NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 68

17 APRIL 1984

---

5 JUNE 1984

RALEIGH
1985

CITE THIS VOLUME

68 N.C. App.

TABLE OF CONTENTS

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

R. A. HEDRICK

Judges

GERALD ARNOLD
JOHN WEBB
HUGH A. WELLS
WILLIS P. WHICHARD
CHARLES L. BECTON
CLIFTON E. JOHNSON
EUGENE H. PHILLIPS
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN
SARAH PARKER
JACK COZORT

Retired Chief Judge

NAOMI E. MORRIS

Retired Judges

HUGH B. CAMPBELL
FRANK M. PARKER
EDWARD B. CLARK
ROBERT M. MARTIN
CECIL J. HILL
E. MAURICE BRASWELL

Clerk

FRANCIS E. DAIL

ADMINISTRATIVE OFFICE OF THE COURTS

Director

FRANKLIN E. FREEMAN, JR.

Assistant Director

DALLAS A. CAMERON, JR.

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

H. JAMES HUTCHESON

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	J. Herbert Small	Elizabeth City
	Thomas S. Watts	Elizabeth City
2	William C. Griffin	Williamston
3	David E. Reid, Jr.	Greenville
	Herbert O. Phillips III	Morehead City
4	Henry L. Stevens III	Kenansville
	James R. Strickland	Jacksonville
5	Bradford Tillery	Wilmington
	Napoleon B. Barefoot	Wilmington
6	Richard B. Allsbrook	Roanoke Rapids
7	Franklin R. Brown	Tarboro
	Charles B. Winberry, Jr.	Rocky Mount
8	James D. Llewellyn	Kinston
	Paul Michael Wright	Goldsboro

Second Division

9	Robert H. Hobgood	Louisburg
	Henry W. Hight, Jr.	Henderson
10	James H. Pou Bailey	Raleigh
	Edwin S. Preston, Jr.	Raleigh
	Robert L. Farmer	Raleigh
	Henry V. Barnette, Jr.	Raleigh
11	Wiley F. Bowen	Dunn
12	Darius B. Herring, Jr.	Fayetteville
	Coy E. Brewer, Jr.	Fayetteville
	E. Lynn Johnson	Fayetteville
13	Giles R. Clark	Elizabethtown
14	Thomas H. Lee	Durham
	Anthony M. Brannon	Bahama
	J. Milton Read, Jr.	Durham
15A	D. Marsh McLelland	Burlington
15B	F. Gordon Battle	Chapel Hill
16	B. Craig Ellis	Laurinburg

Third Division

17A	Melzer A. Morgan, Jr.	Wentworth
17B	James M. Long	Pilot Mountain
18	W. Douglas Albright	Greensboro
	Edward K. Washington	High Point
	Thomas W. Ross	Greensboro
	Joseph John	Greensboro
19A	Thomas W. Seay, Jr.	Spencer
	James C. Davis	Concord
19B	Russell G. Walker, Jr.	Asheboro
20	F. Fetzer Mills	Wadesboro
	William H. Helms	Wingate

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

SPECIAL JUDGES

DONALD L. SMITH	Raleigh
JAMES ARTHUR BEATY, JR.	Winston-Salem
JOHN B. LEWIS, JR.	Farmville
MARY MCLAUCHLIN POPE	Southern Pines
FRED J. WILLIAMS	Durham
LAMAR GUDGER	Asheville
JANET M. HYATT	Waynesville
DONALD W. STEPHENS	Raleigh

EMERGENCY JUDGES

HENRY A. MCKINNON, JR.	Lumberton
SAMUEL E. BRITT	Lumberton
HAL H. WALKER	Asheboro

DISTRICT COURT DIVISION

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

DISTRICT	JUDGES	ADDRESS
	RUSSELL G. SHERRILL III	Raleigh
	PHILIP O. REDWINE	Raleigh
	NARLEY LEE CASHWELL	Apex
	WILLIAM A. CREECH	Raleigh
	L. W. PAYNE	Raleigh
11	ELTON C. PRIDGEN (Chief)	Smithfield
	WILLIAM A. CHRISTIAN	Sanford
	KELLY EDWARD GREENE	Dunn
	EDWARD H. MCCORMICK	Lillington
12	SOL G. CHERRY (Chief)	Fayetteville
	CHARLES LEE GUY	Fayetteville
	LACY S. HAIR	Fayetteville
	ANNA ELIZABETH KEEVER	Fayetteville
	WARREN L. PATE	Raeford
	PATRICIA ANN TIMMONS-GOODSON	Fayetteville
13	WILLIAM C. GORE, JR. (Chief)	Whiteville
	LEE GREER, JR.	Whiteville
	JERRY A. JOLLY	Tabor City
	D. JACK HOOKS, JR.	Whiteville
14	DAVID Q. LABARRE (Chief)	Durham
	KAREN G. SHIELDS	Durham
	ORLANDO HUDSON	Durham
	RICHARD CHANEY	Durham
15A	JASPER B. ALLEN, JR. (Chief)	Burlington
	WILLIAM S. HARRIS, JR.	Graham
	JAMES KENT WASHBURN	Burlington
15B	STANLEY PEELE (Chief)	Chapel Hill
	DONALD LEE PASCHAL	Siler City
	PATRICIA HUNT	Chapel Hill
16	JOHN S. GARDNER (Chief)	Lumberton
	CHARLES G. MCLEAN	Lumberton
	HERBERT LEE RICHARDSON	Lumberton
	ADELAIDE G. BEHAN	Lumberton
17A	PETER M. MCHUGH (Chief)	Reidsville
	ROBERT R. BLACKWELL	Reidsville
17B	FOY CLARK (Chief)	Mount Airy
	JERRY CASH MARTIN	Mount Airy
18	THOMAS G. FOSTER, JR. (Chief)	Greensboro
	WILLIAM L. DAISY	Greensboro
	EDMUND LOWE	High Point
	ROBERT E. BENCINI	High Point
	WILLIAM K. HUNTER	High Point

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

DISTRICT	JUDGES	ADDRESS
	ROBERT P. JOHNSTON	Charlotte
	W. TERRY SHERRILL	Charlotte
	MARILYN R. BISSELL	Charlotte
	RICHARD ALEXANDER ELKINS	Charlotte
27A	J. RALPH PHILLIPS (Chief)	Gastonia
	DONALD E. RAMSEUR	Gastonia
	BERLIN H. CARPENTER, JR.	Gastonia
	LARRY B. LANGSON	Gastonia
27B	GEORGE HAMRICK (Chief)	Shelby
	JAMES THOMAS BOWEN III	Lincolnton
	JOHN M. GARDNER	Shelby
28	WILLIAM MARION STYLES (Chief)	Black Mountain
	EARL JUSTICE FOWLER, JR.	Arden
	PETER L. RODA	Asheville
	ROBERT HARRELL	Asheville
29	ROBERT T. GASH (Chief)	Brevard
	ZORO J. GUICE, JR.	Hendersonville
	THOMAS N. HIX	Hendersonville
	LOTO J. GREENLEE	Marion
30	ROBERT J. LEATHERWOOD III (Chief)	Bryson City
	JOHN J. SNOW, JR.	Murphy
	DANNY E. DAVIS	Waynesville

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

LACY H. THORNBURG

Administrative Deputy Attorney General

LESTER D. ROARK

Special Assistant to the Attorney General

PHILLIP J. LYONS

Senior Deputy Attorneys General

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

Special Deputy Attorneys General

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

Assistant Attorneys General

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

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	H. P. Williams	Elizabeth City
2	Mitchell O. Norton	Williamston
3A	Thomas D. Haigwood	Greenville
3B	W. David McFadyen, Jr.	New Bern
4	William H. Andrews	Jacksonville
5	Jerry Lee Spivey	Wilmington
6	David Beard	Murfreesboro
7	Howard S. Boney, Jr.	Tarboro
8	Donald Jacobs	Goldsboro
9	David Waters	Oxford
10	Randolph Riley	Raleigh
11	John W. Twisdale	Smithfield
12	Edward W. Grannis, Jr.	Fayetteville
13	Michael F. Easley	Whiteville
14	Ronald L. Stephens	Durham
15A	George E. Hunt	Graham
15B	Carl R. Fox	Carrboro
16	Joe Freeman Britt	Lumberton
17A	Philip W. Allen	Wentworth
17B	H. Dean Bowman	Dobson
18	Lamar Dowda	Greensboro
19A	James E. Roberts	Kannapolis
19B	Garland N. Yates	Asheboro
20	Carroll R. Lowder	Monroe
21	Donald K. Tisdale	Clemmons
22	H. W. Zimmerman, Jr.	Lexington
23	Michael A. Ashburn	Wilkesboro
24	James T. Rusher	Boone
25	Robert E. Thomas	Newton
26	Peter S. Gilchrist III	Charlotte
27A	Joseph G. Brown	Gastonia
27B	Thomas M. Shuford, Jr.	Lincolnton
28	Ronald C. Brown	Asheville
29	Alan C. Leonard	Rutherfordton
30	Marcellus Buchanan III	Sylva

PUBLIC DEFENDERS

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

CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINION

CASES REPORTED WITHOUT PUBLISHED OPINION

CASES REPORTED WITHOUT PUBLISHED OPINION

GENERAL STATUTES CITED AND CONSTRUED

G.S.	
1-52(9)	Lee v. Keck, 320
1-56	Bradbury v. Cummings, 302
1-75.8(1)	Lessard v. Lessard, 760
1-254	Town of Nags Head v. Tillett, 554
1-271	Lone Star Industries v. Ready Mixed Concrete, 308
1-277	Simmons v. C. W. Myers Trading Post, 511
1-277(a)	The Bluffs v. Wysocki, 284
1-288	In re Shields, 561
1-363	Lone Star Industries v. Ready Mixed Concrete, 308
1-440.43	Case v. Miller, 729
1-567.3(b)	Paramore v. Inter-Regional Financial, 659
1-567.12	The Bluffs v. Wysocki, 284
1-567.13	The Bluffs v. Wysocki, 284
1-567.14	The Bluffs v. Wysocki, 284
1-567.15	The Bluffs v. Wysocki, 284
1-567.18	City of Statesville v. Gilbert Engineering Co., 676
1-567.18(a)	The Bluffs v. Wysocki, 284
1-567.18(a)(3)-(6)	The Bluffs v. Wysocki, 284
1-567.20	The Bluffs v. Wysocki, 284
1A-1	See Rules of Civil Procedure infra
7A-27(d)	The Bluffs v. Wysocki, 284
7A-517(1) and (21)	In re Gwaltney, 686
8-51	Craig v. Calloway, 143
	Lee v. Keck, 320
8-58.6(b)	State v. Rhinehart, 615
8-58.6(b)(3)	State v. Rhinehart, 615
8-58.6(c)	State v. Rhinehart, 615
15A-534(f)	State v. Jefferson, 725
15A-541	State v. Rogers, 358
15A-544(e)	State v. Horne, 480
15A-922	State v. Caudill, 268
15A-926(b)(2)	State v. Poindexter, 295

G.S.	
44A-2(d)	Case v. Miller, 729
44A-4(a)	Case v. Miller, 729
44A-5	Case v. Miller, 729
47-26	Patterson v. Wachovia Bank & Trust Co., 609
48-6(b)	Flinn v. Laughinghouse, 476
48-28	Flinn v. Laughinghouse, 476
49-2	State v. Caudill, 268
49-4	State v. Caudill, 268
50-7(1)	Roberts v. Roberts, 163
50-10	Roberts v. Roberts, 163
50-13.2(a)	In re Gwaltney, 686
50-13.4(c)	Warner v. Latimer, 170
50-13.4(e)	Warner v. Latimer, 170
50-13.5(d)(2)	Copeland v. Copeland, 276
50-13.6	Gibson v. Gibson, 566
50-16.3	Roberts v. Roberts, 163
50-16.4	Whedon v. Whedon, 191
50-16.5	Roberts v. Roberts, 163
50A-3	Copeland v. Copeland, 276
50A-3(a)(1)(ii)	Copeland v. Copeland, 276
50A-4	Copeland v. Copeland, 276
50A-5	Copeland v. Copeland, 276
50A-25	Copeland v. Copeland, 276
53-13	Carolina Nat'l Bank v. Douglas Gallery of Homes, 246
55-55(d)	Miller v. Ruth's of North Carolina, Inc., 40
55-110(c)	Carolina Nat'l Bank v. Douglas Gallery of Homes, 246
55-127	Miller v. Ruth's of North Carolina, Inc., 40
59-2	Blow v. Shaughnessy, 1
59-11	Blow v. Shaughnessy, 1
75-1.1	Bernard v. Central Carolina Truck Sales, 228
	Borders v. Newton, 768
	Wilder v. Squires, 310

GENERAL STATUTES CITED AND CONSTRUED

G.S.	
75-16	Bernard v. Central Carolina Truck Sales, 228
75-16.1	Borders v. Newton, 768
84-4.1	Theil v. Detering, 754
105-142(a)	Stone v. Lynch, Sec. of Revenue, 441
105-282.1(a)	In re Wesleyan Education Center, 742
105-282.1(c)	In re Wesleyan Education Center, 742
105-312(a)(3)	In re Wesleyan Education Center, 742
105-371, 372, 374	Bradbury v. Cummings, 302
105-378, 378(a)	Bradbury v. Cummings, 302
106-266.8(5), (12) and (14)	State ex rel. Milk Commission v. Pet, Inc., 701
106-266.15(a)	State ex rel. Milk Commission v. Pet, Inc., 701
115C-42	Smith v. McDowell Co. Bd. of Education, 541
115C-215	Smith v. McDowell Co. Bd. of Education, 541
115C-216(a)	Smith v. McDowell Co. Bd. of Education, 541
130-198	In re Grad v. Kaasa, 128
136-28.1(d)	Allan Miles Cos. v. N.C. Dept. of Transportation, 136
136-29(d)	Allan Miles Cos. v. N.C. Dept. of Transportation, 136
143-300.1	Smith v. McDowell Co. Bd. of Education, 541
147-62	Ledbetter Brothers v. N.C. Dept. of Transportation, 97
159-13(a)	In re Wesleyan Education Center, 742
160A-375	Town of Nags Head v. Tillett, 554
160A-389	Town of Nags Head v. Tillett, 554

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW

Case	*Reported*	*Disposition in Supreme Court*
Alamance County Hospital v. Neighbors	68 N.C. App. 771	Allowed, 312 N.C. 81
American Tours, Inc. v. Liberty Mutual Ins. Co.	68 N.C. App. 668	Allowed, 311 N.C. 750
Beard v. Pembaur	68 N.C. App. 52	Denied, 311 N.C. 750
Bernard v. Central Carolina Truck Sales	68 N.C. App. 228	Denied, 311 N.C. 751
Bleggi v. Bleggi	65 N.C. App. 221	Denied, 312 N.C. 796
Blow v. Shaughnessy	68 N.C. App. 1	Denied, 311 N.C. 751
Cantrell v. Liberty Life Ins. Co.	68 N.C. App. 651	Denied, 311 N.C. 751
Carter v. Carr	68 N.C. App. 23	Allowed, 311 N.C. 751
Century Communications v. Housing Auth. of Wilson	68 N.C. App. 563	Allowed, 311 N.C. 752
City of Statesville v. Gilbert Engineering Co.	68 N.C. App. 676	Denied, 312 N.C. 492
Cleland v. Crumpler	68 N.C. App. 353	Denied, 311 N.C. 752
Cole v. Duke Power Co.	68 N.C. App. 159	Denied, 311 N.C. 752
Crumpler v. Stewart	68 N.C. App. 788	Denied, 311 N.C. 753
Day v. Coffey	68 N.C. App. 509	Denied, 312 N.C. 82
Doub v. Doub	68 N.C. App. 718	Allowed, 311 N.C. 754
Douglas v. Parks	68 N.C. App. 496	Denied, 311 N.C. 754
Fiber Industries, Inc. v. Salem Carpet Mills, Inc.	68 N.C. App. 690	Denied, 311 N.C. 754
Flinn v. Laughinghouse	68 N.C. App. 476	Denied, 311 N.C. 755 Appeal Dismissed
Green v. Aetna Casualty & Surety	68 N.C. App. 357	Denied, 311 N.C. 755
Hamilton v. Mercy Hospital	68 N.C. App. 563	Denied, 311 N.C. 755
Hudson v. All Star Mills	68 N.C. App. 447	Denied, 311 N.C. 755
Huff v. Chrismon	68 N.C. App. 525	Denied, 311 N.C. 756
Hunter v. Alcoholic Beverage Control Comm.	68 N.C. App. 638	Denied, 311 N.C. 756 Appeal Dismissed
Ingram v. Craven	68 N.C. App. 502	Denied, 311 N.C. 757

Case	*Reported*	*Disposition in Supreme Court*
In re Denial of Request of Humana Hospital Corp.	68 N.C. App. 162	Denied, 311 N.C. 757 Appeal Dismissed
In re Foreclosure of Mills	68 N.C. App. 694	Denied, 312 N.C. 83
In re Watkins v. Milliken	68 N.C. App. 357	Denied, 311 N.C. 757
Kenney v. Medlin Construction & Realty	68 N.C. App. 339	Denied, 312 N.C. 83
Kilpatrick v. University Mall; Badgett v. University Mall	68 N.C. App. 629	Denied, 311 N.C. 758
King v. Hill & Green	68 N.C. App. 788	Denied, 311 N.C. 758
LaGasse v. Gardner	68 N.C. App. 563	Denied, 311 N.C. 758
Lee v. Keck	68 N.C. App. 320	Denied, 311 N.C. 401
Leggett v. Thomas & Howard Co., Inc.	68 N.C. App. 310	Denied, 311 N.C. 759
Livingston v. City of Charlotte	68 N.C. App. 265	Denied, 311 N.C. 402
Lowder v. Doby	68 N.C. App. 491	Denied, 311 N.C. 759
Lowder v. Lowder	68 N.C. App. 505	Denied, 311 N.C. 759
Lowder v. Rogers	68 N.C. App. 507	Denied, 312 N.C. 83
Lynch v. Hazelwood	68 N.C. App. 357	Allowed, 311 N.C. 759
McManus v. Gambill	68 N.C. App. 563	Denied, 311 N.C. 760
Martin v. Hartford Accident and Indemnity Co.	68 N.C. App. 534	Denied, 311 N.C. 760
Miller v. Ruth's of North Carolina, Inc.	68 N.C. App. 40	Denied, 311 N.C. 760
Mitchell v. Parker	68 N.C. App. 458	Denied, 311 N.C. 760
Nationwide Mut. Fire Ins. Co. v. Allen	68 N.C. App. 184	Denied, 311 N.C. 761
Parks v. Perry	68 N.C. App. 202	Denied, 311 N.C. 761
Raymer v. Raymer	68 N.C. App. 788	Denied, 311 N.C. 761
Robinson v. King	68 N.C. App. 86	Denied, 311 N.C. 762
Rustad v. Rustad	68 N.C. App. 58	Denied, 311 N.C. 763
Scott v. Thorne	68 N.C. App. 788	Denied, 312 N.C. 495 Appeal Dismissed
Simmons v. Broadnax	68 N.C. App. 564	Denied, 311 N.C. 763
Simmons v. C. W. Myers Trading Post	68 N.C. App. 511	Denied, 312 N.C. 85

Case	*Reported*	*Disposition in Supreme Court*
Son-Shine Grading & ADC Construction Co.	68 N.C. App. 417	Denied, 312 N.C. 85
State v. Ataei-Kachuei	68 N.C. App. 209	Denied, 311 N.C. 763
State v. Atkinson	68 N.C. App. 357	Denied, 311 N.C. 763 Appeal Dismissed
State v. Brown	68 N.C. App. 162	Denied, 312 N.C. 86 Appeal Dismissed
State v. Caldwell	68 N.C. App. 488	Denied, 312 N.C. 86
State v. Creason	68 N.C. App. 599	Allowed, 311 N.C. 764
State v. Cromartie	66 N.C. App. 554	Denied, 313 N.C. 332
State v. Exum	68 N.C. App. 357	Denied, 313 N.C. 511
State v. Fowler	68 N.C. App. 564	Denied, 311 N.C. 765
State v. Gardner	68 N.C. App. 515	Allowed as to add. issues, 312 N.C. 87
State v. Gary	68 N.C. App. 357	Denied, 311 N.C. 765
State v. Hockaday	68 N.C. App. 564	Denied, 311 N.C. 766
State v. Jefferson	68 N.C. App. 725	Denied, 311 N.C. 766 Appeal Dismissed
State v. Jenkins	56 N.C. App. 256	Denied, 312 N.C. 799
State v. Jenrette	68 N.C. App. 564	Denied, 311 N.C. 766
State v. Lewis	68 N.C. App. 575	Denied, 312 N.C. 87 Appeal Dismissed
State v. Meadows	68 N.C. App. 357	Denied, 311 N.C. 767
State v. Poindexter	68 N.C. App. 295	Denied, 312 N.C. 624
State v. Quinn	36 N.C. App. 611	Denied, 313 N.C. 513
State v. Rogers	68 N.C. App. 358	Denied, 311 N.C. 767
State v. Rozier	68 N.C. App. 38	Denied, 312 N.C. 88
State v. Sinclair	68 N.C. App. 357	Denied, 311 N.C. 406
State v. Thompson	64 N.C. App. 485	Denied, 313 N.C. 513
State v. Walker	47 N.C. App. 585	Denied, 313 N.C. 514
State v. Waters	68 N.C. App. 789	Denied, 312 N.C. 498
Stevens v. Stevens	68 N.C. App. 234	Denied, 312 N.C. 89
Stone v. Lynch, Sec. of Revenue	68 N.C. App. 441	Allowed, 311 N.C. 768
Thiel v. Detering	68 N.C. App. 754	Denied, 312 N.C. 89

Case	*Reported*	*Disposition in Supreme Court*
Trustees of Rowan College v. Hammond Associates	68 N.C. App. 565	Allowed, 312 N.C. 90
Ward v. Taylor	68 N.C. App. 74	Denied, 311 N.C. 769
Wells v. French Broad Elec. Mem. Corp.	68 N.C. App. 410	Denied, 312 N.C. 498
Whedon v. Whedon	68 N.C. App. 191	Allowed, 311 N.C. 769
Wilder v. Squires	68 N.C. App. 310	Denied, 311 N.C. 769
Williams v. Smith	68 N.C. App. 71	Denied, 311 N.C. 769
Willis v. Russell	68 N.C. App. 424	Denied, 311 N.C. 770
Winfield v. Pierce	68 N.C. App. 357	Denied, 312 N.C. 91

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ELIZABETH BLOW; PETER G. BOUGADES; MOLLIE L. BROWN; STEPHEN J. CHENEY; MARGARET CHENEY; THELMA A. CHURCHILL; HERMAN O. CLARK; PAUL COWGILL; ROBERT A. COX; JESSE B. DAVIS; R. EARL DAVIS; R. EARL DAVIS, CUSTODIAN FOR CHRISTY M. DAVIS AND MARK DAVIS, MINORS; GEORGE W. DUFFIELD; PAUL FAIRBETTER; ALMA FARAH; ALBERT FARAH; ALINE W. FLEMING; MOLLY GLANDER; KENNETH GLANDER; ROBERT HASSELL; MARK L. HITCHCOCK; DIANE HORNE; E. LEE HORNE, JR.; GAYLE B. HORTON; WILLIAM JACKSON, CUSTODIAN FOR DANIEL E. JACKSON AND SCOTT JACKSON, MINORS; GLEN V. JOHNSON; JERRY J. JOHNSON; BARNEY JOYNER; PHYLLIS JOYNER; W. M. KIRVEN; JAMES W. KNIGHT; TERRY R. KNIGHT; JAMES W. KNIGHT, CUSTODIAN FOR MARIE LYNN KNIGHT AND KELLY RENEE KNIGHT, MINORS; RUSSELL LAVIOLETTE; DANIEL C. MARKS; HANS G. MICHEL; BRAD MINSHEW, CUSTODIAN FOR MARY ELIZABETH MINSHEW AND TERESA LEMAN MINSHEW, MINORS; JOHN H. MITCHELL; MARJORIE MOORE; CARLOS W. MURRAY, JR.; ELLIS NASSIF; ELIZABETH NASSIF; WILLIAM J. O'DONNELL; THOMPSON G. PACE, III; JANE F. RABIL; MICHAEL RABIL; ROSELYN R. RABIL; LEROY REGISTER; JOHN O. TOBLER; CHERYL UPHAM; MARJORY K. UPHAM; AND JAMES B. UPHAM v. JEFFREY JOHN SHAUGHNESSY; WHEAT, FIRST SECURITIES, INC.; W. LARRY OWNLEY; LEE FOLGER, III; MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED; RONALD GROVE; BACHE HALSEY STUART SHIELDS INCORPORATED; ROBERT WALTERMAN, AND MAUREEN BERRY

No. 8310SC340

(Filed 17 April 1984)

Arbitration and Award § 1; Partnership § 1.2— investors suing security dealers and brokerage firms—agreement to arbitrate properly not enforced

In an action in which plaintiffs, a group of investors, alleged defendants, security dealers and brokerage firms, used money supplied by plaintiffs to engage in a course of trading in securities that was highly speculative and in

violation of the fiduciary duties owed by them to plaintiffs and that when the trades and investments so made began to lose money, the defendants conspired to misrepresent and to avoid disclosing to plaintiffs the full extent of the activities and the losses sustained, the trial court did not err in denying defendants' motions to stay proceedings in trial court pending arbitration of the matters raised in plaintiffs' complaint for the following reasons: (1) there was no evidence plaintiffs were aware of or signed customer agreements containing the arbitration clause; (2) no limited partnership existed as contended by defendants in that no certificate of limited partnership was filed with the Register of Deeds as provided by G.S. 59-2; (3) under G.S. 59-11, no general partnership was formed; and (4) in cases such as this, there is a strong precedent of both cases and federal rules looking unfavorably at arbitration as a means to settle the dispute.

APPEAL by defendants Wheat, First Securities, Inc., W. Larry Ownley, Lee Folger, III, Merrill Lynch, Pierce, Fenner and Smith, Inc., Ronald Grove, Bache Halsey Stuart Shields, Inc., Robert Walterman, and Maureen Berry from *Farmer, Judge.* Order entered 3 December 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 16 February 1984.

At all times pertinent to this action, defendants Ownley and Folger were employees of Wheat, First Securities, Inc. (hereinafter Wheat). They, along with Wheat, may be referred to in this opinion as the Wheat defendants. Similarly, defendant Grove was an employee of Merrill Lynch, Pierce, Fenner and Smith, Inc. (hereinafter Merrill Lynch). Merrill Lynch and Grove may be referred to as the Merrill Lynch defendants. Defendants Walterman and Berry were employees of Bache Halsey Stuart Shields (hereinafter Bache). They may be referred to as the Bache defendants.

This is a civil action wherein plaintiffs seek damages allegedly arising from a course of dealing with defendants. The essential facts of the case are as follows:

Beginning in 1979, the individual plaintiffs purchased a number of "units" in Capital City Investments. Capital City Investments (hereinafter CCI) was organized in 1979 by defendant Shaughnessy, who sold the "units" to plaintiffs. Each purchaser entered into a written agreement with defendant Shaughnessy. The agreement indicated the number of units purchased and the price per unit as well as the total purchase price. The price per unit ranged from approximately $69.00 to $100.00 between 1979

and late 1981. Depending on when the purchase was made, the agreement denoting the purchase took one of two forms. The first form was designated "Capital City Investments Subscription Agreement" and provided, in part, as follows:

> The undersigned acknowledges that he/she has been furnished and has read a copy of the Limited Partnership Agreement and understands that Jeffrey John Shaughnessy shall be the sole General Partner and Managing Partner of the partnership, that he/she is a citizen and resident of the State of North Carolina, and that the purpose of this limited partnership is as set forth in the document hereinabove referred to which has been furnished to the undersigned.

The second form was designated "Capital City Investments Purchase Agreement." The comparable provision in the second form reads:

> The undersigned acknowledges that he/she has been furnished and has read a copy of the partnership agreement and understands that Jeffrey John Shaughnessy shall be the sole General Partner and Managing Partner of the partnership and the the [sic] purpose of this partnership is as set forth in the document herein [sic] above referred to.

The limited partnership agreement referred to in the "Subscription Agreement" is designated "Limited Partnership Agreement of Capital City Investments" and sets forth the following "Objects and Purposes of Partnership":

> The Partnership is organized to invest and trade, on margin or otherwise, in capital stock, warrants, bonds, notes, debentures, trust receipts, commodities futures contracts, and other securities of any corporation or entity, in rights and options relating thereto, including put and call options (all such items being called herein ["] Securities"), to sell securities short and cover such sales; and to enter into, make and perform, all contracts and other undertakings and engage in all activities and transactions, as may be necessary or advisable or incident to the carrying out of the foregoing.

The Limited Partnership Agreement also establishes defendant Shaughnessy as the general partner and sole manager of the partnership and addresses such other matters of partnership opera-

tion as the general partner's liability to the limited partners, compensation of the general partner, methods of record keeping and accounting, among others. The Limited Partnership Agreement also contains the following provision:

> *Names of Partners.* Jeffrey John Shaughnessy is the General Partner and the Managing Partner (herein called "General Partner"), and the Limited Partner(s) [(] herein called "Limited Partner(s)") to be designated as such on the signature page of this Agreement.

However, there is no indication that the agreement was signed by any of the CCI investors. Defendants concede in their brief that no certificate of limited partnership was ever filed in the office of the Register of Deeds of Wake County, the apparent principal place of business.

Thereafter, defendant Shaughnessy executed customer agreements with each of the corporate defendant securities brokerage firms through the individual defendant securities dealers who are employed by the firms. The first agreement was with defendant Merrill Lynch and was entered into on or about 10 August 1979. Among other things, the customer agreement with Merrill Lynch provides for the arbitration of disputes between the parties to the agreement as follows:

> 11. It is agreed that any controversy between us arising out of your business or this agreement, shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, Inc. or pursuant to the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., as the undersigned may elect. If, the controversy involves any security or commodity transaction or contract related thereto executed on an exchange located outside the United States, then such controversy shall, at the election of the undersigned, be submitted to arbitration conducted under the constitution of such exchange or under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, Inc. or the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc. Arbitration must be commenced by service upon the other of a written demand for arbitration or a written notice of inten-

tion to arbitrate, therein electing the arbitration tribunal. In the event the undersigned does not make such designation within five (5) days of such demand or notice, then the undersigned authorizes you to do so on behalf of the undersigned.

Under the heading designated "SIGNATURES" at the end of the agreement the following appears:

(Partnership)

Capital City Investments
(Name of Partnership)

By s/Jeffrey J. Shaughnessy
(A Partner)

On or about 24 August 1979, defendant Shaughnessy entered into a similar agreement with defendant Bache. That agreement also contained a provision relating to arbitration:

14. This contract shall be governed by the laws of the State of New York, and shall inure to the benefit of your successors and assigns, and shall be binding on the undersigned, his heirs, executors, administrators and assigns. Any controversy arising out of or relating to my account, to transactions with or for me or to this agreement or the breach thereof, and whether executed or to be executed within or outside of the United States, except for any controversy arising out of or relating to transactions in commodities or contracts related thereto executed on or subject to the rules of a contract market designated as such under the Commodity Exchange Act, as amended, shall be settled by arbitration in accordance with the rules then obtaining of either the American Arbitration Association or the Board of Governors of the New York Stock Exchange as I may elect. If I do not make such election by registered mail addressed to you at your main office within five days after demand by you that I make such election, then you may make such election. Notice preliminary to, in conjunction with, or incident to such arbitration proceeding, may be sent to me by mail and personal service is hereby waived. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof, without notice to me.

This agreement with Bache bears defendant Shaughnessy's signature in the space designated "Customer's Signature." On 5 October 1979, Shaughnessy entered into a "Partnership Account Agreement" with Bache. That agreement provided, in part, as follows:

> We, the undersigned, request you to open a partnership account in the name of Capital City Investments a duly organized partnership, of which each of us is a general partner, and of which the undersigned are the sole partners. We jointly and severally authorize and instruct you to accept from any one of us (each of us being fully authorized to act alone) any and all orders upon said account, and to act thereon, including (but, not exclusively) any and all orders for the purchase, for cash and/or on margin, of securities and/or commodities, for the sale of securities and/or commodities, for the payment of money, including payments to the person giving the order, or any other action with respect thereto.

The words "Capital City Investments" were written by hand. Defendant Shaughnessy's signature appears at the bottom of this document. Underneath his signature is the handwritten notation, "Managing Partner, Capital City Investments."

Although there is no written agreement in the record, plaintiffs allege in their complaint that defendant Shaughnessy opened a customer account sometime in March of 1981 with defendant Wheat, purportedly on behalf of CCI. That agreement contained no arbitration provision.

None of the customer agreements bears any signature other than that of defendant Shaughnessy.

On 9 July 1982, plaintiffs filed the complaint in this matter alleging basically that, between October 1981 and April 1982, defendant Shaughnessy, along with the individual defendants in their capacities as securities dealers for the corporate defendants, engaged in a series of securities transactions that resulted in the loss of approximately 95% of the money that plaintiffs had invested with CCI. The total amount of money invested by plaintiffs with CCI exceeded $500,000.00. The complaint further alleged that the loss was occasioned through "the unlawful conspiracy, fraud, false pretense, deceit, breach of fiduciary

duties, breach of contract, gross negligence and reckless conduct" of each defendant, including Shaughnessy. The original complaint contains fourteen counts and eleven claims for relief setting forth in detail the allegations regarding each defendant.

On 21 September 1982, after a stipulated extension of time within which to file responsive pleadings, the Merrill Lynch defendants filed a motion with the Superior Court to stay its proceedings pending arbitration of the dispute or, alternatively, to dismiss plaintiffs' complaint for failure to state a claim for relief. Merrill Lynch also made a demand for arbitration. On 23 September 1982, the Bache defendants moved to stay the judicial proceedings, alleging that they had elected arbitration pursuant to the terms of the customer agreement. The Bache defendants moved at the same time to dismiss the complaint.

In support of these motions, Merrill Lynch and Bache relied on the arbitration provisions in their respective customer agreements and on the CCI partnership agreement. They also cited certain provisions of state and federal law that require the enforcement of agreements to arbitrate.

The Wheat defendants also moved on 21 September 1982 to stay the proceeding in Superior Court pending a ruling on the motions of Bache and Merrill Lynch regarding arbitration. Although the Wheat defendants were not able to rely on a written arbitration provision, they cited judicial economy in support of their motion.

The plaintiffs responded to the defendants' motions by alleging, *inter alia*, that the Limited Partnership Agreement and the customer agreements on which the defendants relied were not valid as to plaintiffs. Plaintiffs also alleged that the motion of the Wheat defendants was not based on any supposed right of arbitration. Plaintiffs requested that the court stay any arbitration proceedings. Specifically, plaintiffs sought to avoid electing an arbitration forum until the court had ruled on the defendants' motions, in effect determining the validity of the arbitration provisions.

By various orders and rulings of court, all matters regarding arbitration were stayed pending the court's ruling on the motions. Plaintiffs amended their complaint to include an allegation that

defendants violated certain provisions of the federal Securities Act of 1933 (Act of 27 May 1933, 48 Stat. 74).

The hearing on the motions was held at the 8 November 1982 Session of Wake County Superior Court before Farmer, Judge. The court considered the plaintiffs' complaint—no answer having been filed, the motions of the defendants, the "Limited Partnership Agreement of Capital City Investments" signed by defendant Shaughnessy, copies of the customer agreements with Merrill Lynch and Bache, the Partnership Account Agreement with Bache, affidavits of defendants Grove and Walterman regarding the nature of the relationship between defendants Bache and Merrill Lynch and CCI, and affidavits by plaintiffs stating that they were unaware of the customer agreements and the arbitration provisions. On 3 December 1982, Judge Farmer entered an order denying defendants' motions to stay judicial proceedings and directing defendants to file a responsive pleading within 10 days. The court also refused to dismiss the action.

In the portion of the order denying the defendants' motions to stay, the court found the following pertinent facts:

> 1. That one of the documents presented by defendants in support of their motions recites that it is a limited partnership agreement creating a limited partnership pursuant to the Uniform Limited Partnership Act and the Uniform Partnership Act of North Carolina.
>
> 2. That such partnership document is not executed or signed by any of the plaintiffs. However, from the pleadings, it is evident that plaintiffs did become investors with Capital City Investments by placing monies with defendant Jeffrey John Shaughnessy.
>
> 3. That on August 10, 1979, defendant Shaughnessy executed a printed customer agreement form with defendant Merrill Lynch, the signatory page thereof containing the handwritten notation "Capital City Investments," the signature of Shaughnessy and, immediately thereafter, the printed words "a partner."
>
> 4. That on August 23, 1979, defendant Shaughnessy signed a printed customer form with defendant Bache, neither the said form nor the signature indicating in any way

that a partnership was involved or that Shaughnessy was executing the same in any capacity other than that of an individual.

5. That on October 5, 1979, defendant Shaughnessy signed a printed Bache form designated as "Partnership Account Agreement." This form indicated that Capital City Investments was a general partnership and the said form obviously contemplates that it is to be signed by all general partners. Defendant Shaughnessy signed the agreement form as "Managing Partner, Capital City Investments."

6. That there is no evidence that any of plaintiffs executed any of the documents introduced into evidence by defendants.

7. That none of plaintiffs was aware of the "customer agreement" forms signed by defendant Shaughnessy until defendants Merrill Lynch and Bache produced such forms and attached them to their motions for stay of proceedings.

8. That the document entitled "Limited Partnership Agreement" relied upon by defendants Bache and Merrill Lynch recites that the Limited Partners shall have no power to manage or control the affairs of Capital City Investments. Further, there is no evidence that any plaintiff was involved in the management of Capital City Investments or was familiar with defendant Shaughnessy's handling of Capital City Investment's affairs.

9. That the customer agreement forms signed by defendant Shaughnessy with defendants Merrill Lynch and Bache both contain paragraphs agreeing to submit any controversy "between us" or "arising out of or relating to my account" to arbitration.

From these facts, the court drew the following pertinent conclusions:

2. That defendants Bache and Merrill Lynch have the burden of proof on the issue of whether there was a valid agreement binding plaintiffs to arbitration of the causes of action set forth in plaintiffs' complaint as amended.

3. That defendants Merrill Lynch and Bache have failed to present to the Court any evidence demonstrating that defendant Shaughnessy had any authority, actual or apparent, to bind plaintiffs to any agreement to submit controversies with any of defendants to arbitration, and accordingly did not meet their burden of proof.

4. That the Court notes that G.S. 59-39(e)[1] specifically precludes a single partner from entering into an agreement to submit partnership claims to arbitration absent actual authority to do so.

5. That defendants have not shown, nor can the Court conclude from the evidence, that plaintiffs had knowledge of the customer agreements containing arbitration clauses, nor is there any evidence of ratification of such agreements by plaintiffs, ratification not being possible where the plaintiffs had no knowledge of the unauthorized act of defendant Shaughnessy in entering into customer agreements containing the subject arbitration clauses.

Other conclusions of law relate to plaintiffs' claims for relief under state and federal securities laws. Because we do not reach defendants' exceptions and assignments of error relating to those conclusions, we perceive no need to repeat them here. Likewise, because defendants have apparently abandoned their assignment of error relating to the court's denial of their motions to dismiss, we perceive no need to set forth the findings and conclusions relating thereto.

On 7 December 1982, defendants moved for reconsideration of the 3 December 1982 orders offering as evidence in support of their motions the purchase agreements and subscription agreements executed between plaintiffs and defendant Shaughnessy and referred to previously. The motions were denied and defendants thereafter gave written notice of appeal from the 3 December 1982 orders.

1. The following stipulation appears on page 4 of the record:

12. Paragraph 4 of the conclusions of law in the order of Judge Farmer dated December 3, 1982, and designated as Order Denying Stay of Proceedings, contains an apparent error in the statutory citation reference. Judge Farmer apparently intended to cite G.S. 59-39(c)(5) instead of G.S. 59-39(e). For the purposes of this appeal, it is agreed that Judge Farmer so intended.

Harrell and Titus, by Bernard A. Harrell, and Akins, Mann, Pike and Mercer by J. Jerome Hartzell, for plaintiff appellees.

Hunton and Williams, by Odes L. Stroupe, Jr., James E. Farnam, and David Dreifus for defendant appellants Wheat, First Securities, Inc., Ownley and Folger.

Fleming, Robinson, Bradshaw and Hinton, by Richard A. Vinroot and John R. Wester, for defendant appellants Bache Halsey Stuart Shields, Inc., Walterman and Berry.

Rogers and Hardin, by Paul W. Stivers and Janice E. Garlitz, pro hac vice, and Manning, Fulton and Skinner, by Michael T. Medford, for defendant appellants Merrill Lynch, Pierce, Fenner and Smith, Inc., and Grove.

North Carolina Department of Justice, by Associate Attorney General Philip A. Telfer, and North Carolina Department of State, by Roland S. Jones, as amici curiae.

No appearance for defendant Shaughnessy.

EAGLES, Judge.

The issue in this case is whether it was proper for the Superior Court to deny the defendants' motions to stay proceedings in the trial court pending arbitration of the matters raised in plaintiffs' complaint. We hold that it was.

I

The underlying suit here involves a group of investors, plaintiffs, who are suing the person to whom they allegedly entrusted their money, defendant Shaughnessy, along with three national stock brokerage firms and named individual securities dealers employed by those firms. The complaint alleges that defendant Shaughnessy and the individual securities dealers, using the money supplied by plaintiffs, engaged in a course of trading in securities that was highly speculative, reckless and in violation of the fiduciary duties owed by them to plaintiffs. The complaint further alleges that when the trades and investments so made began to lose money, the defendants conspired to misrepresent and to avoid disclosing to plaintiffs the full extent of their activities and the losses sustained. Plaintiffs contend that defendants' continued reckless trading without the knowledge or permission of plaintiffs resulted ultimately in the loss of over 95% of the funds invested

by plaintiffs, over $500,000.00. Plaintiffs claim that defendants' conduct was illegal and fraudulent and they seek actual and punitive damages amounting to over 15 million dollars.

a.

Defendants assert that the claims alleged in plaintiffs' complaint are properly the subject of arbitration. They filed motions seeking to stay judicial proceedings pending the arbitration of the dispute. The motions were denied and defendants have appealed.

Defendants' motions were made pursuant to G.S. 1-567.3 and 9 U.S.C. § 1 *et seq.* G.S. 1-567.3 provides, in pertinent part, as follows:

> (a) On application of a party showing an agreement described in G.S. 1-567.2; and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

Denial of an application to compel arbitration under this provision is an appealable interlocutory order. G.S. 1-567.18(a)(1). *See Sims v. Ritter Constr. Co.*, 62 N.C. App. 52, 302 S.E. 2d 293 (1983) (arbitration is a "substantial right"). *But see Peloquin Assocs. v. Polcaro*, 61 N.C. App. 345, 300 S.E. 2d 477 (1983) (order staying arbitration pending judicial determination of a collateral issue held non-appealable). Defendants' appeal therefore is not premature.

b.

We note at the outset that our courts have approved arbitration as a manner of settling disputes. This Court, in *Thomas v. Howard*, 51 N.C. App. 350, 276 S.E. 2d 743 (1981), noted that the intent of the legislature in enacting the Uniform Arbitration Act, G.S. Ch. 1, Art. 45A, was to encourage parties to submit disputed matters to arbitration when feasible and expedient. *See Sims v. Ritter Constr. Co., supra.* This policy of encouraging arbitration in appropriate cases is consistent with federal policy regarding arbitration. Federal law provides for the enforceability of agreements to arbitrate as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The effect of this particular provision was recently considered by the U.S. Supreme Court in the case of *Southland Corp. v. Keating*, 52 U.S.L.W. 4131 (opinion announced 23 January 1984). *Southland* was a case originating in California and involving a franchise agreement containing a provision regarding arbitration. That provision is similar to the provisions involved in this case. It provided as follows:

> Any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration in accordance with the rules of the American Arbitration Association . . . and judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Id. at 4132.

The plaintiffs in *Southland* had sued defendants for fraud, oral misrepresentation, breach of contract, breach of fiduciary duty and other violations of California's Franchise Investment Law. Plaintiffs relied on the following provision of the California Statutes:

> Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void.

Cal. Corp. Code § 31512 (West 1977). The California Supreme Court held that, because of the quoted statute, the arbitration provision in the franchise agreement was void and that plaintiffs' claims were not subject to arbitration.

In an opinion by Chief Justice Burger, the Supreme Court reversed the California Supreme Court holding that the California

law violated the Supremacy Clause of the U.S. Constitution and that the Federal Arbitration Act preempts any state laws purporting to create non-arbitrable claims. The opinion notes that the legislative intent of the federal act was to encourage the non-judicial resolution of the claims of contracting parties and to dispel the traditional hostility toward arbitration inherited from English common law. *Southland* holds that § 2 of the federal act is a rule of substantive law intended to apply in state as well as federal courts.

In an earlier opinion, *Moses H. Cone Hospital v. Mercury Constr.*, --- U.S. ---, 74 L.Ed. 2d 765 (1983), the Court affirmed the reversal of a federal district court order staying arbitration under a provision in a construction contract. The Court there said that § 2 of the Federal Arbitration Act was a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Id.* at ---, 74 L.Ed. 2d at 785. *See also Prima Paint Corp. v. Flood and Conklin Mfg. Corp.*, 388 U.S. 395 (1967) (Federal Arbitration Act applied to federal diversity jurisdiction cases).

c.

These cases should be compared with the earlier case of *Wilko v. Swan*, 346 U.S. 427 (1953). That case more closely resembles the case *sub judice* in that it involved an agreement to arbitrate between a securities brokerage firm and one of its customers. Regarding the federal policy and congressional intent behind the Federal Arbitration Act, *Wilko* makes essentially the same observations as *Southland* and *Moses Cone*. *Wilko*, however, involves neither a franchise agreement nor a construction contract. Rather, *Wilko* concerns securities dealing, a subject with respect to which the Court noted a strong countervailing federal policy underlying the Securities Act of 1933.

> Designed to protect investors, the act requires issuers, underwriters, and dealers to make full and fair disclosure of the character of securities sold in interstate and foreign commerce and to prevent fraud in their sale. To effectuate this policy, § 12(2) created a special right to recover for misrepresentation which differs substantially from the common-law action . . . .

346 U.S. at 431. In concluding, the Court held:

> Two policies, not easily reconcilable, are involved in this case. Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment. On the other hand, it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.

d.

We note also that the Securities Exchange Commission recently codified its policy, based on *Wilko v. Swan, supra*, of discouraging the use of arbitration provisions by brokerage firms in their customer agreements, particularly where individual customers are involved. Rule 15 c 2-2, 48 Fed. Reg. 53404 (1983) (to be codified at 17 C.F.R. § 240). Commenting on the continued inclusion of arbitration provisions by brokerage firms in their customer agreements, the Commission said,

> In light of the clearly contrary law in this area, such language is a misleading statement of customers' rights regarding federal securities laws. Because years of informal discussions have failed to correct this practice, the Commission has decided that it is appropriate to adopt this rule.

48 Fed. Reg. at 53404. The rule provides, in pertinent part:

> (a) it shall be a fraudulent, manipulative or deceptive act or practice for a broker or dealer to enter into an agreement with any public customer which purports to bind the customer to an arbitration of future disputes between them arising under the federal securities laws, or to have in effect such an agreement, pursuant to which it effects transactions with or for a customer.

48 Fed. Reg. at 53406-07. Although the effective date of this regulation is 28 December 1983 and its application to this case therefore uncertain, it is apparent that the rule is meant to reflect and clarify the S.E.C.'s interpretation of existing law.

The question before us concerns a relatively narrow point of pre-trial procedure, i.e.: whether the state court action must be stayed pending arbitration. However, we cannot ignore the fact that this procedural point is significantly intertwined, via the policy considerations previously discussed, with the substantive merits of this case. For this reason, we are compelled to recognize the applicable federal law and underlying policy and note their relevance to the question before us.

II

The essence of defendants' multifaceted argument is that the customer agreements, with their arbitration clauses executed by defendant Shaughnessy are valid as to plaintiffs and therefore binding on them. We have carefully considered defendants' argument, but are not persuaded by it.

a.

Considerations of policy aside, we note that one common thread upon which the preceding authorities depend is the existence of a valid agreement. 9 U.S.C. § 2 provides for the validity and enforceability of agreements to arbitrate "save upon such grounds as exist at law or in equity for the revocation of any contract." *Southland, supra,* in holding this provision to be substantive and preemptive federal law, presupposed that its application would be limited to agreements that were otherwise valid and binding on the parties. However, rather than simply presuming the validity of an arbitration provision from the validity of the underlying agreement, the Court seemed to require some showing that the agreement to arbitrate, whether a separate agreement or a provision of the same agreement, " 'was made in an arm's-length negotiation by experienced and sophisticated businessmen.' " *Southland Corp. v. Keating, supra* at 4133, *quoting The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972). This apparent requirement for independent negotiation underscores the importance of such a provision and militates against its inclusion in contracts of adhesion. This reading of *Southland* is consistent with the federal policy of discouraging arbitration of securities claims.

9 U.S.C. § 3, the federal provision upon which defendants relied in seeking to stay the court proceedings, provides as follows:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

This provision, like § 2, requires a written agreement. The application of 9 U.S.C. § 2 would require that the agreement meet certain other indicia of validity as well. *Southland*, while holding § 2 to be substantive, held that § 3 was procedural. *Southland Corp. v. Keating, supra* at 4135, fn 10. When not in substantive conflict, state law controls questions of procedure. *See generally*, Wright, Miller, Cooper and Gressman, 16 Federal Practice and Procedure § 4023 (1977). Thus, defendants' motion was properly made and considered under the applicable provision of our law, G.S. 1-567.3(a), set forth above.

b.

Under our law, as under the federal law, the very crux of the court's inquiry is whether a valid agreement exists such that the controversies between the parties may be subjected to arbitration. Additionally, *Southland* requires that our courts consider the additional indicia of validity that attach to the substantive application of 9 U.S.C. § 2, including but not limited to, whether the arbitration provision was the subject of independent negotiation.

G.S. 1-567.3(a) provides that where a party denied the existence of an arbitration agreement, "the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party." In the present case, the defendants, as the moving parties, had the burden of establishing the existence of an agreement to arbitrate. Whether defendants met their burden was a matter for the court's deter-

mination. *See In re Boyte*, 62 N.C. App. 682, 303 S.E. 2d 418, *disc. rev. denied*, 309 N.C. 461, 307 S.E. 2d 362 (1983) (G.S. 1-567.3 provides means for a party to seek court determination of whether an agreement to arbitrate exists); *Development Co. v. Arbitration Assoc.*, 48 N.C. App. 548, 269 S.E. 2d 685 (1980), *disc. rev. denied*, 301 N.C. 719, 274 S.E. 2d 227 (1981) (court's inquiry under G.S. 1-567.3 not limited to question of whether agreement to arbitrate exists). The trial court here was sitting as the trier of fact. Its findings are therefore binding on this Court unless there was no competent evidence to support them. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979).

III

Defendants except to and assign as error several of the findings of fact on the grounds that they are not supported by the evidence. Defendants also except to the entry of the judgment as well as to specific conclusions of law on the grounds that they are not supported by the findings of fact. Thus, the question presented for our consideration is whether the findings are supported by the evidence and whether they, in turn, support the conclusions of law and the judgment based thereon. For the reasons stated below, we affirm the order of the trial court.

a.

The defendants concede that no certificate of limited partnership was filed with the Wake County Register of Deeds. G.S. 59-2, governing the formation of limited partnerships, provides in pertinent part:

> (a) Two or more persons desiring to form a limited partnership shall
>
> (1) Sign and swear to a certificate . . . .
>
> (2) File for record the certificate in the office of the register of deeds of the county where the principal place of business is located according to the statement in such certificate.
>
> (b) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of subsection (a).

It is generally held that a failure to file a certificate of limited partnership is a failure of "substantial compliance" such that any assertion of limited partnership is negated. *E.g., Bisno v. Hyde*, 290 F. 2d 560 (9th Cir. 1961), *cert. denied*, 368 U.S. 959 (1962); *Tiburon Nat'l Bank v. Wagner*, 265 Cal. App. 868, 71 Cal. Rptr. 832 (1968). *See generally*, Hamilton, Corporations 6 (1976). *But see Johnson v. Manning*, 63 N.C. App. 673, 306 S.E. 2d 137 (1983) (failure to file certificate of limited partnership does not affect relationship of parties *inter se* where evidence shows intent to operate as a limited partnership). Here, not only has no certificate ever been filed, but there is nothing in the record that suggests that the required certificate was ever prepared. Thus, notwithstanding the existence of a Limited Partnership Agreement, the purchase or subscription agreements, and the recitations in the other documents in evidence, it is our view and we hold that no limited partnership existed here. Though findings to this specific effect were not made by the court, the evidence nevertheless compels them and they are implicit in the findings of ultimate fact that were made. To the extent that the trial court made those findings, we hold that they were correct.

b.

Defendants contend that there was nevertheless some relationship between plaintiffs and defendant Shaughnessy. Defendants argue that the relationship was that of a general partnership. Defendants rely on the theory that a general partnership is formed by operation of law where, as here, there has not been substantial compliance with the statutory requirements for the formation of a limited partnership. *See Atlanta Stove Works, Inc. v. Keel*, 255 N.C. 421, 121 S.E. 2d 607 (1961). The usual situation in which the law implies a general partnership is that in which a party is claiming limited partnership status in order to avoid the greater liability that attaches to status as a general partner or where the evidence shows that the parties intended the existence of a partnership for some agreed upon function. G.S. 59-37 establishes guidelines for determining the existence of a partnership in such situations. The cases cited by defendants, *Heritage Hills v. Zion's First National Bank*, 601 F. 2d 1023 (9th Cir. 1979); *Bisno v. Hyde, supra; Ruth v. Crane*, 392 F. Supp. 724 (E.D. Pa. 1975), *aff'd per curiam*, 564 F. 2d 90 (3d Cir.

1977), are examples of typical cases where the law implies a general partnership.

Our research discloses, however, that a *de facto* general partnership is not the necessary result of a failure to comply with the statutory requirements of limited partnership formation. G.S. 59-11 provides as follows:

> A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income.

The U.S. Supreme Court, in the case of *Giles v. Vette*, 263 U.S. 553 (1924), observed that the Uniform Limited Partnership Act (hereinafter ULPA) was enacted in part to relax the strict rule of law that a general partnership existed in all cases where a purported limited partnership failed to comply with the applicable statute.

> Section 11 [of the ULPA] is broad and highly remedial. The existence of a partnership—limited or general—is not essential in order that it shall apply. The language is comprehensive and covers all cases where one has contributed to the capital of a business conducted by a partnership or person, erroneously believing that he is a limited partner. It ought to be construed liberally, and with appropriate regard for the legislative purpose to relieve from the strictness of the earlier statutes and decisions.

Id. at 563. *See also, U.S. v. Coson*, 286 F. 2d 453 (9th Cir. 1961) (renunciation under § 11 of ULPA accompanied by lack of intent to join a general partnership); *Voudouris v. Walter E. Heller & Co.*, 560 S.W. 2d 202 (Tex. Civ. App. 1977) (no resulting general partnership where intent was only to join a limited partnership). *But see Laney v. Commissioner of Internal Revenue*, 674 F. 2d 342 (5th Cir. 1982) (substantial compliance test satisfied where

only thing lacking is filed certificate of limited partnership). *See generally* Coleman and Weatherbie, Special Problems in Limited Partnership Planning, 30 S.W. L. J. 887 (1976). Thus, where a limited partnership is found not to exist, it is the intent of the parties and not the operation of law, as defendants contend, that determines whether or not a general partnership results. *See Johnson v. Manning, supra.* While the situation here is not one that is obviously contemplated by G.S. 59-11, the status of plaintiffs relative to defendant Shaughnessy is nevertheless important to the resolution of this case and the same principles ought to apply.

The evidence in this case, including the evidence submitted with defendants' motions for reconsideration, discloses that some of the plaintiffs signed agreements with Shaughnessy referring to a limited partnership agreement while others signed agreements referring to a partnership agreement. While a limited partnership agreement did exist, there was no evidence that any of the plaintiffs ever signed it. No two plaintiffs, unless members of the same family, signed the same copy of the agreement. There are no documents relating to the formation of any partnership that are signed by more than one plaintiff, unless members of the same family.

The evidence further shows that CCI was established and promoted as a limited partnership with defendant Shaughnessy as the general partner. However, there is no evidence that any steps were ever taken to comply with G.S. 59-2, regarding limited partnership formation. Applying the principles set forth above to these facts, it is clear that, under G.S. 59-11, no partnership relationship would be formed. CCI had no income, so there was no interest in such income for plaintiffs to renounce, as called for under the statute. Further, there is no indication that any of the plaintiffs acted as principals or in any way behaved as other than the limited partners that they erroneously thought themselves to be. The nature of CCI's business was such that there was little opportunity for them to do so. The same evidence shows that there was no intention on the part of plaintiffs to continue in the operation of CCI as general partners. The court therefore correctly failed to make findings or conclusions to the effect that any partnership—general or limited—existed. Defendants' contentions that the evidence compelled such findings are without merit.

Defendants' argument, insofar as it assumes the existence of a partnership, is also without merit.

IV

What remains of defendants' argument regarding defendant Shaughnessy's purported authority to bind plaintiffs to the customer agreements assumes that plaintiffs had knowledge of the customer agreements. Defendants contend that plaintiffs are equitably estopped from denying the validity of the arbitration provisions in the customer agreements because, by the present action, they are seeking to recover under the agreements as third party beneficiaries. On the same theory, defendants argue that plaintiffs have ratified defendant Shaughnessy's actions and that the customer agreements entered into by him are therefore valid and binding on plaintiffs. These arguments are without merit. There is no evidence anywhere in the record that would suggest that plaintiffs had any knowledge of the customer agreements. The affidavits submitted by plaintiffs in support of their motion indicate that they were not aware of the customer agreements until after the action was initiated. Plaintiffs' complaint relies on the relationship that arose and existed between them and defendants as a result of defendants' trading in the CCI account, allegedly mishandling plaintiffs' money; the customer agreements are not mentioned in the complaint. The court below drew conclusions to this effect and, for the reasons stated, we hold they are correct.

V

The narrow question before the trial court was whether there was a valid agreement between plaintiffs and defendants such that plaintiffs were bound by the arbitration provisions therein. For the reasons stated, we believe that the trial court correctly answered that question in the negative. This alone is a sufficient basis for denying defendants' motion to stay judicial proceedings and it is on this basis that we affirm the order of the court below. The trial court made additional findings and conclusions to which defendants have excepted and assigned error. In light of our conclusion above, we find that the additional findings and conclusions made by the court and excepted to by defendants are unnecessary to support the order and we hold that they are surplusage. We therefore need not consider those exceptions and

assignments of error or the arguments advanced by defendants to support them.

The order of the trial court is

Affirmed.

Judges HEDRICK and HILL concur.

MARGARET H. CARTER v. RAYMOND E. CARR

No. 8318SC482

(Filed 17 April 1984)

1. **Attorneys at Law § 3.1; Rules of Civil Procedure § 60.2— motion for relief from judgment—no conflict of interest by attorney**

The trial court in a medical malpractice action did not abuse its discretion in the denial of plaintiff's Rule 60(b)(3) motion for relief from a judgment on the ground that, prior to plaintiff's filing of the lawsuit, plaintiff's husband had discussed the facts of her case with the attorney who represented defendant at trial in an attempt to retain him for the case where there was evidence supporting a conclusion that plaintiff's husband consulted defendant's attorney only about a possible claim against his former employer for wrongful discharge and not about plaintiff's case.

2. **Rules of Civil Procedure § 60.4— denial of motion for relief from judgment—standard of review**

The abuse of discretion test was used as the standard of review of the denial of a Rule 60(b)(3) motion for relief from a judgment.

3. **Physicians, Surgeons, and Allied Professions § 15— medical malpractice action—question concerning plaintiff's lawyer—absence of prejudice**

The plaintiff in a medical malpractice action was not prejudiced when defense counsel asked plaintiff's husband whether plaintiff or her husband "or your lawyer" had looked at plaintiff's hospital record before plaintiff's lawsuit was filed when plaintiff had filed the complaint pro se where both plaintiff's husband and plaintiff's counsel explained to the jury that plaintiff's attorney came into the case after the original complaint was filed and that he signed the complaint after amending it, and where the effectiveness of plaintiff's counsel with the jury was not in any way hampered by such question.

4. **Appeal and Error § 52; Rules of Civil Procedure § 8.1— medical malpractice action—improper prayer for relief—door not opened to evidence of**

The defendant in a medical malpractice action did not open the door to the admission of evidence of the original prayer for relief which stated a

specific demand for monetary relief exceeding $10,000 in violation of G.S. 1A-1, Rule 8(a)(2) when his counsel cross-examined plaintiff's husband about the amended complaint, and the trial court properly limited plaintiff's redirect examination of her husband to the fact that the complaint had been amended as discussed on cross-examination.

5. **Evidence § 34.4; Physicians, Surgeons, and Allied Professions § 15— medical malpractice action—statement by defendant's partner—inadmissible hearsay**

A statement by the partner of the defendant in a medical malpractice action that plaintiff's vein graft had been inserted backwards was not competent as an admission but was inadmissible hearsay where there was no evidence that the partner was an agent with authority to speak for defendant, and where the statement did not relate to partnership business and was not made within the scope of the declarant's authority as a partner.

6. **Appeal and Error § 49.1— exclusion of testimony—failure to show prejudicial error**

The exclusion of testimony was not prejudicial error where the record failed to show what the excluded testimony would have been and where similar testimony was thereafter admitted.

7. **Witnesses §§ 5.1, 7— evidence competent for impeachment and corroboration**

Testimony in a medical malpractice action that plaintiff's husband refused to allow plaintiff to be treated by the witness at a Medicaid clinic because it was beneath his dignity was admissible to impeach the testimony of plaintiff's husband and to corroborate the witness's later testimony that plaintiff's husband often stood in the way of his wife and her receipt of proper medical care.

8. **Witnesses § 9— clarifying testimony on redirect examination**

A witness could properly be permitted on redirect examination to clarify his testimony which had been cast into doubt on cross-examination.

9. **Witnesses § 9— redirect examination—discretion of court**

The trial court had the discretion to permit counsel to elicit on redirect evidence which could have been but was not admitted during direct examination.

APPEAL by plaintiff from *Freeman, Judge.* Judgment entered 20 October 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 13 March 1984.

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

Henson and Henson by Perry C. Henson and Jack B. Bayliss, Jr., for defendant appellee.

BRASWELL, Judge.

After the amputation of her left leg plaintiff sued her surgeon for malpractice. Answering the issues submitted to it in the defendant's favor, the jury determined that the plaintiff had not been injured by the defendant's alleged negligence and was entitled to no recovery. On appeal, the plaintiff has presented three questions for review: (1) did the trial court err in denying the plaintiff's Rule 60(b)(3) motion for relief from judgment; (2) did the trial court commit reversible error by allowing the plaintiff's witness, David Carter, to be cross-examined concerning the amendments to the complaint filed; and (3) did the trial court commit reversible error with regard to the various evidentiary rulings it made during the course of the trial?

The evidence presented by the plaintiff tended to show that on 26 June 1974 the plaintiff and her husband, David Carter, were in Durham at approximately 10:30 p.m. when the plaintiff developed a sudden severe cramp in the lower part of her left leg. Upon returning to their home in High Point and with the plaintiff's leg still in the same condition, Mr. Carter took his wife to the High Point emergency room around 12:30 that night. Dr. Chester Carl Haworth, Jr., examined the plaintiff and diagnosed the source of her pain as a vascular problem and called Dr. Raymond E. Carr, a vascular surgeon, to further examine the plaintiff.

Dr. Carr, the defendant, determined, according to the plaintiff's evidence, that there was blockage in the femoral artery, preventing the blood from flowing to the lower left leg and that vascular surgery was needed, which was performed the next day. The plaintiff continued to experience problems and her foot was amputated below the knee on 10 July 1974. Two days later, with infection having entered the tissue, Dr. Carr amputated her leg above the knee. After months of non-healing, Dr. Carr suggested the plaintiff see Dr. James M. Marlowe, an orthopedic specialist. On 16 May 1975 the plaintiff re-entered the hospital and Dr. Marlowe revised the amputation site.

The defendant's evidence shows that the first operation was delayed because Mr. Carter, the plaintiff's husband, insisted that the operation not be done under local anesthesia, the normal procedure, but rather under general anesthesia. Later, as the plain-

tiff's leg continued to worsen, Dr. Carr informed the plaintiff that in order to protect her life he would have to amputate. He originally wanted to amputate her leg above the knee, but on Mr. and Mrs. Carter's insistence, agreed to try to save the knee. Dr. Carr warned that because the infection had spread up her leg that an amputation below the knee might not be sufficient and that another operation might be needed.

[1] The plaintiff's first assignment of error challenges the trial court's denial of her G.S. 1A-1, Rule 60(b)(3) motion for relief from judgment based on the misconduct of an adverse party. After the final judgment had been entered on 20 October 1982, the plaintiff filed this motion on 7 March 1983. It was heard and denied in April of 1983. The plaintiff's counsel asserts that after notice of appeal had been given he learned that on 18 April 1975, prior to the filing of any lawsuit by the plaintiff, Mr. Carter had met with Perry Henson and discussed the facts of their case with him in an attempt to retain Mr. Henson as their attorney. Mr. Henson, who subsequently represented the defendant in this action, vaguely remembers discussing with Mr. Carter a possible claim for wrongful employment discharge, but emphatically denies discussing a medical malpractice claim because at that time he did not accept malpractice cases against health care providers.

Since the proposed record on appeal had been served on the defendant prior to the filing of this motion, the trial court ruled on the Rule 60(b)(3) motion for the limited purpose of indicating how it would have ruled were the appeal not pending. Since a Rule 60(b) motion is addressed to the sound discretion of the trial court, our review is limited to whether or not the trial court abused his discretion in denying the motion. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975). We hold that the trial court did not abuse his discretion.

[2] [We note some doubt exists as to the appropriate appellate standard of review of the denial of a Rule 60(b)(3) motion. We have followed *Sink v. Easter, supra*, which establishes the test of abuse of discretion. *Bell v. Martin*, 43 N.C. App. 134, 142, 258 S.E. 2d 403, 409 (1979), utilized an "any competent evidence" test. *Bell* was subsequently reversed in the Supreme Court on other grounds, 299 N.C. 715, 264 S.E. 2d 101, *reh. denied*, 300 N.C. 380, 267 S.E. 2d 686 (1980). *Thelen v. Thelen*, 53 N.C. App. 684, 281

S.E. 2d 737 (1981), applies both tests. We would suggest that if the motion requires an evidentiary hearing before ruling, then the standard for review of the final order would be "any competent evidence," an objective determination. If the ruling on the motion could be made without an evidentiary hearing, that is, if the ruling is subjectively made, then the standard for review is "abuse of discretion."]

The record contains affidavits from David Carter, William G. Pfefferkorn (the plaintiff's attorney), John Haworth, and Perry Henson (the defendant's attorney). Mr. Carter contends that he went to Mr. Haworth for legal advice on a possible lawsuit by his wife against Dr. Carr. Because of a conflict in interest, Mr. Carter contends Mr. Haworth refused to take the case, but recommended three other attorneys, one of which was Perry Henson, from whom Mr. Carter could seek help. Mr. Haworth's affidavit states that he did refer Mr. Carter to three other attorneys but supports Mr. Henson's contention that at this time Mr. Carter was seeking advice on a possible lawsuit for Mr. Carter's wrongful discharge by his former employer, Crown Hosiery Mills. With affidavits to support both positions, the trial judge made his decision based on the credibility he accorded these affidavits. From the materials in the record, the trial judge did not abuse his discretion by according more weight to the affidavits of Mr. Henson and Mr. Haworth. His order to deny the plaintiff's motion was supported by sufficient findings of fact and conclusions. Furthermore, according to Mr. Pfefferkorn's affidavit, Mr. Carter knew throughout the trial of his discussion with Mr. Henson, but failed to inform his attorney of the extent of their conversation until an unfavorable judgment had been entered against his wife. As the trial judge concludes in his order, the plaintiff's delay in bringing this matter to the attention of the court, if in fact Carter had conferred with Henson on this case, was unreasonable and inexcusable. There were no objections or exceptions to any of the trial court's findings of fact or conclusions.

[3] The plaintiff's second assignment of error asserts that the trial court improperly permitted defense counsel to cross-examine Mr. Carter about allegations in the complaint. Although we agree that it is improper to impeach a witness who is not a party with allegations contained in the complaint, it is not on this basis that

the plaintiff assigns error, and at trial the plaintiff did not object to this subject matter line of questioning.

The objectionable portion of the cross-examination arose through defense counsel's comment that the Carters as well as their attorney brought a damaging malpractice suit against Dr. Carr without first checking out the facts. Mr. Carter's cross-examination began with defense counsel's attempt to get Mr. Carter to admit that "the only allegation [in the complaint] that Mrs. Carter made against Dr. Carr was that he didn't come to see her for about seven days," from 1 July 1974 to 7 July 1974. Refusing to admit that the complaint contained only one allegation, Mr. Carter pointed out: "[B]ut see, number two right here, 'Allow the Plaintiff to amend her complaint when we get the records.' See, that was done without having any records." Then, defense counsel replied: "You mean when you filed this lawsuit against Dr. Carr in 1979, that neither you nor Mrs. Carter or *your lawyer* had ever checked out her hospital record and looked at it?" (Emphasis added.) Plaintiff's attorney vehemently objected to this reference to him because at the time this part of the complaint was filed the plaintiff had no attorney. The original complaint filed by the plaintiff *pro se* had violated G.S. 1A-1, Rule 8(a)(2), which states that in all professional malpractice actions, if the matter in controversy exceeds $10,000, the pleading shall not state the specific demand for monetary relief. The trial court denied the defendant's motion to dismiss on the basis of this Rule 8 violation and allowed the plaintiff to amend the complaint's prayer for relief. It was at that juncture that the attorney for the plaintiff first entered this action and he proceeded to amend the complaint and to prepare for trial.

The trial court *sustained* plaintiff's counsel's objection, but defense counsel through subsequent motions implied that plaintiff did have the benefit of counsel at this time because the amended complaint contained the plaintiff's counsel's signature. The plaintiff now asserts that this line of questioning was irrelevant, misleading, and prejudicial to the plaintiff in that it impugned the integrity of her counsel. From our review of the record as a whole, the plaintiff has failed to show that the jury was misled or that she was in any way prejudiced. In the first place, Mr. Carter wanted, and was given, the opportunity to explain, and did so quite adequately, to settle the confusion. Mr. Carter stated:

I can explain it.

* * * *

Mr. Pfefferkorn [plaintiff's attorney] signed this paper here after amending the last page by orders of the Judge, and you [defense counsel] got a sealed order. This is not the original third sheet.

Secondly, plaintiff's attorney, as he objected to defense counsel's inference that he had participated in this case from the start, was allowed to explain *in front of the jury* his version of the facts. He argued:

Your Honor, this Complaint was amended in January of 1980 when my name was put in there, and the lawyer knows it. You can look at the sealed file by the Judge. That shows that was amended in January of 1980, Your Honor.

MR. HENSON [Defense counsel]: I am entitled to cross-examination about his allegation, Your Honor, without Mr. Pfefferkorn making a speech, too.

* * * *

MR. PFEFFERKORN: Your Honor, I am going to object. It's in the file that I was not the attorney. The Complaint was amended after I got in the case in January of 1980, but nunc pro tunc means the old date was put in there, but I was not in the case. Mr. Henson is trying to deceive us and should not be allowed to.

MR. HENSON: I object to this kind of comments of counsel.

We fail to see how the inclusion of plaintiff's attorney within that hasty group in any way hampered his effectiveness with the jury once the situation was explained by Mr. Carter and Mr. Pfefferkorn. Subsequently, defense counsel was able to make Mr. Carter admit that from the plaintiff's hospital record, plaintiff's Exhibit No. 1, Dr. Carr had in fact visited Mrs. Carter six times within the seven days in question. Because the jury was not misled nor was the plaintiff's case improperly prejudiced by the defense counsel's method of impeachment, we hold the trial court committed no reversible error.

[4] The plaintiff further asserts that the trial court erred when it prevented the plaintiff from admitting into evidence the original prayer for relief, which had been in violation of G.S. 1A-1, Rule 8(a)(2), before it was amended. The plaintiff asserts that the defendant by asking Mr. Carter questions concerning the amended complaint had opened the door as to the amount of the original prayer for relief. The trial court disagreed stating: "Well, I will let you go into the fact that changes were made, but I don't think you need to bring out what the amount was in the first Complaint. I will sustain the objection to that."

The purpose behind G.S. 1A-1, Rule 8(a)(2) is " '[to] avoid adverse press attention prior to trial, and thus save reputations from the harm which can result from persons reading about huge malpractice suits and drawing their own conclusions based on the money demanded.' [Citation omitted.]" *Jones v. Boyce,* 60 N.C. App. 585, 587, 299 S.E. 2d 298, 300 (1983). Although this stated rationale for the rule speaks for protection prior to trial, we can find no reason on the facts in this case to allow the plaintiff during trial to expose to the jury the original amount demanded before liability has been established. Jurors, like other persons, after hearing of the amount may unfairly draw their own conclusions based on the money demanded. We hold the trial court properly limited the plaintiff's redirect examination of Mr. Carter to the fact that the complaint had been amended which had been discussed on cross-examination.

[5] The plaintiff's final assignment of error challenges several evidentiary rulings made by the trial court. In the first instance, the plaintiff asserts that the trial court erred by refusing to allow Mr. Carter to testify to Dr. Canipe's statement that the vein graft had been inserted backwards on the basis that Dr. Canipe's statement was an admission and admissible against the defendant as his partner. Dr. Canipe had assisted Dr. Carr in the operation on the plaintiff and there was testimony that they were partners. We hold the trial court properly excluded this statement. The current North Carolina rule on vicarious admissions states that an agent's authority to perform a certain task for a principal does not necessarily imply he has the authority to talk about it afterwards. *Robinson v. Moving and Storage, Inc.,* 37 N.C. App. 638, 246 S.E. 2d 839 (1978). The plaintiff offered no evidence to lay the foundation that Dr. Canipe was in fact an agent and that he had

authority to speak for Dr. Carr. Because Dr. Canipe's statement as an agent did not accompany the act committed as agent, the statement is hearsay and inadmissible. Also, because the statement did not relate to the partnership business and was not made by Dr. Canipe within the scope of his authority as a partner, the statement is again hearsay and inadmissible. *See* 2 Brandis on North Carolina Evidence § 170 (1982).

[6] Secondly, the plaintiff contends that the trial court erred by sustaining the defendant's objection, preventing statements made by Dr. James Marlowe into evidence. The plaintiff through Mr. Carter attempted to elicit testimony that Dr. Marlowe had stated that the stump wound was the biggest mess he had ever seen. Believing that Dr. Marlowe would be called as a witness, the plaintiff offered this evidence to impeach or corroborate, depending on Dr. Marlowe's testimony. Defense counsel objected, stating that Dr. Marlowe would not be called as a witness. When the objection was sustained, the plaintiff made no offer of proof. However, Dr. Marlowe was later called to the stand and testified favorably for Dr. Carr. Nevertheless, the exclusion of evidence will not be reviewed on appeal unless the record sufficiently shows what the evidence would have been. *Gibbs v. Light Co.*, 268 N.C. 186, 150 S.E. 2d 207 (1966). The fact that the defendant later decided to call Dr. Marlowe does not change our need for an offer of proof of the excluded evidence in the record. We also fail to see how the plaintiff has been prejudiced by the trial court's ruling when Dr. Marlowe was cross-examined and subjected to impeachment tactics by the plaintiff concerning his statement to the Carters. He even conceded that "it certainly wasn't one of the biggest I had ever seen by a long shot, but it was a mess." We hold the trial court's ruling did not constitute prejudicial error.

[7] The plaintiff further asserts that the trial court improperly allowed Dr. Chester Carl Haworth, Jr., to testify that although the Carters were having financial trouble, Mr. Carter refused to allow the plaintiff to be treated by Dr. Haworth at a Medicaid Clinic. He stated that it "was a bit beneath [Mr. Carter's] dignity to allow her to be seen in this clinic for indigent people." The plaintiff objected on the basis that because Mr. Carter was not a party, his statements were inadmissible. Yet, this evidence was admissible for the purpose of impeaching Mr. Carter's testimony and to corroborate Dr. Carr's later testimony that Mr. Carter

often stood in the way of his wife and her receipt of proper medical care. 1 Brandis on North Carolina Evidence §§ 47, 49 (1982). We hold the ruling of the trial court was proper.

[8] The plaintiff also charges that the trial court wrongfully allowed a witness to further explain an answer he had given after cross-examination had ended. The plaintiff has failed to recognize that the defendant on redirect examination could properly allow the witness to clarify his testimony which had been cast into doubt on cross-examination. *See State v. Franks*, 300 N.C. 1, 265 S.E. 2d 177 (1980). On cross-examination, the plaintiff attempted to impeach Dr. James Johnson by implying that he had recommended Dr. Carr very highly although Dr. Carr had only been practicing in town for a few weeks. On redirect, the defendant asked Dr. Johnson if he wanted to explain his answer which Dr. Johnson did. We hold the trial court's ruling was proper.

[9] Finally, Dr. Jesse Meredith was called by the defendant to testify as an expert in general surgery that Dr. Carr in his treatment of the plaintiff exercised the standard of care required of general surgeons performing amputations. On redirect examination, Dr. Meredith was also asked to contradict a statement made by the plaintiff's expert, Dr. James, that "a monkey could be taught to do surgery." As insignificant as this evidence might seem, the plaintiff has assigned its admission as error. Although the question may have technically been outside the scope of redirect examination, the trial court has the discretion to permit counsel to elicit on redirect evidence which could have been admitted during direct examination but was not. *See State v. Logan*, 27 N.C. App. 670, 219 S.E. 2d 806 (1975). Since the evidence could have been properly admitted to contradict the testimony of the plaintiff's expert witness, we hold that the trial court committed no prejudicial error.

No error.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. HAZEL MAE JOLLEY

No. 8329SC895

(Filed 17 April 1984)

Searches and Seizures § 10— failure to suppress shotgun—no evidence of exigent circumstances or consent—error to deny motion to suppress

In a prosecution for second degree murder, the trial court erred in failing to suppress evidence of a gun obtained without a warrant where there was neither evidence of exigent circumstances nor evidence of consent.

Judge BRASWELL dissenting.

APPEAL by defendant from *Brown, Judge.* Judgment entered 26 May 1983 in RUTHERFORD County Superior Court. Heard in the Court of Appeals 15 February 1984.

Evidence offered at trial tended to show the following pertinent facts. On 28 December 1982 John Jolley, Sr., died as a result of multiple gunshot wounds. Rutherford County Deputy Sheriff Mike Summers, responding to a call for help, found Jolley lying on the floor in his home being attended by emergency medical technicians. He also found defendant, Jolley's widow, crouched beside the kitchen bar crying. He observed a gun similar to that later introduced as state's exhibit number one in the den. He did not examine or seize the gun or make a positive identification of it at trial.

Shortly after arriving, Deputy Summers placed defendant in his patrol car and advised her of her *Miranda* rights. Jolley's body was removed from the house and Deputy Summers "roped off" the crime scene. Shortly thereafter Detective Philbeck arrived and Summers informed him that he was unsure whether the shooting was a homicide or accidental. Mrs. Jolley was taken to jail. No other member of the defendant's family was present at the house.

Without seeking consent and without obtaining a search warrant, Detective Philbeck conducted a six hour search of the home. During this search he confiscated a semi-automatic .22 caliber rifle and several spent shell cases. The items were introduced at trial over defendant's objection.

At the Rutherford County jail, defendant gave a statement indicating that the shooting was accidental. Later that evening

Detective Simmons disassembled the seized rifle. The rifle was then reassembled and tested by firing one bullet. Based upon his examination and testing of the rifle Detective Simmons was allowed to give his opinion at trial that the weapon was functioning properly. An S.B.I. agent who later examined the weapon was allowed to testify that, based upon his examination of the weapon, it was functioning properly.

Defendant, testifying in her own defense, presented evidence which tended to show the following facts and events. On 28 December 1982, her husband was resting on the sofa in their house, and defendant was going out shopping and decided to buy some new bullets for the gun. The gun was loaded because some time prior to this her daughter's estranged husband had come to the house and tried to cause trouble. On that occasion the daughter pointed the gun at her husband, but he took it away from her and threw it to the ground, damaging it. Defendant's son repaired the gun, and told defendant that the bullets needed to be replaced. While defendant was carrying the gun to the kitchen to determine what type bullets were needed, the gun discharged, striking her husband. Defendant also offered testimony from expert witnesses who stated that multiple discharges were common with these type weapons and that they should be tested in a controlled environment before they were disassembled and then reassembled.

Defendant was convicted of second degree murder and from a judgment sentencing her to imprisonment for a term of ten years she appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for the State.

Hamrick, Bowen, Nanney & Dalton, by Walter H. Dalton, for defendant.

WELLS, Judge.

In her second assignment of error defendant contends the court erred in denying her motion to suppress the state's exhibit number one, a J. C. Higgins .22 semi-automatic rifle, on the grounds that the gun was obtained as a result of an illegal search and seizure. We agree and grant defendant a new trial.

On 20 April 1983, defendant filed a motion to suppress alleging, *inter alia*:

> The grounds for the suppression of this evidence are as follows:
>
> (a) Its exclusion is required by the Constitution of the United States or the Constitution of North Carolina in that it resulted from an unreasonable search and seizure and in addition, it was obtained as a result of a substantial violation of the provisions of Chapter 15A of the General Statutes in that the sworn testimony of the officers involved at the probable cause hearing clearly show that the defendant was arrested at her home on December 28, 1982 and was taken to the Rutherford County Jail; thereafter, other officers proceeded to her residence without the authority of a search warrant and under no recognized exception to the requirement of a search warrant and entered the defendant's premises without the consent of the defendant and without her being present and in violation of law and thereafter, seized the .22 rifle, J. C. Higgins model, which the defendant now seeks to suppress, together with any test results relating to said rifle; that said intrusion into the defendant's home without the authority of a search warrant was unlawful and a substantial violation of her rights and in violation of the Fourth Amendment of the United States Constitution and in violation of Chapter 15A of the North Carolina General Statutes.

Following a hearing on the motion the trial court made the following pertinent findings of fact and conclusions of law:

> That on December 28, 1982 at 3:00 p.m., Deputy Michael Summers of the Rutherford County Sheriff's Department went to the home of John Preston Jolley and Hazel Mae Jolley to investigate a possible shooting; that he found John Jolley in the den on the floor and EMT personnel were working on him.
>
> That he saw a .22 rifle in a chair in the den area.
>
> That the Defendant, Hazel Mae Jolley, was in the kitchen area in a squatting position.
>
> That Summers asked her to sit in the patrol car, that he thought getting her out of the house would help her emo-

tional state, that he thereafter helped rope the area off to secure the scene, that he spoke with the defendant in his patrol [car] and advised her of her rights, on a form used by the Rutherford County Sheriff's Department.

. . .

That Detective David Philbeck had arrived at the Jolley residence about five minutes after 3:00, and Summers turned control of the premises over to him.

That Philbeck went inside the residence where he made photographs, seized the rifle, spent cartridges, a lead fragment, made a diagram, and visually observed the premises.

. . .

From the foregoing findings of fact the Court concludes:

1. That a search warrant was not required for Detective Philbeck to enter the Jolley home and conduct an investigation of the shooting of John Preston Jolley; and that the evidence seized is competent and should be admitted into evidence.

. . .

Based upon these findings and conclusions the motion to suppress was denied.

Searches conducted without properly issued search warrants are *per se* unreasonable under the Fourth Amendment, unless they fall within certain specific exceptions. Among these exceptions are exigent circumstances and consent to search. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564, *reh. denied*, 404 U.S. 874, 92 S.Ct. 26, 30 L.Ed. 2d 120 (1971). The trial court did not find that either of these exceptions existed, but denied the motion to suppress because he concluded that "a search warrant was not required for Detective Philbeck to enter the Jolley home and conduct an investigation of the shooting." The state first contends that the trial court was correct based upon the theory that the search was conducted under exigent circumstances. Secondly, the state contends that Detective Philbeck had consent to search the house. We cannot agree with either of these contentions.

The exigent circumstances argument must be rejected in light of the United States Supreme Court decision in *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed. 2d 290 (1978). In *Mincey* a gun battle erupted during an undercover drug buy at defendant's apartment. Once this happened officers stormed the apartment and rendered aid to the wounded. Within ten minutes of the shooting, detectives not involved in the undercover transaction arrived at the apartment and began a four day search of the premises. Among the items seized during the search were illegal drugs. Defendant was convicted of assault, homicide and narcotics offenses. The Arizona Supreme Court, in upholding the narcotics convictions, held that the warrantless search of defendant's apartment was permissible since it was part of a routine homicide investigation. On appeal, the United States Supreme Court reversed defendant's conviction holding that the warrantless search violated defendant's constitutional rights. In its decision the Court said:

> We do not question the right of the police to respond to emergency situations. . . . [t]he Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. . . . But a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation . . .'

(Citations omitted.) *Id.*

In the case at bar, when Detective Philbeck arrived at the scene, defendant and the victim had been removed, and the scene, as Philbeck found it presented no exigent circumstances. Under the rule of *Mincey v. Arizona, supra*, the legality of Detective Philbeck's search could not be based on exigent circumstances.

The state also contends that Detective Philbeck was in the house with the consent of the defendant. "It is well settled that a person may waive his right to be free from unreasonable searches and seizure. A consent to search will constitute such a waiver, only if it clearly appears that the person voluntarily consented, or permitted, or expressly invited and agreed to the search."

State v. McPeak, 243 N.C. 243, 90 S.E. 2d 501 (1955). When the state relies upon consent as a basis for a warrantless search, the police have no more authority than that they have been given by the consent. 2 W. LaFave, *Search and Seizure*, § 8.1 (1978). The trial court did not find that there was a consent to search. When a trial court makes no findings of fact relating to an issue and there is no conflict in the voir dire testimony "the necessary findings are implied" from the court's admission of the evidence. *State v. Biggs*, 289 N.C. 522, 223 S.E. 2d 371 (1976). Under the rule of *Biggs* we imply that the trial court found that consent was given in light of the denial of defendant's motion to suppress. The court's findings of fact are conclusive on appeal only if they are supported by competent evidence. *State v. Biggs, supra.*

In the case at bar the only consent given was consent, in the form of a phone call, to come into the house to aid the victim. We do not believe that this invitation can properly be used to show consent to a search of the premises by an officer who was not involved in aiding the victim. There was nothing in defendant's conversations with Deputy Summers to indicate that defendant consented to a search by Detective Philbeck, and defendant never spoke to Detective Philbeck at all. We are unable to agree that there was any evidence to support a finding that defendant consented to Philbeck's search.

Having found no exigent circumstances or consent which would justify a warrantless search, we hold that the trial court erred in denying defendant's motion to suppress. We therefore reverse defendant's conviction and remand the cause for a new trial.

Reversed and remanded.

Judge PHILLIPS concurs.

Judge BRASWELL dissents.

Judge BRASWELL dissenting.

I respectfully dissent and would vote no error. The majority opinion defines the scope of the defendant's consent too narrowly and it unreasonably restricts the ability of law enforcement officers to investigate probable crimes when called to the scene.

Eight shots were fired from the rifle. Seven wounds of entry were counted in the body of the husband.

The defendant testified that after the rifle was fired:

> The next thing I remember is that he was lying on the floor hurt. I threw the gun behind me and went to him. I don't remember the gun going off. He was laying face down on the floor and said "Get help." I went to the telephone and dialed the operator to get help.

In response to a general call for help, the EMS personnel, Deputy Summers and Detective Philbeck were notified and sent to the Jolley home. By making this phone call, the defendant gave her consent for entry into the home to those who usually respond to such calls for help. The record shows that Deputy Summers arrived at 3:00 p.m. and found the EMS personnel performing CPR on Mr. Jolley. Detective Philbeck arrived at 3:05 p.m. The defendant in her brief does not object to Deputy Summers' entry into her home, further indicating that her consent was not limited only to emergency medical technicians. Both officers saw the rifle in question in plain view. Detective Philbeck actually seized the rifle, along with eight .22 caliber shell casings from various spots about the den. I believe that the Constitution does not require such a technical tightrope walking of the rules of search and seizure. The constitutionality of a seizure should not depend on which officer arrived and entered the house first. The law enforcement officers' legal authority to be in the house should not be lost, like losing one's place in line, because the first officer to arrive had left the house to escort the defendant outside and because the officer who arrived five minutes later [but pursuant to the original call for help] failed to beat the body out of the house to justify exigent circumstances.

The majority opinion states that "[i]n the case at bar the only consent given was consent, in the form of a phone call, to come into the house to aid the victim. We do not believe that this invitation can properly be used to show consent to a search of the premises by an officer [Detective Philbeck] who was not involved in aiding the victim." The defendant did not limit her consent in such a fashion and the officers called to her home were under no duty to ask how long consent would last. Detective Philbeck, like Deputy Summers, entered the premises to conduct a general in-

vestigation into a possible homicide. This entry was made possible without a warrant by the defendant's consent. Also, contrary to the majority opinion, Philbeck searched only the kitchen-den area which made up one large open room in the Jolley home. He did not search the entire premises. The defendant's consent and the limited search are in themselves sufficient to distinguish this case from *Mincey v. Arizona, supra.*

I would hold that the trial court's findings of fact are supported by competent evidence and that the defendant's motion to suppress was properly denied.

In the alternative, applying the law of *State v. Johnson*, 310 N.C. 581, 313 S.E. 2d 580 (1984), I would vote to remand for a new *voir dire* hearing on both the subject of consent and exigent circumstances. As in *Johnson*, it could be said here that there is a lack of sufficient findings of fact and conclusions of law in this case, as well as the lack of evidence in the transcript, for our review of the legality of the entry of law enforcement officers into the dwelling house pursuant to a general call for help. It could be that on this record that both the majority and myself are engaging in speculation.

I dissent.

THOMAS E. MILLER v. RUTH'S OF NORTH CAROLINA, INC., RUTH'S OF SOUTH CAROLINA, INC., B & H FOODS, INC., B & H, INC. OF CHESTER, FRANCES JUNE GRIFFIN, AND ROBERT GRIFFIN

No. 8326SC28

(Filed 17 April 1984)

Corporations § 6— action by minority shareholder against corporate defendants and other shareholders—no error in failure to award attorneys' fees

Plaintiff failed to show an abuse of discretion in a trial court's denial of his motion for attorneys' fees under G.S. 55-55(d), dealing with shareholder derivative actions, where plaintiff requested "appointment of a receiver in accordance with G.S. 55-127 to effect the liquidation and involuntary dissolution" of one of the defendant corporations of which plaintiff was a minority shareholder and where "as an alternative to dissolution and liquidation" he asked for the purchase of his shares.

Judge ARNOLD concurring in the result.

Miller v. Ruth's of North Carolina, Inc.

APPEAL by plaintiff from *Ferrell, Judge.* Judgment entered 19 October 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 December 1983.

At the formation of the Ruth's corporations in 1964, plaintiff received 20 percent of the issued shares of the capital stock. In 1972, defendant Frances June Griffin inherited 60 percent of the issued and outstanding shares of the capital stock of the Ruth's corporations and controlling interest of the shares of the two B & H Foods corporations from her deceased husband, plaintiff's brother. She later increased her interest in the Ruth's corporations to 80 percent. In 1974, Frances June Griffin married defendant Robert Griffin. She later appointed him chairman of the board of the two Ruth's corporations and of the two B & H Foods corporations.

On 6 December 1976, plaintiff instituted this action, alleging acts of mismanagement and oppression by the Griffin defendants, resulting in damage to the Ruth's corporations, of which he retained a 20 percent interest, as well as damage to plaintiff individually. Extensive discovery and trademark litigation followed. The cause came on for trial in 1982; the court found that plaintiff's right as a minority shareholder had in fact been violated and ordered the repurchase by the Ruth's corporations of plaintiff's shares at fair market value, which was to be determined by a referee appointed by the court. Based on the referee's findings, the court awarded plaintiff a total of $416,503.05. Plaintiff's request for attorneys' fees was denied, however, and is the subject of this appeal.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Gaston H. Gage and Debra L. Foster, for plaintiff appellant.

Fairley, Hamrick, Monteith and Cobb, by F. Lane Williamson and Dean Hamrick, for defendant appellees.

JOHNSON, Judge.

Plaintiff contends that the court erred in denying his request for attorneys' fees under G.S. 55-55(d), which provides that a court "may award" a successful plaintiff in a shareholders' derivative action "the reasonable expenses of maintaining the action, including reasonable attorneys' fees. . . ."

However, since this was not a shareholders' derivative action, we need not reach the arguments presented by plaintiff concerning the court's exercise of discretion. In his original complaint, plaintiff did allege damage to the corporations and unsuccessful efforts to obtain relief within the corporation, as required to maintain a derivative action. G.S. 55-55(a), (b). However, plaintiff did not allege that he was bringing the suit as a derivative action. More importantly, plaintiff apparently realized that as the dissenting shareholder of two shareholders, relief on behalf of the corporations would be futile. Accordingly, plaintiff did not ask for any relief on behalf of Ruth's. Instead, he requested "appointment of a receiver in accordance with G.S. 55-127 to effect the liquidation and involuntary dissolution" of the Ruth's corporate defendants. Plaintiff prayed for an accounting and recovery by the receiver of amounts for which the other defendants might be liable. As "an alternative to dissolution and liquidation" he asked for the forced purchase of his shares.

Four years later, after extensive discovery litigation, plaintiff moved to amend his complaint. He sought in essence to reallege his case in two claims, one derivatively as a shareholder and one in his individual capacity. He requested extensive relief on behalf of Ruth's, as well as again asking for individual relief. The court denied the motion,[1] although it allowed plaintiff to file a supplemental complaint alleging new matters. Plaintiff then moved for leave to file such a complaint, patterned after his motion to amend. Again, the court denied his motion.[2] Apparently the nature of the case came up again when it was called for trial: the court issued an order, noting plaintiff's contention that this was a derivative action, but ruling that only the issues of appointment of a receiver or alternative equitable relief were before it. The court was the finder of the fact and ruled in plaintiff's favor, citing its authority under the dissolution statutes, G.S. 55-125, G.S. 55-125.1. The court subsequently denied plaintiff's motion for attorneys' fees under G.S. 55-55(d).

1. Plaintiff does not assign error to this ruling on this appeal. Even if he had, we do not believe that it amounted to an abuse of discretion. *See Flores v. Caldwell*, 14 N.C. App. 144, 187 S.E. 2d 377 (1972). Nor is there any indication that plaintiff was unjustly deprived of any right to relief by the court's order.

2. See note 1, *supra*.

Undaunted by these contrary rulings, plaintiff contends that this was nevertheless a derivative action. He relies on a single sentence in the court's order to the effect that his action sought redress for injury to the corporations and not just injury to himself. Under *Hoyle v. Carter*, 215 N.C. 90, 1 S.E. 2d 93 (1939), he argues, such an action to protect the value of stock and to preserve assets is maintainable solely in the right of the corporation and is not maintainable in the right of the individual shareholder. Plaintiff overlooks the subsequent enactment of G.S. 55-125 which authorizes such relief in actions by individual shareholders. Furthermore, there is also authority for individual actions by minority shareholders where the corporation is "so dominated and controlled by a wrongdoer as to be powerless to act." *Fulton v. Talbert*, 255 N.C. 183, 185, 120 S.E. 2d 410, 412 (1961); *see also Parrish v. Brantley*, 256 N.C. 541, 124 S.E. 2d 533 (1962).[3] Certainly this condition was met here. Therefore, the court could properly rule that this was not a derivative action; plaintiff suffered no loss of rights as a result. In light of the extensive procedural history outlined above and the availability of individual actions, plaintiff's reliance on the one sentence is misplaced. *A fortiori*, then, the court could not and did not abuse its discretion under G.S. 55-55(d).

Plaintiff also alleges error in the court's refusal to award him attorneys' fees as a discovery sanction pursuant to G.S. § 1A-1, Rule 37. His motions were, however, granted in part and denied in part; he has not shown that the court abused its discretion in apportioning costs. This assignment is also without merit.

Affirmed.

Judge PHILLIPS concurs.

Judge ARNOLD concurs in the result.

Judge ARNOLD concurring.

I concur in the majority's decision to affirm the order of the trial court denying plaintiff's request for attorneys' fees. How-

3. The corporation must be joined as a party; this condition was met here as to both Ruth's corporations.

ever, believing this to have been a derivative action, I rest my decision on the fact that plaintiff has failed to show an abuse of discretion by the trial court. G.S. 55-55(d) provides that "If the action on behalf of the corporation is successful, in whole or part, whether by means of a compromise and settlement or by a judgment, the court may award the plaintiff the reasonable expenses of maintaining the action, including reasonable attorney's fees. . . ." For plaintiff to be entitled to attorneys' fees under this statute, then, it must be found first that this action is a shareholder's derivative action brought on behalf of the corporation and, second, that the trial court abused its discretion in denying plaintiff's request.

A stockholder may maintain an action in behalf of a corporation against the corporate officers for acting against the interest of the corporation only where he alleges that he has exhausted reasonable efforts to obtain relief within the corporate management or where it appears that efforts to obtain such relief would be to no avail. *Hill v. Erwin Mills, Inc.*, 239 N.C. 437, 80 S.E. 2d 358 (1954). *See* 3 Strong's N.C. Index 3d, Corporations § 6 (1976).

In the case at bar, plaintiff alleged in his complaint that he was unable to obtain relief from defendants, despite his persistent efforts. Moreover, he specifically asked for relief for the Ruth's corporations. It is clear that the corporations were injured by the acts of defendants. Therefore, although the judgment awarding damages does appear to resemble an individual recovery in some respects, the totality of the evidence indicates that this action is in fact a derivative action, brought on behalf of the corporation. G.S. 55-55(d) is, therefore, applicable.

The provision in G.S. 55-55(d) that "the court *may* award" reasonable attorneys' fees clearly leaves that decision to the discretion of the trial judge. A finding that the judge erred in denying a request for attorneys' fees would, therefore, require the complaining party to show an abuse of that discretion. After a careful examination of the record on appeal, it cannot be found that the trial court abused its discretion in denying plaintiff's motion.

In its order directing defendants to purchase plaintiff's interest in the Ruth's corporations, the court found the following instances of bad faith on the part of defendants: 1) payment of

B & H Foods' expenses by Ruth's; 2) registration of Ruth's trademark in the name of B & H Foods as owner; 3) transferral of Ruth's employees to other corporations in which defendants owned stock; 4) transferral of Ruth's income, customers, and existing business opportunities to a brokerage company owned by defendants; 5) alteration of a written distributorship agreement between Ruth's and B & H Foods so as to impose additional expenses on Ruth's; 6) cancellation of the distributorship agreement, with the effect being that total control of Ruth's was left in the hands of defendants; 7) adjustment of Ruth's income so as to reduce its profits; and 8) putting the aforementioned brokerage firm in control of Ruth's business activities to its detriment. These acts were found by the court to have rendered the Ruth's corporations "substantially unprofitable." Plaintiff maintains that by making these findings the court was, in effect, required to go an additional step and award attorneys' fees as well. This is not correct.

Although there is no hard and fast rule as to what constitutes an abuse of discretion, the view is generally taken that any party seeking such a finding has a substantial hurdle to overcome. The general rule in this state is that "the action of the trial court as to matters within its judicial discretion will not be disturbed unless there is a clear abuse thereof; or, as it is frequently stated, the appellate court will not review the discretion of the trial court." *Meiselman v. Meiselman*, 58 N.C. App. 758, 768-69, 295 S.E. 2d 249, 256 (1982). In the case at bar, the order of the court denying attorneys' fees states "[t]hat the Motion by the plaintiffs for the allowance of attorney's fees to the plaintiff is in the discretion of the court denied." Although the trial judge did not detail his reasons for denying plaintiff's request for attorneys' fees, the record suggests several possibilities.

Plaintiff contends that defendants were uncooperative during discovery, causing delay and added expense. The record shows, however, that plaintiff himself may have contributed to any delay which occurred, particularly by filing a petition for cancellation of the Ruth's trademark with the Trademark Office Trial and Appeals Board. The action remained with that board for some three years before it was ultimately decided that plaintiff lacked standing for such an appeal.

More importantly, plaintiff received a substantial recovery. In assigning a value to plaintiff's stocks the referee chose the date of the filing of the complaint rather than the date of judgment. By basing the valuation on the prior date, where, as the referee reported, "due to drastic changes and numerous economic and business factors unrelated to specific acts of mismanagement," the stock had a much greater value, plaintiff received the maximum economic benefit allowable. The trial court did not abuse its discretion in refusing to add to plaintiff's recovery by the award of attorneys' fees. Moreover, this Court should not substitute its discretion and allow the attorney fees simply because in our opinion plaintiff might very well have deserved the attorney fees.

D. B. AMOS, KAREN SULLIVAN, EXECUTRIX, ESTATE OF SOLANGE M. AMOS, MARTIN AMOS, SUSAN AMOS TAPP, CHRISTOPHER AMOS, NIGEL AMOS, IRENE AMOS, HENRY WILLIS, AND GERTRUDE WILLIS v. CAREY BATEMAN, NANCY C. BATEMAN, STANLEY PEELE, CAROLYN PEELE, AND DON COLLINS

No. 8315SC411

(Filed 17 April 1984)

1. **Easements § 6.1— prescriptive easement—right to use road—belief of witness—ultimate question for jury**

In an action to establish a prescriptive easement in a road running across defendants' land, testimony by a witness that he believed that plaintiffs have a right to use the portion of the road across his property constituted an opinion upon the ultimate fact to be determined by the jury and was properly excluded.

2. **Easements § 6.1— prescriptive easement—declaration of right to use road by predecessor—invasion of province of jury**

In an action to establish a prescriptive easement in a road running across defendants' land, testimony by one plaintiff that his predecessor in title told him that the road was a traditional right-of-way access and that the predecessor had a right to use it constituted a conclusion which invaded the province of the jury and was not competent as a claim of right in the road.

3. **Adverse Possession § 25.1; Easements § 6.1— prescriptive easement in road—use not adverse to rights of other members of family**

In an action to establish a prescriptive easement in a road running across defendants' land, the trial court in a nonjury trial did not err in determining

that the evidence was insufficient to rebut the presumption of permissive use by plaintiffs' predecessors in title whose adverse use was required to be tacked onto plaintiffs' adverse use in order to come within the 20 year statutory period, where it showed that the predecessors in title and the owners of the land which the road crossed were members of the same family.

APPEAL by plaintiffs from *Barnette, Judge.* Judgment entered 24 January 1983 in Superior Court, ORANGE County. Heard in the Court of Appeals 7 March 1984.

Plaintiffs seek a declaratory judgment that they have a prescriptive easement across an old road running from plaintiffs' property across three tracts of land owned by Stanley and Carolyn Peele, Carey and Nancy Bateman, and Don Collins. The defendants Stanley and Carolyn Peele and Don Collins concede that plaintiffs are entitled to such a right of way insofar as the road crosses their property. The court entered a preliminary injunction by consent restraining Carey and Nancy Bateman from blocking and obstructing the old road. The trial judge sat as a jury, made findings of fact and conclusions of law, and entered judgment denying plaintiffs an easement over the road through the Bateman property by prescription. Plaintiffs appeal.

Winston, Blue & Rooks by David M. Rooks, III for plaintiff appellants.

Cheshire & Parker by D. Michael Parker for defendant appellees.

HILL, Judge.

This is an action essentially to establish prescriptive title to a road running from plaintiffs' property across lands owned by defendants to a public road. Based on the pleadings, stipulations contained in the pretrial order, and the evidence at trial, the trial judge made findings of fact substantially as follows:

The plaintiffs are the owners of an 80.16 acre tract of land acquired 3 May 1965. The defendants are the owners of a tract of land acquired in 1980. Plaintiffs' property does not abut on a public road. There is a road running from plaintiffs' property across defendants' property to State Road 1129 which has been in existence at least 40 years. At one time this road extended across plaintiffs' lands and the lands of others, running from State Road

1129 to N.C. Highway 86. Some 10 or 15 years ago, that portion of the road running between plaintiffs' lands and N.C. Highway 86 became impassable. Prior to the time the road became impassable, plaintiff D. B. Amos occasionally used that portion of the road to reach N.C. Highway 86.

Before the 80.16 acre tract of land was sold to plaintiffs, Henry Ray and his wife lived on the tract and used the road which is the subject of this controversy as the primary means of access to State Road 1129. After plaintiff D. B. Amos purchased the land in 1965, he used the road occasionally, usually on an average of once a month or less. The course of the boundaries of the road have not changed since plaintiffs have owned the 80.16 acre tract of land. Since acquisition, D. B. Amos has graded the road and put gravel on the soft spots three times. Plaintiffs never sought permission to use the road, and defendants prior to blocking the road never advised the plaintiffs they could not use the road.

The defendants built a house on the land over which the road traverses and moved into the house in 1980. They improved the road from its intersection with State Road 1129 to the point where the driveway bears off to their house. Defendants acquired a right of way to use that portion of the road lying on the lands of Don Collins, and Don Collins has no objection to judgment being entered against him by plaintiffs to use that portion of the road.

Plaintiffs submitted a proposed finding of fact which would have found that prior to the purchase of the 80.16 acre tract by plaintiffs, Henry and Emily Ray lived on the 80.16 acre tract and used the road in excess of 15 years as the primary means of access to State Road 1129 under a claim of right. The court declined to adopt plaintiffs' proposed finding of fact.

Based on the foregoing findings of fact the trial judge made conclusions of law including:

> 1. That the road lying between the Plaintiffs' property and State Road 1129 has been in existence for a period of forty years.
>
> 2. That the Plaintiffs have used said road under claim of right since acquiring the 80.16 acre tract of land on May 3, 1965.

3. That the use of the road by Plaintiffs has not been of such a nature as to give notice to the Defendants Carey Batemand and wife, Nancy C. Bateman that said use was under claim of right and adverse to the Defendants Carey Bateman and wife, Nancy C. Bateman.

The court then entered judgment denying plaintiffs an easement across the lands of Carey and Nancy Bateman.

[1] Plaintiffs first contend the court erred in not permitting Don Collins to testify as to his understanding of plaintiffs' right to use the road. On direct examination by plaintiffs, Don Collins testified as follows:

Q. Do you object to the Amoses or Willises using the road across your property?

A. No, I do not. I'm . . .

Q. Do you believe they have a right to use the road across your property?

A. Yes.

MR. PARKER: Object.

A. I've closed . . .

COURT: Sustained as to that.

A. I also believe Mr. Bateman has a right. I think the record will show that I gave him an easement.

MR. PARKER: Object.

COURT: Sustained.

MR. PARKER: I would move to strike his response.

COURT: Motion allowed as to his response.

The question and answer requires an opinion on the ultimate fact—whether the plaintiffs had a legal right to the use of the roadway by adverse possession. A lay person may testify to the facts if he knows them, but he cannot give a legal opinion as to the legal effect of these facts. 1 Brandis on North Carolina Evidence § 130 (1982); *Memory v. Wells*, 242 N.C. 277, 87 S.E. 2d 497 (1955). The court was correct in sustaining the objection and striking the response to the question.

[2] Plaintiff's next assignment of error regards the testimony of D. B. Amos, over objection, that Henry Ray, his predecessor in title, told him the road was a traditional right of way access and that he (Henry Ray) had a right to use it. The court considered the statement only for the fact that he said it and not for the truth of the matter asserted. Plaintiff contends Henry Ray's declaration should have been admitted as a claim of right in and to the road. We disagree.

The evidence offered by the witness is a conclusion. It is the province of the jury to draw such conclusions from competent evidence, not the witness. A witness may tell what use has been made, or what acts of ownership have been exercised over the property; and then it is for the jury to say, under proper instructions, whether that act constitutes open, notorious, and adverse possession. See *Memory v. Wells, supra.* Although there is evidence that the road was used by predecessors in title to plaintiffs, we find nothing showing such use to be hostile and adverse to the owners of the land. The parties in interest at these times were brother and sister, or mother and son, facts which the trial judge acknowledged by his findings. Mere use, standing alone, is presumed to be permissive, *Dickinson v. Pake,* 284 N.C. 576, 201 S.E. 2d 897 (1974), particularly use by members of a family living as neighbors as in this case. This assignment of error is overruled.

[3] For their third assignment of error plaintiffs contend the court erred in failing to find that they and their predecessors in title used the old road openly and continuously under a claim of right for a period in excess of twenty years.

Plaintiffs contend this case falls within the parameters of *Potts v. Burnette,* 301 N.C. 663, 273 S.E. 2d 285 (1981). In that case plaintiffs' evidence, viewed in the most favorable light, showed that the disputed roadway was the only means of access to plaintiffs' land and the cemetery located thereon and had been openly and continuously used by plaintiffs, their predecessors in title and the public for a period of at least fifty years. No permission for such use had ever been asked or given. Plaintiffs, on at least one occasion, smoothed, graded, and gravelled the road and on other occasions attempted to work on the road. Although there was no evidence that plaintiffs thought they owned the road,

there was abundant evidence that plaintiffs considered their use of the road to be a right and not a privilege. This evidence was sufficient to rebut the presumption of permissive use and to allow, but not compel, a jury to conclude that the road was used under such circumstances as to give the defendants notice that the use was adverse, hostile, and under a claim of right, and that the use was open and notorious and with defendants' full knowledge and acquiesence.

Assuming, *arguendo*, the evidence in this case was sufficient for the judge sitting as a jury to find the use of the road to be a right and not a privilege, such evidence under *Potts, supra*, does not compel such a finding. The judge, sitting as a jury, stated at the close of all the evidence, *inter alia*, that the road was constantly and uninterruptedly used for a forty year period until the Batemans closed it, and that D. B. Amos used the road believing that he had a right to use it for the period of time that he owned it. The judge found no evidence that Henry Ray actually used the road adversely as to the rights of other members of his family. In order to come within the twenty year statute it is necessary to tack such use as D. B. Amos may have made to some adverse use by Henry Ray. This was not done. Apparently the judge believed the kinship of the parties was the foundation for cooperation among them rather than a hostile or adverse situation. He thereupon properly found that the presumption of permissive use had not been rebutted.

This assignment of error is overruled and judgment of the trial court is

Affirmed.

Chief Judge VAUGHN and Judge PHILLIPS concur.

RONNIE BEARD D/B/A RONNIE BEARD TRAINING STABLES v. JOAN E. PEMBAUR

No. 8320SC459

(Filed 17 April 1984)

1. **Rules of Civil Procedure § 55— failure to reply to counterclaim—entry of default**

A clerk of court may properly enter a default when no reply is timely filed in response to a counterclaim denominated as such. G.S. 1A-1, Rule 55(a).

2. **Rules of Civil Procedure § 55— denial of motion to set aside entry of default—abuse of discretion**

The trial court acted under a misapprehension of the law to the extent that it required plaintiff to show excusable neglect or a meritorious defense in order to set aside an entry of default on a counterclaim. Even if the trial court properly used the standard of "good cause" as set forth in G.S. 1A-1, Rule 55(d), the trial court abused its discretion in refusing to set aside the entry of default where the record shows that discovery was being pursued vigorously by the parties; plaintiff's counsel erroneously thought that service was not perfected on defendant until four days before the entry of default; and all matters in defendant's counterclaim related to the sale of the horse that was the subject of all material allegations in plaintiff's complaint.

3. **Rules of Civil Procedure § 55— erroneous entry of default judgment**

The trial court erred in entering default judgment against plaintiff on defendant's counterclaim where plaintiff filed a reply to the counterclaim after entry of default but before the hearing on the motion for default judgment, and where plaintiff's attorney erroneously believed that service was not perfected on defendant until four days before the entry of default and did not seek to delay the matter or gain an unfair advantage over defendant.

APPEAL by plaintiff from *Seay, Judge*. Judgment entered 27 January 1983 in Superior Court, MOORE County. Heard in the Court of Appeals 9 March 1984.

Pollock, Fullenwider, Cunningham & Patterson, P.A., by Bruce T. Cunningham, Jr., for plaintiff appellant.

White and Crumpler, by William E. West, Jr., for defendant appellee.

BECTON, Judge.

I

On 1 July 1982, plaintiff, Ronnie Beard, d/b/a Ronnie Beard Training Stables, filed a Complaint alleging that defendant, Joan

E. Pembaur, breached a written contract to purchase a horse named "Bold Seeker." On 3 September 1982, after having been granted an extension of time to file an Answer, defendant filed a verified "Answer and Counterclaim" denying the material allegations in the Complaint and seeking relief against plaintiff on five separate grounds—(1) rescission, (2) breach of warranty of fitness for a particular purpose, (3) fraudulent representation, (4) unfair and deceptive trade practices, and (5) breach of fiduciary duty.

Although defendant submitted herself to the jurisdiction of the court by filing her Answer and Counterclaim, plaintiff, believing that service of process had not been perfected, erroneously sought to effectuate service on defendant by issuing alias and pluries summons on 16 September 1982 and 27 October 1982. Defendant, on the other hand, was pursuing discovery by the filing of interrogatories and requests for admissions. After realizing that plaintiff had not timely filed a Reply to defendant's Counterclaim, defendant, on 19 November 1982, filed a Motion for Entry of Default. Default on the Counterclaim was entered by the Clerk of Superior Court on 19 November 1982.

In response to the entry of default, plaintiff, on 3 December 1982, filed (a) a Motion to Set Aside the Entry of Default, and (b) a Reply to the Counterclaim. On 13 December 1982, defendant moved for a judgment by default on the Counterclaim. On 27 January 1983, the trial court denied plaintiff's motion to set aside the entry of default and granted defendant's motion for judgment by default. Plaintiff appeals.

II

Plaintiff phrases the questions presented by his assignments of error as follows: (1) "[w]hether the Clerk of Superior Court erred in entering a default against the plaintiff on the defendant's Counterclaim"; (2) "[w]hether the trial court erred in denying the plaintiff's motion to set aside entry of default"; and (3) "[w]hether the trial court erred in granting judgment by default in favor of defendant on the Counterclaim."

III

[1] We consolidate the first two questions for review since they both involve the propriety of the entry of default when no Reply

is filed in response to a Counterclaim. The issue is apparently one of first impression in this State.

A.

Rule 55(a) of the North Carolina Rules of Civil Procedure, which authorizes clerks to enter defaults, is not limited by any of the following restrictive words: "plaintiff," "defendant," "answer," or "appearance." The rule states:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default.[1]

N.C. Gen. Stat. § 1A-1, Rule 55(a) (1983). As can be seen, the *entry* of default by the Clerk requires only that the Clerk ascertain that the *party* against whom a judgment for affirmative relief is sought has failed to *plead*. Plaintiff's reliance on *Roland v. W & L Motor Lines, Inc.*, 32 N.C. App. 288, 231 S.E. 2d 685 (1977) is, therefore, misplaced.

Roland is a judgment by default case, Rule 55(b)(1); the assignment of error we address concerns entry by default, Rule 55(a). In *Roland*, this Court was concerned with whether a letter sent by the defendant to the plaintiff's attorney and to the clerk of court in response to a Complaint constituted an "appearance." Although not deciding if the letter constituted an Answer, this Court found that the letter constituted an "appearance" so as to remove any authority under Rule 55(b)(1) for the clerk to enter a default judgment. Specifically, the *Roland* Court said:

> Upon examination of this statute [G.S. 1A-1, Rule 55(b)(1)], we have concluded that there are thus two basic requirements that must be fulfilled before a clerk can enter a default judgment. These requirements are: (1) the plaintiff's

1. Compare the following relevant excerpts from Rule 55(b)(1) which allows the clerk to enter *judgments* by default in only a limited number of circumstances:

> When the plaintiff's claim against a defendant is for a sum certain . . . , the clerk upon request of the plaintiff . . . shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

> claim must be for a sum certain or for a sum that can by computation be made certain, and (2) *the defendant must have been defaulted for failure to appear* and he must not have been an infant or incompetent person. We therefore hold that this statute is clearly intended to allow a clerk to enter default judgment against a defendant only if he has never made an appearance. [Citations omitted.] Moreover, when a party, or his representative, has appeared in an action and later defaults, then G.S. 1A-1, Rule 55(b) requires that the judge, rather than the clerk, enter the judgment by default after the required notice has been given.

32 N.C. App. at 291, 231 S.E. 2d at 687-88. Consequently, plaintiff's argument, based on *Roland*, that the entry of default was improper, since plaintiff had "appeared" in the case by filing the complaint, is misplaced.

Further, Rule 55(e) specifically contemplates the situation in which a party has "appeared," but is otherwise subject to a default. Rule 55(e) in relevant part states: "The provisions of this rule [Rule 55] apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a crossclaim or counterclaim."

Our Rules of Civil Procedure clearly provide that a Reply must be filed to any Counterclaim denominated as such, and that averments to which a responsive pleading is required are deemed admitted when not denied. N.C. Gen. Stat. § 1A-1, Rule 7(a) and Rule 8(d) (1983). *See also Connor v. Royal Globe Ins. Co.*, 56 N.C. App. 1, 286 S.E. 2d 810, *disc. rev. denied*, 306 N.C. 382, 294 S.E. 2d 206 (1982). We hold that a clerk may properly enter a default when no reply is timely filed in response to a counterclaim denominated as such.

B.

[2] Having determined that the Clerk's action was proper under Rule 55(a) and that *Roland* provides no relief for plaintiff, we now determine whether the trial court erred in denying plaintiff's motion to set aside the entry of default. The standard is clear: "For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)." N.C. Gen. Stat. § 1A-1, Rule 55(d) (1983). As this Court has said:

> [A] motion to set aside entry of default is governed by the first clause of Rule 55(d) that, 'for good cause shown, the court may set aside an entry of default.' This standard is more lax than that requirement for setting aside a default judgment pursuant to Rule 60(b), which requires the presence of 'mistake, inadvertence, or excusable neglect.'

Bailey v. Gooding, 60 N.C. App. 459, 462, 299 S.E. 2d 267, 269 (1983).

In his motion to set aside the entry of default, plaintiff cites both Rule 55 and Rule 60 and specifically refers to "excusable neglect" and "meritorious defense." The trial court's order denying defendant's motion to set aside entry of default merely recites that "it appearing to the court upon affidavits, pleadings and arguments of counsel, that said motion should be denied; it is therefore ordered, that motion of the plaintiff to set aside entry of default is hereby denied." To the extent the trial court required plaintiff to show excusable neglect or a meritorious defense the trial court operated under a misapprehension of law. Even if the trial court used as its standard, "good cause," as set forth in Rule 55(d), the trial court abused its discretion in this case. After all, "the law generally disfavors default judgments, [and] any doubt should be resolved in favor of setting aside an entry of default so the case may be decided on its merits." *Byrd v. Mortenson*, 60 N.C. App. 85, 88, 298 S.E. 2d 170, 172 (1982), *modified and affirmed*, 308 N.C. 536, 302 S.E. 2d 809 (1983) (quoting *Peebles v. Moore*, 48 N.C. App. 497, 504-05, 269 S.E. 2d 694, 698 (1980), *modified and affirmed*, 302 N.C. 351, 275 S.E. 2d 833 (1981)). Equally important are the facts in this case. The record indicates that discovery was being pursued vigorously by the parties; that plaintiff's counsel thought, albeit erroneously, that service was not perfected on defendant until 15 November 1982, four days before the entry of default; and that all matters in defendant's Counterclaim related to the sale of the allegedly unsound, unfit and unhealthy horse that was the subject of all material allegations in the plaintiff's Complaint.

IV

[3] Our reasoning applied in part III to the entry of default applies with equal force to the default judgment entered by the trial court. Significantly, after the entry of default, but before the

hearing on the motion for default judgment, plaintiff filed a Reply to defendant's Counterclaim. No motion to strike the Reply was ever made. Again, recognizing the quintessential purpose of giving each litigant a day in court—of hearing claims on the merits—our Supreme Court said:

> We are unable to perceive anything in this language [Rule 55(a)] or in the language of the entire Rule, G.S. 1A-1, Rule 55, which alters the established law that defaults may not be entered after answer has been filed, even though the answer be late.
>
> We believe that the better reasoned and more equitable result may be reached by adhering to the principle that a default should not be entered, even though technical default is clear, if justice may be served otherwise. [Citations omitted.]

302 N.C. at 356, 275 S.E. 2d at 836. We are aware that *Peebles* is factually distinguishable since the Answer in that case was filed beyond the 30-day time limit but before the entry of default. *Peebles* is nevertheless instructive.

Plaintiff's counsel made technical errors in this case, to be sure, but he was not dilatory. In this "I sold you a thoroughbred, now pay me" versus "You sold me a nag, I don't owe you anything, and I want my down payment back" case, it is inconceivable that plaintiff would knowingly fail to respond to counter allegations based on the same transactions that are the subject matter of his Complaint. Nothing before us suggests that plaintiff sought to delay this matter or gain an unfair advantage over defendant. Simply put, we perceive no prejudice to the defendant since a timely filed Reply could not have been expected to more clearly define the issues already joined. Indeed, the Reply subsequently filed on 3 December 1982 takes up only 20 typewritten lines, avers that the Counterclaim fails to state a claim, and denies the material allegations in the Counterclaim. We also find it significant that in a letter to defendant's attorney dated 18 November 1982, one day before the entry of default, plaintiff's attorney included a copy of the Civil Summons showing service on defendant on 15 November 1982 and asked for dates on which defendant's deposition could be taken.

Default judgment is a drastic remedy which should be reserved for those cases, unlike the present case, in which one party refuses or fails to attend to his or her legal business.

Finding that the trial court erred in denying plaintiff's motion to set aside the entry of default and further erred in granting defendant judgment by default, we

Reverse.

Judges WEBB and EAGLES concur.

ROBERT LEWIS RUSTAD v. CECILIA SALLEY RUSTAD

No. 8321DC523

(Filed 17 April 1984)

1. **Arbitration and Award § 2— child support action—waiver of agreement to arbitrate**

When the parties submitted themselves to the jurisdiction of the court in a child custody and support action, they waived their rights to arbitration arising under a separation agreement and foreclosed their rights to enter into a subsequent arbitration agreement concerning child custody and support. Therefore, an agreement to arbitrate spousal and child support which was entered after the court awarded custody was void *ab initio*, the trial court retained sole jurisdiction over matters involving child support, and the court had jurisdiction over plaintiff father's motion to eliminate an amount paid for child support after he was given custody of the children.

2. **Divorce and Alimony § 24.2— separation agreement—amount intended for child support**

The trial court properly found that a separation agreement contemplated that $500 of the amount paid by plaintiff husband to defendant wife for support each month was for child support and that plaintiff was entitled to reduce his support payments by $500 per month after he was given custody of the children where the agreement provided that "the husband shall pay to the wife as alimony for her support and the support of the children the sum of one thousand two hundred sixty-five dollars ($1,265) per month as basic support and alimony," that plaintiff's support obligation would be reduced by $200 when the first child of the parties enrolled in college or turned 19 and that it would be reduced by $300 when the second child enrolled in college or turned 19, and that the payments would be reduced by $765 if defendant wife remarried.

Rustad v. Rustad

APPEAL by defendant from *Harrill, Judge.* Judgment entered 23 December 1982 in District Court, FORSYTH County. Heard in the Court of Appeals 2 April 1984.

This appeal concerns the jurisdiction of the court and the validity of its order reducing plaintiff husband's support payments to defendant wife by $500, after finding that such sum was intended to be child support.

The pertinent facts are: The parties were married in 1964. Two children were born of the marriage. In 1979, the parties separated and executed a written separation agreement. The agreement provided that the parties would have joint custody of the children but that defendant wife would have physical custody. Paragraph Six of the agreement provided in pertinent part:

> 6. *Support of Wife and Children*: (a) Beginning May 1, 1979, and on the first of each month thereafter until reduced, increased or terminated as hereinafter provided, the husband shall pay to the wife as alimony for her support and the support of the children the sum of one thousand two hundred sixty-five dollars ($1,265) per month as basic support and alimony.

Paragraph Seven of the agreement provided in pertinent part:

> 7. (e) No alimony shall abate during any visitation even as long as two months unless the permanent residence of the minor children shall be changed by mutual agreement of the parties.

In Paragraph Sixteen, the parties agreed to submit all future disputes arising under the agreement to mediation and arbitration.

On 27 March 1981, a divorce judgment was entered which incorporated by reference the parties' separation agreement. The court, in its order, specifically retained jurisdiction to enforce the support provisions of the agreement.

On 24 April 1981, defendant wife filed an action for custody and child support. Plaintiff husband answered and counterclaimed, and on 30 April 1982, after both parties had presented evidence, the court awarded custody of the children to plaintiff husband. The court included in its order a provision that the mat-

ter would "remain open for further orders of the Court as may be in the best interests of the children."

Less than two weeks after entry of this custody order, on 11 May 1982, the parties executed a written agreement to submit to mediation and, if necessary, binding arbitration, the issues of spousal and child support.

On 2 August 1982, despite this agreement, plaintiff brought the present action to reduce his support obligation by $500 per month. Defendant moved to dismiss the action on the ground that the parties were contractually bound to submit this issue to mediation and arbitration. The court, after both parties had presented evidence, found, in essence, that it had jurisdiction over the matter, arbitration not being a necessary precondition to litigation. The court also found that plaintiff was entitled to a $500 per month reduction in support, such sum representing the amount of plaintiff's child support obligation.

Thomas J. Keith, for plaintiff appellee.

Clyde C. Randolph, Jr. and Keith Y. Sharpe, for defendant appellant.

VAUGHN, Chief Judge.

I.

[1] The first question we consider on appeal is whether the trial court had jurisdiction to hear plaintiff's motion in light of the parties' contractual agreement to submit disputes regarding spousal and child support to mediation and arbitration. For reasons set forth below, we hold that the trial court had such jurisdiction.

The parties in this case entered into a separation agreement in 1979, which included therein provisions for custody and support. Said agreement also contained a provision that all future disputes arising out of or relating to the contract would be submitted to mediation and arbitration. Ordinarily, a contractual agreement to resolve disputes through arbitration is valid, enforceable, and irrevocable. G.S. 1-567.2; *Adams v. Nelsen*, 67 N.C. App. 284, --- S.E. 2d --- (1984); *Sims v. Ritter Construction, Inc.*, 62 N.C. App. 52, 302 S.E. 2d 293 (1983). In *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E. 2d 793 (1982), our Supreme Court made it

clear, moreover, that the policy underlying the recently adopted Uniform Arbitration Act, G.S. 1-567.1, *et seq.*, favoring arbitration as a means of dispute resolution, extends to domestic relations disputes. Although the court always retains ultimate authority to review and modify arbitration awards involving *custody* and *child* support, the parties may agree initially to submit such controversies to an arbitrator. *Crutchley, supra.*

In 1979, the parties agreed, in their separation contract, to submit controversies, including those involving custody and support, to arbitration. When, in 1981, a controversy involving custody developed, however, the parties instead submitted themselves to the jurisdiction of the court. On 30 April 1982, after a hearing in which both parties presented evidence, the court awarded custody to plaintiff husband and retained jurisdiction for further orders as necessary in the best interests of the children. By submitting themselves initially to the jurisdiction of the court, the parties waived their rights to arbitration arising under their separation agreement and furthermore foreclosed the right to enter into a subsequent arbitration agreement.

When, on 11 May 1982, the parties entered into an agreement to arbitrate disputes, including child support, such agreement was void *ab initio. See Crutchley, supra.* Once a civil action has been filed and is pending, it is too late to enter into an agreement to arbitrate. *Id.* The court, which rendered the 30 April custody order, retained sole jurisdiction over matters involving custody and child support. Defendant's motion for arbitration in this case, was, therefore, properly denied.

II.

[2] We next consider defendant's contention that the trial court erred in allowing plaintiff to reduce his support payments by $500 per month, after finding such sum to have been intended as child support. For reasons set forth below, we find no error.

The cardinal principle in construing separation agreements, as with any other contract, is to determine the intent of the parties, ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time of the contract's execution. *Bowles v. Bowles*, 237

N.C. 462, 75 S.E. 2d 413 (1953). Upon review of the separation agreement involved here, we conclude that the trial court correctly ascertained the intention of the parties in construing the contract's support provisions.

Paragraph 6(a) of the agreement defeats any argument that plaintiff's obligation to pay $1,265 per month was intended solely as alimony, no part of which represented child support. Paragraph 6(a) provided:

> 6. *Support of Wife and Children*: (a) Beginning May 1, 1979, and on the first of each month thereafter until reduced, increased or terminated as hereinafter provided, the husband shall pay to the wife as alimony for her support and the support of the children the sum of one thousand two hundred sixty-five dollars ($1,265) per month as basic support and alimony.

Other provisions of the parties' contract make it clear that of plaintiff's total support obligation, $765 represented alimony and $500 represented child support. Paragraph 6(c) provided for a $200 reduction in plaintiff's support obligation when the parties' first child enrolled in college or turned nineteen and a $300 reduction when the second child enrolled in college or turned nineteen. The total reduction in support when the children either reached majority or entered college was thus $500. The contract, furthermore, consistent with traditional characteristics of alimony, provided for a $765 reduction in payments if defendant remarried. *See Falls v. Falls*, 52 N.C. App. 203, 278 S.E. 2d 546, *review denied*, 304 N.C. 390, 285 S.E. 2d 831 (1981). Such reduction would leave defendant with $500 per month for child support.

We note that although the contract oftentimes uses the term "alimony" to refer to plaintiff's support obligation, the literal wording of a separation agreement does not control its interpretation. *Pruneau v. Sanders*, 25 N.C. App. 510, 214 S.E. 2d 288, *cert. denied*, 287 N.C. 664, 216 S.E. 2d 911 (1975). For tax reasons, payments intended as child support are often designated "alimony." *Falls v. Falls, supra.*

When the agreement was executed in 1979, the parties agreed that defendant would have physical custody of the children. Plaintiff, thus, as the non-custodial parent, had the obliga-

tion to provide child support. *See* G.S. 50-13.4. When, however, in 1982, pursuant to court order, plaintiff was given custody of the children, plaintiff's contractual and statutory obligation to provide defendant with child support abated. We note that pursuant to Paragraph 7(e) of the parties' agreement, "alimony" would not abate *unless* the permanent residence of the children changed.

Defendant has presented no evidence to refute a conclusion that $500 per month represented a reasonable and just child support obligation. *See Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963). Finding that the court correctly determined the parties' intentions underlying the contract's support provisions and that plaintiff, as the custodial parent, no longer has an obligation to pay child support, we affirm the trial court order.

Affirmed.

Judges WHICHARD and PHILLIPS concur.

JOHN TROY, ADMINISTRATOR OF THE ESTATE OF JOSEPH TROY, DECEASED v. GEORGE WAITUS TODD

No. 8313DC486

(Filed 17 April 1984)

Automobiles and Other Vehicles §§ 62.3, 83.2— striking pedestrian at night—failure to keep proper lookout—contributory negligence

Evidence that defendant motorist failed to see a pedestrian in or upon the roadway at night before striking him constituted some evidence that defendant was negligent in failing to keep a proper lookout. Furthermore, evidence tending to show that plaintiff's intestate was walking in defendant's lane of travel with his back toward the traffic in violation of G.S. 20-174 was some evidence of negligence by plaintiff's intestate but did not constitute contributory negligence *per se*.

APPEAL by plaintiff from *Trest, Judge*. Judgment entered 3 March 1983 in BRUNSWICK County District Court. Heard in the Court of Appeals 13 March 1984.

Plaintiff, the administrator of the estate of Joseph Troy, filed a claim against defendant, George W. Todd, for the wrongful

death of plaintiff's intestate, who was struck by defendant's car as he walked on State Road 1430 on 16 January 1981.

At trial plaintiff's evidence consisted of the testimony of defendant; Trooper B. C. Jones of the North Carolina Highway Patrol, who investigated the accident; Henry Lee Ballard, an acquaintance of plaintiff's intestate, who owned an entertainment spot called the L. T. D. Club; and plaintiff. Henry Lee Ballard testified that on the evening of the collision, Joseph Troy went to the L. T. D. Club where he helped Ballard clean the tables and prepare to open the club. Troy did not complain of ill health, nor did he consume any alcoholic beverages on the night of his death. After dark, about 6:55 p.m., Troy told Ballard that he was going home, and left the club.

Defendant testified that on the evening of the collision he was driving on State Road 1430 on the way to work. It was dark and the weather was clear. Defendant had his headlights on, and while he could not recall whether they were on bright or dim, he could see 200 feet ahead. Defendant was driving 35 to 40 miles per hour. Defendant saw Troy, who was wearing dark clothes, "just an instant or so" before he struck Troy. Troy had his back to defendant and was two and one-half to three feet "from the shoulder on the paved portion of the road." As soon as defendant saw Troy, he swerved to avoid Troy. Defendant applied his brakes and hit Troy at the same time. The impact occurred at the right front headlight of defendant's car. There were no lights in the area. Defendant stopped, found Troy's body on the side of the road, and then summoned help.

Patrolman Jones testified that he investigated the collision. He found Troy's body on the right shoulder of the road, completely off the pavement. There were about 15 to 20 feet of skid marks leading up to the body, and about 99 feet of skid marks leading away from the body to the spot where defendant's car stopped. A small amount of broken glass and debris was found in the right hand travel lane. There were no skid marks on the shoulder of the road.

Following the close of plaintiff's evidence, the trial judge granted defendant's motion for a directed verdict. From entry of the directed verdict, plaintiff appealed.

Stuart V. Carter for plaintiff.

McGougan, Wright & Worley, by D. F. McGougan, Jr., for defendant.

WELLS, Judge.

It is well established that a defendant's motion for a directed verdict under N.C. Gen. Stat. § 1A-1, Rule 50(a) of the Rules of Civil Procedure ". . . tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. . . . On defendant's motion for a directed verdict, plaintiff's evidence must be taken as true and all the evidence must be considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom." (Citations omitted) *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977). "Where the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury." *Id.*

Defendant's motion asserted two grounds: (1) lack of negligence by defendant; or (2) if defendant was negligent, plaintiff's intestate was contributorily negligent as a matter of law. We first examine the issue of plaintiff's negligence. N.C. Gen. Stat. § 20-174 (1983), provides, in pertinent part,

> (d) . . . Where sidewalks are not provided, any pedestrian walking along and upon a highway shall, when practicable, walk only on the extreme left of the roadway or its shoulder facing traffic which may approach from the opposite direction. Such pedestrian shall yield the right-of-way to approaching traffic.
>
> (e) Notwithstanding the provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway.

Evidence of a violation of G.S. § 20-174 does not constitute negligence or contributory negligence *per se*, but rather is some proof of negligence, to be considered with the rest of the evidence

in the case. *Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976). Every motorist is under duty to exercise due care to avoid colliding with pedestrians on a roadway. Such duty of due care includes to keep a proper lookout, i.e., to look in the direction of travel, to see what is there to be seen. Although the failure of a motorist to stop a vehicle within the range of his headlights or the range of his vision does not constitute negligence *per se*, *see* N.C. Gen. Stat. § 20-141(n) (1983), the failure of a motorist to see a person in or upon a roadway at night before striking him constitutes some evidence of negligence. *Clark v. Bodycombe, supra.*

In *Clark v. Bodycombe, supra*, plaintiff's evidence showed that the plaintiff was walking beside a city street, but was forced to step down into the street to avoid a car parked in a driveway across her path. The plaintiff stepped into the gutter and was walking around the parked car when she was struck by defendant's vehicle. At the time of the accident, it was dark and a light rain was falling. Defendant testified that he saw only a "shadow dodging traffic" before his car struck the plaintiff. Our supreme court concluded that ". . . there was ample evidence from which the jury could infer that defendant negligently failed to keep a proper lookout and negligently failed to keep his vehicle under control thereby proximately causing plaintiff's injuries." Because of the similarity of facts, we believe that *Clark v. Bodycombe, supra*, compels us to hold that there was sufficient evidence that defendant failed to keep a proper lookout to support a finding of negligence in the case at bar. *But see Rogers v. Green*, 252 N.C. 214, 113 S.E. 2d 364 (1960) (insufficient showing of defendant's negligence where pedestrian was dressed in dark blue uniform and white hat and was struck by defendant's car along a rural paved road at night), *Thompson v. Coble*, 15 N.C. App. 231, 189 S.E. 2d 500, *cert. denied*, 281 N.C. 763, 191 S.E. 2d 360 (1972) (insufficient showing of defendant's negligence where defendant was traveling about 30 miles per hour along a rural paved road at night, heard a noise but saw nothing before the collision. The pedestrian was found later, dressed in dark clothes, lying in the ditch off the shoulder of the road).

We turn now to the issue of whether, despite evidence of defendant's negligence, entry of a directed verdict was proper on the ground that plaintiff's intestate's contributory negligence was shown as a matter of law. Evidence tending to show that

plaintiff's intestate was walking in the travel lane of the road with his back toward the traffic, in violation of G.S. § 20-174, is some evidence of negligence, but does not constitute contributory negligence *per se*. *Clark v. Bodycombe, supra.* As in *Bodycombe*, we hold that plaintiff's evidence was sufficient to permit ". . . diverse inferences as to whether plaintiff[']s intestate] acted in a reasonable manner and whether . . . [his] acts proximately caused . . . [his] injuries. Thus, the issue of contributory negligence should have been submitted to the jury." *Id. But see Price v. Miller*, 271 N.C. 690, 157 S.E. 2d 347 (1967), *Blake v. Mallard*, 262 N.C. 62, 136 S.E. 2d 214 (1964), *Thornton v. Cartwright*, 30 N.C. App. 674, 228 S.E. 2d 50 (1976) (different rule in cases involving pedestrians attempting to cross highways at night outside of a crosswalk). This holding is consistent with the general rule that ordinarily it is for the jury to determine from the attendant circumstances what proximately caused an injury.

Reversed.

Judges ARNOLD and BRASWELL concur.

INEZ H. BROWN v. RAYMOND AVERETTE, EXECUTOR OF THE ESTATE OF LUTHER M. RAY, AND RAYMOND AVERETTE, J. W. PRIVETTE, AND GWENDOLYN F. PRIVETTE, INDIVIDUALLY

No. 8210SC1261

(Filed 17 April 1984)

Malicious Prosecution § 12— sufficiency of allegations of special damages

Plaintiff's complaint sufficiently alleged special damages to support a malicious prosecution action where it alleged that a prior suit brought by defendants to set aside a deed on the ground that plaintiff and her husband had induced an incompetent to convey land to them through fraud and undue influence had created a cloud on her title which prohibited her from profiting from the tobacco acreage on the land and from conveying a portion of the land to her son as she had promised, notwithstanding there was no allegation that attachment, injunction or *lis pendens* had been used.

APPEAL by plaintiff from *Smith, Judge.* Order entered 27 August 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 21 October 1983.

This malicious prosecution suit was dismissed pursuant to Rule 12(b)(6) of the Rules of Civil Procedure for failing to state a claim upon which relief can be granted.

In the *prior* case that is the basis for this case plaintiff and her husband were sued by the guardian of Luther M. Ray, incompetent, and after Ray died the case was pursued to a conclusion by his executor, Raymond Averette. The complaint alleged that plaintiff and her husband, through fraud and undue influence, had induced the incompetent to convey certain real estate to them, and therefore the conveyance should be cancelled and set aside. No *lis pendens* was filed. When the case was tried a directed verdict dismissing the claim with prejudice was entered, from which no appeal was taken.

In *this* case, in addition to alleging the history of the prior case, the plaintiff alleges, in substance, that it was initiated and continued by the representatives of the incompetent-decedent with the assistance, connivance, and support of the individual defendants; and that all of the defendants were actuated by malice and ill will toward plaintiff and her husband and knew that the case had no factual or legal basis and had "no possibility of success." Plaintiff's damages allegation is as follows:

> [P]laintiff has suffered great injury to her reputation, she has lost time from work which had to be made up at times inconvenient to her and her family, she has been greatly embarrassed in the community in which she resides, she has had to hire legal counsel to defend her and to protect her rights, she has been deprived of the society of her family because of the tension that arose from the threat of incurring a large judgment against she and her husband and the possibility of the losing all of her property, and because of this threat she was unable to convey certain real property to her son that she had promised to do, she was unable to profit from the tobacco acreage on the property conveyed to her by her uncle because of the cloud on title caused by the filing of the lawsuit against she and her husband, she has suffered mental anguish and as a cancer victim such condition which defendants knew or should have known existed, she was put under constant stress, unable to sleep properly, all of which plaintiff believes was injurious to her health and further in addition

to costs for counsel she has incurred other costs to defend the action against her. . . .

William A. Smith, Jr. for plaintiff appellant.

Johnson, Gamble & Shearon, by David R. Shearon and M. Blen Gee, Jr., for defendant appellee Raymond Averette.

J. Michael Weeks for defendant appellees J. W. Privette and Gwendolyn F. Privette.

PHILLIPS, Judge.

Malicious prosecution claims based on prior court proceedings of a civil nature are enforceable in this state. Byrd, *Malicious Prosecution in North Carolina*, 47 N.C. Law Review 285 (1969). According to some of the most cited and quoted decisions in this field, such claims have the following requirements: (1) the prior action was against plaintiff; (2) it was brought, instigated or supported by the defendant; (3) in doing so the defendant acted with malice and without probable cause or justification; (4) the action terminated in plaintiff's favor; and (5) because of the action plaintiff was specially damaged in a way different from the way that everyone is damaged who is sued unsuccessfully. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979); *Carver v. Lykes*, 262 N.C. 345, 137 S.E. 2d 139 (1964). Though not material to the determination of this appeal, since the plaintiff alleges that the defendants acted maliciously in the prior action, it is interesting that a decision written by one of the state's most venerated jurists more than a century and a quarter ago indicates that requiring malice in these actions is not well founded. In that case, based on an unwarranted attachment of plaintiff's property, one of the earliest involving litigation of this type, Justice (later Chief Justice) Pearson noted that malice is required for cases based on prior criminal prosecutions because it is the policy of the law to encourage people to bring criminals under control of the courts, but that those who wrongfully instigate or pursue spurious civil actions are protected by no such policy. "It is a matter between private citizens, and if the wrongful act of one causes loss to another, there is no reason why compensation should not be made." *Kirkham v. Coe*, 46 N.C. 423, 429 (1854). Be that as it may, the only requisite listed above that is not indisputably alleged in plaintiff's complaint is the last one concerning special damages.

Thus, the outcome of the appeal depends upon that allegation; if it is sufficient the judgment appealed from must be reversed, if it is insufficient the judgment must be affirmed.

Certainly, the allegations that plaintiff was obliged to devote both time and money to the prior case and was greatly embarrassed and upset because of it do not help to lay out a claim that our law can enforce. Embarrassment, expense, inconvenience, lost time from work or pleasure, stress, strain and worry are experienced by all litigants, to one degree or another, and by themselves do not justify additional litigation. But the allegations that because of the cloud on her title that the prior suit created she was unable to convey some of the land to her son, as she had promised to do, and was unable to profit from the tobacco acreage on the property, complete the statement of an enforceable claim, in our opinion. An interference with the use, enjoyment, transfer of, and profit from property is not the inherent and usual result of all civil litigation; and her allegation that the case of the defendants had those damaging effects gives her the right, under the law, to try and prove that that is the fact. A holding to the contrary would require a determination that plaintiff could not be entitled to any relief under any evidence that might be presented in support of the claim, *Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979), or that her allegations are not supportable by evidence. For reasons that seem obvious to us, we are not prepared to make either determination. Instead, we hold that the special damages requirement for these actions has been adequately alleged and that it was error to dismiss plaintiff's complaint. That we do not know how plaintiff proposes to prove her allegations is beside the point. Our only duty now is to evaluate the adequacy of her allegations; whether she can prove them is another matter that will have to be determined later.

The defendants' reliance upon the fact that the complaint does not allege any overt seizure or technical interference with plaintiff's property—such as an attachment, as in *Brown v. Guaranty Estates Corp.*, 239 N.C. 595, 80 S.E. 2d 645 (1954); or a *lis pendens*, as in *Chatham Estates v. American National Bank*, 171 N.C. 579, 88 S.E. 783 (1916); or an injunction, as in *Shute v. Shute*, 180 N.C. 386, 104 S.E. 764 (1920)—is misplaced. The law does not grant redress just when certain civil procedures or devices are used; it grants redress to parties that are damaged in

ways that the usual civil litigant is not. Furthermore, there is no reason to believe that the procedures utilized in the cases referred to are the only means by which parties can be damaged by civil litigation. Indeed, when some of these cases were decided tobacco allotments and many other valuable, modern property interests were unknown; and that the owners of such interests can be damaged by civil actions even when no attachment, injunction, or *lis pendens* is used, is a possibility that we are not prepared to deny. Nor do we accept the defendants' contention that plaintiff could not have been damaged, as alleged, since the public was not technically put on notice of defendants' claim by a *lis pendens*, and therefore plaintiff could have sold, leased, or given the property or tobacco allotments to someone that did not know of the lawsuit. The title to plaintiff's property was being contested in court, and we reject the notion that everyone, or even most people, would sell, lease or give away land so beclouded, or would encourage or even permit one to start a tobacco crop on it, without disclosing the fact that a burden, instead of a benefit, might be received. The law does not penalize candor and fair dealing, and if it should be established that the defendants' lawsuit prevented plaintiff from conveying her property or profiting from her tobacco acreage in transactions based on a full disclosure of the facts, the law will not deny her redress.

Reversed.

Judges WEBB and EAGLES concur.

RALEIGH LEO WILLIAMS v. KIMBERLY SMITH AND KEEFER RAYMOND LING, JR.

No. 8327SC535

(Filed 17 April 1984)

Negligence § 10.3— police officer struck by vehicle—defendant's negligence not proximate cause of injuries

In an action by plaintiff police officer to recover for injuries received when he was struck by a car while directing traffic at an accident scene, the evidence on motion for summary judgment established that the negligence of defendant in causing the original accident was not a proximate cause of plain-

tiff's injuries where it showed that plaintiff was struck when the driver of the car which struck him became distracted by the lights of a wrecker at the accident scene, and that the original accident had occurred some 20-45 minutes earlier.

APPEAL by plaintiff from *Lewis, Judge.* Judgment entered 19 January 1983 in Superior Court of GASTON County. Heard in the Court of Appeals 3 April 1984.

Plaintiff instituted this negligence action against defendant. The following facts appear of record: Defendant Ling was involved in an automobile accident occurring on 19 November 1980 in the City of Gastonia. Plaintiff, a Gastonia police officer, was called to the scene. As he was directing traffic around the collision, defendant Smith (not a party to this appeal) was operating her vehicle at the scene. She became distracted by the yellow lights atop the wrecker and caused her vehicle to strike plaintiff as he was directing traffic. The collision between plaintiff and Smith occurred some twenty to forty-five minutes after the first collision.

Plaintiff sues defendant Ling for injuries arising out of the automobile accident. The parties stipulated that defendant Ling's negligence was the proximate cause of the first collision. The trial judge entered summary judgment in favor of defendant Ling. Plaintiff appealed.

Harris, Bumgardner & Carpenter by R. Dennis Lorance for plaintiff appellant.

Wayne Huckel and Fred B. Clayton for defendant appellee.

HILL, Judge.

Plaintiff assigns as error the granting of summary judgment for defendant Ling contending that there is a genuine issue as to defendant Ling's negligence being a proximate cause of plaintiff's injuries. He further contends the question of intervening and concurring negligence became jury questions under the facts of this case. It is only in the exceptional negligence case that summary judgment is appropriate, because "it usually remains for the jury, under appropriate instructions from the court, to apply the standard of the reasonably prudent man to the facts of the case in order to determine where the negligence, if any, lay and what

was the proximate cause of the aggrieved party's injuries." *Robinson v. McMahan*, 11 N.C. App. 275, 280, 181 S.E. 2d 147, 150, *cert. denied*, 279 N.C. 395, 183 S.E. 2d 243 (1971). In our opinion, this case is the exceptional negligence case and we hold that summary judgment was properly granted.

Proximate cause is that cause, unbroken by any new or independent cause, which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all of the facts then existing. *Kanoy v. Hinshaw*, 273 N.C. 418, 160 S.E. 2d 296 (1968); *Green v. Tile Co.*, 263 N.C. 503, 139 S.E. 2d 538 (1965). Foreseeability is thus a requisite of proximate cause, which is, in turn, a requisite for actionable negligence. *Nance v. Parks*, 266 N.C. 206, 146 S.E. 2d 24 (1966); *Osborne v. Coal Co.*, 207 N.C. 545, 177 S.E. 796 (1935).

The issue before us involves the question of proximate cause. Specifically, is there a genuine issue of fact as to defendant Ling's negligence being a proximate cause of plaintiff's injuries?

The parties stipulated that the original accident was the result of the negligence of the defendant Ling, and his negligence was its proximate cause. The second collision, which involved plaintiff and the second defendant Smith, took place some twenty to forty-five minutes later while plaintiff was directing traffic. There was no unbroken connection between the negligent act of defendant Ling and plaintiff's injury. The facts do not constitute a continuous succession of events, so linked together as to make a natural whole. Rather, Ling's negligence was too remote and not foreseeable as such to constitute a proximate cause of plaintiff's injury. Plaintiff was injured by an independent act of negligence on the part of the defendant Smith, an intervening act which was not itself a consequence of defendant Ling's original negligence, nor under the control of defendant Ling, nor foreseeable by him in the exercise of reasonable prevision. Therefore, plaintiff's injurious consequence must be deemed too remote to constitute the basis of a cause of action against Ling. See *Insurance Co. v. Stadiem*, 223 N.C. 49, 25 S.E. 2d 202 (1943).

We distinguish this case from that of *Hairston v. Alexander Tank and Equip. Co.*, 60 N.C. App. 320, 299 S.E. 2d 790 (1983),

rev'd and remanded, 310 N.C. 227, 311 S.E. 2d 559 (1984). In that case the seller of a new car switched wheels on the vehicle and failed to tighten the lugs on one wheel prior to delivery to the purchaser. Purchaser drove the new vehicle a short distance from the sales agency and onto highway I-85; thence down I-85 to a bridge where the wheel with the loose lugs came off. The automobile came to a stop in a lane of traffic. A van stopped behind the disabled car. The owner of the new vehicle got out of the vehicle and went between his car and the van. Defendant Alexander's truck negligently struck the van, pinned the owner of the car, killing him. Our Supreme Court adjudged that a jury could find a reasonably prudent person should have foreseen that the sales agency's negligence to tighten the lugs on the wheel of the new automobile could cause it to be disabled on the highway and struck by another vehicle, causing injury to the driver. In *Hairston* it is reasonably foreseeable that an improperly mounted wheel would become disengaged while the automobile was driven a short distance on the highway and the driver would be placed in a dangerous situation. Such foreseeability was not present in the case *sub judice*.

The decision of the trial judge in granting summary judgment in favor of defendant is

Affirmed.

Judges HEDRICK and JOHNSON concur.

WILLIAM F. WARD AND KENNEDY W. WARD v. JOHN T. TAYLOR, JR.

No. 833SC56

(Filed 1 May 1984)

1. Rules of Civil Procedure §§ 41.1, 60.2— ability of court to enter order and correct defective orders after voluntary dismissal

The filing of notice of dismissal, while it may terminate adversary proceedings in a case, does not terminate the court's authority to enter orders apportioning and taxing costs. Further, where a court, in a title dispute where a surveyor had been appointed, failed to allow and tax the costs of the surveyor to plaintiff in its order granting defendant's and plaintiffs' motions for volun-

tary dismissal, the failure may be considered an "oversight or omission" in the "order," and, pursuant to G.S. 1A-1, Rule 60(a) and Rule 41(d), the court could correct its failure subsequent to the entry of the "order." G.S. 38-4.

2. Boundaries § 14— court-appointed surveyor—ability to entertain motion as non-party

A court-appointed surveyor's lack of party status in a case involving a boundary dispute did not make his motion for unpaid expenses improper in light of his position as court-appointed surveyor. G.S. 38-4.

3. Abatement § 6— plea of abatement properly rejected

In an action involving a title dispute, where the court appointed a surveyor prior to the parties entering into voluntary dismissal and instituting a subsequent action, the subsequent action did not prevent the surveyor from requesting expenses in the prior action since the surveyor had no appointment in the later case, had never performed any work as an appointed surveyor in that case, and the court lacked jurisdiction to hear the motion as pertaining to the previous case. Therefore, the court did not err in rejecting the defense of abatement.

4. Process § 6— subpoena duces tecum properly quashed

There was no abuse of discretion in the trial court quashing a subpoena *duces tecum* which plaintiffs obtained for the production of all movant's timecards and records of all work over an eight year period where it was evident that plaintiffs waited until the last minute to serve the extremely broad subpoena, after having been put on notice at least two weeks previously of the importance of the items sought. G.S. 1A-1, Rule 45(c)(1).

5. Boundaries § 14— amount of award to surveyor inconsistent with evidence

Where the court did not appoint a surveyor in a boundary dispute until November of 1970, the court erred in considering services rendered to plaintiffs since August of 1968 in making its award for surveying services. G.S. 38-4(d).

APPEAL by plaintiff-respondents from *Friday, Judge*. Order entered 11 August 1982 in Superior Court, CRAVEN County. Heard in the Court of Appeals 6 December 1983.

This is an appeal from an order entered following a motion in the cause for an award of fees by a court-appointed surveyor. The Wards, plaintiffs in the underlying action, own a large tract of land across the Neuse River from New Bern. In response to information that Taylor claimed a portion of that tract and was cutting lumber on it, the Wards instituted an action, Craven County case number 68CVS1176, in August 1968 to oust defendant Taylor. At or about the same time, plaintiffs asked Darrel Daniels, a registered surveyor (hereinafter "Daniels" or "movant"), to make

a perimeter survey of the whole tract. Daniels had worked for the Wards for many years previously, surveying other lands owned by them. They did not discuss a price for the job. Daniels began work; in November 1969, at his request, the Wards paid him $750.

In November 1970, a consent order was entered appointing Daniels as court surveyor to set out plaintiffs' (Wards') contentions on a court map, and another surveyor to do the same for defendant's contentions. The order provided that reasonable charges of the surveyors, as approved by the court, would be taxed as costs on a final determination of the case. Daniels worked intermittently on the job, which was rendered difficult by the swampy and overgrown conditions of the subject property. His survey included the entire twelve mile perimeter of plaintiffs' property, not just the small area in contention. Defendant's surveyor never prepared a map.

On 15 August 1975, Daniels filed a certified map; several days later plaintiffs paid him $2,500. Daniels never did any work for defendant and considered himself an employee of plaintiffs. The case came on for trial on 28 June 1976; after presenting some evidence, plaintiffs announced that they elected to take a voluntary dismissal without prejudice, as did defendant. The court issued an order granting the motions and dismissing case 68CVS1176; however, no mention of costs was made in the order.

The Wards refiled their complaint shortly thereafter, case number 76CVS705. That case, in which Daniels did not participate, resulted in a final judgment in early 1982.

On 14 June 1982, Daniels filed a motion "for payment of charges" in case 68CVS1176 which is the case *sub judice*. He sought to recover of plaintiffs, as court costs, $17,945 in surveyor's fees. Daniels had earlier filed a lawsuit against the Wards for his fees, for which he had submitted a bill for $24,785 in 1979, but took a voluntary dismissal. At the time Daniels filed his motion in case 68CVS1176, he had a similar motion pending in case 76CVS705.

On 29 June 1982, the court issued an order directing that the motion in case 68CVS1176 be treated as a motion in the cause to be heard at the next session of court. After three days of hearing, the court ruled in favor of movant Daniels on 11 August 1982.

The court found that although Daniels was "somewhat dilatory" that he had nonetheless performed the services under the court order, and that plaintiffs had appropriated them to their own use. The court found the reasonable value of the services to be $16,000, minus $3,250 already advanced, and further that none of the parties had pointed out to the court in 1976 that surveyor's fees needed to be apportioned as costs in its dismissal order, and therefore the motion Daniels filed in 1982 breathed new life into his claim. The court then cancelled the motion pending in case 76CVS705, ordered the Wards to pay Daniels $12,750, and dismissed the case as to Taylor. Plaintiffs appeal.

Ward, Ward, Willey & Ward, by A. D. Ward, for plaintiff-respondent-appellants Ward.

Henderson and Baxter, P.A., by David S. Henderson, for defendant-appellee Taylor.

Dunn & Dunn, by Raymond E. Dunn, for movant-appellee Daniels.

JOHNSON, Judge.

I

We must first address the question of whether the court had authority to entertain Daniels' motion in the previously dismissed cause, 68CVS1176.

A

G.S. 1A-1, Rule 41(d), "Costs," provides that "A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis." Although a voluntary dismissal is not *per se* a final judgment, this Court has held that the clerk of superior court has authority to tax costs against a plaintiff who took a dismissal. *Thigpen v. Piver*, 37 N.C. App. 382, 246 S.E. 2d 67, *disc. review denied*, 295 N.C. 653, 248 S.E. 2d 257 (1978); G.S. 6-7. In fact, the clerk is ordinarily the proper official to tax such costs. *Thigpen v. Piver, supra*; G.S. 1-7. Here, however, the court appointed a surveyor in a boundary dispute, pursuant to G.S. 38-4. "When in any action or special proceeding pending in the Superior Court the boundaries of lands are drawn into question,

the court may, if deemed necessary, order a survey . . .," G.S. 38-4(a); the court may appoint one or more surveyors, G.S. 38-4(b); and it "shall make an allowance for the fees of the surveyor or surveyors and they shall be taxed as a part of the costs." G.S. 38-4(d). The Supreme Court has consistently held that where such a survey has been ordered and made, and the trial judge has failed to order compensation, the clerk has no authority to do so. *Ipock v. Miller*, 245 N.C. 585, 96 S.E. 2d 729 (1957); *Cannon v. Briggs*, 174 N.C. 740, 94 S.E. 519 (1917); *LaRoque v. Kennedy*, 156 N.C. 360, 72 S.E. 454 (1911). Therefore, movant could only look to the superior court for relief; only that court had authority to allow and tax his fees as costs.

B

[1] It is well established that where plaintiff takes a voluntary dismissal pursuant to G.S. 1A-1, Rule 41(a)(1), no suit is pending thereafter on which the court could make a final order. *West v. Reddick, Inc.*, 38 N.C. App. 370, 248 S.E. 2d 112 (1978) (court had no power to enter "supplemental order" after voluntary dismissal and defendant's appeal); *Sutton v. Sutton*, 18 N.C. App. 480, 197 S.E. 2d 9 (1973) (dismissal of divorce action upon separation agreement precluded motion to enforce portions of agreement). Therefore, appellants contend, the court lacked authority to enter any order in case 68CVS1176, since it was terminated by a voluntary dismissal under Rule 41(a), to which defendant consented while simultaneously taking a voluntary dismissal of his counterclaim under the same rule.

C

This argument is inapplicable to the circumstances of this case, however. Under G.S. 1A-1, Rule 41(a)(1), ". . . an action or any claim therein may be dismissed by the plaintiff *without order of court* (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action." (Emphasis supplied.) The rule clearly does not require court action, other than ministerial record-keeping functions, to effect a dismissal.

G.S. 1A-1, Rule 41(d) provides that plaintiffs ". . . *shall* be taxed with the costs . . . ." (Emphasis supplied.)[1] If, as plaintiffs here contend, a notice of voluntary dismissal completely terminates the case and prevents issuance of any further orders in the case, the superior and district courts would lack authority to enforce the mandate of Rule 41(d). Only where the parties chose to reinstitute the suit *and* the reinstituted suit was still pending would the courts then be able to order payment of costs. We do not believe the General Assembly intended to give *parties* this degree of control over the power of the trial courts to tax costs. Particularly in a case such as this, where the court appoints surveyors who run up large bills largely at the direction of the parties, such a rule would present obvious possibilities for abuse.

In construing Rule 41(d), we must give effect to the legislative intent, and avoid constructions which operate to defeat or impair that intent. *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975).[2] The object of this statutory rule is clearly to provide superior and district courts with authority for the efficient collection of costs in cases in which voluntary dismissals are taken. We therefore hold that the filing of notice of dismissal, while it may terminate adversary proceedings in the case, does not terminate the court's authority to enter orders apportioning and taxing costs.

D

Courts clearly have the power to correct defective orders under G.S. 1A-1, Rule 60(a):

1. G.S. 1A-1, Rule 41(d) provides in full:

A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action.

2. The North Carolina Rule is mandatory, as opposed to the discretionary federal rule. The federal commentary and decisions thus provide little guidance; there is no North Carolina commentary or helpful legislative history.

> *Clerical mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors arising therein from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders.

The uncontroverted record shows that movant filed his map before dismissal of case 68CVS1176, and that the dismissal therein was by order of the court. Therefore, the court's failure to allow and tax costs may be considered an "oversight or omission" in an "order." *See* G.S. 38-4, G.S. 1A-1, Rule 41(d).

It is clear that no substantive changes may be effected under Rule 60(a). *See H & B Co. v. Hammond*, 17 N.C. App. 534, 195 S.E. 2d 58 (1973) (money judgment improperly changed to real property lien). Here, however, the substantive rights of the parties are not affected, only the procedural matter of costs. *See Hockoday v. Lawrence*, 156 N.C. 319, 72 S.E. 387 (1911) (costs are not subject of litigation, arising "only incidentally"); *see also* 20 C.J.S., Costs § 1 (1940 & Supp. 1983). Therefore, the court had authority under Rule 60(a) to correct the inadvertent omission of costs from its order of 28 June 1976.

E

[2] Plaintiffs also contend that since movant was not a party, the court could not entertain a motion from him. As movant points out, however, the record amply demonstrates that he cannot look to either party to make the motion in his behalf. Nor do we believe that a court which appoints a surveyor lacks the authority to take heed of his request for unpaid expenses in the same case in which it appointed him. The obvious policy of G.S. 38-4 is to allow the courts to avail themselves of expert help in what are often exceedingly difficult cases. It would certainly frustrate this purpose if the court-appointed surveyors themselves became exposed to the burden of litigation to recover fees.

The general rule is that only a party or his legal representative has standing to have an order set aside, and that a stranger to the action may not obtain such relief. *Shaver v. Shaver*, 244 N.C. 309, 93 S.E. 2d 614 (1956). This rule does permit exception, however. In *Bowling v. Combs*, 60 N.C. App. 234, 298 S.E. 2d 754, *disc. rev. denied*, 307 N.C. 696, 301 S.E. 2d 389 (1983),

this Court found no error where the trial court granted an administratrix's motion, made three months before she became a party to the action, to set aside a voluntary dismissal taken by her predecessor in office. The "technicality" that she was not a party was insufficient reason to vacate the order. Like the administratrix in *Bowling*, Daniels was no "stranger to the case." In his capacity as court-appointed surveyor, he was available to serve the court as its witness. G.S. 38-4(c). The court possessed authority to direct the surveyor in his duties. G.S. 38-4(b). Therefore, Daniels acted properly in bringing the matter to the court's attention; his lack of formal party status did not render his motion improper.

We conclude that (1) the provisions of G.S. 1A-1, Rule 41 and the cases interpreting it did not bar the court from issuing its order, (2) the court also possessed authority to do so under G.S. 1A-1, Rule 60(a), and (3) movant's lack of party status did not make his motion improper in light of his position as court-appointed surveyor.

II

[3] Having determined that the matter could properly come before the Superior Court on a motion by Daniels, it remains to be determined whether a similar motion pending in case 76CVS705 precluded the court from hearing a motion in case 68CVS1176. The pendency of a prior action between the same parties concerning the same subject matter in a state court of competent jurisdiction works an abatement of the subsequent action. *Conner Co. v. Quenby Corp.*, 272 N.C. 214, 158 S.E. 2d 22 (1967). Although the motion in 76CVS705 was also before the Superior Court for Craven County, the court lacked jurisdiction to hear the motion as pertaining to that case; movant had no appointment in 76CVS705 and had never performed any work as an appointed surveyor in that case, and therefore could not invoke the court's jurisdiction therein. Therefore, the court did not err in rejecting the defense of abatement; its jurisdiction in 68CVS1176 was proper and was properly exercised.

III

Plaintiffs allege several procedural errors at the hearing as grounds for reversal of the order awarding fees.

A

The court ruled that certain cross-examination of movant regarding his other accounts receivable was inadmissible. However, the court then allowed plaintiffs to ask the questions for the record in the presence of the court. Plaintiffs contend that this constituted reversible error.

In *Davis v. Insurance Co.*, 28 N.C. App. 44, 220 S.E. 2d 149 (1975), *disc. rev. denied*, 289 N.C. 296, 222 S.E. 2d 696 (1976), no prejudice was found where the court sitting without a jury improperly ruled certain evidence inadmissible but nevertheless let it in for the record and considered it. Here, assuming *arguendo* that the court's ruling was error, it allowed plaintiffs to go forward "for the record." Plaintiffs chose not to pursue the matter, nor did they offer any other evidence of movant's accounts. On this record, plaintiffs have shown no error. *Davis v. Insurance Co., supra.*

B

Plaintiffs next contend that the court erred in denying their motion for mistrial on the grounds that the court improperly inquired into settlement negotiations. Plaintiffs cite no authority, nor do we find any, for declaring a mistrial where the court is the finder of fact. Furthermore, no evidence of any settlement negotiations appears in the record. The fair but expeditious dispatch of litigation remains the duty of the trial courts. *See* G.S. 1A-1, Rule 16. The courts are expected to encourage litigants to settle their differences amicably. Plaintiffs' allegation that at some unspecified time the trial court made inquiry into the possibility of settlement indicates nothing more than its faithful performance of this duty. This assignment is without merit.

C

[4] The court quashed a subpoena *duces tecum* which plaintiffs obtained for the production of all movant's time cards and records of all work over an eight year period. Plaintiffs contend that this was error.

The record shows that movant mailed his motion to plaintiffs on 14 June 1982; they appeared at a hearing on 9 July 1982, filed a detailed response, and participated in an all day hearing; the

time cards were a crucial aspect of the 9 July 1982 hearing, to which plaintiffs devoted extensive cross-examination of movant; plaintiffs participated in another full day of hearings on 26 July 1982, presenting several witnesses. Only at the commencement of the third day of hearing, on 27 July 1982, did plaintiffs bring their subpoena before the court. (The subpoena was dated 23 July 1982, but no record of service appears and movant denied prior knowledge of it.)

It is evident that plaintiffs waited until the last minute to serve an extremely broad subpoena, after having been put on notice at least two weeks previously of the importance of the time cards in this litigation. Therefore, the court could properly find that the subpoena was unreasonable and oppressive and did not abuse its discretion in quashing it. G.S. 1A-1, Rule 45(c)(1); *see State v. Neely*, 26 N.C. App. 707, 217 S.E. 2d 94, *cert. denied and appeal dism.*, 288 N.C. 512, 219 S.E. 2d 347 (1975) (subpoena for all long distance calls to two residences for a three month period properly quashed); *see also Vaughan v. Broadfoot*, 267 N.C. 691, 149 S.E. 2d 37 (1966) (similar discovery type subpoena served on day of trial properly quashed).

IV

Plaintiffs additionally contend that movant has shown no right of relief, since he did not comply with the original (1970) order of the court, which required filing of maps within 90 days. However, the record reveals that the same court extended the time in which to file the maps by its order of 24 March 1975. Movant filed his map within the time period set in that order. The reason for the delay of four and one-half years does not appear from this record. Plaintiffs apparently were satisfied with movant's work, since they did not petition the court to discharge him; this Court will not impute bad faith to movant from an otherwise silent record. Therefore, movant has complied with the orders of the court so as to entitle him to the relief sought.

V

Finally, plaintiffs challenge the sufficiency of the evidence to support the court's findings of fact.

A

Although the proceedings were in the nature of a trial by the court sitting without a jury, they involved a discretionary matter, *i.e.*, the correction of an omission of costs in an order of the court. *LaRoque v. Kennedy, supra*; G.S. 1A-1, Rule 60(a). A discretionary order is conclusive on appeal in the absence of abuse or arbitrariness, or some imputed error of law. *Highway Commission v. Coggins*, 262 N.C. 25, 136 S.E. 2d 265 (1964); *see* 1 Strong's N.C. Index 3d, Appeal and Error, § 54 (1976). Therefore, our review is limited to determining whether the court acted within its discretion and whether it committed an error of law.

B

[5] The trial court made extensive findings of fact in support of its order. It found that the motion was in the nature of one for *quantum meruit*, seeking that the court establish the reasonable value of movant's services. This interpretation accords with the statute: "The court shall make an allowance for the fees of the surveyor . . . ." G.S. 38-4(d). "The amount of the allowance is within the discretion of the court, after considering the evidence as to the work done, ..." *LaRoque v. Kennedy, supra*, 156 N.C. at 375, 72 S.E. at 459. The court found that movant had expended 800 hours on the project and that his services were worth $20 per hour. It further found that plaintiffs had paid movant $3,250 and deducted this amount from the total award. Plaintiffs challenge the sufficiency of the evidence to support these findings.

As indicated above, the issue of the sufficiency of the evidence is not properly before this Court. However, since it appears from the record as a matter of law that the court improperly considered certain evidence in its award, we remand for further proceedings.

The court found that movant spent 800 hours on the project. The only evidence to support such a finding is contained in movant's time cards, later abstracted into his affidavit. These reflect services for the period August 1968 to June 1976, totalling some 913 hours. However, the court did not appoint movant until 23 November 1970; his services between that date and 30 June 1976 totalled only 553 hours. Nothing in the order of 23 November 1970 suggests that fees for prior services would be taxed at the

final determination of the case. It is apparent, however, that the court considered these earlier services in computing its allowance of costs. This constituted error of law.

Similarly, the court found that plaintiffs had paid movant $3,250. However, the uncontroverted record shows that they paid $750 of this in 1969, long before movant's appointment. Again, consideration of this evidence in computing the allowance of costs constituted error of law.

We have reviewed the court's other findings and find them fully supported by the evidence. Upon remand, the question of movant's services prior to the order of appointment should not arise, except insofar as it may bear on the value of his services during the period of his appointment. If movant desires to bring an independent action to recover fees for those earlier services, he may certainly do so.

C

The court dismissed the case as to defendant. Plaintiffs assign error, while defendant urges affirmance. Whether the court taxed the costs to plaintiffs as following the judgment, *see* G.S. 38-4(d); G.S. 1A-1, Rule 41(d); *and Hines v. Pierce*, 23 N.C. App. 324, 208 S.E. 2d 721, *cert. denied*, 286 N.C. 335, 210 S.E. 2d 57 (1974); or whether it allowed them under its discretionary authority, *see* G.S. 6-20, no abuse of discretion is apparent. Therefore, this assignment is overruled.

VI

We conclude that the court properly exercised its jurisdiction in hearing this matter and did not abuse its discretion in apportioning the costs. However, since it erred as a matter of law in considering certain evidence used to compute its award, we remand for further proceedings to determine the proper amount of that award.

Remanded.

Judges ARNOLD and PHILLIPS concur.

Robinson v. King

THOMAS HOUSTON ROBINSON; JAMES H. ROBINSON AND WIFE, SARAH M. ROBINSON; HENRY HOUSTON ROBINSON AND WIFE, CAROLYN M. ROBINSON; NELL ROBINSON SUMMERS AND HUSBAND, FOSTER SUMMERS; ETHEL ROBINSON BUTLER AND HUSBAND, JOSEPH H. BUTLER; JESSIE B. SNYDER AND HUSBAND, ROBERT L. SNYDER; LYNN ROBINSON HALLMAN AND HUSBAND, NEY M. HALLMAN; MARGARET ROBINSON SISTARE AND HAZEL ROBINSON v. JOHN EDWIN KING AND WIFE, SARAH E. KING; ANNIE LOUISE KING; MARGARET EVELYN KING; MELVIN T. GRAHAM AND WIFE, PEGGY T. GRAHAM; JOHN H. ROBINSON AND WIFE, LENA S. ROBINSON; SAM ROBINSON AND WIFE, KATHLEEN W. ROBINSON; ROBERT FRANKLIN ROBINSON AND WIFE, JOYCE ROBINSON; AND WILLIAM M. ROBINSON AND MARY ROBINSON FARLESS AND OSSIE McMANUS AND LAURA KING ROBINSON

No. 8320SC423

(Filed 1 May 1984)

Deeds § 12— construction of deed—conflicting provisions in granting clause and habendum

Where the granting clause of a 1924 quitclaim deed gave all "right, title and interest" in land to the grantee but contained no words of inheritance, and the habendum gave the grantee the land "for and during the term of her natural life," the deed conveyed only a life estate to the grantee under both the common law and G.S. 39-1.

APPEAL by defendants from *Davis, Judge*. Judgment entered 18 February 1983 in Superior Court, UNION County. Heard in the Court of Appeals 8 March 1984.

Plaintiffs sought a judgment declaring their interest in 147 acres of Union County land. The land was previously owned in fee by James Pickens Robinson, who died on 14 April 1924. James Pickens Robinson had attempted on 27 March 1922 to make a will, handwritten by someone else, which stated:

> To my sister Maggie Robinson I bequeath [sic] all my real estate; also all of my personal property, except my mules (which are to aid in the support of her and the sister's children in her charge) which I will to C. P. Robinson.
>
> I also request ten dollars ($10.) each to my four brothers; an [sic] ten dollars ($10.) each to the sister's three children.
>
> I do not want my sister under any bond, and she is to use the said property her lifetime as she desires.

The will was never probated.

James Pickens Robinson's four brothers jointly executed two documents on 17 April 1924, three days after his death. One document expressed the brothers' desire to waive their intestate succession rights to James Pickens Robinson's estate in favor of their sister, Maggie Robinson, to the extent provided in the aforementioned will. It provided:

> KNOW ALL MEN BY THESE PRESENTS, That we, C. P. Robinson, R. D. Robinson, W. W. Robinson and C. C. Robinson brothers and heirs-at-law of J. P. Robinson, deceased, of the County of Union, State of North Carolina, for valuable consideration, hereby waive all our right, title and interest in and to the property constituting the estate of the said J. P. Robinson, deceased, except such as bequeathed to us under the last will and testament of the said J. P. Robinson, deceased, dated the 27th day of March, 1922; said waiver is in favor of the principal legatee under said will, to wit; Maggie Robinson, sister of said deceased.
>
> We further hereby consent that such will shall be admitted to probate and the property distributed, as provided under the terms thereof. We also further agree to make good and sufficient deed of conveyance to the said Maggie Robinson of all our right, title and interest in the real estate of which the said J. P. Robinson died seized. Witness our hands and seals this 17th day of April, 1924.

The other document was a quitclaim deed from the four brothers and their wives, which conveyed their interest in the land formerly owned by James Pickens Robinson to Maggie Robinson in consideration of forty dollars, which was the total monetary amount that was to be bequeathed to the four brothers under the attempted will. The granting clause of the quitclaim deed, standing alone, appears to give Maggie Robinson a fee simple, while the habendum clause, standing alone, appears to give her a life estate. The deed provided:

> Know all men by these presents, that we, C. P. Robinson, R. D. Robinson and wife, Ellie Robinson, W. W. Robinson and wife Hattie Robinson, C. C. Robinson and wife, Luka Robinson, all of the County of Union in the State aforesaid, for and

in consideration of the sum of Forty Dollars to be paid under the terms of the last Will and Testament of J. P. Robinson, deceased to us in hand paid at and before the sealing of these presents by Maggie Robinson, of the County of Union, in the state aforesaid the receipt whereof is hereby acknowledged, *have granted, bargained, sold and released, and by these presents do bargain, sell and release unto the said Maggie Robinson all our right, title and interest in and to all that piece, parcel or tract of land* with the buildings and improvements thereof in Jackson Township, in said County and State, containing One Hundred and Forty-four (144) acres, more or less, bounded on the North by lands of W. W. Robinson; on the East by lands of A. W. Heath & Company; on the South by lands of C. C. Robinson and on the West by lands of J. W. Morrison, the land herein conveyed is known as the home place of J. P. Robinson, deceased.

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging, or in any wise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned, unto the said Maggie Robinson, for and during the term of her natural life.

And we do hereby bind ourselves our heirs and executors and administrators, to warrant and forever defend, all and singular, the said premises unto the said Maggie Robinson, our heirs and assignz [sic], against us and our heirs and all other persons lawfully claiming or to claim the same, or any part thereof.

WITNESS our hands and seals this 17th day of April, in the year of our Lord, one thousand nine hundered [sic] and Twenty-four, and in the one hundred and forty-eight year of the Sovereignty and Independence of the United States of America. (Emphasis supplied.)

The waiver agreement and the quitclaim deed were simultaneously recorded on 2 June 1924.

Plaintiffs argue that the quitclaim deed passed only a life estate to Maggie Robinson, thereby leaving a reversion to the heirs of James Pickens Robinson. Those heirs include the plain-

tiffs. Defendants respond that the quitclaim deed passed a fee simple to Maggie Robinson. Defendants, who are the heirs of Maggie Robinson and their assignees, would have acquired all rights to the land in question under Maggie Robinson's will if she had owned a fee simple.

Defendants presented evidence that Maggie Robinson thought she owned the land in fee simple. In 1957 and again in 1966 she sold timber and pulpwood from the property. She executed a will in 1946 which devised the land to a nephew and two nieces, her predeceased sister's children whom she had reared. That will was admitted to probate after Maggie Robinson's death in 1980.

Three of James Pickens Robinson's four brothers died intestate. The fourth executed a detailed will, admitted to probate in 1953, which made no mention or disposition of a reversionary interest in the James Pickens Robinson land.

The trial court granted summary judgment for plaintiffs, adjudging that Maggie Robinson acquired only a life estate under the quitclaim deed. Defendants appeal.

Dawkins, Glass & Lee, by W. David Lee, for plaintiff appellees.

Clark & Griffin, by Bobby H. Griffin and Richard S. Clark, for defendant appellants.

WHICHARD, Judge.

I. Applicable Law

The rights of the parties depend upon whether the quitclaim deed to Maggie Robinson conveyed a life estate or a fee simple. The deed is ambiguous. The granting clause gives all right, title, and interest to Maggie Robinson, while the habendum clause gives her the land "for and during the term of her natural life."

Ambiguous deeds traditionally have been construed by the courts according to rules of construction, rather than by having juries determine factual questions of intent. The current governing rule is as follows:

> In construing a conveyance executed after January 1, 1968, in which there are inconsistent clauses, the courts shall

> determine the effect of the instrument on the basis of the intent of the parties as it appears from all of the provisions of the instrument.

G.S. 39-1.1(a). The quitclaim deed to Maggie Robinson was executed in 1924, however, and G.S. 39-1.1 thus is inapplicable.

Whetsell v. Jernigan, 291 N.C. 128, 133, 229 S.E. 2d 183, 187 (1976) and *Frye v. Arrington*, 58 N.C. App. 180, 182, 292 S.E. 2d 772, 773 (1982), held that deeds executed prior to 1 January 1968 would be construed according to the common law rules. *Whetsell* specifically stated that the principles enunciated in *Artis v. Artis*, 228 N.C. 754, 47 S.E. 2d 228 (1948), and *Oxendine v. Lewis*, 252 N.C. 669, 114 S.E. 2d 706 (1960), would control the construction of such deeds.

This Court must look beyond the principles enunciated in the *Whetsell*, *Artis*, and *Oxendine* cases, however. Those cases all held that where the granting clause gave an unqualified estate in fee simple, the habendum contained no limitation on the fee, and fee simple title was warranted in the covenants, inconsistent clauses elsewhere in the deed would be rejected. This rule, which is an aberration from earlier common law, has no application here, since it is the granting and habendum clauses in the deed here which appear inconsistent.

The rules of construction applicable here are found in G.S. 39-1 and *Triplett v. Williams*, 149 N.C. 394, 63 S.E. 79 (1908). Pursuant to these authorities, we affirm the summary judgment for plaintiffs.

II. G.S. 39-1

G.S. 39-1 states:

> When real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word "heir" is used or not, *unless such conveyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity.* (Emphasis supplied.)

This statute has been in effect, with minor and immaterial revision, since 1879. It thus applies to the deed under consideration. The grant to Maggie Robinson did not give her an estate of in-

heritance by use of the word "heir"; the conveyance did contain plain and express words showing the grantors' intent to give her an estate "for and during the term of her natural life." Under G.S. 39-1, the absence of words of inheritance, combined with the presence of language limiting the estate to the term of the grantee's life, should be interpreted to convey a life estate.

This result has been reached in other jurisdictions where a grant "to A," which standing alone would convey a fee, has been held to convey a life estate when the granting clause is accompanied by a habendum clause which refers to a life estate. *See* 4 H. Tiffany, *The Law of Real Property* § 980 (3d ed. 1975). Such a construction does not violate the rule of *Whetsell, supra, Oxendine, supra,* and *Artis, supra,* because the limiting language appears in the habendum. In any event, the rule of construction in G.S. 39-1 prevails over common law rules to the extent that they conflict. *See* G.S. 4-1.

III. *Triplett v. Williams*

In 1908 the North Carolina Supreme Court construed a deed containing language strikingly similar to that of the quitclaim deed here. *Triplett, supra. Triplett* has never been overruled. Pursuant to the doctrine of *stare decisis*, we thus hold that it controls here.

The deed in *Triplett* gave land to a woman "and her heirs forever" in the granting clause, but the habendum stated that she was to have it "during her lifetime," and that it was to be divided equally between her children at her death. Thus, the granting clause standing alone conveyed a fee, while the habendum standing alone conveyed a life estate, just as the quitclaim deed here did.

The *Triplett* opinion began by paying obeisance to the common law rule of *Hafner v. Irwin*, 20 N.C. 570 (3 & 4 Dev. & Bat.) (1839), which held that the habendum may lessen, enlarge, explain or qualify the premises (i.e., the granting clause and all other parts of the deed preceding the habendum), but must be held void if repugnant to the granting clause. *Triplett, supra,* 149 N.C. at 395, 63 S.E. at 79. North Carolina common law had always maintained that a habendum or other clause may not divest an estate already vested in the granting clause. *See Whetsell, supra,* 291

N.C. at 130, 229 S.E. 2d at 185. The *Triplett* opinion proceeded to view the common law in a new perspective, however. It stated:

> But this doctrine, which regarded the granting clause and the *habendum* and *tenendum* as separate and independent portions of the same instrument, each with its especial function, is becoming obsolete in this country, and a more liberal and enlightened rule of construction obtains, which looks at the whole instrument without reference to formal divisions, in order to ascertain the intention of the parties, and does not permit antiquated technicalities to override the plainly expressed intention of the grantor, and does not regard as very material the part of the deed in which such intention is manifested.

Triplett, supra, 149 N.C. at 396, 63 S.E. at 79-80. The Court decided that the habendum so clearly showed the grantor's intent to convey a life estate that the word "heirs" in the granting clause must have been included in deference to the established formula for conveyances rather than out of a desire to convey an estate in fee simple. *Id.* at 399, 63 S.E. at 81. In so deciding the Court stated, based on the predecessor to G.S. 39-1 then in effect, that "[i]t is the legislative will that the intention of the grantor and not the technical words of the common law shall govern." *Id.* at 398, 63 S.E. at 80.

The Court stated in *Triplett* that it was "clear beyond doubt" that the grantor there intended to convey a life estate. *Id.* It is equally clear that the grantors here intended to convey a life estate since, in addition to using life estate language in the habendum, they omitted from the granting clause the word of inheritance "heirs." The failure of the quitclaim deed to name remaindermen does not serve to distinguish this case from *Triplett,* since a reversionary interest passes by operation of law.

Triplett did not depart from previous rules of construction, for the Court had previously stated that "[i]n the interpretation of a deed the first thing to be considered is to ascertain the intention of the parties and give it such a construction as will carry out their intention, so far as it can be done consistently with the established rules of law." *Rowland v. Rowland,* 93 N.C. 214, 218 (1885). *Triplett* did mark a departure in the application of this rule, however. In *Rowland, supra,* 93 N.C. at 220, the Court re-

ferred to 2 W. Blackstone, Commentaries 298 (Christian ed. 1794), for an illustration of a habendum that was void for repugnancy to the estate granted in the premises. The example was a grant to one and his heirs followed by a habendum to him for life. This illustration in *Rowland* was *obiter dictum* because it presented facts not involved in determination of the case. As such, it cannot constitute controlling precedent. *In re University of North Carolina*, 300 N.C. 563, 576, 268 S.E. 2d 472, 480 (1980). The *Rowland* illustration is also distinguishable from the present case in that it has words of inheritance in the granting clause. In any event, the holding in *Triplett*, while it does not expressly mention the dictum in *Rowland*, plainly rejects it; and *Triplett* is the controlling precedent here.

IV. The Law Since *Triplett*

For forty years after *Triplett* the North Carolina Supreme Court consistently construed deeds according to the overall intent expressed in the instrument. *See, e.g., Krites v. Plott*, 222 N.C. 679, 24 S.E. 2d 531 (1943); *Jefferson v. Jefferson*, 219 N.C. 333, 13 S.E. 2d 745 (1941); *Lee v. Barefoot*, 196 N.C. 107, 144 S.E. 547 (1928).[1] The *Triplett* emphasis on intent was extended to allow conveyance of a life estate where the granting, habendum, and warranty clauses all used the form language for conveying a fee, but the deed contained additional words evincing a clear intent to convey a life estate. The Court stated in *Krites, supra*, 222 N.C. at 682, 24 S.E. 2d at 553:

> The true test is to take all of the provisions together and in the case of an apparent repugnance, to adopt that construction which is most consonant with the intent of the deed; and it cannot be questioned that this intent is not infrequently found in the later expressions of the instrument, and that they are sometimes of a character so impressive as to override the more formal technical expressions in which conveyances are sometimes couched.

This settled and straightforward rule of construction was significantly modified in *Artis v. Artis*, 228 N.C. 754, 47 S.E. 2d 228 (1948). The Supreme Court there held that the granting, habendum, and warranty clauses constitute the operative parts of

1. These cases have since been overruled. *See infra.*

a conveyance. Any additional words contrary to those clauses will be rejected as repugnant, since they are not part of the conveyance within the meaning of G.S. 39-1. *Id.* at 760, 47 S.E. 2d at 232.

The Court since has steadfastly applied the *Artis* rule. *See Whetsell, supra.* One result has been the overruling of *Krites, supra,* and *Jefferson, supra,* in *Jeffries v. Parker,* 236 N.C. 756, 73 S.E. 2d 783 (1953), and of *Lee, supra,* in *Tremblay v. Aycock,* 263 N.C. 626, 139 S.E. 2d 898 (1965). The practical effect of *Artis* and subsequent cases has been to replace a rule of construction with an inflexible rule of property which arbitrarily prefers certain formal parts of the deed over the plainly expressed intent of the grantor.

Although *Artis* undermines the *Triplett* rule of construction based on intent, it does not change the law as applied in *Triplett,* since the *Artis* line of cases has not involved inconsistencies between the granting and habendum clauses. *Triplett* has been narrowly confined to its facts, *see Whetsell, supra,* 291 N.C. at 131-32, 229 S.E. 2d at 186, but those facts are sufficiently close to those here to control our decision.

The Supreme Court in *Whetsell, supra,* 291 N.C. at 133, 229 S.E. 2d at 188, admitted that the *Artis* rule could subvert the grantor's real intention, but justified this result by the need for settled rules of property. It would seem that the *Triplett* rule of intent, based on prior common law and the predecessor to G.S. 39-1, was a well-settled rule before the "sudden and radical" change in *Artis. Id.* The reasons for adhering to the *Triplett* rule of construing the deed from the intent as conveyed in the entire instrument are ably stated in Justice Copeland's dissent in *Whetsell, supra,* 291 N.C. at 134-36, 229 S.E. 2d at 187-88, and in Note, Construction of a Deed—Continued Use of the *Artis-Oxendine* Rule to Subvert the Intention of the Parties, 13 Wake Forest L. Rev. 478 (1977). The facts here allow us to follow those reasons without conflicting with the *Artis* line of cases.

The General Assembly has required that deeds executed after 1 January 1968 be construed according to the intent expressed in all provisions of the instrument. G.S. 39-1.1(a). This statute essentially codifies the *Triplett* rule of construction. Thus, in holding that Maggie Robinson acquired a life estate, our ruling

is consistent with the law to be applied to deeds executed after 1 January 1968, as well as with existing common law and G.S. 39-1.

V. Evidence of Intent Apart from the Deed

Evidence in addition to the quitclaim deed was presented. While arguably, in light of *Triplett*, there is no need to look beyond the four corners of the deed, there are some situations where outside evidence of intent should be considered. In *Seawell v. Hall*, 185 N.C. 80, 82, 116 S.E. 189, 190 (1923), our Supreme Court stated:

> [I]ntention, as a general rule, must be sought in the terms of the instrument; but if the words used leave the intention in doubt, resort may be had to the circumstances attending the execution of the instrument and the situation of the parties at that time—the tendency of modern decisions being to treat all uncertainties in a conveyance as ambiguities to be explained by ascertaining in the manner indicated the intention of the parties.

The following circumstances have been argued to provide evidence of the grantor's intent:

(1) The 1922 will of James Pickens Robinson, which was never admitted to probate, attempted to "bequeath" the land in dispute to Maggie Robinson. The grantors intended to achieve the result desired in the will by their waiver agreement and quitclaim deed to Maggie Robinson. The fact that the attempted will was homemade and uses the word "bequeath" instead of "devise," to dispose of realty, indicates that it was drafted by someone who lacked understanding of the technical legal meaning of words of conveyance. In such a situation, it is argued, it is especially important to derive the intent of the maker or grantor from the plainly expressed meaning of the whole document. The attempted will clearly stated that Maggie Robinson was to use the property during her lifetime. Therefore, contrary to defendants' contentions, the will is evidence, if anything, of an intent to convey a life estate.

(2) The 1924 recorded agreement among the four brothers of James Pickens Robinson stated their intent to make his will effective, to waive their rights to his property except for what they would receive under his will, and to make a deed to Maggie

Robinson of all their right, title, and interest in the subject property. As discussed above, the attempted will would have left reversionary interests in the four brothers, since it apparently would have devised Maggie Robinson only a life estate, and the waiver agreement does not indicate a clear intent to change that meaning of the will. As for the agreement to deed their interest to Maggie Robinson, the deed itself stated that she was to hold the property interest "during the term of her natural life," and there were no words of inheritance in the granting clause to contradict that limiting language.

(3) On the other hand, Maggie Robinson executed timber deeds in 1957 and 1966. She executed a will in 1946 which purported to devise her real property, and she never owned any real property other than the land in question. None of the four brothers made any testamentary disposition of their remainder interests, although one did execute a detailed will in 1946. These circumstances indicate that Maggie Robinson believed she had an estate in fee.

Such evidence has little probative value on the issue of whether the grantors intended to convey a fee or a life estate, however. Similarly, the failure of one brother to dispose of his reversionary interest in his will is little evidence that the grantors intended to convey a fee to their sister. The evidentiary weight of these circumstances is further diminished by the fact that they involve actions or omissions which occurred many years after the quitclaim deed was executed, and thus are not "circumstances attending the execution of the instrument and the situation of the parties at that time." *Seawell, supra.*

VI. Conclusion

The surrounding circumstances and evidence apart from the quitclaim deed are ambiguous at best, and fail to show a clear intent on the part of the grantors to convey a fee simple. Because the granting clause here does not contain words of inheritance, while the granting clause in *Triplett* did, the deed here presents an even stronger case for the *Triplett* interpretation than did the deed there.

We apply G.S. 39-1 in light of the *Triplett* precedent, which we find controlling, and hold that the trial court properly ruled

that Maggie Robinson acquired only a life estate under the quitclaim deed. The order of summary judgment for plaintiffs is accordingly

Affirmed.

Judges HEDRICK and JOHNSON concur.

LEDBETTER BROTHERS, INC., AND HARTFORD ACCIDENT AND INDEMNITY COMPANY v. THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 8310SC192

(Filed 1 May 1984)

1. **Highways and Cartways § 9— highway construction contract—no right of action by subcontractor's surety**

Where a highway construction contract provided that a subcontractor could not assert a claim against the Department of Transportation, a subcontractor's surety had no standing to challenge the Department of Transportation's assessment of liquidated damages under the contract.

2. **Assignments § 1; State § 4.3— highway construction contract—"hold harmless" agreement between contractor and subcontractor's surety—no assignment of claim against State—right of contractor to challenge liquidated damages**

A "hold harmless" agreement between the general contractor of a highway construction project and a subcontractor's surety did not constitute an assignment of a claim against the State in violation of G.S. 147-62, but was an indemnity agreement, and as long as the indemnitee remained unpaid, it was a real party in interest with standing to challenge the Department of Transportation's assessment of liquidated damages under the construction contract.

3. **Damages § 7— highway construction contract—liquidated damages clause—when effective**

A liquidated damages clause of a highway construction contract which was to take effect upon failure "to complete the work by the completion date" did not require only substantial performance to preclude the assessment of liquidated damages but permitted liquidated damages until the project was finally accepted, and liquidated damages could properly be assessed for failure to complete sign and guardrail work on time.

4. Damages § 7— highway construction contract—validity of liquidated damages clause

The liquidated damages provision of a highway construction contract was not an unenforceable penalty and was valid where (1) it was undisputed that the damages that the parties might reasonably anticipate were difficult to ascertain, and (2) the actual damages amounted to a minimum of 50% of the liquidated damages assessed, the liquidated damages amounted to only 1.5% of the total contract price, and the amount assessed was thus reasonably proportionate to the actual damages incurred.

APPEAL by plaintiffs from *Brannon, Judge*. Judgment entered 6 October 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 19 January 1984.

Moore, Van Allen and Allen, by Arch T. Allen, III and Joseph W. Eason, for plaintiff appellants.

Attorney General Edmisten, by Assistant Attorney General Thomas H. Davis, Jr., for defendant appellee.

BECTON, Judge.

This case involves a challenge, by a general contractor and the surety for a subcontractor on a State highway project, to a Superior Court judgment upholding the Department of Transportation's (DOT's) assessment of liquidated damages from contract retainages. We affirm the judgment.

I

Ledbetter Brothers (Ledbetter) entered into a general contract with the DOT to perform some $3,300,000 in highway renovation. The work was to be completed by 1 December 1977. Part of it involved moving and replacing signs and guardrails. Ledbetter subcontracted the sign and guardrail work to SMS, Inc. (SMS), and, as required by the general contract, SMS provided a performance bond issued by Hartford Accident and Indemnity Company (Hartford) guaranteeing its performance.

The sign and guardrail work was not completed by the contract date, although the highway was open to the public. SMS completed the guardrail work by 5 January 1978, and it relocated and replaced all required signs by 16 February 1978. Shortly after 16 February 1978, the DOT inspected the new and relocated signs and found many of them to be defective and, accordingly, rejected

them. In particular, reflectorized replacement signs were not sufficiently legible at night. At about the same time, SMS defaulted on the work remaining under the subcontract (including replacement and correction of the rejected signs), filed bankruptcy, and abandoned work on the project. Hartford, as surety for SMS, arranged to have the defective work corrected, and the DOT accepted the project on 15 May 1978.

The general contract contained a liquidated damages provision which stipulated damages at a rate of $300.00 per day. Upon final payment to Ledbetter in December 1978, the DOT withheld $49,500.00, representing damages at the contract rate for the 165 days from 1 December 1977 to 15 May 1978. Ledbetter and Hartford sought recovery of the liquidated damages by administrative appeal. The claim was disallowed by the DOT on 20 July 1979. Ledbetter and Hartford then brought the present action in Wake County Superior Court. The trial court, sitting as trier of fact, found the liquidated damages withheld valid and proper, and dismissed the claims, finding that neither party had standing in any event. From this judgment, Ledbetter and Hartford appeal.

II

We first address the standing questions. The trial court found that Ledbetter had assigned its unliquidated claim to Hartford, and that, therefore, Hartford was the real party in interest. It found that such an assignment was void under N.C. Gen. Stat. § 147-62 (1983), the "anti-assignment" statute; that Hartford did not have any subrogation rights against the DOT; and that Hartford, therefore, could not sue the DOT. Apparently because Ledbetter was not the real party in interest, the trial court ruled that Ledbetter's claim should be dismissed. Ledbetter and Hartford complain that this ruling places them in an untenable "catch-22" situation. We agree only as to Ledbetter, and hold that Ledbetter had standing to sue and hence to bring the present appeal.

A.

[1] The contract entered into between Ledbetter and the DOT included by reference the Standard Specifications for Roads and Structures (1972) (SRSS) issued by the North Carolina State Highway Commission, DOT's predecessor. These specifications contain the following provision, SSRS § 108-6:

> The Contractor shall not sublet, sell, transfer, assign, or otherwise dispose of the contract or any portion thereof, or of his right, title, or interest therein, without written consent of the Engineer. . . . The approval of any subcontract will not release the Contractor of his liability under the contract and bonds, nor will the Subcontractor have any claim against the Commission by reason of the approval of the subcontract.

This Court has recently and clearly interpreted this language to mean that had SMS itself remedied the defective work, it would have had no cause of action against the DOT, nor would Ledbetter be entitled to bring such a suit in SMS' behalf, to recover liquidated damages. *Warren Bros. Co. v. Dep't of Transp.*, 64 N.C. App. 598, 307 S.E. 2d 836 (1983). Does Hartford, which remedied the defective work in SMS' behalf as its surety, have a better right?

Hartford argues that having performed in the stead of SMS, it has, by subrogation, a right to proceed against the liquidated damages retained by the DOT. "Subrogation is the substitution of one person in the place of another with reference to a lawful claim or right. . . . A party can acquire no better right by subrogation than that of the principal." *Dowdy v. Southern Ry. Co.*, 237 N.C. 519, 525, 75 S.E. 2d 639, 643 (1953); *see also Employers Mut. Cas. Co. v. Griffin*, 46 N.C. App. 826, 266 S.E. 2d 18, *disc. rev. denied*, 301 N.C. 86 (1980). When Hartford completed the work which SMS had contracted to do, it therefore acquired no cause of action against the DOT. *Warren Bros. Co. v. Dep't of Transp.* As surety for SMS, the defaulting principal, Hartford could also attempt to recover its payments from the estate of the bankrupt. *See generally* 74 Am. Jur. 2d *Suretyship* §§ 168-177 (1974). However, Hartford has shown no authority for its assertion that it is entitled to recover against the DOT itself, and therefore the ruling dismissing its claim was correct.

B.

[2] With respect to the dismissal of Ledbetter's claim, on the other hand, the trial court committed error. The contract between SMS and Ledbetter contained a "hold harmless" clause. Subsequent to the default of SMS, Ledbetter and Hartford entered into an agreement incorporating a similar provision. The trial court apparently confused these provisions with the separate obligation

on the part of SMS and then Hartford to actually complete the work, and ruled that they constituted a void assignment of a claim against the State under G.S. § 147-62 (1983), the "anti-assignment" statute. That statute provides in relevant part:

> All transfers and assignments made of any claim upon the State of North Carolina or any of its departments, bureaus or commissions or upon any State institution or of any part or share thereof or interest therein, whether absolute or conditional and whatever may be the consideration therefor and all powers of attorney, orders or other authorities for receiving payment of any such claim or any part or share thereof shall be absolutely null and void unless such claim has been duly audited and allowed and the amount due thereon fixed and a warrant for the payment thereof has been issued; and no warrant shall be issued to any assignee of any claim or any part or share thereof or interest therein . . . .

The appellate courts of this State have not construed this language to date. However, certain principles are clear. An "assignment" involves a transfer from one to another, usually in exchange for some consideration. *Black's Law Dictionary* 109 (5th ed. 1979); *Morton v. Thornton*, 259 N.C. 697, 131 S.E. 2d 378 (1963). The "hold harmless" agreements did not purport to assign or transfer anything; rather they constituted an indemnity, whereby SMS and later Hartford agreed to assume secondary liability in the event a claim by Ledbetter against the DOT failed. *See New Amsterdam Cas. Co. v. Waller*, 233 N.C. 536, 64 S.E. 2d 826 (1951); 41 Am. Jur. 2d *Indemnity* §§ 3-4 (1968). Neither the record nor the agreement itself suggests that Hartford has actually paid Ledbetter pursuant to the hold harmless agreement. It is elementary that as long as Ledbetter remained unpaid, even in part, it remained a real party in interest, as our courts have uniformly held in indemnity (particularly insurance) cases. *See e.g. Sec. Fire & Indem. Co. v. Barnhardt*, 267 N.C. 302, 148 S.E. 2d 117 (1966); *Taylor v. Green*, 242 N.C. 156, 87 S.E. 2d 11 (1955). We find nothing in the "anti-assignment" statute to change this rule, nor does the policy behind such statutes require that an unpaid indemnitee (Ledbetter) be precluded from bringing its claim. *See United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 94 L.Ed. 171, 70 S.Ct. 207 (1949) (discussing policy of similar federal

statute and allowing claim). Accordingly we hold that Ledbetter did in fact have standing to challenge the DOT's assessment of liquidated damages, and the court's ruling to the contrary was error.

III

We now address the merits of the claim that the damages withheld were unreasonable. Plaintiffs contend that the liquidated damage provision was not intended to apply to the period between substantial performance of the contract and final acceptance, and that the provision is an invalid penalty clause on its face and as applied. The DOT contends that the contract is incomplete until accepted and that the damages withheld are therefore appropriate.

A.

[3] The contract incorporated by reference the Standard Specifications for Roads and Structures (1972) (SSRS) issued by the N.C. Highway Commission, the predecessor to DOT. It provided for liquidated damages as follows, SSRS § 108-11:

> It is mutually recognized that *time is an essential element of the contract,* and that *delay in completing the work will result in damages due to public inconvenience, obstruction to traffic, interference with business, and the increasing of engineering, inspection, and administrative costs to the Commission.* It is therefore agreed that in view of the difficulty of making a precise determination of such damages, a sum of money in the amount stipulated in the contract will be charged against the Contractor for each calendar day that the work remains *uncompleted after the expiration of the completion date,* not as a penalty but as liquidated damages.
>
> Should the Contractor or, in case of default, the Surety fail *to complete the work by the completion date,* a deduction of the amount stipulated in the contract as liquidated damages will be made for each and every calendar day that such contract remains *uncompleted.* This amount will be deducted from any money due the Contractor or his Surety under the contract, and the Contractor and his Surety will be liable for any liquidated damages in excess of the amount due.

> In case of default of the contract and the completion of the work by the Commission, the Contractor and his Surety will be liable for the liquidated damages under the contract, but no liquidated damages will be chargeable for any delay in the final *completion* of the work by the Commission due to any action, negligence, omission, or delay of the Commission.
>
> In any suit for the collection of or involving the assessment of liquidated damages, the reasonableness of the amount stipulated in the contract will be presumed. The liquidated damages referred to herein are intended to be and are cumulative, and will be in addition to every other remedy now or hereafter enforceable at law, in equity, by statute, or under the contract.
>
> Permitting the Contractor to *continue and finish the work* or any part thereof after the expiration of the *completion date* shall in no way operate as a waiver on the part of the Commission of any of its rights under this contract. (Emphasis added.)

Since the terms "completion of work" and "complete" are arguably ambiguous, and since the DOT drafted the contract, plaintiffs contend that any ambiguity should be construed against the DOT. *See Wood-Hopkins Contracting Co. v. State Ports Auth.*, 284 N.C. 732, 202 S.E. 2d 473 (1974). Therefore, they argue the contract requires only substantial performance to preclude assessment of liquidated damages.

This Court must construe the contract as a whole and examine each provision in its proper relation to the others. *Sell v. Hotchkiss*, 264 N.C. 185, 141 S.E. 2d 259 (1965). Upon examination of the contract as a whole, and in light of the public policy involved, we conclude that the contract is clear, that plaintiffs' interpretation is incorrect and that liquidated damages are properly assessable until the time the project is finally accepted. The damages provision takes effect on failure "to complete the work by the completion date." "Work" is defined in the contract as including everything necessary to the "*successful* completion of the project." SSRS § 101-75. (Emphasis added.) "Completion date" is defined as the time by which the work is to be "*satisfactorily* completed." SSRS § 101-16. (Emphasis added.) The contract contains elaborate provisions governing inspection by the DOT. *See*

SSRS § 105-17. Under our law such "satisfaction" provisions clearly invest the inspecting party with discretionary power to reject, subject only to restrictions of good faith. *See Fulcher v. Nelson*, 273 N.C. 221, 159 S.E. 2d 519 (1968); *see also Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E. 2d 410 (1973), *cert. denied*, 284 N.C. 616, 201 S.E. 2d 689 (1974); 5 S. Williston, *Law of Contracts* §§ 675A-B (3d ed. 1961); 17A C.J.S. *Contracts* §§ 494-95 (1963). It would clearly be inconsistent with such discretionary power to interpret the contract so as to deny the DOT the major contemplated means of assuring timely completion of the work in a manner satisfactory to it. The record does not suggest that the DOT has acted in bad faith in any way.

Moreover, the liquidated damages provision itself expressly recognizes that failure to complete the work would result in increased inspection and administrative costs to the DOT. The damages contemplated therefore necessarily included the inspection costs arising *before* final acceptance, even though substantial performance might be complete. The damages provision itself, with the definitions supplied elsewhere in the contract, thus clearly indicates the intent to allow damages up to final acceptance.

Other relevant provisions support this interpretation. The specialty specifications relating to the sign work provide that no part of the project will be accepted until the entire project is ready for final acceptance. The contract specifically called for night inspections to check reflectivity. In the general provisions, final inspection takes place upon "apparent completion," and only if the construction "is found to be satisfactorily completed" will the project be accepted. SSRS § 105-17. On default, the contractor is entitled to payment only for work "satisfactorily completed." SSRS § 108-9(D). Contractors and sureties remain obligated until completion *and* acceptance. SSRS §§ 108-9(F); 108-14. Payment is not due until final acceptance. SSRS § 109-8 to -10.

Aside from their compensatory function, liquidated damages provisions have long been held valid and consistent with public policy as an appropriate means of inducing due performance. *See Robinson v. United States*, 261 U.S. 486, 67 L.Ed. 760, 43 S.Ct. 420 (1923). It would frustrate this policy, and increase the likelihood of inconvenience and danger to the public, to allow disputes over substantial performance to affect such provisions. The intent of

the damages provision is clear and its application proper. Plaintiffs do not contend that the DOT wrongfully delayed acceptance or otherwise contributed to an excessive number of days for which damages were assessed. As a matter both of contract interpretation and of public policy, then, plaintiffs' interpretation of the contract must fail.

B.

[4] Plaintiffs contend that the liquidated damages provision constitutes an unenforceable penalty, both on its face and as applied. A penalty is unenforceable under North Carolina law. *City of Kinston v. Suddreth*, 266 N.C. 618, 146 S.E. 2d 660 (1966). A stipulated damages clause in a highway contract is not *per se* a penalty, however. *See L. A. Reynolds Co. v. State Highway Comm'n*, 271 N.C. 40, 155 S.E. 2d 473 (1967). Such provisions are widely used in construction contracts and have been generally enforced as an appropriate remedy for breach. *See* Annot., 12 A.L.R. 4th 891 (1982). The dispositive test was set forth by our Supreme Court:

> Whether a stipulated sum will be treated as a penalty or as liquidated damages may ordinarily be determined by applying one or more aspects of the following rule: '[A] stipulated sum is for liquidated damages only (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach *or* is reasonably proportionate to the damages which have actually been caused by the breach.'

Knutton v. Cofield, 273 N.C. 355, 361, 160 S.E. 2d 29, 34 (1968) (quoting 22 Am. Jur. 2d *Damages* § 214 at 299 (1965)). The result of the application of this test will also depend on the factual circumstances of each case. *Id.*; Annot., 12 A.L.R. 4th 891, 900 (1982).

It is undisputed that the damages that the parties might reasonably anticipate were difficult to ascertain; in fact, the liquidated damages provision itself contains a recitation to that effect. SSRS § 108-11. Plaintiffs attempt to avoid the operation of this clause by arguing that the multiplicity of potential breaches and the lack of any adjustment mechanism make the liquidated

damages provision invalid. However, the very multiplicity of possible breaches in a large and complex project such as this is what makes damages difficult to ascertain in the first place. Plaintiffs' apparent contention that the DOT may only assess liquidated damages in proportion to the relative value of the breach as against the value of the contract as a whole overlooks this fundamental rationale for liquidated damages provisions, and if implemented would serve only to foster additional wasteful litigation. Moreover, the dollar amount of liquidated damages is set by a separate stipulation not contained in the pre-printed SSRS. There is no suggestion that this figure was arrived at by unfair means, or that it does not represent part of the bargained-for contract. We conclude that the first prong of the *Knutton* test has been satisfied.

Accordingly, if either (1) the amount stipulated was a reasonable estimate of damages *or* (2) it was reasonably proportionate to the actual damages, the second prong of the *Knutton* test was also satisfied. The DOT presented evidence that the delay had caused it to incur $44,837.36 in additional costs. This figure very closely approximates the $49,500.00 in liquidated damages actually withheld. Plaintiffs argue that certain portions of the alleged actual damages represented costs that would have been incurred anyway, and that a breakdown by periods indicates that overcharges of up to 90% resulted for certain months of the delay period. No precise mathematical formula exists for determining what is "reasonably proportionate;" the following language of our Supreme Court is instructive:

> [I]t is the general rule that the amount stipulated in a contract as liquidated damages for a breach thereof, if regarded by the court as liquidated damages and not as a penalty, may be recovered in the event of a breach *even though no actual damages are suffered.* [Citations omitted.] Unless the provision for liquidated damages be regarded as a penalty and unenforceable, the effect of such clause in a contract 'is to substitute the amount agreed upon as liquidated damages for the actual damages resulting from breach of the contract, and thereby [prevent] a controversy between the parties as to the amount of damages. . . . [T]he sum stipulated forms, in

general, the measure of damages in case of a breach, and the recovery must be for that amount.'

Knutton v. Cofield, 273 N.C. at 362-63, 160 S.E. 2d at 35-36 (quoting 22 Am. Jur. 2d *Damages* § 235 at 321 (1965)) (emphasis added); *see also* Restatement (Second) of Contracts § 356 comments a and b (1981); Annot., 12 A.L.R. 4th 891, 936-48 (1982). These authorities indicate that the disproportion must be such as to shock the judicial conscience for a penalty to be found. In applying this test, the value of the contract as a whole also bears on the question of proportion. *Id.* In this case, even if we accept plaintiffs' arguments concerning actual damages as true, they still amounted to at least 50% of the liquidated damages assessed; the liquidated damages themselves amounted to only approximately 1.5% of the total contract price. Accordingly, the second prong of the *Knutton* test was satisfied, since the amount assessed was reasonably proportionate to the actual damages incurred. We must therefore further conclude that the trial court did not err in ruling that the liquidated damages clause was valid as written and applied, and that the DOT's assessment was entirely proper. *Knutton v. Cofield.*

IV.

In conclusion, although the trial court ruled incorrectly on Ledbetter's standing to sue, that error did not affect its order on the merits. The judgment appealed from is therefore

Affirmed.

Judges ARNOLD and WHICHARD concur.

FRED J. STANBACK, JR. v. WESTCHESTER FIRE INSURANCE COMPANY

No. 8319SC551

(Filed 1 May 1984)

1. Insurance § 149— "umbrella policy"—duty of defendant to defend on plaintiff's behalf in legal action

The trial court properly concluded that a complaint filed by plaintiff's former wife in another action in which she sought to recover damages for per-

sonal injury within was the coverage afforded by the defendant's policy, and that the defendant was required to provide a defense for plaintiff in that action where (1) defendant issued to plaintiff a comprehensive catastrophe liability policy known as an "umbrella policy"; (2) under the policy defendant had a duty to pay the net loss in excess of the retained limits which plaintiff became liable for when his actions caused personal injury; (3) defendant had a duty to "[d]efend any suit against the insurer alleging such injury or damage and seeking damages . . . even if such suit is groundless, false or fradulent . . ."; and (4) the bare allegations of plaintiff's former wife's complaint seeking damages for mental anguish and anxiety and for abuse of process were enough to bring the complaint within defendant's duty to defend on plaintiff's behalf.

2. Evidence § 22.1— deposition taken from another case—properly admitted

There was no error in the trial court's making findings of fact based upon the deposition taken in another action arising from the same subject matter where prior to the trial of this action the parties agreed to a stipulation which included the *entire contents* of the court file for the prior case and the deposition was part of the file.

3. Insurance § 149— "umbrella policy"—inclusion and exclusion provisions of policy creating ambiguity—resolved in favor of plaintiff

Where an exclusion provision in an insurance policy tended to exclude intentional torts from coverage but the policy defined "personal injury" to include the intentional torts of false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution, and libel and slander, there was an ambiguity in the policy, and given the construction most favorable to the insured, the policy did not exclude intentional infliction of mental anguish and malicious prosecution from its coverage.

4. Insurance § 149— excess liability policy—underlying insurance not covering plaintiff's claim

The underlying insurance policies which plaintiff was required to retain included standard automobile liability and homeowners policies; therefore, the court did not err in finding that the intentional tort claims which plaintiff sought defendant to defend were not covered by the underlying insurance plaintiff had in effect.

5. Insurance § 149— duty to defend not terminating upon Supreme Court decision in parent action

There was no merit to defendant's argument that its duty to defend terminated upon the entry of the Supreme Court opinion in the parent action since the Court found that plaintiff's wife's allegations were sufficient to permit her to go to trial upon questions of whether great mental anguish and anxiety caused her physical injury and since defendant's insurance policy clearly provided coverage for personal injury caused by mental anguish and mental anxiety.

6. Insurance § 149— excess liability insurance policy—failure to defend—interest properly awarded on judgment

When recovery is had for breach of an insurance contract and the amount of recovery is ascertained from relevant evidence, such as billing dates for

services rendered by lawyers, interest should be, and was properly, added to the recovery from the date of the breach.

7. **Appeal and Error § 24.1— failure to preserve issue by cross-appeal—cross-assignment of error ineffectual**

Plaintiff's attempt to raise the question of whether the court erred by its failure to award him attorney's fees in the present action was ineffectual since the proper method to have preserved this issue for review would have been to cross-appeal. App. Rule 10(d).

APPEAL by defendant from *Wood, William Z., Judge.* Judgment entered 23 December 1982 in ROWAN County Superior Court. Heard in the Court of Appeals 3 April 1984.

On 10 December 1972, defendant issued to plaintiff a comprehensive catastrophe liability policy known as an "umbrella policy." The policy was renewed on 10 December 1975 and was effective through 10 December 1978. The policy obligated defendant to pay plaintiff's liability for personal injury or property damage and to defend any suit alleging such injury or damage, including the duty to defend even if the suit was groundless, false or fraudulent. The policy excluded from coverage acts committed by or at the direction of the insured with the intent to cause personal injury or property damage.

On 14 January 1976, Vanita B. Stanback, plaintiff's former wife, filed an action in Rowan County Superior Court alleging that plaintiff had breached that part of their separation agreement wherein he agreed to reimburse her for any taxes she was required to pay because of his payment of her attorneys' fees; that as a result of this breach of contract she suffered mental anguish and anxiety because of the Internal Revenue Service's attempts to collect taxes allegedly due because of the payment of the fees, including filing a tax lien against her property; and that as a result of plaintiff's failure to pay the taxes, she was required to pay taxes and interest and also suffered $250,000.00 worth of consequential damages. She sought $100,000.00 in punitive damages.

In count two of the action, Mrs. Stanback alleged that a prior federal action, instituted by plaintiff against her and the government, to require her to seek a refund of the taxes she paid on the attorney fee payment was, malicious, wrongful and unjustified so as to constitute an abuse of process. She alleged that due to the

federal action she incurred legal expenses and suffered embarrassment, humiliation and mental anguish and sought an additional $100,000.00 on account of these damages.

When plaintiff notified defendant of Mrs. Stanback's suit, defendant declined to defend him. The reason given for the refusal was that the "complaint allegations do not fall within the scope of an 'occurrence' and therefore would not be covered under the policy." After being asked to reconsider, defendant agreed that the policy did not contain a definition of occurrence but it still refused to defend on the ground that the complaint's allegations fell within policy exclusion (e) which barred from coverage "acts committed by or at the direction of the insured with intent to cause personal injury or property damage."

In the parent action, plaintiff, represented by counsel obtained at his expense, moved to dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure. The trial court granted the motion with respect to all the allegations except the breach of contract claim. Mrs. Stanback appealed to this court, which affirmed the trial court's judgment in *Stanback v. Stanback*, 37 N.C. App. 324, 246 S.E. 2d 74 (1978), *aff'd in part and rev'd in part*, 297 N.C. 181, 254 S.E. 2d 611 (1979). The Supreme Court affirmed this court's decision regarding the abuse of process claim and held that count one stated a claim for intentional infliction of emotional stress and for punitive damages.

On remand, the Superior Court ultimately granted summary judgment against Mrs. Stanback on all the counts. That judgment was affirmed by this court in *Stanback v. Stanback*, 53 N.C. App. 243, 280 S.E. 2d 498, *disc. rev. denied*, 304 N.C. 197, 285 S.E. 2d 101 (1981).

On 7 November 1977, plaintiff filed this action, alleging that defendant had a duty to defend him in the parent action. The matter was heard before Judge William Z. Wood, sitting without a jury. Based upon extensive findings of fact, Judge Wood concluded that defendant had a duty to defend plaintiff in the parent action, and that plaintiff was entitled to recover the money he had expended for attorney fees in defense of that action. The judgment also awarded plaintiff interest. From the entry of the judgment, defendant appealed.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by George L. Little, Jr. and Robert J. Lawing, for plaintiff.

Henson & Henson, by Perry C. Henson and Paul D. Coates, for defendant.

WELLS, Judge.

[1] Defendant in its first argument contends "[t]he trial court committed reversible error in concluding that the complaint filed by Mrs. Stanback in the parent action sought to recover damages for personal injury within the coverage afforded by the defendant's policy, and that the defendant was required to provide a defense for . . . [plaintiff] in the parent action." The policy which is the subject of this action contained the following pertinent provisions:

I. COVERAGE–

To pay on behalf of the insured the ultimate net loss in excess of the retained limit which the insured shall be legally obligated to pay:

(a) Personal Liability. As damages because of personal injury or property damage;

. . .

II. DEFENSE-SETTLEMENT-COVERAGE I. (a)–

With respect to any occurrence not covered by the underlying policies or insurance described in Schedule A hereof or any other underlying insurance available to the insured, but covered by the terms and conditions of this policy except for the amount of the retained limit specified in Item 4(D) of the declarations, the company shall:

(a) Defend any suit against the insured alleging such injury or damage and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;

. . .

This policy shall not apply, with respect to coverage 1(a):

. . . (e) to any act committed by or at the direction of the insured with intent to cause personal injury or property damage:

. . .

(b) "Personal injury" means:

(1) Bodily injury, sickness, disease, disability, shock, mental anguish and mental injury;

(2) False arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution or humiliation;

(3) Libel, slander, defamation of character, or invasion of right of privacy; and

(4) Assault and battery not committed by or at the direction of the insured, unless committed for the purpose of preventing or eliminating danger in the operation of automobiles or watercraft or for the purpose of protecting persons or property;

. . .

Defendant contends that it "did not owe a duty to the plaintiff to defend the lawsuit by Vanita Stanback since her complaint did not allege a cause of action which was covered by the terms of the policy, and since the defendant could not be legally obligated to pay . . . for the damages claimed by Mrs. Stanback for such 'personal injury.'" Defendant bases this contention on the fact that our Supreme Court found that count two of the parent action lacked the substantive elements of a claim for malicious prosecution and that count one only alleged a cause of action for breach of contract, and punitive damages for emotional distress. Defendant argues that its duty to defend did not arise because even if all the facts alleged in the complaint were true Mrs. Stanback could not have recovered any damages for which defendant would have been liable. We disagree.

The insurance policy issued to the plaintiff imposed two duties on defendant. First, defendant had a duty to pay the net loss in excess of the retained limits which plaintiff became liable for when his actions caused personal injury. Secondly, defendant had a duty to "[d]efend any suit against the insured alleging such

injury or damage and seeking damages . . . even if such suit is groundless, false or fraudulent. . . ." Justice Lake writing for our Supreme Court in *Insurance Co. v. Insurance Co.*, 269 N.C. 358, 152 S.E. 2d 513 (1967) explained the differences between these duties:

> Each of the plaintiffs, by its policy, contracted with Jerry Denning to do two different things. First, it contracted to pay on his behalf all sums for the payment of which he became legally liable, because of bodily injury sustained by any person arising out of the use of an automobile not owned by him, to the extent that such liability exceeded other valid and collectible insurance and did not exceed the limit fixed by its policy. Second, it contracted to defend, at its expense, on his behalf, any suit, even though groundless, brought against him, alleging such bodily injury and seeking damages payable under the terms of the policy.
>
> It will be observed that *the first of these undertakings requires that plaintiff company to step into the shoes of Jerry Denning* and pay a sum for the payment of which he became liable. *The second undertaking is not of that nature.* In the performance of it *the company does not step into the shoes of the policyholder. Its liability under that undertaking is not contingent upon the existence of a liability on his part,* and its performance of that undertaking does not impose any liability upon him. *That undertaking is absolute.*

(Emphasis added.)

We hold that the bare allegations of Mrs. Stanback's complaint seeking damages for mental anguish and anxiety and for abuse of process because the federal action was commenced "maliciously, wrongfully . . . and without probable cause" were enough to bring the complaint within defendant's duty to defend on plaintiff's behalf. Defendant in support of its contention that there was no duty to defend points to the outcome of the parent action. Defendant argues because the Supreme Court determined that there was no viable claim for malicious prosecution and only an action for the intentional infliction of mental anguish, defendant had no duty to defend the action.

We find no merit in this argument. Mrs. Stanback was clearly attempting to recover for malicious prosecution and physical in-

jury brought about by mental anguish. These torts are within the coverage of defendant's policy; therefore, even though it was later determined that the suit was groundless under the terms of the policy and the law of this state, defendant nevertheless had a duty to defend.

[2] In its next argument, defendant contends the court erred "in making findings of fact based upon the deposition taken August 5th 1980 of Mrs. Stanback in the parent action." Prior to the trial of this action the parties agreed to the following stipulation:

> 15. Plaintiff Stanback has been required to employ counsel at his own expense, to defend the action instituted by his former wife in the Superior Court of Rowan County, 76CVS36, and has incurred legal expenses and costs to date as set forth in the attached affidavits which are incorporated herein by reference. With regard to the proceedings and defense efforts required, the parties stipulate the entire contents of the court file in the case 'Vanita B. Stanback, plaintiff vs. Fred J. Stanback, Jr., defendant' 76CVS36.

Defendant argues that since the deposition was taken following the original Supreme Court decision it should not be considered, and that even if the deposition was timely it was not within the stipulation of the parties. We interpret the stipulation to clearly include the *entire contents* of the court file for 76CVS36. The deposition was a part of this file and was therefore properly before the trial court. The deposition is consistent with the allegations of the complaint. We find no error in the court's use of the deposition.

[3] In its third argument, defendant contends the court erred by failing to find that exclusion (e) of the policy excluded the parent action from the coverage of the policy. Defendant argues that this exclusion "would prevent liability for personal injury which is the result of intentional acts."

In North Carolina exclusions from coverage under insurance policies are to be strictly construed. *Insurance Co. v. Insurance Co.*, 269 N.C. 341, 152 S.E. 2d 436 (1967); *see also Industrial Center v. Liability Co.*, 271 N.C. 158, 155 S.E. 2d 501 (1967). In this case the policy defined "personal injury" to include false arrest, false imprisonment, wrongful eviction, wrongful detention,

malicious prosecution, libel and slander. These are clearly intentional torts. This definition when read in conjunction with exclusion (e), which purportedly attempts to exclude intentional torts creates an ambiguity in the policy. Our Supreme Court has held that when language is used in an insurance policy which is reasonably susceptible of differing constructions, it must be given the construction most favorable to the insured, since the insurance company prepared the policy and chose the language. *See Grant v. Insurance Co.*, 295 N.C. 39, 243 S.E. 2d 894 (1978). In this case, the apparent conflict between coverage and exclusion must therefore be resolved in favor of plaintiff, and we therefore reject defendant's argument that Mrs. Stanback's allegations regarding intentional infliction of mental anguish and malicious prosecution are excluded from coverage by exclusion (e).

[4] Next defendant contends that since its policy was an excess liability policy which required plaintiff to keep certain underlying insurance in effect, the court erred by failing to find that these policies covered Mrs. Stanback's claim and that defendant, therefore, was not liable. The underlying insurance policies which plaintiff was required to retain included standard automobile liability and homeowner policies. Their coverages were not designed to protect plaintiff from this type of liability. The trial court's determination that they did not terminate defendant's duty to defend was correct.

[5] Next defendant argues that even if there was an original duty to defend that the duty terminated upon the entry of the order by Judge Rousseau on 15 April 1977 or upon the filing of the Supreme Court opinion in *Stanback v. Stanback*, 297 N.C. 181 *supra*, its duty ceased because the only causes of action which remained were for breach of contract and punitive damages which were not covered by the policy. Defendant is apparently misinterpreting the opinion. In *Stanback* the Supreme Court said "[p]laintiff's allegations are sufficient to state a claim for what has become essentially the tort of intentional infliction of serious emotional distress." The court further said "[a]lthough it is clear that plaintiff must show some physical injury resulting from the emotional disturbance caused by [plaintiff's] alleged conduct, . . . we think her allegation that she suffered great mental anguish and anxiety is sufficient to permit her to go to trial upon the question of whether the great mental anguish and anxiety . . . has caused

physical injury." *Id.* Since the insurance policy clearly provides coverages for personal injury caused by mental anguish and mental anxiety defendant's duty to defend the action continued to the conclusion of the litigation. We therefore reject this argument.

[6] Defendant next contends that the trial court erred in awarding interest on the judgment because "the record in this case fails to reveal what amounts were incurred on what dates and it would be impossible to determine when it is to accrue on these amounts." We cannot agree.

When recovery is had for breach of an insurance contract and the amount of recovery is ascertained from relevant evidence, interest should be added to the recovery from the date of the breach. *Wilkes Computer Services v. Aetna Casualty & Surety Company,* 59 N.C. App. 26, 295 S.E. 2d 776 (1982), *disc. rev. denied,* 307 N.C. 473, 299 S.E. 2d 229 (1983). Plaintiff's lawyers billed him on several dates for services rendered. From such billings, interest due plaintiff could be properly computed, and we therefore overrule this assignment of error.

In its seventh argument, defendant contends the court erred by finding that defendant had provided plaintiff a defense to Mrs. Stanback's counterclaim in the federal action which contained substantially similar allegations to count one of the parent action. The complaint in this action and the federal counterclaim are included as part of the record. We have carefully examined them and believe that the trial court's finding of fact was correct. This argument is without merit.

Finally, defendant contends the court erred by the entry of the judgment. As a basis for this contention defendant realleges the arguments, assignments of error and exceptions previously presented and we find no merit in this assignment.

[7] Plaintiff, by a cross-assignment of error, attempts to raise the question of whether the court erred by its failure to award him attorney's fees in this action. Rule 10(d) of the North Carolina Rules of Appellate Procedure provides:

> (d) Exceptions and Cross Assignments of Error by Appellee. Without taking an appeal an appellee may set out exceptions to and cross-assign as error any action or omission of the trial court to which an exception was duly taken or as to

which an exception was deemed by rule or law to have been taken, and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Portions of the record necessary to an understanding of such cross-assignments of error may be included in the record on appeal by agreement of the parties under Rule 11(a), or may be included by the appellee in a proposed alternative record on appeal under Rule 11(b).

Because plaintiff's cross-assignment of error does not present an alternative basis upon which to support the judgment, the question argued therein is not properly before this court. The proper method to have preserved this issue for review would have been a cross-appeal. Plaintiff's cross-assignment of error is overruled.

No error.

Judges ARNOLD and BRASWELL concur.

STATE OF NORTH CAROLINA v. OGER CUNNINGHAM

No. 8326SC196

(Filed 1 May 1984)

1. Criminal Law § 86.5— questioning concerning "another robbery"—good faith basis

In a prosecution for armed robbery, a good faith basis existed for inquiry on cross-examination of the defendant about two other robberies where defense counsel stipulated there was a good faith basis for questioning defendant concerning one of the robberies, and where the record revealed that both offenses, as well as the offense for which defendant was being tried, occurred in the same geographic area between 9:30 and 11:30 p.m. on the same night; the defendant was identified as the perpetrator of the other two robberies; the perpetrator of the unstipulated robbery fit the general description of defendant; in all three robberies, the perpetrator first engaged the victims, who were working, in seemingly innocent conversation prior to pulling a gun on them; and, in the two robberies that were not the present prosecution, the perpetrator asked the victims about a job prior to robbing them.

2. Criminal Law § 34.5— evidence of other offense—properly admitted to establish identity

In a prosecution for armed robbery, the trial court did not err in allowing the State to introduce evidence during the rebuttal stage of the trial tending to show that defendant committed another robbery where identity of the defendant was in issue, and where there was great similarity between the robbery for which defendant was being tried and the other robbery.

Judge BECTON dissenting.

APPEAL by defendant from *Sitton, Judge.* Judgment entered 10 September 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 25 October 1983.

Defendant was charged in a proper bill of indictment with armed robbery. The jury returned a verdict of guilty as charged, and the court sentenced defendant to a prison term of 26 years, a term exceeding the presumptive sentence fixed by N.C. Gen. Stat. Sec. 14-87. Defendant appealed.

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

Assistant Appellate Defender Nora B. Henry for defendant, appellant.

HEDRICK, Judge.

[1] Defendant first contends that the trial court erred in permitting the State to cross-examine him about "another robbery," arguing that such questioning "exceeded the scope of permissible cross-examination and [was without] good faith basis."

> It has long been the rule that where a defendant in a criminal case testifies in his own behalf, specific acts of misconduct may be brought out on cross-examination to impeach his testimony. [Citations omitted.] Such "cross-examination for the purpose of impeachment *is not limited to conviction of crimes.* Any act of the witness which tends to impeach his character may be inquired about or proven by cross-examination." *State v. Sims,* 213 N.C. 590, 197 S.E. 176 (1938). Although a defendant may not be asked if he has been accused, arrested or indicted for a particular crime, *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971), he may be asked if he in fact committed the crime.

State v. Mack, 282 N.C. 334, 341-42, 193 S.E. 2d 71, 76 (1972). The purpose of permitting disparaging questions concerning collateral matters relating to a defendant's criminal and degrading conduct is to allow the jury to consider the defendant's acts and conduct in weighing his or her credibility. The testifying defendant is not without some protection, however, since the questions must concern a specific, identifiable act of defendant, *State v. Dawson*, 302 N.C. 581, 276 S.E. 2d 348 (1981), and "the questions asked by the prosecutor must be based on information and must be asked in good faith." *State v. Pilkington*, 302 N.C. 505, 510, 276 S.E. 2d 389, 393, *cert. denied*, 454 U.S. 850 (1981). Defendant bears the burden of showing bad faith. *State v. Dawson*, 302 N.C. 581, 276 S.E. 2d 348 (1981).

The questioning alleged by defendant to have been improper appears in the transcript as follows:

> Q. On the night of May 27, 1982, Mr. Cunningham, didn't you rob Michael Boyles at the Axton-Cross Company at 9:30 that evening on Service Road in Charlotte?
>
> MR. RAWLS: OBJECTION.
>
> THE COURT: OVERRULED.
>
> MR. RAWLS: OBJECTION.
>
> THE COURT: OVERRULED.
>
> A. No, ma'am.
>
> Q. Earlier that evening on that very same date, isn't it true, Mr. Cunningham, that you robbed William Galloway on North Graham Street in Charlotte by asking him first about a job and pulling a gun on him and later firing that gun in a struggle with him?
>
> A. No, ma'am.
>
> MR. RAWLS: OBJECTION.
>
> THE COURT: OVERRULED.

Following this interchange, the court conducted a *voir dire* on the question of the State's good faith basis for inquiring about the Galloway robbery and found as a fact that such good faith basis existed. In regard to the Boyles robbery, the transcript contains

the following statement by defense counsel: "I will stipulate that in the Boyles case there is a good-faith basis for asking that question." We thus turn our attention to the narrow question whether defendant has sustained his burden of showing that the State did not act in good faith in asking defendant for impeachment purposes whether he robbed William Galloway.

The State's argument, which we find persuasive, is that a good faith basis for inquiry about the Galloway robbery may be found in its significant similarities to the Lazinsky robbery, with which defendant was charged. The record reveals that both offenses, as well as the Boyles robbery, occurred in the same geographic area between 9:30 and 11:30 p.m. on the same night; the defendant was identified as the perpetrator of the other two robberies; the perpetrator of the Galloway robbery fit the general description of defendant; in all three robberies, the perpetrator first engaged the victims, who were working, in seemingly innocent conversation prior to pulling a gun on them; and, in the Galloway and Lazinsky robberies, the perpetrator asked the victims about a job prior to robbing them. We think this information was ample to provide the State with a good faith basis for asking defendant whether he in fact committed the Galloway robbery. While, as Professor Brandis points out, "the unconvicted defendant [is unlikely to] admit the criminal acts charged," 1 Brandis on North Carolina Evidence Sec. 112, n. 61 (1982), this common sense observation in no way changes the well-established law of this State. The assignment of error is without merit.

[2] Defendant next contends that the court erred in allowing the State to introduce evidence during the rebuttal stage of the trial tending to show that defendant committed the Boyles robbery. Defendant argues that extrinsic evidence of other crimes is not admissible for impeachment purposes, and that such evidence was inadmissible for any other purpose.

It is true, as defendant states, that extrinsic evidence of prior bad acts is not admissible for the purpose of contradicting defendant's denial of such acts on cross-examination. *State v. Robinette*, 39 N.C. App. 622, 251 S.E. 2d 635 (1979). The rule regarding substantive use of prior offenses is equally clear, and is set out in *Brandis* as follows: "Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the

character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime." 1 Brandis on North Carolina Evidence Sec. 91 (1982). Because we believe the challenged evidence was properly admitted as tending to prove the disputed issue of identity, we find no error.

Our decision in this regard finds support in the decisions of our Supreme Court in *State v. Freeman*, 303 N.C. 299, 278 S.E. 2d 207 (1981) and *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982). In both *Freeman* and *Leggett* the Court upheld the admission of evidence tending to show that defendant therein committed another separate offense as bearing on identity in the case being tried, where identity was a disputed issue in the case. In our view, the similarities between the Boyles and Lazinsky robberies were even greater and more substantial than the similarities of the offenses in *Leggett*. In *Leggett*, each victim had identified the defendant as her assailant. Although the *Leggett* Court said nothing about any similarity of the descriptions of the assailant, the Court had this to say about the similarity of the manner in which the attacks occurred:

> The accounts by Miss Martin and Miss Mosely of the attacks against them revealed many similarities in the manner in which each of them was attacked, even though the attacks occurred one month apart. In each case the perpetrator came from a parking area in the vicinity of a church and grabbed a teenage woman on the public streets. In each case the perpetrator held a knife on the victim and proceeded to drag her to a secluded area from which he had more than one route of escape. The manner in which the perpetrator in each situation exposed himself to the young woman while holding a knife on her as well as the manner of his demands that they commit sexual acts with him were substantially the same.

Id. at 224, 287 S.E. 2d at 839. The Supreme Court's conclusion in *Leggett*—"If the evidence complained of tended to show that the attack on Miss Martin and another offense were committed by the same person, evidence that the defendant committed the other offense was admissible to identify him as Miss Martin's attacker,"

id. at 223, 287 S.E. 2d at 838—compels the same result in this case.

We summarily reject defendant's final arguments concerning his sentence. First, there has been no showing by defendant that the trial court considered the defendant's potential release date or elements of the offense for which defendant was charged in sentencing defendant. Second, our Supreme Court's decision in *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983), rejects and disposes of defendant's contention that the State is obligated to prove defendant's non-indigency or representation by counsel at the time of prior convictions.

For the reasons stated above, we find

No error.

Judge ARNOLD concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

The two substantive issues on appeal are (1) whether the State had sufficient information of defendant's involvement in, and a good faith basis for asking defendant if he committed, a second armed robbery in Charlotte on the night in question; and (2) whether the State's rebuttal evidence—that defendant committed a third armed robbery in Charlotte on the night in question—was properly admitted, considering defendant's denial of the third armed robbery on cross-examination. Believing that both issues should be answered in the negative, I dissent.

I

Before discussing the substantive issues on appeal, a summary of the evidence regarding the three separate robberies that took place within the same geographical area of Charlotte between 9:30 and 11:30 p.m. on 27 May 1982 seems to be in order.

A. The Michael Boyles Robbery

Michael Boyles made a delivery of goods to the Axton-Cross Company in the Industrial Park on Service Street in Charlotte on

the night of 27 May 1982. As Boyles backed his truck to the dock between 9:00 and 9:30 p.m., a man approached and asked directions to North Tryon Street. Boyles told the man he would give him directions when he had finished backing up. Boyles testified:

> When I got up to the dock, I stopped, and I got ready to get out of the truck. When I stooped down on the ground with my back toward him, and he pulled the pistol out on me and told me to throw my wallet out on the ground.

After seeing the chrome revolver, Boyles threw his wallet on the ground and backed up. The man grabbed the wallet and ran away.

Boyles, five days later, picked out defendant's picture from a photographic array shown him by Officer S. L. Mullis. Boyles had previously described his assailant to police as being a 5'10", 170 pound black male with short to medium hair, approximately 23 to 26 years old, wearing a burgundy hat, a light blue tank top, dark blue shorts, and white tennis shoes.[1]

After this case (the Lazinsky case) was appealed, defendant was tried for robbing Michael Boyles. A Mecklenburg County jury found defendant not guilty of robbing Boyles.

B. The William Galloway Robbery

In the absence of the jury (no formal *voir dire* hearing was held), the assistant district attorney made the following statements to the trial court concerning the Galloway robbery.

> On the same date, May 27, a victim, William Galloway at 2731 North Graham Street, made a complaint at . . . 10:00 in the evening, that he had been robbed at gunpoint by a young black male, approximately five feet seven inches, weighing approximately 135 pounds. [I]n the course of the incident, he asked about a job at the place where Mr. Galloway was working, and that he had a handgun in his possession at the time, and that Mr. Galloway and the robber tussled, and the gun was fired.

1. At the time of the robberies, defendant, Oger Cunningham, was 21 years old, 5'9½" tall and weighed approximately 150 pounds.

Although the record does not reflect the exact distance, 2731 North Graham Street is in the same geographical area of Charlotte as the Axton-Cross Company.

Galloway described his assailant to the police as being a black male "approximately five/seven, weighed about 135 pounds, somewhere around 17 or 19 years of age, I believe, with short hair." Officer Mullis testified on *voir dire* that Mr. Galloway "was reluctant as to whether he could or he could not" identify anybody. Mullis also testified that Galloway did not pick defendant out of the line-up.

No charges were brought against defendant as a result of the armed robbery of Mr. Galloway.

C. The Neil Lazinsky Robbery

Neil Lazinsky was robbed while working at the DeLuca Valve Company on Ashbury Avenue in Charlotte. The DeLuca Valve Company is three to four blocks away from the Axton-Cross Company. As Lazinsky was working about 11:00 p.m. on 27 May 1982, he saw a man standing inside the garage door of the shop. The man inquired about the possibility of a job and then asked directions to North Tryon Street. After Lazinsky opened the door to let the man out, the man pointed a gun at Lazinsky's head and told him to empty his pockets or he would blow his brains out. Lazinsky did as he was told, backed inside the building, and closed and locked the door.

Lazinsky identified the defendant as the man who robbed him, describing him as a black male, about five feet seven inches tall, early- to mid-twenties, weighing 170 to 175 pounds, with a gold ball pierced earring in one ear. Lazinsky identified defendant from the same photographic array that Boyles had used to identify the defendant.

II

Because Michael Boyles identified defendant as the person who robbed him on 27 May 1982, defense counsel conceded at trial that the prosecutor had a good faith basis for asking defendant if

he in fact robbed Michael Boyles.[2] Because William Galloway *could not identify defendant* as the perpetrator of the robbery on him, and because *the State never charged defendant with the Galloway robbery*, the defendant argues that the prosecutor had no basis, other than her own speculation, for belief that defendant was the man who committed the Galloway robbery. I agree with defendant.

Questions relating to a defendant's criminal and degrading conduct must concern a specific, identifiable act of defendant, *State v. Dawson*, 302 N.C. 581, 276 S.E. 2d 348 (1981), and "the questions asked by the prosecutor *must be based on information* and must be asked in good faith." *State v. Pilkington*, 302 N.C. 505, 510, 276 S.E. 2d 389, 393, *cert. denied*, 454 U.S. 850, 70 L.Ed. 2d 140, 102 S.Ct. 290 (1981) (emphasis added). As evidence that the *Pilkington* Court was referring to two separate requirements when it said that the questions asked by the prosecutor *must be based on information* and must be asked in good faith, one need look no further than the next two sentences in *Pilkington*, which read: "In the instant case, defendant does not contend that the prosecutor acted in bad faith. Furthermore, it does not appear that the prosecutor lacked sufficient information upon which to base her questions on cross-examination." 302 N.C. at 510, 276 S.E. 2d at 393.

That the prosecutor *believed* that defendant was the person who robbed Galloway is not enough. Her belief did not satisfy the test imposed by *Pilkington*. Speculation, conjecture and surmise are not sufficient, given the strictures imposed by our case law, which refers to specific, identifiable acts of misconduct.

Further, because the defendant denied committing the robbery in this case (the Lazinsky robbery), and also denied committing the robbery in the Boyles case, knowing that witnesses had identified him as the perpetrator of both robberies, the prosecutor had little hope that defendant would admit to robbing Galloway when no one had identified him as the perpetrator and when he had not been charged with that offense. The questions asked in this situation could give the jury the impression that the

2. Defendant does argue, and I address the argument in Part III, *infra*, that the State could not impeach defendant by extrinsic evidence once defendant said, on cross examination, that he did not commit the Boyles robbery.

prosecutor had knowledge of facts to support the insinuations. Or, as stated by Professor Brandis: "Further, seldom, if ever, will the prosecutor anticipate that the unconvicted defendant will admit the criminal acts charged. Trial by insinuation is the compelling motive for the inquiry." 1 H. Brandis, *North Carolina Evidence* § 112 n. 61, at 418 (2d rev. ed. 1982).

In my view, it was error, given the facts of this case, for the prosecutor to question defendant about the Galloway robbery.

III

Defendant also contends that the trial court erred in admitting evidence of, and instructing the jury on, the Boyles robbery, because (1) the State was thereby allowed to refute defendant's denial of the robbery on cross-examination by extrinsic evidence; and (2) the evidence was not competent for any other purpose. Again, I agree.

The trial court, evidently relying on *State v. Freeman*, 303 N.C. 299, 278 S.E. 2d 207 (1981), and *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982), admitted the challenged evidence for the purpose of identification and not to rebut the defendant's denial that he committed the robbery. Our Supreme Court has also said, however, that the probative effect of evidence is sometimes outweighed by its prejudicial impact. *See State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982). Such is the case here. Generally, in a prosecution for a particular crime, the State cannot introduce evidence tending to show that the defendant committed another separate offense. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). However, there are eight exceptions to the general rule enumerated in *McClain*. Exception No. 4 reads:

> (4) Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged. [Citations omitted.]

Id. at 175, 81 S.E. 2d at 367.

I am aware that the *McClain* Court nowhere sought to define or explain what it meant by its use of the words "definitely iden-

tified" in exception No. 4—the identification exception—to the general rule, and that the Supreme Court's subsequent decisions in *Leggett* and *Freeman* may have effectively read "definitively" out of the exception.[3] But that, of course, is the Supreme Court's prerogative. However, neither *Freeman* nor *Leggett ipso facto* compel the same reult in this case.

As indicated, on the facts of this case, it was error for the State to cross-examine defendant about an alleged robbery of Galloway. Further, I have also noted—what is now known from hindsight, but which the trial court did not know—that defendant was subsequently acquitted of the Boyles robbery. Separate and apart from those considerations, however, is the law's recognition that the prejudicial impact of some evidence outweighs its probative force. In *State v. Shane*, our Supreme Court would not let the State rely upon the "common scheme or plan" exception for admission of its evidence about defendant Shane's commission of a similar sexual offense, fellatio, with a prostitute in Fayetteville to get around the general rule that evidence of a distinctly separate criminal offense is inadmissible. The *Shane* Court said:

> [T]he facts of each case ultimately decide whether a defendant's previous commission of a sexual misdeed is peculiarly pertinent in his prosecution for another independent sexual crime. In addition, it must affirmatively appear that the probative force of such evidence outweighs the specter of undue prejudice to the defendant, and, in close cases, fundamental fairness requires giving defendant the benefit of the doubt and excluding the evidence. [Or, as it is more descriptively said in the game of baseball, the tie must go to the runner.]

304 N.C. at 654, 285 S.E. 2d at 820.

3. In both *Freeman* and *Leggett* our Supreme Court allowed evidence tending to show that the defendant therein committed another separate offense as bearing on identity in the case being tried, even though the defendant had been positively identified as the perpetrator of the crime charged. After referring to the identification exception in *McClain*, the *Freeman* Court, without further citation of authority, said: "Although Ms. Whitman positively identified defendant as her assailant, defendant's evidence of alibi made the question of whether the defendant was, indeed, the perpetrator the very heart of the case. It was, therefore, proper for the state, in rebuttal, to offer evidence probative of this question." 303 N.C. at 302, 278 S.E. 2d at 208-09. One year later, our Supreme Court in *Leggett* said the same thing, quoting from and citing *Freeman* as its only authority.

In this case, after defendant had presented his alibi evidence, the State got the last lick by the "mini-trial" of defendant for the Boyles robbery. This, combined with the improper question regarding the Galloway robbery, was extremely prejudicial. The jury received the image of a career robber, hardly appropriate in light of defendant's record or the subsequent disposition of the Galloway and Boyles robberies. In my view, defendant is entitled to a

New trial.

IN THE MATTER OF: LUCILLE B. GRAD v. LAURIN J. KAASA, M.D.

No. 8310SC283

(Filed 1 May 1984)

1. **Dead Bodies § 3— liability of medical examiner for wrongful autopsy**

Where a medical examiner receives a death report under G.S. 130-198 or 10 N.C. Administrative Code § 11.0203 and then makes a subjective determination that an autopsy is advisable and in the public interest, his actions are within the scope of his authority and he is immune from liability unless his actions are motivated by malice or corruption.

2. **Dead Bodies § 3— action for wrongful autopsy—malice—genuine issue of material fact**

A genuine issue of material fact was presented as to whether defendant medical examiner acted in reckless disregard of plaintiff's rights by conducting an autopsy on the body of plaintiff's husband who died from a heart attack without first having made a reasonable investigation as to the circumstances of the death where defendant's forecast of evidence tended to show that defendant consulted with the emergency room physician, read the emergency room report and conducted an external examination of the body, that defendant decided to conduct the autopsy because the cause of death was unknown and plaintiff's husband died under unusual or unnatural circumstances, and that defendant made no attempt to check the medical history of the deceased, and where plaintiff's forecast of evidence tended to show that her husband's medical history showed that he had suffered a previous heart attack and had been warned not to overexert himself, that defendant knew how to get in touch with her but did not consult her to obtain information concerning the possible cause of death, and that a physician practicing in Pennsylvania was of the opinion that an autopsy was not necessary to determine the cause of the death of plaintiff's husband.

3. Evidence § 50— expert medical testimony—necessity for autopsy—competency of witness

In an action to recover damages for an alleged wrongful autopsy conducted by the Wake County Medical Examiner, plaintiff was not required to show that a physician was familier with the standards common to medical examiners in Raleigh or similar communities in order for the physician to give expert opinion testimony that an autopsy was not necessary to determine the cause of decedent's death.

Judge BRASWELL dissenting.

APPEAL by plaintiff from *Bailey, Judge.* Order entered 13 January 1983 in WAKE County Superior Court. Heard in the Court of Appeals 10 February 1984.

Plaintiff, Lucille Grad, seeks compensatory and punitive damages for an alleged wrongful autopsy conducted by defendant, Dr. Laurin Kaasa, upon the body of her husband, Carl Edward Grad. In her complaint, plaintiff alleges that Mr. Grad suffered a heart attack on 17 March 1982 while playing tennis. Mr. Grad was rushed to Wake County Medical Center where he was pronounced dead at 1:44 p.m., after resuscitation efforts failed. An emergency room physician, unable to determine the cause of Mr. Grad's death, referred the case to defendant pursuant to N.C. Gen. Stat. § 130-198 (1981). Defendant conducted an autopsy and determined that Mr. Grad died of a heart attack. During the course of the autopsy, Mr. Grad's vital organs were removed, examined, and then cremated. Defendant did not seek plaintiff's permission to conduct the autopsy, nor did he consult plaintiff or Mr. Grad's medical records to obtain information concerning the possible cause of death before conducting the autopsy. Plaintiff learned of the autopsy several weeks after Mr. Grad's death, when the death certificate was sent to her home. Plaintiff is morally opposed to the practice of cremation and removal of human organs.

In his answer, defendant alleges that he discussed the case with the emergency room physician, read the emergency room report and conducted an external examination of Mr. Grad's body before deciding to conduct an autopsy. Defendant further contends that his actions were performed in the course of his official duties as Wake County Medical Exam-

iner, that the autopsy was authorized by North Carolina law and that he is therefore entitled to immunity from liability.

After the pleadings were joined, defendant moved for summary judgment. Defendant's motion was supported by plaintiff's interrogatories to defendant, defendant's affidavit, and the affidavit of Dr. Page Hudson, Chief Medical Examiner of North Carolina. In opposition to defendant's motion, plaintiff submitted her interrogatories to defendant, plaintiff's affidavit, and the affidavit of Dr. Edward Notari, a physician practicing in Pennsylvania. After reviewing the materials, the trial judge granted defendant's motion for summary judgment, from which order plaintiff appealed.

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

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Ronald C. Dilthey, for defendant.

WELLS, Judge.

A motion for summary judgment is proper where ". . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982). When the moving party demonstrates that no material issues of fact exist, the burden shifts to the nonmovant to set forth specific facts showing that genuine issues of fact remain for trial. *Id.*

It is clear that a cause of action exists in North Carolina for wrongful autopsy. *Gurganious v. Simpson*, 213 N.C. 613, 197 S.E. 163 (1938). The cause of action arises from a quasi-property right of the surviving next-of-kin to bury the dead without wrongful interference. *Id. See generally* Annot., 18 A.L.R. 4th 858 (1982).

In North Carolina, performance of autopsies is regulated by statute, and administrative rules adopted under statutory authority. We turn, therefore, to these sources to determine the extent of defendant's liability. Under the rules, the following kinds of deaths must be reported to the medical examiner of the county in

which the body of the deceased is found: homicide, suicide, trauma, accident, disaster, violence, unknown, unnatural or suspicious circumstances, in police custody, jail or prison, by poison or suspected poisoning, suggesting possible public health hazard, during surgical or anesthetic procedures, sudden deaths not reasonably related to previous known diseases and deaths without medical attendance, 10 N.C. Administrative Code, § 11.0203, G.S. § 130-198. Upon receiving a report of a death occurring in any of the circumstances listed above, the medical examiner must take charge of the body, make inquiries regarding the cause of death and make a written report of his findings. G.S. § 130-199.

An autopsy may be lawfully performed without a request only in cases involving a death reported under G.S. § 130-198 and 10 N.C. Administrative Code, § 11.0203 *and* in which the medical examiner determines, in his opinion, that an autopsy is both advisable and in the public interest. G.S. § 130-200, N.C. Administrative Code, §§ 11.0206, -.0210. Autopsies may also be conducted upon the request of a superior court district attorney or superior court judge, or the next-of-kin of the deceased. G.S. § 130-200.

Although the regulations and statutes limit a medical examiner's authority to order autopsies, a violation will not inevitably result in liability. As a general rule, public officials are immune from liability for damages resulting from negligent exercise of their judgment and discretion. A public official will be held liable only if it is shown that he acted entirely outside the scope of his authority or that his act, while inside his authority, was malicious or corrupt. *See Smith v. Hefner*, 235 N.C. 1, 68 S.E. 2d 783 (1952); *Pigott v. City of Wilmington*, 50 N.C. App. 401, 273 S.E. 2d 752, *cert. denied*, 303 N.C. 181, 280 S.E. 2d 453 (1981); 63 Am. Jur. 2d, *Public Officers & Employees* § 289 (1972 & 1983 Supp.). It is clear that a medical examiner is a public official and that the decision to conduct an autopsy is a discretionary one, involving the use of a medical examiner's judgment. 10 N.C. Administrative Code § 11.0210; *Scarpaci v. Milwaukee Co.*, 96 Wisc. 2d 663, 292 N.W. 2d 816 (1980); *Rupp v. Jackson*, 238 So. 2d 86 (Fla. 1970). We must therefore decide (1) whether defendant was within his authority in ordering an autopsy upon Mr. Grad's body

and (2) if defendant was within his authority, whether he acted maliciously in exercising that authority.

[1] The medical examiner's initial authority is triggered when a death occurs under the circumstances set out in G.S. § 130-198 and 10 N.C. Administrative Code, § 11.0203, and the death is reported to the medical examiner. The medical examiner then has jurisdiction to investigate the death and make a report. He may take the more drastic step of conducting an autopsy, however, only when in his opinion it is advisable and in the public interest that the autopsy be ordered. The statute thus creates one objective prerequisite (report of a death) and one subjective prerequisite (formation of an opinion that an autopsy is advisable and in the public interest) to trigger the medical examiner's authority to conduct an autopsy. 10 N.C. Administrative Code § 11.0210. It is clear, therefore, that a medical examiner acts outside his authority if he subjectively determines that the autopsy is not authorized by statute, yet proceeds anyway. For example, in *Gurganious v. Simpson, supra,* the defendant coroner testified that he did not have permission to conduct an autopsy and did not suspect foul play. The court held that the defendant acted entirely outside the scope of his authority and was not immune from liability since the statute then permitted autopsies only with permission of relatives or where the death was by criminal act. The medical examiner also acts outside the scope of his office if he fails to make any subjective determination at all concerning whether an autopsy would serve the public interest before proceeding. *Scarpaci v. Milwaukee Co., supra.* Conversely, where a medical examiner receives a death report under G.S. § 130-198 or 10 N.C. Administrative Code § 11.0203, and then makes a subjective determination that an autopsy is advisable and in the public interest, his actions are within the scope of his authority and he is immune from liability unless his actions are motivated by malice or corruption. A mere mistake in the exercise of judgment is insufficient to trigger liability where the action is within the officer's authority. 63 Am. Jur. 2d, *Public Officers & Employees, supra.* It would render an official's immunity meaningless if that protection could be overcome by a showing of mere mistake, since immunity would then be available only in cases when no mistake had been made, and obviously immunity would be unnecessary. *Scarpaci v. Milwaukee Co., supra.*

In the case at bar, defendant's forecast of evidence tended to show that defendant received a proper death report and that thereafter he made a subjective determination that an autopsy was advisable and in the public interest. It therefore appears that defendant was acting within the scope of his office and summary judgment in his favor was proper unless the forecast of evidence before the trial court would allow a trier of fact to find that defendant acted maliciously or corruptly.

Malice is present when a defendant acts 'wantonly, doing what any man of reasonable intelligence must have known to be contrary to his duty, and purposely prejudicial and injurious to another . . .' *Givens v. Sellars*, 273 N.C. 44, 159 S.E. 2d 530 (1968), citing 34 Am. Jur. *Malice* § 3 (1941). An action is wanton when it is done '. . . of wicked purpose or when done needlessly, manifesting a reckless indifference to the rights of others.' *Givens v. Sellars, supra*, citing *Foster v. Hyman*, 197 N.C. 189, 148 S.E. 36 (1929).

[2] In the case before us, defendant's forecast of evidence tended to show that he ordered the autopsy because he was unable to determine the cause of Mr. Grad's death after consulting with the emergency room physician, reading the emergency room report and conducting an external examination of the body. Defendant did not suspect criminal activity, foul play, or suicide. He ordered an autopsy because the cause of Mr. Grad's death was unknown and because Mr. Grad died under unusual or unnatural circumstances. Defendant made no attempt to check Mr. Grad's medical history, but had he been aware of such history, he would have ordered an autopsy in order to establish the exact cause of death. Plaintiff's forecast of evidence tended to show that Dr. Kaasa knew her and how to get in touch with her, that Mr. Grad's medical history showed he had suffered a previous heart attack and had been warned not to overexert himself. Plaintiff also offered the affidavit of Dr. Notari, who stated that, in his opinion, an autopsy was not necessary in order to determine the cause of Mr. Grad's death. We hold that this forecast of evidence raises a genuine material issue of fact as to whether defendant, although acting within his authority, acted in reckless disregard of plaintiff's rights by ordering an autopsy without first having made further reasonable investigation as to the circumstances of Mr. Grad's death.

[3] We deem it appropriate to address one other issue discussed in the briefs. Defendant contends that Dr. Notari's affidavit should not be considered as plaintiff failed to establish a foundation showing that Dr. Notari was familiar with the standards common to medical examiners in Raleigh or similar communities. In medical malpractice cases, of course, expert testimony is required to determine if the applicable standard of care has been violated. N.C. Gen. Stat. § 90-21.12 (1981), *Dickens v. Everhart*, 284 N.C. 95, 199 S.E. 2d 440 (1973). The case before us, however, does not involve a medical malpractice claim, and therefore Dr. Notari's lack of familiarity with the standard of care in Raleigh would not affect the competency of his testimony. In general, expert testimony is admissible if the witness can be helpful to the jury because of his or her superior knowledge. Brandis, *North Carolina Evidence*, § 134 (2d Ed. 1982). In his affidavit, Dr. Notari states that, in his opinion, there was ample, available evidence which "must have indicated" that Mr. Grad died of natural causes.

Reversed.

Judge PHILLIPS concurs.

Judge BRASWELL dissents.

Judge BRASWELL dissenting.

When a medical examiner makes a subjective determination that an autopsy is advisable and in the public interest then his actions are within the scope of his authority. The majority opinion holds that a forecast of the evidence clearly shows that Dr. Kaasa, the medical examiner, was acting within the scope of his office (slip opinion, page 6) and within the scope of his authority (slip opinion, page 8), but that there is a genuine issue of fact as to whether Dr. Kaasa "acted in reckless disregard of plaintiff's rights by ordering an autopsy without first having made further reasonable investigation as to the circumstances of Mr. Grad's death." I strongly disagree that a forecast of evidence raises a genuine issue as to whether Dr. Kaasa acted recklessly.

Under all the facts of this case there was no legal duty to make "further reasonable investigation," and no standard exists

by which to measure this "further reasonable investigation." In spite of the allegation that the plaintiff and defendant had known each other through a previous nurse-doctor working relationship, this did not create a legal duty on Dr. Kaasa, while performing his duties as medical examiner, to telephone plaintiff and ask for her permission to perform an autopsy. All of the evidence shows that Dr. Kaasa acted in good faith. There is not a spark of evidence that Dr. Kaasa acted with malice or corruption.

It is of critical importance that even though the medical examiner may have been able to determine from the general information furnished to him that Mr. Grad had suffered a cardiac arrest, the cause of such cardiac arrest could not have been determined short of an autopsy. With the cause of death unknown, the duty lay within the medical examiner to determine if the cause of death was related to trauma, injury, natural causes, or accident. The record shows that there were extensive injuries to the head and face of Mr. Grad. Plaintiff's complaint and forecast of evidence argues that because she can prove as a fact that Mr. Grad had prior heart trouble that this fact alone should have conclusively eliminated the possibility of death by trauma, accident, or unknown causes, and that therefore it was malicious and corrupt for Dr. Kaasa to determine in his medical examiner discretion that it was advisable and in the public interest to perform an autopsy.

North Carolina has created a system of professional medical examiners which grants them the duty and discretion to use their judgment in deciding when to perform an autopsy under statutory situations. The General Assembly has granted medical examiners immunity from civil lawsuits when acting within the scope of their authority and when not acting corruptly or maliciously. The courts should not take away this immunity.

As our Supreme Court said in *Smith v. State*, 289 N.C. 303, 331, 222 S.E. 2d 412, 430 (1976), *reversed on other grounds*, 298 N.C. 115, 257 S.E. 2d 399 (1979), "As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability."

Further, I would hold as a matter of law that plaintiff's use of the affidavit of Dr. Edward J. Notari in her forecast of evidence fails to create any issue of fact on the issues raised in these pleadings, and that the affidavit is of no value in this case.

I dissent and would vote to affirm the granting of summary judgment for the defendant.

ALLAN MILES COMPANIES, INC., ALLAN D. MILES AND WANDA M. MILES, AND BEN B. PROPST CONTRACTOR, INC. v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 8319SC719

(Filed 1 May 1984)

Highways and Cartways § 9.1; State § 4.3— highway rest areas—easement and extension of water and sewer lines—highway construction contract—submission of claim to State Highway Administrator

An agreement whereby plaintiffs would convey to defendant Department of Transportation an easement for telephone, water and sewer lines across their property to two rest areas on I-85, plaintiffs would extend water and sewer lines across a portion of their property, and defendant would bear one-half of the cost of the water line extension and all of the cost of the sewer line extension *is held* a contract for the construction of the highway rest area buildings which is deemed a contract for highway construction pursuant to G.S. 136-28.1(d). Therefore, plaintiffs were required by G.S. 136-29(d) to submit their claim to the State Highway Administrator prior to bringing an action against the Department of Transportation for breach of the agreement.

APPEAL by plaintiff from *Freeman, Judge.* Judgment entered 11 April 1983 in Superior Court, CABARRUS County. Heard in the Court of Appeals 12 April 1984.

This case involves an alleged breach of contract. The action was started with the filing of a complaint by Allan Miles Companies, Inc. against the defendant. The complaint was amended to add plaintiffs Allan D. Miles and Wanda M. Miles. Defendant filed a motion to dismiss pursuant to Rule 12(b), which was denied. The defendant filed an answer alleging (1) the State had not waived its sovereign immunity against being sued; (2) a general denial; (3) failure to show by the pleadings a valid contract; and (4) a void contract in that plaintiffs have not alleged the contract was let

pursuant to the competitive bidding requirements set out in G.S. 136-28.1, and has not submitted his claim to the State Highway Administrator prior to bringing suit as required by G.S. 136-29. Thereafter defendant filed a counterclaim alleging unfair trade practices under G.S. 75-1.1 and seeking treble damages against the Miles Companies, Inc. and Allan D. Miles and wife. Answer to the counterclaim denied the allegation set out therein. Ben B. Propst Contractor, Inc. was allowed to intervene as a party plaintiff. Defendant filed a motion to dismiss and motion for summary judgment. The motion for summary judgment was allowed. All plaintiffs appealed.

Attorney General Rufus L. Edmisten by Assistant Attorney General Thomas H. Davis, Jr. for North Carolina Department of Transportation, defendant appellee.

Tom M. Grady and William F. Rogers, Jr. for Allan Miles Companies, Inc., Allan D. Miles and Wanda M. Miles, plaintiff appellants.

K. Michael Koontz and William F. Rogers, Jr. for Ben B. Propst Contractor, Inc., plaintiff appellant.

HILL, Judge.

The sole question presented on appeal is whether the trial court erred in granting summary judgment for defendant. Resolution of this issue involves determination of (1) whether the parties' contractual dispute created a genuine issue of material fact, and (2) whether plaintiffs' claim was barred by statute and operation of law. Because it clearly appears G.S. 136-29 operates to bar plaintiffs' claim, we conclude defendant was entitled to summary judgment as a matter of law.

(1) *The contract.* Plaintiffs Allan D. Miles and his wife, Wanda M. Miles, are the record owners of a tract of land located adjacent to a pair of rest areas on I-85 in Cabarrus County and owned by the Department of Transportation. The two of them are president and secretary respectively of the corporate plaintiff Allan Miles Companies, Inc. Plaintiff Ben B. Propst Contractor, Inc. is a private contracting firm. Ernest D. Ransdell is the area utility agent for the North Carolina Department of Transportation.

Ransdell and Allan D. Miles negotiated a proposed agreement whereby Allan D. Miles and wife, Wanda M. Miles, would convey to the defendant Department of Transportation a permanent easement for telephone, water, and sewer lines across their property to the I-85 rest areas. A letter from Ransdell to Allan Miles dated 30 July 1980 provided substantially as follows: Plaintiff Miles Companies would extend an eight inch water main from an existing main on one of the properties of Allan D. Miles and wife to a designated point in Bridlewood Place at an estimated cost to plaintiff of $57,490.00. Defendant would bear one-half of the cost. From that point defendant was to procure construction and installation of a six inch water main across the property of Allan D. Miles and wife to defendant's property at an estimated cost of $7,608.00.

Plaintiff Miles Companies would extend the line from an existing sewer line in Overlook Subdivision owned by Allan D. Miles and wife to a point in Bridlewood Place at an estimated cost to plaintiff Miles Companies of $55,610.00. Defendant would bear all the costs of this line. From that point the defendant would extend at its own expense the sewer line along Bridlewood Place and plaintiff's property at an estimated cost of $8,558.00. The final paragraph of the letter stated:

> Please submit the estimate and plans for the work indicated above, at your earliest convenience, and we will proceed with preparing the necessary reimbursement agreement. If you should have questions or need additional information concerning the above, please let me know.

Another letter dated 31 July 1980 was sent to Allan Miles as president of Allan Miles Companies, Inc., from the State utility agent amending the location of the sewer line. Again the letter stated, "I will proceed with preparing the reimbursement as soon as Mr. Billups submits your estimate and plans." Another letter was addressed to Allan Miles from the State utility agent dated 4 August 1980 amending the description of the location of the property lines.

On 8 August 1980, J. H. Craver, president of Ben B. Propst Contractor, Inc., submitted a proposal to install the eight inch and six inch water lines, and to extend the sewer line. Thereafter on

24 November 1980 the State utility agent wrote Allan Miles as follows:

> SUBJECT: Water and Sewer Service to Proposed Rest Areas
>
> Dear Mr. Miles:
>
> This letter will confirm our telephone conversation of November 14, 1980, wherein the following items were discussed:
>
> 1. It was agreed that the Division of Highways will abandon plans, both for now and the future, to tie water and sewer service lines from our proposed rest area sites into existing water and sewer lines in your Partridge Bluff and Overbrook Subdivisions.
>
> 2. The Division of Highways will reimburse you for the cost of making certain water and sewer line adjustments solely for the benefit of the Division. These adjustments, which were shown as numbered paragraphs two (2) and four (4) in Mr. J. H. Craver's letter of August 8, 1980, to you, were estimated to cost $16,971.00. A copy of Mr. Craver's letter is attached for your information.
>
> 3. You agreed to submit to this office an itemized bill covering the costs mentioned in item two (2) above. Please detail the bill to show a breakdown of the amount and type of the various items of material used and any other cost involved, such as rock excavation, etc. I advised you that the bill would be audited prior to payment and you agreed to provide our auditors documentation of the costs and allow them to examine your records when requested.
>
> 4. You agreed to nullify any agreements that you felt you had with the Division of Highways and not pursue further any claims against the Division associated with any such agreements. This includes, but is not limited to, the items included in my letters of July 30 and 31, 1980, to you. A copy of each of the letters is attached for your use.
>
> If you are in agreement with the foregoing, please advise. Also, please submit the bill for the actual cost of the work indicated in item two (2) above.

On 17 December 1980, Allan Miles replied to the State utility agent as follows:

> In reply to your letter dated November 24, 1980, I am not in agreement with your proposal and request payment according to your letter of intent dated July 30th, and amended July 31, 1980. Easements, estimates and plans as you requested in your July 30th letter may be obtained from Mr. Johnny Graham, P. E. Staff Engineer, Security Real Estate, 476 Church Street N., Concord, North Carolina 28025.

The State utility agent replied by letter dated 13 January 1981 stating:

> In our last meeting of September 23, 1980, you advanced the proposal that the Division of Highways not tie water and sewer service lines from the proposed rest areas into existing lines within your Partridge Bluff and Overbrook Subdivisions. In addition, you proposed that the rest areas be served from some point that would not involve your property. Accordingly, we abandoned plans to tie into water and sewer lines located on your property and have made plans to receive water and sewer service from another direction. This is in keeping with both the meeting mentioned above and our telephone conversation of November 14, 1980, with you.

Thereafter, the defendant offered to submit a check as full and complete settlement of all expenses incurred by Miles for work done solely for the Division of Highways in accordance with an itemized statement attached to Miles' letter dated 17 December 1980 totalling $16,971.00. Miles refused to accept defendant's offer.

In the meantime plaintiff Miles Companies had installed the eight inch water main at the cost of $57,490.00 and the sewer line for a cost of $55,610.00, and plaintiff Propst had extended the six inch water main at a cost of $16,166.00. Defendant refused to reimburse plaintiff Miles Companies for one-half the cost of installing the eight inch water main and the total cost of the sewer line. Defendant also refused to pay plaintiff Propst Contractor, Inc. for the work performed by it.

No competitive bidding was held for any of the work described herein. Nor were any claims filed with Billy Rose, State

highway administrator, prior to initiation of the action in superior court.

All plaintiffs have alleged the existence of contracts with the State Department of Transportation, and defendant has denied the existence of such contracts. Such constitutes a genuine issue of fact. However, when the question of fact presented is immaterial, entry of summary judgment is not prevented. *Keith v. Reddick, Inc.*, 15 N.C. App. 94, 189 S.E. 2d 775 (1972). In the case under review, the issue of fact as to the parties' contract becomes immaterial because where it clearly appears on the face of the record that a plaintiff's claim is barred by statute or operation of law, the moving party is entitled to summary judgment as a matter of law. *Jarrell v. Sampsonite Corp.*, 12 N.C. App. 673, 184 S.E. 2d 376 (1971), *cert. denied*, 280 N.C. 180, 185 S.E. 2d 704 (1972).

(2) *G.S. 136-29.* Defendant contends summary judgment was proper, asserting that G.S. 136-29 is a condition precedent to the institution of this action by all plaintiffs. Defendant argues the trial court lacked subject matter jurisdiction in this case because of plaintiff's failure to exhaust their administrative remedies. We agree.

The North Carolina Department of Transportation is an agency of the State of North Carolina, and as such is subject to sovereign immunity, when such immunity is not waived. *Orange County v. Heath*, 14 N.C. App. 44, 187 S.E. 2d 345, *aff'd* 282 N.C. 292, 192 S.E. 2d 308 (1972). The North Carolina Legislature has waived sovereign immunity with respect to disputes between contractors and the North Carolina Department of Transportation by the enactment of G.S. 136-29 entitled, "Adjustment of Claims." This statute reads in part as follows:

> (a) Upon the completion of any contract for the construction of any State highway awarded by the Department of Transportation to any contractor, if the contractor fails to receive such settlement as he claims to be entitled to under his contract, he may, within 60 days from the time of receiving his final estimate, submit to the State Highway Administrator a written and verified claim for such amount as he deems himself entitled to under the said contract setting forth the facts upon which said claim is based. . . .

(b) As to such portion of the claim as is denied by the State Highway Administrator, the contractor may, within six (6) months from receipt of said decision, institute a civil action for such sum as he claims to be entitled to under said contract by the filing of a verified complaint and issuance of summons in the Superior Court of Wake County or in the superior court of any county wherein the work under said contract was performed. . . .

(c) All issues of law and fact and every other issue shall be tried by the judge, without a jury. . . .

(d) The submission of the claim to the State Highway Administrator within the time and as set out in subsection (a) of this section and the filing of an action in the superior court within the time as set out in subsection (b) of this section shall be a condition precedent to bringing such an action under this section and shall not be a statute of limitations.

(e) The provisions of this section shall be deemed to enter into and form a part of every contract entered into between the Department of Transportation and any contractor, and no provision in said contracts shall be valid that is in conflict herewith.

Plaintiffs contend that the contracts between the parties are not contracts for the construction of a state highway, and G.S. 136-29 has no application to the facts of this case. In support of their position, plaintiffs Allan D. Miles and Wanda M. Miles and Miles Companies point out that defendant bargained to acquire two thirty foot permanent rights of way without cost and to "reimburse" plaintiffs for their costs of installing water and sewer lines in said rights of way over their property toward the proposed highway rest areas. Plaintiffs contend this constituted, in effect, a sale of easements. Plaintiff Ben B. Propst contends his installation of water and sewer lines does not constitute "construction and repair of the highway rest area buildings and facilities" covered by the statute. We disagree with plaintiffs' contentions and affirm the decision of the trial judge.

The sole need for the water and sewer lines is to service the two rest areas adjoining I-85. Rest areas are an accepted part of the modern highway system. They not only provide comfort for

the traveller, but also promote highway safety by serving the physical needs of the traveller. "The construction and repair of the highway rest area buildings . . . shall be deemed highway construction or repair. . . ." G.S. 136-28.1(d). In order to provide permanent access to the Concord utility system, plaintiff Miles agreed to give the right of way for the water and sewer lines. The water and sewer lines *per se* as installed became a part of the rest stop facility which they served. The *raison d'etre* for the lines was to provide this service as a part of the rest stop facility, which was a part of the highway system.

We conclude the contracts fall within the provisions of G.S. 136-29. The language of the statute clearly sets out that the presentation of a "claim to the State Highway Administrator . . . shall be a condition precedent to bringing such an action under this section." G.S. 136-29(d); *In re Huyck Corp. v. Mangum, Inc.*, 309 N.C. 788, 309 S.E. 2d 183 (1983). Plaintiffs have failed to pursue their administrative remedies and have no standing in court. *Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979).

The decision of the trial judge is

Affirmed.

Judges WEBB and WHICHARD concur.

CATHERINE V. CRAIG v. ROBERT W. CALLOWAY AND WIFE, OREE C. CALLOWAY

No. 8325SC529

(Filed 1 May 1984)

1. Evidence § 32.1— parol evidence rules—partial integration of agreement—evidence not contradicting writing

The parol evidence rule permits the introduction of extrinsic evidence where a writing only partially integrates the agreement and the evidence does not contradict the writing; therefore, the trial court properly denied plaintiff's request for a jury instruction that written instruments control any parol evidence to the contrary since the evidence indicated that a deed was not intended to contain the entire agreement of the parties, but only that portion of it pertaining to the conveyance of the real property, and where the evidence

regarding the oral agreement to convey personal property in no way contradicted any part of the deed.

2. **Wills § 2.3— admission of revoked will to demonstrate existence of oral agreement between parties—properly admitted**

The trial court properly admitted plaintiff's will into evidence even though the will may have been revoked since defendants never sought to prove the validity of the will; rather, they introduced it for the purpose of showing the existence of an oral agreement. G.S. 31-5.1.

3. **Evidence § 11— dead man's statute not precluding evidence of will**

The Dead Man's Statute did not operate to exclude the admission of the will and power of attorney of plaintiff's deceased husband since neither was a personal transaction or communication with the deceased husband. G.S. 8-51.

4. **Trial § 42— inconsistent verdict—second verdict consistent—j.n.o.v. properly denied**

In a civil action where plaintiff filed suit against defendants seeking to have a deed conveying her property to defendants and reserving a life estate for herself set aside because the defendants failed to supervise her care, maintenance and needs as spelled out in the deed, the trial court properly denied plaintiff's motions for j.n.o.v. and a new trial where, although the jury's first verdict was inconsistent, when the jury returned with a second verdict, it was consistent where it found defendants had breached the agreement and that defendants were prevented from performing their part of the agreement.

APPEAL by plaintiff from *Beaty, Judge.* Judgment entered 9 December 1982 in Superior Court, CALDWELL County. Heard in the Court of Appeals 9 April 1984.

This is a civil action wherein plaintiff filed suit against defendants husband and wife, seeking to have a deed conveying her property to defendants and reserving a life estate for herself set aside because the defendants failed to supervise her care, maintenance and needs as spelled out in the deed. The deed had originally been entered into between plaintiff and her late husband, W. L. (Lee) Craig, and the defendants. Plaintiff alleged that defendants breached the agreement by failing to perform any of the conditions in the deed, and also alleged that the defendants willfully and wantonly cut off plaintiff's water supply. The plaintiff sought the reconveyance of her land, or in the alternative, monetary damages. The plaintiff also sought injunctive relief requiring defendants to reconnect her water supply.

The defendants alleged in their answer that they were prevented from performing their part of the agreement. They also

alleged that in addition to the terms contained in the deed, the parties and plaintiff's late husband had also entered into an oral agreement that certain personal property belonging to plaintiff and her husband, including farm tools and vehicles, be conveyed to the defendants upon the deaths of Lee Craig and plaintiff Catherine Craig.

At trial, plaintiff put on evidence tending to show that defendants had breached the terms of the agreement embodied in the deed. The defendants put on evidence tending to show the existence of the agreement concerning personalty, and also that the defendants were prevented from performing their part of the agreement. After listening to the judge's charge, the jury first returned a verdict which the judge, without exception by the parties, declared inconsistent. The trial judge repeated and clarified his instructions. The jury retired for a second time, and returned the following verdict:

1. Did the defendant [sic] breach the agreement between the parties by failing to supervise the care, maintenance and needs of the plaintiff?

   Answer: Yes.

2. Were the defendants prevented from performing the supervision of the care, maintenance and needs of the plaintiff?

   Answer: Yes.

3. What amount, if any, are the defendants, Robert Calloway and Oree Calloway, entitled to recover of Catherine Craig for such services rendered to Catherine Craig under such circumstances that Catherine Craig should be required to pay for them?

   Answer: [left blank].

Plaintiff appeals from a judgment in accord with this verdict. That part of the action seeking injunctive relief is not involved in this appeal.

Ted West Professional Association, by Ted G. West, Joseph C. Delk, III, and David A. Swanson, for plaintiff appellant.

Baumberger and Bell, by Michael P. Baumberger, for defendant appellees.

VAUGHN, Chief Judge.

Plaintiff makes several assignments of error. They concern the trial court's refusal to allow certain requested instructions, the admissibility of testimony and documentary evidence, and the failure of the trial court to award a new trial based on alleged misunderstanding of the jurors of the consequences of their verdict. We overrule all assignments of error and affirm.

[1] Plaintiff first argues that the trial court incorrectly denied plaintiff's request for a jury instruction that written instruments control any parol evidence to the contrary. Plaintiff contended throughout the trial and contends here on appeal that the deed represents the entire agreement of the parties and therefore parol evidence should not have been considered by the jury. Defendants' position is that the parol evidence rule only comes into play when a writing is intended as a complete integration of an agreement and that the deed was only a partial integration of the agreement between the parties. We hold that because the evidence tended to show that the writing was only a partial integration that the instruction was properly refused.

The 1 March 1977 deed conveyed certain property to the defendants in exchange for the defendants' promise to provide plaintiff and her husband supervision for their care, maintenance and needs, with a life estate reserved for plaintiff and her husband. Defendants presented evidence tending to show the existence of a side agreement to convey to defendants upon the deaths of plaintiff and her husband, various farm tools, implements, vehicles and other personalty. This evidence was in the form of testimony by plaintiff and by defendant Oree Calloway concerning the execution by plaintiff and her husband of wills and powers of attorney at the same time the deed was executed, and also by the introduction of those documents into evidence.

Our Supreme Court in *Craig v. Kessing*, 297 N.C. 32, 253 S.E. 2d 264 (1979), held that parol evidence of a purchase price and expiration date that directly contradicted contract terms was inadmissible. The court defined the parol evidence rule and discussed an exception thereto applicable to the instant case:

> It appears to be well settled in this jurisdiction that parol testimony of prior or contemporaneous negotiations or con-

> versations inconsistent with a written contract entered into between the parties, or which tends to substitute a new or different contract for the one evidenced by the writing, is incompetent. . . . This rule applies where the writing totally integrates all the terms of a contract or supersedes all other agreements relating to the transaction. The rule is otherwise where it is shown that the writing is not a full integration of the terms of the contract. The terms not included in the writing may then be shown by parol.

Id. at 34-5, 253 S.E. 2d at 265-6. In such cases, where an agreement has been only partially reduced to writing, "the test for determining whether the remaining part can be proved by parol is simply stated: If oral evidence does not contradict written it is admissible; otherwise, it is not admissible." *Mozingo v. Bank*, 31 N.C. App. 157, 162, 229 S.E. 2d 57, 61 (1976), *cert. denied*, 291 N.C. 711, 232 S.E. 2d 204 (1977). *Cf. Neal v. Marrone*, 239 N.C. 73, 79 S.E. 2d 239 (1953) (parol evidence inadmissible where inconsistent with written instrument, and where it "tends to establish a new and different contract").

The situation before us fits into this exception to the parol evidence rule that permits the introduction of extrinsic evidence where a writing only partially integrates the agreement and the evidence does not contradict the writing. At least one North Carolina case has applied this exception to a situation involving a deed and a concurrent oral agreement to sell personalty. In *Anderson v. Nichols*, 187 N.C. 808, 123 S.E. 86 (1924), the Supreme Court held that defendant had stated a cause of action where defendant buyer alleged in his counterclaim that the purchase price included not only the land described in the deed but also certain personal property. The Court held that the trial court's ruling

> was not in conflict with the principle that parol evidence is not admissible to contradict, add to, or vary the terms of a written instrument. If the entire contract is not required to be in writing it may be partly written and partly oral . . . and . . . the oral part . . . may be proved, if not at variance with the written instrument. It was competent to show that the title to the furniture was to vest in the defendant under

the oral agreement, because it was not in conflict with the deed.

Id. at 809, 123 S.E. at 87. *Accord, Manning v. Jones*, 44 N.C. 368 (1853) (where agreement to convey land embodied in a deed, parol evidence of oral agreement to make certain repairs of the premises admissible; evidence not offered to contradict, add to or explain main contract). *See also Borden, Inc. v. Brower*, 284 N.C. 54, 199 S.E. 2d 414 (1973) (where an agreement only partly reduced to writing, North Carolina emphasizes giving the proponent of the oral agreement a chance to prove that it was made).

In our case there was no requirement that the entire agreement be in writing. The evidence indicated that the deed was not intended to contain the entire agreement of the parties, but only that portion of it pertaining to the conveyance of the real property. Furthermore, the evidence regarding the oral agreement to convey personal property in no way contradicted any part of the deed. The plaintiff was therefore not entitled to the requested instruction on parol evidence.

[2] In a related assignment of error, plaintiff contends that the trial court erred in denying its motion *in limine* to exclude any testimony concerning plaintiff Catherine Craig's purported will and in allowing the introduction of this will into evidence because plaintiff revoked the will. The denial of this motion was likewise proper.

As already discussed, parol evidence to prove the oral portion of the agreement between the parties concerning personalty is competent. The testimony and evidence regarding plaintiff's former will as well as her power of attorney are competent for this very reason: they tend to demonstrate the existence of an oral agreement between the parties. Although plaintiff's contention that plaintiff has revoked this will, *see* G.S. 31-5.1, is arguably correct, whether the will has been revoked was not at issue. The defendants never sought to prove the validity of the will. Rather, they introduced it for the purpose of showing the existence of an oral agreement. This was permissible, and plaintiff's motion *in limine* was hence properly denied.

[3] Plaintiff also argues that the will and power of attorney of Lee Craig, plaintiff's husband, were improperly admitted into evi-

dence. Plaintiff maintains that G.S. 8-51, which disallows a witness to testify about a transaction between the witness and a person since deceased, applies to disqualify the introduction of these documents into evidence. We disagree.

G.S. 8-51 permits a party to testify to anything except "a personal transaction or communication between the witness and the deceased person." The admission of the will of Lee Craig and his power of attorney was not such a personal transaction or communication. *See generally* 1 Stansbury's N.C. Evidence § 73 (Brandis rev. 1982), and cases therein cited.

The trial court also correctly denied plaintiff's request for jury instructions to the effect that making a will passes no legal title. Although it is true that a will does not operate to pass legal title until probated, G.S. 31-39, there was neither allegation nor evidence that any title to any property, real or personal, passed pursuant to any will. The wills of plaintiff Catherine Craig and of her late husband Lee Craig were properly admitted for the purpose of showing the intent of the parties at the time the agreements were made and the terms of the agreements, particularly those concerning personalty. The instruction was irrelevant and properly refused.

[4] Upon the rendition of the verdict, plaintiff made a motion in open court for a judgment notwithstanding the verdict and for a new trial. Plaintiff subsequently filed a written motion for a new trial. These motions were all denied, and we here affirm the trial court's action in denying them.

Plaintiff's principal argument in support of these motions is that the jury did not intend to return the verdict that they did. Neither the facts nor the law supports plaintiff's contention. In response to the three issues submitted to them, the jury initially returned a verdict that defendants had breached the agreement between the parties by failing to supervise the care, maintenance and needs of the plaintiff, that defendants were prevented from performing their part of the agreement, and that defendants were entitled to recover the sum of $22,500 from the plaintiff for services rendered to plaintiff. This verdict, without exception, was held to be inconsistent and in conflict with the trial judge's instructions, which were also given without exception.

The jury retired for a second time and returned a verdict that first, defendants had breached the agreement and second, that defendants were prevented from performing their part of the agreement. The jury did not answer the issue regarding the amount defendants might recover for services rendered. Plaintiff's counsel requested that the jury be polled. Each juror responded that he or she intended to answer both the first and second issues "yes" as reflected in the verdict. The plaintiff thereupon moved for a judgment notwithstanding the verdict and for a new trial, which motions were denied.

The following day, plaintiff filed a written motion for a new trial. Plaintiff's counsel informed the court that one of the jurors had told him that the jurors were confused as to the issues, and that the legal effect of the verdict was not the effect intended by the jury.

It is well settled that "[A]fter their verdict has been rendered and received by the court, and they have been discharged, jurors will not be allowed to attack or overthrow it, nor will evidence from them be received for such purpose." *Selph v. Selph*, 267 N.C. 635, 637, 148 S.E. 2d 574, 576 (1966). If any evidence is to be admitted to impeach, attack or overthrow a verdict, it must come from a source other than from the jurors themselves. *State v. Hollingsworth*, 263 N.C. 158, 163, 139 S.E. 2d 235, 238 (1964). Plaintiff is attempting to do exactly that which is forbidden: impeach the verdict. *Cf. In re Sugg*, 194 N.C. 638, 140 S.E. 604 (1927) (juror's affidavit admissible where it did not impeach verdict, but explained what that juror would have said if the judge had been present during polling).

Furthermore, the evidence by which plaintiff's counsel attempted to impeach the verdict, testimony from plaintiff's counsel himself as to what a juror had told him, is inadmissible hearsay. In *Baker v. Winslow*, 184 N.C. 1, 113 S.E. 570 (1922), our Supreme Court held that the clerk's affidavit as to what jurors said was incompetent. "If the jurors could not be heard to impeach their own verdict directly by affidavits, we are unable to understand how it could be done indirectly by affidavit as to what three of them had said in the hearing of the clerk." *Id.* at 9, 113 S.E. at 574. Similarly is the testimony of plaintiff's counsel incompetent.

We further note that even if Mr. West's statements to the trial court had been admissible, and found by the court to be true, they would not affect the conclusiveness of the verdict. When the jury returned its original verdict, the plaintiff exercised her right to have the jury polled. *See In re Sugg, supra* (purpose of polling is to ascertain whether verdict as tendered is unanimous decision of jurors). Each juror stated in response to the court's questions that he or she intended to answer each issue as it appeared on the verdict. The verdict was therefore the unanimous decision of the jurors. If in fact any juror misconceived or misconstrued the legal effect of the verdict, as plaintiff's counsel suggests, this is not grounds for a new trial. *See Selph v. Selph, supra* (no new trial, poll of jurors showed that each meant to answer issues consistent with verdict as rendered); *Coxe v. Singleton*, 139 N.C. 361, 51 S.E. 1019 (1905) (verdict upheld although jurors signed statement that they did not understand the issues and the legal effect of their findings).

Plaintiff lastly argues that the verdict goes against the greater weight of the evidence. We have carefully examined the record, briefs and transcripts in this case and find plaintiff's argument to be without merit.

Affirmed.

Judges WHICHARD and PHILLIPS concur.

WILLIE G. MILLS, SR., EMPLOYEE v. FIELDCREST MILLS, EMPLOYER, SELF-INSURER

No. 8310IC682

(Filed 1 May 1984)

Master and Servant § 68— workers' compensation—chronic obstructive lung disease—significance of exposure to cotton dust—remand for findings

The evidence in a workers' compensation case was insufficient to support a legal conclusion regarding the significance of plaintiff's exposure to cotton dust in his employment to the development of his chronic obstructive lung disease where it showed that plaintiff's tobacco consumption contributed to a significant extent to the development of his disease; although plaintiff worked in a textile mill for approximately 35 years, he worked primarily in the weave

room, a relatively low risk area; and although the development of plaintiff's lung disease coincided with his employment in the textile mill, the medical experts disagreed as to the relative correlation between the two. Therefore, the case is remanded to the Industrial Commission for proper findings as to whether plaintiff's exposure to cotton dust significantly contributed to or was a significant causal factor in the development of his lung disease.

APPEAL by defendant from the North Carolina Industrial Commission. Opinion and award entered 7 February 1983. Heard in the Court of Appeals 11 April 1984.

Defendant appeals from an order of the Industrial Commission awarding plaintiff, totally disabled due to chronic obstructive lung disease, workers' compensation benefits.

The pertinent facts are: Except for a period of two and one-half years, from 1944-46 when plaintiff entered the military service, and a period of eight months in 1948 when he worked on a farm, plaintiff worked for defendant from 1942 until 1980, primarily as a tie-in operator in the weave room of the mill. The mill processed cotton until 1967, when it began processing a 50/50 cotton blend.

In a hearing before the Deputy Commissioner, plaintiff testified that he began smoking at age sixteen or seventeen. He did not have a breathing problem when he began working in the mill in 1942 and first noticed such a problem in the late 1950's or early 1960's. Plaintiff's symptoms included a feeling of tightness in his chest, shortness of breath upon exertion and a cough. He testified that the air in the weave room where he worked was very dirty and that his symptoms became worse during the first four to five hours every Monday and became better outside the mill. In 1972, plaintiff was diagnosed as having emphysema. On 14 March 1980, plaintiff became totally disabled and incapable of earning wages as a result of his lung disease.

Three physicians, qualified as experts in the field of pulmonary medicine, presented somewhat conflicting evidence regarding the etiology of plaintiff's lung disease: Dr. William Wade O'Neill diagnosed plaintiff as suffering from emphysema primarily and chronic bronchitis. He testified that emphysema and chronic bronchitis are two kinds of chronic obstructive lung diseases which may be caused or aggravated by long-term cigarette smoking, but which are not caused or aggravated by exposure to cot-

ton dust in a textile mill. He testified that the weave room where plaintiff worked was a low-risk area for developing byssinosis, a kind of chronic obstructive pulmonary disease caused by exposure to cotton bract. He testified that work in the weave room had no influence on the development of plaintiff's lung disease. Dr. David Allen Hayes diagnosed plaintiff as suffering from chronic obstructive lung disease caused primarily from tobacco consumption. He testified that once plaintiff's lung disease was relatively well advanced, however, cotton dust in the mill served as an aggravating factor that acutely worsened his symptoms in the mill and made his obstructive impairment greater than that usually associated with just cigarette smoking. He further testified that plaintiff was placed at an increased risk of developing chronic obstructive lung disease by reason of his occupational exposure to cotton dust. Dr. T. Reginald Harris diagnosed plaintiff as suffering from emphysema. He testified that cigarette smoking is and cotton dust exposure is not a factor known to cause emphysema.

The Deputy Commissioner denied plaintiff's claim for workers' compensation after concluding:

(1) Plaintiff does not suffer from an occupational disease due to causes and conditions characteristic of and peculiar to his particular employment in the cotton textile industry.

(2) Plaintiff does not suffer from a disease aggravated by causes and conditions characteristic of and peculiar to his employment in the textile industry.

Upon appeal to the full Commission, the decision of the Deputy Commissioner was reversed and plaintiff was awarded compensation based on his total incapacity to work. The Commission concluded: "The non-occupational lung disease which disabled the plaintiff was aggravated and accelerated by causes and conditions characteristic of and peculiar to his employment in the textile industry . . ."

Michaels and Jernigan, by John Alan Jones and Paul J. Michaels, for plaintiff appellee.

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

VAUGHN, Chief Judge.

The question raised by defendant on appeal is whether the Industrial Commission erred in awarding plaintiff, disabled due to chronic obstructive lung disease, workers' compensation pursuant to G.S. 97-53. G.S. 97-53 enumerates a list of diseases and conditions deemed to be occupational diseases justifying an award under our Workers' Compensation Act, G.S. 97-1, *et seq.* Neither byssinosis, a work-related lung disease caused by the inhalation of cotton dust, nor chronic obstructive lung disease, a disease which may be caused by work-related components like byssinosis or non-work-related components like bronchitis, emphysema, and asthma are among those diseases specifically enumerated. *See Rutledge v. Tultex Corp.*, 308 N.C. 85, 94, 301 S.E. 2d 359, 366 (1983). Nevertheless, under the catch-all provision of G.S. 97-53(13), a disease not specifically enumerated is compensable if it is "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."

Pursuant to pre-*Rutledge* Supreme Court precedent, a disabled worker's right to compensation under G.S. 97-53(13) depended on proving:

(1) the disease was characteristic of a trade or occupation,

(2) the disease was not an ordinary disease to which the public was equally exposed outside of employment, and

(3) a causal connection between the disease and the worker's employment.

See Walston v. Burlington Industries, 304 N.C. 670, 285 S.E. 2d 822, *amended on rehearing*, 305 N.C. 296, 285 S.E. 2d 822 (1982); *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981); *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981); *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979). A worker with a non-occupational disease had a right to compensation if he or she could prove that the disease was aggravated or accelerated by causes or conditions peculiar to the worker's employment. *Hansel, supra.* A worker only partially disabled due to an occupational disease had to prove not only the

disablement, but also the degree of incapacity actually caused by his or her occupational disease. *Morrison, supra.*

In the watershed case of *Rutledge v. Tultex Corp.*, Justice Exum, writing for the majority, recognized the inability of medical science to distinguish among causal factors when a worker becomes totally disabled due to chronic obstructive lung disease:

> [C]hronic obstructive lung disease may apparently be brought on by just the continuous inhalation of cotton dust, just the continuous inhalation of other substances, such as cigarette smoke, or by the inhalation of both kinds of substances together. It is apparently medically impossible even on autopsy objectively to distinguish the effect on the lungs of cigarette smoke inhalation and the inhalation of cotton dust, or between the effects of bronchitis and the inhalation of these substances.

Id. at 94-95, 301 S.E. 2d at 366. In light of the difficulty in determining etiology, the *Rutledge* court, balancing both the rights of the worker and those of the employer, articulated a workable legal standard to determine whether a claimant totally disabled due to chronic obstructive lung disease caused in part by occupational factors and in part by non-occupational factors has a compensable occupational disease. Pursuant to *Rutledge*, the right to compensation depends on proving:

(1) the occupation in question exposed the worker to a greater risk of contracting the disease than members of the public generally, and

(2) the worker's exposure to cotton dust *significantly contributed to* or was a *significant causal factor* in the disease's development.

Id. at 101, 301 S.E. 2d at 369-70. The factual inquiry under the second prong of the *Rutledge* test replaces the burden of proving etiology with the burden of proving that without occupational exposure, *i.e.*, to cotton dust in a textile mill, the disease would not have developed to such an extent as to cause the worker's total physical disablement. *Id.* at 102, 301 S.E. 2d at 370.

The *Rutledge* decision was filed on 5 April 1983. The Industrial Commission, in the case *sub judice*, rendering its decision

of 7 February 1983 relied, thus, on pre-*Rutledge* law in awarding claimant benefits after concluding that claimant's lung disease was "aggravated and accelerated by causes and conditions characteristic of and peculiar to his employment in the textile industry . . ." The Commission's pertinent findings of fact included the following:

> 4. Plaintiff suffers from chronic obstructive lung disease with components of chronic bronchitis and emphysema. His lung disease was predominantly caused by tobacco consumption. Once his disease was relatively well advanced, the exposure to cotton dust served as an aggravating factor by acutely worsening his symptoms and making his impairment increase at a greater rate.
>
> 5. Plaintiff is totally disabled as a result of his chronic obstructive lung disease, partially as a result of his long-term exposure to cotton dust in his job. . . .
>
> 6. Plaintiff was placed at an increased risk of developing chronic obstructive lung disease by reason of his occupational exposure to cotton dust but the major cause of his lung disease is cigarette smoking.
>
> 7. Plaintiff's lung disease was aggravated and accelerated by his exposure to cotton dust in his employment, an exposure which is characteristic of and peculiar to employment in the textile industry. He is permanently and totally disabled by his chronic obstructive pulmonary disease and is entitled to compensation for his disability under the Workers' Compensation Act.

The Commission made no findings regarding the *significance* of plaintiff's exposure to cotton dust in relation to the development of his lung disease. Despite this omission in the findings, an award of workers' compensation may, nevertheless, be proper if the evidence supports a conclusion that occupational exposure was a significant contributing or causal factor in the development of plaintiff's lung disease.

In *Dowdy v. Fieldcrest Mills*, 308 N.C. 701, 304 S.E. 2d 215 (1983), the Supreme Court reviewed the evidence in a case similar to the one at bar involving a pre-*Rutledge* award by the Industrial Commission for plaintiff's total permanent disability due

to chronic obstructive lung disease. In *Dowdy,* plaintiff and others testified that plaintiff's condition became substantially worse each time plaintiff was exposed to cotton dust. A physician's report showed that plaintiff's disease was " 'probably due in part to cotton dust exposure' and that there was 'distinct aggravation' of his symptoms when exposed to cotton dust." *Id.* at 708, 304 S.E. 2d at 220. Based on this evidence, the Supreme Court found as a matter of law that plaintiff's "exposure to cotton dust in his employment with the defendant significantly contributed to and was a significant causal factor in the development of the disease." *Id.* at 708-09, 304 S.E. 2d at 220.

We have carefully reviewed the record in this case and unlike the court in *Dowdy,* we find the evidence insufficient to draw a legal conclusion regarding the significance of plaintiff's exposure to cotton dust in relation to the development of his lung disease. In reaching this conclusion, we have reviewed such evidence as:

(1) the extent of plaintiff's exposure to cotton dust during employment,

(2) the extent of other non-work-related, but contributing exposures and components,

(3) the manner in which the disease developed with reference to plaintiff's work history, and

(4) medical testimony.

See Rutledge, 308 N.C. at 105, 301 S.E. 2d at 372.

The record here showed that although plaintiff worked in a textile mill for approximately 35 years, he worked primarily in the weave room, a relatively low-risk area. The record furthermore showed that plaintiff's tobacco consumption contributed to a significant extent to the development of his disease. Finally, although the development of plaintiff's lung disease coincided with his employment in the mill, the medical experts disagreed as to the relative correlation between the two. Dr. O'Neill testified that plaintiff's work had *no* influence on the development of his lung disease, while Dr. Hayes testified that cotton dust in the mill was an aggravating factor causing plaintiff greater obstructive impairment. The equivocal evidence in this case supports neither

an award nor a denial of workers' compensation pursuant to the principles espoused in *Rutledge*. A possibility of causation or contribution is not enough to support an award of compensation. *See Walston v. Burlington Industries, supra.*

Ordinarily, our scope of review upon appeal from an award of the Industrial Commission is limited to determining: (1) whether there was competent evidence before the Commission to support its findings of fact; and (2) whether the Commission's findings of fact justify its legal conclusions. *Hansel v. Sherman Textiles, supra.* When, however, as here, facts are found or the Commission fails to find facts under a misapprehension of the law, a remand may be necessary so that the evidence may be considered in its true legal light. *Bailey v. Dept. of Mental Health,* 272 N.C. 680, 159 S.E. 2d 28 (1968). The proper procedure on appeal is to remand a case when the Commission's findings of fact are insufficient to determine the rights of parties upon a claim for compensation. *See Clark v. American & Efird Mills,* 66 N.C. App. 624, 311 S.E. 2d 624 (1984); *Swink v. Cone Mills, Inc.,* 65 N.C. App. 397, 309 S.E. 2d 271 (1983) (both reversing and remanding decisions of the Industrial Commission for findings on the question of significant contribution).

In light of *Rutledge* and other recent authority from this court, we remand this case to the Industrial Commission for findings on the question of "significant contribution" or "significant causal factor." On remand, the Industrial Commission may, but is not limited to consider such factors as:

(1) medical testimony,

(2) the extent of plaintiff's exposure to cotton dust during employment,

(3) the extent of other non-work-related, but contributing exposures and components, *i.e.*, tobacco consumption, and

(4) the manner in which the disease developed with reference to the plaintiff's work history.

See Rutledge, 308 N.C. at 105, 301 S.E. 2d at 372.

Reversed and remanded.

Judges BRASWELL and EAGLES concur.

JAMES A. COLE, JR., ADMINISTRATOR OF THE ESTATE OF JAMES ANDERSON COLE, III v. DUKE POWER COMPANY

No. 8314SC191

(Filed 1 May 1984)

Electricity § 5— electrocution in power company's cabinet—absence of warning signs—jury issue as to negligence

The trial court erred in entering summary judgment for defendant power company in an action to recover for the death of plaintiff's intestate who was electrocuted when he entered a padmounted primary cabinet used in connection with defendant's electric distribution lines where plaintiff presented evidence tending to show that, although defendant placed locks on the cabinet, there were no signs warning of the high voltage contained in the cabinet; the cabinet was in a residential area in which children often played; it was a deviation from standard practice not to have warning signs posted on the cabinet; the National Electrical Safety Code requires that defendant post warning signs on the cabinet; and plaintiff's intestate made a statement before entering the cabinet that the wires were not dangerous.

APPEAL by plaintiff from *Preston, Judge.* Order entered 20 August 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 19 January 1984.

Plaintiff appeals from an order granting summary judgment for defendant in a negligence action. Plaintiff's intestate was electrocuted when he entered a padmounted primary cabinet, which was used in connection with defendant's electric distribution lines or conductors. Defendant placed locks on the cabinet, but there were no signs warning of the high voltage contained in the cabinet. Plaintiff alleges that defendant was negligent in the maintenance and design of the cabinet and in the failure to post warnings.

Pulley, Watson, King & Hofler, P.A., by W. Paul Pulley, Jr., and A. Neil Stroud, for plaintiff appellants.

William I. Ward, Jr., W. Edward Poe, Jr., and Newsom, Graham, Hedrick, Bryson, Kennon & Faison, by E. C. Bryson, Jr., and Lewis A. Cheek, for defendant appellee.

ARNOLD, Judge.

The only issue presented here is whether the court was correct in granting defendant's motion for summary judgment. G.S. 1A-1, Rule 56(c) provides that summary judgment is proper "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." Summary judgment may be granted in a negligence action. Our Supreme Court, however, has stated that:

> As a general proposition, issues of negligence are ordinarily not susceptible of summary adjudication either for or against the claimant "but should be resolved by trial in the ordinary manner." 6 Pt. 2 Moore's Federal Practice, § 56.17 [42] at 946 (2d ed. 1980). Hence, it is only in exceptional negligence cases that summary judgment is appropriate because the rule of the prudent man, or other applicable standard of care, must be applied, and ordinarily the jury should apply it under appropriate instructions from the court.

Vassey v. Burch, 301 N.C. 68, 73, 269 S.E. 2d 137, 140 (1980); *see also Williams v. Power & Light Co.*, 296 N.C. 400, 402, 250 S.E. 2d 255, 257 (1979); W. Shuford, North Carolina Civil Practice and Procedure § 56-7 (1981).

Plaintiff argues that this is not one of those "exceptional negligence cases" in which it is proper to grant summary judgment. He argues that there was a genuine issue as to whether defendant was negligent because of the failure to post warning signs.

In discussing the standard of care required of electric companies, our Supreme Court has stated that they

> are required to use reasonable care in the construction and maintenance of their lines and apparatus. The degree of care which will satisfy this requirement varies, of course, with the circumstances, but it must always be commensurate with the dangers involved, and where the wires maintained by a company are designed to carry a strong and powerful current of electricity, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its business, to avoid injury to those likely to come in contact with its wires.

Helms v. Power Co., 192 N.C. 784, 786, 136 S.E. 9, 10 (1926); *see also Alford v. Washington*, 238 N.C. 694, 699, 78 S.E. 2d 915, 919

(1953); *Bogle v. Power Co.*, 27 N.C. App. 318, 321, 219 S.E. 2d 308, 310 (1975), *disc. rev. denied*, 289 N.C. 296, 222 S.E. 2d 695 (1976). Further, while the National Electrical Safety Code is instructive as to whether an electric company used reasonable care, it is not decisive on the issue of negligence. Rather, the prudent man rule still controls. *Hale v. Power Co.*, 40 N.C. App. 202, 204, 252 S.E. 2d 265, 267, *disc. rev. denied*, 297 N.C. 452, 256 S.E. 2d 805 (1979).

Here, plaintiff's expert stated in his deposition that it was a deviation from standard practice not to have warning signs posted on the cabinet. He also stated that the National Electrical Safety Code requires that defendant post warning signs on the cabinet. Further, the cabinet was in a residential area in which children often played.

We agree with plaintiff that this is not one of the "exceptional negligence" cases in which summary judgment is proper. Reasonable minds could differ as to whether, when an electric company places a cabinet containing high voltage in a residential area, it should place warning signs on the cabinet. Further, a statement made by plaintiff's intestate before entering the cabinet that the wires were not dangerous tends to show that had warning signs been posted, the accident would not have occurred.

Reversed.

Judges BECTON and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 MAY 1984

CANTRELL v. CANTRELL No. 8329DC717	Henderson (82CVD1033)	Vacated and Remanded
IN RE DENIAL OF REQUEST OF HUMANA HOSPITAL CORP. No. 8310SC453	Wake (82CVS1081)	Appeal Dismissed
IN RE FORECLOSURE OF EZZELL No. 8313SC606	Bladen (82SP212)	Affirmed
McMILLAN v. SEABOARD COASTLINE R.R. No. 8316SC665	Robeson (80CVS734)	Affirmed
STATE v. BROWN No. 834SC499	Onslow (81CRS21298) (81CRS21299)	No Error
STATE v. DAYE No. 8315SC1110	Alamance (82CRS15951)	Reversed and Remanded for Resentencing Consistent with this Opinion
STATE ex rel. EDMISTEN, ATTORNEY GENERAL v. WHOLESALE MARKETING No. 8210SC1330	Wake (79CVS2128)	Reversed and Remanded

DEWEY A. ROBERTS, JR. v. AVIS COOPER ROBERTS

No. 8317DC88

(Filed 1 May 1984)

1. Divorce and Alimony § 11— indignity—sufficiency of evidence

The trial court properly considered the evidence that plaintiff physically abused defendant where plaintiff neither alleged nor raised the defense of condonation, and the evidence of abuse was sufficient to support the court's finding and conclusion that plaintiff offered indignities to the defendant which rendered her condition intolerable and her life burdensome.

2. Divorce and Alimony § 8— abandonment—sufficiency of evidence

Undisputed evidence that plaintiff willfully ceased living with defendant at a certain date without justification and without her consent and without an intent to renew their marital relationship supported the court's finding and conclusion that plaintiff abandoned defendant. G.S. 50-7(1).

3. Divorce and Alimony § 14.3— evidence of adultery—improperly admitted—no prejudicial error

The trial court erred in admitting into evidence defendant's testimony that on the occasions plaintiff abandoned her he would move into his house and live there alternately with two women since the testimony implied acts of adultery and, pursuant to G.S. 50-10, in a divorce proceeding, neither the husband nor wife shall be a competent witness to prove the adultery of the other. However, the error was not prejudicial to plaintiff in light of the evidence supporting the court's findings and conclusions on the issues of abandonment and indignities, which issues effectively established the rights of the parties.

4. Divorce and Alimony § 17— divorce from bed and board—alimony—insufficient evidence to support award

In an action in which the trial court awarded defendant divorce from bed and board, alimony and attorney's fees, the evidence was insufficient to support the award of alimony where there were no findings to indicate that the court considered (1) plaintiff's expenses, (2) the standard of living to which the parties as a unit became accustomed during their marriage prior to the abandonment, and (3) the length of the marriage and contribution of each party to the financial status of their unit during marriage prior to plaintiff abandoning defendant. G.S. 50-16(3) and G.S. 50.16.5.

5. Divorce and Alimony § 20.3— award of attorney fees—insufficient findings

In an action for divorce from bed and board, the trial court erred in awarding attorney's fees where it failed to make the required findings of fact upon which a determination of the reasonableness of the fees could be based, and where the issues of dependency and the amount of alimony had been vacated.

Roberts v. Roberts

APPEAL by plaintiff from *Martin (Jerry), Judge.* Judgment entered 30 November 1982 in District Court, ROCKINGHAM County. Heard in the Court of Appeals 8 December 1983.

On 23 July 1982, the plaintiff-husband instituted this action for absolute divorce on the ground of a one year separation, alleging that the parties separated on 4 July 1981. The defendant-wife filed an answer denying the period of separation and counterclaimed for divorce from bed and board, permanent alimony and attorney's fees. As grounds for a divorce from bed and board and alimony, defendant alleged abandonment, adultery and indignities. Neither party demanded a trial by jury and the matter was heard and decided by the presiding judge. Plaintiff appeared *pro se* and defendant was represented by counsel. The court denied plaintiff's request for absolute divorce; granted defendant's request for divorce from bed and board; and awarded her permanent alimony and attorney's fees. From that portion of the judgment awarding defendant divorce from bed and board, alimony and attorney's fees, plaintiff appeals.

Turner, Enochs and Sparrow, P.A., by Betty J. Pearce, for plaintiff appellant.

Harrington, Stultz and Maddrey, by J. Hoyte Stultz, Jr., for defendant appellee.

JOHNSON, Judge.

Evidence adduced at trial pertinent to defendant's counterclaim and this appeal showed the following: plaintiff Dewey Roberts and defendant Avis Roberts were married to each other on 25 June 1981. After a one day honeymoon they returned to live with Avis' mother in her mother's home in Eden, North Carolina. Dewey also owned a house in Eden. They lived together as man and wife in the home of Avis' mother for the ten day period immediately after their wedding and then separated. After a two week separation, they reunited and resumed living together for a time, after which they again separated. The parties reunited once again on about 13 August 1981. Thereafter, they lived together off and on until 5 November 1981 when Dewey, without justification, abandoned Avis.

Each separation of the parties was brought about by Dewey leaving Avis' mother's home and going to live in the house he owned. Each time they separated, Dewey refused to allow Avis to accompany him. During the times when Dewey returned to his own house, he lived there together with either Debra Proffitt or Barbara Travis. On 22 August 1981, Dewey physically abused Avis by slapping her.

Avis is unemployed and continues to live with her mother and is without resources or estate from which to provide herself with the necessities of life. Her weekly expenses, as found by the trial court, are $15 for food, $20 for shelter, $7.50 for medical needs and $10 for clothes and miscellaneous items. Dewey is employed and earns $300 per week.

First, the plaintiff husband contends that the evidence was insufficient to support the court's findings and conclusions of indignities, abandonment and adultery as grounds for the allowance of divorce from bed and board and alimony.

A trial court's findings of fact are conclusive on appeal where there is some evidence to support those findings. *Worthington v. Worthington*, 27 N.C. App. 340, 219 S.E. 2d 260 (1975), *disc. rev. denied*, 289 N.C. 142, 220 S.E. 2d 801 (1976).

Indignities

[1] The evidence upon which defendant relies to establish indignities, and upon which the court based its finding and conclusion, is that on 22 August 1981, plaintiff physically abused defendant by slapping her. Plaintiff argues condonation in defense. Condonation is a specific affirmative defense and must be alleged and proved by the party insisting upon it. *Cushing v. Cushing*, 263 N.C. 181, 139 S.E. 2d 217 (1964). Plaintiff neither alleged nor raised the defense of condonation at the trial level. Therefore, the court properly considered only the evidence that plaintiff physically abused defendant on 22 August, and that evidence is sufficient to support the court's finding and conclusion that plaintiff offered indignities to the defendant which rendered her condition intolerable and her life burdensome.

Abandonment

[2] Plaintiff argues that the evidence is insufficient to support the court's finding of abandonment. We disagree. Although abandonment within the meaning of G.S. 50-7(1) is not subject to an all-embracing definition, one spouse abandons the other, within the meaning of the law, where he wilfully brings their cohabitation to an end without justification, without the consent of the other spouse, and without an intent to renew it. *Richardson v. Richardson*, 268 N.C. 538, 151 S.E. 2d 12 (1966). The evidence is undisputed that on 5 November 1981, Dewey wilfully ceased living with Avis without justification and without her consent and without an intent to renew their marital relationship. This evidence supports the court's finding and conclusion that plaintiff abandoned defendant on 5 November.

Adultery

[3] Plaintiff argues that the trial court erred in admitting into evidence defendant's testimony that on the occasions plaintiff abandoned her he would move into his house and live there alternately with Debra Proffitt or Barbara Travis. Plaintiff contends this testimony clearly implies acts of adultery and was, therefore, inadmissible under G.S. 50-10.

G.S. 50-10 provides, in pertinent part, that in a divorce proceeding, neither the husband nor wife shall be a competent witness to prove the adultery of the other. This Court has held that testimony by a wife concerning her husband's relationship with another woman is inadmissible under G.S. 50-10 when it clearly implies an act of adultery, even though the words "adultery" or "intercourse" are not used, but that when there is no clear implication of intercourse, the testimony is admissible. *Spencer v. Spencer*, 61 N.C. App. 535, 301 S.E. 2d 411, *disc. rev. denied*, 308 N.C. 678, 304 S.E. 2d 757 (1983); *Horner v. Horner*, 47 N.C. App. 334, 267 S.E. 2d 65, *disc. rev. denied*, 301 N.C. 89, 273 S.E. 2d 297 (1980). In *Horner* we held that testimony by the wife that she had undressed in front of other men clearly implied an act of adultery and was inadmissible under G.S. 50-10. In *Phillips v. Phillips*, 9 N.C. App. 438, 176 S.E. 2d 379 (1970), we held that testimony by a husband that he caught his wife in the woods with a man clearly

implied an act of adultery and was properly excluded under G.S. 50-10.

Under the facts of the case *sub judice*, we hold that defendant's testimony that on the occasion that Dewey left Avis and moved into another house and lived with another woman, while refusing to allow his wife to accompany him, presents facts tending to imply that Dewey committed an act of adultery and was, therefore, inadmissible under G.S. 50-10. However, although the trial judge erred in the admission of this testimony, the error was not prejudicial to plaintiff in light of the evidence supporting the court's findings and conclusions on the issues of abandonment and indignities, which issues effectively established the rights of the parties. *Mode v. Mode*, 8 N.C. App. 209, 174 S.E. 2d 30 (1970).

[4] Next, plaintiff contends the court erred in finding and concluding that defendant is the dependent spouse and plaintiff is the supporting spouse.

G.S. 50-16.1(3) defines "dependent spouse" as a spouse who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse. G.S. 50-16.1(4) defines "supporting spouse" as a spouse upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support.

The case of *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980) is the leading case concerning the meaning of the terms "dependent spouse" and "supporting spouse" and lists the following relevant circumstances that the trial court must consider in determining dependency.

> (2) The incomes and expenses measured by the standard of living of the family as a unit must be evaluated from the evidence presented. If this comparison reveals that one spouse is without means to maintain his or her accustomed standard of living, then the former would qualify as the dependent spouse under the phrase "actually substantially dependent." G.S. 50-16.1(3).
>
> (3) If the comparison does not reveal an *actual* dependence by one party on the other, the trial court must then determine if one spouse is "substantially in need of maintenance and sup-

port" from the other. In so doing these additional guidelines should be followed:

(A) The trial court must determine the standard of living, socially and economically, to which the parties *as a family unit* had become accustomed during the [marriage] prior to their separation.

(B) It must also determine the present earnings and prospective earning capacity and any other "condition" (such as health and child custody) of each spouse at the time of hearing.

(C) After making these determinations, the trial court must then determine whether the spouse seeking alimony has a demonstrated need for financial contribution from the other spouse in order to maintain the standard of living of the spouse seeking alimony in a manner to which that spouse became accustomed during the last several years prior to separation. This would entail considering what reasonable expenses the party seeking alimony has, bearing in mind the family unit's accustomed standard of living.

(D) The financial worth or "estate" of both spouses . . .

* * *

. . . [T]he length of a marriage and the contribution each party has made to the financial status of the family . . . (Emphasis original.)

In determining the issue of dependency, the trial court in the case *sub judice*, found that defendant was "substantially in need of maintenance and support" rather than "actually substantially dependent." Therefore, the trial court was required to make factual findings sufficiently specific[1] to indicate that the trial judge properly considered

(a) the incomes and expenses of the parties as a family unit;

1. G.S. 1A-1, Rule 52(a) requires specific findings of the ultimate facts established which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

(b) the standard of living, socially and economically, to which the parties as a family unit had become accustomed during marriage prior to separation;

(c) the present earnings and prospective earning capacity and any condition such as health and child custody of each spouse at the time of hearing;

(d) bearing in mind the family unit's accustomed standard of living, defendant's reasonable expenses;

(e) the financial worth or estate of both plaintiff and defendant; and

(f) the length of the marriage and the contribution each party made to the financial status of the family unit during marriage prior to separation.

The trial court's findings are deficient because there are no findings to indicate that the court considered (1) plaintiff's expenses, (2) the standard of living to which the parties as a unit became accustomed during their marriage prior to the 5 November 1981 abandonment, and (3) the length of the marriage and contribution of each party to the financial status of their unit during marriage prior to plaintiff abandoning defendant on 5 November 1981.

In view of the deficiencies stated, we are compelled to vacate the court's judgment on the issue of dependency. Also, in view of the holding of the *Williams* court that in defining dependency, G.S. 50-16(3) must be read *in pari materia* with G.S. 50-16.5 (the statute for determining alimony), we must vacate that portion of the judgment setting the amount of alimony.

[5] By his final assignment of error, plaintiff contends the court erred in awarding defendant her attorney's fees. As a prerequisite for determination of an award of counsel fees, defendant must be entitled to the relief demanded, must be a dependent spouse and must have insufficient means to defray the necessary expense in prosecuting her claim. G.S. 50-16.4; *Powell v. Powell*, 25 N.C. App. 695, 214 S.E. 2d 808 (1975). In light of our holding vacating the issues of dependency and the amount of alimony, we must also vacate the award of attorney's fees and remand the case for a new hearing on these three issues. The trial court also

failed to make the required findings of fact upon which a determination of the reasonableness of the fees can be based. *Brown v. Brown*, 47 N.C. App. 323, 267 S.E. 2d 345 (1980).

In summary, we affirm the court's determination of the existence of indignities and abandonment as grounds for an award of alimony and divorce from bed and board; we vacate the court's determination of dependency, the amount of alimony awarded, and the award of attorney's fees and remand the case for a new hearing on the issue of dependency and the issues of the amount of alimony and attorney's fees, if any, to be awarded.

Affirmed in part, vacated in part and remanded.

Judges ARNOLD and PHILLIPS concur.

CAROL DILLINGHAM (LATIMER) WARNER v. DAVID MANSFIELD LATIMER, JR.

No. 835DC648

(Filed 1 May 1984)

1. **Divorce and Alimony § 24.1— child support—reasonable needs—sufficient evidence**

The evidence supported the trial court's determination that $500 per month in child support from defendant father was required to meet the reasonable needs of the child where the record contained detailed testimony establishing the child's expenses and the net incomes, expenses and financial situations of both plaintiff mother and defendant father. G.S. 50-13.4(c).

2. **Divorce and Alimony § 24— back child support—lump sum award**

A lump sum award of back child support was proper where it was based upon the amounts actually expended on behalf of the child. G.S. 50-13.4(e).

3. **Divorce and Alimony § 27— child custody and support action—award of attorney fees**

The trial court's determination that plaintiff mother had insufficient means to defray the expense of a child custody and support action to entitle her to an award of attorney fees was supported by evidence of the net salaries of plaintiff and her new husband and their monthly expenses.

APPEAL by defendant from *Lambeth, Judge.* Judgment entered 26 January 1983 in District Court, NEW HANOVER County. Heard in the Court of Appeals 9 April 1984.

This appeal arises out of an action for custody and child support of a minor child, one of the parties' three children, brought by plaintiff wife. Plaintiff also sought an order that defendant husband be made liable for the child's medical expenses, and for attorney's fees. At the time this action was filed both parties had remarried and the parties' other two children were in the custody of the defendant.

The parties were married in December 1965 and divorced in September 1976, following a separation. Subsequent to the divorce, the three minor children resided at various times with their mother or their father. On or about December 1981, the eldest son, David, then fifteen years old, came to live with the plaintiff. From that date, the defendant paid $200 per month as his share of support and maintenance of the child. Plaintiff did not feel that $200 per month was an adequate share of support. She apparently attempted to get the defendant to increase his payments, without success. She then filed this action on 3 July 1982.

At the hearing, plaintiff presented evidence showing the monthly expenses needed to support the child, monthly living expenses for herself and her new husband, her gross income and net income, and the gross and net income of her husband. Defendant also presented evidence pertaining to the financial situation of himself and his new wife including his gross and net monthly income, monthly expenses for himself, the parties' two other children, defendant's wife, and her two children from a former marriage. Based on the evidence, the trial court entered its order awarding custody of David to the plaintiff, a lump sum of back child support in the amount of $2,100, periodic child support payments of $500 per month starting in February 1983 until the child reached his majority, attorney's fees in the amount of $1,500, and ordering that defendant was to be responsible for David's medical bills. From this order, defendant appeals.

Goldberg & Anderson, by Frederick D. Anderson, for plaintiff appellee.

Shipman & Lea, by Gary K. Shipman, for defendant appellant.

VAUGHN, Chief Judge.

[1] Defendant first contends that the child support award did not contain findings of fact and conclusions of law supported by competent evidence demonstrating that the reasonable needs of the child as of the date of the hearing were $500 per month. We disagree.

G.S. 50-13.4(c), the controlling statute, provides:

> Payments ordered for the support of a minor child shall be in such amount 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, the child care and homemaker contributions of each party, and other facts of the particular case.

Our Supreme Court in *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980), clarified the proper application of the statute:

> Under G.S. 50-13.4(c) . . . an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to "meet the reasonable needs of the child" and (2) the relative ability of the parties to provide that amount. These conclusions must themselves be based upon factual *findings* specific enough to indicate to the appellate court that the judge below took "due regard" of the particular "estates, earnings, conditions, [and] accustomed standard of living" of both the child and the parents. . . . Evidence must support findings; findings must support conclusions; conclusions must support the judgment.

Id. at 712, 714, 268 S.E. 2d at 189, 190.

In addition to the factors enumerated in G.S. 50-13.4(c), the trial court may consider the conduct of the parties and the equities of a given case, *Stanley v. Stanley*, 51 N.C. App. 172, 275

S.E. 2d 546, *review denied*, 303 N.C. 182, 280 S.E. 2d 454, *appeal dismissed*, 454 U.S. 959, 70 L.Ed. 2d 374, 102 S.Ct. 496 (1981), and any other relevant facts in determining child support. *McCall v. McCall*, 61 N.C. App. 312, 300 S.E. 2d 591 (1983). *See also Beall v. Beall*, 290 N.C. 669, 674, 228 S.E. 2d 407, 410 (1976) ("It is a question of fairness and justice to all parties").

We note that this assignment of error is directed at the findings pertaining to the reasonable needs of the child, and not to the defendant's ability to pay. Our Supreme Court has stated that "[w]hat amount is reasonable for a child's support is to be determined with reference to the special circumstances of the particular parties." *Williams v. Williams*, 261 N.C. 48, 57, 134 S.E. 2d 227, 234 (1964). *See also Bethea v. Bethea*, 43 N.C. App. 372, 375, 258 S.E. 2d 796, 799 (1979), *review denied*, 299 N.C. 119, 261 S.E. 2d 922 (1980) (necessities include articles reasonably necessary for suitable maintenance of the child in view of the child's social station, customs of child's social circle and the fortune possessed by the child and by the child's parents). Furthermore, to determine the amount of support necessary to meet the reasonable needs of the child for health, education and maintenance, the court must make findings of specific facts as to what actual past expenditures have been. *Steele v. Steele*, 36 N.C. App. 601, 244 S.E. 2d 466 (1978).

We here conclude that competent evidence supported the findings and conclusions set forth by the trial court. The record contains detailed testimony establishing the child's expenses, evidence of the net incomes, expenses, and financial situations generally of both plaintiff and defendant. *See McLeod v. McLeod*, 43 N.C. App. 66, 258 S.E. 2d 75, *review denied*, 298 N.C. 807, 261 S.E. 2d 920 (1979) (court justified award in that it enabled children to live as children of someone with supporting spouse's income are entitled to live; court also noted supporting spouse's income was "substantial" and dependent spouse's "limited").

Defendant argues that a budget apparently prepared by plaintiff documenting her living expenses and those of her husband and child, to which she referred during her testimony, was not introduced into evidence, and that therefore the order should be vacated. Plaintiff testified as to the contents of that budget,

and that provided sufficient competent evidence to support the findings of fact and conclusions of law.

Finally, we note that the amount of child support is in the discretion of the trial judge and may be disturbed only on a showing of abuse of that discretion. *Wyatt v. Wyatt*, 32 N.C. App. 162, 231 S.E. 2d 42 (1977), *aff'd*, 35 N.C. App. 650, 242 S.E. 2d 180 (1978). No such showing was made here. *Cf. Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976) (vacating child support portion of order where Supreme Court found that after making payments ordered by trial court, defendant would not be able to meet his own necessary expenses); *Evans v. Craddock*, 61 N.C. App. 438, 300 S.E. 2d 908 (1983) (findings and conclusions not supported by competent evidence where order misstated defendant's net monthly income and trial court relied in part on affidavit using an impermissible mathematical formula to calculate child's needs); *Hamilton v. Hamilton*, 57 N.C. App. 182, 290 S.E. 2d 780 (1983) (no abuse of discretion although this Court admitted it could not determine exactly how trial court arrived at figure for child's reasonable needs).

[2] Defendant next contends that the trial court's lump sum award of back child support was erroneous in that the court failed to base the award on amounts actually expended on behalf of the minor child. This assignment of error is bottomed on substantially the same argument as the preceding assignment; again, we find no error.

G.S. 50-13.4(e) provides, in pertinent part: "Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of any interest therein, or a security interest in or possession of real property, as the court may order." This Court has specifically held that the methods of payment listed in the statute are not mutually exclusive. *Moore v. Moore*, 35 N.C. App. 748, 751, 242 S.E. 2d 642, 644 (1978). Furthermore, not only may an action be brought to collect child support payments in arrears, *see, e.g., Griffith v. Griffith*, 38 N.C. App. 25, 247 S.E. 2d 30, *review denied*, 296 N.C. 106, 249 S.E. 2d 804 (1978), a claim for retroactive child support may be brought under the statute. *See Wood v. Wood*, 60 N.C. App. 178, 298 S.E. 2d 422 (1982). The $2,100 lump sum payment order by Judge Lambeth, in addition to

the monthly payments, represents retroactive child support. *Hicks v. Hicks*, 34 N.C. App. 128, 237 S.E. 2d 307 (1977) articulated the standard for vacating such lump sum awards. In *Hicks*, this Court vacated an award for retroactive child support where there was "no evidence or finding as to the actual amount expended by plaintiff for the support of the children for which she is entitled to reimbursement from defendant." *Id.* at 130, 237 S.E. 2d at 309. This is distinguishable from the instant case, where there was both evidence and findings on these matters. The analysis in *Hicks v. Hicks* applies here:

> What the defendant "should have paid" is not the measure of his liability to plaintiff. *The measure of defendant's liability to plaintiff is the amount actually expended by plaintiff which represented the defendant's share of support.* . . . In determining this amount the court must take into consideration the needs of the children and the ability of the defendant to pay during the time for which reimbursement is sought. . . . It seems clear from the findings and conclusions made by the trial judge that he calculated that defendant should have been paying . . . the same amount per month as he will be required to pay in the future. Obviously, the trial judge did not . . . [take] into consideration what plaintiff actually expended for the children's support for and in behalf of the defendant. *While the amount that the defendant "should have paid" might very well be substantially the same as the amount of his liability to the plaintiff, we cannot assume so.*

34 N.C. App. at 130, 237 S.E. 2d at 309 (citations omitted; emphasis added).

What the trial court failed to do in *Hicks* is precisely what Judge Lambeth did here; he assumed nothing and took into account amounts actually expended. As this Court recognized in *Hicks*, there will be occasions in which the amount of a defendant's actual past liability to a plaintiff will be equivalent to the amount of support that defendant should have paid. The facts before us present such a situation. The lump sum award of child support is therefore entirely proper.

[3] Defendant lastly contends that $1,500 in attorney's fees were improperly awarded plaintiff. G.S. 50-13.6 allows counsel fees to be awarded in certain circumstances in actions for custody and

support of minor children. The text of the statute sets out four requirements to support such an award, namely: (1) that the party awarded fees be an interested party; (2) that that party be acting in good faith; (3) that that party have insufficient means to defray the expense of the suit; and (4) that the party ordered to furnish support have refused to provide adequate support under the circumstances existing at the time the action was instituted.

As G.S. 50-13.6 requires that awards of attorney's fees be reasonable, cases construing the statute have in effect annexed a fifth requirement concerning reasonableness onto the express statutory ones. Namely, the record must contain findings of fact upon which a determination of the requisite reasonableness can be based, for example, findings pertaining to the nature and scope of the legal services rendered and the skill and time required. *Austin v. Austin*, 12 N.C. App. 286, 296, 183 S.E. 2d 420, 427 (1971).

Defendant assigns error in the award of attorney's fees on the grounds that no evidence supported the finding and conclusion that plaintiff had insufficient means to defray the expense of this action. We therefore assume that the other statutory requirements to support an award of fees were met, and based on our review of the record, find evidence of the plaintiff's insufficient means to defray her expenses. In particular, the award is supported by evidence of the net salaries of plaintiff and her new husband and their monthly expenses. *See also Williams v. Williams*, 299 N.C. 174, 190, 261 S.E. 2d 849, 860 (1980) (construing related statute G.S. 50-16.3: "purpose of the allowance of counsel fees is to enable the dependent spouse, *as litigant*, to meet the supporting spouse, *as litigant*, on substantially even terms by . . . [enabling] the dependent spouse to employ adequate counsel"). *Cf. Nolan v. Nolan*, 20 N.C. App. 550, 202 S.E. 2d 344, *cert. denied*, 285 N.C. 234, 204 S.E. 2d 24 (1974) (evidence that plaintiff received $1,825 per month for alimony and support of the parties' three minor children would not have supported a finding of fact concerning her inability to defray the expenses of the action). A trial judge is permitted to exercise considerable discretion in allowing or disallowing attorney's fees in child custody or support cases, *Brandon v. Brandon*, 10 N.C. App. 457, 179 S.E. 2d 177 (1971), and we find no abuse of that discretion here.

Affirmed.

Judges BRASWELL and EAGLES concur.

MABEL W. MYERS v. BOBBY R. MYERS AND TRIPLE "A" CONSTRUCTION COMPANY, INC.

No. 8312SC505

(Filed 1 May 1984)

1. **Rules of Civil Procedure § 15.1— denial of motion to amend answer—no abuse of discretion**

In an action in which conversion of certificates of deposit was alleged, the trial court did not abuse its discretion in denying defendants' motion to amend their answer where it was apparent that the court denied the motion because it was tardily made and at that point undue prejudice could have resulted to plaintiff.

2. **Banks and Banking § 4— joint account—signature card not releasing one depositor from liability to another**

When one spouse deposits funds into a joint account with the other, the other is designated the depositor's agent, with authority to withdraw the funds, and a depositing spouse, as principal, may bring an action in conversion against the withdrawing spouse to recover funds which that spouse has converted as agent. Therefore, defendants' motions for directed verdict and summary judgment were properly denied where plaintiff alleged that she deposited funds into a joint account with defendant-husband, and that he, without her knowledge or consent, converted the funds to his own use and refused to return them or account for them in any way. G.S. 41-2.1(b)(1).

3. **Trial § 31— peremptory instructions on right to relief and damages—improper on issue of damages**

In an action for conversion of certificates of deposit and restitution, the trial court correctly peremptorily instructed on the issue of conversion since all the evidence supported the right to relief; however, the trial court erred in peremptorily instructing on the precise sum converted, and thus the amount of plaintiff's damages, since the jury could have drawn more than a single inference from the evidence on the issue of damages.

APPEAL by defendants from *McLelland, Judge*. Judgment entered 13 December 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 15 March 1984.

McCoy, Weaver, Wiggins, Cleveland & Raper, by E. R. Zumwalt, III, for plaintiff appellee.

Rose, Rand, Ray, Winfrey & Gregory, P.A., by Randy S. Gregory, for defendant appellants.

WHICHARD, Judge.

I.

Plaintiff and the individual defendant (hereafter defendant-husband) were married in 1974 and were divorced subsequent to institution of this action. Plaintiff brought to the marriage a house and lot obtained during a previous marriage. For nine months plaintiff and defendant-husband made mortgage payments on that house with funds from their joint account.

In September 1975 plaintiff sold the house and deposited sales proceeds of $26,156.92 into the joint account. Two months later plaintiff and defendant-husband withdrew $27,248.16 from that account, placed that sum with funds from other accounts, and opened a joint savings account containing $50,000. In October 1976 they withdrew $52,430 from that account and $2,800 from their checking account and purchased $55,000 worth of certificates of deposit issued to plaintiff or defendant-husband.

On 11 January 1980 defendant-husband, without telling plaintiff, converted these certificates to identical certificates in his name only. Defendant-husband ultimately placed the funds from these certificates in defendant-company's bank account. Defendant-husband is the president and sole shareholder of defendant-company.

Plaintiff brought this action alleging conversion of the certificates of deposit and praying for restitution. At the conclusion of all the evidence the trial court indicated that it would peremptorily instruct for plaintiff, and that it would not allow arguments. Following summarization of the evidence, it gave the following peremptory instruction:

> I, therefore, instruct you that if you believe the evidence that you have heard, it is your duty to return as your verdict favorable answers for Plaintiff, answers favorable to Plaintiff.

It is your duty, if you believe the evidence, to answer the first issue, which reads: Did the Defendants Bobby Myers and Triple "A" Construction Company, Incorporated, convert the property of the Plaintiff? "yes." [sic]

And it's your duty to answer the second issue: What amount, if any, is Plaintiff entitled to recover? if [sic] you believe all the evidence, both Plaintiff's and Defendants', "$26,156.92."

The jury found that defendants converted plaintiff's funds and that plaintiff was entitled to recover $26,156.92 plus interest from the time of conversion. From a judgment in accordance with the verdict, defendants appeal.

II.

[1] Defendants contend the court erred in denying their motion for leave to amend their answer to allege confusion of goods, gift, and equitable set-off or mitigation of damages. A motion to amend is addressed to the sound discretion of the trial court, and denial is not reviewable absent a clear showing of abuse of discretion. *Smith v. McRary*, 306 N.C. 664, 671, 295 S.E. 2d 444, 448 (1982). While leave to amend should be freely given, a court may refuse to allow amendment if it finds undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, undue prejudice to the opposing party if amendment were allowed, futility of amendment, or other apparent or declared reason. *Ledford v. Ledford*, 49 N.C. App. 226, 232-33, 271 S.E. 2d 393, 398 (1980).

Plaintiff filed her complaint on 9 September 1980. Defendants were given nine and a half months in which to answer. They filed answer on 2 July 1981. They did not attempt to amend until after their motion for summary judgment was denied at the beginning of trial on 7 December 1982. It is apparent that the court denied the motion because it was tardily made and at that point undue prejudice could result to plaintiff. Under these circumstances we find no abuse of discretion.

III.

[2] Defendants contend they were entitled to summary judgment and directed verdict on the basis of a bank signature card,

signed by plaintiff and defendant-husband, which provided as follows:

> We, the persons whose signatures are written above, agree that all funds deposited at any time, including those deposits prior to this date, in Southern National Bank of North Carolina in any joint deposit account (i.e. demand, savings, certificates of deposit or any other designation) of the above signed shall be held by us as co-owners with the right of survivorship regardless of whose funds are deposited and regardless of who deposits the funds. Subject to the provisions of North Carolina General Statutes Section 41-2.1, which shall govern this agreement, either (or any) of us shall have the right to draw upon such account(s), without limit; and, in case of the death of either (or any) of us, the survivor(s) shall be the sole owner(s) of the entire account.

They argue that under the terms of the signature card, the provisions of G.S. 41-2.1(b)(1), and this Court's opinion in *Benfield v. Savings & Loan Assoc.*, 44 N.C. App. 371, 261 S.E. 2d 150 (1979), defendant-husband could withdraw the entire amount in the certificates of deposit; and that he thus cannot be held liable in conversion.

G.S. 41-2.1(b)(1) does provide that either party to an agreement establishing a joint bank account with right of survivorship may deposit to or withdraw from the account, and that "any withdrawal by or upon the order of either party shall be a complete discharge of the banking institution with respect to the sum withdrawn." A signature card under this statute " 'constitutes the contract between the depositor of money, and the bank in which it is deposited, and it controls the terms and disposition of the account.' " *O'Brien v. Reece*, 45 N.C. App. 610, 617, 263 S.E. 2d 817, 821 (1980) (quoting *Colley v. Cox*, 209 Va. 811, 814, 167 S.E. 2d 317, 319 (1969)).

The statute and signature cards serve only to discharge the bank from liability to its depositors, however. They do not release one depositor to a joint account from liability to another for withdrawal which constitutes wrongful conversion.

Further, a deposit by one spouse into an account in the names of both, standing alone, does not constitute a gift to the

other. The depositor is still deemed to be the owner of the funds. For a deposit by one spouse to constitute a gift to the other, there must be donative intent coupled with loss of dominion over the property. The donor must divest himself of all right and title to, and control of, the gift. *Smith v. Smith*, 255 N.C. 152, 120 S.E. 2d 575 (1961).

Here, there is no evidence of donative intent. Further, plaintiff had the power to add to and withdraw from the account. She thus retained some dominion over the funds.

When one spouse deposits funds into a joint account with the other, the other is designated the depositor's agent, with authority to withdraw the funds. *Id.* at 155, 120 S.E. 2d at 579. A principal may maintain an action in conversion to recover funds converted by his agent. *See Finance Co. v. Holder*, 235 N.C. 96, 68 S.E. 2d 794 (1952). The depositing spouse, as principal, thus may bring an action in conversion against the withdrawing spouse to recover funds which that spouse has converted as agent.

Plaintiff alleged that she deposited funds into a joint account with defendant-husband, and that he, without her knowledge or consent, converted the funds to his own use and refused to return them or account for them in any way. Her complaint sufficed to state a claim for conversion, and her evidence sufficed to support the allegations. Defendants' motions for summary judgment and directed verdict thus were properly denied.

IV.

[3] Defendants contend the court erred in giving the peremptory instruction set forth above. When there is no conflict in the evidence, all the evidence supports the right to relief, and only one inference can be drawn therefrom, a peremptory instruction may be given in favor of the party with the burden of proof. *Cutts v. Casey*, 278 N.C. 390, 418, 180 S.E. 2d 297, 312 (1971); *Chisholm v. Hall*, 255 N.C. 374, 376-77, 121 S.E. 2d 726, 728 (1961). Such an instruction directs the jury to answer an issue in an indicated manner if it finds the facts to be as all the evidence tends to show. *Chisholm, supra.* It "does not deprive the jury of its right to reject the evidence because of lack of faith in its credibility," however. *Id.* at 376, 121 S.E. 2d at 728; *see also Morris v. Tate*, 230 N.C. 29, 51 S.E. 2d 892 (1949).

Here, defendant-husband admitted on cross-examination that the funds from the sale of plaintiff's house were deposited into their joint checking account, and were subsequently transferred, together with other funds, first to their joint savings account, and then into joint certificates of deposit. He admitted transferring all of the certificates of deposit into his name only, without plaintiff's knowledge or consent, and that the funds were ultimately placed in the bank account of defendant-company, of which he was president and sole shareholder. He also admitted that he refused to return the funds to plaintiff upon request. Given these uncontroverted facts, unless all the funds were expended for family purposes with plaintiff's consent, *see infra*, peremptory instruction on the issue of conversion was proper.

However, under a recent decision of this Court, which was not available to the trial court when this action was tried, peremptory instruction as to the precise sum converted, and thus the amount of plaintiff's damages, was not proper.

In *McClure v. McClure*, 64 N.C. App. 318, 307 S.E. 2d 212 (1983), *disc. rev. denied*, 310 N.C. 308, 312 S.E. 2d 651 (1984), a husband and wife sold a house in Virginia which they owned as tenants by the entireties. The proceeds remaining after purchase of a new house in North Carolina were deposited into the parties' joint savings account. Over a period of time the husband withdrew therefrom the total sum of $4,849, which he used to satisfy family and household needs. Shortly before the parties separated the wife withdrew $5,500 from the account.

The wife sought to recover her share of the bank account, which she claimed to be one-half of the original $22,817.39 deposit less her $5,500 withdrawal. She contended that her husband had a unilateral duty to support her and the children, and that he could not draw on her share of the account to fulfill that obligation. The trial court disagreed, and awarded her one-half of the original deposit less the $4,849 which the husband had expended for family purposes and the $5,500 which the wife had withdrawn.

In rejecting the wife's contention and affirming the trial court, this Court took judicial notice of the fact "[t]hat spouses today commonly contribute their separate earnings or estates to joint accounts, and periodically draw therefrom to sustain the family or enhance its standard of living." *Id.* at 322, 307 S.E. 2d at

215. It stated that "absent clear and convincing evidence to the contrary, creation of a spousal joint account should as a matter of law imply consent by each spouse to use by the other of funds from the account for purposes of sustaining the family or enhancing its standard of living." *Id.* at 323, 307 S.E. 2d at 215. It thus held that upon divorce one spouse is not required to account for and reimburse sums expended for family purposes from a spousal joint account which originated in part from the other spouse's separate earnings or estate.

There was evidence here that some payments on the house which plaintiff sold were made with funds from the joint account, to which defendant-husband had contributed. There was also evidence that defendant-husband had kept the house in good repair and had it painted, and that funds from the parties' joint account, which contained the proceeds of the house sale, had been used to make family support expenditures for groceries and other items. The jury thus could draw more than a single inference from the evidence on the issue of damages, and that issue was properly for it without peremptory instruction. Defendants thus are entitled to a new trial on the issue of damages only.

Upon retrial the parties may offer evidence as to sums deposited in a joint account or accounts, expenditures made therefrom, the purpose of such expenditures, and whether they were made with the consent of the originating party. If evidence tends to show that portions of plaintiff's $26,156.92 were expended to sustain the family or enhance its standard of living, the burden is on plaintiff to show by clear and convincing evidence the nonconsensual nature of such expenditures. *McClure, supra.* If plaintiff offers such evidence, sufficient to satisfy the jury that any such expenditures were made without her consent, the jury may award her the entire sum claimed. If not, however, it must deduct from the sum claimed any sums expended therefrom for family purposes with plaintiff's consent. The jury should be instructed, and the issue submitted, accordingly.

New trial.

Judges HEDRICK and WELLS concur.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY AND NATIONWIDE MUTUAL INSURANCE COMPANY v. JOHN W. ALLEN, FREDA P. ALLEN, KATHERYN E. PALAVID, COMMONWEALTH REALTY DEVELOPMENT CORPORATION D/B/A DUTCH VILLAGE APARTMENTS, A CORPORATION, AND LUMBERMENS MUTUAL CASUALTY COMPANY, A CORPORATION

No. 8326SC683

(Filed 1 May 1984)

1. **Insurance § 121— tenant-homeowner's policy—fire not caused by ownership or maintenance of motor vehicle—motorcycle kept in dead storage**

A fire in defendant insured's apartment did not arise out of the "ownership" or "maintenance" of a motor vehicle (a motorcycle) so that the fire was excluded from coverage under a tenant-homeowner's insurance policy where the fire was caused by the male insured's handling of combustible materials in the immediate vicinity of ignition sources (an operating electrical battery trickle charger and an open light bulb as a timing light left upon a metal frame of the motorcycle). Further, the motor vehicle exclusion did not apply since the motorcycle was not subject to motor vehicle registration because it was "kept in dead storage on the residence premises" within the meaning of the policy.

2. **Appeal and Error § 24.1— inappropriate cross-assignment of error**

A cross-assignment of error by defendants will not be considered where the appellate court upheld defendants' favorable judgment on plaintiff's appeal, since an appellee's cross-assignment of error can only be utilized in supporting the judgment from which appeal was taken. Appellate Rule 10(d).

APPEAL by plaintiff from *Cornelius, Judge.* Judgment entered 6 March 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 April 1984.

Kennedy, Covington, Lobdell & Hickman by Wayne P. Huckel for plaintiff appellant.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston by Irvin W. Hankins, III, for defendant appellees, Katheryn E. Palavid, Commonwealth Realty Development Corporation and Lumbermens Mutual Casualty Company.

BRASWELL, Judge.

A fire occurred in the rented apartment of John and Freda Allen in the Dutch Village Apartments complex. The Allens had tenant-homeowner's insurance coverage with the plaintiff Nation-

wide Mutual Fire Insurance Company. Mrs. Allen was the owner of a 1973 Honda motorcycle. The other plaintiff, Nationwide Mutual Insurance Company, provided liability insurance coverage on the motorcycle before policy coverage expired on 10 October 1979. Defendant Katheryn E. Palavid leased an adjacent apartment to the Allens and her personal property was damaged by the fire. Defendant Commonwealth Realty Development Corporation, d/b/a Dutch Village Apartments, a Corporation, owned the apartment complex. Lumbermens Mutual Casualty Company was the fire insurance carrier for Ms. Palavid and Commonwealth Realty.

On 20 March 1980, a fire originated in the living room of the Allen apartment and damaged not only its interior, but the apartment structure, the adjacent apartments, and the contents of certain adjacent apartments. The plaintiffs sought a declaratory judgment to determine insurance coverage. The trial judge, based upon a finding of forty-five uncontested facts, concluded and adjudged as a matter of law that coverage was afforded under the policy of Nationwide Mutual Fire Insurance Company, that this company had a duty to provide a defense for the Allens in a related civil action, but that the policy excluded coverage for the fire damage to the interior of the Allen apartment itself and excluded any loss of use coverage of the Allen apartment. Damages were stipulated to be $7,575.26 to the Allen apartment and $46,951.33 to the other apartments.

The plaintiff, Nationwide-Fire, appeals. The defendants cross-assign error on the denial of coverage on the Allen apartment loss, but did not appeal. No mention of disposition is made in the final judgment as to plaintiff Nationwide Mutual Insurance Company, the earlier carrier on the Honda motorcycle.

[1] The question plaintiff presents for review is whether it was reversible error for the trial court to fail to find and conclude that the homeowner's insurance policy excluded coverage for all the damages by fire. In a declaratory judgment action our standard of review is "to determine whether the record contains competent evidence to support the findings; and whether the findings support the conclusions." *Insurance Co. v. Allison*, 51 N.C. App. 654, 657, 277 S.E. 2d 473, 475, *disc. rev. denied*, 303 N.C. 315, 281 S.E. 2d 652 (1981); *Baucom's Nursery Co. v. Mecklenburg Co.*, 62

N.C. App. 396, 303 S.E. 2d 236 (1983). Here, because there were no exceptions to the findings of fact, we will be concerned only with the conclusions and questions of law.

What did the terms of the policy provide? Nationwide-Fire relies upon Exclusions 1.a.(2) and 2.d., quoted below, in its effort to avoid coverage.

> SECTION II—EXCLUSIONS
>
> This policy does not apply:
>
> 1. Under Coverage E—Personal Liability . . . :
>
> a. to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of:
>
> * * * *
>
> (2) any motor vehicle owned or operated by, or rented or loaned to any Insured; but this subsection (2) does not apply to bodily injury or property damage occurring on the residence premises if the motor vehicle is not subject to motor vehicle registration because it is used exclusively on the residence premises or kept in dead storage on the residence premises; or
>
> * * * *
>
> 2. Under Coverage E—Personal Liability
>
> * * * *
>
> d. to property damage to property occupied or used by the Insured or rented to or in the care, custody or control of the Insured or as to which the Insured is for any purpose exercising physical control.

On the other hand, the policy's personal liability coverage provides as follows:

> Coverage E—Personal Liability.
>
> This Company agrees to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay for damages because of bodily injury or property damage, to which this insurance applies, caused by an occurrence. This

Company shall have the right and duty, at its own expense, to defend any suit against the Insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, but may make such investigation and settlement of any claim or suit as it deems expedient.

For approximately six months prior to the fire on 20 March 1980, the Honda motorcycle had been stored on the patio to the Allen apartment. Because of mechanical damage in its last use, the Honda was now inoperable. The Honda was not registered, bore no license tag, and was not named or covered in any motor vehicle insurance policy. The last liability insurance policy on the Honda expired on 10 October 1979. Mrs. Allen was the owner.

Because 20 March 1980 was a rainy day, Mr. Allen was not working. On that day he decided to move the Honda motorcycle into the living room of the apartment, intending to charge the battery, to check the timing, and to inspect the motorcycle to determine what repairs might be needed. Those repairs would be performed at a later date either by him, if possible, or by a repair shop, so that the Honda could be sold and used. He had no repair parts available and did not intend to repair it that day.

In preparation for a work place, Mr. Allen placed a plastic cover over the carpet in the living room and newspapers over the plastic. Then he brought in the motorcycle, placing it over the newspaper and plastic. Prior to taking the Honda into the apartment Mr. Allen had drained 1½ gallons of gas, but was unable to remove all of it from the main tank and was unable to remove any gas from the reserve tank. While inside the room he drained the oil from the motorcycle, placing it in a plastic milk carton upon the newspaper-covered plastic.

The battery was removed and activated to a trickle charger which was situated upon the newspaper-covered plastic. A portion of the gas tank was removed in order to examine the magneto. The motorcycle was supported by a kickstand, which was wet from exposure to the rain.

Mr. Allen placed a timing light, a bare light bulb in a socket, upon the fork of the front wheel and plugged the light into an outlet. He was not intending to fix or set the timing, but did in-

tend to check to see by visual inspection if the timing was off. At this juncture "Mr. Allen went to turn off the television . . . and while at the television he heard a loud crash and looked around and the motorcycle had toppled over on top of his coffee table." As he looked, "he observed flames coming from underneath the motorcycle in the vicinity of the area where he had examined the magneto." The services of the fire department were required to extinguish the blazing fire.

On 5 December 1980 the defendants Palavid and Commonwealth Realty commenced a separate action for damages against Mr. Allen on the basis that he negligently caused the fire. On 23 February 1980 the plaintiffs denied coverage to the Allens.

Nationwide-Fire prepared and issued the policy in question. The Allens paid the premiums, none of which have been returned.

It is the insured that has the burden of bringing himself within the insuring language of the policy. Once it has been determined that the insuring language embraces the particular claim or injury, the burden then shifts to the insurance company to prove a policy exclusion excepts the particular injury from coverage. Our Supreme Court's views on the law of interpreting exclusions and exceptions in insurance contracts were well summed up in *Maddox v. Insurance Co.*, 303 N.C. 648, 650, 280 S.E. 2d 907, 908 (1981):

> In interpreting the relevant provisions of the insurance policy at issue, we are guided by the general rule that in the construction of insurance contracts, any ambiguity in the meaning of a particular provision will be resolved in favor of the insured and against the insurance company. *Exclusions from and exceptions to undertakings by the company are not favored, and are to be strictly construed to provide the coverage which would otherwise be afforded by the policy.* The various clauses are to be harmoniously construed, if possible, and every provision given effect. [Citations omitted.] An ambiguity exists where, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions asserted by the parties. (Emphasis added.)

Without question the claim in controversy involves property damages caused by an occurrence, a fire. In the separate lawsuit, should the owners of the apartments win and obtain judgment against Mr. Allen, a named insured, he would be "legally obligated to pay for damages because of . . . property damage, to which this insurance applies, caused by an occurrence," as contracted for by the terms of the policy. Since the insuring language embraces the claim, the burden now shifts to Nationwide-Fire to avoid coverage through the cited provisions for exclusion.

We now consider the use of words in the exclusionary sections.

Nationwide-Fire contends the fire arose out of the "ownership" and "maintenance" of the motorcycle, and that coverage is excluded. It also would exclude coverage on the ground that Mr. Allen was exercising physical control over the rented apartment which he occupied and used, and that Exclusion 2.d. also applies. The defendants contend that an ambiguity is present in the meaning of the words "ownership" and "maintenance" which should be construed against the insurer. They also contend that by its language the exclusion should not be applied because the motor vehicle, the motorcycle, was "not subject to motor vehicle registration because it . . . [was] kept in dead storage on the residence premises."

It was Mr. Allen's handling of combustible materials (newspapers, plastic floor covering, gasoline, oil) in the immediate vicinity of ignition sources (an operating electrical battery trickle charger and an open light bulb as a timing light left upon a metal frame of the motorcycle) which created a risk covered by Nationwide-Fire's policy against personal liability and caused the fire. Mr. Allen obtained coverage to protect himself against this type of accident and to pay for property damage to others for which he might be liable.

We hold that the property damage which occurred did not arise out of either the ownership or the maintenance of the Honda motorcycle. We also hold that, as of the date of the fire, the motorcycle was not subject to motor vehicle registration and that it had been kept in dead storage for approximately six months on the residence premises. The trial judge ruled correctly in all of

his conclusions and in his adjudication of the policy's exclusions against Nationwide Mutual Fire Insurance Company.

Under the canons of construction, exclusionary clauses in a policy are construed narrowly against the insurer. We recognize that the word "maintenance" may have a different meaning under different circumstances, and " 'whenever possible, the courts will apply an interpretation which gives, but never takes away, coverage.' " *See State Farm Mutual Automobile Insurance Co. v. Partridge*, 10 Cal. 3d 94, 102, 514 P. 2d 123, 129 (1973), *quoting* Marcus, *Overlapping Liability Insurance* 16 Def. L. J. 549, 559 (1967).

[2] We note that the defendant appellees cross-assigned as error the conclusion of law by the trial court that Exclusion 2.d. of the policy was applicable, and that coverage for the damages to the interior of the Allen apartment was excluded. Because an appellee's cross-assignment of error can only be utilized in "*supporting* the judgment, order, or other determination from which appeal has been taken," and when the appellee has been deprived of "an alternative basis in law for *supporting* the judgment," (emphasis added), Rule 10(d), N.C. Rules App. Proc., we do not reach the cross-assignment in this case. The defendants did not appeal as an aggrieved party. The purpose of making a cross-assignment of error is "to protect appellees who have been deprived in the trial court of an alternative basis in law upon which their favorable judgments might be supported and who face the possibility that on appeal prejudicial error will be found in the ground upon which their judgments were actually based." *See* Drafting Committee Note to Rule 10(d), N.C. Rules App. Proc. Since the cross-assignment here only conditionally presented the issue we do not reach it by virtue of having upheld the defendants' favorable judgment on the plaintiff's appeal.

Affirmed.

Chief Judge VAUGHN and Judge EAGLES concur.

PARKER WHEDON v. JEANNETTE C. WHEDON

No. 8326DC675

(Filed 1 May 1984)

1. **Divorce and Alimony § 17.3; Evidence § 48.3— witness never formally accepted as expert—testimony concerning amount of alimony—competency of testimony**

There was no error in the trial court allowing a witness to testify concerning his computation of defendant's prospective tax liability on her alimony receipts even though the witness was never formally accepted by the trial court as an expert witness. The witness testified that he relied upon tax tables contained in the Internal Revenue Service Code, plus information concerning defendant's finances supplied to him by defendant's attorney to calculate defendant's potential tax liability, and by permitting the witness to testify, the court implicitly found that the witness was qualified as an expert witness.

2. **Divorce and Alimony § 20.3; Rules of Civil Procedure § 41.2— dismissing request for appellate attorneys' fees without prejudice—error**

It was the trial court's duty, when presented with plaintiff's motion for an involuntary dismissal of defendant's request for attorneys' fees, to examine the quality of defendant's evidence and make a ruling on the merits. When the trial court did this, and denied defendant's motion, the additional language in the order indicating that the motion for appellate attorneys' fees was dismissed without prejudice must be disregarded as mere surplusage, G.S. 1A-1, Rule 41(b), since a party who has failed to produce sufficient substantive evidence to support a G.S. § 50-16.4 motion may not be allowed to "mend his licks" in a second hearing.

3. **Appeal and Error § 24.1— failure to preserve issue by cross-appeal—cross-assignment of error ineffectual**

Defendant's attempt to argue (1) that the trial court erred in dismissing her request for attorneys' fees, (2) that the trial court erred in failing to find that plaintiff was in willful contempt for nonpayment of alimony and attorneys' fees, and (3) that the trial court's order concerning her 1982 alimony award was ambiguous and should be clarified, was ineffectual since the proper method to have preserved these issues for review would have been to cross-appeal rather than to attempt to raise the issues by cross-assignments of error. App. R. 10(b).

APPEAL by plaintiff from *Todd, Judge.* Order entered 25 January 1983 in MECKLENBURG County District Court. Heard in the Court of Appeals 11 April 1984.

This appeal marks the second time plaintiff and defendant have been before this court seeking resolution of various domestic difficulties. The current appeal therefore stems from a some-

what complex set of facts which may be briefly set out as follows. Plaintiff filed for divorce on 20 November 1980 based on a one-year separation from defendant. In his complaint, plaintiff admitted that defendant was entitled to reasonable alimony. After a hearing on 17 February 1981 on the issue of permanent alimony, the trial court entered judgment (1) sequestering the marital home and certain personal property for defendant and requiring plaintiff to pay the mortgage, *ad valorem* property taxes and hazard insurance thereon; (2) granting possession of an automobile to defendant and ordering plaintiff to maintain insurance thereon; (3) granting $1,259.00 per month in permanent alimony until defendant vacated the marital home, when the payments would increase to $1,467.00 per month and (4) ordering plaintiff to pay to defendant a sum calculated to equal defendant's income tax obligations on the alimony payments. From the order of the trial court, plaintiff appealed.

This court, in *Whedon v. Whedon*, 58 N.C. App. 524, 294 S.E. 2d 29, *disc. rev. denied*, 306 N.C. 752, 295 S.E. 2d 764 (1982), affirmed the trial court's decision, with the exception of the award of payments for defendant's income tax obligations. While recognizing that income tax consequences "are among factors properly considered in awarding alimony . . ." we held that the trial court's award was improperly calculated. "[T]he tax payments by plaintiff ordered here constitute further taxable income to defendant . . . [and] the order results in an interminable cycle of further payments by plaintiff to defendant. . . . The uncertainty thus created renders impossible determination of the precise amount of alimony awarded, and the reviewing court thus cannot determine the reasonableness or fairness of the award." (Citations omitted.) *Id.*

Thereafter, defendant sought an order holding plaintiff in contempt for failure to pay alimony, an amendment of the alimony award in light of *Whedon v. Whedon, supra*, and counsel fees. Following a hearing on 22 November 1982, an order was entered on 25 January 1983 dismissing defendant's motions to hold plaintiff in contempt and for attorneys' fees, and granting defendant's motion to amend the alimony award. From entry of the trial court's order, plaintiff appeals and defendant makes cross-assignments of error.

Kennedy, Covington, Lobdell & Hickman, by Richard D. Stephens and Raymond E. Owens, for plaintiff.

Cannon and Basinger, P.A., by A. Marshall Basinger, II, for defendant.

WELLS, Judge.

In his first argument, plaintiff contends that the trial court erred by amending the February 1981 alimony award under *Whedon v. Whedon, supra.* In the January 1983 order, the trial court concluded that the amount necessary to produce $1,259.00 per month net spendable income for defendant after payment of income taxes is $1,604.00 in 1982; $1,564.31 in 1983 and $1,549.58 in 1984 and thereafter, providing no changes are made in the tax laws. Plaintiff urges two grounds for his argument; first, that defendant did not present competent evidence of the respective finances and tax liabilities of the parties; and second, that the witness Brian Ives, who testified concerning the amount of alimony necessary to produce $1,259.00 per month net income after taxes, was not qualified as an expert and his testimony was based on incompetent evidence.

Plaintiff correctly points out that, in determining the amount of alimony, the trial court must consider the ". . . estates, earnings, earning capacity, condition, [and] accustomed standard of living of the parties . . ." N.C. Gen. Stat. § 50-16.5 (1976). Plaintiff overlooks the fact, however, that the issues of defendant's right to alimony and the respective finances of the parties were addressed in *Whedon v. Whedon, supra.* That decision constitutes the law of the case and plaintiff may not seek to raise the same questions in this appeal. *Hayes v. Wilmington,* 243 N.C. 525, 91 S.E. 2d 673 (1956). The sole issue left for consideration on remand in *Whedon v. Whedon, supra,* was the *method* by which the amount of defendant's tax liability was to be computed.

[1] We hold that the witness Brian Ives was properly permitted to testify concerning his computation of defendant's prospective tax liability on her alimony receipts. Ives was never formally accepted by the trial court as an expert witness, but was nevertheless permitted to testify as an expert, after giving testimony concerning his qualifications. "The absence of a record finding in favor of . . . [the witness'] qualification is no ground for challeng-

ing the ruling implicitly made by the judge in allowing him to testify. In such a case, at least if the record indicates that such a finding could have been made, it will be assumed that the judge found him to be an expert. . . ." *Lawrence v. Insurance Co.*, 32 N.C. App. 414, 232 S.E. 2d 462 (1977), citing 1 Stansbury's North Carolina Evidence, Brandis Revision § 133 (1973). By permitting Ives to testify, the court implicitly found that Ives was qualified as an expert witness. Ives' qualifications clearly invoke the rule that a person may testify as an expert witness when his own knowledge is greater than that of the trier of fact, and is necessary to give a proper understanding of the facts. *Glenn v. Smith*, 264 N.C. 706, 142 S.E. 2d 596 (1965); *Cogdill v. Highway Comm. and Westfeldt v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373 (1971). An expert witness may testify based either on his personal knowledge of certain facts, or based upon facts made known to him through hypothetical questions, or by a combination of these methods. *State v. David*, 222 N.C. 242, 22 S.E. 2d 633 (1942). Facts within the personal knowledge of an expert witness include those facts gathered from reports and other sources. The witness need not have observed each event or circumstance, *see Board of Transportation v. Warehouse Corp.*, 300 N.C. 700, 268 S.E. 2d 180 (1980) (dicta) (court permitted expert witness to testify concerning average rainfall and flooding in area presumably gathered from records and reports); *State v. DeGregory*, 285 N.C. 122, 203 S.E. 2d 794 (1974) (medical expert permitted to testify from observations, records and tests conducted by others).

In the case before us, Ives testified that he relied upon tax tables contained in the Internal Revenue Service Code, plus information concerning defendant's finances supplied to him by defendant's attorneys to calculate defendant's potential tax liability. We find no error in the trial court's rulings as to the competency of Ives' testimony, and therefore, this assignment of error is overruled.

[2] In his second argument, plaintiff contends that the trial court erred by dismissing defendant's request for appellate attorneys' fees without prejudice. Defendant sought attorneys' fees for preparation of the contempt hearing and for the preparation of the appeal in *Whedon v. Whedon, supra.* The trial court denied both of defendant's requests, apparently because defendant had failed to

produce sufficient evidence to support her claim.[1] The trial court noted that defendant's motion for appellate attorneys' fees was "denied and dismissed without prejudice." We believe this was error. The trial court's use of "dismissed without prejudice" may have been in reliance on N.C. Gen. Stat. § 1A-1, Rule 41(b) of the Rules of Civil Procedure, which governs motions for involuntary dismissals and provides that, in certain cases, the trial court may allow the moving party's motion for an involuntary dismissal without prejudice to the nonmoving party. The nonmovant may then correct the error which caused the dismissal and bring another lawsuit against the movant.

We recognize that the language of Rule 41(b) is somewhat vague and at first glance may appear to permit an involuntary dismissal without prejudice of a motion for counsel fees under N.C. Gen. Stat. § 50-16.4 when the movant has failed to present sufficient evidence to support such motion. We do not believe, however, that this is a proper application of the rule.

Neither party has cited, nor has our own research revealed, North Carolina decisions supporting the notion that a party who has failed to produce sufficient substantive evidence to support a G.S. § 50-16.4 motion, under Rule 41(b), may be allowed to "mend his licks" in a second hearing. *But see*, 5 J. Moore, *Moore's Federal Practice*, ¶ 41.14(1) (1982).

Applying the foregoing rule to the case before us, we hold that it was the trial court's duty, when presented with plaintiff's motion for an involuntary dismissal of defendant's requests for attorneys' fees, to examine the quality of defendant's evidence and make a ruling on the merits. This the trial court did, denying defendant's motion. The additional language in the order indicating that the motion for appellate attorneys' fees was dismissed without prejudice was without legal effect and must be regarded as mere surplusage.

[3] We turn now to defendant's cross-assignments of error. Defendant attempts to argue (1) that the trial court erred in dismissing her request for attorneys' fees, (2) that the trial court erred in failing to find that plaintiff was in wilful contempt for non-

1. The record of evidence clearly shows that defendant failed to produce sufficient evidence to support her motion for counsel fees.

payment of alimony and attorneys' fees, and (3) that the trial court's order concerning her 1982 alimony award was ambiguous and should be clarified.

The issue of what matters may be raised by cross-assignment of error by an appellee is governed by Rule 10(d) of the Rules of Appellate Procedure, which provides in pertinent part:

> Without taking an appeal an appellee may set out exceptions to and cross-assign as error any action or omission of the trial court to which an exception was duly taken or as to which an exception was deemed by rule or law to have been taken, and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. . . .

In her cross-assignments of error, however, defendant does not contend that the trial court's order deprived her of additional basis supporting the court's order, but rather that certain portions of the order were erroneous. The proper means by which to raise such an attack is an independent appeal. Defendant's cross-assignments of error are therefore overruled.

As modified, the judgment of the trial court is affirmed.

Affirmed.

Judges BECTON and JOHNSON concur.

WALLACE BUTTS INSURANCE AGENCY, INC. v. TOMMY RUNGE

No. 8310SC593

(Filed 1 May 1984)

1. Injunctions § 13— standard for issuance of preliminary injunction

A preliminary injunction should not be issued unless the plaintiff shows both (1) likelihood of success on the merits of the case, and (2) that he is likely to sustain irreparable harm unless the injunction is issued or that the injunction is necessary to protect his rights during litigation.

2. Injunctions § 13— preliminary injunction—discretion of court

Generally, issuance of a preliminary injunction is a matter of discretion to be exercised by the court after weighing the equities and the relative advantages and disadvantages to the parties.

3. Courts § 21.7— validity of contract entered in Georgia—Georgia law applicable

The law of Georgia governed the validity of a covenant not to compete in an employment contract which was entered in that state.

4. Contracts § 7.1; Master and Servant § 11.1— covenant not to compete void under Georgia law

A covenant not to compete contained in a contract employing defendant to sell credit life insurance in the state of Georgia was overly broad and unnecessary to protect the employer and was thus void under Georgia law where it barred defendant from employment in any capacity by a company which sells credit life or accident insurance and from participating in or being in any manner connected with the ownership, management, operation or control of a credit life or accident insurance company, and where plaintiff employer was operating in areas greater than those in which it operated when defendant was originally employed.

5. Injunctions § 10.1— enjoining prosecution of South Carolina lawsuit

The trial court properly ruled that plaintiff employer's commencement of an identical suit in South Carolina to enforce a covenant not to compete only minutes after a North Carolina court entered an order dissolving a temporary restraining order and denying a preliminary injunction prohibiting a violation of the covenant was intentionally calculated to harass defendant and frustrate the denial of injunctive relief, and the trial court's order enjoining plaintiff employer from proceeding with the South Carolina lawsuit pending the outcome of the North Carolina action was proper.

APPEAL by plaintiff from *Bailey, Judge.* Orders entered 25 February 1983 and 7 March 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 5 April 1984.

Defendant was employed to sell credit life insurance by plaintiff's predecessor corporation in the state of Georgia. His contract of employment contained a covenant not to compete upon termination of employment.

Subsequent to 5 August 1975, Wallace Butts Insurance Agency, Inc., plaintiff's predecessor, merged with plaintiff, a North Carolina corporation; and all employment contracts became a part of the North Carolina corporation. Thereafter, defendant terminated his employment and was employed in South Carolina in the sale of credit life insurance, calling on existing accounts and customers of the plaintiff.

Plaintiff sought and received a temporary restraining order prohibiting defendant's employment in the credit life insurance business, and sought damages pursuant to G.S. 75-16 and G.S. 75-16.1. The trial judge entered an order dissolving the temporary restraining order based on his conclusion that the restrictive covenant is unenforceable as a matter of Georgia law. The judge subsequently enjoined plaintiff from proceeding with a lawsuit in South Carolina involving the same matter pending the outcome of the North Carolina action. Plaintiff appeals this interlocutory action under G.S. 7A-27(d) and G.S. 1-277(a).

Reynolds & Cox, P.A., by Ted R. Reynolds and Maria J. Mangano for plaintiff appellant.

House, Blanco & Osborn, P.A., by Lawrence U. McGee and John S. Harrison; and Sanford, Adams, McCullough & Beard, by E. D. Gaskins, Jr. and H. Hugh Stevens, Jr. for defendant appellee.

HILL, Judge.

Plaintiff contends the restraining order was improvidently dissolved because (1) defendant was interfering with a substantial right of plaintiff, and (2) the court's finding the covenant to be unenforceable "as a matter of law" in effect decides the action. Plaintiff asserts the order was erroneous both procedurally and substantively. We do not agree and overrule plaintiff's first assignment of error.

[1, 2] The standard for issuance of a preliminary injunction is well settled: A preliminary injunction should not be issued unless the plaintiff shows both (1) likelihood of success on the merits of the case; and (2) that he is likely to sustain irreparable harm unless the injunction is issued, or that the injunction is necessary to protect his rights during litigation. *Investors, Inc. v. Berry*, 293 N.C. 688, 239 S.E. 2d 566 (1977); *Waff Bros. v. Bank*, 289 N.C. 198, 221 S.E. 2d 273 (1976). Generally, issuance of a preliminary injunction is a matter of discretion to be exercised by the court after weighing the equities and the relative advantages and disadvantages to the parties. *Superscope, Inc. v. Kincaid*, 56 N.C. App. 673, 289 S.E. 2d 595, *disc. rev. denied*, 305 N.C. 592, 292 S.E. 2d 14 (1982).

[3] The employment agreement between the insurance agency and defendant was entered into in the state of Georgia. Consequently, the lex loci contractus rule which the courts of this State consistently have followed is applicable. See *Land Co. v. Byrd*, 299 N.C. 260, 261 S.E. 2d 655 (1980); see also *Fast v. Gulley*, 271 N.C. 208, 155 S.E. 2d 507 (1967).

In Georgia, a covenant not to compete ancillary to an employment contract is void and unenforceable unless "it is strictly limited in time and territorial effect and is otherwise reasonable considering the business interest of the employer sought to be protected and the effect on the employee." *Howard Schultz & Assoc. v. Broniec*, 239 Ga. 181, 183, 236 S.E. 2d 265, 267 (1977).

[4] The contract into which the parties entered originally contained the following non-competition clause:

> *Restrictive Covenants.* After terminating his employment with the Agency [plaintiff herein] the Employee shall not for a period of one (1) year thereafter *within the sales area within which he has been operating,* own, manage, control, operate, *be employed by or participate in or be in any manner connected with the ownership, management, operation or control of any business in the sale of credit life or credit accident insurance or any other insurance sold by the Agency.* (Emphasis ours.)

A careful reading of the restrictive covenant leads us to the conclusion that the limitations imposed on the defendant are overly broad and unnecessary to protect the employer. The defendant is barred from employment *in any capacity* by a company which sells credit life and/or health insurance. Nor can the defendant participate in or be *in any manner connected with* the ownership, management, operation or control of a credit or health insurance company. Such limitations could, if enforced, compel the defendant to seek employment completely alien to his life's work or to move outside the area not only where plaintiff was operating at the time of employment but any other areas added thereafter. In this case the plaintiff was a North Carolina corporation which was operating in areas greater than those of the Georgia corporation which originally employed the defendant. This merger plus others could tend to limit the area and opportunity for employment by the defendant unreasonably; and defendant could do nothing to

protect himself if the covenant is enforced. By merger or subsequent expansion the employer could move into territories never suspected by the employee when first employed. We therefore adjudge the trial judge was correct in concluding the contract was unenforceable as a matter of law.

Nor do we find error by the trial judge procedurally in determining the covenant was unenforceable as a matter of law. The case-in-chief was not before the court—only the ancillary matter of the restraining order. Nevertheless, the judge in ruling on the motion for the restraining order must consider the likelihood of success on the merits of the case. It was entirely proper for the judge in his discretion to consider this matter in weighing the equities and relative advantages and disadvantages to the parties. Plaintiff's first assignment of error is overruled.

[5] By its second assignment of error plaintiff argues the court erred in ruling that the commencement of an identical suit in South Carolina was intentionally calculated to harass the defendant and frustrate the court's original denial of injunctive relief.[1] We conclude the court ruled correctly and affirm its action.

In connection with the issuance of the restraining order on 7 March 1983, the trial court made *inter alia* the following findings of fact to which no objections were made by the plaintiff:

> 2. The Temporary Restraining Order was dissolved and the request for preliminary injunctive relief was denied by the Honorable James H. Pou Bailey on the morning of February 25, 1983, on the grounds that the covenant is invalid as a matter of law.
>
> 3. Without giving notice of appeal regarding the Court's ruling the plaintiff, at the conclusion of the hearing before the Court, caused at 11:56 a.m. on February 25, 1983, an action to be instituted in the South Carolina state courts which

1. Plaintiff presents a curious argument in its brief. In its Statement of Case on this point based on defendant's affidavits to operate solely in South Carolina, plaintiff says: "It was and remains, Plaintiff's intention to voluntarily dismiss this North Carolina action. . . ." In its argument plaintiff says: "The record reflects that Plaintiff is willing to consent to a stay of the North Carolina proceedings pursuant to N.C.G.S. 1-75.12 pending the outcome of the South Carolina action. . . . Plaintiff has become progressively aware of the appropriateness and logic of bringing suit in South Carolina." Yet plaintiff pursues its appeal.

is substantially identical to the North Carolina action and in which the plaintiff again moved for injunctive and compensatory relief.

4. On March 2, 1983, the plaintiff caused a Notice of Motion for a Preliminary Injunction hearing to issue, in the South Carolina suit, which notice was served on defendant on March 3, 1983. If no injunctive relief is granted by this court, the defendant will be required to appear in the Court of Common Pleas of Lexington County, South Carolina, to respond to plaintiff's motion for a preliminary injunction and will otherwise be required to respond to the plaintiff's South Carolina action.

5. The defendant filed his Answer and Counterclaim to the North Carolina action on March 3, 1983.

6. The filing of the subsequent action in South Carolina by the plaintiff is an attempt to subvert and circumvent the jurisdiction of this court, which duly attached when plaintiff filed its action and moved for preliminary injunctive relief. Plaintiff is incorporated under the laws of the State of North Carolina and does business herein; it chose this forum; it availed itself of the benefits of this Court; its contractual rights may be fully adjudicated here; and it must, therefore, accept whatever burdens arise as a result of its selection of this forum. Defendant does not contest or oppose the exercise of jurisdiction by this Court.

7. The South Carolina action is a willful and wanton attempt to vex, annoy, and harass the defendant and to interfere with his gainful employment and is calculated to subject him to oppression and irreparable injury.

8. The plaintiff is instigating the South Carolina action in violation of the defendant's rights as declared by the Court's Order of February 25, 1983 and seeks to frustrate the Court's Order and render it ineffectual. Moreover, by seeking in a South Carolina court the very relief denied by the Court, plaintiff is engaging in the most blatant sort of "forum shopping."

9. The law of North Carolina provides that an injunction may issue against a litigant when an attempt is made to sub-

sequently prosecute an identical action in an effort to subvert the rulings of the courts of this State and subject the defendant to unreasonable and vexatious burdens. . . .

The plaintiff made no objections to the findings. Rather it states that it had no knowledge prior to the hearing in the first cause that defendant intended to limit his activities to the State of South Carolina. The record reveals otherwise. A copy of the complaint filed in the Court of Common Pleas in South Carolina reveals that it was verified 18 February 1983 by the chairman of the board of plaintiff corporation, a full week prior to the preliminary injunction hearing in North Carolina on 25 February 1983. The action was filed in the Court of Common Pleas at 11:56 a.m. on 25 February 1983, only a few minutes after the hearing in North Carolina was concluded. It is apparent that plaintiff was ready to file the action in South Carolina if the court rendered an unfavorable ruling in North Carolina. Had the trial judge not entered the restraining order on 2 March 1983, the defendant would be forced to defend two lawsuits in separate states involving the same subject matter, resulting in vexation, harassment, annoyance, and great expense. See *Childress v. Motor Lines*, 235 N.C. 522, 531, 70 S.E. 2d 558, 565 (1952).

The decision of the trial judge is

Affirmed.

Judges HEDRICK and JOHNSON concur.

BETTY LEDFORD PARKS AND JOHNNY A. PARKS v. H. B. PERRY, JR., FRANKLIN B. WILKINS, LOUISE GODWIN, AND HUGH CHATHAM MEMORIAL HOSPITAL

No. 8323SC630

(Filed 1 May 1984)

1. Physicians, Surgeons, and Allied Professions §§ 12, 16— nerve damage to arm while under general anesthesia—negligence of nurse anesthetist—applicability of res ipsa loquitur

In a medical malpractice action in which a plaintiff sought to recover for nerve damage in her right arm which she alleged occurred during surgery for

a hysterectomy, the trial court erred in granting defendant nurse anesthetist's motion for summary judgment. Plaintiffs met their burden of proving the applicability of the doctrine of *res ipsa loquitur* since (1) there was no direct proof of the cause of the injury available to the plaintiff or the defendant, and (2) the defendants admit that the instrumentality involved, positioning and monitoring the female plaintiff's arms, was under the defendant nurse anesthetist's control. With the benefit of the inference of negligence which the doctrine of *res ipsa loquitur* provides, there remained a genuine issue of fact for the jury with respect to the nurse's liability.

2. **Physicians, Surgeons, and Allied Professions § 16.1— insufficiency of evidence of negligence of assistant surgeon in medical malpractice action**

In a medical malpractice action in which the female plaintiff suffered nerve damage in her arm following surgery for a hysterectomy, the trial court properly granted summary judgment for an assistant surgeon since the surgeon could not be held liable if he had no duty to inspect the position of the patient's arms or to supervise the nurse anesthetist's work, and there was no evidence that the assistant surgeon had such a duty.

3. **Hospitals § 3.2— liability of hospital for negligence of nurse anesthetist—summary judgment improper**

In a medical malpractice action, the trial court erred by granting the defendant-hospital's motion for summary judgment where there was a genuine issue of fact as to the hospital's liability for the negligence of a nurse anesthetist on agency principles.

APPEAL by plaintiffs from *Collier, Judge.* Order entered 18 January 1983 in Superior Court, WILKES County. Heard in the Court of Appeals 9 April 1984.

Frye, Booth, Porter & Van Zandt by John P. Van Zandt, III, for plaintiff appellants.

Bell, Davis & Pitt by William Kearns Davis and Joseph T. Carruthers for defendant appellee, Franklin B. Wilkins.

Womble, Carlyle, Sandridge & Rice by Jimmy H. Barnhill and Richard T. Rice for defendant appellee, Louise Godwin.

Harris, Cheshire, Leager & Southern by F. Stephen Glass and Claire L. Moritz for defendant appellee, Hugh Chatham Memorial Hospital.

BRASWELL, Judge.

Betty Parks awoke after surgery with a numb little finger and a partially numb ring finger on her right hand. Mrs. Parks and her husband, who has also sued for loss of consortium, con-

tend that she suffered severe ulnar nerve damage in her right arm at the level of the elbow due to the negligence of Dr. H. B. Perry, Jr. (Chief Surgeon), Dr. Franklin B. Wilkins (Assistant Surgeon), Louise Godwin (Nurse Anesthetist), and the Hugh Chatham Memorial Hospital. Following discovery, each defendant filed a motion for summary judgment which was granted by the trial court. The plaintiffs have resolved all matters against the defendant, Dr. H. B. Perry, Jr., and have filed a voluntary dismissal of their action against him. The plaintiffs appealed from the summary judgment motions granted in favor of the remaining three defendants.

On 30 September 1979, Betty Parks was admitted to the Hugh Chatham Memorial Hospital in Elkin, North Carolina, under the care of Dr. H. B. Perry, Jr. The next morning, Dr. Perry, with Dr. Wilkins assisting, performed a vaginal hysterectomy on Mrs. Parks. She was placed under general anesthesia and in the lithotomy position by Louise Godwin, the nurse anesthetist.

The plaintiff's evidence showed that immediately prior to her operation on 1 October 1979 Mrs. Parks had no neurological defects in her right fingers, hand, wrist, arm, and in particular, had no damage to her right ulnar nerve. However, on 2 October 1979, during her first moments of consciousness after the surgery, Mrs. Parks experienced numbness and weakness in the fourth and fifth fingers of her right hand. Mrs. Parks repeatedly told Dr. Perry and the nurses about the numbness in her hand. Dr. Perry stated that it would eventually go away. When the numbness did not disappear, Mrs. Parks was referred to several other doctors who determined that she had suffered ulnar nerve damage in her right arm at the elbow. Further surgery was performed by Dr. William Brown, a neurosurgeon, on 12 December 1979, but the damage could not be corrected.

As a result of this damage to her ulnar nerve, several muscles in Mrs. Parks' right hand have deteriorated so that she is unable to use her fourth and fifth fingers, causing her great difficulty in gripping objects and in writing. Because of the permanent damage to her hand, Mrs. Parks could not return to her job with Central Carolina Telephone.

The plaintiffs contend that the permanent injury to Mrs. Parks' ulnar nerve was sustained during the vaginal hysterecto-

my. The plaintiff's expert witness, Dr. Edward Hayes Camp, testified that in his opinion Mrs. Parks' injury which caused the partial paralysis in her right hand occurred during the 1 October 1979 operation due to improper positioning or monitoring of her right arm by the nurse anesthetist.

The defendant Godwin contends that because the plaintiffs' entire case rests upon expert testimony it is insufficient as a matter of law to create an inference of actionable negligence. The defendant Wilkins argues that summary judgment in his favor was proper because the evidence shows he took no part in positioning the patient and had no duty to inspect her arm position. The defendant-hospital asserts that the plaintiffs have produced no evidence sufficient to show it was guilty of actionable negligence or that Nurse Godwin and Dr. Wilkins were agents of the hospital.

The sole question presented for our review is whether the trial court erred in granting summary judgment in favor of the defendants. Summary judgment is proper, according to G.S. 1A-1, Rule 56, when the movant establishes " 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Easter v. Hospital*, 303 N.C. 303, 305, 278 S.E. 2d 253, 255 (1981), *quoting Vassey v. Burch*, 301 N.C. 68, 72, 269 S.E. 2d 137, 140 (1980). In *Easter*, also a medical malpractice action, the Supreme Court recognized the general rule that only in exceptional negligence cases is summary judgment appropriate. *Id.*

[1] We begin our discussion with the alleged liability of the defendant-nurse, Louise Godwin, because, as this defendant concedes, if negligence occurred then she is the primary tortfeasor. Nurse Godwin contends that the plaintiffs have offered no evidence of actionable negligence, except that which might be inferred from the doctrine of *res ipsa loquitur*. Generally, "[r]*es ipsa* applies when direct proof of the cause of an injury is not available, the instrumentality involved in the accident is under the defendant's control, and the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission." *Russell v. Sam Solomon Co.*, 49 N.C. App. 126, 130, 270 S.E. 2d 518, 520 (1980), *disc. rev. denied*, 301 N.C. 722, 274 S.E. 2d 231 (1981). In her brief Nurse Godwin claims that "[t]he only types of

malpractice cases in which the doctrine of *res ipsa* has been applied in North Carolina are either 'foreign object' cases or cases in which there is manifest such an obviously [*sic*] gross want of care and skill as to afford, of itself, an almost conclusive inference of negligence." *See Pendergraft v. Royster*, 203 N.C. 384, 393, 166 S.E. 285, 289-90 (1932). The reason given for the doctrine's limited availability is the principle that a health care provider is not an insurer of results and that no presumption of negligence can arise from the mere fact of an accident or injury. *Mitchell v. Saunders*, 219 N.C. 178, 182, 13 S.E. 2d 242, 245 (1941); *see also Russell, supra*, at 131, 270 S.E. 2d at 520. However, the North Carolina Supreme Court has long recognized that

> where proper inferences may be drawn by ordinary men from proved facts which give rise to *res ipsa loquitur* without infringing this principle, there should be no reasonable argument against the availability of the doctrine in medical and surgical cases involving negligence, just as in other negligence cases, where the thing which caused the injury does not happen in the ordinary course of things . . . .

Mitchell, supra. In *Pendergraft, supra*, at 393, 166 S.E. at 289, the Court recognized the doctrine's importance " '*where the injury is received while the patient is unconscious . . . because under such circumstances the patient would not be able to testify as to what had happened, whereas the physician could.*' " (Citation omitted.)

The test of the applicability of *res ipsa loquitur* in medical malpractice cases is twofold: (1) the injurious result must rarely occur standing alone and (2) the result must not be an inherent risk of the operation. 61 Am. Jur. 2d, *Physicians, Surgeons, and Other Healers* § 333 (1981). With regard to the test's first prong the plaintiffs' expert witness, Dr. Edward Hayes Camp, in his deposition testified after reviewing all of Mrs. Parks' hospital records and those records made by the consultants who later examined her that in his opinion Mrs. Parks' paralysis was caused by pressure to her ulnar nerve occurring during the course of the hysterectomy. He further stated that although there was nothing Mrs. Parks could have done to prevent or avoid the injury, the injury could have been prevented by proper positioning and maintenance of the arm's position during the operation. Nurse Godwin conceded that it was her responsibility to position and monitor

Mrs. Parks' arms. Dr. Camp also explained that this injury does not occur by itself, for instance by falling asleep on one's arm. He stated that it only occurs when one is completely unconscious and prolonged pressure of a constant nature is applied to a certain small vulnerable area. A sleeping patient, or any person for that matter, is caused sufficient discomfort from the lack of circulation in the limb to cause him to move his arm and remove the pressure. Likewise, a patient after an operation whose arms are no longer bound in one position does not lie absolutely still in the normal course of recovery from general anesthesia, but turns from side to side relieving any harmful pressure on this nerve.

The second prong of the test requires that the injurious result not be an inherent risk of the operation. Both Dr. Camp and Nurse Godwin stated that although this type of nerve damage is a possibility in any operation where general anesthesia is used, it is not common and not a particular hazard in gynecological surgery. Dr. Camp explained that the major risk peculiar to a vaginal hysterectomy is placing the patient in the lithotomy position which, if improperly done, can cause nerve damage to the lower legs.

Thus, both prongs of this test to determine the applicability of *res ipsa loquitur* in malpractice cases have been satisfied. There is also sufficient evidence to support the remaining two traditional elements of the *res ipsa* doctrine. First of all, there is no direct proof of the cause of the injury available to the plaintiff. The only evidence that Mrs. Parks can testify to is that before the general anesthesia she had a healthy functional right hand, yet after the operation she awoke with numb fingers as a result of damage to her ulnar nerve. Similarly, neither Nurse Godwin nor the other defendants can offer direct evidence as to how the injury occurred. Secondly, the defendants admit that the instrumentality involved, positioning and monitoring Mrs. Parks' arms, was under the defendant Godwin's control. We hold therefore that the use of *res ipsa loquitur* in this case is justified. With the benefit of this inference of negligence, there remains a genuine issue of fact for the jury with respect to Nurse Godwin's liability. We hold the trial court improperly granted summary judgment in Nurse Godwin's favor.

[2] The liability of Dr. Wilkins, the assistant surgeon, however, is another matter. There is no evidence in the record before us that Dr. Wilkins had a duty to inspect or monitor the position of the patient's arms. Even if such evidence existed, the law does not impose such a duty on the chief surgeon, much less the assisting surgeon. *Starnes v. Hospital Authority*, 28 N.C. App. 418, 221 S.E. 2d 733 (1976). The plaintiffs' expert, Dr. Camp, testified that the assisting surgeon stays down at the base of the operating table with the Chief Surgeon during a vaginal hysterectomy. Thus, because of the operating drape, he would not have the opportunity or the duty to inspect the patient's upper body, including the arms. Dr. Camp stated that the responsibility for the patient's arms rests with the nurse anesthetist who positions and monitors the arms. Dr. Camp further stated that the assisting physician has no role or duty with respect to the patient in the post-operative follow-up. Even with *res ipsa* supplying the requisite degree of proof of negligence to create a jury question, Dr. Wilkins cannot be held liable if he had no duty to inspect the position of the patient's arms or to supervise Nurse Godwin's work. We hold that summary judgment in Dr. Wilkins' favor was properly granted.

[3] Finally, we hold the trial court erred by granting the defendant-hospital's motion for summary judgment. From the record before us, we believe there is a genuine issue of fact as to the hospital's liability on agency principles. In Nurse Godwin's answer, she admits that she "may have been an agent, servant, or employee of one or more of the other defendants." In her deposition, however, Nurse Godwin states that her relationship with the hospital was that of an independent contractor for Latipac, Inc. She asserted that "I considered myself hired by Latipac to perform a contractual job on a day-to-day basis." Whether or not Nurse Godwin was an independent contractor or an agent for the hospital is yet to be determined. In turn, whether the hospital is liable under the theory of *respondeat superior* is also a genuine issue of fact to be decided by the jury.

The defendants contend that *Hoover v. Hospital, Inc.*, 11 N.C. App. 119, 180 S.E. 2d 479 (1971), a case denying recovery to a plaintiff who also suffered nerve damage in his arm while unconscious from anesthesia during surgery, should control. This Court held in *Hoover* that summary judgment in favor of the

defendants doctor and hospital was proper because "the plaintiff has taken advantage of the discovery procedures available and has still been unable to obtain evidence as to when and how the injury occurred and who or what caused it." *Id.* at 123, 180 S.E. 2d at 482. This case is distinguishable from the present case because Mr. and Mrs. Parks through their expert witness did offer evidence tending to show that the injury occurred during the hysterectomy due to the mispositioning of Mrs. Parks' right arm by Nurse Godwin. Therefore, we hold that summary judgment as to defendants Godwin and the Hugh Chatham Memorial Hospital is

Reversed.

Summary judgment granted in favor of the defendant Wilkins is

Affirmed.

Chief Judge VAUGHN and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. HASSAN ATAEI-KACHUEI

No. 8310SC585

(Filed 1 May 1984)

1. **Weapons and Firearms § 3— discharging firearm into occupied vehicle—detaining felon—instructions on justification**

In a prosecution for discharging a firearm into an occupied motor vehicle, the trial court erred in refusing to give defendant's requested instruction that defendant would be justified in discharging a firearm into an occupied motor vehicle if (1) he had probable cause to believe that the person detained had committed a felony in his presence or was attempting to escape from the commission of a felony with the use of a deadly weapon, and (2) he attempted to detain the person in a reasonable manner considering the offense involved and the circumstances of the detention, where there was evidence from which the jury could find that defendant had grounds to believe that the person in the automobile had committed in his presence the felonies of larceny from the person and assault with a deadly weapon [an automobile] inflicting serious injury, that defendant was merely trying to detain the person in the automobile until the police arrived, and that the manner of detention was reasonable under the circumstances.

2. Homicide § 30.3— first-degree murder case—submission of involuntary manslaughter as prejudicial error

In a prosecution for first-degree murder in which the evidence showed that defendant intentionally fired a shot into a vehicle occupied by the deceased, the trial court committed prejudicial error in submitting involuntary manslaughter to the jury since involuntary manslaughter was not a lesser included offense of first-degree murder under the circumstances of this case, and where the jury found defendant guilty of involuntary manslaughter and acquitted defendant of all other degrees of homicide, defendant is entitled to be discharged.

APPEAL by defendant from *Britt, Samuel E., Judge.* Judgment entered 18 March 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 6 February 1984.

Defendant, tried for first-degree murder and discharging a firearm into an occupied motor vehicle, was convicted of involuntary manslaughter and discharging a firearm into occupied property. The evidence at trial tended to show the following:

The defendant owns The Goodtime Ice Cream Company situated in Raleigh. The company's ice cream is sold from trucks by independent salesmen; the company leases the trucks to them and supplies them with merchandise at wholesale prices and the salesmen collect from their customers. Salesmen usually pay in advance for their daily stock of merchandise, but when they cannot the company supplies them anyway if they agree to pay out of the sale proceeds. Salesmen in debt to the company for other reasons are permitted to continue working if they agree to turn in all or a certain part of their receipts until their debt is paid. Records are kept for each salesman, who turns in a form daily accounting for his receipts, business and expenses. When a debtor salesman keeps company money for his personal use, that is recorded on the form under "incidentals." When not in use, the company's trucks are parked in a fenced in lot next to the business and the employees park their cars in a space beyond the fence.

The victim, Donald J. Becker, a company salesman, had not worked for about ten days and owed the company several hundred dollars. The exact amount of his debt has not been established because his records were incomplete. On 9 June 1982, Becker reported to work at 1 p.m. and returned with his truck about 9 p.m., but turned in no money. He told defendant that he had taken the sale proceeds home. Defendant and Becker dis-

cussed the day's work, his debt to the company, and that Becker was quitting. Defendant, who had a $100 bill in his hand, received from another driver, asked Becker to complete his records by stating on the form what the day's receipts were and that they had been used as "incidentals," and by stating on another form what he owed the company altogether. After Becker completed these forms, signed them, and gave them to defendant, he suddenly struck defendant with his fist, grabbed the $100 bill and signed forms, and ran out of the building. Defendant got a pistol out of his desk and gave chase. Becker went through the enclosed parking lot, where three other employees, one of whom was defendant's wife, Kim, were; those employees saw defendant chasing Becker and heard him yell, "stop him, catch him, or something." Defendant's wife, Kim, tried to grab and hold Becker; but he passed on through the truck parking lot toward his nearby car and she followed. While Becker was starting his car, she placed herself behind it, but moved out of the way when Becker backed the car toward her. She then ran in front of the vehicle, but Becker changed gears, drove forward, and knocked her to the ground with the car. At that moment, defendant ran into the parking lot with his pistol, hollering all the while. First he got in front of the automobile, then he moved eight or ten feet to the driver's side, and upon the car continuing to move, shot one time; and as the car continued moving away, he shot twice more. One bullet, after breaking the car window, passed through Becker's lung and heart and he died before completely leaving the scene. The other two bullets were not found. Defendant had never shot that pistol or any other gun before.

When the police arrived defendant told them that the victim had tried to rob him and he had shot him. In a search of the scene, the forms filled out and signed by Becker were found, but the $100 was not. Though defendant testified, he had no memory of the shooting and therefore could not testify as to what his intentions were. He did testify, however, that he got the gun because he was "scared to go out with nothing in my hand," he thought having the gun would cause the deceased not to harm him or his wife, and he wanted to give Becker a copy of the lease and get his copy of the papers Becker had.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Alan S. Hirsch, for the State.

Tharrington, Smith and Hargrove, by Wade M. Smith, Roger W. Smith and Douglas E. Kingsbery, for the defendant appellant.

PHILLIPS, Judge.

[1] In regard to the discharging a firearm charge, defendant requested that the court specially instruct the jury as follows:

> The defendant would be justified in discharging a firearm into an occupied motor vehicle if in doing so he:
>
> 1. had probable cause to believe that the person detained has committed a felony in his presence or was attempting to escape from the commission of a felony with the use of a deadly weapon,
>
> or (sic) "and"
>
> 2. attempted to detain the person in a reasonable manner considering the offense involved and the circumstances of the detention.

The denial of this request is the basis for defendant's first assignment of error.

Under G.S. 15A-1232 it is the duty of the trial court to "declare and explain the law arising on the evidence." In determining whether an instruction requested by a defendant in a criminal case is supported by evidence, and therefore should be given, at least in substance, the evidence must be interpreted in the light most favorable to him. In making this determination the trial judge is concerned only with the sufficiency of the evidence; its credibility is for the jury to determine, not the court. *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750 (1973).

G.S. 15A-404 in pertinent part provides:

> (b) When Detention Permitted.—A private person may detain another person when he has probable cause to believe that the person detained has committed in his presence:

(1) A felony,

(2) A breach of the peace,

(3) A crime involving physical injury to another person, or

(4) A crime involving theft or destruction of property.

(c) Manner of Detention.—The detention must be in a reasonable manner considering the offense involved and the circumstances of the detention.

Thus, defendant was entitled to the requested instruction only if there was evidence that: (1) defendant had probable cause to believe that one or more of the crimes enumerated above had been committed; (2) defendant was trying to "detain" the offender until the police arrived; and (3) the manner of detention was reasonable under the circumstances.

The existence of the first requisite is plain and need not detain us. Leaving aside the misdemeanors that defendant had grounds to believe Becker had committed, there was evidence from which a jury could find that defendant had probable cause to believe that Becker had committed two felonies in his presence: larceny from the person, in violation of G.S. 14-72(b)(1), and assault with a deadly weapon [an automobile], inflicting serious injury, in violation of G.S. 14-32. But the other two requisites require more discussion.

Though defendant, perhaps because of his amnesia, did not testify that he was trying to detain Becker until the police came and did not intend to hit him, other evidence in support of this claim was presented, including the testimony about giving Becker a copy of the lease. That defendant yelled "stop him, catch him," got in front of Becker's car at first, as if to block his exit from the parking lot, and did not fire the gun then, when he was directly in front of the car with a clear shot, tends to show that defendant was trying to detain Becker. And that defendant had never fired a gun before and two of the three shots were into the air, even though the range was close, would warrant a jury in finding, it seems to us, that defendant was trying to scare Becker into not leaving the area, rather than shoot him. If a jury so found, they

could properly conclude, we believe, that under the exigent circumstances that then existed, the means used by defendant in attempting to detain Becker were reasonable. It is just as clear, however, that a jury could just as properly conclude to the contrary. Since that is the case, what defendant's purpose was and whether he acted reasonably or unreasonably are not questions of law for the court, but questions of fact for a jury. Thus, in our view, it was prejudicial error not to charge the jury as requested.

The State contends that *State v. Wall*, 304 N.C. 609, 286 S.E. 2d 68 (1982) requires that the trial judge's refusal to instruct be affirmed. We do not so understand that case. In *Wall*, a teenage girl that had not paid a convenience store for two six packs of beer that she had put in her car and who said she was going to get the money was shot after her car had left defendant's parking lot and therefore his control; also in that case, the defendant stated that he shot, not to detain the girl, but in the hope that it would cause her to bring the beer back. In this case, on the other hand, there is evidence defendant was trying to "stop" or "catch" the deceased, who was just a few feet away, still in defendant's parking lot, and inferentially still under his control. In *Wall* the victim, at most, was a petty misdemeanant that had done no physical harm to the defendant or anyone else, while in this case the victim had apparently committed two felonies—one involving an assault on defendant's person, the other an assault on defendant's wife with an automobile. Thus, defendant's case is different from *Wall's* and different rules of law apply to it. In *Wall* the circumstances clearly indicated that the defendant, instead of trying to detain the victim, shot her without any reasonable basis for doing so; but in this case, the circumstances permit contrasting inferences and the jury's determination is therefore necessary.

[2] The second question presented is whether the involuntary manslaughter conviction can stand. Since defendant was tried for first-degree murder, it was appropriate for the court to permit the jury to consider the lesser included offenses of second degree murder and voluntary manslaughter—but under the circumstances recorded here involuntary manslaughter was not a lesser included offense of the first-degree murder that he was charged with committing. *State v. Carson*, 51 N.C. App. 144, 275 S.E. 2d 221 (1981). "Involuntary manslaughter is the unintentional killing of a human being without malice, proximately caused by (1) an

unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Redfern*, 291 N.C. 319, 321, 230 S.E. 2d 152, 153 (1976). So far as we can determine, the record contains no evidence which tends to show that Becker died as the result of an unlawful act not amounting to a felony or as the result of an unlawful act that was not naturally dangerous to human life. Thus, it was error to permit the jury to consider an involuntary manslaughter verdict. While the State, in effect, concedes the error, they contend it favored defendant and was therefore harmless. Though such errors are not always prejudicial, we believe the one in this instance was. Our Supreme Court has held that where it appears that there is a "reasonable possibility" that the defendant would have been acquitted if the involuntary manslaughter issue had not been submitted, the error must be held prejudicial. *State v. Ray*, 299 N.C. 151, 167, 261 S.E. 2d 789, 799 (1980). This Court has also held: "It is difficult to submit an offense which is not a lesser included offense when there is no evidence to support it and then determine that if the jury had not convicted on the offense submitted, they would have convicted on another offense which did not have all the elements of the offense of which the defendant was convicted." *State v. Carson*, 51 N.C. App. 144, 146, 275 S.E. 2d 221, 222 (1981). In this instance there is a strong likelihood, in our judgment, that defendant would not have been convicted of any homicide if the involuntary manslaughter issue had not been submitted. This is because the court submitted a special verdict form to the jury, the jury answered that defendant was not guilty of first-degree murder, not guilty of second degree murder, and not guilty of voluntary manslaughter, and nothing in the record leads us to believe that any of these verdicts would have been different if involuntary manslaughter had not been added to the list. Defendant having been acquitted of all the homicide charges other than involuntary manslaughter, and we having held that there was no basis for that verdict and it was prejudicial error to submit it, the judgment in Case No. 82CRS34153 is reversed and the defendant is ordered discharged from the charge in that case.

Though the defendant's final question—whether the trial court's refusal to postpone the sentencing hearing from Friday afternoon to Monday morning was an abuse of discretion—need not be determined, it nevertheless concerns us. The jury returned

its verdict at approximately 3 o'clock on Friday afternoon, and the court asked if any evidence would be submitted before sentencing. Since defendant and his counsel had been engaged in the trial of guilt or innocence all week, they were not prepared to present evidence on the sentencing question at that moment and requested that the hearing be deferred until Monday. The court refused, stating that on Monday he had twenty civil cases waiting on him. Though the demands on the time of trial judges are very onerous, indeed, and they have broad discretion in conducting the business of the courts, the sentencing process, especially since the Fair Sentencing Act was adopted, is nevertheless an important part of any trial that must be fairly processed, and a hearing that a defendant has no opportunity to prepare for is not the kind of hearing that the Act requires.

Case No. 82CRS34153—reversed.

Case No. 82CRS63253—new trial.

Judges ARNOLD and JOHNSON concur.

CECIL TOWERY v. T. D. ANTHONY

No. 8327SC275

(Filed 1 May 1984)

Accord and Satisfaction § 1; Rules of Civil Procedure §§ 12.1, 56.4— alleged accord and satisfaction for negligent construction of house—either judgment on pleading or summary judgment improper

In an action in which plaintiff's complaint was sufficient to allege a claim for relief for breach of the implied warranty which accompanied the sale of a newly constructed dwelling, the trial court erred in granting defendant's motion for either judgment on the pleadings pursuant to G.S. 1A-1, Rule 12(c), or for summary judgment pursuant to G.S. 1A-1, Rule 56. Defendant's defense of accord and satisfaction is not among those defenses properly made by motion, G.S. 1A-1, Rule 12(b), and the bare allegations of defendant's unverified motion could not constitute a forecast of evidence which required plaintiff to respond at peril of summary judgment.

APPEAL by plaintiff from *Burroughs, Judge.* Judgment entered 12 July 1982 and Order entered 29 October 1982 in Superior

Court, CLEVELAND County. Heard in the Court of Appeals 9 February 1984.

Plaintiff appeals from a judgment dismissing his complaint with prejudice on the ground that the claim for relief asserted "should be barred based on the affirmative defense of accord and satisfaction raised by the defendant in his defensive pleading."

Hamrick & Hamrick, by J. Nat Hamrick, for plaintiff appellant.

O. Max Gardner, III, for defendant appellee.

WHICHARD, Judge.

I.

Plaintiff filed an unverified complaint alleging the following:

He contracted with defendant for the construction of a house, paid defendant the contract price, and moved into the house. About a year later he noticed that his floor and roof sagged, the floor joists were breaking and were not made of first-class lumber, one floor joist "was about to fall out and take the electrical wiring with it," and all the floor joists were made of knotty and weak lumber.

He informed defendant of the problems, and defendant performed further work on the broken floor joist. This did not remedy the situation, however, and he subsequently noticed further problems. He has asked defendant several times to fix the house, and defendant has refused.

He was informed and believed that he had been damaged in the sum of $10,000. He sought recovery of that sum, the cost of the action, and such other and further relief as the court found proper.

Defendant, in response, filed an unverified document captioned "Motion." The document contained six "motions," only one of which is pertinent on this appeal. It reads as follows:

FOURTH MOTION

> The complaint . . . should be dismissed on the grounds that the acceptance by the plaintiff of certain alleged work

performed by the defendant . . . constitutes and did constitute an accord and satisfaction of any disputed claim or claims or causes of action that the plaintiff could or might have asserted against the defendant, and as a result thereof such accord and satisfaction is specifically pleaded in bar of any claim or claims for relief that the plaintiff might have against the defendant.

Plaintiff's unverified complaint, and defendant's unverified "Motion," are the only substantive pre-judgment materials in the record. Findings in the judgment, which are not excepted to, establish that in that state of the record the case was scheduled for a motion hearing on 12 July 1982; and that counsel for plaintiff, who had advised counsel for defendant that he would be present, neither appeared nor contacted the court. The court postponed the hearing until later on the scheduled day to provide counsel for plaintiff an opportunity to appear or contact the court, but it ultimately proceeded to judgment in his absence.

The court made the following pertinent findings of fact:

9. In his fourth motion, the defendant contends that the complaint filed by the plaintiff should be dismissed on the grounds that the acceptance by the plaintiff of certain work alleged to have been performed by the defendant in February of 1979 constitutes an accord and satisfaction of the disputed claim or claims or causes of action that the plaintiff could or might have asserted against the defendant in this cause.

10. The plaintiff, in his complaint, alleged that certain work had been performed by the defendant as set forth in the fourth motion.

11. The plaintiff has not produced any response or filed any counter-affidavits in opposition to the facts alleged in the fourth motion of the defendant nor has the plaintiff amended his complaint so as to clarify the allegations contained therein regarding the work performed by the defendant in 1979.

12. As a result of the foregoing, the Court finds that the work performed by the defendant in repairing certain alleged defects to the plaintiff's residence constituted an accord and satisfaction of any claims or causes of action that the plaintiff

could or might have asserted against the defendant because of the defendant's construction of the plaintiff's home or the materials used therein.

It concluded as a matter of law that "[t]he claim for relief asserted by the plaintiff in his complaint should be barred based on the affirmative defense of accord and satisfaction raised by the defendant in his defensive pleading." It thus dismissed the complaint with prejudice.

The court subsequently heard a motion to reconsider filed by plaintiff. It found that "the . . . judgment . . . should be affirmed after re-hearing, and the case dismissed on the merits," and it ordered the action dismissed.

Plaintiff appeals.

II.

Defendant did not state the rule pursuant to which he made his "FOURTH MOTION." The court found that "plaintiff has not produced any response or filed any counter-affidavits in opposition to the facts alleged in the fourth motion of the defendant nor has the plaintiff amended his complaint so as to clarify the allegations contained therein regarding the work performed by the defendant." It thus appears that the court treated the motion either as one for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12(c), or as one for summary judgment pursuant to G.S. 1A-1, Rule 56. In either event, we hold the ruling on the motion erroneous.

A pleading must contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." G.S. 1A-1, Rule 8(a)(1). Judged by this standard, we find the complaint sufficient to allege a claim for relief for breach of the implied warranty which accompanies the sale of newly constructed dwellings in this jurisdiction. *See Hartley v. Ballou*, 286 N.C. 51, 209 S.E. 2d 776 (1974). Amendments "to clarify the allegations" were not necessary to assert a valid claim.

Defendant's unverified "FOURTH MOTION" merely *alleged* an affirmative defense of accord and satisfaction. Because it neither asserted a counterclaim nor raised a contributory negligence

defense, a reply pleading matter in denial or avoidance of the affirmative defense was neither required nor permitted except upon order of the court. G.S. 1A-1, Rule 7(a). The affirmative defense was deemed denied or avoided. G.S. 1A-1, Rule 8(d); *Brown v. Lanier*, 60 N.C. App. 575, 577, 299 S.E. 2d 279, 281 (1983).

Further, while "[t]he better pleading practice dictates that a plaintiff should not anticipate a defense and undertake to avoid it in his complaint," *Vernon v. Crist*, 291 N.C. 646, 650, 231 S.E. 2d 591, 593 (1977), plaintiff here did so. The complaint alleged that defendant's efforts in response to plaintiff's call regarding the problems "did not remedy the situation." It further alleged that "since then" plaintiff had asked defendant several times to fix the house, and defendant had refused. These allegations effectively deny that an accord and satisfaction occurred.

Treating defendant's "FOURTH MOTION" as one for judgment on the pleadings, the following principles apply:

> Upon a motion for judgment on the pleadings the allegations of the non-movant are taken as true and all contravening assertions of the movant are taken as false. (Citation omitted.) Judgment on the pleadings is not favored by the law, and the non-movant's pleadings will be liberally construed. (Citations omitted.) The trial court is required to view the facts and permissible inferences in the light most favorable to the non-movant. (Citation omitted.)

Huss v. Huss, 31 N.C. App. 463, 466, 230 S.E. 2d 159, 162 (1976). A motion for judgment on the pleadings is the proper procedure only "when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E. 2d 494, 499 (1974).

Pursuant to these principles, plaintiff's allegations are taken as true. As noted, they state a claim for relief for breach of implied warranty. Defendant's allegations of accord and satisfaction are taken as false. The allegations of the parties thus present issues of fact as to whether defendant breached the implied warranty which accompanied plaintiff's newly constructed dwelling, as plaintiff alleges; and if so, whether there has been an accord and satisfaction, as defendant alleges. It is not the case, then, that

"only questions of law remain." *Ragsdale, supra.* Judgment on the pleadings thus was improper.

The finding that "plaintiff has not produced any response or filed any counter-affidavits in opposition to the facts alleged in the fourth motion of the defendant" indicates that the court may have treated defendant's "FOURTH MOTION" as one for summary judgment. So treated, the judgment sought should have been rendered only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show[ed] that there [was] no genuine issue as to any material fact and that [defendant was] entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c); *see, e.g., Kessing v. Mortgage Corp.*, 278 N.C. 523, 533-35, 180 S.E. 2d 823, 829-30 (1971).

As noted, the pleadings, *i.e.*, plaintiff's complaint and defendant's "FOURTH MOTION," do not show such. On the contrary, they present genuine issues of material fact as to breach of implied warranty and accord and satisfaction.

As further noted, the pleadings are the only substantive prejudgment materials in the record. There are no "depositions, answers to interrogatories, . . . admissions . . ., [or] . . . affidavits." G.S. 1A-1, Rule 56(c). The only material produced by defendant in response to plaintiff's complaint, *viz*, his unverified "FOURTH MOTION," could not serve as a forecast of evidence to which plaintiff was required to respond at peril of summary judgment.

There thus is no forecast of evidence either negating plaintiff's claim or sustaining the affirmative defense, on which defendant had the burden of proof. *Price v. Conley*, 21 N.C. App. 326, 328, 204 S.E. 2d 178, 180 (1974) ("on an affirmative defense, the burden of proof lies with the defendant"). Treating the motion as one for summary judgment, then, it was improper to grant it.

III.

The posture of the case is as follows:

Plaintiff has sufficiently alleged a claim for relief for breach of implied warranty. Defendant, by motion, has alleged an affirmative defense of accord and satisfaction. Accord and satisfaction is

not among those defenses properly made by motion. *See* G.S. 1A-1, Rule 12(b).

There has been no discovery, and the record contains no forecast of evidence. The bare allegations of an unverified motion could not constitute a forecast of evidence which required plaintiff to respond at peril of summary judgment. Defendant thus has done nothing to sustain his burden of proof on the affirmative defense of accord and satisfaction.

In this state of the record, the conclusion that plaintiff's claim "should be barred based on the affirmative defense of accord and satisfaction raised by the defendant in his defensive pleading" was erroneous. The judgment dismissing the complaint with prejudice, and the subsequent order purporting to affirm the judgment, were thus improper.

Accordingly, the judgment and order are vacated, and the cause is remanded for further proceedings not inconsistent with this opinion.

Vacated and remanded.

Judges ARNOLD and BECTON concur.

ANDREW JACKSON SALES v. BI-LO STORES, INC.

No. 8326SC662

(Filed 1 May 1984)

1. Courts § 21.5— action for unfair trade practices—what law governs

The law of South Carolina governed an action for unfair trade practices since that state had the most significant relationship to the occurrence giving rise to the action.

2. Unfair Competition § 1— unfair trade practices—South Carolina Law—insufficient evidence on motion for summary judgment

In an action to recover for alleged unfair and deceptive trade practices in which the law of South Carolina applied, the evidence before the trial judge on a motion for summary judgment failed to raise an issue as to any act or practice by defendant tending to deceive plaintiff where it showed that plaintiff and defendant had a business relationship whereby plaintiff maintained racks

with products from its various suppliers in defendant's retail stores; after defendant instituted an inventory reduction program, some managers of its stores refused to accept additional goods from plaintiff and began to return merchandise already in the stores; defendant told plaintiff that its inventory reduction program was not intended to apply to plaintiff's products; and defendant agreed to investigate and respond to plaintiff's concerns about the inventory reduction program and was prepared to do so, but plaintiff closed its business operations before defendant could work on the problem.

APPEAL by plaintiff from *Snepp, Judge.* Judgment entered 24 January 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 April 1984.

This is an appeal by plaintiff from an order granting summary judgment for defendant on plaintiff's claim that defendant engaged in unfair and deceptive trade practices. The following facts are undisputed:

Plaintiff Andrew Jackson Sales (hereinafter AJS) is a North Carolina corporation that operates as a service agent for various suppliers of goods. Under its contracts with these suppliers, AJS obtains merchandise from the suppliers and delivers it to various retail establishments. AJS is responsible for setting up "racks" on which the goods are displayed and for maintaining these racks, keeping them fully supplied and removing damaged, dirty, or otherwise unsellable goods. The suppliers pay AJS a commission based on "net billings," defined as "total new goods placed in the store during the particular period less the returned items."

Defendant, Bi-Lo, Inc., is a Delaware corporation having its principal place of business in Mauldin, South Carolina. Defendant operates retail stores in North Carolina, South Carolina, and Georgia. Plaintiff and defendant entered into a business relationship "sometime prior to 1980," with AJS agreeing to deliver, set up, and maintain racks with products from its various suppliers in specific Bi-Lo stores. Bi-Lo was billed for these items by the suppliers. Plaintiff and defendant agreed that their business relationship could be terminated by either party at any time. They further agreed on a "100% guarantee policy," which provided that Bi-Lo could return any unsold items and receive a full refund from the supplier. Such returns, as mentioned above, reduced "net billings" and thus decreased AJS's total commission.

In early 1982 Bi-Lo instituted an inventory reduction program. In January AJS salespeople reported that some Bi-Lo store managers were refusing to accept additional goods, and in late March store managers began to return merchandise already in the stores. Faced with drastically reduced commissions because of the high rate of returns, AJS officials arranged a meeting with Bi-Lo personnel at Bi-Lo's home office in South Carolina. Present at that meeting, which occurred on 12 April 1982, were Gary Mauldin, president of AJS, Frank Dawson, a partner in AJS, Donald Lentz, director of merchandising at Bi-Lo, and Bob Wheeler, a buyer for Bi-Lo. Bi-Lo's inventory reduction and its effect on both plaintiff's and defendant's business was discussed by those present, and Mr. Lentz asked plaintiff's agents to document the problem in detail. Upon return to North Carolina, Mr. Mauldin prepared a letter, dated 13 April 1982, in which he identified six stores as "examples of our problems." Mr. Wheeler received this letter, and placed it in his files for discussion at his next weekly meeting with store operations and supervisory personnel, scheduled for 22 April. On the morning of 22 April he learned that AJS had discontinued their business operations.

Plaintiff appealed from grant of summary judgment for defendant.

Hovis & Hunter, by B. Garrison Ballenger, Jr., for plaintiff, appellant.

Leatherwood, Walker, Todd & Mann, by Harvey G. Sanders, Jr., and Kennedy, Covington, Lobdell & Hickman, by William C. Livingston, for defendant, appellee.

HEDRICK, Judge.

Plaintiff assigns error to the court's grant of summary judgment for defendant, contending that the "pleadings, affidavits and depositions presented to the Superior Court . . . present a genuine issue of material fact for determination by a jury." Before examining the merits of plaintiff's claim, we must determine what law governs the substantive aspects of this case.

[1] The traditional choice of law rule employed by our courts in deciding actions in tort is *lex loci delicti*, determined in turn by the place where the injury occurs. *Petrea v. Tank Lines*, 264 N.C.

230, 141 S.E. 2d 278 (1965). In actions involving unfair or deceptive trade practices, however, our courts have not followed this traditional rule, but have instead applied the law of the state having the most significant relationship to the occurrence giving rise to the action. *Michael v. Greene*, 63 N.C. App. 713, 306 S.E. 2d 144 (1983). *See also Santana, Inc. v. Levi Strauss and Co.*, 674 F. 2d 269 (4th Cir. 1982). Applying this rule to the facts of the instant case, we conclude that the law of South Carolina governs this action. Defendant's home office and principal place of business are located in South Carolina, and AJS's written "proposals" to Bi-Lo for supply of various products were directed, received, and accepted there. Four of the six stores identified in Mr. Mauldin's letter as "examples of our problems" are located in South Carolina, and the representations alleged to have been unfair or deceptive were made there. While North Carolina is not without connection to the parties and the subject matter of the suit, we think it clear that South Carolina has the more significant relationship and thus hold that the law of that state governs. We note in passing that resolution of this question is of no practical import, as our disposition of the case would be the same under North Carolina law.

The law of South Carolina regarding unfair trade practices, like that of North Carolina and many other states, is modeled on Sec. 5 of the Federal Trade Commission Act, 15 U.S.C. Sec. 45(a)(1) (1976). S.C. Code Ann. Sec. 39-5-20 provides:

> (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> (b) It is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to § 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

[2] South Carolina has followed the federal courts in construing the statutory language broadly: "It is in the public interest generally to prevent the use of false and misleading statements in the conduct of business . . . and actual deception need not be shown; a finding of a tendency to deceive and mislead will suffice." *State ex rel. McLeod v. Brown*, 278 S.C. 281, ---, 294 S.E.

2d 781, 783 (1982) (quoting *United States Retail Credit Association, Inc. v. F.T.C.*, 300 F. 2d 212, 221 (4th Cir. 1962)). We thus frame the issue before us as follows: did the evidence presented to the trial judge raise a genuine issue of material fact as to whether defendant's representations to plaintiff had "a tendency to deceive and mislead?" For the reasons discussed below, we hold that the evidence raised no such issue, and affirm the court's entry of summary judgment for defendant.

We note at the outset that AJS does not contend that Bi-Lo's inventory reduction campaign constituted an unfair or deceptive trade practice. That either party could terminate its relationship with the other at any time is conceded by all. Plaintiff's contention is instead that Bi-Lo "made various representations to AJS concerning this inventory reduction campaign and then conducted itself in exactly the opposite manner." We think it critical to examine the representations allegedly made by Bi-Lo.

The record contains a deposition given by Mr. Gary Mauldin, president of AJS, who made the following statements:

> The only conversations that I had with Bi-Lo personnel, other than store managers, about the inventory reduction program were with Mr. Lentz and Mr. Wheeler. We went to Bi-Lo and talked to Don Lentz and Bob Wheeler about it in mid-April. . . . We told them what was going on, that the store managers had started refusing all orders. . . . [W]e wanted to know what the hell was going on, and it was killing our sales . . . and if it didn't stop, it would put us out of business.

Mr. Mauldin testified that Mr. Lentz responded by assuring him that "it was not meant for us, and if we would document every problem that we were having, he would stop it because it was not meant for Andrew Jackson Sales to cut back on their inventory."

The record shows that Mr. Mauldin responded to Mr. Lentz' request by writing a letter dated 13 April 1982, in which he identified six stores as "examples of our problems." The final sentence of that letter states: "Bob, this is a major problem for both, Bi Lo and Andrew Jackson Sales and a quick resolvement would be beneficial to all concerned."

Bob Wheeler's deposition contains the following uncontradicted testimony:

> I did get a letter from them, that was the letter I received in April. As to whether I worked on the problem, I didn't have an opportunity to because of the letter—I meet with the Store Operations and supervisory people, the divisional people, once a week, on Thursday. That letter was placed in my files to review with Operations on the 22nd of April, that was the next available meeting to discuss that problem with them. It was that morning that I received a phone call that Andrew Jackson had already let their help go and would no longer be servicing Bi-Lo stores.

Stated simply, we think the evidence before the trial judge failed to raise an issue as to any act or practice by Bi-Lo "tending to deceive" AJS. On the contrary, we think the evidence clearly reveals that AJS made a business decision to continue dealing with Bi-Lo, a company providing more than 80% of AJS's monthly revenue, that Bi-Lo agreed to investigate and respond to AJS's concerns about the inventory reduction program, that Bi-Lo in fact prepared to do so, and that time ran out for AJS. The record contains no evidence that Bi-Lo guaranteed AJS that it would fully alleviate its problem within the week. Furthermore, while we do not hold today that the South Carolina statute protects only consumers against unfair or deceptive acts or practices, we do note that business entities such as the parties in the instant case are more sophisticated and certainly better equipped to protect themselves contractually than is the average consumer. We do not believe the South Carolina statute was intended to be an insurance policy against the exercise of business judgment which in hindsight shows itself to have been erroneous. Because the record contains no evidence of any act or practice by Bi-Lo that may be characterized as deceptive or unfair, we hold the court acted correctly in granting summary judgment for defendant.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

LONNIE L. BERNARD v. CENTRAL CAROLINA TRUCK SALES, INC., AND TRANSPORT ACCEPTANCE CORPORATION

No. 8313SC112

(Filed 1 May 1984)

1. **Unfair Competition § 1— unfair or deceptive trade practice—sufficiency of evidence**

The trial court properly found an unfair or deceptive trade practice pursuant to G.S. 75-1.1 where the evidence tended to show that defendant represented to plaintiff that the tractor plaintiff purchased was a 1975 Peterbilt with a 1975, 400 Cummins engine, and in reality it contained a 1972, 370 Cummins engine.

2. **Unfair Competition § 1— unfair trade practice—measure of damages**

In an action for unfair and deceptive trade practices involving the sale of a tractor, the trial court properly found the measure of damages to be the value of the truck plaintiff traded in and the total of the monthly payments plaintiff made for his "new" tractor, and, pursuant to G.S. 75-16, the trial court correctly trebled the damages.

APPEAL by defendant from *Lee, Judge.* Judgment entered 14 September 1982 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 11 January 1984.

Defendant Central Carolina Truck Sales (hereafter defendant) appeals from a judgment finding that it engaged in unfair or deceptive acts or practices and awarding treble damages.

Herbert J. Zimmer for plaintiff appellee.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by Robert J. Lawing and Robert E. Price, Jr., and Frye, Booth & Porter, by Leslie G. Frye, for defendant appellant.

WHICHARD, Judge.

I.

Plaintiff brought this action alleging breach of contract, fraudulent misrepresentation, and unfair or deceptive acts or practices. The facts giving rise to the action, as found by the court, are as follows:

In August 1978 plaintiff entered a contract with defendant to purchase a tractor. Defendant represented the tractor to be a

1975 Peterbilt with a 1975, 400 Cummins engine. In reality it contained a 1972, 370 Cummins engine.

Defendant's agent said the tractor was "ready in all aspects for long distance hauling." Immediately after the purchase, however, plaintiff began having problems with the tractor. These included problems with "the transmission, front end shimmying, air conditioning not working, air bags not working properly, no taillights, engine making noise, truck burning excessive oil, accelerator cable breaking, engine gasket breaking, water pump breaking, gear shift not working properly, water entering the oil, and other matters." In January 1979 plaintiff parked the tractor. He was unable to use it thereafter.

The purchase price of the tractor was $27,500. Plaintiff traded in a used dump truck valued at $11,000. The remaining $16,500 was financed through defendant Transport Acceptance Corp. Plaintiff made three monthly payments totalling $1,818.30. He did not make any additional payments, and Transport repossessed the tractor.

The court found that defendant breached the contract, made fraudulent misrepresentations, and engaged in unfair or deceptive acts or practices. It found that expenses plaintiff incurred for repairs "cannot be attributed to any fault of the defendant." It found damages to plaintiff in the amount of $12,818.30, however, consisting of the value of the truck traded in ($11,000) and the total of the monthly payments plaintiff had made ($1,818.30). Pursuant to G.S. 75-16, the court trebled the damages.

Defendant appeals.

II.

[1] A careful review of the record indicates that the findings of fact are supported by competent evidence. Thus, the only issues are whether the conclusion of law that defendant engaged in unfair or deceptive acts or practices is supported by the findings of fact, and whether the damages were proper. *Williams v. Insurance Co.*, 288 N.C. 338, 342, 218 S.E. 2d 368, 371 (1975); *Spivey v. Porter*, 65 N.C. App. 818, 819, 310 S.E. 2d 369, 370 (1984).

G.S. 75-1.1 provides that "unfair or deceptive acts or practices in or affecting commerce . . . are declared unlawful." The

Act does not, however, define an unfair or deceptive act, "nor is any precise definition of the term possible." *Trust Co. v. Smith*, 44 N.C. App. 685, 690, 262 S.E. 2d 646, 649, *disc. rev. denied*, 300 N.C. 379, 267 S.E. 2d 685 (1980). To determine whether a particular act is unfair or deceptive, the court must look at the facts surrounding the transaction and the impact on the marketplace. *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E. 2d 397, 403 (1981); *Trust Co. v. Smith, supra.* The determination of whether an act is unfair or deceptive is a question of law for the court. *Trust Co. v. Smith, supra*, 44 N.C. App. at 689, 262 S.E. 2d at 649. "[T]he question of whether the defendant acted in bad faith is not pertinent." *Marshall v. Miller, supra*, 302 N.C. at 544, 276 S.E. 2d at 400-01.

An action for unfair or deceptive acts or practices is "the creation of . . . statute. It is, therefore, sui generis. It is neither wholly tortious nor wholly contractual in nature . . . ." *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 704, 322 N.E. 2d 768, 779 (1975). While fraudulent behavior may evoke the action, it is not an action for fraud. *Holley v. Coggin Pontiac*, 43 N.C. App. 229, 241, 259 S.E. 2d 1, 9, *disc. rev. denied*, 298 N.C. 806, 261 S.E. 2d 919 (1979).

In discussing the purpose of the statute, our Supreme Court has stated:

> Such legislation was needed because common law remedies had proved often ineffective. Tort actions for deceit in cases of misrepresentation involved proof of scienter as an essential element and were subject to the defense of "puffing." . . . Proof of actionable fraud involved a heavy burden of proof, including a showing of intent to deceive. . . . Actions alleging breach of express and implied warranties in contract also entailed burdensome elements of proof. . . . A contract action for rescission or restitution might be impeded by the parol evidence rule where a form contract disclaimed oral misrepresentations made in the course of a sale. Use of a product after discovery of a defect or misrepresentation might constitute an affirmance of the contract. Any delay in notifying a seller of an intention to rescind might foreclose an action for rescission. (Citations omitted.)

Marshall v. Miller, supra, 302 N.C. at 543-44, 276 S.E. 2d at 400.

A case involving facts similar to those here is *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). Defendant there falsely represented "that the automobile was a one-owner vehicle which had been driven approximately 23,000 miles, that it had never been wrecked, and that the Chrysler warranty could and would be transferred to plaintiff." *Id.* at 305-06, 218 S.E. 2d at 344. In reality the automobile had two prior owners, it had been wrecked, and the Chrysler warranty could not be transferred. The parties stipulated both that the representations were false and that defendant had knowledge of the falsity. The Court held that the acts constituted unfair or deceptive acts or practices under G.S. 75-1.1.

The false representations here involved the size and year of the engine and the readiness of the tractor for long distance hauling. The court did not make a finding that defendant had knowledge of the falsity, although it did find that the misrepresentations were intentional. Knowledge of the misrepresentation is not essential, however, since our Supreme Court has held that plaintiff is not required to show bad faith. *Marshall v. Miller*, *supra*, 302 N.C. at 546, 276 S.E. 2d at 401. We thus agree with the trial court that defendants' acts constituted unfair or deceptive acts or practices under G.S. 75-1.1.

III.

[2] G.S. 75-16 provides that

> [i]f any person shall be injured . . . such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

The statute merely refers to the person being "injured" and does not state the method of measuring damages. Consequently, there is confusion as to the proper measure of damages in an unfair or deceptive act or practice case. *See* Leaffer & Lipson, Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence, 48 Geo. Wash. L. Rev. 521, 546-49 (1980).

In *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 220 S.E. 2d 806 (1975), *disc. rev. denied*, 289 N.C. 619, 223 S.E. 2d

396 (1976), this Court applied the measure of damages for fraudulent inducement. It stated:

> When a person discovers that he has been fraudulently induced to purchase property he must choose between two inconsistent remedies. He may repudiate the contract of sale, tender a return of the property, and recover the value of the consideration with which he parted; or, he may affirm the contract, retain the property, and recover the difference between its real and its represented value. He may not do both. Once made, the election is final. . . .

27 N.C. App. at 717, 220 S.E. 2d at 811 (quoting *Bruton v. Bland*, 260 N.C. 429, 430, 132 S.E. 2d 910, 911 (1963)).

Plaintiff in *Taylor* had purchased from defendant an automobile which was represented to be a 1971 model when in fact it was a 1970 model. The evidence did not disclose that anything else was wrong with the automobile. The Court stated: "It is clear that plaintiff is seeking to rescind the sales contract and recover the sales price of $4,600. He was not damaged, nor injured within the meaning of G.S. 75-16 so as to warrant treble damages, in the sum of $4,600." 27 N.C. App. at 716-17, 220 S.E. 2d at 811.

In *Hardy v. Toler, supra*, the actual damage was the difference in the fair market value of the automobile as represented and the actual value. *See also Lee v. Payton*, 67 N.C. App. 480, 313 S.E. 2d 247 (1984).

We do not believe, however, that the only available measure of damages is that for fraudulent inducement. As previously stated, an action for unfair or deceptive acts or practices is a distinct action apart from fraud, breach of contract, or breach of warranty. Since the remedy was created partly because those remedies often were ineffective, it would be illogical to hold that only those methods of measuring damages could be used. "To rule otherwise would produce the anomalous result of recognizing that although G.S. 75-1.1 creates a cause of action broader than traditional common law actions, G.S. 75-16 limits the availability of any remedy to cases where some recovery at common law would probably also lie." *Marshall v. Miller, supra*, 302 N.C. at 547, 276 S.E. 2d at 402.

The measure of damages used should further the purpose of awarding damages, which is "to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money." *Phillips v. Chesson*, 231 N.C. 566, 571, 58 S.E. 2d 343, 347 (1950); *see also Bowen v. Bank*, 209 N.C. 140, 144, 183 S.E. 266, 268 (1936). Here, before the unfair or deceptive act or practice occurred, plaintiff had his used truck and the money with which he made the three payments. He subsequently had neither of these, nor did he have the 1975 Peterbilt tractor. The court thus concluded that this was the amount of his injury which was proximately caused by the unfair or deceptive act. *See Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 184, 268 S.E. 2d 271, 273-74 (1980).

A case involving similar damages is *Parris v. Fischer & Co.*, 221 N.C. 110, 19 S.E. 2d 128 (1942). Plaintiff there alleged that he was induced by false representations to purchase a new short wave therapeutic machine. He traded in his old therapeutic machine, which was valued at $60, and financed the balance. The new machine "proved to be entirely worthless for his purposes." Plaintiff notified defendant of this and refused to make any further payments. Defendant subsequently repossessed the machine in plaintiff's absence. Plaintiff was allowed to recover the value of his old machine.

We hold that the award of damages here was proper. Like the award in *Parris*, it restored plaintiff to his original condition. Having properly concluded that defendant's acts were unfair or deceptive, the court properly trebled the damages pursuant to G.S. 75-16.

Affirmed.

Judges WEBB and WELLS concur.

WILFRED HARTLEY STEVENS v. PHYLLIS JOANNE STEVENS

No. 8319DC734

(Filed 1 May 1984)

1. **Parent and Child § 10; Process § 9.1— enforcement of Georgia child support order—Uniform Reciprocal Enforcement of Support Act—jurisdiction over nonresident defendant**

The Uniform Reciprocal Enforcement of Support Act gave the courts of this State statutory authority for the exercise of personal jurisdiction over a nonresident father upon motion by the mother for garnishment of alleged arrearages under a Georgia child support order which had been registered in Randolph County pursuant to the Uniform Act. Furthermore, the nonresident father had sufficient minimum contacts with this State so that the exercise of personal jurisdiction over him did not violate due process where the father was assigned to duty in the armed services at Fort Bragg; he brought his wife and two children to North Carolina where they lived in 1972 and 1973; he purchased a home in Fayetteville in which the family lived; in 1973 the father was assigned to Georgia on temporary duty, but his family continued to live in North Carolina; the father and mother thereafter separated, and the mother obtained child support judgments in Georgia; after the father and mother were divorced, the mother and children continued to live in North Carolina; and the father came to this State on two occasions to visit with his children and on one occasion was arrested under a warrant for child support initiated by the mother.

2. **Parent and Child § 10— enforcement of Georgia child support order—Uniform Reciprocal Enforcement of Support Act—garnishment—motion in the cause**

Garnishment was a proper remedy for the enforcement of a Georgia child support order which had been registered in this State pursuant to the Uniform Reciprocal Enforcement of Support Act, and service of a motion in the cause for garnishment was proper process without the need of beginning a new action.

3. **Parent and Child § 10— Uniform Reciprocal Enforcement of Support Act—foreign support order entered prior to 1 October 1975**

The registration provisions of the Uniform Reciprocal Enforcement of Support Act apply so as to allow enforcement in North Carolina of foreign support orders entered prior to 1 October 1975.

APPEAL by plaintiff from *Hammond, Judge.* Order entered 8 February 1983 in the District Court of RANDOLPH County. Heard in the Court of Appeals 12 April 1984.

This appeal involves North Carolina's jurisdiction over plaintiff. Plaintiff and defendant lived together as husband and wife in North Carolina until 1973, when they separated. Two children

were born of the marriage. Each party subsequently obtained a divorce. A temporary order for child support was entered against plaintiff in Augusta, Georgia in 1973, and a final order for child support was entered 5 February 1980 in Georgia. Defendant registered the Georgia support orders in the Foreign Support Order Registry of Randolph County on or about 19 August 1982, pursuant to G.S. 52A-29 of the Uniform Reciprocal Enforcement of Support Act (hereinafter "URESA").

Plaintiff was a member of the armed forces during the marriage, and the parties lived at Fayetteville, North Carolina. Plaintiff was living temporarily in Georgia at the time of separation and thereafter moved to Kentucky. Defendant returned to North Carolina and continued to reside here. Since the separation, plaintiff has visited his children in North Carolina at least twice, and on the second visit was charged with and arrested for nonsupport of his children. Presently plaintiff is living in Michigan.

Subsequent to the registration of the Georgia support orders in Randolph County, defendant filed a motion in the cause for garnishment of alleged arrearages under the Georgia orders. No summons was issued in connection therewith. In lieu thereof, defendant served notice of the motion on plaintiff by registered mail. Before filing his answer, plaintiff made a special appearance and filed a motion to dismiss pursuant to Rule 12(b)(2), challenging jurisdiction of the North Carolina court over him and quashing any alleged service of process. The trial judge denied plaintiff's motion. Plaintiff appeals.

Moser, Ogburn, Heafner & Miller by Michael C. Miller for plaintiff appellant.

Beck, O'Briant and O'Briant by Lillian B. O'Briant for defendant appellee.

HILL, Judge.

I

Plaintiff first contends the action should have been dismissed due to lack of personal jurisdiction over plaintiff. A state court may assert jurisdiction over a nonresident respondent and bind him by its judgment when the following elements exist: (1) a

statutory ground for the exercise of jurisdiction over his person; (2) proper service of process; and (3) such minimum contacts with the state that it is fair to require him to defend within the state. *Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977); *Russell v. Tenore*, 55 N.C. App. 84, 284 S.E. 2d 521 (1981). Finding the presence of each of these elements, we conclude North Carolina acquired personal jurisdiction over plaintiff.

[1] (1) *Statutory ground and service of process.* Initially we note that the purpose of URESA is to enforce terms of a support order or agreement already adjudicated in another forum. It is the application of full faith and credit by a sister state to the decrees of the state of original jurisdiction. The issues have been resolved; the obligation fixed, and only enforcement is pending—whether in the state of original jurisdiction or this state.

The proper registration of the Georgia orders in North Carolina is not contested in this appeal. G.S. 52A-30(a) provides that "[u]pon registration, the registered foreign support order shall be treated in the same manner as a support order issued by a court of this State." Personal jurisdiction is not a requisite for registration of an order under G.S. 52A-29. *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E. 2d 633 (1977). But registration does have "the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating or staying as a support order of this State and may be enforced and satisfied in like manner." G.S. 52A-30(a). The obligor is further protected by G.S. 52A-30(b) which grants him twenty days after the mailing of notice of the registration in which to petition the court to vacate the registration or for other relief. If he does not do so, the registered support order is confirmed.

The duties of support are enforced as set out in G.S. 52A-9. Because the State has an interest in the welfare and support of those persons living within its boundaries, the statute is broad in granting authority to bring suit for support, and grants authority to the official who prosecutes criminal actions for the State to appear on behalf of the obligee, although the action may also be brought by another.

We do not believe the Legislature intended to limit the effect of this statute to obligors residing in this State. It has been the law of the land prior to this statute that foreign judgments may

be domesticated in any state when proper jurisdiction and venue were present. Rather we believe the Legislature intended to extend the obligations of an obligee without the suit for domestication of a foreign judgment when proper jurisdiction is present. In effect, URESA is an extension of the court of original jurisdiction for the purpose of enforcement of judgments lawfully rendered. Chapter 52A does not establish additional grounds for support; it produces additional means of enforcing support obligations already established. *Blake v. Blake*, 34 N.C. App. 160, 237 S.E. 2d 310 (1977).

Since the statute is directed toward the enforcement of an existing judgment, no new suit need be commenced as in the domestication of foreign judgments. Once proper registration was accomplished, the Georgia order became the order of the North Carolina court and subject to enforcement in the same manner as a North Carolina order.

[2] G.S. 50-13.4(f)(4) provides for garnishment, as provided in Article 35 of Chapter 1 of the General Statutes, as a remedy for the enforcement of child support orders. The proper process for garnishment when a responsible parent is under court order to provide child support is by motion. G.S. 110-136(b). A motion is not the commencement of an action requiring a service of summons. See G.S. 1A-1, Rule 3, 4(a).

The defendant herein filed a motion in the cause for garnishment, and service of said motion is proper process without the need of beginning a new action. URESA provides proper statutory grounds for the exercise of jurisdiction and service of process was proper.

[1] (2) *Minimum contacts.* The record reveals the following: The plaintiff volunteered for the armed services and was assigned to duty at Fort Bragg. He brought his wife and two sons to North Carolina where they lived in 1972 and 1973. He purchased a home in Fayetteville in which the family lived. In 1973 plaintiff was assigned to Georgia on temporary duty, but his family continued to live in North Carolina. A separation ensued between husband and wife, and the wife initiated the proceedings which are the bases for the judgments entered herein in Georgia. However, her residence remained in this State. After the husband and wife were divorced, the wife and children continued to live in North

Carolina. Husband came to the State on two occasions to visit with his children, and on one occasion was arrested under a warrant for child support initiated by his wife. We conclude the sum of such contacts to be sufficient to require the plaintiff to defend this lawsuit. The arrearages due wife are in the nature of a claim of injury to property of the defendant and as such provide grounds for personal jurisdiction under the long-arm statute. See *Brown v. Brown*, 47 N.C. App. 323, 267 S.E. 2d 345 (1980). (This case involved a claim for alimony, but the same reasoning applies to child support cases.)

II

[3] Lastly, plaintiff contends the action should be dismissed for lack of subject matter jurisdiction. We disagree. URESA shall not apply to pending litigation including proceedings which have been initiated in a state other than North Carolina. 1975 N.C. Session Laws, Chapter 656, § 2. However, defendant's order of support was entered in Georgia in 1973, and prior to 1 October 1975. The registration provisions of URESA apply so as to allow enforcement in North Carolina of foreign state support orders entered prior to 1 October 1975. Transfer of the order to North Carolina was a ministerial act ancillary to the entry of original judgment. This assignment of error is overruled.

The decision of the trial court is

Affirmed.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. PHILLIP BARRY DAVIS

No. 8325SC935

(Filed 1 May 1984)

1. Criminal Law § 88.3— cross-examination of State's witnesses not improperly restricted

The trial court did not improperly restrict cross-examination of the State's two witnesses when he sustained objections to three repetitive questions about the defendant's self-serving declaration that he was not the driver of a

car, and where these questions had either been answered already or were asked again later using different phrasing.

2. Criminal Law § 87.4— redirect examination—questions not improper

In a prosecution for driving under the influence of an alcoholic beverage, assaulting a law enforcement officer, and similar crimes, the trial court did not abuse its discretion in admitting evidence of defendant's friendship with the man identified as a passenger in his car on redirect examination where one of the State's witnesses had been cross-examined about a scuffle between defendant and the man identified as his passenger.

3. Automobiles and Other Vehicles § 137— failure to stop for blue light and siren —sufficiency of evidence

The evidence that defendant failed to stop for a blue light and siren was sufficient to withstand defendant's motion for directed verdict where an officer testified that he turned on his siren when he saw defendant's erratic driving pattern, and that, after he turned on his siren, the defendant came to a complete stop and waited for the officer to approach his car before fleeing. G.S. 20-157(a).

4. Assault and Battery § 14.6— assault on a police officer—sufficiency of evidence

The trial court properly failed to dismiss the charge of assault on a police officer where the evidence tended to show that after grabbing the defendant around the neck to try to prevent him from escaping, the officer was dragged along beside defendant's car; that the defendant attempted to strike the officer in the face; and that then, with the automobile traveling at approximately 20 miles per hour, the defendant turned the steering wheel sharply to the right, causing the officer to be thrown from the automobile into a ditch.

5. Criminal Law § 98.2— denial of motion to sequester witness—no prejudicial error

The trial judge did not abuse his discretion by allowing an officer to hear another officer's identification of defendant as the driver of a car where the officer had already heard the other officer testify in district court, and sequestering him would have served no purpose. G.S. 15A-1225.

APPEAL by defendant from *Sitton, Judge.* Judgment entered 28 January 1983 in Superior Court, BURKE County. Heard in the Court of Appeals 16 February 1984.

Attorney General Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

Simpson, Aycock, Beyer & Simpson, P.A., by Richard W. Beyer, for defendant appellant.

BECTON, Judge.

Defendant, Phillip Barry Davis, was arrested and charged with driving under the influence of an alcoholic beverage, driving while his operator's license was revoked, assaulting a law enforcement officer, resisting arrest, and failing to stop for a blue light and siren. The charge of driving without a license was dismissed. The charge of driving under the influence was reduced to reckless driving. On 28 January 1983, a Burke County jury found the defendant guilty on all the charges. From judgments imposing sentences totalling 30 months, defendant appeals.

I

Defendant's assignments of error relate to: (a) the trial judge's restrictions on defendant's cross-examination of the State's witnesses, (b) the trial judge's admission of redirect examination testimony on topics not brought out on direct or cross-examination, (c) the trial judge's denial of defendant's motion for a directed verdict, (d) the trial judge's admission of identification testimony, (e) the trial judge's failure to sequester the State's witnesses, and (f) the trial judge's admission of opinion testimony. For the reasons that follow, we find no prejudicial error.

II

After noticing the erratic driving pattern of a car on 31 July 1982, Officer L. R. Rector turned on his blue light and siren and pursued the car. The car continued for some distance in the same manner before coming to a stop. Officer Rector approached the car and observed two men inside the car. When the driver attempted to drive away, the tires started to spin on the wet road. Officer Rector, who had been standing next to the driver's window, grabbed the driver around the neck. He and the driver exchanged blows. Officer Rector gained control of the steering wheel, but the driver regained control and drove away, at fifteen to twenty miles per hour. Officer Rector was thrown some twenty or thirty feet, suffering cuts, abrasions, and damage to his clothes, shoes and watch. He rushed to his patrol car and pursued the car while calling headquarters for assistance. After a few seconds, he saw the car turn off the highway and pull into a private driveway. The driver jumped out and ran into the woods. Before approaching the vehicle, Officer Rector notified head-

quarters. He then confronted the passenger, detected a stong odor of alcohol, and noticed beer cans in the car.

Officer Rector took the passenger, identified as L. G. Shuffler, into custody. The driver was taken into custody by Officer Jones, who had answered Officer Rector's call for assistance. At the jail, both Shuffler and Officer Rector identified defendant as the driver of the car. After being identified, defendant became upset. Defendant also refused to take a breathalyzer test. Defendant has consistently denied any connection with the events of 31 July 1982 even though Officer Rector and L. G. Shuffler identified him as the driver.

III

[1] Defendant's first assignment of error, based on his fifth, sixth and eighth exceptions, is that the trial court improperly restricted cross-examination of the State's two witnesses. The defendant contends that his statement to Officer Rector and Officer Jones that he was not driving the car should have been admitted. We find no error.

The North Carolina practice of cross-examination serves three purposes: "(1) to elicit further details of the story related on direct, in the hope of presenting a complete picture less unfavorable to the cross-examiner's case; (2) to bring out new and different facts relevant to the whole case; and (3) to impeach the witness, or cast doubt upon his credibility." 1 H. Brandis, *North Carolina Evidence* § 35, at 145 (2d rev. ed. 1982). The wide latitude accorded the cross-examiner " 'does not mean that all decisions with respect to cross-examination may be made by the cross-examiner.' [Citation omitted.] Rather the scope and duration of the cross-examination rest largely in the discretion of the trial judge." *State v. Satterfield*, 300 N.C. 621, 627, 268 S.E. 2d 510, 515 (1980) (quoting 1 Stansbury, *North Carolina Evidence* § 35, at 108 (Brandis rev. 1973)). The trial judge has the "discretion to ban unduly repetitious and argumentative questions, as well as inquiry into matters of only tenuous relevance." 1 H. Brandis, *supra*, at 146.

The trial judge sustained objections to three repetitive questions about the defendant's self-serving declaration that he was not the driver of the car. One of the State's witnesses had already

said that he did not recall any statement made by the defendant. The second witness later answered the same question in a different form. Since these questions had either been answered already or were asked again later using different phrasing, we find no abuse of discretion.

IV

[2] The defendant next assigns as error the trial court's decision to allow redirect examination of a State's witness on topics not brought out on direct or cross-examination. As a general rule, redirect examination is intended "to clarify testimony which had been cast into doubt upon cross-examination, to clarify new matter brought out on cross-examination, or to refute testimony elicited on cross-examination. . . ." *State v. Franks*, 300 N.C. 1, 12, 265 S.E. 2d 177, 183 (1980). "Nevertheless, the judge has discretion to vary the regular order and permit counsel to elicit on redirect relevant evidence which could have been but was not included in the examination in chief." 1 H. Brandis, *supra* p. 3, § 36, at 147; *see also State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975), *cert. denied*, 433 U.S. 907, 53 L.Ed. 2d 1091, 97 S.Ct. 2971 (1977); *State v. Locklear*, 60 N.C. App. 428, 298 S.E. 2d 766 (1983). The *Locklear* Court said:

> We find no abuse of [judicial] discretion here where the subject of the redirect examination was the identification of the defendant by James Strickland, which was discussed on both direct and cross-examination. Even if some new matter were the subject of redirect, any error here would not be prejudicial given the heavy weight of the evidence against the defendant.

60 N.C. App. at 430, 298 S.E. 2d at 767.

In this case, the friendship between defendant and L. G. Shuffler was raised on the redirect examination of Officer Jones. Although the State did not question Officer Jones on direct concerning Shuffler, both the State and the defendant had mentioned Shuffler's name when Officer Rector testified. Indeed, defense counsel had cross-examined Officer Rector about a scuffle between defendant and Shuffler. Therefore, the trial court did not abuse its discretion in admitting evidence of defendant's friendship with Shuffler on redirect examination.

V

[3] Defendant next contends that the trial judge improperly denied his motions for a directed verdict. A motion for a directed verdict has the same legal effect as a motion for nonsuit and challenges the sufficiency of the evidence. *State v. Glover*, 270 N.C. 319, 154 S.E. 2d 305 (1967). "It is elementary that, upon a motion for judgment of nonsuit in a criminal action, all of the evidence favorable to the State, whether competent or incompetent, must be considered, such evidence must be deemed true and considered in the light most favorable to the State, discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom." *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E. 2d 822, 826 (1977).

In support of his contention that there was insufficient evidence that he failed to stop for a blue light and siren, defendant argues that the State's evidence did not show two essential facts—(1) that the vehicle had a siren that could be heard from a distance of not less than one thousand feet, and (2) that the defendant was able to hear the siren.[1]

Because defendant consistently denied any connection with the disputed events, the State presented the only version of the events of 31 July 1982. Officer Rector testified that he turned on his siren when he saw defendant's erratic driving pattern. He testified further that after he turned on his siren, the defendant came to a complete stop and waited for the officer to approach his car before fleeing. This evidence, although circumstantial, is sufficient, when viewed in the light most favorable to the State, to carry the case to the jury. Defendant's motion for a directed verdict was properly denied.

1. N.C. Gen. Stat. § 20-157(a) (1983) states that "[u]pon the approach of any police or fire department vehicle . . . giving warning signal by appropriate light and by audible bell, siren or exhaust whistle, audible under normal conditions from a distance not less than 1,000 feet, the driver of every other vehicle shall immediately drive the same to a position as near as possible and parallel to the right-hand edge or curb, clear of any intersection of streets or highways, and shall stop and remain in such position unless otherwise directed by a police or traffic officer. . . ."

VI

[4] Defendant next argues that the trial court erred by not dismissing the charge of assault on a police officer. We do not agree. A person is guilty of a misdemeanor if he assaults a law enforcement officer "while the officer . . . is discharging or attempting to discharge a duty of his office." N.C. Gen. Stat. § 14-33(b)(4) (Supp. 1983). This statute is designed "to protect the State's law enforcement officers from bodily injury and threats of violence. . . ." *State v. Hardy*, 298 N.C. 191, 197, 257 S.E. 2d 426, 431 (1979).

An assault is "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another . . . sufficient to put a [reasonable person] in fear of immediate bodily harm." *State v. Roberts*, 270 N.C. 655, 658, 155 S.E. 2d 303, 305 (1967). Even though intent is an essential element of criminal assault, the "intent may be implied from culpable or criminal negligence, [citation omitted], if the injury or apprehension thereof is the direct result of intentional acts done under circumstances which show a reckless disregard for the safety of others and a willingness to inflict injury." *State v. Coffey*, 43 N.C. App. 541, 543, 259 S.E. 2d 356, 357 (1979).

After grabbing the defendant around the neck to try to prevent him from escaping, Officer Rector was dragged along beside the car. The defendant attempted to strike the officer in the face. Then, with the automobile travelling at approximately twenty miles per hour, the defendant turned the steering wheel sharply to the right, causing Officer Rector to be thrown from the automobile into a ditch.

The defendant's actions were sufficient to submit the issue of assault on a police officer to the jury.

VII

The defendant argues that the trial court erred by not striking Officer Rector's identification testimony of Shuffler, the passenger. Again, we do not agree. The identification of Shuffler was collateral and non-prejudicial. Further, defendant's objection was not timely made. Moreover, the test used in determining "whether the identification evidence is inherently incredible is

whether 'there is a reasonable possibility of observation sufficient to permit subsequent identification.' Where such a possibility exists, the credibility of the witness' identification and the weight given his testimony is for the jury to decide." *State v. Turner*, 305 N.C. 356, 363, 289 S.E. 2d 368, 372 (1982) (quoting *State v. Miller*, 270 N.C. 726, 732, 154 S.E. 2d 902, 906 (1967)). Officer Rector testified that he walked up to the defendant's automobile and turned so that he was directly facing the driver. After Officer Rector observed both the driver and the passenger, the automobile was driven away.

VIII

[5] The defendant next argues that the trial court erred by denying his motion to sequester the State's witnesses. However, we find no prejudicial error.

"Upon 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. . . ." N.C. Gen. Stat. § 15A-1225 (1983). A ruling on a motion to sequester is within the trial judge's discretion and will not be disturbed absent a showing of an abuse of discretion. *State v. Royal*, 300 N.C. 515, 268 S.E. 2d 517 (1980); *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982).

The defendant contends the trial court erred by allowing Officer Jones to hear Officer Rector identify defendant as the driver of the car. However, Officer Jones had already heard Officer Rector's testimony in district court. Therefore, sequestering him would have served no purpose. The trial judge did not abuse his discretion.

IX

The defendant's final assignment of error relates to the trial court's decision to allow Officer Rector to give an opinion concerning defendant's intoxication. The defendant has failed to argue this issue in his brief. Therefore, pursuant to Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure (1983), this issue is deemed abandoned.

For the foregoing reasons, we find no prejudicial error.

No error.

Judges ARNOLD and WHICHARD concur.

CAROLINA FIRST NATIONAL BANK, PLAINTIFF v. DOUGLAS GALLERY OF HOMES, LTD. (FORMERLY HARLESTON AND MAGNESS, INC., D/B/A GALLERY OF HOMES), AND ERNEST R. MAGNESS AND JAMES A. JENNINGS, DEFENDANTS, ERNEST R. MAGNESS, THIRD PARTY PLAINTIFF v. MARINELL S. MOORE, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF B. T. MOORE, THIRD PARTY DEFENDANT, AND ERNEST R. MAGNESS, THIRD PARTY PLAINTIFF v. DOUGLAS GALLERY OF HOMES, LTD., THIRD PARTY DEFENDANT

No. 8327SC166

(Filed 1 May 1984)

1. **Appeal and Error § 4; Rules of Civil Procedure § 50.5— denial of directed verdict—different ground from that asserted in trial**

In reviewing the denial of a motion for directed verdict, the appellate court could not consider an argument not stated as a specific ground for the motion at trial.

2. **Banks and Banking § 23; Bills and Notes § 18— bank merger—right of action on promissory note**

In a bank merger, the surviving bank or its transferee has the legal right to enforce the claim of a promissory note because the surviving bank succeeds to the merged bank's holder status by operation of law. G.S. 53-13.

3. **Banks and Banking § 23; Rules of Civil Procedure § 25— bank merger—no continuance of action by merged bank**

Since the substantive law of G.S. 55-110(c) does not authorize a merged bank to continue prosecuting an action, G.S. 1A-1, Rule 25(d) does not do so.

4. **Bills and Notes § 18; Rules of Civil Procedure § 19— effect of absence of necessary party**

In an action on a promissory note by a bank which had merged with another bank and was no longer in existence, the absence of the surviving bank, the real party in interest, from the action did not warrant a directed verdict. Rather, the trial court should have granted a continuance to permit the real party in interest to be substituted or should have corrected the defect by an *ex mero motu* ruling.

5. **Rules of Civil Procedure § 19— absence of real party in interest—failure to show prejudice—remand for substitution of party**

Where defendant failed to show real prejudice in not having had the real party in interest joined at the original trial, the trial court's directed verdict in

favor of plaintiff will be left intact, but the case will be remanded to the trial court to amend the pleadings and to substitute the real party in interest in its verdict.

APPEAL by defendant from *Russell G. Walker, Jr., Judge.* Judgment entered 2 November 1982 in Superior Court, LINCOLN County. Heard in the Court of Appeals 17 January 1984.

Erwin and Beddow, P.A., by Timothy W. Griffin and Fenton T. Erwin, Jr., for defendant appellant Magness.

Jonas, Jonas & Rhyne, by Richard E. Jonas, for plaintiff appellee.

BECTON, Judge.

Plaintiff, payee, Carolina First National Bank (CFNB), instituted this action on 23 September 1981 against the maker, defendant Harleston & Magness, Inc. (Harleston), and the endorsers, defendants Ernest R. Magness and James A. Jennings, of a negotiable promissory note made payable to "CAROLINA FIRST NATIONAL BANK, or Order." In his Answer, Magness admitted his endorsement on the note, but raised several defenses. Neither Harleston nor Jennings appeared at trial. Magness made a motion for a directed verdict under Rule 50 of the North Carolina Rules of Civil Procedure at the close of CFNB's evidence. The specific grounds stated to the trial court under Rule 50 were:

> [T]he lawsuit has been brought by Carolina First National Bank which no longer exists and NCNB is the holder of the note. Rule 17 requires that all actions be prosecuted in the name of the real party in interest and Defendant may have defenses against the holder, NCNB, that cannot be asserted against Carolina First National Bank. Further, there was no evidence that the holder of the note, NCNB, gave value for it.

The trial court deferred ruling on the motion. After presenting no evidence, Magness renewed his motion. Magness' motions were denied. The trial court then granted CFNB's motion for a directed verdict under Rule 50 at the close of all the evidence. Magness appeals.

I

On appeal, Magness argues that the trial court erred in denying his motions for directed verdict and granting CFNB's motion for directed verdict when (1) "uncontradicted evidence showed [CFNB] no longer existed and no evidence as to the identity of the holder or owner of the note was offered," and (2) the evidence "demonstrated the action was not prosecuted by the real party in interest and [CFNB] failed to make [a] motion for joinder or substitution."

[1] Because Magness did not raise the issue of the "identity of the holder" before the trial court in his specific grounds for the directed verdict motion, we cannot consider this argument on appeal. *Feibus & Co. v. Godley Const. Co.*, 301 N.C. 294, 271 S.E. 2d 385 (1980).

For the following reasons, we remand to the trial court to amend the pleadings and substitute the real party in interest in its directed verdict.

II

In its Complaint, filed 23 September 1981, CFNB alleged that "Plaintiff is a National Banking Association with principal office in Lincolnton, Lincoln County, N.C." The matter came on for trial in early November 1982. The testimony of CFNB's sole witness, Neil Ferguson, a Vice President with North Carolina National Bank (NCNB), revealed that CFNB had merged with an unnamed bank and, therefore, was no longer in existence. Ferguson explained,

> In October of 1978 Carolina First National Bank was a national banking corporation licensed to do banking in North Carolina. As to whether there is now a Carolina First National Bank in existence, it's been merged to another bank. There are no more signs at the Denver office of Carolina First National Bank. I am employed by NCNB and it is NCNB that I am here for today.

Ferguson did not establish how NCNB came into possession of the note; that is, whether NCNB was the surviving bank or its transferee, but Ferguson did present the note at trial.

[2] Faced with evidence of a merger, we are asked to determine whether the action could continue in CFNB's name, although CFNB, the merged bank, ceased to exist at the time of the merger. N.C. Gen. Stat. §§ 53-12 to -13 (1982). N.C. Gen. Stat. § 1A-1, Rule 17(a) (1983) provides that "[e]very claim shall be prosecuted in the name of the real party in interest." A real party in interest is " 'a party who is benefited or injured by the judgment in the case', [citation omitted] [and] who by substantive law has the legal right to enforce the claim in question." *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 18-19, 234 S.E. 2d 206, 209, *disc. rev. denied*, 293 N.C. 159, 236 S.E. 2d 704 (1977) (quoting *Parnell v. Nationwide Mut. Ins. Co.*, 263 N.C. 445, 448, 139 S.E. 2d 723, 726 (1965)). In a bank merger, the surviving bank or its transferee has the legal right to enforce the claim because the surviving bank succeeds to the merged bank's holder status by operation of law. G.S. § 53-13; *see also Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 271 S.E. 2d 54 (1980).

[3] CFNB asserts, though, that N.C. Gen. Stat. § 1A-1, Rule 25(d) (1983) controls:

> In case of any transfer of interest other than by death, the action shall be continued in the name of the original party; but, upon motion of any party, the court may allow the person to whom the transfer is made to be joined with the original party.

At first blush, Rule 25(d) appears to be the solution to our quandary. However, we remind the parties that Rule 25(d) is merely a procedural rule. Substantive law governs its application. 7A C. Wright and A. Miller, *Federal Practice and Procedure* § 1958, at 664 (1972). The statutory provision dealing with bank mergers, G.S. § 53-12, provides:

> In case of either transfer or merger or consolidation the rights of creditors shall be preserved unimpaired, and the respective companies deemed to be in existence to preserve such rights for a period of three years.

The merged bank is deemed to continue in existence to defend in actions by creditors. No statutory language enables a merged bank to continue prosecuting an action for a period of time after the merger. The legislative intent is clear, especially in light of

the corporate merger provision, N.C. Gen. Stat. § 55-110(c) (1982), which permits the prosecution and defense of actions in the name of the merged corporation.

> [A]ny claim existing or action or proceeding, civil or criminal, pending by or against any such [merged] corporations may be prosecuted as if such merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place. . . .

G.S. § 55-110(c). Since the substantive law does not authorize a merged bank to continue prosecuting an action, Rule 25(d) is not applicable to the case *sub judice.*

[4] We return to the provisions of G.S. § 1A-1, Rule 17(a), real party in interest. Rule 17(a) provides that:

> No action shall be dismissed on the grounds that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Magness first raised his real party in interest objection in his motion for a directed verdict at the close of CFNB's evidence. The trial court subsequently denied Magness' motions and granted CFNB's motion for a directed verdict.

In *Booker v. Everhart,* 294 N.C. 146, 240 S.E. 2d 360 (1978), our Supreme Court relied on the lenient language of Rule 17(a) dealing with dismissal, when it remanded an action on a non-negotiable promissory note for a new trial, because the trial court had failed to join a necessary party plaintiff under N.C. Gen. Stat. § 1A-1, Rule 19 (1983).

> Where, as here, a fatal defect of the parties is disclosed, the court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the court. [Citations omitted.] Absence of necessary parties does not merit a nonsuit. Instead, the court should order a contin-

uance so as to provide a reasonable time for them to be brought in and plead.

Booker, 294 N.C. at 158, 240 S.E. 2d at 367.

Applying Rule 17(a) and the reasoning in *Booker* to the case *sub judice*, we hold that the absence of the real party in interest did not warrant a directed verdict. Therefore, the trial court did not err in denying Magness' motion. However, before ruling on the merits by granting CFNB's motion, the trial court should have granted a continuance to permit the real party in interest to be substituted, or the trial court should have corrected the defect by *ex mero motu* ruling.

[5] Nevertheless, the trial court's error does not require a new trial. Unlike *Booker*, an action with a fatal defect—the absence of a necessary party—the absence of the real party in interest in the case *sub judice* does not constitute a "fatal defect," since Magness has failed to "show real prejudice in not having had the real party joined at the original trial." 3A J. Moore and J. Lucas, *Moore's Federal Practice* § 17.15, at 17-187 (2d ed. 1984). Magness, in his Answer, admitted his endorsement on the note. Although he alleged defenses in his Answer, he presented no evidence at trial. He argues, in his specific grounds for the motion for a directed verdict: "Defendant may have defenses against the holder, NCNB, that cannot be asserted against Carolina First National Bank." We disagree.

A holder in due course takes subject to the defenses of any party to the instrument with whom he has dealt. N.C. Gen. Stat. § 25-3-305 (Supp. 1983). If CFNB dealt with Magness through an authorized agent, as alleged in Magness' Answer, CFNB was subject to Magness' defenses. Since NCNB did not establish holder in due course status, both NCNB and CFNB were subject to Magness' alleged defenses. *See* N.C. Gen. Stat. § 25-3-302 (1965). Magness' failure to present evidence proving the alleged defenses shows that he was not prejudiced by not having had the real party joined.

We, therefore, leave the trial court's directed verdict in favor of CFNB intact, but remand the case to the trial court to amend the pleadings and to substitute the real party in interest in its verdict. *See Econo-Travel*

Remanded.

Judges ARNOLD and WHICHARD concur.

DORIS WISEMAN v. LENORA WISEMAN, IN THE MATTER OF THE ESTATE OF WALTER LEE WISEMAN

No. 8312SC31

(Filed 1 May 1984)

1. **Appeal and Error § 24— failure to follow appellate rules—appeal subject to dismissal**

Where petitioner violated App. R. 9(b)(1)(xi) and App. R. 10 by failing to set out any exceptions immediately following the record of the judicial action to which they are addressed and by failing to list all the objections or exceptions upon which the assignments of error set out at the conclusion of the record were based, where petitioner violated App. R. 10(b)(2) by failing to identify the specific portion of the jury instruction questioned in this appeal by setting it within brackets or by any other clear means of reference, where petitioner's brief failed to make reference to the numbered assignments of error and exceptions pertinent to the separate questions and arguments presented in the body of the brief in violation of App. R. 28(b)(5), and where there were no numbered exceptions anywhere in the body of the record, petitioner's appeal was subject to dismissal for failure to follow the mandatory Rules of Appellate Procedure.

2. **Rules of Civil Procedure § 50— failure to preserve the right to move for a judgment n.o.v.**

Petitioner's failure to move for a directed verdict at the close of her own evidence or at the close of all the evidence justified the trial court's denial of her motion for judgment n.o.v. G.S. 1A-1, Rule 50(b).

3. **Marriage § 6— presumption applicable to multiple marriages**

In an action to revoke the Letters of Administration issued to respondent and to have Letters of Administration issued to petitioner, where petitioner challenged the subsequent marriage of the deceased to respondent, the trial court properly instructed the jury that a second or subsequent marriage is presumed valid.

APPEAL by plaintiff from *McLelland (D. Marsh), Judge.* Judgment entered 26 October 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 1 December 1983.

This is an action to revoke the Letters of Administration issued to respondent, Lenora Wiseman and to have Letters of Administration issued to petitioner, Doris Wiseman, on the grounds that petitioner is the lawful surviving wife of the decedent, Walter Lee Wiseman. The facts are uncomplicated; Walter Wiseman died on 5 February 1982 leaving a modest estate. Lenora Wiseman qualified as his Administratrix by virtue of her then being his wife and commenced to administer his estate. Thereafter, Doris Wiseman intervened in the administration of the estate, claiming that she was the lawful widow of Walter Wiseman and entitled to be his Administratrix and heir by virtue of her having married Walter in 1952.

At trial before a judge and jury, Doris Wiseman offered (1) evidence of her marriage to Walter in 1952 and (2) evidence to the effect that she had not filed for a divorce thereafter and that no divorce documents were ever served upon her. Doris offered further evidence that she maintained contact with Walter Wiseman from the time of her marriage until the spring of 1981, during which time she engaged in marital relations with him at irregular intervals. She also cared for him for a time until a few months before his death. Doris Wiseman was also aware that Walter lived with other women.

Lenora Wiseman offered evidence that she married Walter Wiseman in 1969 and that she lived with him until his death. In addition, Lenora worked with Walter in their business as funeral directors and they acquired property jointly, filed joint income tax returns as husband and wife and Lenora was named the beneficiary of insurance policies as the wife of Walter Wiseman. Lenora offered further evidence that she had never heard of Doris Wiseman until after the death of Walter Wiseman.

After the evidence was presented, Doris Wiseman requested certain instructions on the law regarding the validity of a subsequent marriage and the relevance of Lenora Wiseman's lack of knowledge of Walter's prior marriage to Doris. The requested charge, as it appears in the record, failed to mention the presumption of validity which arises upon proof of a second or subsequent marriage. The trial court apparently denied petitioner's requested charge and instructed the jury, *inter alia*, "that when a party to a marriage is shown to have married a second time while the first

marriage partner is yet living, a presumption arises that the first marriage was dissolved by divorce and that the second marriage is valid."

The appropriate issues were submitted to the jury and the issues and answers thereto are as follows:

1. Were Walter Lee Wiseman and Doris Wiseman married to each other on 24 February 1952?

ANSWER: Yes.

2. If so, was that marriage undissolved and subsisting at the time of the death of Walter Lee Wiseman on February 5, 1982?

ANSWER: No.

Thereafter, judgment in favor of Lenora Wiseman was entered on the jury's verdict, petitioner's motion for judgment n.o.v. was denied, and petitioner, Doris Wiseman, appeals.

Ronald Williams, P.A., for petitioner appellant.

Mitchel E. Gadsden and N. H. Person, for respondent appellee.

JOHNSON, Judge.

[1] The precise nature of the questions presented by petitioner Doris Wiseman's appeal is rendered uncertain by virtue of the fact that petitioner has failed to comply with the Rules of Appellate Procedure in preparing the record on appeal and the brief supporting her position on the questions presented. Petitioner has violated App. R. 9(b)(1)(xi) and App. R. 10 by failing to set out any exceptions immediately following the record of the judicial action to which they are addressed and by failing to list all the objections or exceptions upon which the assignments of error set out at the conclusion of the record are based. In addition, petitioner has violated App. R. 10(b)(2) by failing to identify the specific portion of the jury instruction questioned in this appeal by setting it within brackets or by any other clear means of reference. Finally, petitioner's brief fails to make reference to the numbered assignments of error and exceptions pertinent to the separate questions and arguments presented in the body of the brief in

violation of App. R. 28(b)(5). Furthermore, no numbered exceptions appear anywhere in the body of this record.

The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal. *Marsico v. Adams*, 47 N.C. App. 196, 266 S.E. 2d 696 (1980). However, we are aware that petitioner's assignments of error pertain to the jury instructions and denial of judgment n.o.v., and it cannot be said that petitioner's various rule violations have markedly increased the difficulty of our task in evaluating this appeal, in view of the brevity of the record and nature of the issue presented. Therefore, we deem it appropriate to suspend the rules in this instance. App. R. 2; *Drug Stores v. Mayfair*, 50 N.C. App. 442, 274 S.E. 2d 365 (1981). However, this result should not be construed as either approving or encouraging the laxity in compliance with the Rules of Appellate Procedure demonstrated in this case.

[2] We note first that the record is devoid of any indication that petitioner moved for a directed verdict at the close of her own evidence or at the close of all the evidence. In order to preserve the right to move for a judgment n.o.v. under G.S. 1A-1, Rule 50(b), a party must move for a directed verdict at the close of all the evidence. *Gibbs v. Duke*, 32 N.C. App. 439, 232 S.E. 2d 484, *disc. rev. denied*, 292 N.C. 640, 235 S.E. 2d 61 (1971); *Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 176 S.E. 2d 851 (1970). This is an absolute prerequisite. *Id.; see generally* Shuford, N.C. Civ. Prac. & Proc. (2nd Ed.), § 50 *et seq.* Petitioner's failure to do so, therefore, justified the trial court's denial of her motion for judgment n.o.v. As a consequence, the question of the sufficiency of the evidence to support the verdict has not been properly preserved for appellate review.

[3] Petitioner contends that the jury was erroneously instructed that a second or subsequent marriage is presumed valid because such a presumption is in "direct violation" of G.S. 51-3, which provides that all marriages between any two persons either of whom "has a husband or wife living at the time of such marriage" shall be void. In other words, petitioner appears to be arguing that the first marriage of Walter and Doris is presumed to continue, absent evidence to the contrary, and that the trial court erred in the charge as to the burden of proof and substantive law with respect to this issue. We do not agree.

It is well established that, "'A second or subsequent marriage is presumed legal until the contrary be proved, and he who asserts its illegality must prove it. In such case, the presumption of innocence and morality prevail over the presumption of the continuance of the first or former marriage.'" *Kearney v. Thomas*, 225 N.C. 156, 33 S.E. 2d 871 (1945). *Accord Chalmers v. Womack*, 269 N.C. 433, 152 S.E. 2d 505 (1967); *Ivory v. Greer Brothers, Inc.*, 45 N.C. App. 455, 263 S.E. 2d 290 (1980); *Green v. Construction Co.*, 1 N.C. App. 300, 161 S.E. 2d 200 (1968).

We have carefully examined the trial court's charge to the jury and find that it fully and accurately summarized the evidence presented, the contentions of the parties, and correctly declared and explained the law arising upon the evidence in all respects. Therefore, the petitioner's assignment of error is wholly without merit. The parties have received a fair trial, and the verdict and judgment are

Affirmed.

Judges ARNOLD and PHILLIPS concur.

JOE H. ADAMS v. HAZEL Z. MILLS

No. 8320SC637

(Filed 1 May 1984)

Automobiles and Other Vehicles § 11.4— failure to instruct on contributory negligence proper

In a negligence action in which plaintiff sued for the property damage to his truck suffered when defendant crashed his truck into the plaintiff's dump truck after being blinded by the setting sun, the trial court properly failed to instruct on contributory negligence where the plaintiff offered evidence that he stopped his truck off the highway to sweep off any loose rock that might have been left after dumping rock in a driveway, G.S. 20-116(g), and where defendant failed to offer any evidence that the plaintiff parked his truck on the road "outside municipal corporate limits." The words "park" and "leave standing" of G.S. 20-161(a) have been construed so as to exclude a mere temporary or momentary stoppage for a necessary purpose, and leaving the parked vehicle "outside municipal corporate limits" is an essential element in establishing a violation of G.S. 20-161(a).

Chief Judge VAUGHN dissenting.

Adams v. Mills

APPEAL by defendant from *Seay, Judge.* Judgment entered 16 March 1983 in Superior Court, ANSON County. Heard in the Court of Appeals 9 April 1984.

Leath, Bynum, Kitchin & Neal by Fred W. Bynum, Jr., and Timothy C. Barber for defendant appellant.

Caudle, Underwood & Kinsey by Lloyd C. Caudle and Thad A. Throneburg; and Henry T. Drake for plaintiff appellee.

BRASWELL, Judge.

Blinded by the setting sun, the defendant crashed his truck into the plaintiff's dump truck. The plaintiff sued for the property damage to his truck and the defendant counterclaimed for his personal injuries and property damages. Upon the plaintiff's motion, the trial court granted a directed verdict dismissing the defendant's counterclaim and refused to submit an issue of contributory negligence to the jury. The jury returned a favorable verdict for the plaintiff and damages were awarded in the amount of $4,600.00.

The primary question presented on appeal by the defendant is whether the trial court erred by refusing to submit to the jury the issue of contributory negligence. As stated in his brief, "[t]he defendant did not appeal the dismissal of his counterclaim and does not seek a new trial on the issue of damages but only upon the liability issues raised by the pleadings and the evidence."

On 4 February 1981, a fair and sunny day, the plaintiff, around 5:00 p.m., was dumping a load of stone on the driveway of a house he was landscaping. The plaintiff pulled up past the driveway, turned on his four-way flashers, and backed into the driveway. He hopped out of his truck, loosened the dump clamps, partially raised the dump, and started out of the driveway, dumping the rock as he went. After dumping all of the rock, the plaintiff pulled out into the highway in a westerly direction and onto the right shoulder of the road. The plaintiff and two other witnesses testified that he pulled the truck entirely off the road. He again got out and went to the rear of the truck to clean off the remaining rock and to fasten the tailgate. The plaintiff testified that he had been stopped for less than a minute when he heard the defendant's truck coming down the road from the east.

He looked over his right shoulder and saw that the defendant's truck was headed straight for him. To avoid being hit, the plaintiff jumped from the back of the truck into a roadside ditch. The plaintiff never heard the screech of tires or the defendant's horn.

The plaintiff further testified that from the driveway, looking in an easterly direction, there was a clear and unobstructed view from 1,200 to 1,400 feet. In a westerly direction, there was a straight, unobstructed view from 1,100 to 1,200 feet. Jack Painter, who was working with the plaintiff that day, testified that the defendant's truck was traveling sixty to sixty-five miles per hour.

The defendant's evidence consisted of the testimony of Larry Wayne Whitley, the State Highway Patrolman called to the scene, who stated that the plaintiff had previously indicated that his truck was not completely off the highway and that his left front and rear wheels were on the pavement. Whitley also testified that there were no skid marks from the defendant's truck and that the defendant stated he had never decreased his speed.

The defendant testified that:

> [A]bout a quarter of a mile East of the accident scene, I noticed the sun was bright in front of me. . . . When I topped the hill I could see the area and Joe Adams' truck down there . . . . Then I proceeded on down the hill, and I got about halfway down the hill and the sun got worse. I pulled my sun visor down, and I put my right hand up so I could see the road.
>
> The sun just blinded me. . . .
>
> Well, the next thing I knew I'd done had the wreck . . . .

The defendant has essentially raised only one question for our review. He complains that the trial court erred by refusing to charge and to submit to the jury the issue of whether or not the plaintiff was contributorily negligent. G.S. 1A-1, Rule 51, requires a judge to "declare and explain the law arising on the evidence given in the case." This rule imposes a positive duty on the trial judge to charge on the substantial features of the case as the evidence dictates. *Clay v. Garner*, 16 N.C. App. 510, 192 S.E. 2d 672 (1972). With regard to a defense urged by the defendant, "the trial judge must submit the issue to the jury with appropriate in-

structions if there is evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the defense asserted." *Pallet Co. v. Wood*, 51 N.C. App. 702, 703, 277 S.E. 2d 462, 463-64, *disc. rev. denied*, 303 N.C. 545, 281 S.E. 2d 393 (1981).

Because the defendant asserts that the plaintiff was contributorily negligent, he has the burden of proving that the plaintiff was negligent and that such contributory negligence was a proximate cause of the accident. *R.R. v. Woltz*, 264 N.C. 58, 140 S.E. 2d 738 (1965). The plaintiff's negligence, according to the defendant, is based on his violation of G.S. 20-161(a) which provides:

> No person shall *park or leave standing* any vehicle, whether attended or unattended, upon the paved or main-traveled portion of any highway or highway bridge *outside municipal corporate limits* unless the vehicle is disabled to such an extent that it is impossible to avoid stopping and temporarily leaving the vehicle upon the paved or main traveled portion of the highway or highway bridge. (Emphasis added.)

The words "park" and "leave standing" of the statute have been construed so as to exclude a mere temporary or momentary stoppage for a necessary purpose. *Saunders v. Warren*, 264 N.C. 200, 141 S.E. 2d 308 (1965). The defendant concedes that the stop was a temporary one, but contends that it was not for a necessary purpose. We disagree. The plaintiff offered evidence that he stopped his truck to sweep off any loose rock that might have been left after the dumping so that when he continued his travel other vehicles would not be damaged by flying rock. G.S. 20-116(g) forbids any vehicle loaded with rock to be driven on the highway unless measures are taken to prevent the load from blowing off the truck.

In any event, the defendant has the burden of establishing the plaintiff's contributory negligence and he has offered no evidence that the stop was not temporary or that it was not for a necessary purpose. The defendant also failed to offer any evidence that the plaintiff parked his truck on the road "outside municipal corporate limits," which is an essential element in establishing a violation of G.S. 20-161(a). *See Pardon v. Williams*,

265 N.C. 539, 144 S.E. 2d 607 (1965). Because the defendant has failed to offer any evidence that the plaintiff violated G.S. 20-161(a), the basis for his contributory negligence claim, we hold the trial court properly refused to charge and to submit an issue of contributory negligence to the jury.

The defendant's second assignment of error contends that the trial court erred by refusing to set aside the verdict for errors of law committed during the trial. This assignment of error was argued together with the defendant's first assignment of error in the brief. The defendant has chosen not to specify any other errors of law allegedly committed other than the trial court's refusal to submit a contributory negligence issue to the jury. Thus, we must arrive at the same conclusion as stated above. Because the defendant offered no evidence that the plaintiff's actions constituted negligence in violation of G.S. 20-161(a) or with regard to any other standard of care, the trial judge was not obligated to charge the jury on contributory negligence or to submit it as an issue to them.

Affirmed.

Judge EAGLES concurs.

Chief Judge VAUGHN dissents.

Chief Judge VAUGHN dissenting.

I would order a new trial.

The question of plaintiff's contributory negligence should have been submitted to the jury. There is evidence tending to show that plaintiff "parked or left standing" his vehicle on the paved portion of the highway. There is no evidence that the vehicle was "disabled to such an extent that it [was] impossible to avoid stopping and temporarily leaving the vehicle" on the highway. The weight to be given the evidence of plaintiff's contributory negligence and the question of proximate cause were for the twelve. *Saunders v. Warren*, cited by the majority, reversed a judgment of involuntary nonsuit and held that the question of plaintiff's contributory negligence in stopping on the highway because his lane of travel was blocked by other stalled vehicles was for the jury.

Duke v. Hill

WILLIAM B. DUKE AND WIFE, MAE G. DUKE, AND J. LEON HAWKINS AND WIFE, EVA B. HAWKINS v. EDWARD HILL (WIDOWER); JAMES HILL AND WIFE, CATHERINE HILL; DUPREE HILL AND WIFE, ELSIE W. HILL; MOLLIE HILL; SARENA H. GAYNOR; RILEY MOORE, JR. AND WIFE, SHIRLEY MOORE; BEATRICE M. SMITH (WIDOW); VELVET LEE OLLISON; GLADYS M. STILLEY AND HUSBAND, NORMAN STILLEY; ANNIE MOORE; WILLIAM SIMON MOORE III AND WIFE, LOTTIE MAE MOORE; CLARA HOOKER (WIDOW); JEFFREY HOLLIDAY; WALTER L. HOLLIDAY AND WIFE, JEWELL R. HOLLIDAY; RUBY B. HOLLIDAY (WIDOW); SELMON HOLLIDAY, JR.; BERNICE HOLLIDAY; ANTHONY HOLLIDAY; AND STANDARD GUARANTY INSURANCE COMPANY

No. 832SC134

(Filed 1 May 1984)

1. **Partition § 6— whether land should be sold or partitioned—question of fact—burden of proof**

Whether land owned by the parties should be partitioned in kind among them according to their respective interests or whether it should be sold and the proceeds divided was a question of fact for the court, and since petitioners' allegation that the property could not actually be partitioned among the parties without injury to some or all the parties was denied by respondents, petitioners had the burden of establishing that a sale was necessary.

2. **Evidence § 48— qualification of witness as expert**

The trial court could have justifiably found that a witness was qualified to testify as an expert in the field of land use and values where the record showed that the witness was the director of planning and environmental management for a county, had a B.S. degree in urban regional planning, was taking graduate studies primarily in the field of land use planning and resource management, and had been over the land in question for the purpose of considering its possible uses, and since the court not only permitted the witness to give the testimony but accepted it as true, the court's failure formally to find that the witness was an expert was an immaterial oversight rather than prejudicial error.

3. **Partition § 6.1— necessity for sale of land—supporting evidence**

The trial court's determination that a partition in kind could not be made without injury to some or all of the parties and that the land should be sold and the proceeds divided was supported by evidence and findings concerning the varied interests of the parties, the irregular nature and character of the land, the impossibility of physically dividing it in a fair manner according to value, and the economic waste of so doing.

APPEAL by respondents from *Peel, Judge.* Judgment signed 12 March 1982 *nunc pro tunc* 3 November 1981 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 12 January 1984.

The subject of this partition and sale proceeding is 42 acres of land owned by petitioners and respondents. The petitioners, who have combined their varied interests into one share, own approximately 86 percent of the 42 acres involved. The shares of the different respondents therein vary in size from 1/28th to 1/945th. The petitioners allege, but the respondents deny, that the land cannot be divided among the several owners according to their respective interests without injury to some or all the parties interested. G.S. 46-22. The other preliminary steps taken in the proceeding are irrelevant to this appeal, which is from the judgment of the Superior Court Judge, following a *de novo* hearing upon appeal from the Clerk, ordering that the property be sold and the proceeds divided among the parties according to their respective interests.

Stephen A. Graves and Wilkinson & Vosburg, by John A. Wilkinson, for petitioner appellees.

Robert L. White for respondent appellants.

PHILLIPS, Judge.

[1] In this partition proceeding, whether the land owned by the parties should be partitioned in kind among them according to their respective interests or whether it should be sold and the proceeds divided, was a question of fact for the court. *Barber v. Barber*, 195 N.C. 711, 143 S.E. 469 (1928). Since petitioners' allegation that the property could not be actually partitioned among the parties without injury to some or all the parties was denied by the respondents, the burden of establishing that a sale was necessary reposed on petitioners. *Brown v. Boger*, 263 N.C. 248, 139 S.E. 2d 577 (1965). As the courts have stated many times, and as is both obvious and inherent in any event, whether a sale of land is or is not necessary in partition cases is determined by the circumstances, the most salient of which are usually the land itself, its nature, extent, condition and location and those that own it, their number and respective interest. According to the evidence (all presented by petitioners, the respondents choosing to remain silent for some reason), those who own the land are numerous and their interests vary from about 86% to a small fraction of 1%; whereas, the land involved, though quite varied, is for all intents and purposes even less extensive than its 42 acres indicate.

Situated along Blount's Creek, not far from Blount's Bay and the Pamlico River and hard to get to except by boat, some of the land is unusable marsh; some is high, open bluff with a commanding view of the creek and the waters it runs into; some is cleared and relatively flat or moderately rolling; much of it, covered with woods of no commercial value, is irregularly traversed by steeply sloped ridges and eroded gullies; and through the tract meanders a small tributary of the creek known as Yellow Bank Branch.

[2] In support of their contention that the land cannot be fairly divided among the several parties, petitioners presented opinion testimony by John Edgar Prevatt, Jr. to the effect that the highest and best use that the property could be put to was that of residential housing with access to the creek. The respondents objected to this testimony and its receipt by the court is cited as prejudicial error. The basis of the contention is that the court had not found that the witness was an expert in the field of land use and thus qualified to give opinion testimony concerning it. Whether someone qualifies to testify as an expert in a particular field is within the sound discretion of the trial court. *State v. Strickland*, 229 N.C. 201, 49 S.E. 2d 469 (1948). The record shows that the witness was the Director of Planning and Environmental Management for Beaufort County, had a B.S. degree in urban regional planning, was taking graduate studies primarily in the field of land use planning and resource management, and had been over the land in question for the purpose of considering its possible uses. That the court could have justifiably found that the witness was a qualified expert in the field of land use and values is plain; and since the court not only permitted the witness to give the testimony, but accepted it as true, it also is plain to us that the failure to formally find that the witness was an expert was an immaterial oversight, rather than prejudicial error. *Apex Tire and Rubber Company v. Merritt Tire Company, Inc.*, 270 N.C. 50, 153 S.E. 2d 737 (1967).

[3] Working from the end, rather than the beginning, which is more convenient in this instance, it is clear that the judge's conclusion that "it appears by proof satisfactory to the undersigned Judge that the partition requested by the respondents cannot be made without injury to some or perhaps all the parties interested" justified the order to sell the land. G.S. 46-22. It is also clear, we think, that this conclusion, as well as each of the others

subordinate to it that the court made, is supported by his findings of fact, in which the varied interests of the parties, the irregular nature and character of the land, the impossibility of physically dividing it in a fair manner according to value, and the economic waste of so doing, were all specified, which only leaves for determination whether the findings so made are supported by evidence. The respondents' *eight* other assignments of error address that question, at least inferentially. If the findings are supported by evidence, they are conclusive and binding. *West v. West*, 257 N.C. 760, 127 S.E. 2d 531 (1962). Though we choose to discuss them, we note that respondents' assignments of error are neither in the form nor contain the substance that Rule 10(c) of the N.C. Rules of Appellate Procedure requires. The office of an assignment of error, as both the rule and the innumerable cases interpreting it plainly show, is to state directly, albeit briefly, what legal error is complained of and why. Merely stating that "the respondents object and except to" a designated finding of fact, as was done eight times, neither tells us what the claimed legal errors were nor why they were erroneous. Nevertheless, we accept them as maintaining that the findings were erroneous in that they were not supported by evidence. Our study of the record, however, leads us to conclude otherwise and the judgment appealed from is therefore affirmed.

In arguing that various of the findings of fact were improperly supported, respondents cited and quoted from *Brown v. Boger*, 263 N.C. 248, 139 S.E. 2d 577 (1965) several times. While that case contains a number of instructive quotations and statements about processing partition cases, the case is not at all similar to this and has no application to the findings made in it. In *Brown*, 1,250 acres were involved, of which the petitioners owned 7/10ths and the respondents 3/10ths, there was neither finding nor evidence that that vast tract could not be divided into the two large shares required without injury to either of the parties, and eight witnesses for the respondents, in resistance to the petitioners' demand for a sale, testified that the land could be divided without injury to anyone. This case, on the other hand, involves but 42 acres, much of which is unusable, and parties that own as little as 1/20th of an acre, and it is marked by the respondents' inability or unwillingness to present any evidence whatever that the land

could be fairly divided as to value, though the petitioners presented much evidence to the contrary.

Affirmed.

Judges ARNOLD and JOHNSON concur.

THOMAS JAY LIVINGSTON, ET AL., PETITIONER-APPELLANTS v. THE CITY OF CHARLOTTE, NORTH CAROLINA, ET AL., RESPONDENT-APPELLEES, IN RE: ANNEXATION ORDINANCE NO. 1182-X, ADOPTED BY THE CITY OF CHARLOTTE ON JUNE 3, 1982

No. 8326SC711

(Filed 1 May 1984)

1. **Municipal Corporations § 2.4— petition to review annexation—irrelevant allegations**

Allegations in a petition for judicial review of an annexation ordinance that city officials conspired, improperly and fraudulently, in tampering with the political and quasi-legislative process by attempting to cause the council of a nearby city to deny petitioners a full and fair hearing on a voluntary annexation petition filed by petitioners with the nearby city were irrelevant to the matter before the court and were properly stricken.

2. **Appeal and Error § 24.1— broadside exception and assignment of error**

An assignment of error and the exception upon which it was based were broadside and thus failed to present any question for review.

3. **Municipal corporations § 2.3— annexation—contiguity requirements**

Findings by the trial judge in an action to review an annexation ordinance that the annexed area directly abuts the city's municipal boundary and that at least one-eighth of the aggregate external boundaries of the annexed area coincide with the city's municipal boundary supported the court's judgment upholding the annexation ordinance.

APPEAL by petitioners from *Sitton, Judge.* Judgment entered 30 November 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 April 1984.

This is an appeal from a final judgment affirming an ordinance adopted by the City Council of the City of Charlotte annexing an area known as the Raintree-Providence Plantation Area (hereinafter "Area"). The record reveals the following:

On 26 April 1982 the Charlotte City Council adopted a resolution announcing its intent to annex the Area, and on 10 May 1982 received and approved an annexation report containing plans for services pursuant to N.C. Gen. Stat. Sec. 160A-47. On 27 May a public hearing was held, and on 3 June 1982 Ordinance 1182-X annexing the Area was adopted. On 6 July 1982 petitioners, all of whom are residents of the Area, filed a petition seeking judicial review of the annexation ordinance in Superior Court, pursuant to N.C. Gen. Stat. Sec. 160A-50. On 30 November 1982 the court entered judgment affirming Ordinance 1182-X. On 9 December petitioners filed "a motion for judgment notwithstanding the verdict, a motion to amend the court's findings of fact, a motion to amend the judgment, and a motion for a new trial." On 13 December 1982 Judge Sitton entered an order denying all of petitioners' post-judgment motions. Petitioners then gave notice of appeal from the final judgment entered 30 November 1982.

Hamel, Hamel & Pearce, by Reginald S. Hamel and Hugo A. Pearce, III, for petitioners, appellants.

Henry W. Underhill, Jr., City Attorney, and H. Michael Boyd, Deputy City Attorney, for respondents, appellees.

HEDRICK, Judge.

[1] By Assignments of Error Nos. 1-4 petitioners contend that the court erred in permitting respondents to file a motion to strike, in granting in principal part this motion, and in excluding evidence at trial relating to the stricken material. These assignments of error relate to allegations in the petition for judicial review that the Charlotte city officials "conspired, improperly and fraudulently, in tampering with the political and quasi-legislative process, in attempting to cause the Matthews Council to deny the petitioners a full and fair hearing" on a voluntary annexation petition filed with the City of Matthews by petitioners. N.C. Gen. Stat. Sec. 160A-50 provides that the only matters to be reviewed by the Superior Court on appeal of an annexation ordinance are: (1) whether statutory procedures were followed; (2) whether the provisions of N.C. Gen. Stat. Sec. 160A-47, entitled "Prerequisites to annexation; ability to serve; report and plans," are met; (3) whether the provisions of N.C. Gen. Stat. Sec. 160A-48, entitled "Character of area to be an-

nexed," are met. Clearly, the allegations stricken by the trial judge were and are irrelevant and immaterial to the matters before the court, and the rulings challenged by these assignments of error were not prejudicial error.

[2] The second and third questions presented for review by petitioners are based on a single assignment of error which is in turn based on a single exception to the court's denial of petitioners' four "post-judgment motions." The assignment of error in question contains numerous legal issues and thus falls far short of the admonition contained in Rule 10(c), North Carolina Rules of Appellate Procedure, that assignments of error "so far as practicable, be confined to a single issue of law." Our earnest examination of the exception and assignment of error forming the basis of petitioners' second and third questions has been of little assistance in identifying the precise judicial action complained of on this appeal. Our uncertainty is increased by petitioners' failure to except to a single finding of fact or conclusion of law contained in the detailed final judgment entered by Judge Sitton. We hold that this assignment of error and the exception upon which it is based are broadside and thus fail to present any question for review. *See Hines v. Frink*, 257 N.C. 723, 127 S.E. 2d 509 (1962); *Braswell v. Purser*, 16 N.C. App. 14, 190 S.E. 2d 857, *aff'd* 282 N.C. 388, 193 S.E. 2d 90 (1972).

[3] In their fourth argument, petitioners contend that the court erred in failing to hold that the annexation ordinance "did not meet either equitable or legal contiguity requirements, in light of its irregular shape, which caused the annexation area not to be compact and to lack the unity and cohesiveness necessary for inclusion within a municipal boundary." The assignments of error upon which this question is based present difficulties similar to those discussed above in that they are broadside, raising multiple legal issues. We note, however, that petitioners excepted to entry of judgment, and that this exception is the basis of an assignment of error brought forward and argued in relation to the fourth question presented for review. Pursuant to the provisions of Rule 10, North Carolina Rules of Appellate Procedure, we will consider whether the findings of fact and conclusions of law made by the court in regard to this issue support the judgment.

N.C. Gen. Stat. Sec. 160A-48(b) in pertinent part provides:

The total area to be annexed must meet the following standards:

(1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun.

(2) At least one eighth of the aggregate external boundaries of the area must coincide with the municipal boundary.

N.C. Gen. Stat. Sec. 160A-53(1) defines "contiguous area" as "any area which . . . abuts directly on the municipal boundary. . . ."

Our examination of the final judgment reveals that Judge Sitton found and concluded that the annexed area "directly abuts the City's municipal boundary." Further, the court found as a fact that "[a]t least one-eighth of the aggregate external boundaries of the Area coincide with the City's municipal boundary in that the aggregate external boundary of the Area is 114,627 feet (21.7 miles) of which 17,272 feet (3.3 miles), or 15.1%, coincide with the City's existing municipal boundary." We hold the court's findings and conclusions support the judgment and thus find the assignment of error to be without merit.

The judgment of the Superior Court dated 30 November 1982 is affirmed.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. VICKY WAYNE CAUDILL

No. 8323SC1064

(Filed 1 May 1984)

1. Parent and Child § 9— superior court without jurisdiction in non-support case

In an action in which defendant was tried and convicted in district court for failure to support his legitimate child under G.S. 14-322, where defendant appealed to superior court and filed a motion to dismiss in which he stated that the child was not his legitimate child, and where, instead of ruling on

defendant's motion, the superior court allowed the State upon an oral motion to file a misdemeanor statement of charges alleging defendant's failure to support his illegitimate child in violation of G.S. 49-2, the superior court did not obtain jurisdiction pursuant to G.S. 15A-922 since the statement of charges filed in the superior court changed the nature of the offense that defendant was charged with and convicted of in the district court.

2. Bastards § 3— statute of limitations barring prosecution for failure to support illegitimate child

The three year statute of limitations contained in G.S. 49-4 barred the State from charging defendant with a violation of G.S. 49-2, failure to support an illegitimate child.

APPEAL by defendant from *Collier, Judge.* Judgment entered 11 May 1983 in ALLEGHANY County Superior Court. Heard in the Court of Appeals 11 April 1984.

On 1 July 1981, defendant was charged with unlawfully and willfully neglecting and refusing to support his child, Jessica Beth Absher, age two, in violation of N.C. Gen. Stat. § 14-322 (1981). Defendant was tried and found guilty in Alleghany County District Court. From a judgment sentencing defendant to six months in the county jail, suspended upon the condition that he provide support for the child, he appealed to superior court.

On 14 October 1982, defendant filed a motion to dismiss in superior court. As grounds for his motion defendant argued that he was charged under G.S. § 14-322, which makes it a crime to fail to support one's legitimate children and that Jessica Beth Absher was not his legitimate child. The superior court did not rule on defendant's motion. Instead, the court allowed the State upon an oral motion to file a misdemeanor statement of charges alleging that defendant "did unlawfully and willfully neglect and refuse to provide adequate support and maintain Jessica Beth Absher, his illegitimate child born to Barbara Absher on the 23rd day of July, 1978," in violation of N.C. Gen. Stat. § 49-2 (1983 Cum. Supp.). The misdemeanor statement of charges was filed on 19 October 1982.

Defendant was tried and convicted under the misdemeanor statement of charges in superior court. From a judgment sentencing him to six months in the county jail, suspended upon the condition that he pay support, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General David Gordon, for the State.

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

WELLS, Judge.

[1] Defendant first contends "[t]he superior court was without jurisdiction to try the defendant on a statement of charges filed in superior court for an April 11, 1981 § 49-2 bastardy violation where the case arose upon defendant's appeal for a trial *de novo* from a district court conviction for a 23 July 1978 § 14-322 non-support violation." We agree.

Violation of G.S. § 49-2 is a misdemeanor over which the district court had exclusive original jurisdiction. Until defendant was tried and convicted of this offense in district court and appealed to the superior court for a trial *de novo* the superior court has no jurisdiction. *State v. Killian*, 61 N.C. App. 155, 300 S.E. 2d 257 (1983). The State attempts to argue that the superior court obtained jurisdiction pursuant to N.C. Gen. Stat. § 15A-922 (1983). In pertinent part, G.S. § 15A-922 provides:

. . .

(d) Statement of Charges upon Determination of Prosecutor.—The prosecutor may file a statement of charges upon his own determination *at any time prior to arraignment in the district court.* It may charge the same offenses as the citation, criminal summons, warrant for arrest, or magistrate's order or additional or different offenses.

(e) Objection to Sufficiency of Criminal Summons . . .—If the defendant by appropriate motion objects to the sufficiency of a criminal summons, warrant for arrest, or magistrate's order as a pleading, at the time of or after arraignment in the district court or upon trial de novo in the superior court, and the judge rules that the pleading is insufficient, the prosecutor may file a statement of charges, but *a statement of charges filed pursuant to this authorization may not change the nature of the offense.* (Emphasis supplied.)

It is clear that the superior court could obtain jurisdiction in this case only if the statement of charges did not change the nature of the offense that defendant was charged with and convicted of in the district court.

G.S. § 14-322, the offense with which defendant was originally charged, relates only to the offense of failure to support one's legitimate children. *See Allen v. Hunnicutt*, 230 N.C. 49, 52 S.E. 2d 18 (1949). A person may be convicted for non-support of his illegitimate children only under G.S. § 49-2. Since these statutes provide separate punishment for distinctive criminal offenses, the misdemeanor statement of charges changed the nature of the offense with which defendant was accused, and therefore the superior court could not have obtained jurisdiction pursuant to G.S. § 15A-922. The conviction must therefore be reversed.

[2] Defendant further argues that the State was barred from charging him with violation of G.S. § 49-2 because the action was barred by the three year statute of limitations, contained in G.S. § 49-4.[1] Again we must agree.

G.S. § 49-4 provides:

> *When Prosecution May Be Commenced.*—The prosecution of the reputed father of an illegitimate child may be instituted under this Chapter within any of the following periods, and not thereafter:
>
> (1) Three years next after the birth of the child; or
>
> (2) Where the paternity of the child has been judicially determined within three years next after its birth, at any time before the child attains the age of 18 years; or

1. The three-year limitations period for criminal prosecutions under G.S. § 49-2 was held not to violate the Equal Protection Clause of the United States Constitution in *State v. Beasley*, 57 N.C. App. 208, 290 S.E. 2d 730, *disc. rev. denied*, 306 N.C. 559, 294 S.E. 2d 225 (1982). The court held that the limitations period is constitutional, despite the fact that there is no limitations period under G.S. § 14-322(d) for parents who willfully fail to support their legitimate children. *Compare, however, Cogdell v. Johnson*, 46 N.C. App. 182, 264 S.E. 2d 816 (1980), Annot., 16 A.L.R. 4th 919 (1982), holding that the three-year limitations period under G.S. § 49-14(c)(1) for civil actions to enforce support of illegitimate children violated the Equal Protection Clause, in light of the fact that there is no limitations period under G.S. § 50-13.4 for actions to enforce support of legitimate children.

(3) Where the reputed father has acknowledged paternity of the child by payments for the support thereof within three years next after the birth of such child, three years from the date of the last payment whether such last payment was made within three years of the birth of such child or thereafter: Provided, the action is instituted before the child attains the age of 18 years.

. . .

Jessica Absher was born on 23 July 1978. The statement of charges was filed against defendant on 19 October 1982, over four years following Jessica's birth. G.S. § 49-4 clearly forecloses any prosecution of defendant on this charge, since none of the statutory exceptions apply.

The State contends that the misdemeanor statement of charges should relate back to the date of the original warrant charging defendant under G.S. § 14-322. We cannot accept this contention because the offenses charged are separate and distinct offenses requiring different elements to convict defendant. We would also note that the offenses contain different statutes of limitation.

For the foregoing reasons defendant's conviction must be reversed.

Reversed and judgment vacated.

Judges BECTON and JOHNSON concur.

STATE OF NORTH CAROLINA v. CALVIN LEVERN MARTIN

No. 8314SC576

(Filed 1 May 1984)

1. Constitutional Law § 48— failure to raise insanity defense—no denial of effective assistance of counsel

A defendant convicted of second-degree murder was not denied the effective assistance of counsel by the failure of his counsel to investigate and assert the defense of insanity where the record showed only that a psychiatrist who determined defendant's competency to stand trial reported that defendant was

uncommunicative and reluctant to trust others, that defendant claimed not to recall the shooting and to occasionally suffer from hallucinations, and that no conditions which usually accompany hallucinations were found, and where defendant failed to show that an insanity defense could have been supported at trial.

2. **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 depreciate the seriousness of the crime committed.

3. **Criminal Law § 138— acknowledgment of wrongdoing mitigating circumstance**

The trial court erred in failing to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing prior to arrest where the State's own evidence showed that defendant told the police immediately upon their arrival at the scene that he had shot his wife and then shot himself. G.S. 15A-1340.4(a)(2)(1).

4. **Criminal Law § 138— extenuating relationship mitigating factor**

The trial court did not err in failing to find as a mitigating factor for second-degree murder that the relationship between defendant and the victim was extenuating where the evidence showed only that defendant and the victim were separated and the victim had custody of their child. G.S. 15A-1340.4(a)(2)(i).

APPEAL by defendant from *Herring, Judge.* Judgment entered 5 November 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 10 January 1984.

Defendant was found guilty of second degree murder. Before trial, pursuant to his own motion, defendant's competency to stand trial was determined under G.S. 15A-1002. He spent several days at Dorothea Dix Hospital in Raleigh, where he was examined several times by a forensic psychiatrist, who reported that no active psychosis was indicated. The psychiatrist also reported, however, that Martin was uncommunicative and reluctant to trust others and questioned his ability or willingness to effectively communicate with counsel during the prolonged period required to prepare and try the case. Martin's mental condition at the time of the offense was not inquired into, nor was any request therefor made by counsel, though defendant claimed not to recall the shooting and to occasionally suffer from hallucinations. As to the claimed amnesia, the psychiatrist expressed no opinion, saying it is a condition that is very difficult to either verify or disprove, but as to the hallucinations, he reported that no conditions that usually accompany hallucinations were found.

At trial, the State's evidence tended to show that: Defendant was separated from his wife, who had custody of their child. While visiting his grandmother, who regularly cared for the child while his wife worked, his wife entered the house to pick up the child and defendant, without saying a word, shot and killed her; shortly thereafter, defendant shot and wounded himself.

Defendant offered no evidence at trial, but did during the sentencing hearing. The judge found aggravating and mitigating factors, that the aggravating factors outweighed the mitigating factors, and sentenced defendant to fifty years in prison, whereas the presumptive term is fifteen years.

Attorney General Edmisten, by Special Deputy Attorney General T. Buie Costen, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Malcolm Ray Hunter, Jr., for defendant appellant.

PHILLIPS, Judge.

[1] Defendant's only contention in regard to his conviction is that he had ineffective assistance of counsel and is therefore entitled to a new trial. This contention is based on counsel's failure to investigate and develop the defense of insanity. In our system of jurisprudence it is fundamental that: Those charged with crime have a right to counsel, which means effective counsel; a lawyer defending one charged with homicide has a duty, subject to the client's approval, to raise any defense that is reasonably supportable, which does not conflict with another defense; and a failure to perform that duty deprives the client of the effective assistance of counsel. In this case, so far as the record reveals, the only defense that was possibly available to defendant was insanity and counsel neither developed nor asserted it. That it was the only defense available to defendant does not mean, however, that counsel was necessarily obligated to develop and assert it. No lawyer has a duty to raise an insupportable defense and no defendant can be prejudiced by such a defense not being raised. The pivotal question, therefore, is whether a supportable insanity defense could have been developed in this case.

A defense of not guilty by reason of insanity is not easy to establish under our law. A showing that a defendant is uncom-

municative or suspicious or even cruel and violent is not sufficient. As was stated in *State v. Jones*, 293 N.C. 413, 425, 238 S.E. 2d 482, 490 (1977):

> [T]he test of insanity as a defense to a criminal charge is whether the accused, at the time of the alleged act, was laboring under such a defect of reason, from disease or deficiency of the mind, as to be incapable of knowing the nature and quality of the act, or, if he does know this, was, by reason of such defect of reason, incapable of distinguishing between right and wrong in relation to such act.

The burden of showing that this defense could probably have been established by counsel, had he pursued it, reposed on the defendant. *McMann v. Richardson*, 397 U.S. 759, 25 L.Ed. 2d 763, 90 S.Ct. 1441 (1970). And, as has been pointed out, it is a very stringent burden indeed. *State v. Vickers*, 306 N.C. 90, 291 S.E. 2d 599 (1982).

Though defendant strenuously argues that another psychiatrist might have supported an insanity defense, if counsel had had him examined for that purpose, nothing in the record justifies us in so concluding. That he was uncommunicative and suspicious and committed a cruel, heartless and seemingly senseless crime is but background and does not begin to show that he was laboring under a defect of reason that rendered him incapable of knowing the nature and quality of his act. Since the existence of such mental defect is not supported by the record, we necessarily conclude that defendant has failed to show that his counsel was derelict in not pursuing this defense.

[2-4] But because of errors committed in the sentencing process, defendant must be resentenced. One error was in finding as an aggravating factor that "a lesser sentence will depreciate the seriousness of the crime committed." *State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983). Another error was in failing to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing prior to arrest. G.S. 15A-1340.4(a)(2)(l). The State's own uncontradicted evidence was that defendant told the police immediately upon their arrival at the scene: "I shot my wife and then shot myself." Under the circumstances, therefore, the judge was obliged to find this statutorily approved mitigating factor. *State v. Graham*, 309 N.C. 587, 308 S.E. 2d 311 (1983). But the

judge's refusal to find as a mitigating factor that the relationship between the defendant and the victim was extenuating, as permitted by G.S. 15A-1340.4(a)(2)(i), was not error. So far as we can tell, the only aspects of defendant's relationship to his victim that could possibly be extenuating were that he was married to her and she had borne him a child. The evidence showed that he had neglected and abused her for years and shot her with no provocation whatever. The statute reads as follows:

> i. The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.

In enacting it, the Legislature apparently had in mind circumstances that morally shift part of the fault for a crime from the criminal to the victim; certainly, it was not their purpose to make homicides of spouses or relatives, however senseless and unprovoked, less deserving of punishment than those of others. Because of the errors discussed, however, defendant is entitled to a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

The defendant's conviction is affirmed and the matter is remanded for resentencing.

Affirmed and remanded.

Judges ARNOLD and JOHNSON concur.

DOROTHY D. COPELAND v. ARTHUR D. COPELAND

No. 831DC546

(Filed 1 May 1984)

1. Divorce and Alimony § 26— determination of question of enforceability of foreign custody order on basis of compliance with North Carolina statute rather than provisions of UCCJA—error

The trial court erred in determining the question of enforceability of a Massachusetts custody order based on whether it complied with the terms of G.S. 50-13.5(d)(2) rather than the provisions of the UCCJA since the fact that rules concerning enforcement of a state's own custody decree may vary from

the UCCJA (G.S. 50A-25) does not change the requirements for enforcement of another state's custody order under the UCCJA.

2. Divorce and Alimony § 26— failure of foreign custody order to comply with terms of UCCJA—lack of notice

A Massachusetts court custody order did not substantially comply with the terms of the UCCJA and the Massachusetts court did not obtain personal jurisdiction over defendant where the Massachusetts court did not comply with the notice provisions of G.S. 50A-4 and 50A-5 in that defendant was not served with process pursuant to G.S. 1A-1, Rule 4. G.S. 50A-3 and G.S. 50A-3(a)(1)(ii).

APPEAL by defendant from *Parker, Judge.* Order entered 3 February 1983 in PERQUIMANS County District Court. Heard in the Court of Appeals 3 April 1984.

Plaintiff and defendant were married in December, 1973 in Massachusetts, where they lived until they separated in June, 1982. On 5 September 1982, defendant moved to North Carolina, taking the parties' three minor children with him. No official court order concerning custody of the children had been entered, but the parties had orally agreed that the children would remain with plaintiff, and defendant concedes that he took the children to North Carolina without plaintiff's knowledge or consent. On 13 September 1982, plaintiff sought a temporary custody order in the Probate Court of Plymouth, Massachusetts. On that same date the probate court entered an *ex parte* order granting temporary custody to plaintiff. Defendant was not notified prior to entry of the order, nor does the record show that he was served with process at any time thereafter.

On 12 November 1982, plaintiff filed a petition in Perquimans County District Court, seeking an order enforcing the Massachusetts temporary custody order. Following a hearing at which both parties were present and represented by counsel, the trial court entered an order enforcing the Massachusetts custody award and granting plaintiff $668.75 in travel expenses and $443.68 in attorney fees. The trial court's order provided that defendant was to make the children available to plaintiff on 18 November 1982, and that he would be jailed if he failed to comply.

Upon entry of the order enforcing the Massachusetts court's temporary award of custody to plaintiff, defendant appealed.

Edwards & Edwards, by Walter G. Edwards, Jr., for plaintiff.

W. T. Culpepper, III, for defendant.

WELLS, Judge.

Enforcement of out-of-state child custody orders is governed by the terms of the Uniform Child Custody Jurisdiction Act (UCCJA), N.C. Gen. Stat. §§ 50A-1 through -25, adopted in North Carolina in 1979. Under the UCCJA, a court may properly enforce a child custody order only if the jurisdictional requirements of G.S. § 50A-3 and the notice requirements of G.S. § 50A-4 and § 50A-5 are met, *see* G.S. § 50A-13. States which have adopted the UCCJA must enforce an out-of-state custody order which substantially complies with the terms of the UCCJA, regardless of whether the state issuing the order has adopted the UCCJA, G.S. § 50A-13, *Nabors v. Farrell*, 53 N.C. App. 345, 280 S.E. 2d 763 (1981).

[1] We note that the trial court determined the question of enforceability of the Massachusetts order based on whether it complied with the terms of N.C. Gen. Stat. § 50-13.5(d)(2) (1976),[1] rather than the provisions of the UCCJA. This was error. The trial court apparently used G.S. § 50-13.5(d)(2) as a guideline because of the terms of G.S. § 50A-25, which states that "[n]othing in . . . [the UCCJA] shall be interpreted to limit the authority of the court to issue an interlocutory order under the provisions of G.S. § 50-13.5(d)(2) . . ." G.S. § 50A-25 merely makes it clear that passage of the UCCJA in North Carolina did not eliminate the power of our trial courts to issue temporary custody orders under G.S. § 50-13.5(d)(2). However, nothing in the terms of G.S. § 50A-25 in any way changes the prerequisites to enforcement of an out-of-state custody order under the UCCJA. It is clear that states may set their own standards for enforcement of in-state custody orders, as in G.S. § 50-13.5(d)(2), which are different from the UCCJA standards. The fact that rules concerning enforcement of a state's own custody decrees may vary from the UCCJA

1. § 50-13.5(d)(2). If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.

does not change the requirements for enforcement of another state's custody orders under the UCCJA. *See, e.g.*, 9 U.L.A. Mat., Fam. & H. Laws, UCCJA, Section 4, Official Comment (1979): "As to persons in the forum state, the general law of the state applies; others are notified in accordance with section 5."

[2] The issue before us, therefore, is whether the Massachusetts court custody order substantially complies with the terms of the UCCJA. Under G.S. § 50A-3(a)(1), a state has subject matter jurisdiction and may properly decide child custody matters if the state ". . . (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this State because of the child's removal or retention by a person claiming the child's custody or for other reasons, and a parent or person acting as parent continues to live in this State. . . ." The facts clearly show that defendant's children were residents of Massachusetts until he took them to North Carolina in September of 1982, and that the plaintiff remained in Massachusetts. The Massachusetts courts, therefore, had subject matter jurisdiction under G.S. § 50A-3 to enter a valid child custody order.

We find, however, that the Massachusetts court did not comply with the notice provisions of G.S. §§ 50A-4 and -5 and, therefore, did not obtain personal jurisdiction over defendant. Under G.S. § 50A-4, "[b]efore making a decree under this Chapter reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child." Defendant clearly had a right to notice under the Act before the Massachusetts court entered its temporary order. The Massachusetts order also fails to meet the requirements of G.S. § 50A-5, which provides that the notice required under G.S. § 50A-4 "shall be given in a manner reasonably calculated to give actual notice and shall be served in the same manner as the manner of service of process set out in G.S. 1A-1, Rule 4. . . ." Plaintiff concedes that defendant was not served with process pursuant to Rule 4 of the Rules of Civil Procedure. It is clear that "[s]trict compliance with sections 4 and 5 is essential for . . . a custody decree['s] . . . recognition and enforcement in other states under sections 12, 13 and 15." 9 U.L.A. Mat., Fam. & H. Laws, *supra*. While the Massachusetts court's failure to obtain

personal jurisdiction over defendant requires us to reverse the trial court's order, we commend the trial court's efforts to comply with the spirit of the UCCJA, by discouraging unilateral removals of children from their custodial parent. Because we hold that the trial court's order must be reversed, we need not reach defendant's other assignments of error.

Reversed.

Judges ARNOLD and BRASWELL concur.

WARREN D. NIX v. ALLSTATE INSURANCE COMPANY

No. 8324SC586

(Filed 1 May 1984)

1. **Appeal and Error § 42; Rules of Civil Procedure § 43— insertion of excluded answer in record**

Although the trial judge is not required to allow insertion of an answer in the record if it clearly appears that the proffered testimony is not admissible on any grounds, the trial judge should be loath to deny an attorney his right to have an excluded answer placed in the record because the Appellate Division may not concur in his judgment that the proffered testimony is clearly inadmissible. G.S. 1A-1, Rule 43(c).

2. **Evidence § 35— admissibility of spontaneous utterances**

Declarations made by a participant or bystander in response to a startling or unusual event and without opportunity to reflect or fabricate are admissible as spontaneous utterances.

3. **Evidence § 35— spontaneous utterances—declarant need not be unavailable**

The declarant need not be unavailable as a witness at trial for a spontaneous utterance to be admissible. Moreover, spontaneous utterances are admissible as substantive evidence and their admissibility is not limited to impeachment or corroboration purposes.

4. **Appeal and Error § 42; Evidence § 35; Rules of Civil Procedure § 43— spontaneous utterance—failure to permit offer of proof for record**

In an action to recover under an insurance policy for the destruction of an automobile by fire, the trial court erred in refusing to allow defendant insurer to make an offer of proof for the record of a spontaneous utterance made by plaintiff's wife to an officer which may have implicated plaintiff in setting the family automobile afire.

APPEAL by defendant from *Friday, Judge.* Judgment entered 11 February 1983 in Superior Court, MADISON County. Heard in the Court of Appeals 5 April 1984.

Plaintiff instituted this action to recover the amount due under the terms of an automobile insurance policy issued by defendant for the destruction of his automobile due to fire. The issues at trial were whether fire was accidental in origin, and if so, what amount was plaintiff entitled to recover from defendant. The jury found that the plaintiff's automobile was damaged as a result of accident and that plaintiff was entitled to recover $5,000 from the defendant. The court entered judgment in accordance with the jury's verdict and also ordered defendant to pay plaintiff's counsel fees.

Huff and Huff, by Stephen E. Huff, for plaintiff-appellee.

Roberts, Cogburn, McClure and Williams, by Robert G. McClure, Jr., and Isaac N. Northrup, Jr., for defendant-appellant.

HILL, Judge.

The dispositive issue on appeal is whether the trial court committed prejudicial error by refusing to allow defendant to make an offer of proof for the record. For the reasons that follow, we hold the trial court did err and remand this cause for a new trial.

During its presentation of evidence, defendant called Sergeant Johnny Robinson of the North Carolina Highway Patrol to the stand. Sergeant Robinson was initially examined out of the presence of the jury. He testified that he was on routine patrol on the evening of 4 July/morning of 5 July 1981 when he observed a fire in the distance. As he neared the fire, he encountered plaintiff's wife and her daughter running toward him on the shoulder of the road. He stopped his vehicle and Mrs. Nix entered the car. Mrs. Nix was crying and upset. When defendant's counsel asked Sgt. Robinson what she said upon entering the car, the trial court sustained plaintiff's objection and refused to allow defendant to have Sgt. Robinson's answer placed in the record. Sgt. Robinson subsequently gave the same testimony in the presence of the jury. Again, the trial court refused to allow Sgt. Robinson to

testify regarding Mrs. Nix's statement to him and refused to allow defendant's counsel to make an offer of proof for the record.

[1] Rule 43(c) of the North Carolina Rules of Civil Procedure provides in pertinent part:

> (c) *Record of Excluded Evidence.* In an action tried before a jury, if an objection to a question propounded to a witness is sustained by the court, the court on request of the examining attorney *shall* order a record made of the answer the witness would have given. (Emphasis added.)

Rule 43(c) thus requires the trial court, upon request, to allow the insertion of excluded evidence in the record. The trial judge, however, is not required to allow insertion of an answer in the record if it clearly appears that the proffered testimony is not admissible on any grounds. 1 Brandis North Carolina Evidence § 26 (1982); *State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978); *see cf. Sheppard v. Sheppard*, 38 N.C. App. 712, 248 S.E. 2d 871 (1978), *disc. rev. denied*, 296 N.C. 586, 254 S.E. 2d 34 (1979) (action tried without a jury). The trial judge, though, "should be loath to deny an attorney his right" to have an excluded answer placed in the record because the Appellate Division may not concur in his judgment that the proffered testimony is clearly inadmissible. *State v. Chapman*, 294 N.C. at 415, 241 S.E. 2d at 672.

Defendant contended at trial that the proffered testimony was admissible under the spontaneous or excited utterance exception to the hearsay rule. The trial court, however, refused to allow the testimony because the declarant, Mrs. Nix, was available as a witness for the defendant. The trial judge went on to state that he would allow the evidence only if it corroborated the testimony of Mrs. Nix, who had not testified.

[2] Declarations made by a participant or bystander in response to a startling or unusual event and without opportunity to reflect or fabricate are admissible as spontaneous utterances. *State v. Bowden*, 290 N.C. 702, 228 S.E. 2d 414 (1976); *see generally* 1 Brandis North Carolina Evidence § 164 (1982); McCormick on Evidence § 297 (1972). The trustworthiness and reliability of such declarations are derived from their spontaneity—the unlikelihood of fabrication because the statement is made in immediate response to the stimulus of the occurrence and without opportunity

to reflect. *State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 (1974). Because spontaneity is what makes the statements relevant and admissible, statements made after the event are admissible if they are spontaneous. *State v. Hamlette*, 302 N.C. 490, 276 S.E. 2d 338 (1981).

[3] Contrary to the trial judge's statement, the declarant need not be unavailable as a witness at trial for a spontaneous utterance to be admissible. McCormick on Evidence § 297 (1972); *see Woods v. Roadway Express, Inc.*, 223 N.C. 269, 25 S.E. 2d 856 (1943); *State v. Poole*, 298 N.C. 254, 258 S.E. 2d 339 (1979); *State v. Collins*, 50 N.C. App. 155, 272 S.E. 2d 603 (1980); *State v. McKinney*, 13 N.C. App. 214, 184 S.E. 2d 897 (1971). Spontaneous utterances are admissible as substantive evidence and their admissibility is not limited to impeachment or corroboration purposes. *See State v. Harding*, 291 N.C. 223, 230 S.E. 2d 397 (1976); *State v. Collins, supra; State v. McKinney, supra.* In fact, Mrs. Nix never testified.

[4] At the time Mrs. Nix made her statement to Sgt. Robinson, the family automobile was ablaze, and she was visibly upset. She had run to meet Sgt. Robinson. Under these circumstances, it was unlikely that she fabricated her statement. Her declaration, if relevant and otherwise admissible, therefore, should have been admitted.

Unfortunately, we do not know the content of her statement based upon the record before us. Consequently, we are unable to determine whether the exclusion of the proffered testimony constituted prejudicial error. Because it is possible Mrs. Nix's spontaneous utterance implicated her husband in setting the family automobile afire, and hence bore upon the critical issue at trial, we must remand for a new trial. We cannot say that the exclusion was harmless error.

New trial.

Judges HEDRICK and JOHNSON concur.

THE BLUFFS, INC. v. PAUL V. WYSOCKI, T/A WYSCO CONTRACTORS

No. 838SC714

(Filed 1 May 1984)

Appeal and Error § 6.2; Arbitration and Award § 2— order compelling parties to arbitrate interlocutory

An order compelling the parties to arbitrate is an interlocutory order and does not affect a substantial right and does not work an injury to the appellant if not corrected before an appeal from a final judgment. G.S. 1-277(a) and G.S. 7A-27(d). Nor does G.S. 1-567.18(a) provide a right to appeal from an order compelling arbitration. G.S. 1-567.3(a), G.S. 1-567.12, G.S. 1-567.13, G.S. 1-567.14, G.S. 1-567.15, G.S. 1-567.18(a)(3) -(6) and G.S. 1-567.20.

APPEAL by plaintiff from *Bruce, Judge.* Order entered 18 February 1983 in Superior Court, WAYNE County. Heard in the Court of Appeals 12 April 1984.

Plaintiff instituted this declaratory judgment action seeking to have the court construe an agreement between the parties and to restrain defendant from seeking arbitration of their dispute. Defendant filed an answer and counterclaim, and subsequently filed a motion to stay court proceedings and to compel arbitration, among other motions. Following a hearing on the motion, the court allowed defendant's motion to compel arbitration and ordered the parties to proceed with arbitration. Plaintiff appeals from the order compelling arbitration. An order staying arbitration pending this appeal was subsequently entered.

Freeman, Edwards and Vinson, by George K. Freeman, Jr., for plaintiff appellant.

Kenneth M. Kirkman, and Griffin, Cochrane & Marshall, by Luther P. Cochrane and Lee C. Davis, for defendant appellee.

HILL, Judge.

The threshold issue is whether there is a right of appeal from an order compelling arbitration. For the following reasons, we hold there is not.

G.S. 1-567.3(a) provides that upon application of a party showing a written arbitration agreement, and the opposing party's refusal to arbitrate, the trial court shall order the parties to

proceed with arbitration. If the opposing party denies the existence of an agreement to arbitrate, the court must summarily decide the issue of the existence of an agreement to arbitrate, and it must order arbitration if it finds the existence of an agreement to arbitrate.

Pursuant to G.S. 1-567.18(a), appeals may be taken from:

(1) An order denying an application to compel arbitration made under G.S. 1-567.3;

(2) An order granting an application to stay arbitration made under G.S. 1-567.3(b);

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A judgment or decree entered pursuant to the provisions of this Article.

Noticeably absent from this list is an appeal from an order granting an application to compel arbitration.

An order compelling the parties to arbitrate is an interlocutory order. We do not believe it affects a substantial right and works an injury to the appellant if not corrected before an appeal from a final judgment. It is not appealable under G.S. 1-277(a) or G.S. 7A-27(d). See *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979). Following the conclusion of arbitration, a party may apply to the court for an order either confirming, vacating, modifying or correcting an arbitration award pursuant to G.S. 1-567.12, 1-567.13 or 1-567.14. Upon the entry of such an order, the trial court must enter a judgment or decree in conformity with such order. G.S. 1-567.15. A dissatisfied party then, pursuant to G.S. 1-567.18(a)(3) -(6), has a right of appeal from the trial court's order or judgment. The parties thus have access to the courts. Moreover, the parties may present their defenses and contentions, including waiver, accord and satisfaction or compromise and settlement, novation, or duress, at the arbitration proceedings.

Other states which have enacted the Uniform Arbitration Act hold that there is no right of appeal from an order compelling arbitration. *Hodes v. Comprehensive Health Associates*, 670 P. 2d 76 (Kan. Ct. App. 1983). See *Roeder v. Huish*, 105 Ariz. 508, 467 P. 2d 902 (1970); *Maietta v. Greenfield*, 267 Md. 287, 297 A. 2d 244 (1972); *Harris v. Insurance Co.*, 283 So. 2d 147 (Fla. Dist. Ct. App. 1973); *Clark County v. Empire Electric, Inc.*, 96 Nev. 18, 604 P. 2d 352 (1980); *see cf. School Committee of Agawam v. Agawam Education Association*, 371 Mass. 845, 359 N.E. 2d 956 (1977); *Miyoi v. Gold Bond Stamp Co. Employees Retirement Trust*, 293 Minn. 376, 196 N.W. 2d 309 (1972) (cases involving refusal to stay arbitration). In *Clark County, supra*, the Nevada Supreme Court stated a party could preserve the issue of the opponent's waiver of the right to arbitrate for appellate review by objecting to the trial court's confirmation of the award. *Accord, Maietta v. Greenfield, supra.* The Nevada statutes relating to confirmation, vacation, or modification of the award are identical to G.S. 1-567.12, .13, and .14. The appeal provisions are also virtually identical to G.S. 1-567.18.

G.S. 1-567.20 provides that Article 45A, the Uniform Arbitration Act, is to be construed toward the end of making the law of all of the states enacting the Act uniform. In accordance with the purpose stated by G.S. 1-567.20, we hold that there is no immediate right of appeal from an order compelling arbitration. Plaintiff may raise the issue of waiver at arbitration and preserve the issue of waiver for appellate review by objecting to the confirmation of the award, if any.

The appeal is

Dismissed.

Judges WEBB and WHICHARD concur.

IN THE MATTER OF: MERRILL F. KAHL v. SMITH PLUMBING COMPANY AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 833SC493

(Filed 1 May 1984)

Master and Servant § 108.1 – unemployment compensation – intent to violate moonlighting rule – no misconduct connected with work

An employee's expressed intent to violate the employer's moonlighting policy in the future did not rise to the level of willful or wanton disregard of the employer's standards such as to constitute misconduct connected with his work which would disqualify the employee from receiving unemployment compensation benefits.

APPEAL by Employment Security Commission of North Carolina and employer Smith Plumbing Company from *Reid, Judge.* Judgment entered 2 December 1982 in Superior Court, CARTERET County. Heard in the Court of Appeals 14 March 1984.

Merrill Kahl was employed by Smith Plumbing Company as a plumbing mechanic superintendent. Kahl had worked for Smith since July of 1978, and employees of the company had been permitted to "moonlight" as plumbers with the employer's knowledge and consent all during that time.

In May of 1982, Kahl came to Smith and told him that he was going to bid on two outside, "moonlighting" jobs. Smith then called an employee meeting and announced that there would be no more moonlighting because (1) the employees' outside work was interfering with the employer's work schedule and (2) the employees might be bidding against the employer for the same jobs. The employees were told that they could finish outside jobs that they had already begun. At the time, the employees were working reduced hours because of lack of work.

At that time, Smith told Kahl specifically not to bid on the two jobs. Kahl then told another employee that Smith should not be able to control the outside work he performed and indicated that he intended to bid on the jobs anyway. Because of this, Smith called Kahl in and gave him the option of resigning or being fired. Kahl chose to resign. At that point, he had not bid on the outside jobs. Kahl submitted a price to a contractor a week after his "resignation."

When Kahl filed a claim for unemployment insurance benefits, an Employment Security Commission Adjudicator ruled that Kahl's resignation was "tantamount to a discharge" but that he was disqualified from receiving unemployment benefits under G.S. 96-14(2) because he was discharged for "misconduct connected with work." Kahl appealed, and an appeals referee ruled that Kahl was not disqualified from receiving unemployment benefits, because the employer had not presented evidence of "such wilful or wanton disregard of an employer's interest" so as to show "misconduct connected with work." Smith then appealed to the Employment Security Commission and on 29 September 1982, the decision of the appeals referee was reversed. Kahl appealed to Superior Court for judicial review. There, the court reversed the Employment Security Commission and awarded benefits to Kahl. Smith and the Employment Security Commission appealed.

Thelma M. Hill for appellant Employment Security Commission of North Carolina.

Richard L. Stanley for employer-appellant Smith Plumbing Company.

Richard F. Gordon for claimant-appellee.

EAGLES, Judge.

Appellants assign as error the trial court's conclusion as a matter of law that the Employment Security Commission (ESC) failed to properly apply the law to the facts. Appellants contend that the facts here show, as a matter of law, "misconduct connected with work" sufficient to disqualify Kahl from unemployment insurance benefits, pursuant to G.S. 96-14(2). We do not agree.

In its decision ESC declared that Kahl was disqualified for unemployment benefits because:

> [I]f a prohibition against moonlighting is adopted and made known to the employees, an employee's expressed intent to violate this moonlighting policy would run counter to the standards of behavior that the employer had a right to expect of the individual as an employee. In the case at hand, it is concluded that the claimant's behavior constituted an in-

> tentional and wilful disregard of the standards of behavior that his employer had the right to expect of him and therefore constituted misconduct connected with his work.

We note that ESC's decision here incorporates language that has been set out by this court defining "misconduct":

> [T]he term "misconduct" [in connection with one's work] is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee . . . or to show 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).

ESC erred in its conclusion that an employee's expressed intent to violate the moonlighting policy in the future was equivalent to intentional and willful disregard of the standards of behavior that his employer had the right to expect of him. At the time that Kahl was discharged, he had not bid on the outside jobs and thus had not exhibited conduct "evincing . . . wilful or wanton disregard of his employer's interest." *Id.* Even if Kahl had violated a work rule, he was not, as a matter of law, disqualified from unemployment benefits. "While the violation of a work rule may well justify the discharge of an employee, such a violation does not necessarily amount to misconduct for unemployment compensation purposes." 76 Am. Jur. 2d Unemployment Compensation § 53 (1975). Here, where there was not even a violation of a work rule, an employee's grumbling and his statement that he intended in the future to violate a work rule do not rise to the level of willful or wanton disregard of the employer's standards such as to constitute misconduct connected with work. The trial judge was therefore correct in reversing ESC's ruling that an intent to violate a work rule is equivalent to misconduct within the purview of G.S. 96-14(2) as a matter of law.

The trial court's order setting aside and reversing ESC's decision disqualifying Kahl from receiving unemployment benefits is

Affirmed.

Judges WEBB and BECTON concur.

RICHARD ROBERT DEAN v. RUTH POTTS DEAN

No. 8326DC701

(Filed 1 May 1984)

Divorce and Alimony § 21.9— separation agreement bar to claim for equitable distribution

A separation agreement entered into between plaintiff and defendant was a property settlement and was an insurmountable bar to defendant's claim for equitable distribution.

APPEAL by defendant from *Todd, Judge.* Judgment entered 17 February 1983 in District Court, MECKLENBURG County. Heard in the Court of Appeals 12 April 1984.

On 11 August 1980, the parties herein executed a separation agreement. This agreement in pertinent part provides:

> (1) The parties presently own a dwelling house and lot at Route 1, Box 85-C, Pineville, North Carolina, which is free and clear. It is agreed that the Wife will sign over her interest in this house and lot to the Husband contemporaneously with the signing of this agreement, and that the Husband will pay to the Wife the sum of $50,000.00, payable as follows:
>
> . . .
>
> (2) The parties presently own a 1976 Triumph TR-7 automobile which is titled in the Husband's name. It is agreed that this automobile will henceforth be the Husband's property, and the Wife hereby relinquishes any right to claim an interest in this automobile.
>
> (3) The parties presently own a 1971 Oldsmobile Toronado automobile. It is agreed that this automobile will henceforth be the Wife's property, and the Husband hereby relinquishes any right to claim an interest in this automobile.

On 20 May 1982, plaintiff husband filed an action for an absolute divorce wherein he asked the court to incorporate the separation agreement into the judgment of divorce. Thereafter, defendant wife filed a motion in the cause seeking equitable distribution. From the order dismissing her motion defendant appealed.

Walker, Palmer & Miller, P.A., by James E. Walker and H. Irwin Coffield, for plaintiff, appellee.

Cannon & Basinger, P.A., by Thomas R. Cannon, for defendant, appellant.

HEDRICK, Judge.

The parties herein have stipulated that:

> (1) The Separation Agreement which is exhibit 1 to plaintiff's response to defendant's motion is valid, and its terms have not been breached by either party.
>
> (2) Each party owns assets in his or her separate name, which were acquired during the course of the marriage, and were owned at the time of the execution of the Separation Agreement.
>
> [and]
>
> (3) At the time the agreement was signed, the parties fully intended it to be a complete property settlement agreement, and neither made claims against property owned individually by the other, as no equitable distribution claim existed in law at the time.

Since these facts are not in controversy, the only question before this Court is whether the separation agreement entered into by the parties on 11 August 1980 is an insurmountable bar to defendant's claim for equitable distribution.

Defendant contends that the separation agreement was not a "property settlement" agreement. She further contends that the agreement "was not bargained for at arms' length, in that [she] did not fully realize, nor was she fully apprised of, the extent of the marital assets."

To support her first contention, defendant relies on *Smith v. Smith*, 72 N.J. 350, 371 A. 2d 1 (1977). The *Smith* court divided separation agreements into property settlement agreements or support agreements. *Id.* at 357, 371 A. 2d at 4. After making this distinction, the *Smith* court held that a separation agreement which qualifies as a property settlement and is fair and just bars equitable distribution. *Id.* at 358, 371 A. 2d at 5. Defendant argues that the agreement in the case at bar is a support agreement as defined by the *Smith* court since it contains provisions for support of defendant and for the division of jointly held property. We disagree.

A separation agreement is a contract and therefore its meaning and effect are "ordinarily determined by the same rules which govern the interpretation of contracts." *Lane v. Scarborough*, 284 N.C. 407, 409, 200 S.E. 2d 622, 624 (1973). The language of the agreement in the present case is clear and unambiguous. The parties agreed in Sec. VII to "forego and waive any and all rights which they may have to claim support or alimony from the other." The only inference to be drawn from this language is that the agreement in question was a property agreement and not a support agreement. Furthermore, the agreement states in pertinent part that:

> The parties agree that the $50,000.00 paid for the house, together with other properties divided between the parties, shall be considered as a settlement of their marital obligations to each other, and as a property settlement in full.

Indeed the defendant is bound by her stipulation that the agreement was "intended . . . to be a complete property settlement agreement."

We hold the trial judge correctly held that the separation agreement executed on 11 August 1980 by the parties is an insurmountable bar to defendant's claim for equitable distribution.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

CENTURY COMMUNICATIONS, INC. v. THE HOUSING AUTHORITY OF THE CITY OF WILSON AND SITE, INC.

No. 837SC61

(Filed 1 May 1984)

Eminent Domain § 2— inverse condemnation—building building over radio wires

There was a taking of the plaintiff's property when the defendant placed buildings on the ground over the plaintiff's underground wires so that the plaintiff could not reach the wires even though there was no evidence that the wires were not now functioning properly.

APPEAL by defendant Housing Authority of the City of Wilson from *Winberry, Judge.* Judgment entered 28 September 1982 in Superior Court, WILSON County. Heard in the Court of Appeals 7 December 1983.

The plaintiff brought this action alleging the defendant Housing Authority of the City of Wilson is interfering with certain rights the plaintiff has as lessee of certain property in Wilson County. The plaintiff prayed for damages and injunctive relief.

The plaintiff made a motion for summary judgment as to liability. The papers filed in support and in opposition to the motion for summary judgment showed the following matters are not in dispute. The plaintiff owns and operates radio station WVOT (AM) and WXYY (FM) on land it holds under a lease from the defendant's predecessor in title. Extending outward 360 degrees from the base of each transmitting tower are underground wires. These wires extend 250 feet and beyond the boundaries of the land leased by the plaintiff. There is a recorded lease in which there is a covenant by the lessor "not to interfere with, —either by cultivation or otherwise—, wires of the present Radio ground system of Station WVOT, radiating approximately 250 feet from the center of the two Radio Towers." The defendant has constructed buildings over a part of the wires so the plaintiff cannot now reach a part of some of the underground wires. Some of the wires were damaged during the construction but they have now been repaired. There is no allegation or proof that the wires are not now working properly.

The court granted the plaintiff's motion for summary judgment as to liability and reserved the damage issue for trial. The defendant Housing Authority appealed.

Kimzey, Smith, McMillan and Roten, by James M. Kimzey, for plaintiff appellee.

Manning, Fulton and Skinner, by Howard E. Manning, Jr. and Charles E. Nichols, Jr., for defendant appellant.

WEBB, Judge.

We believe that by holding that the defendant had taken the plaintiff's property for public use without just compensation the superior court has held there was an inverse condemnation of the plaintiff's property. If an entity with the power of eminent domain, such as the defendant in this case, interferes substantially with a property right without condemning it, the person who has had his property right infringed may bring an action to recover damages. *See Long v. City of Charlotte,* 306 N.C. 187, 293 S.E. 2d 101 (1982). The question raised by this appeal is whether there has been a taking of the plaintiff's property when the defendant has placed buildings on the ground over the plaintiff's underground wires so that the plaintiff cannot reach the wires although there is no evidence that the wires are not now functioning properly. We hold that on these undisputed facts there is a taking. Summary judgment for the plaintiff was proper. We believe that excluding the plaintiff from getting to its wires in the event it is necessary is an interference with the wires which violates the covenant.

We receive some guidance from *Light Co. v. Bowman,* 229 N.C. 682, 51 S.E. 2d 191 (1949). That case held that it was a violation of an easement to construct a building under a power line although the power line could be maintained with some additional expense. That case is not on all fours with this one because the easement in that case specifically gave the plaintiff the right to maintain the power line, which right is not specifically given the plaintiff under the easement in this case. We believe the right to maintain the plaintiff's wires is inherent in its easement in which the lessor covenants not to interfere with the wires. We believe the placing of the buildings over the wires so that the plaintiff cannot get to them is a substantial interference with this right.

The appellant argues that under the order of the superior court the plaintiff can argue that it has been deprived of the use and enjoyment of the entire radio station. We do not so read the order or the contentions of the plaintiff. The damages should be limited to what the plaintiff has suffered by being deprived of the ability to reach the wires.

Affirmed.

Judges WELLS and WHICHARD concur.

STATE OF NORTH CAROLINA v. LEROY FELTON POINDEXTER

No. 8315SC946

(Filed 1 May 1984)

1. **Criminal Law § 66.9— photographic lineup—identification not tainted**

There was no merit to defendant's contention that a pretrial photographic identification procedure was unnecessarily suggestive and created a substantial likelihood that the identification at trial was tainted where two witnesses viewed defendant for over two minutes under good conditions and each witness selected defendant from a group of five to seven photographs within 24 hours of the robbery for which defendant was being tried.

2. **Criminal Law § 92— joinder of trials—motion not in writing and made after arraignment**

There was no prejudicial error in the joinder of defendant's trial with that of his accomplice where the joinder motion was not in writing and was made after arraignment since arraignment was waived and since G.S. 15A-926(b)(2) enables a court to order a joinder on its own initiative without a motion of any kind, written or oral.

APPEAL by defendant from *Bowen, Judge*, and *Lewis, John B., Jr., Judge*. Order entered 6 November 1982 and judgment entered 8 December 1982 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 17 February 1984.

Defendant was convicted of the armed robbery of a Burlington convenience store.

Evidence at trial tended to show the following: Approximately thirty minutes past midnight on June 21, 1982, Harvey Bur-

nette and Gregory Saunders were working at Joe's Shopwell, Burnette then being inside the store and Saunders just outside. Two black males, one armed with a sawed-off shotgun, entered the store, demanded money, took $360 in small bills from the cash register, and left in a late model yellow-green Cadillac with New York tags. According to Burnette, defendant was the robber with the shotgun. Saunders, outside the store, saw Milton Ford, a co-defendant, and defendant together in the parking lot; Ford approached Saunders, asked about somebody's address, and after two or three minutes of conversation pulled a pistol on him and Saunders fled. Three hours later defendant and Ford were apprehended by police officers in Durham; they were in a late model yellow-green Cadillac with New York tags, a sawed-off shotgun, identified by Burnette as the gun used in the robbery, was in the trunk, and each had approximately $150 in small bills in his trouser pockets. Later that morning Burnette was shown two photographic lineups of five to seven photographs each and immediately identified among those defendant as the robber. Later that day Saunders was also shown the photographs and identified defendant as the person that he saw outside the store with Ford just before the robbery. Both witnesses also identified the defendant at trial.

Attorney General Edmisten, by Assistant Attorney General Guy A. Hamlin, for the State.

Allen, Walker and Cecil, by Loretta A. Cecil, for defendant appellant.

PHILLIPS, Judge.

[1] Defendant's first and main contention is that the pretrial photographic identification procedure employed by the State was unnecessarily suggestive and created a substantial likelihood that the identification at trial was tainted, thus requiring its exclusion. This contention is without merit. Following defendant's motion to suppress, Judge Lewis conducted an extensive *voir dire* hearing thereon. Testimony at the hearing indicated that within twenty-four hours of the robbery a group of five to seven photographs was presented to both Burnette and Saunders, but on separate occasions, with the request that they select the perpetrator if he was among those pictured. Each immediately selected defendant's

picture from the group and each testified that he got a good look at defendant either before or during the robbery and had no difficulty recognizing him both in the picture and in court. Burnette testified that: He looked at defendant for two or three minutes in a well-lighted part of the store while defendant held a sawed-off shotgun on him, recognized him in court from seeing him at that time, and accurately described defendant's appearance, physical characteristics and attire to the police officers immediately after the robbery. Saunders testified that: He was in defendant's presence for three to four minutes outside the store, which was also well-lighted, and even though he spent most of that time in conversation with Milton Ford, he also was observing defendant a short distance away, and was sure from seeing defendant in court that he was the person with Ford just before the robbery. From the evidence so heard, the court found and concluded that the identification procedures employed were "not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification" and also that the in-court identification of defendant by the witnesses "is of origin independent of any out-of-Court identification procedure." Since the findings and conclusions so found and made are supported by competent evidence, they are conclusive, *State v. Long*, 293 N.C. 286, 237 S.E. 2d 728 (1977), and this assignment of error is therefore denied.

[2] Defendant's only other contention is that he was deprived of a fair trial because the court joined his trial with that of his accomplice, Ford. The express basis for the contention, as stated in the assignment of error that supports it, is that the State's joinder motion was not in writing and was made after arraignment. Arraignment was waived on 17 August 1982. The State's oral motion to join was made during the October 25, 1982 session of court, when the trial judge was hearing various motions by the defendants. The motion was really made in response to defense counsel's inquiry as to whether Ford and defendant were going to be tried together and counsel asked the court to defer its ruling for a day or two until the two defense lawyers could determine whether any conflict existed between the defendants. Apparently, no grounds for conflict were found, since defendant did not mention joinder again, according to the record and transcript, until the trial began six weeks later. At that time both defendants, without either explanation or argument, asked the court to note

their objections to being tried together. Defendant does not state in his brief how he might have been prejudiced because the State's motion was not in writing and we cannot perceive that he was. Certainly, the record fails to show defendant was prejudiced by the oral motion. *State v. Campbell*, 51 N.C. App. 418, 276 S.E. 2d 726 (1981).

Furthermore, when the grounds for joinder set forth in G.S. 15A-926(b)(2) exist, as they clearly did here, the court can order a joinder on its own initiative without a motion of any kind, written or oral. *State v. Cottingham*, 30 N.C. App. 67, 226 S.E. 2d 387 (1976).

No error.

Judges WELLS and BRASWELL concur.

STATE OF NORTH CAROLINA v. CARROLL DEAN BROOKS

No. 8327SC1065

(Filed 1 May 1984)

Criminal Law § 138— mitigating factors—refusal to consider because of not guilty plea

The trial judge could not, as a matter of law, refuse to consider evidence of the mitigating factors that defendant acted under strong provocation and that he committed the offense under duress or coercion because defendant pled not guilty and presented an alibi defense. G.S. 15A-1340.4(a)(2)(b)(i).

APPEAL by defendant from *Grist, Judge.* Judgment entered 16 May 1983 in Superior Court, LINCOLN County. Heard in the Court of Appeals 16 March 1984.

In 1982, defendant was tried on charges of discharging a firearm into occupied property. Defendant presented an alibi defense, but he was found guilty and sentenced to a 5 year prison term. Defendant appealed, and this court found error in defendant's sentencing and remanded the case for resentencing. *State v. Brooks*, 61 N.C. App. 572, 301 S.E. 2d 421 (1983).

On 16 May 1983, the resentencing hearing was held, and arguments of counsel in support of aggravating and mitigating factors were heard. The judge found one aggravating factor and no mitigating factors and sentenced defendant to a 5 year prison term, two years more than the presumptive term. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General James E. Magner, Jr., for the State.

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

EAGLES, Judge.

Defendant assigns as error the trial judge's failure to find mitigating factors at the resentencing hearing. Defendant contends that the sentencing judge improperly refused to consider the existence of two mitigating factors because he felt that defendant's plea of not guilty prohibited his receiving evidence in support of the mitigating factors. We agree that this was error.

At the resentencing hearing, defendant's attorney asked the judge to consider as a mitigating factor, pursuant to G.S. 15A-1340.4(a)(2)(i), that defendant acted under strong provocation or the relationship between the victim and defendant was extenuating. The judge responded: "How can you have a mitigating factor that he acted under strong provocation when he says he didn't even do it?" Then, defendant's attorney requested that the judge consider, pursuant to G.S. 15A-1340.4(a)(2)(b), that defendant committed the offense under duress, coercion, threat or compulsion, which was insufficient to constitute a defense but significantly reduced his culpability. The judge replied:

> I just can't assimilate a situation where a person says he's not guilty—that he was somewhere else—that he didn't do it—and then say, well, give me credit for a mitigating factor because even though I didn't do it, I was under duress, coercion, threat or compulsion.

We hold that the sentencing judge was operating under a misapprehension of the law in foreclosing consideration of evidence in support of these statutory mitigating factors because he

felt that defendant's plea of not guilty prohibited such consideration. The sentencing judge cannot, as a matter of law, refuse to consider mitigating factors after a jury has determined that defendant committed the crime, even though defendant presented an alibi defense at the guilt determination stage of the trial.

Remand for resentencing.

Judges WEBB and BECTON concur.

IN THE MATTER OF: CHRISTY ANN MOORE, ALBERT WILLIAM MOORE, TIMMIE DALE MOORE, MINOR CHILDREN

No. 8313DC723

(Filed 1 May 1984)

Parent and Child § 1.5— termination of parental rights—failure to pay reasonable portion of cost of care—necessity for findings as to ability to pay

The trial court erred in terminating respondent mother's parental rights for failure to pay a reasonable portion of the costs of care for her three children who had been placed in the custody of a county department of social services where the court failed to make findings as to respondent's ability to pay some portion of the costs of child care.

APPEAL by respondent Helen Dixon from *Gore, Judge.* Juvenile order entered 11 February 1983 in District Court, BRUNSWICK County. Heard in the Court of Appeals 12 April 1984.

Respondent Helen Dixon (hereafter respondent) appeals from an order terminating her parental rights, pursuant to G.S. 7A-289.32(4), for failure to pay a reasonable portion of the cost of care for her three children who had been placed in the custody of the Brunswick County Department of Social Services.

Walton, Fairley & Jess, by Elva L. Jess, for respondent appellant.

David L. Clegg for petitioner appellee.

WHICHARD, Judge.

In this jurisdiction parental rights may be terminated upon a finding that "[t]he 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." G.S. 7A-289.32(4). Our courts have upheld the constitutionality of this provision. *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).

Our Supreme Court has stated, however, that

> [a] parent's ability to pay is the controlling characteristic of what is a "reasonable portion" of cost of foster care for the child which the parent must pay. A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay.

Clark, *supra*, 303 N.C. at 604, 281 S.E. 2d at 55. This Court has stated, in light of the foregoing from *Clark*, that "nonpayment would constitute a failure to pay a 'reasonable portion' if and only if respondent were able to pay some amount greater than zero." *In re Bradley*, 57 N.C. App. 475, 479, 291 S.E. 2d 800, 802 (1982); *see also Biggers*, *supra*, 50 N.C. App. at 339-41, 274 S.E. 2d at 240-41 (ability to pay is controlling characteristic of what is a reasonable amount to pay; as with child support orders, determination must be based upon interplay of amount necessary to meet reasonable needs of child, and the relative ability of the parties to provide it).

This Court also has stated, in a termination case in which the respondent contended she was unable to pay any of the child care costs, that "the better practice would have been for the trial court to have made separate findings as to her failure to pay." *In re Allen*, 58 N.C. App. 322, 327-28, 293 S.E. 2d 607, 611 (1982). The Court there found "no prejudice in this error" only because there were other grounds for termination sufficient to sustain the order. *Id.* at 328, 293 S.E. 2d at 611.

The only express basis for termination found here was the G.S. 7A-289.32(4) ground that respondent had failed to pay a reasonable portion of the cost of child care. The court made no find-

ing that respondent was able to pay such portion. It found that "she has no outside employment except for working in the river on an occasional basis" and "that because of a depressed economic situation in the home . . . she is not able to meet the financial needs of [the children]." Ability to meet the financial needs of the children is not the test, however. The test is whether respondent was "able to pay some amount greater than zero." *Bradley, supra.*

Pursuant to the foregoing authorities, we hold that the court erred in failing to make findings as to respondent's ability to pay some portion of the cost of child care. Unlike in *Allen*, respondent's failure to pay such was the sole ground for termination. The error thus cannot be held nonprejudicial, and the case must be remanded for findings as to whether respondent is "able to pay some amount greater than zero."

Remanded for findings.

Judges WEBB and HILL concur.

SARA B. BRADBURY v. RALPH EUGENE CUMMINGS AND THE UNKNOWN HEIRS AND/OR ASSIGNS OF JOSEPH FAIN A/K/A JAMES FAINES AND JOSEPH N. FAINES, DECEASED, THE CITY OF NEW BERN, A MUNICIPAL CORPORATION, AND CRAVEN COUNTY, A BODY POLITIC OF THE STATE OF NORTH CAROLINA

No. 833DC735

(Filed 1 May 1984)

Taxation § 34— tax lien—private holder—statute of limitations precluding foreclosure

An action brought by plaintiff pursuant to G.S. 105-371, 372, 374, to foreclose certain tax liens for ad valorem taxes on real estate due the City of New Bern for the years 1933 through 1968 was barred by G.S. 105-378(a) since the action was not instituted within ten years from the date the taxes became due. Although private holders of tax lien sale certificates are not mentioned in G.S. 105-378, the Court found the statute to also apply to them. G.S. 105-371 and G.S. 1-56.

APPEAL by defendant Ralph Cummings and the unknown heirs and/or assigns of Joseph Fain a/k/a James Faines and Joseph N. Faines, deceased, from the Order denying their Rule

12(b)(6) motion to dismiss entered by *Rountree, Judge*, on 18 January 1983, in District Court, CRAVEN County, and from the Order granting summary judgment for the plaintiff, entered by *Lumpkin, Judge*, on 27 May 1983 in District Court, CRAVEN County. Heard in the Court of Appeals 13 April 1984.

Lee, Hancock, Lasitter & King, by C. E. Hancock, Jr. and John W. King, Jr., for defendant appellant Ralph Eugene Cummings.

Perdue, Voerman & Alford, by Benjamin G. Alford, for defendant appellants the unknown heirs and/or assigns of Joseph Fain a/k/a James Faines and Joseph N. Faines, deceased.[1]

Henderson & Baxter, P.A., by B. Hunt Baxter, Jr., for plaintiff appellee.

BECTON, Judge.

I

On 19 October 1982, plaintiff brought this action pursuant to N.C. Gen. Stat. §§ 105-371, -372, -374 (1979), to foreclose certain tax liens for ad valorem taxes on real estate due the City of New Bern for the years 1933 through 1968, with the exception of the year 1943. Plaintiff had purchased the tax lien sale certificates from the City on 16 August 1978 for the purchase price of $359.78. The defendants filed answers raising the statute of limitations as a defense. The defendants also filed motions to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. District Court Judge Horton Rountree denied the Rule 12(b)(6) motions of Ralph Cummings and of the guardian for the unknown heirs, but granted the motion filed by the City of New Bern to dismiss the action as to the City. Subsequently, District Court Judge W. Lee Lumpkin, III, granted summary judgment for plaintiff, and the remaining defendants appealed.

II

Defendants style the question presented as follows: "Did the trial court commit reversible error in denying the defendants' mo-

1. By order of this Court, filed 20 October 1983, Benjamin G. Alford was allowed to withdraw from the case, and a substitute guardian ad litem was later appointed.

tion to dismiss and in granting plaintiff's motion for summary judgment where action was brought fourteen years after it accrued?" We answer the issue, "Yes."

N.C. Gen. Stat. § 105-378(a)(1979) provides as follows:

> No county or municipality may maintain an action or procedure to enforce any remedy provided by law for the collection of taxes or the enforcement of any tax liens (whether the taxes or tax liens are evidenced by the original tax receipts, tax sales certificates, or otherwise) unless the action or procedure is instituted within 10 years from the date the taxes became due.

As can be seen, the taxing unit—the municipality—would be barred from maintaining any action or procedure to enforce for the collection of the taxes in question unless the action or procedure was instituted within ten years from the date the taxes became due. Taxes are due on the first day of September of the taxable year. N.C. Gen. Stat. § 105-360 (1979). Consequently, at the time the plaintiff purchased or took an assignment of tax liens from the City of New Bern, the City would have been barred by G.S. § 105-378 from maintaining any action to collect the taxes, except the taxes that were delinquent for the year 1968. That tax lien was barred by the statute of limitations one month later.

We have not overlooked plaintiff's argument that G.S. § 105-378, by its specific terms, refers to "county" or "municipality." Although private holders of tax lien sale certificates are not mentioned in G.S. § 105-378, we believe the statute nevertheless applies to private holders. N.C. Gen. Stat. § 105-371 (1979) provides that the lien of the purchasers of tax lien sale certificates "shall be of the same dignity" as the lien of the taxing unit. To allow the plaintiff to enforce a lien more than fourteen years after the most recent tax has become due would give her rights of greater dignity than those of the taxing unit from which she acquired the lien certificates. We do not believe the legislature intended for taxing units to assign barred claims to individuals who would then serve as collection agents for the taxing unit and thereby circumvent the limitation placed on the taxing units by G.S. § 105-378.

As a further basis for our ruling, we note that an action to foreclose a tax lien is a civil action and that N.C. Gen. Stat. § 1-56 (1983) bars civil actions commenced more than ten years after the action accrues.

For the foregoing reasons, the orders of the trial court denying defendants' Rule 12(b)(6) motion to dismiss and granting summary judgment in favor of the plaintiff are

Reversed.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. TENIS SAMUEL GORE, JR.

No. 835SC984

(Filed 1 May 1984)

Criminal Law § 138— aggravating and mitigating factors improperly found

In a prosecution for felonious breaking and entering and felonious larceny, the trial court erred in finding as aggravating factors that the offenses were committed for hire or pecuniary gain, and that the defendant induced others to participate in the commission of the offenses or occupied a position of leadership or dominance of other participants since the evidence did not support these factors. Further, the court erred in failing to find as a mitigating factor that at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offenses to law enforcement officers.

APPEAL by defendant from *McConnell, Judge.* Judgment entered 2 February 1983 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 14 March 1984.

Attorney General Edmisten, by Associate Attorney General Barbara P. Riley for the State.

Hockenbury & Smith, by Jay D. Hockenbury, for defendant appellant.

BECTON, Judge.

In November, 1982, defendant, Tenis Samuel Gore, Jr., and three others were arrested in connection with a series of house breakings occurring in New Hanover County during October and November 1982. On 1 February 1983, the defendant pleaded guilty to six counts of felonious breaking and entering and six counts of felonious larceny pursuant to a plea bargain whereby all of defendant's charges were to be consolidated for judgment into three cases, each having a maximum exposure of ten years, so that the maximum total exposure for the defendant was to be thirty years in prison. From judgments imposing a twenty-five year active prison sentence, defendant appeals, contending that the trial court erred in its consideration of, and the weight it gave to, the various aggravating and mitigating circumstances. For error committed by the trial court in finding two aggravating factors and in failing to find an additional mitigating factor, we remand for resentencing.

Following defendant's sentencing hearing, the trial court found one mitigating factor—that defendant was 21 years of age —and the following aggravating factors:

> (1) The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants;
>
> (3) The offense was committed for hire or pecuniary gain;
>
> (13) The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband;
>
> (15) The defendant has a prior conviction or convictions for criminal offenses punishable by more than sixty days confinement; and
>
> (16) The defendant was involved in six breaking and enterings in the City of Wilmington.

It is only necessary to discuss aggravating factors (1) and (3) since we find no error in the trial court's findings with regard to the other aggravating factors.

We reject the State's argument that the "totality of [the] evidence presented amply supports [the] trial court's finding" that the defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants. The State points out that (a) defendant, unlike some of the co-defendants, was involved in all the break-ins; (b) defendant had a list of people living on Edgewater Lane that he considered the most lucrative to rob; and (c) defendant gave a detailed statement to the police revealing how the offenses were perpetrated, who was involved in each, and the location of approximately half of the stolen property. In our view, this evidence is insufficient to support the trial court's finding. The aggravating factor at issue in this case cannot be proved by conjecture. The record contains no direct evidence that the defendant was the leader or held dominance over the other participants. This matter must therefore be remanded for resentencing. *See State v. Setzer*, 61 N.C. App. 500, 301 S.E. 2d 107, *disc. rev. denied*, 308 N.C. 680, 304 S.E. 2d 760 (1983).

The trial court also erred in finding as an aggravating factor that the offenses were committed for hire or pecuniary gain, since there is no evidence that defendant was hired or paid to commit the offenses. *See State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983).

With regard to defendant's assignments of error relating to mitigating factors, we find no evidence suggesting that defendant aided in the apprehension of another felon. Consequently, the trial court properly refused to find such as a mitigating factor. The evidence is unequivocal, however, in showing that at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offenses to law enforcement officers. The prosecuting attorney conceded as much at the sentencing hearing. The following excerpt from the testimony of Officer Ramsey, is sufficient to require a remand since the trial court refused to consider this evidence as a mitigating factor:

> Tenis Gore's statement was the longest statement of all the defendants. He went into detail about how he went into the places, who was with him, who drove the car, where the stuff went after it was stolen, and how much money was received. As a result of my investigation of this case, everything that

he has told us has been substantially true. It is fair to say that after he was arrested he helped us collect at least fifty percent of the merchandise that was out in the woods in different places.

For the above reasons, this case is

Remanded for resentencing.

Judges WEBB and EAGLES concur.

LONE STAR INDUSTRIES, INC. v. READY MIXED CONCRETE OF WILMINGTON, INC.

No. 835DC110

(Filed 1 May 1984)

Appeal and Error § 7— appointment of receiver for corporate judgment debtor— no right of shareholders to appeal

A shareholder and a former shareholder of a corporate judgment debtor were not "parties aggrieved" and had no standing to appeal from the appointment of a receiver for the corporation under G.S. 1-363 since they are not parties to the case and their interests are antagonistic to the debtor corporation in that the only property of the corporation is a claim against the purported appellants. G.S. 1-271; G.S. 1-363.

APPEAL by Derwood H. Godwin and W. Glenn Pleasant from *Peel, Judge.* Order entered 23 July 1982 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 10 January 1984.

Murchison, Taylor & Shell, by Michael Murchison and Frank B. Gibson, Jr., for plaintiff appellee.

No counsel for defendant.

Hutchens & Waple, by H. Terry Hutchens, for appellants Godwin and Pleasant.

PHILLIPS, Judge.

In this action, filed in 1974, judgment for $55,191.15 was rendered against the defendant in 1977. The judgment has not

been satisfied, and, after various proceedings irrelevant to this appeal, on July 23, 1982, pursuant to plaintiff's verified motion, Judge Peel entered an order appointing a receiver for the defendant corporation under the provisions of G.S. 1-363 and related statutes. From that order Derwood H. Godwin and W. Glenn Pleasant appealed and assigned as error that the law does not authorize the appointment of a receiver under the circumstances recorded. So far as the record reveals, the appellants are not parties to this case and are interested in it only because Godwin is a shareholder of the defendant corporation and Pleasant is a former shareholder, and they have been sued by defendant for $18,080 in a separate action.

Under our law, it is rudimentary that the only person who may appeal is the "party aggrieved." G.S. 1-271; 1 Strong's N.C. Index 3d, *Appeal and Error* § 7 (1976). Since nothing in the record suggests that the appellants are either parties to this case or have been legally aggrieved by the order appointing a receiver, the appeal must be and is dismissed. *Gaskins v. Blount Fertilizer Company, et al.*, 260 N.C. 191, 132 S.E. 2d 345 (1963).

The appeal is without merit in any event, however, since the record plainly shows that all the requisites for appointing a receiver under G.S. 1-363 were complied with and appointing a receiver is always appropriate when it appears, as the record here shows, that a judgment debtor has property that might be applied to the payment of its debt. *Massey v. Cates*, 2 N.C. App. 162, 162 S.E. 2d 589 (1968). The property that the judgment debtor has, according to the record, is its claim against the appellants. That they are opposed to the defendant debtor receiving the benefit of that property is understandable; but that they were able to assert their opposition in this case for so long under the circumstances is not. The appellants have no standing in this Court and should have had none in the court below. They are not parties to the case, and, even if they were, their interests are entirely antagonistic to the debtor corporation, whose own interests clearly require that any sums that are owed it by others be promptly applied to its debts.

Appeal dismissed.

Judges ARNOLD and JOHNSON concur.

JAMES COLLINS WILDER v. J. RALPH SQUIRES AND VIVIAN HAWKINS

No. 8226SC1099

(Filed 15 May 1984)

1. **Unfair Competition § 1— attempted sale of home—failure to return binder without signing release—unfair trade practice**

The trial court properly failed to grant defendant's motions for directed verdict in an action for unfair and deceptive acts or practices in the attempted sale of a house where the evidence tended to show that when plaintiff was unable to obtain financing through conventional means after signing a binder on a home, defendant Squires repeatedly told plaintiff that Squires was entitled to damages and that plaintiff would not get any of the binder back unless he agreed to Squires' terms (leaving $2,460 with Squires), and that plaintiff acquiesced and signed the release. This threatening conduct and the fact that defendant was actively engaged in real estate business was sufficient to constitute a violation of G.S. 75-1.1.

2. **Unfair Competition § 1— unfair trade practices—jury issues—proper**

An issue submitted to the jury which stated "did the defendant, J. Ralph Squires, cause $2,460 of the funds held in escrow to be paid to him without consent of the plaintiff?" adequately supported the theory of coercion which was the theory which plaintiff relied upon to prove unfair acts or practices.

3. **Unfair Competition §1— unfair or deceptive trade practices—findings of fact by court supported by issues submitted to jury**

In an action for unfair or deceptive acts or practices, the issues submitted to the jury supported the trial court's findings of fact and conclusions of law, and the trial judge properly documented the matters that led him to conclude and decide as a matter of law that defendant committed an unfair act or practice pursuant to G.S. 75-1.1.

4. **Unfair Competition § 1— unfair act or practice—attorneys' fees properly awarded**

In an action for an unfair act or practice, the trial court properly awarded attorneys' fees to plaintiff pursuant to G.S. 75-16.1.

APPEAL by defendant Squires from *Sitton, Judge.* Judgment entered 24 May 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 2 September 1983.

Parham, Helms & Kellam, by James H. Morton, for defendant appellant.

Byrum, Byrum & Burris, by Robert N. Burris, for plaintiff appellee.

BECTON, Judge.

Defendant appeals from a judgment awarding plaintiff treble damages and attorneys' fees based on defendant's unfair and deceptive acts or practices in the attempted sale of a house. We affirm.

On 26 June 1979, plaintiff, James Collins Wilder, negotiated through Realty World, a realtor, to purchase a house from defendant, J. Ralph Squires. The parties did not have any direct communication. Wilder signed a Realty World purchase agreement, which listed the total purchase price as $77,250.00. Under the terms of the agreement, Wilder deposited a $7,250.00 "[b]inder and part payment to be held in escrow by Realty World. . . ." Wilder was to seek financing by a "conventional loan at current rate" for $61,800. One condition of the agreement was:

> [T]he Purchaser will in good faith do all things necessary to procure said loan, and will cooperate to the fullest in obtaining such loan, if the loan cannot be obtained the binder will be returned. The binder will not be returned if the Purchaser takes any action that will prevent the loan being obtained.

The agreement stipulated that if Wilder defaulted in the performance of any of the conditions of the agreement, the $7,250 would be "retained by, and become the property of Realty World. . . ."

Realty World recommended that Wilder obtain financing at First Federal Savings and Loan Association. A loan officer at First Federal refused Wilder's $61,800 loan request because Wilder's income was insufficient. "[W]ith the salary he gave me that he was presently making and the loan amount he was seeking, he was way out of line to qualify for the loan. . . ." Wilder, a sales representative for a manufacturing company, had an annual income of $14,300 in 1979. Wilder did not attempt to obtain financing elsewhere. He notified Realty World that he had not qualified for the loan and, therefore, no longer wished to purchase the house.

Squires discovered through co-defendant, Hawkins, the real estate broker who had listed the house for him, that Wilder had not qualified for the loan. He tried to reach Wilder several times "to find out what he wanted to do." Finally, Squires hand-delivered a letter to Wilder on 29 July 1979. The letter stated

that Squires had "made arrangements for [Wilder] to obtain financing as provided in the contract . . ." and urged Wilder to contact Squires at his home or office "at his earliest convenience in order that we may obtain this financing and close this transaction. . . ."

The following day, 30 July 1979, Wilder met with Squires at Squires' office. Squires is the president and major stockholder of Ralph Squires Homes, one of the largest companies in Charlotte in the business of building and selling new homes. In addition, Squires and his wife buy and sell real estate separate and apart from Ralph Squires Homes. Squires told Wilder that he would guarantee Wilder's loan. The evidence is conflicting at this point. Wilder testified that he asked that his binder be returned. Squires testified that Wilder wanted "to negotiate or work something out." Wilder testified that Squires threatened not to return any of the $7,250 "unless [Wilder] went ahead and went along with what he wanted to do." According to Wilder, Squires talked about charging Wilder a percentage rate for the costs of keeping his house off the market. Squires admitted telling Wilder "according to the laws and rules of real estate, Mrs. Hawkins is entitled to a full commission because I'm willing to finance the house for you." The parties did not reach a consensus. Wilder and Squires arranged to meet that afternoon at Realty World. In the meantime, Squires had an attorney draft a release which provided in part:

> For and in consideration of the sum of two thousand four hundred sixty dollars ($2,460.00) paid by James Collins Wilder, the undersigned, does hereby agree that the contract attached hereto by and between Ralph Squires and James Collins Wilder is hereby declared null and void and of no other force and effect.

At the afternoon meeting, Squires, according to Wilder, again told Wilder that "[he] would not get any of [the binder] back if [he] did not go ahead and sign the agreement." Wilder signed the release; Realty World distributed the $7,250.00 binder by checks among Wilder, Squires and Hawkins.

On 8 November 1979 Wilder filed an action against Squires and Hawkins to recover the portion of the binder withheld. Wilder's complaint alleged coercion, fraud and unfair trade practices

in violation of N.C. Gen. Stat. § 75-1.1 (1981). At the close of Wilder's evidence, the trial court dismissed the action as to Hawkins under the provisions of Rule 50 of the North Carolina Rules of Civil Procedure. The trial court concluded that Squires' coercive conduct constituted an unfair and deceptive trade practice, after submitting the factual questions to the jury. Squires appeals.

I

[1] Squires first contends that the trial court should have granted his motions for directed verdict because "[t]here was insufficient evidence of any conduct on the part of the defendant which would support a finding of fact or conclusion of law that such conduct of the defendant constituted an unfair or deceptive act or practice in or affecting commerce" in violation of G.S. § 75-1.1.[1]

A motion for directed verdict raises the question whether evidence, viewed in the light most favorable to the non-movant, is sufficient to go to the jury. *Rappaport v. Days Inn of America, Inc.*, 296 N.C. 382, 250 S.E. 2d 245 (1979).

A. "In or Affecting Commerce"

To come within the scope of G.S. § 75-1.1, the unfair or deceptive act or practice must be "in or affecting commerce." *See Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). Commerce, as defined in G.S. § 75-1.1(b), "includes all business activities, however denominated. . . ." In his Answer, Squires admitted that he was "involved in business activities relating to the buying and selling of residential real estate in and around Mecklenburg County, North Carolina." However, on appeal, Squires seeks to classify the attempted sale of this particular house as a non-business activity, because the house had

1. N.C. Gen. Stat. § 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.

been purchased with the funds from the sale of his personal residence. The source of the funds is not controlling. Squires' heavy reliance on this Court's reasoning in *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E. 2d 63 (1979), is misplaced.

The defendants in *Rosenthal* sold their own home through a realtor without disclosing a drainage and flooding condition. This Court, in denying plaintiff's recovery under G.S. § 75-1.1, held that the defendants, private homeowners, were not engaged in commerce. "They did not by the sale of their residence on this one occasion become realtors. It is clear from the cases involving violation of the Unfair Trade Practices Act that the alleged violators must be engaged in a business. . . ." *Rosenthal*, 42 N.C. App. at 454, 257 S.E. 2d at 67. In *Rosenthal* the defendants were private homeowners, rather than realtors. The sale of their own home was an isolated transaction. *See* Aycock, *North Carolina Law on Antitrust and Consumer Protection*, 60 N.C. L. Rev. 207 (1982).

The Squires, on the other hand, were actively engaged in the real estate business. There is substantial evidence in the record suggesting that the acquisition and attempted sale of this house was a business activity. When asked why Mrs. Squires did not sign the release, Mr. Squires responded,

> Because she doesn't usually get involved with releases and signing. It's my business and she's confident and comfortable with the way I transact business, . . . it's my house and her house but I'm more familiar with the transactions in the business than she is—. . . .

On redirect:

> Q. Did you list the house with Mrs. Hawkins on a listing sheet as being owned by you individually or you and your wife?
>
> A. I don't remember, usually just put my name on it.
>
> Q. Whether it's owned by you or you and your wife? She does what you tell her to?
>
> A. In business—

We, therefore, hold that there was sufficient evidence that Squires' conduct was "in or affecting commerce" to withstand a motion for directed verdict.

B. "Unfair or Deceptive Acts or Practices"

We next evaluate whether the evidence of Squires' conduct was sufficient to constitute an "unfair or deceptive act or practice" under G.S. § 75-1.1(a). The terms "unfair" and "deceptive" are not defined within the body of the statute. Our Supreme Court has relied on federal decisions interpreting the identically worded section 5 of the Federal Trade Commission Act in finding that a practice is unfair "when it offends public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," *Johnson*, 300 N.C. at 263, 266 S.E. 2d at 621, and deceptive "if it has the capacity or tendency to deceive," *id.* at 265, 266 S.E. 2d at 622; *see also Spiegel, Inc. v. Fed. Trade Comm'n*, 540 F. 2d 287 (7th Cir. 1976). Therefore, coercive tactics are within the definition of unfair practices. 2 Trade Reg. Rep. (CCH) § 7906 (1971); Craswell, *The Identification of Unfair Acts and Practices by The Federal Trade Commission*, 1981 Wisc. L. Rev. 107, 143 (1981). "[A]n essential element of duress or coercion is a *wrongful* act or threat." *Link v. Link*, 278 N.C. 181, 194, 179 S.E. 2d 697, 705 (1971).

Under the terms of the agreement, Wilder was entitled to the return of his entire binder, if, after a good faith effort, he was unable to obtain financing. Whether a prospective home buyer has indeed made a good faith effort is a question for the jury. *Smith v. Currie*, 40 N.C. App. 739, 253 S.E. 2d 645, *disc. rev. denied*, 297 N.C. 612, 257 S.E. 2d 219 (1979). The home buyer need not search for financing indefinitely until he finds a willing lender, nor must he accept financing under oppressive financing terms. He must make a reasonable effort. *See Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E. 2d 410 (1973), *cert. denied*, 284 N.C. 616, 201 S.E. 2d 689 (1974).

From the evidence presented, a jury could find that Wilder had made a good faith effort. Squires, however, threatened Wilder with the loss of his entire binder because he would not accept Squires' financing scheme. Squires had no right to threaten Wilder. Further, Squires' assertion that he was only doing what he thought he had a right to do—negotiate—does not excuse his con-

duct considering the test enunciated by our Supreme Court: "If unfairness and deception are gauged by consideration of the effect of the practice on the marketplace, it follows that the intent of the actor is irrelevant. Good faith is equally irrelevant. What is relevant is the effect of the actor's conduct on the consuming public." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E. 2d 397, 403 (1981). Moreover, Squires admitted, on direct examination, that he was not entitled to damages under the terms of the contract.

Q. How were you entitled to it then?

A. Because he agreed to it.

"Duress or coercion may take the form of unlawfully inducing one to make a contract or to perform some other act against his own free will. It may be manifested by threats. . . ." *Fletcher v. Fletcher*, 23 N.C. App. 207, 210, 208 S.E. 2d 524, 527 (1974). Wilder entered Squires' office and asked for the return of his binder. When Squires repeatedly told him that Squires was entitled to damages and that Wilder would not get any of the binder back unless he agreed to Squires' terms, Wilder acquiesced and signed the release. On cross-examination, Wilder exposed the coercive element in the exchange:

Q. Why did you just have blind faith and believe everything Mr. Squires told you at the time?

A. I'm not in the real estate business, he is.

. . .

Q. Were you afraid of Mr. Squires?

A. When he's got $7,200 of my money, I am.

. . .

Q. Now, how do you say Mr. Squires coerced you?

A. He threatened me if I didn't sign this, I wouldn't get my money back.

We conclude that there was sufficient evidence of Squires' coercive conduct to constitute an unfair act or practice and withstand a motion for directed verdict.

The same evidence supports a deceptive act or practice "with the capacity or tendency to deceive." *Johnson*, 300 N.C. at 265, 266 S.E. 2d at 622. Viewed in the light most favorable to Wilder, the evidence tends to show that Squires misrepresented the legal

positions of the parties. Squires, himself, testified that he told Wilder: "Well, according to the laws and rule of real estate, Mrs. Hawkins is entitled to a full commission because I'm willing to finance the house for you." Squires testified further that he told Wilder: "I'll figure up what kind of interest after I talk with Mrs. Hawkins." Squires explained that the $2,460 figure included the interest paid on the house since Squires had taken it out of multiple listings and damages for the time it might take to sell it. Simply put, Wilder was led to believe that his refusal to accept Squires' offer to guarantee the loan entitled Squires to damages. We hold that the evidence of a deceptive act or practice was sufficient to withstand a motion for directed verdict.

Therefore, the trial court did not err in denying Squires' motions for directed verdict.

II

[2] Squires next assigns error to issues number 1 and 2 as submitted to the jury:

> 1. Did the Defendant, J. Ralph Squires, cause $2,460.00 of the funds held in escrow to be paid to him without consent of the Plaintiff?
>
> 2. Was the Defendant's conduct in commerce or did it affect commerce?

Squires argues that issue number 1 is too general and does not support the theory upon which recovery is sought. We disagree. Squires also contends that issue number 2 is not supported by the evidence. We have disposed of Squires' second argument in our discussion on Squires' motions for directed verdict.

Returning to Squires' first argument, we note that Squires has neither assigned error to nor included a copy of the jury instructions in the record on appeal. We, therefore, are left to assume that there was no error in the jury instructions. Since an issue is to be construed in the context of the pleadings, the evidence presented, and the pertinent jury instructions, we must assume that the trial court instructed the jury adequately on (a) the elements of a good faith effort; (b) the law of coercion; and (c) the interplay between a good faith effort and the law of coercion. *See Clinard v. Town of Kernersville*, 217 N.C. 686, 9 S.E. 2d 381

(1940). A finding that Squires' conduct was coercive presupposes that Wilder had made a good faith effort to obtain financing. We conclude that the language of issue number 1 adequately supports the theory of coercion, as defined in I, *supra*, the theory relied upon to prove unfair acts or practices.

III

[3] Squires contends that the issues submitted to the jury do not support any of the trial court's findings of fact or conclusions of law. We disagree.

After the jury determined that Squires' conduct was indeed coercive, the trial court found that:

> Defendant J. Ralph Squires' refusal to allow the return of the $2,460.00 portion of the binder to the Plaintiff, James Collins Wilder, was unwarranted and that the Defendant, J. Ralph Squires had no right to cause the withholding of said funds from the Plaintiff.
>
> FURTHER, the Court determines that Plaintiff was entitled to the return of the total $7,250.00 binder upon his inability to qualify for the conventional loan.
>
> FURTHER, the Court finds that pursuant to the terms of the real estate purchase and sales contract, the Defendant, J. Ralph Squires was not entitled under any circumstances to any portion of the binder.
>
> 2. THE Court further determines that the action of the Defendant, J. Ralph Squires offends established public policy, was unethical, unscrupulous, oppressive and substantially injurious to the consumer, i.e. Plaintiff, James Collins Wilder. Further, Defendant, J. Ralph Squires' actions were deceptive and misleading to the Plaintiff and constitutes an unfair and deceptive trade practice in violation of NCGS 75-1.1.

The trial court concluded that Squires' conduct constituted an unfair *and* a deceptive trade practice.

The trial court's findings reflect the issues inherent in the jury's findings of coercion discussed in II, *supra*. As discussed earlier, coercive conduct is an adequate basis for an "unfair act or practice." Consequently, whether coercive conduct is also an ade-

quate basis for a deceptive trade practice need not be addressed. An unfair act or practice is a sufficient ground, in and of itself, upon which to assess treble damages under N.C. Gen. Stat. § 75-16 (1981).

Squires also argues that the trial judge erred in finding facts based on the evidence, because the factfinding lay within the sole province of the jury. Squires relies on *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975), in which our Supreme Court held that in an action under G.S. § 75-1.1, the jury determines the facts and the trial court then determines as a matter of law whether the defendant engaged in unfair or deceptive trade practices. However, as accurately explained in N.C.P.I. Civil 813.05: "whether a defendant's conduct constitutes an unfair or deceptive trade practice is a question of law for the judge. The jury decides what acts were committed . . ., whether these acts . . . occurred in or affected commerce . . ., whether these acts had an impact on plaintiff . . ., and the amount of damages." The jury decides that the acts were committed, and the judge decides whether these acts violated G.S. § 75-1.1, and trebles the damages pursuant to G.S. § 75-16, if the jury assessed damages. Here, the trial judge recorded in the judgment the findings of fact based on the issues addressed in the absent jury instructions, which were inherent in the jury determination of coercive conduct. The trial judge simply documented the matters that led him to conclude and decide as a matter of law that Squires committed an unfair act or practice. The judge acted according to law, and we find no error.

IV

[4] Squires' final argument relates to the trial court's award of attorneys' fees to Wilder pursuant to N.C. Gen. Stat. § 75-16.1 (Supp. 1983), which states, in pertinent part:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

(1) The party charged with the violation has wilfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit. . . .

The findings by the trial court, although they do not specifically track the language of the statute, are sufficient to support the trial court's award of attorneys' fees to Wilder. The trial court found that "Squires' refusal . . . was unwarranted"; that "Squires had no right to cause the withholding of said funds from" Wilder; that "Squires was not entitled under any circumstances to any portion of the binder"; and "that the action of . . . Squires offends established public policy, was unethical, unscrupulous, oppressive and substantially injurious to" Wilder. We therefore affirm the award of attorneys' fees.

V

For the above reasons, the judgment of the trial court is

Affirmed.

Judges JOHNSON and BRASWELL concur.

RONALD D. LEE, PAMELA L. LEE, WOODROW W. WEAVER, TOMMIE L. WEAVER, STEPHEN E. COOKE, WILMA F. COOKE, ROBERT PLACER AND CLAIRE PLACER v. HARVEY L. KECK, INDIVIDUALLY, AND WIFE, PATRICIA T. KECK, CORA G. KECK AND HARVEY L. KECK, EXECUTOR OF THE ESTATE OF KELLY H. KECK

No. 8315SC281

(Filed 15 May 1984)

1. Evidence § 11.8— waiver of right to rely on dead man's statute

Service by defendants of interrogatories concerning transactions or communications with the deceased, which elicited without objection otherwise incompetent evidence, constituted a waiver by defendant of the protection of G.S. 8-51 in an action for fraud and unfair trade practices.

2. Rules of Civil Procedure § 33— denial of protective order—failure of defendant to show actual potential prejudice

Defendant failed to meet his burden of showing some actual potential prejudice in the denial of defendants' motion for a protective order after being

served with interrogatories "until such time as it is determined the issues of punitive damages is for the jury," on the grounds that the answers might tend to be incriminatory.

3. Fraud § 9.1— defendant-wives liable as principals for fraud perpetrated by their agent

The evidence was sufficient to deny defendant-wives' motion for summary judgment where plaintiffs proceeded on the theory that the wives were liable as principals for fraud perpetrated by Harvey Keck as their agent and where defendant-wives admitted in their answers to plaintiffs' interrogatories that Harvey Keck acted as their agent; where the complaint alleged that Harvey Keck acted as agent for his wife, Patricia Keck, and that the deeds for all the lots purchased by plaintiffs were signed by Harvey Keck and Patricia Keck; where in her motion for summary judgment, Patricia Keck did not deny that she had received and retained benefits from the sale of entireties property; and where the complaint contained ample allegations of misrepresentations by Harvey Keck.

4. Frauds, Statute of § 6— statute of frauds not applying to action to recover difference between actual value and value as represented of real property

There was no error in the denial of defendants' motion to amend their answer to add the statute of frauds as a defense since the statute of frauds is no bar to an action to recover the difference between the actual value of real property and the value as represented, based on fraudulent misrepresentations in the sale of property.

5. Limitation of Actions § 8.3— statute of limitations for fraud or mistake

The three-year statute of limitations for fraud or mistake does not commence to run "until the discovery by the aggrieved party of the facts constituting the fraud or mistake," G.S. 1-52(9), or until the facts should have been discovered in the exercise of due care. Therefore, in an action for fraud, the trial court did not err in failing to allow defendants to amend their complaint to allege the statute of limitations as a defense where the complaint reveals that representations were made to the plaintiffs until 1979 and their complaint was filed in 1980.

6. Fraud § 12; Unfair Competition § 1— sufficiency of evidence

The trial court properly denied defendants' motion for directed verdict at the close of all the evidence in an action for fraud and unfair trade practices where there was evidence that Harvey Keck knowingly made false statements to each plaintiff concerning the paving of a road in their development—that is, his conversations with the State regarding pavement, that the representations were made in the course of negotiations, and that plaintiffs were thereby induced to purchase to their damage.

7. Executors and Administrators § 21— failure to put notice to creditors in record—failure to prove lack of notice to estate of tort claim defense

Defendants failed to show that they had a complete defense to the claims against Harvey Keck as the executor of the estate of Kelly Keck based on G.S.

28A-19-3(a) where there was no notice to creditors in the record, and defendants did not mention anywhere when, if ever, one was published.

8. **Appeal and Error § 31.1— failure to object to charge—waiver of errors**

Failure to make a contemporaneous objection to portions of the jury charge constituted a waiver of the right to challenge the instructions on appeal. App. R. 10(b)(2).

APPEAL by defendants from *McLelland, Judge.* Judgment entered 30 July 1982 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 9 February 1984.

David I. Smith, for defendant appellants.

James F. Walker and H. Clay Hemric, Jr., for plaintiff appellees.

BECTON, Judge.

Plaintiff homeowners purchased lots in a subdivision developed by defendants. The road into the development, Keck Drive, was unpaved when the lots were sold. After several years of increasing tension with defendants over the paving of the road, plaintiffs filed this action. The Complaint alleged that plaintiffs relied on representations by Harvey Keck, both individually and as agent for Kelly Keck, his father (since deceased), and their respective wives, Patricia Keck and Cora Keck, that Keck Drive would be paved. These representations allegedly induced plaintiffs to purchase their lots. The Complaint sought punitive damages for fraud, treble damages for unfair trade practices, and specific performance of an alleged oral agreement to pave the road. Defendants denied any wrongdoing and counterclaimed for libel and resulting physical and mental suffering. The Counterclaim was later summarily disposed of, and plaintiffs took a voluntary dismissal of their claim for specific performance.

At trial, plaintiffs presented evidence that at the time the lots were sold, Harvey Keck had represented to each couple that he was working with the State to get Keck Drive paved. Evidence was also presented that Kelly Keck had been the payee of various checks written by plaintiffs for the purchase of land, that Harvey Keck took the checks and delivered receipts signed by Kelly Keck, and that Kelly Keck had made similar representations regarding the paving of Keck Drive. The land sold was

owned by the entireties with the wives, Patricia Keck and Cora Keck. Both wives testified that Harvey Keck arranged the sales and that they received part of the proceeds. Plaintiffs also presented the county tax supervisor, who described the procedure for getting roads paved and the land ownership along Keck Drive, which effectively gave defendants veto power on any petition for paving. A real estate appraiser testified as to the diminution in value of plaintiffs' land as a result of the lack of paving; plaintiffs themselves introduced other evidence of damages. Plaintiffs also testified that a neighborhood petition to get Keck Drive paved had been torn up by Harvey Keck.

Defendants offered the testimony of Harvey Keck, who denied any promises or other representations concerning the paving of Keck Drive. Several other property owners in the development testified that defendants had made no representations to them concerning paving the road.

The jury found that Harvey Keck had perpetrated fraud in connection with the sale of land to each plaintiff, and that he committed unfair and deceptive trade practices in each instance, all the while acting as agent for Kelly, Cora and Patricia Keck. From judgment on this verdict, defendants appeal.

I

[1] One of the plaintiffs testified that the deceased, Kelly Keck, told him that he left it to his son, Harvey Keck, to handle the proceedings concerning Keck Drive. Defendants objected that the evidence should have been excluded under N.C. Gen. Stat. § 8-51 (1981), the dead man's statute. However, defendants had, during the course of discovery, served interrogatories on each plaintiff asking what promises or statements Kelly Keck made to them concerning paving Keck Drive. Plaintiffs responded substantially in accord with the testimony defendants now find objectionable. We have recently held, in an identical situation, that service by defendants of interrogatories concerning transactions or communications with the deceased, which elicit without objection the otherwise incompetent evidence, constitutes a waiver by defendants of the protection of G.S. § 8-51. *Wilkie v. Wilkie*, 58 N.C. App. 624, 294 S.E. 2d 230, *disc. rev. denied*, 306 N.C. 752, 295 S.E. 2d 764 (1982); *see also Hayes v. Ricard*, 244 N.C. 313, 93 S.E. 2d

540 (1956). *Wilkie* clearly controls, and this assignment must accordingly be overruled.

II

[2] Plaintiffs served certain interrogatories on defendants. Since the Complaint prayed for punitive damages, defendants moved for a protective order "until such time as it is determined the issue of punitive damages is for the jury," and further sought a protective order on the grounds that the answers might tend to be incriminatory. Defendants assign error to the denial of this motion.

Although some earlier cases have apparently held that defendants may properly refuse to answer questions which may subject them to a civil penalty, it is clear even under those cases that the initial burden is on the defendant to show some actual potential prejudice; the matter may not rest with the *ipse dixit* of the defendants. *Allred v. Graves*, 261 N.C. 31, 134 S.E. 2d 186 (1964). The cases under our new Rules of Civil Procedure indicate that defendant must at least "assist the court by pushing the door even a tiny bit ajar so as to disclose some rational grounds for believing that a real danger of self-incrimination" exists. *Johnson County Nat'l Bank and Trust Co. v. Grainger*, 42 N.C. App. 337, 342, 256 S.E. 2d 500, 503, *disc. rev. denied*, 298 N.C. 304, 259 S.E. 2d 300 (1979). This is certainly true for potentially incriminatory answers. *Id.* Assuming that defendants could properly object to what appear to this Court to be innocuous questions, they have failed to provide any justification other than some vague "belief" to support such an objection. This assignment of error is therefore without merit.

III

[3] The court denied the pretrial motion of defendants Cora Keck and Patricia Keck for summary judgment on the claims against them. These defendants contend that no actual representations or other acts of fraud were committed by them.

On motion for summary judgment, the movant has the burden of showing that there is no issue of triable fact. *Sharpe v. Quality Education, Inc.*, 59 N.C. App. 304, 296 S.E. 2d 661 (1982). The facts asserted by the answering party must be accepted as true. *Norfolk and Western Ry. Co. v. Werner Industries, Inc.*, 286 N.C. 89, 209 S.E. 2d 734 (1974). The movant's burden in an action

for fraud is especially heavy, since state of mind is usually at issue. *Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980).

Plaintiffs proceeded on the theory that the wives were liable as principals for fraud perpetrated by Harvey Keck as their agent.

> The general rule is that a principal is responsible to third parties for injuries resulting from the fraud of his agent committed during the existence of the agency and within the scope of the agent's actual or apparent authority from the principal, even though the principal did not know or authorize the commission of the fraudulent acts.

Vickery v. Olin Hill Construction Co., 47 N.C. App. 98, 102, 266 S.E. 2d 711, 714, *disc. rev. denied*, 301 N.C. 106, --- S.E. 2d --- (1980) (quoting *Norburn v. Mackie*, 262 N.C. 16, 23, 136 S.E. 2d 279, 284-85 (1964)). A husband is not his wife's agent simply because of the marital relationship; but only "slight evidence" of agency suffices to charge her as a principal, when "she received, retains, and enjoys the benefits of a contract." *Norburn v. Mackie*, 262 N.C. at 23, 136 S.E. 2d at 284; *Passmore v. Woodard*, 37 N.C. App. 535, 246 S.E. 2d 795 (1978) (retention of benefits from a contract sufficient).

Defendants admitted in their answers to plaintiffs' interrogatories that Harvey Keck acted as Cora Keck's and Kelly Keck's agent. The Complaint further alleged that he acted as agent for his wife, Patricia Keck, and that the deeds for all the lots purchased by plaintiffs were signed by Harvey Keck and Patricia Keck. In her motion for summary judgment, Patricia Keck did not deny that she had received and retained benefits from these sales of entireties property. The Complaint contained ample allegations of misrepresentations by Harvey Keck. Movants' forecast of evidence does not establish plaintiffs' lack of a right to relief as a matter of law. Accordingly, the trial court properly denied these motions for summary judgment. Moreover, the admissions of both femme defendants at trial that they did in fact receive and retain proceeds of the subject sales substantiate the trial court's ruling.

IV

Defendants next contend, relying on the liberal provisions of N.C. Gen. Stat. § 1A-1, Rule 15(a) (1983), that the trial court's denial of their motions to amend constituted reversible error. Approximately eighteen months after the Complaint was filed, the trial court denied defendants' motions to add the defenses of the Statute of Frauds and the statute of limitations.

[4] Rulings on motions to amend after the expiration of the statutory period are within the discretion of the trial court; that discretion is clearly not abused when granting the motion would be a futile gesture. *Smith v. McRary*, 306 N.C. 664, 295 S.E. 2d 444 (1982). Therefore, the trial court did not abuse its discretion in denying leave to amend to add the Statute of Frauds defense, since the Statute of Frauds is no bar to an action to recover the difference between the actual value of real property and the value as represented, based on fraudulent misrepresentations in the sale of the property. *Kent v. Humphries*, 303 N.C. 675, 281 S.E. 2d 43 (1981) (statute bars only enforcement of the invalid contract); *Horne v. Cloninger*, 256 N.C. 102, 123 S.E. 2d 112 (1961) (rights of parties to a fraudulent transaction); *see generally* Annot., 13 A.L.R. 3d 875, 936 (1967). Even if the plaintiffs had pursued their claim for specific performance of the alleged oral contract to pave the road, the statute would have been no defense. *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 279 S.E. 2d 1 (1981).

[5] Defendants also moved for leave to add a statute of limitations defense to their Answer to the Placers' claim, arguing that since the Placers purchased in 1976, their right of action had expired by 1980, when the Complaint was filed. The three-year statute of limitations for fraud or mistake does not commence to run, however, "until the discovery by the aggrieved party of the facts constituting the fraud or mistake," N.C. Gen. Stat. § 1-52(9) (1983), or until the facts should have been discovered in the exercise of due care. *Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294, 271 S.E. 2d 385 (1980), *reh'g denied*, 301 N.C. 727, 274 S.E. 2d 228 (1981). The Complaint and various discovery papers reveal that representations were made to the Placers until 1979, and no evidence in the record, aside from defendants' general denials, suggests anything different. On this record, we hold that the trial

court did not abuse its discretion in denying defendants' motions. Assuming, *arguendo*, that it did, defendants have failed to show that a different result would have been reached had the motions been granted. N.C. Gen. Stat. § 1A-1, Rule 61 (1983); *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 302 S.E. 2d 204 (1983). This assignment is, therefore, overruled.

V

Defendants also assign error to the denial of a motion for summary judgment in favor of Harvey Keck. The motion, apparently addressing all claims by all parties, was supported only by Harvey Keck's affidavit stating that plaintiffs Weaver had actually bought their property from one Wade Coble. Woodrow Weaver's counteraffidavit stated that he had purchased the property from Keck. No affidavit or other testimony by Coble appears in the record. The credibility of the sharply conflicting testimony of opposing witnesses was at issue. Summary judgment against plaintiffs was thus inappropriate and correctly denied. *See Bone Int'l, Inc. v. Brooks*, 304 N.C. 371, 283 S.E. 2d 518 (1981); *North Carolina Nat'l Bank v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979).

Defendants argue for the first time on appeal that this motion should have been granted because of the statute of limitations bar against the Placers. Assuming, *arguendo*, that this argument may now be heard, for the reasons discussed in the preceding section, it is equally without merit.

VI

[6] At the close of plaintiffs' evidence and at the close of all the evidence, defendants moved unsuccessfully for directed verdict. The motion at the close of plaintiffs' evidence was as follows:

> Your Honor, at the close of the plaintiffs' evidence, defendants move for a directed verdict in their favor, and I move on the following grounds: There are three causes of action alleged in the complaint by the plaintiffs, the first one being under contract and for damages, the second being under contract and for specific performance, and the third for unfair trade practices, and they also ask for punitive damages in the—in their prayers for relief.

The second motion set forth the same grounds. Defendants contend the trial court erred in denying their motions. We disagree.

"A motion for a directed verdict shall state the specific grounds therefor." N.C. Gen. Stat. § 1A-1, Rule 50(a) (1983). "However, the courts need not inflexibly enforce the rule when the grounds for the motion are apparent to the court and the parties." *Anderson v. Butler*, 284 N.C. 723, 729, 202 S.E. 2d 585, 588 (1974). But the only thing "apparent" from the motions in this record is the defendants' awareness of the causes of action against them. This Court has cautioned litigants in the past to be sure to include their specific grounds for directed verdict in the record. *Davis v. Peacock*, 10 N.C. App. 256, 178 S.E. 2d 133 (1970), *cert. denied*, 277 N.C. 725, 178 S.E. 2d 832 (1971). When a specific ground is not stated in the original motion, it cannot be raised on appeal. *Jones v. Allred*, 52 N.C. App. 38, 278 S.E. 2d 521, *aff'd*, 304 N.C. 387, 283 S.E. 2d 517 (1981) (per curiam). Even the sufficiency of the evidence cannot be raised for the first time on appeal. *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E. 2d 769 (1970); *see also Oxendine v. Moss*, 64 N.C. App. 205, 306 S.E. 2d 831 (1983). On appeal, defendants argue several grounds, including the sufficiency of the evidence, which were not advanced at trial. They are, therefore, not properly before this Court.

However, even if we do consider the sufficiency of the evidence, we find ample evidence that Harvey Keck knowingly made false statements to each plaintiff concerning present facts—that is, his consultations with the State regarding pavement, that the representations were made in the course of negotiations, and that plaintiffs were thereby induced to purchase to their damage. These also supported the unfair trade practices claim. This evidence, taken in the light most favorable to plaintiffs, was sufficient that reasonable men might form divergent opinions as to its import, and the motions were therefore properly denied. *Smith v. McRary. Overstreet v. Brookland, Inc.*, on which defendants rely, clearly does not control. There, plaintiffs presented no evidence that *at the time of the sale* defendant had any other intent than to do what he had promised in the future. Here, on the other hand, plaintiffs' evidence showed that at the time of the sale defendants represented that they were *presently* taking actions which they were in fact *not* taking, and that they intended to do

that which they in fact had no intention to do (and later actively blocked).

VII

[7] Defendants moved for summary judgment with respect to claims against Harvey Keck as the executor of the estate of Kelly Keck, based on N.C. Gen. Stat. § 28A-19-3(a) (Supp. 1983), which operates as a permanent bar to claims "not presented to the personal representative . . . by the date specified in the general notice to creditors. . . ." As the moving party, defendants bore the burden of showing that they had a complete defense as a matter of law. *See Ballinger v. Dept. of Revenue*, 59 N.C. App. 508, 296 S.E. 2d 836 (1982), *cert. denied*, 307 N.C. 576, 299 S.E. 2d 645 (1983). No general notice to creditors appears in the record, and defendants do not mention anywhere when, if ever, one was published. Defendants thus failed to carry their burden and there is no reversible error in the denial of this motion for summary judgment.

VIII

[8] Defendants assign error to numerous portions of the charge. Objection to most of these errors was waived, however, by operation of Rule 10(b)(2) of the Rules of Appellate Procedure (Supp. 1983):

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

Failure to make contemporaneous objection prevents the court from recalling the jury to correct allegedly prejudicial errors. *See* General Rules of Practice for the Superior and District Courts, Rule 21 (Supp. 1983). Such failure constitutes a waiver of the right to challenge the instructions on appeal. *City of Winston-Salem v. Hege*, 61 N.C. App. 339, 300 S.E. 2d 589 (1983); *State v. Ellers*, 56 N.C. App. 683, 289 S.E. 2d 924 (1982). Defendants had ample opportunity to object, and the court took pains to inform counsel when such objections would be heard.

The only objection registered by defense counsel was the following:

> Your honor, we object to the charge of the court—and this is for the record because we have already made the request—concerning the unfair trade practice issue and requested at that time and renew it that the court charge as the defendants raised it in their pretrial order.

The objection was overruled. No request for an unfair trade practice instruction was submitted by defendants. Defendants did apparently request that certain unfair trade practices issues be submitted to the jury, but they do not argue now that the issues submitted were in any way erroneous.

Assuming, *arguendo*, that the cited objection went to the instructions given on unfair trade practices, we discern no prejudicial error. In unfair trade practices cases, the jury need only find whether the defendant committed the acts alleged; it is then for the court to determine as a matter of law whether these acts constitute unfair or deceptive practices in or affecting commerce. *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). The trial court substantially followed the pattern instructions in this respect. *See* N.C.P.I.—Civil 813.21 (1981). Before doing so, however, it instructed the jury as follows: "I instruct you that a representation to a prospective purchaser of land on an unpaved road that there are existing immediate plans to pave that road made falsely or in reckless disregard of the truth is an unfair or deceptive trade practice." This instruction was unnecessary. Defendants contend it was "peremptory," but we fail to see how the court could preempt itself on a question of law. Jurors often go into the jury room with knowledge of the consequences of their decisions, for example, in capital cases. The court carefully and repeatedly instructed that there could be no double recovery, and it nowhere mentioned the possibility of treble damages. While the language should have been omitted, we find no prejudicial error when construing the charge as a whole.

Defendants also urge the application of the "plain error" rule to the charge. Regardless of the rule's applicability to this case, there is clearly no fundamental error which would justify its invocation. *In re Will of Maynard*, 64 N.C. App. 211, 307 S.E. 2d 416 (1983).

IX

Plaintiffs cross appeal and urge reversal of an order denying their motion to dismiss defendants' appeal for failure to timely post the proper appeal bond. The record indicates that an adequate undertaking has been posted. N.C. Gen. Stat. § 1-285 (1983). The docket of this Court reveals that all bonds and fees have been paid. Our decision in favor of plaintiffs on defendants' appeal renders this appeal moot in any event.

We conclude that no prejudicial error appears from the record before this Court.

No error.

Judges WELLS and WHICHARD concur.

IRENE H. WOODWARD v. DONALD RAY CLOER AND WIFE, PHYLLIS R. CLOER

No. 8327DC294

(Filed 15 May 1984)

Deeds § 20.7; Waters and Watercourses § 1— drainage easements in restrictive covenants—reasonable use rule inapplicable

The trial court erred in applying the reasonable use test for surface water drainage cases set forth in *Pendergrast v. Aiken*, 293 N.C. 201, in an action to enforce a restrictive covenant governing drainage easements in a residential subdivision since there was no need for the trial court to look outside the restrictive covenants to determine plaintiff's right to recover against defendants.

APPEAL by plaintiff from *Bowen, Judge.* Judgment entered 15 October 1982 in District Court, LINCOLN County. Heard in the Court of Appeals 13 February 1984.

This is an action to enforce certain restrictive covenants in a residential subdivision property owner's deed reserving easements on each lot and prohibiting the obstruction or interference with the flow of water through drainage channels located within the easement. The plaintiff, Irene H. Woodward, instituted this proceeding on 10 February 1982 against the defendants, Donald

Ray Cloer and wife, Phyllis R. Cloer, seeking to permanently enjoin the defendants from maintaining the obstruction of the drainage ditch across the front portion of defendants' property, which was located across the street and uphill from plaintiff's property. Plaintiff also sought actual and exemplary damages for injuries caused to her property by flooding occurring after the drainage ditch was obstructed by the defendants.

The defendants filed an answer admitting the filling of the drainage ditch, partially in 1976 and then completely in May, 1981, for the purpose of beautifying their property; denying that the water entering the plaintiff's property and causing flood damage thereon was the result of the defendants' actions; and alleging that a drainage ditch previously existing across the front of plaintiff's property was filled in 1974; that its closing was the cause of plaintiff's flooding and that plaintiff was obligated to reopen that alleged drainage ditch.

The action was tried without a jury before the District Court Judge. Prior to the trial, the parties entered a stipulation concerning the plat of the subdivision in which both plaintiff's and defendants' property is located, the deeds by which both parties acquired title to their real property, and the restrictive covenants which affect the subdivision and both plaintiff's and defendants' properties. The court then conducted a jury view of the plaintiff's and defendants' properties, and the area of the subdivision involved in the action.

Both parties presented evidence relative to the situation and history of their respective properties, the defendants' obstruction of the drainage ditch and the plaintiff's subsequent flood damage. Following arguments by counsel, the court ruled that the law applicable to the case was the reasonable use test set forth in *Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E. 2d 787 (1977). The court then made findings of fact and conclusions of law and denied the relief sought by the plaintiff. From the entry of judgment in favor of defendants, plaintiff appeals.

Wilson & Lafferty, P.A., by John O. Lafferty, Jr., for plaintiff appellant.

Jonas, Jonas & Rhyne, by Harvey A. Jonas, Jr., for defendant appellees.

JOHNSON, Judge.

The question dispositive of this appeal is whether the trial court erred in applying the reasonable use test of *Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E. 2d 787 (1977) to the case under discussion. We conclude that application of the *Pendergrast* rule was error and therefore remand the case to the trial court so that the evidence of the parties may be considered in its true legal light. *See A.M.E. Zion Church v. Union Chapel A.M.E. Zion Church*, 64 N.C. App. 391, 308 S.E. 2d 73 (1983), *disc. rev. denied*, 310 N.C. 308, 312 S.E. 2d 649 (1984) (bench trial; new trial appropriate where evidence heard and factual findings made under misapprehension of the controlling law).

In the trial of this action it was undisputed that all lands involved are located in the Lincoln Forest Subdivision and are subject to certain "Protective Covenants" dated 24 January 1966, and recorded in the Lincoln County Public Registry. It is also undisputed that the "protective" or "restrictive" covenants contain reservations for certain easements over each lot and prohibitions against any obstruction or interference with the flow of water through drainage channels within the easement, and also contain provisions providing for the enforcement of such "Protective Covenants."

The undisputed evidence also showed that a drainage ditch existed along the easement in the front of defendants' lot until 1976 when defendants filled the ditch with dirt, leaving a grassy swag 14 inches deep, and that defendants did substantial additional filling of the ditch in May, 1981. Further, that the purpose behind defendants' filling of the ditch within the easement was to improve the aesthetic appearance of their property, by improving the growth of grass in that area and making grass mowing there more efficient.

Plaintiff offered evidence which tended to show that she had never had any flooding or water damage to her property prior to May, 1981 and that after the second filling of the ditch in May, 1981, she received a heavy volume of water and mud; that her carport and basement were flooded; that she has continued to suffer similar water and mud damage since that time; and that as a result of such flooding her home has been damaged.

Defendants did not offer evidence contradicting plaintiff's evidence of flooding or damage. Rather, they offered evidence which tended to show that prior to 1974, a drainage ditch had existed along the front portion of plaintiff's lot within the easement and that such ditch was not filled in. Plaintiff's evidence tended to show that no such ditch had ever existed.

Defendants offered further evidence which tended to show that the flow of water coming down the road separating their upper property from plaintiff's lower property remained continuously on defendants' side of the road and did not cross over the road onto plaintiff's property. Plaintiff offered evidence tending to show that the flow of water did in fact cross the road at the point where defendants' drive entered the road, and that the flow then continued down plaintiff's drive and into her carport and basement.

Other evidence showed that the parties had discussed the possibility of water damage to plaintiff's property if the defendants' drainage ditch were to be filled in, but that despite plaintiff's opposition, the defendants did not believe such damage would occur and proceeded to fill in the ditch.

At the close of the evidence, the trial court ruled that the law applicable to plaintiff's claim was set forth in *Pendergrast v. Aiken, supra.* In this ruling, the court erred. We find no indication in the *Pendergrast* opinion that the Supreme Court intended to supersede the vested property right of a subdivision lot owner to have drainage easements maintained with a rule of "reasonable use." As the *Pendergrast* court explicitly recognized, its adoption of the reasonable use rule in surface water drainage cases was "an act of clarification—not innovation," 293 N.C. at 218, 236 S.E. 2d at 798, in an effort to bring consistency to an area of the law theretofore subject to piecemeal modifications dictated by time and circumstance. *Ibid.* The choice made by the *Pendergrast* court to formally adopt "reasonable use" as the test for analyzing drainage problems must be considered to be purely doctrinal. Accordingly, it is applicable to determine the rights and duties of landowners in the absence of another source for these reciprocal rights and obligations. The rights and duties plaintiff seeks to enforce were expressly contained in the restrictive covenants to which all the subdivision lot owners were subject. Therefore,

there was no need for the trial court to look outside the restrictive covenants to determine plaintiff's right to recover against defendants.

Support for this interpretation of the limited scope of the *Pendergrast* rule may be found in the nature of the problem before the court and in the text of the opinion itself. *See also* Note, 56 N.C. L. Rev. 1118 (1978) (inquiry shifted from *concepts* of property law to *principles* of tort law) and Note, 14 Wake Forest L. Rev. 866 (1978). In *Pendergrast*, a downstream landowner placed a culvert in a drainage ditch running through his property and then filled the ditch and property with dirt. As a result, the stream that formerly flowed through the ditch backed up several times during rainfalls and flooded a building on plaintiff's land. The plaintiff sued for damages, allegedly caused by the nuisance on defendant's property. Plaintiff alleged that under the "civil law rule" any interference with the natural flow of surface waters was a nuisance. The defendant, relying on the "reasonable use rule," countered that unless his conduct was unreasonable, he should not be subject to liability for making improvements on his property. The trial court's instruction to the jury contained elements of both rules.

Three basic doctrines relative to the disposition of surface water have been developed by the courts in the various states: the civil law rule, the common enemy rule, and the reasonable use rule. *Pendergrast v. Aiken, supra* at 207, 236 S.E. 2d at 791. *See also* Note, Disposition of Diffused Surface Waters in North Carolina, 47 N.C. L. Rev. 205, 206-207 (1968). Although the civil law rule, which is analytically dependent on property law concepts, prevailed at the time suit was initiated, the Supreme Court had traditionally adhered to a "policy of flexible application" of the civil law rule. 293 N.C. at 212, 236 S.E. 2d at 793. After reviewing a number of its prior decisions, the court concluded that it had traditionally included elements of "reasonable use" in its application of the civil law rule in an effort to accommodate change in the social and economic structure of society; an accommodation not possible under that rule when strictly applied. The court also noted that this "flexible" application of the civil law rule had led to numerous result-oriented decisions and "unpredictable disruptions" in the law of surface water drainage in the court's quest to accommodate changing social needs. 293 N.C. at

216, 236 S.E. 2d at 796. Continuing in its analysis, the court stated:

> In sum, we think the reasonable use rule is more in line with the realities of modern life and that consistency, fairness and justice are better served through the flexibility afforded by that rule. [Par.] Accordingly, we now formally adopt the rule of reasonable use with respect to *surface water drainage.* (Emphasis original.)

Id. at 216, 236 S.E. 2d at 796.

In a subsequent decision, the court characterized its holding as follows:

> Specifically, the doctrine of reasonable use adopted in *Pendergrast* defines the extent to which a private landowner may interfere with the flow of surface water on the property of another. This doctrine presupposes that all private landowners must accept a reasonable amount of interference with the flow of surface water by other private landowners if a fair and economical allocation of water resources is to be achieved. The conclusion reached in *Pendergrast* is that a rule of reasonable use with respect to water rights is the best way to promote the orderly utilization of water resources by private land owners.

Board of Transportation v. Warehouse Corp., 300 N.C. 700, 705, 268 S.E. 2d 180, 184 (1980). Significantly, the court refused to apply the reasonable use test in that case, concluding that the "principle of reasonable use articulated in *Pendergrast* is superseded by the constitutional mandate that '[w]hen private property is taken for public use, just compensation must be paid.' " (Citation omitted.) *Id.* at 706, 268 S.E. 2d at 184.

Similarly, we conclude that the *rights* and *duties* established by the restrictive covenants governing the subdivision supersede the *principle or doctrine* of reasonable use articulated in *Pendergrast.* Here, the developer of the subdivision, by inclusion of the restrictive covenants in the plan of development, has already determined that the "best way to promote the orderly utilization of water resources" within the private subdivision is through the maintenance of unobstructed drainage channels within easements reserved on each lot. It is well established that:

> [W]hen an owner of a tract of land subdivides it and conveys distinct parcels to separate grantees, imposing common restrictions upon the use of each parcel pursuant to a general plan of development, the restrictions may be enforced by any grantee against any other grantee. Moreover, the right to enforce may be exercised by subsequent grantees against any purchaser who takes land in the tract with notice of the restrictions. A purchaser has such notice whenever the restrictions appear in a deed or in any other instrument in his record chain of title.

Hawthorne v. Realty Syndicate, Inc., 300 N.C. 660, 665, 268 S.E. 2d 494, 497 (1980). Furthermore, purchasers in a subdivision acquire the right to have existing easements remain open, and such rights cannot be extinguished or revoked except by agreement. *Cleveland Realty Company v. Hobbs*, 261 N.C. 414, 135 S.E. 2d 30 (1964); *Land Corporation v. Styron*, 7 N.C. App. 25, 171 S.E. 2d 215 (1969). *See also Johnson v. Winston-Salem*, 239 N.C. 697, 81 S.E. 2d 153 (1954) (drainage easements). Mrs. Woodward, the plaintiff herein, has not agreed to the obstruction of the drainage ditch by the defendants and, upon a proper evidentiary showing, should be entitled to relief from the obstruction of such drainage easements as are mandated by the restrictive covenants.

Although the *Pendergrast* decision contains many broad statements regarding the future applicability of the reasonable use test to all surface water drainage problems, it is clear from the text that the court was referring to drainage rights arising under the common law tort doctrine of nuisance.

> *Analytically, a cause of action for unreasonable interference with the flow of surface water causing substantial damage is a private nuisance action,* with liability arising where the conduct of the landowner making the alterations in the flow of surface water is either (1) intentional and unreasonable or (2) negligent, reckless or in the course of an abnormally dangerous activity. (Citations omitted.)
>
> * * *
>
> Regardless of the category into which the defendant's actions fall, the reasonable use rule explicitly, as in the case of intentional acts, or implicitly, as in the case of negligent acts, re-

quires a finding that the conduct of the defendant was unreasonable. *This is the essential inquiry in any nuisance action.* (Citations omitted.) (Emphasis added.)

293 N.C. at 216, 217, 236 S.E. 2d at 796, 797.

Analytically, plaintiff Woodward's cause of action is a private action to enforce a restrictive covenant governing drainage easements in a residential subdivision. There is no indication in the *Pendergrast* opinion that the court meant to apply the reasonable use rule to surface water drainage problems *not* arising under a nuisance theory. We are of the opinion that the *Pendergrast* court rejected only the civil law rule's dependency on "*property law concepts* such as rights, servitudes, easements, and so forth," 293 N.C. at 215, 236 S.E. 2d at 795, as a *method for analyzing* surface water drainage problems, without thereby rejecting the enforceability of *actual property rights* embodied in restrictive covenants requiring maintenance of easements with drainage channels such as those at issue here. However inflexible the reciprocal rights and duties under the parties' restrictive covenants may appear, those rights are incident to real property ownership in the Lincoln Forest Subdivision and are not, therefore, subject to the "reasonable use" rule articulated in *Pendergrast v. Aiken, supra.* It is evident that the goals of "consistency, fairness and justice," *Pendergrast, supra* at 216, 236 S.E. 2d at 796, will be best served in this case through the judicial enforcement of the rights and duties arising under the Lincoln Forest Subdivision's "Protective Covenants."

In conclusion, the rule of *Pendergrast* is not applicable in an action between private landowners in a residential subdivision subject to restrictive covenants governing surface water drainage rights. Accordingly, the judgment of the trial court, entered under that theory, must be reversed and the matter remanded to the District Court for a new trial so that the evidence regarding the restrictive covenant and defendant's actions may be considered in its true legal light.

New trial.

Chief Judge VAUGHN and Judge WEBB concur.

GERRY ANN KENNEY v. MEDLIN CONSTRUCTION & REALTY CO., A NORTH CAROLINA CORPORATION

No. 8319SC743

(Filed 15 May 1984)

1. **Evidence § 45— value of house—opinion testimony by owner**

In an action for breach of an implied warranty of workmanlike quality in the construction of plaintiff's house, plaintiff was properly allowed to give her opinion as to the reasonable fair market value of the house on the date of purchase.

2. **Evidence § 48— quality of workmanship—damage from construction—qualification of expert witness**

A witness who was qualified as an expert in the building of residential structures was properly permitted to give an opinion as to the quality of workmanship in and the damage resulting from the construction of plaintiff's house although he admitted that he did not know what caused the damage, since he did not testify as to causal factors and his lack of knowledge regarding the cause of damage was thus irrelevant.

3. **Evidence § 48— qualification of witness to testify as expert**

Although a witness was not a licensed contractor, the trial court properly permitted the witness to testify as an expert in the field of residential construction where the evidence showed that the witness had been involved in building more than 200 residences, including eight to twelve in plaintiff's subdivision.

4. **Sales § 6.4; Vendor and Purchaser § 6.1— construction of house—breach of implied warranty of workmanlike quality**

Plaintiff's evidence was sufficient for the jury in an action to recover for breach of an implied warranty of workmanlike quality in the construction of plaintiff's house where plaintiff and two expert witnesses testified to various structural defects rendering the quality of construction of plaintiff's house below the standard prevailing in the area.

5. **Sales § 19; Vendor and Purchaser § 8— breach of implied warranty of workmanlike quality—costs of repair as measure of damages**

In an action for breach of an implied warranty of workmanlike quality in the construction of plaintiff's house, the trial court did not err in permitting the jury to award plaintiff the costs of repair rather than the diminution in value where the jury awarded plaintiff damages of $35,000, plaintiff and her two expert witnesses testified to numerous structural defects in the construction of the house, and both expert witnesses testified that repairing the structural problems would involve stripping the house to its foundation at a cost ranging between $28,000 and $60,000, since the costs of repair method may best insure the injured party of receiving the benefit of his or her bargain, even if repair would involve destroying work already completed, when defects

or omissions in construction are so major that the building does not substantially conform to the contract.

APPEAL by defendant from *Freeman, Judge.* Judgment entered 31 March 1983 in Superior Court, CABARRUS County. Heard in the Court of Appeals 30 April 1984.

Defendant appeals from a verdict awarding plaintiff $35,000 for defendant's breach of an implied warranty of workmanlike quality in the construction of plaintiff's house.

Plaintiff's evidence tended to show: In December, 1978, the parties executed a contract in which defendant agreed to build a house for plaintiff at a cost of $50,625. Construction of the house was completed sometime before 7 February 1979, when the closing occurred. Shortly after plaintiff moved in on 9 February 1979, she began noticing structural problems with the house, including cracks in various walls, doors and in the front porch, buckling of various walls, gaps between the brick and the windows and doors, holes in the walls of the crawl space under the house and loose wires under the house. Plaintiff also became aware that the floor was sinking and that the siding, chimney and doors were pulling apart from the main structure of the house.

Two expert witnesses testified for plaintiff concerning problems with the house. Howard Taylor, Jr., qualified as an expert in building residential structures, testified that he inspected plaintiff's house in October, 1980, and found many structural problems, the most major one being the settling of the house. He testified that the construction of plaintiff's house did not meet the standards of workmanlike quality prevailing in Cabarrus County in December, 1978 and January, 1979. In order to remedy the structural and settling problems, Taylor stated that he would probably need to tear down the house to the footing at a cost of at least $35,000. James Jones, Jr., also qualified as an expert in the field of residential construction, testified that he inspected plaintiff's house in June, 1980 and found extensive structural problems. In his opinion, an increased amount of settlement in one particular area of the house was causing the interior and exterior damage. According to Jones, the construction of plaintiff's home did not meet the standards of workmanlike quality prevailing in the area in December, 1978 and January, 1979. At the time of his inspec-

tion, Jones had estimated that repair of the visible damage would cost at least $28,000. At the time of trial, however, he testified that determining the extent of the damage would require stripping the house down to its frame and foundation at a cost of between $50,000 and $60,000.

Defendant's evidence tended to show: Charles Ervin, the Cabarrus County Inspection Department Supervisor, testified that the construction of plaintiff's house was of sufficient quality to pass inspections in December, 1978 and in January, 1979. He testified that the standard of workmanship exceeded the minimum building code requirements for Cabarrus County.

Defendant testified that plaintiff did not complain until after the closing and that he returned to the house several times to satisfy her various complaints. He offered on one occasion to purchase the house from plaintiff, but plaintiff refused telling him that except for a few minor problems, she was satisfied with the house. He testified that he had constructed other houses in the area in a manner similar to the way he constructed plaintiff's. Before beginning construction, he testified that he checked for soft places in the ground but did not find any.

The jury found that defendant had breached an implied warranty of workmanlike quality and that plaintiff suffered damages, measured by the amount required to bring the property into compliance with the implied warranty, in the amount of $35,000.

Grant & Hastings, by Randell F. Hastings, for plaintiff appellee.

Williams, Boger, Grady, Davis & Tuttle, by John R. Boger, Jr., for defendant appellant.

VAUGHN, Chief Judge.

[1] At trial, plaintiff was allowed to give her opinion as to the reasonable fair market value of the house on the date of purchase. Defendant first contends that the trial court erred in admitting this testimony since it affirmatively appeared that plaintiff did not know the fair market value. We find no error.

Generally, the owner is considered competent to testify to the fair market value of his property, even if his knowledge

would not qualify him as a witness were he not the owner. The only recognized exception to the general rule is when it affirmatively appears that the owner does not know the fair market value. *Highway Comm. v. Helderman*, 285 N.C. 645, 207 S.E. 2d 720 (1974). In this case, there was no evidence showing a lack of such knowledge. On the contrary, the record shows that plaintiff, who had traveled to Charlotte on a house-hunting trip and had looked at houses in the Tay-More subdivision where she purchased her lot, had the requisite knowledge qualifying her testimony.

[2] Defendant's next two contentions concern the testimony of plaintiff's two expert witnesses, Howard Taylor, Jr. and James Jones, Jr., as to the quality of workmanship in and the damage resulting from the construction of plaintiff's house. Defendant first contends that Taylor's testimony was inadmissible since Taylor himself admitted that he did not know what caused the damage. We find no merit in this contention.

Ordinarily, opinion testimony of an expert witness is admissible if there is evidence that the witness is better qualified than the jury to form such opinion. *Maloney v. Hospital Systems*, 45 N.C. App. 172, 262 S.E. 2d 680, *review denied*, 300 N.C. 375, 267 S.E. 2d 676 (1980); *Stone v. Homes, Inc.*, 37 N.C. App. 97, 245 S.E. 2d 801, *review denied*, 295 N.C. 653, 248 S.E. 2d 257 (1978). Mr. Taylor, who built most of the houses in plaintiff's subdivision and who was qualified at trial as an expert in the building of residential structures, was qualified to render an opinion as to the quality of workmanship and the amount of damage. His lack of knowledge regarding the cause of the damage was irrelevant since he did not testify as to causal factors.

[3] Defendant next contends that the trial court erred in allowing James Jones, Jr. to testify as an expert witness in the field of residential construction. We find no error.

The trial court has discretion to determine whether a witness has qualified as an expert. *Maloney, supra.* We find no abuse of discretion in the trial court determination that Jones, who had been involved in building more than 200 residences, including eight to twelve in plaintiff's subdivision, was an expert, better qualified than the jury to form an opinion as to the quality of workmanship and damage resulting from the construction of

plaintiff's house. That Jones was not a licensed contractor does not render his opinion testimony inadmissible. *See id.*

[4] At the close of plaintiff's evidence, defendant moved for a directed verdict on the grounds that plaintiff failed to establish defendant's breach of an implied warranty of workmanlike quality. Defendant now contends that the trial court's denial of his motion constituted prejudicial error. We disagree.

It is the duty of every contractor or builder to perform in a proper and workmanlike manner. The law recognizes an implied warranty that the contractor or builder will use the customary standard of skill and care. *Hartley v. Ballou*, 286 N.C. 51, 209 S.E. 2d 776 (1974). Upon review of the record in this case, we find plenary evidence supporting plaintiff's claim of breach of an implied warranty. Plaintiff and two expert witnesses testified to the various structural defects rendering the quality of construction of plaintiff's house below the standard prevailing in the area. The question on a directed verdict is whether the evidence, considered in the light most favorable to plaintiff, is sufficient for submission to a jury. *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980). We answer this question in the affirmative; the trial judge properly submitted plaintiff's case to the jury.

[5] Defendant's next contention concerns the standard used to measure damages caused by defendant's breach. Defendant cites error in the trial court instruction to the jury to measure plaintiff's damages by "the amount required to bring the subject property into compliance with the implied warranty." We find no error.

The purpose of awarding money damages is to ensure the injured party of receiving what he or she contracted for or its equivalent. *Leggette v. Pittman*, 268 N.C. 292, 150 S.E. 2d 420 (1966); *Robbins v. Trading Post, Inc.*, 251 N.C. 663, 111 S.E. 2d 884 (1960). Our courts recognize two methods of measuring damages in construction contract cases, both of which are intended to put the injured party in as good a position as if the contract had been fully performed. The first method, the one used by the trial court in this case, awards the injured party the cost of repair necessary to make the building conform to the contract specifications. The second method awards the injured party the difference in value between the building contracted for and the building actually

received. *See Leggette, supra; Robbins, supra; LaGasse v. Gardner*, 60 N.C. App. 165, 298 S.E. 2d 393 (1982).

Our courts have adhered to the general rule that the cost of repair is the proper measure of damages unless repair would require that a substantial portion of the work completed be destroyed. In such case, the diminution in value method may be the better measure of a party's damages. *See Leggette, supra. Robbins, supra; Board of Education v. Construction Corp.*, 64 N.C. App. 158, 306 S.E. 2d 557 (1983), *review denied*, 310 N.C. 152, 311 S.E. 2d 290 (1984); *LaGasse, supra; Coley v. Eudy*, 51 N.C. App. 310, 276 S.E. 2d 462 (1981).

The policy underlying this general rule recognizes the need to avoid economic waste and undue hardship to the defendant contractor when, although the building substantially conforms to the contract specifications, a minor defect exists that does not substantially lower its value. *See D. Dobbs*, Remedies, § 12.21 (1973); 5 A. Corbin, Contracts § 1089 (1964); *see also Blecick v. School District No. 18 of Cochise County*, 2 Ariz. App. 115, 406 P. 2d 750 (1965) (absent proof that economic waste would result from remedying defects, a builder is liable for the cost of making a structure conform to the contract). If, for example, a minor defect could be repaired only at a high cost disproportionate to the minor loss value, then the diminution in value method is the better measure of damages. *See* Restatement (Second) of Contracts § 348 (1979); *D. Dobbs, supra*; 5 *A. Corbin, supra.* A damage award based on the diminution in value in a case involving substantial performance by the defendant also assures that the plaintiff will not be unjustly enriched by receiving an award far exceeding the probable loss in value. A good illustration of a situation warranting the diminution in value method of measuring damages is found in *Jacob & Youngs v. Kent*, 230 N.Y. 239, 129 N.E. 889, *re-argument denied*, 230 N.Y. 656, 130 N.E. 933 (Ct. App. 1921), where a plumber, instructed to use a certain type of plumbing supplies in the construction of a house, used a different type of equal quality. Remedying the defect would have required tearing down the house. Judge Cardozo held, in such case, that the diminution in value method was the better measure of damages.

While the diminution in value method can avoid economic waste, when the cost of repair does not involve an imprudent ex-

pense, the cost of repair method may best ensure the injured party of receiving the benefit of his or her bargain, even if repair would involve destroying work already completed. When defects or omissions in construction are so major that the building does not substantially conform to the contract, then the decreased value of the building constructed justifies the high cost of repair. *See D. Dobbs, supra;* 5 *A. Corbin, supra;* Restatement (Second) of Contracts, *supra.*

The Restatement (Second) of Contracts, offers the following illustration of a situation warranting the cost method of measuring damages:

> A contracts to build a house for B for $100,000. When it is completed, the foundations crack, leaving part of the building in a dangerous condition. To make it safe would require tearing down some of the walls and strengthening the foundation at a cost of $30,000 and would increase the market value of the house by $20,000. B's damages include the $30,000 cost to remedy the defects.

Id. at § 348, comment c, illustration 3.

The example in the Restatement is markedly similar to the situation in this case: Plaintiff and her two expert witnesses testified to numerous structural defects in the construction of the house, including cracks in the walls, door and in the front porch; gaps between the brick and the windows and doors; ill-fitting moldings; and sinking of the floor due to the settling of the house. After hearing estimates from both expert witnesses that repairing the structural problems would involve stripping the house to its foundation at a cost ranging anywhere between $28,000 and $60,000, the jury awarded plaintiff damages of $35,000.

We do not find the cost of repair awarded plaintiff to be disproportionately high as compared to the loss in value without such repair. Plaintiff testified that she entered into a contract for a house worth around $51,000 and received a house, that in her opinion, was worth only around $20,000. The record shows that defendant did not substantially perform his part of the bargain. Awarding plaintiff the cost of repair in this case does not involve economic waste and best ensures that plaintiff will be in as good

a position as she would have been had the contract been fully performed.

Defendant lastly contends that the trial court erred in denying his motion for judgment notwithstanding the verdict. Because there was plenary evidence supporting the jury verdict, we find no error.

No error.

Judges BRASWELL and EAGLES concur.

CANDIS L. HORD v. JAMES ANTHONY ATKINSON, AND WOL KIM ATKINSON

No. 838SC679

(Filed 15 May 1984)

1. **Automobiles and Other Vehicles § 43— allegation of negligence in respects not set forth in complaint**

Plaintiff's allegation that defendant "was negligent in other respects not herein set forth" availed plaintiff nothing.

2. **Automobiles and Other Vehicles § 52— speed competition on highway—insufficient evidence to require instruction**

In a passenger's action to recover for injuries received in an automobile accident, the evidence did not require the trial court to charge on willful speed competition in violation of G.S. 20-141.3(b) where it tended to show that defendant's car was being chased by a car driven by plaintiff's former boyfriend, and that defendant was fleeing because he was afraid for the safety of plaintiff and himself, but that there was no evidence that defendant and plaintiff's boyfriend arranged to race one another for the set purpose of determining whose car was faster.

3. **Automobiles and Other Vehicles § 53— failure to yield to overtaking vehicle—insufficient evidence**

The trial court did not err in failing to charge the jury on defendant's failure to yield to an overtaking vehicle in violation of G.S. 20-151 where the evidence showed that defendant's vehicle was being chased by a vehicle driven by plaintiff passenger's former boyfriend, and there was no evidence that the boyfriend ever attempted to pass or overtake defendant once the chase had begun.

4. **Rules of Civil Procedure § 51; Trial § 38.1— refusal to give orally requested instruction**

The trial court did not err in denying plaintiff's request for a special instruction that the jury could consider certain physical evidence in determining whether defendant was negligently driving at an excessive rate of speed since such an instruction related to a subordinate feature of the case, and since plaintiff failed to submit a proposed instruction and failed to submit her request in writing as required by G.S. 1A-1, Rule 51(b).

5. **Automobiles and Other Vehicles § 87.5— instruction on insulating negligence— sufficient evidence**

In a passenger's action to recover for injuries received in an automobile accident, the trial court properly instructed the jury on insulating negligence where there was evidence tending to show that a vehicle driven by plaintiff's former boyfriend had been chasing the vehicle driven by defendant and occupied by plaintiff, and that defendant had slowed down to the speed limit of 35 m.p.h. and was about to make a turn when the boyfriend's car hit his vehicle from the rear.

6. **Trial § 11.3— right to opening and closing jury arguments**

Where defendant was called by plaintiff as an adverse witness but offered no evidence of his own, defendant had the right to make the opening and closing jury arguments. Rule 10 of the General Rules of Practice for the Superior and District Courts.

APPEAL by plaintiff from *Winberry, Judge.* Judgment entered 1 February 1983 in Superior Court, WAYNE County. Heard in the Court of Appeals 11 April 1984.

Duke and Brown by John E. Duke; and Hulse and Hulse by Herbert B. Hulse for plaintiff appellant.

Taylor, Warren, Kerr & Walker by Robert D. Walker, Jr. and David E. Hollowell for defendant appellees.

BRASWELL, Judge.

The allegations are that the plaintiff, a passenger in the Atkinson automobile, was seriously injured by the negligent operation of the vehicle as it left the road and struck a telephone pole and two houses. The plaintiff sued James Anthony Atkinson (referred to henceforth as the defendant), the driver of the automobile, and Wol Kim Atkinson, the owner of the vehicle. The jury's verdict decided the issue of negligence in favor of the defendants. The plaintiff appeals on the grounds that the trial court erred by: (1) refusing to charge on willful speed competition,

on failure to yield to an overtaking vehicle, and on the jury's right to consider the physical evidence; (2) charging on intervening and insulating negligence; (3) granting the defendant the opening and closing argument in their final jury arguments; and (4) denying plaintiff's motion for a new trial.

The plaintiff's evidence tended to show that on 10 July 1981 around 2:00 a.m. the plaintiff, through a friend, asked the defendant for a ride home from the Peacock's Lounge. As they were driving towards town, a car with its bright lights burning drove behind them, then passed the defendant's car. This car pulled over onto the right shoulder of the road and a man who the plaintiff identified as Earl Cole got out of his car, reached into his pocket, and began approaching the defendant's car. When the defendant did not also stop, Cole jumped back into his car and resumed following the defendant. As the defendant speeded up, Cole speeded up. Both cars were exceeding the posted speed limit of 35 miles per hour. The plaintiff testified that the defendant stated that he had a 440 engine and he knew that Earl Cole could not outrun him. When the defendant failed to turn down a street to the plaintiff's house, she insisted that he slow down and let her out of the car if he was not going to take her home. The defendant did neither, and continued down the street where both cars ran a red light. When the defendant started to make a right turn onto a street in the area of the plaintiff's house, a collision occurred. Mr. Cole's vehicle had been traveling one to one-and-one-half car lengths behind the defendant's car. As the defendant made the turn, the front end of Mr. Cole's car crashed into the rear of the defendant's car. The defendant's car thereafter hit a utility pole and two houses. The plaintiff was seriously injured, requiring hospitalization.

The defendant did not offer any evidence of his own, but was able to tell his version of the incident when called as an adverse witness by the plaintiff. The defendant testified that the plaintiff told him that the man following them was Earl Cole, her old boyfriend, and that he carried a pistol. He further stated that Mr. Cole passed him, pulled over, got out of his car, and reached into his pocket. On observing these things, and on hearing of Cole's relationship with the plaintiff, Atkinson panicked, quickly turned his car around, and drove off to avoid any trouble. Cole then chased Atkinson, who stated he was afraid for the plaintiff's and

his own safety. Cole stayed one-and-one-half car lengths behind the defendant. Just before the collision Atkinson testified that he slowed down and was in the process of making a right-hand turn when Cole ran into the back of his vehicle, causing the accident.

The first four of plaintiff's assignments of error are concerned with what the trial judge did and did not include in his charge to the jury. G.S. 1A-1, Rule 51, requires a trial judge in his charge to "declare and explain the law arising on the evidence given in the case." This rule imposes a positive duty on the trial judge to charge on the substantial features of the case as the evidence dictates. *Clay v. Garner*, 16 N.C. App. 510, 192 S.E. 2d 672 (1972).

[1] At the close of all the evidence the judge conducted a recorded charge conference in the absence of the jury. The judge asked plaintiff's counsel to specify the ways in which they contended the defendant was negligent. During this discussion plaintiff's counsel mentioned for the first time the act of willful speed competition to which the judge replied that he did not think there was sufficient evidence for its inclusion in his charge. Also, the judge stated that he did not think there was sufficient evidence of failing to yield to an overtaking vehicle. We note that the complaint fails to list as a specific act of negligence a violation of either one of these motor vehicle rules of the road. After listing five specific acts of negligence in the complaint, the plaintiff then added: "He was negligent in other respects not herein set forth." This conclusionary allegation avails the plaintiff nothing, and is a useless, although sometimes engaged in, practice. We do not sanction its use. We repeat what this court said in *Ormond v. Crampton*, 16 N.C. App. 88, 93, 191 S.E. 2d 405, 409, *cert. denied*, 282 N.C. 304, 192 S.E. 2d 194 (1972):

> North Carolina Illustrative Forms 3 and 4, Rule 84, illustrate the sufficient form of a complaint for negligence; they contain much more than the corresponding federal forms, by requiring the pleader to allege the specific acts which constitute the defendant's negligence. This North Carolina requirement was the result of compromise between the drafting committee and practicing lawyers on the General Statutes Commission who wanted more specificity, especially in automobile cases. 5 W.F. Intra. L. Rev. 1 (1969). See also North Carolina

> Rules of Civil Procedure, § 1A-1, Rule 8, Comment.—Section (a) 3: "By specifically requiring a degree of particularity the Commission sought to put at rest any notion that the mere assertion of a grievance will be sufficient under these rules. . . ."

We also recognize the rule that under certain circumstances a pleading may be deemed amended by implication when evidence outside the scope of the pleading has been received without objection and which evidence thus constitutes a substantial feature of a case. In that situation no formal amendment of a pleading is required. *See Roberts v. Memorial Park*, 281 N.C. 48, 58, 187 S.E. 2d 721, 726 (1972). But here the evidence is insufficient to establish violations of G.S. 20-141.3(b) or G.S. 20-151. Also, there was an objection to the request at the charge conference by opposing counsel, and there was no formal motion to amend the complaint. We further explain our position below.

[2] The plaintiff first argues that the trial court erred by failing to charge the jury on the issue of whether or not the defendant engaged in a willful speed competition. G.S. 20-141.3(b) declares it "unlawful for any person to operate a motor vehicle on a street or highway *willfully* in speed *competition* with another motor vehicle." (Emphasis added.) " 'An act is done wilfully when it is done purposely and deliberately in violation of law [citation omitted], or when it is done knowingly and of set purpose. . . .' " *Harrington v. Collins*, 40 N.C. App. 530, 533, 253 S.E. 2d 288, 290, *aff'd*, 298 N.C. 535, 259 S.E. 2d 275 (1979), *quoting Brewer v. Harris*, 279 N.C. 288, 296-97, 182 S.E. 2d 345, 350 (1971). Under this definition there was no evidence that the defendant purposely and deliberately engaged in a race with Cole. There was no evidence even from the plaintiff that the defendant and Cole, pursuant to a common plan or in a joint venture, arranged to race one another for the set purpose of determining whose car was faster. *See Mason v. Gillikin*, 256 N.C. 527, 124 S.E. 2d 537 (1962). Also, Atkinson's remark to the plaintiff that Cole could not outrun his car must be interpreted in the light in which it was uttered—not as an effort to see which car was faster in a competitive sense, but to indicate that he could elude Cole for his own and his passenger's safety. Due to the lack of evidence, we hold the trial court correctly refused to charge the jury on this statute.

[3] Secondly, the plaintiff asserts that the trial judge should have charged the jury on the defendant's failure to yield to an overtaking vehicle in violation of G.S. 20-151. From our review of the record, there was no evidence presented that indicates that Cole ever attempted to pass or to overtake the defendant once the chase had begun. Cole, during his testimony, admitted that he was following the defendant, but never stated that he wanted to pass the defendant. Even if, as the plaintiff contends, the defendant drove longer than was required in the left-hand lane after rounding two parked vehicles, this fact is not evidence that the defendant failed to yield to a passing vehicle. Thus, we hold the trial court properly refused to instruct the jury on this issue.

[4] The plaintiff further contends that the trial judge erred "in failing to charge on the jury's right to consider the physical evidence," such as "the destruction of the power pole and the house that was struck, [and the fact that the defendant's car] travelled across the lady's yard, hit a bush, [and] ran into a concrete wall." The trial court did generally recite this evidence in his charge to the jury, but refused to specifically instruct that the jury could use this evidence in determining whether the defendant was negligently driving at an excessive rate of speed. The trial judge denied the plaintiff's request for such a special instruction upon learning that the plaintiff had failed to submit a proposed instruction and had failed to submit her request to him in writing as required by G.S. 1A-1, Rule 51(b). We agree with the trial court that the plaintiff's request went beyond the trial judge's general duty of explaining the law arising on the evidence with respect to the substantial features of the case. On this subordinate feature, because the plaintiff did not comply with the requirements of Rule 51(b), we hold the trial judge was properly within his discretion in denying her oral request for this special instruction.

[5] The final assignment of error dealing with the trial judge's charge to the jury asserts that the trial court erred in charging the jury on insulating negligence. Insulating or intervening negligence arises in a situation where two motorists have committed negligent acts on the highway resulting in an automobile accident, but the negligence of one of the tortfeasors is of such a nature so as to exclude the negligence of the other as a proximate cause of the accident. The second tortfeasor's negligence is said to

have intervened between the negligence of the first and the resulting accident. 2 Strong's N.C. Index 3d *Automobiles* § 87.4 (1976). *See Moore v. Archie*, 31 N.C. App. 209, 228 S.E. 2d 778 (1976). To insulate the negligence of the first driver, the intervening negligence of the second driver must break any causal connection between the first driver's negligence (the defendant in this case) and the injury to the plaintiff. *Thomas v. Deloatch*, 45 N.C. App. 322, 263 S.E. 2d 615, *disc. rev. denied*, 300 N.C. 379, 267 S.E. 2d 685 (1980). A review of the record indicates that there was sufficient evidence tending to show a break in the causal connection between the defendant's negligent conduct and the plaintiff's injuries to justify an instruction on insulating negligence. During cross-examination, the defendant testified that Earl Cole had been chasing him, staying only one-and-one-half car lengths behind him, for a considerable distance. The defendant further testified that he had slowed down to the speed limit of 35 miles per hour and was about to make a turn when Cole's car hit him. Cole also testified that after swerving around two parked cars he was blinded temporarily and that "[t]he next thing I seen was his brake lights . . . and I . . . hit the . . . right back end of his bumper." On this evidence, we hold that the trial court properly included the law of insulating negligence in his charge.

[6] The plaintiff's next assignment of error suggesting that the trial court erred by granting the defendant the right to open and close the final jury arguments is without merit. G.S. 4A—Appendix I(5), Rule 10 of the General Rules of Practice provide that

> In all cases, civil or criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him.

The plaintiff chose to call the defendant as an adverse witness. The defendant was therefore allowed to explain his version of the incident during the plaintiff's evidence without having to offer any evidence of his own. The defendant, having offered no evidence, was entitled to open and close the final arguments to the jury. We hold the trial court committed no error.

The defendant finally assigns as error the denial of his motion for a new trial pursuant to G.S. 1A-1, Rule 59(a)(8). His grounds for this motion are that the trial court incorrectly ruled that the defendant had not offered evidence when called as an

adverse witness and improperly instructed the jury on the law of insulating negligence. A motion for a new trial under Rule 59 is addressed to the trial judge's discretion and may only be reversed on appeal in those cases where an abuse of discretion is clearly shown. *Worthington v. Bynum*, 305 N.C. 478, 484, 290 S.E. 2d 599, 603 (1982). Through the plaintiff's other assignments of error we have reviewed both grounds stated as the basis for the plaintiff's new trial motion and have held that the trial court committed no error with respect to either ground. Since no error has been committed, we hold the trial court did not abuse his discretion in denying the plaintiff's motion for a new trial.

No error.

Chief Judge VAUGHN and Judge EAGLES concur.

GEORGE M. CLELAND v. FRED G. CRUMPLER, JR., HARRELL POWELL, JR., AND G. EDGAR PARKER

No. 8321SC570

(Filed 15 May 1984)

Contracts § 18.1— amended agreement adding limiting clause to earlier partnership agreement—valid contract

In an action in which plaintiff, as a former partner with defendants' law firm, sought an interest in the real estate partnership of the firm after withdrawing from the firm, the trial court properly found that an amended agreement which added a limiting clause vesting an interest in the real estate partnership after five years with the firm was a valid contract.

APPEAL by plaintiff from *Rousseau, Judge.* Judgment entered 30 December 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 4 April 1984.

Clyde C. Randolph, Jr. and David F. Tamer, for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and Stephan R. Futrell, for defendant appellee.

BECTON, Judge.

The controlling question in this case is whether the trial court erred in ruling that an amended agreement which added a limiting clause to an earlier partnership agreement was a valid contract. We find no error and affirm.

I

The trial court sat as the trier of fact in this case and found the following facts. Plaintiff, George M. Cleland, began practicing as a partner with defendants' law firm in January, 1978, after practice as city police attorney and with other firms. Largely due to the efforts of defendant Crumpler, the senior partner, the firm had acquired a new office building to house its offices. Crumpler was the only partner to pay any cash toward the purchase. The partners agreed orally to set up a separate real estate partnership to own and manage the building. Since the firm had experienced problems with employee turnover, Crumpler offered to give the others an interest in the real estate partnership which would vest after five years with the firm. A written agreement was signed in December 1977 by all the partners, including plaintiff. The written agreement was prepared by an associate who had not attended the partnership meeting. The written agreement provided that upon the death, withdrawal or expulsion of one of the partners, his share would be appraised and paid out, *without the mention of a five-year vesting period.* In the following months, the partners discussed the correction of the writing from time to time, without taking action.

On 4 October 1978, after a criminal case in which he was defense counsel had been voluntarily dismissed by the State, plaintiff handed two bills to the arresting officer which the defendant's father had handed to him. These later turned out to be $100 bills. On 8 October 1978, plaintiff and the other partners signed a revised partnership agreement, which contained only one new provision. This required five years' service before payment of any distributive share from the partnership in excess of actual cash contributions (plus ten percent of such contributions). On 9 October 1978 a bondsman informed plaintiff that the district attorney had commenced an investigation of the alleged bribe involving the two bills. Plaintiff withdrew from the firm after consulting with the other members of the firm that day. There-

after, in accordance with the amended agreement, defendants refused to pay plaintiff any share from the real estate partnership.

II

Since the trial court found the facts, its findings are conclusive on appeal if supported by competent evidence. *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E. 2d 189 (1980). Plaintiff excepts only to the finding that Crumpler discussed the five-year rule with the other partners before the first writing was executed. Plaintiff offered no evidence contradicting this finding, and various other members of the partnership testified that such conversations did take place. Defendants also introduced substantial corroborative circumstantial evidence, from a bank loan officer, the remodeler of the building, and a firm secretary. This evidence amply sufficed to support the finding. *Id.* The credibility of defendants' evidence is the real issue plaintiff attempts to present. That issue has been settled by the trial court, however, and we cannot disturb its result. Review of the record as a whole indicates that the trial court's other findings also have evidentiary support and are consequently binding.

III

Thus the only remaining question is whether the trial court's findings support its conclusions of law. The crucial conclusion is that the amended agreement constituted a valid contract. Plaintiff contends that no valid consideration supported the amended agreement and therefore the only valid agreement is the earlier one.

As discussed above, the trial court properly found that the five-year rule was discussed as part of the partnership before signing, and it also found that further discussions took place regarding "correction" of the first writing to reflect the oral agreement. It is well established that courts have equitable power to grant reformation of a contract when the writing does not represent the true agreement between the parties, including situations in which the writing omits stipulated provisions. *Northwestern Mut. Ins. Co. v. Hylton*, 7 N.C. App. 244, 172 S.E. 2d 226, *cert. denied*, 276 N.C. 497, --- S.E. 2d --- (1970) (attachment of wrong rider to policy corrected); *Williams v. Greensboro*

Fire Ins. Co., 209 N.C. 765, 185 S.E. 21 (1936) (allowing reformation for mutual mistake when named insured known to be dead at issuance); *see generally* 13 S. Williston, *The Law of Contracts* §§ 1549- 1549A (3d ed. 1970). The cases deal uniformly with judicial reformation of a single writing, but the same logic compels judicial recognition, upon sufficient evidence, that a second writing corrects mutual mistake(s) of omission in an earlier writing. Therefore, the trial court properly concluded that the amended agreement constituted a valid contract. Under these circumstances, the existence of consideration at the time of the second signing becomes irrelevant.

IV

Plaintiff also takes issue with the trial court's conclusion that defendants did not breach a fiduciary duty to plaintiff. Since the alleged breach involved inducing plaintiff to sign the amended agreement, and since we have already affirmed the trial court's ruling that the amended agreement merely corrected the writing to reflect the true agreement, which predated the alleged breach, we fail to see how any breach of fiduciary duty could have occurred. The same logic applies to plaintiff's allegations of actual fraud. This assignment is therefore overruled, since no fiduciary duty was breached at the time of the oral argument, and the second signing merely memorialized that earlier agreement.

V

We conclude that the findings of fact are supported by the evidence, and they in turn support the conclusions of law. The judgment appealed from is therefore

Affirmed.

Judges WEBB and BRASWELL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 MAY 1984

EDWARDS v. JOHNSON No. 8329DC621	Rutherford (80CVD181)	Affirmed
GREEN v. AETNA CASUALTY & SURETY No. 8323SC910	Wilkes (82CVS976)	Affirmed
IN RE WATKINS v. MILLIKEN No. 8329SC559	Polk (82CVS102)	Affirmed
LYNCH v. HAZELWOOD No. 8320DC816	Moore (83CVD259)	Affirmed
STATE v. ATKINSON No. 838SC759	Wayne (79CRS12690)	Affirmed
STATE v. BRIDGES No. 8310SC1033	Wake (83CRS4461)	No Error
STATE v. CERKONEY No. 8310SC919	Wake (78CRS20614) (78CRS20615)	No Error
STATE v. EXUM No. 838SC983	Wayne (83CRS478) (83CRS3517)	No Error
STATE v. GARY No. 834SC904	Onslow (82CRS18763)	No Error
STATE v. MEADOWS No. 8320SC986	Union (82CRS1940)	No Error
STATE v. RUSSELL No. 839SC1068	Vance (81CRS6061)	No Error
STATE v. SINCLAIR No. 834SC923	Onslow (82CRS17501) (82CRS18185)	No Error
TEACHEY v. TEACHEY No. 835DC942	Pender (83CVS127)	Affirmed
WINFIELD v. PIERCE No. 8315SC1015	Orange (82CVS977)	Affirmed
WOODS v. DIAL No. 8316SC877	Robeson (80SP00344)	Affirmed

(Continued on Page 788.)

STATE OF NORTH CAROLINA v. DAVID H. ROGERS

No. 8310SC825

(Filed 15 May 1984)

1. **Constitutional Law § 28— unconstitutional selective prosecution—necessity for intentional discrimination**

Selectivity in prosecution does not constitute a denial of equal protection unless there is shown to be present in the decision to prosecute an element of intentional or purposeful discrimination. Further, such discriminatory purpose is not presumed; rather, the good faith of the officers is presumed and the burden is upon the complainant to show the intentional or purposeful discriminations upon which he relies.

2. **Constitutional Law § 28— unconstitutional selective prosecution—manner of obtaining indictment irrelevant**

Allegations relating to the manner in which the indictment against defendant was obtained rather than to the decision to seek an indictment for the conduct at issue are not germane to the issue of unconstitutional selective prosecution.

3. **Constitutional Law § 28— unconstitutional selective prosecution—failure to prosecute alleged aiders and abettors**

Defendant attorney was not subjected to unconstitutional selective prosecution for standing bond for a person not a member of his family because a magistrate and a police officer who failed to prevent him from signing the bond were not prosecuted as aiders and abettors in the offense.

4. **Constitutional Law § 28— unconstitutional selective prosecution—failure of proof**

Defendant attorney failed to show that he was subjected to unconstitutional selective prosecution for standing bond for a person not a member of his family in that he failed to show that he was singled out for prosecution or that his selection for prosecution was invidious where the trial court found that only one other attorney in the county had actually become a surety on a bail bond during the relevant time period and that the actions of such attorney were not known to the District Attorney's Office; defendant's contention that he was prosecuted because of prosecutorial hostility engendered by his representation of clients in cases against law officers and officials and because of particular acrimonious dealings he had had with the District Attorney's Office reflected mainly defendant's own subjective beliefs and was not supported by the facts of record; any possible bad faith on the part of the District Attorney's Office was insulated when the case was referred to and the ultimate decision to prosecute was made by an independent special prosecutor in the Special Prosecutions Division of the Attorney General's Office; and the trial court found that the Special Prosecutor did not act in bad faith or for an impermissible motive.

5. Constitutional Law § 28— failure to show prosecutorial vindictiveness

Defendant attorney was not subjected to impermissible prosecutorial vindictiveness because the prosecutor obtained a superseding indictment containing two counts relating to intimidating and interfering with witnesses after one count in the original indictment relating thereto had been dismissed for duplicity upon motion by defendant since (1) defendant was not subjected to additional charges and increased punishment under the superseding indictment because the trial court ruled that the two counts would be considered only as one offense and the superseding indictment contained no new or additional charge of a criminal offense which was not originally alleged, and (2) even if defendant was subjected to additional charges and increased punishment under the superseding indictment, he was not entitled to a presumption of prosecutorial vindictiveness and failed to show actual vindictiveness by the prosecutor.

6. Arrest and Bail § 11— attorney as surety on bail bond—ignorance of law no defense

Ignorance of the law is not a valid defense to a charge against an attorney for becoming a surety on a bail bond for a person who is not a member of his immediate family in violation of G.S. 15A-541.

7. Arrest and Bail § 11— attorney as surety on bail bond—intent

The mental state required under G.S. 15A-541 is nothing more than the general intent to do the proscribed act, that is, for the attorney to intend or knowingly to become surety on a bail bond for any person other than a member of the attorney's immediate family.

8. Arrest and Bail § 11— attorney as improper surety on bail bond—sufficiency of evidence

The State's evidence was sufficient to support conviction of defendant attorney for becoming a surety on a bail bond for a criminal defendant who was not a member of his immediate family in violation of G.S. 15A-541 where it tended to show that, after being informed by a magistrate that a statute prohibited attorneys from signing bail bonds for defendants, defendant nevertheless signed a bail bond for a criminal defendant to whom he was not related.

9. Obstructing Justice § 1— interfering with State's witness—sufficiency of evidence

The State's evidence was sufficient to support conviction of defendant attorney for attempting to interfere with a State's witness in violation of G.S. 14-226 where it tended to show that defendant represented a client charged with driving under the influence and hit and run; defendant told the prosecutor that the case would have to be dismissed if the prosecuting witness did not arrive in court; when the prosecuting witness did arrive in court, defendant muttered an obscenity and summoned his client, the prosecuting witness and the arresting officer to a conference room; there defendant and his client reached an agreement with the prosecuting witness that the client would pay for all the damages incurred on the night of the accident if the witness would agree not to press charges; defendant then told the prosecuting witness that

he could leave the courthouse; and the prosecuting witness had second thoughts about his agreement and returned to the courtroom.

10. Attorneys at Law § 12; Criminal Law § 142.3— crimes by attorney—revocation of license as condition of probation

The revocation of defendant attorney's license to practice law for eighteen months, with the provision that the period of revocation could be reduced to as little as six months if defendant satisfied the State Bar that he has the moral qualifications and competency and learning in the law demanded of attorneys and that his physical and mental condition is such that it does not interfere with his handling of cases and advising clients, was reasonably related to defendant's rehabilitation and was a proper condition of defendant's probation for the crimes of improperly posting bail bond for a person who was not a member of his immediate family and for attempting to interfere with a State's witness. G.S. 15A-1343(b)(17).

APPEAL by defendant from *Brannon, Judge*. Judgment entered 7 March 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 13 February 1984.

Defendant, David H. Rogers, is an attorney licensed to practice law in North Carolina. Defendant was tried pursuant to a four-count indictment brought as a superseding indictment. Originally, defendant was indicted by the Wake County grand jury on 25 October 1982 in a three count indictment based upon the same incident and occurrences as the superseding indictment. The three original counts charged the defendant, in substance, as follows: Count I, standing bail bond for a person not a member of the defendant's immediate family, in violation of G.S. 15A-541; Count II, improper solicitation of legal business by an attorney, in violation of G.S. 84-38; and Count III, attempting to, and intimidating and interfering with a State's witness who was under subpoena to testify in a named case, in violation of G.S. 14-226.

On 14 February 1983, defendant successfully moved to quash and dismiss the third count of the original indictment for failure to state an offense under the provisions of G.S. 15A-924. The third count of the original indictment was then dismissed by the presiding judge. Thereafter, the State, through its Special Prosecutor, Associate Attorney General Charles H. Hobgood, returned to the grand jury and obtained a superseding indictment on 15 February 1983. In the superseding indictment, Count I remained the same, Count II was reworded, but still charged soliciting legal business, and Count III was broken down into two counts. New

Count III charged intimidating and attempting to intimidate a State's witness who was under subpoena to testify in a named case, in violation of G.S. 14-226. New Count IV charged interfering and attempting to interfere with a State's witness and prevent him from testifying by offering to have his damages paid, in violation of G.S. 14-226. The State then dismissed the original indictment.

Following four days of pretrial motion hearings, defendant went to trial on the four-count superseding indictment before the Wake County Superior Court and jury. The court ruled, *inter alia*, that Counts III and IV would be considered together as a single count and instructed the jury accordingly. Defendant was convicted for Count I, standing bond for a person not a member of his immediate family, and for Count IV, attempting to interfere with a State's witness.

Judgment was entered on those verdicts, and the defendant was sentenced to a term of imprisonment of six months on Count I and of two years on Count IV. These sentences were to run concurrently and were suspended for five years, with defendant placed on unsupervised probation for five years. Among the terms and conditions of probation was the requirement that defendant surrender his law license to the North Carolina State Bar and cease the practice of law for a period not to exceed 18 months, to be shortened to as little as six months if he satisfies the State Bar with regard, *inter alia*, to his moral qualifications, competency and legal knowledge. In addition, the court entered a civil order imposing the identical discipline upon defendant under the court's summary jurisdiction to discipline attorneys. Defendant appeals from both the criminal judgment and sentence and the civil order.

Attorney General Edmisten, by Associate Attorney General Charles H. Hobgood, for the State.

Wayne Eads, for defendant appellant.

JOHNSON, Judge.

Defendant presents 15 questions for review broadly concerning the issues of (1) whether the indictment should have been quashed and the charges dismissed on the grounds that the prose-

cution against him was based on unconstitutional selective prosecution; (2) whether the superseding indictment should have been quashed and the charges dismissed on the ground of unconstitutional vindictive prosecution; (3) the sufficiency of the evidence to withstand defendant's motion to dismiss; and (4) whether the court abused its discretion in imposing a probationary judgment temporarily suspending defendant's license to practice law for his criminal offenses and also in entering a civil order imposing the identical discipline under the court's inherent authority to discipline attorneys.

The defendant was initially indicted for violating several criminal statutes prohibiting attorneys for engaging in certain conduct and for obstructing justice by intimidating or interfering with a State's witness. All of the alleged violations arose out of defendant's initial connection with and representation of Paula Ann Gately, who was charged with driving under the influence and with hit and run. We will address defendant's arguments in order of convenience and begin with the factual background leading up to the decision to prosecute defendant.

I

The evidence at defendant's trial tended to show the following: On 7 July 1982, between 2:00 and 2:30 a.m., the defendant, a licensed attorney, was in the Wake County Magistrate's Office. The magistrate on duty that night was Jerry Ray. Magistrate Ray testified that he had seen Attorney Rogers at the back of the courthouse late at night on other occasions.

Earlier that same night, Paula Ann Gately had gone to Darryl's Restaurant on Glenwood Avenue in Raleigh. There she drank a number of alcoholic beverages and, according to the arresting officer, became "very intoxicated." Ms. Gately remembered leaving Darryl's and pulling out onto Glenwood Avenue, but little that occurred thereafter.

At the same time that Gately pulled out onto Glenwood Avenue, a man named Bobby McMillan was driving on Glenwood Avenue, near Darryl's. Gately drove through a flashing red light, pulled out in front of McMillan and the two cars collided. Gately drove away with McMillan driving after her. Eventually, he caught up to talk to her, but she drove off again. McMillan

reported the accident to the Raleigh Police Department and Officer Mizelle arrived to investigate. Eventually, Officer Mizelle located Gately's parked car, found Gately herself, placed her under arrest and took her to the Magistrate's Office.

Magistrate Ray charged Gately with driving under the influence and with hit and run and placed her under a $100 secured bond. Rogers, who had been listening, then discussed something with Gately outside the office, and returned to notify Magistrate Ray that he was going to post Gately's bond. Magistrate Ray informed him that "the statute, [G.S.] 85C-22[1] states that attorneys are not allowed to sign bail bonds for defendants." Rogers said that he had to go and get the hundred dollars and, after a second warning from Magistrate Ray, said that he was "loaning" Gately the money. When Rogers returned, Magistrate Ray again informed him of the statute. In the meantime, the magistrate had taken out the General Statute book so that Rogers could read it if he wanted to. Without doing so, Rogers told Magistrate Ray that he was "aware" of the statute and again informed Ray that he was going to post the bond, that he was not representing Gately in court and was just loaning her the money. Rogers then paid the $100 and signed the bond as surety. He was not related to Gately.

Rogers and Gately left the office together and he drove her home. In his car, Rogers gave Gately his business card and she gave him her court papers; each considered Rogers to be her attorney. The next day, Gately telephoned McMillan. She offered to pay him $150 for his damages. McMillan informed Gately that her leaving the accident had been dangerous because he'd been carrying a gun that night. McMillan had left it in the holster and did not point it at her. According to McMillan, Gately did not remember the events of that evening. Gately then sent McMillan a check, but stopped payment upon Rogers' advice.

Prior to the trial of Gately's cases, Rogers requested that he be taken off Gately's bond, telling the Clerk's Administrative

1. G.S. 85C-22 states, in pertinent part, that, "No . . . attorney . . . may in any case become surety on a bail bond for any person . . . Provided, however, nothing herein shall prohibit any person above designated from being surety upon the bond of his or her spouse, parent, brother, sister, child or descendant." G.S. 15A-541(a) contains a substantially identical prohibition and subsection (b) provides that violation of that section is a misdemeanor.

Assistant that he had done it as "a friend" and was not going to represent Gately. On 19 August 1982, Gately's cases were scheduled for trial in Wake County District Court. Gately testified that she went to court with Rogers because he was her attorney. McMillan had been subpoenaed as a witness for the State, but was late in arriving. Officer Mizelle was present and told Rogers that he hadn't seen McMillan. Rogers said ". . . if he doesn't show up, we'll have the case dismissed . . ."

When Assistant District Attorney Mary Dombalis called Gately's cases, Rogers stood up and said he represented Gately and that the plea was not guilty. The Assistant District Attorney testified that a few minutes later Rogers said to her that her witness "was not there and if the witness did not show up I'd have to dismiss the case." Eventually, McMillan arrived and when he answered to the call of his name, Rogers muttered "shit" and motioned for Gately to meet him in the attorneys' conference room.

Rogers also asked Officer Mizelle to come into the conference room. Present at this meeting were Rogers, McMillan, Gately and Officer Mizelle, but not the Assistant District Attorney. Rogers discussed the accident with McMillan. He told McMillan that Gately was "willing to take care of" his damages and then asked McMillan whether he'd been carrying a gun that night. When McMillan told him, "yeah," Rogers said something to the effect that "we could bring charges on you for having that gun." Further, that McMillan was the only one actually to see Gately driving drunk and that he would have a good chance of getting Gately's cases thrown out if McMillan was not a witness. McMillan testified that he "got the understanding" that if he did not press charges and did not appear as a witness his damages would be paid. Also, that if McMillan brought Rogers his bill, Rogers and Gately would not bring any charges against McMillan about the gun. Rogers indicated that it was his opinion that the case would probably be dropped, and that McMillan would not be needed. They shook hands and Rogers told McMillan, "you can hit the door."

On the way out, McMillan had second thoughts and informed the witness coordinator that Rogers had told him to leave. McMillan was told to return to the courtroom. Thereafter, the

Assistant District Attorney was informed of the conference and of the agreement between McMillan and Rogers. Rogers had not spoken to her about Gately's cases since the calendar call, although he had the opportunity to do so. She, therefore, requested the court that Gately's cases be continued. Rogers stood up and insisted that he was ready for trial. When the judge asked Rogers if he had dismissed the State's witness, Rogers initially attempted to discuss the merits of the case, but eventually admitted that he had told the witness to leave.

That day or the next, Rogers contacted Gately and advised her to take out a warrant against McMillan for assault by pointing a gun. Although Gately had told Rogers that she did not remember the incident, she agreed and Rogers accompanied her to the Magistrate's Office. A warrant was taken out against McMillan, with David Rogers listed on the warrant as a witness. McMillan was then charged, taken to the police station, fingerprinted and photographed. A week later, Gately attempted to have the charges dropped because she thought it was vindictive and because she did not actually remember the event occurring.

Thereafter, Attorney Rogers was charged with illegally becoming a surety, soliciting business and obstruction of justice. After the State rested its case, defendant moved to dismiss each count and his motions were denied. The defendant put on evidence and testified on his own behalf. Essentially, defendant pled ignorance of the law at his trial. Defendant testified that he was working late on a case on the night in question and had gone over to the Magistrate's Office in the early morning hours to clarify something. He testified further that when he attempted to act as surety on Gately's bail bond, the magistrate told him: "don't you know that an attorney cannot go bond for his client?," but that Gately was not his client at that point and he wanted to do it as a friend, because he felt sorry for her. His practice was mostly civil, and he was not aware of the statute referred to by the magistrate prior to that time.

As to the events in the conference room on the morning of Gately's trial, Rogers testified that at no time was the payment of McMillan's expenses and damages conditioned on his not prosecuting the hit and run charge. Rather, defendant believed that the conversation was for the purpose of reaching a plea bargain

and settlement of the entire situation, including both the civil and criminal aspects of the Gately-McMillan incidents. Defendant testified further that, in dismissing the State's witness, he had exercised "bad judgment."

After rebuttal evidence for the State, defendant again moved for dismissal of all four counts. These motions were denied and the jury found defendant guilty of standing bond for a person not a member of the defendant's immediate family and attempting to interfere with the witness Bobby McMillan by offering to have money paid if he did not appear and testify.

II

Defendant contends that he made a sufficient showing that he was a victim of unconstitutional selective prosecution to warrant dismissal of the indictment and charges against him. We do not agree.

A

The test for determining the limits of constitutionally permissible selective prosecution was first expressly articulated by the United States Supreme Court in *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed. 2d 446 (1962). In *Oyler*, the petitioner claimed he was discriminated against because he was prosecuted and sentenced as a "habitual offender" as a result of his former Juvenile Court convictions while six other men, sentenced in the same court and subject to prosecution as habitual offenders as a result of three or more adult felony convictions, were not prosecuted as "habitual offenders." The Court first noted that the petitioner had failed to state whether the prosecutor had failed to proceed against the other three-time offenders due to a lack of knowledge of their prior offenses or as a result of a deliberate policy to proceed only in a certain class of cases or against specific persons. Finding that the allegations "set out no more than a failure to prosecute others because of a lack of knowledge" that they were subject to prosecution for the same offense as petitioner, the Court held that petitioner had not been denied equal protection under the Fourteenth Amendment. Continuing, the Court stated:

> Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.

> Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification. Therefore grounds supporting a finding of denial of equal protection were not alleged. *State v. Hicks* [213 Or. 619, 325 P. 2d 794 (1958)]; cf. *Snowden v. Hughes*, 321 U.S. 1, [64 S.Ct. 397, 88 L.Ed. 497] (1944); *Yick Wo v. Hopkins*, 118 U.S. 356, [6 S.Ct. 1064, 30 L.Ed. 220] (1886) (by implication).[2]

368 U.S. at 456, 82 S.Ct. at 506, 7 L.Ed. 2d at 453.

Following *Oyler* and *Yick Wo*, the federal courts have generally recognized a two-part test for discriminatory prosecution similar to that stated in *United States v. Greene*, 697 F. 2d 1229, 1234 (5th Cir.), *cert. denied*, --- U.S. ---, 103 S.Ct. 3542, 77 L.Ed. 2d 1391 (1983).

> To prevail on a selective prosecution challenge, a defendant must first make a *prima facie* showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not. (Citations omitted.) If a defendant meets this first showing, he must then demonstrate that the government's discriminatory selection of him for prosecution has been invidious or in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

See e.g. United States v. Ness, 652 F. 2d 890 (9th Cir.), *cert. denied*, 454 U.S. 1126, 102 S.Ct. 976, 71 L.Ed. 2d 113 (1981) (initial decision to prosecute must not be based on an "impermissible motive"); *United States v. Crowthers*, 456 F. 2d 1074 (4th Cir. 1972) (prosecution based on exercise of "First Amendment" rights is impermissible); *United States v. Wilson*, 639 F. 2d 500 (9th Cir. 1981) (prosecution based on exercise of constitutional rights is im-

2. In *Yick Wo* the court stated:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. 118 U.S. at 373-374, 6 S.Ct. at 1073, 30 L.Ed. at 227.

permissible); *Wheaton v. Hagan*, 435 F. Supp. 1134 (M.D.N.C. 1977) ("constitutionally" impermissible ground). *See generally* 45 A.L.R. Fed. 732 (1979).

[1] Our Supreme Court, following *Yick Wo*, recognized the defense under the equal protection clause of Art. I, § 19 of the Constitution of North Carolina in *Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E. 2d 382 (1971). The court initially observed that the constitutional protection against unreasonable discrimination between persons in similar circumstances under color of law is not limited to the enactment of legislation, but "extends also to the administration and the execution of laws valid on their face." 277 N.C. at 660, 178 S.E. 2d at 385, *citing Yick Wo v. Hopkins, supra.* Continuing, the court distinguished unequal administration or enforcement of the law from unconstitutional discriminatory enforcement of the law.

> One who violates a law, valid upon its face, does not bring himself within the protection of the *Yick Wo* rule merely by showing that numerous other persons have also violated the law and have not been arrested and prosecuted therefor. Mere laxity, delay or inefficiency of the police department, or of the prosecutor, in the enforcement of a statute or ordinance, otherwise valid, does not destroy the law or render it invalid and unenforceable. Even selective enforcement does not have that effect if it has a reasonable relation to the purpose of the legislation, such as making efficient use of police manpower by concentrating upon the major sources of criminal activity.

Id. at 661, 178 S.E. 2d at 386. In deference to the need for prosecutorial discretion in weighing such factors as the likelihood of successful prosecution, the social value of obtaining a conviction as against the time and expense to the state, and the prosecutor's own sense of justice in the particular case, the court held that selectivity does not constitute a denial of equal protection unless there is shown to be present in the decision to prosecute an element of intentional or purposeful discrimination. Further, that such discriminatory purpose is not presumed; rather, the good faith of the officers is presumed and the burden is upon the complainant to show the intentional or purposeful discriminations upon which he relies. 277 N.C. at 662, 178 S.E. 2d at 386. *See also*

State v. Spicer, 299 N.C. 309, 261 S.E. 2d 893 (1980). The requirements of discriminatory prosecution in *Kresge* are substantially in accord with those followed in other states. *See generally* 95 A.L.R. 3d 280 (1979) and cases collected therein.

B

In an attempt to satisfy the first part of the selective prosecution test, the defendant conducted extensive discovery to determine whether other persons have been prosecuted in the Tenth Judicial District for conduct of the type forming the basis of the charges against him. As a result of this discovery, defendant has constructed five classes and argues that he is the only one to have been prosecuted within those classes. All the classes pertain to persons engaging in the questioned conduct since the date that J. Randolph Riley took office as District Attorney in Wake County, North Carolina, and all such conduct pertains to that time frame and county. The classes are as follows:

1. All persons charged solely with misdemeanor offenses who have been prosecuted on those misdemeanors by initiation of charges in the Superior Court through the use of the statutory presentment procedure.

2. All attorneys who have signed a surety bond for a person not a member of their immediate families.

3. All attorneys charged with a criminal misdemeanor who were prosecuted originally in the Superior Court through the presentment procedure.

4. All attorneys who have, or may have, solicited legal business, directly or indirectly, in Wake County.

5. The persons who were present and actually took part in the activities involved in Counts I and III of the Indictment, out of which activities this prosecution arose.

[2] At the outset, we may summarily dispense with consideration of classes one, three and four for the following reasons: (1) the defendant was found not guilty of improperly soliciting legal business and therefore defendant's fourth proposed class is irrelevant with respect to this appeal, and (2) defendant's proposed classes one and three relate to the *manner* in which the indictment was obtained rather than to the *decision* to seek an indict-

ment for the conduct at issue, and are therefore not at all germane to the issue of selective prosecution.[3]

[3] Of the remaining classes, numbers two and five relate solely to the charge of having improperly signed a surety bond. Defendant's second proposed class consists of all attorneys in Wake County who signed surety bonds for persons not members of their immediate families in violation of G.S. 15A-541. Defendant's fifth proposed class consists of the defendant, Magistrate Ray, and Officer Mizelle. The defendant argues that Ray and Mizelle should have been prosecuted as aiders and abettors because they had the opportunity and duty to prevent him from signing the bond and they failed to do so. Even assuming *arguendo* that they were subject to prosecution, it is routine prosecutorial practice to refrain from prosecuting some participants in order to secure their testimony as State's witnesses against the most culpable party. Under defendant's theory all undercover agents engaged in, for example, drug operations would have to be prosecuted. We find the fifth class inappropriate. *See Bell v. State*, 369 So. 2d 932 (Fla. 1979) (failure to prosecute policemen as well as defendants for various violations of law relating, *inter alia*, to lewdness, did not constitute selective and discriminatory enforcement even though policemen upon whose evidence information was based, were guilty participants along with defendants; mere failure to prosecute all offenders is no ground for claim of denial of constitutional guarantees of equal protection).

At the hearing on his motion, defendant offered to prove that an impermissible motive underlay the decision to prosecute him, based upon the following facts: (1) he handled malicious prosecution and false arrest cases, (2) he filed two lawsuits against police officers, (3) he had an argument with Assistant District Attorney William Hart, and (4) he has incurred the wrath of the District At-

3. Defendant raises a number of constitutional issues relating to the fact that the prosecutor chose to bring charges against him initially in Superior Court under the presentment statutes, G.S. 15A-628(a)(4) and G.S. 15A-641(c), rather than prosecuting him originally in the District Court, from which defendant could have appealed his conviction for trial *de novo* in the Superior Court and thus secure a "second bite at the apple." Defendant also contends that the presentment statutes were not properly followed in this case and are unconstitutionally vague. We have carefully examined all of defendant's arguments regarding the initiation of charges against him under the presentment statutes and find them to be wholly without merit.

torney's staff by "handling several unpopular causes in an extremely uncongenial and uncompromising manner."

C

[4] Although the trial court did not conduct a full evidentiary hearing[4] and take the testimony of witnesses, the court did consider defendant's proffer of proof and statements made by the attorneys which, without objection, were received as evidence. Based on these, the court made extensive findings of fact and conclusions of law that the prosecution did not result from impermissible considerations.

With regard to the first prong of the selective prosecution test, the trial court found as a fact that defendant had only shown that one other attorney in Wake County actually became a surety on a bail bond during the relevant time period and that the actions of said attorney were not called to the attention of or known by the District Attorney's Office for the Tenth Judicial District. Additionally, the court found that "no other attorneys in Wake County have been shown to have been involved in the illegal solicitation of business or in the intimidation or interference with witnesses." With regard to the second prong of the test, the trial court's key findings of fact were that the defendant's case was referred by J. Randolph Riley, District Attorney for the 10th Judicial District, to the Special Prosecutions Division of the Attorney General's Office; that the decision to prosecute the defendant was made solely by Associate Attorney General Charles Hobgood; and that no one from the 10th Judicial District District Attorney's Office suggested, persuaded, pressured, discussed, or took any action to affect the decision of the special prosecutor as

4. Defendant also contends that he at least made a *prima facie* showing of discriminatory prosecution and was therefore entitled to a full evidentiary hearing on his motion to dismiss the indictment. The federal courts have apparently held that a defendant must make a nonfrivolous *prima facie* showing before becoming entitled to an evidentiary hearing on a selective prosecution claim. *See e.g. United States v. Ness, supra* at 892. Similarly, in *State v. Spicer, supra,* our Supreme Court recognized that a full evidentiary hearing is not mandated by the requirements of due process in every selective prosecution case. The trial court ruled that defendant had not made a *prima facie* showing of discriminatory prosecution so as to entitle him to a full evidentiary hearing. The hearing afforded the defendant in this case met the requirements of due process and we find no error in the denial of defendant's request for a full evidentiary hearing. See discussion, *infra,* of defendant's substantive claims.

to whether the defendant should be prosecuted. Further, that no one in the District Attorney's Office acted in bad faith in referring the case to the Special Prosecutions Division; that to the contrary, the referral was made to avoid any conflict and to avoid the appearance of impropriety since one of the Assistant District Attorneys was a potential witness; and that no one in the Special Prosecutions Division acted with bad faith, vindictiveness, or discrimination in the investigation of the case and decision to proceed to the grand jury by way of presentment and indictment. The court also found that there were no facts that would indicate an impermissible motive to investigate and prosecute the case and that the ultimate decision to prosecute was made "simply, solely, exclusively, and entirely by the grand jury on the one hand and the Special Prosecutions Division on the other hand; and that these bodies were several steps removed from and independent of the District Attorney's Office for the Tenth Judicial District."

A trial court's findings of fact are conclusive on appeal if supported by the evidence, *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed. 2d 1137 (1980), and will not be reversed on appeal unless shown to be "clearly erroneous." *United States v. Wilson*, *supra* at 503. In the present case, the trial court's findings were supported by the evidence and are not clearly erroneous.

At the pretrial hearing, defendant's documentary evidence disclosed that only he and one other local attorney had become sureties on bail bonds during the tenure of District Attorney J. Randolph Riley. Defendant argues in effect, that in addition to this evidence, the testimony of Magistrate Ray supports a conclusion that many other attorneys in Wake County have acted as surety for non-family members in criminal cases and have not been prosecuted for doing so.

It is noteworthy that our research has disclosed *no* reported cases under G.S. 15A-541, nor the prior statutory provision it expanded upon, G.S. 15-107.1 (Repealed by Session Laws 1975, c. 166, s. 26). *See* Official Commentary, G.S. 15A-541. In addition, there are very few reported cases under G.S. 14-226. These factors, however, either alone or in conjunction with defendant's other evidence, do not establish impermissible selectivity in the

enforcement of the statutes. Furthermore, the testimony of Magistrate Ray does not support defendant's contentions.

The magistrate testified that at one time the Office had had a "problem" with attorneys attempting to sign bonds. In response, a policy was developed whereby the attorney was informed of the statutory prohibition and if he insisted upon signing the bond, he was permitted to do so, but a record would be kept for the office files. It was not "the policy" to prohibit signing, or to bring charges. However, Ray testified further that the "problem" was "more prevalent" when he first became a magistrate some 11 years prior and that today it was "very rare" to see that problem. In addition, Ray's testimony indicated that in three cases he personally handled, other attorneys had *attempted* to sign bonds, but did not ultimately do so.

At any rate, by defendant's own definition, the second proposed class is limited to attorneys who signed bonds after J. Randolph Riley became District Attorney in 1977 and that class has only two documented members. It would appear that a class of two members is too statistically small a sampling to accurately measure a claim of selective prosecution. *See State v. Spicer, supra. Compare United States v. Wilson, supra* (first part of selective prosecution test met by a showing that only two persons out of approximately 425 who filed "exempt" W-4 tax forms in Arizona were prosecuted) and *United States v. Greene, supra* (test satisfied with a showing that of the approximately 300 air traffic control specialists who failed to report for work in the Dallas-Fort Worth area, only six individuals, including the three defendants, were prosecuted). However, assuming *arguendo* that defendant has *prima facie* satisfied the first part of the test, he nonetheless failed to present evidence which convincingly shows that he was deliberately prosecuted on the basis of any impermissible ground.

First, defendant presented no evidence to show that the other attorney who became a surety on a bail bond during District Attorney Riley's tenure was called to the attention of a prosecutor. The other attorney was never questioned by a law enforcement officer or official. Moreover, the record discloses that it was *after* the discovery that the defendant had interfered with a witness, that it was discovered that defendant was surety on his

client's bond.[5] An investigation of the bond incident revealed that the defendant had become a surety *after* being warned against doing so by the magistrate. In contrast, the other local attorney never represented the principal and immediately withdrew as surety. To some extent, therefore, the other attorney and defendant were not "similarly situated."

Based upon its findings of fact, the trial court concluded that there was "no showing that others similarly situated to the defendant had not been prosecuted because of conduct of the type forming the basis of the charges against defendant and the prosecutorial failure, if any, to proceed against any such person was motivated by nothing more than a failure to have any knowledge of such acts or offenses; and that, therefore, the defendant's motion to quash should be denied." In addition, the trial court rested its decision upon two further independent and alternative grounds for denying defendant's motion to dismiss. These conclusions of law are as follows:

> 3. That as a separate, independent, and alternative ground for denying the defendant's motion to quash, there has been no showing that either J. Randolph Riley, any member of the District Attorney's Office for the Tenth Judicial District, Detective A. C. Mundy, Charles H. Hobgood or any member of the Special Prosecutions Division, or the Grand Jury discriminated against the defendant or acted in bad faith or acted with vindictiveness or selected the defendant for prosecution based on impermissible grounds such as race, religion, sex, creed, occupation, performance of members in their profession, or any other possible field of arbitrary classification whatsoever, or any constitutional rights, including but not limited to First Amendment freedom of speech considerations; and that, therefore, the defendant's motion to quash should be denied.
>
> 4. That as a separate, independent, and alternative ground for denying the defendant's motion to quash, that the autonomy of the actual charging authority, that is, the Grand Jury and/or the Special Prosecutions Division, as against

5. Rule 20 of the Superior and District Court Rules also prohibits an attorney from acting as surety in any case, suit, action or proceeding in which he appears as counsel. *See* General Statutes, Appendix I, Superior and District Court Rules.

whom there has been no allegational showing of any bad faith, discrimination, or vindictiveness, insulates and makes immaterial any alleged taint of bad faith, vindictiveness, or intentional discrimination on the part of any member of the District Attorney's Office for the Tenth Judicial District or any investigating officer; and, therefore, the defendant's motion to quash should be denied.

We find no error in the trial court's conclusions of law.

D

First, it is clear that a failure to prosecute others because of a lack of knowledge that they were subject to prosecution for the same offense as defendant does not amount to a denial of equal protection under the Fourteenth Amendment. *Oyler v. Boles, supra.* Furthermore, a showing of the "mere laxity, delay or inefficiency" of the prosecutor in the enforcement of a statute does not render it unenforceable. *Kresge Co. v. Davis, supra.* Nor does a showing of mere selectivity alone entitle a defendant to prevail on his claim because it is necessary to prove that the decision to prosecute contained "an element of intentional or purposeful discrimination," *id.*; *State v. Spicer* ("intentional or deliberate discrimination"). Defendant has not made such a showing.

Although defendant stated that he believed he was prosecuted because of prosecutorial hostility engendered by his representation of clients in cases against law enforcement officers and officials, and because of particular acrimonious dealings he'd had with the District Attorney's Office, these allegations were not supported by the facts of record and reflect mainly defendant's own subjective beliefs. "Speculative and tenuous" allegations of impermissible prosecutorial motive which are unsupported by evidence of a causal link between the defendant's "hostility" provoking conduct and the decision to prosecute are insufficient to support a claim of discriminatory prosecution. *United States v. Erne*, 576 F. 2d 212, 216 n. 4 (9th Cir. 1978).

"District Attorneys have wide discretion in performing the duties of their office. This encompasses the discretion to decide who will or will not be prosecuted." *State v. Spicer, supra*, 299 N.C. at 311, 261 S.E. 2d at 895. Defendant has failed to produce factual evidence to show that but for his alleged problems with the District Attorney's Office he would not have been prosecuted.

> Vindictive prosecution only requires a substantial "appearance" of vindictiveness, but selective prosecution requires a finding that the decision to prosecute was based on impermissible grounds.

United States v. Wilson, supra, 639 F. 2d at 503, n. 2. Defendant cannot, therefore, rely on appearances.

More importantly, defendant's allegations, even if true, are focused upon members of the District Attorney's Office. The record is clear, however, that the ultimate decision to prosecute was not made by anyone in that office, but by an independent special prosecutor. The trial court specifically found and concluded that the Special Prosecutions Division did not act in bad faith or for an impermissible motive. This finding is supported by statements of counsel and no allegation to the contrary is made. The findings of fact in turn also support the trial court's separate and alternative conclusion of law that *any possible* bad faith on the part of the District Attorney's Office was insulated when the case was referred to an autonomous charging body, the Special Prosecutions Division of the Attorney General's Office, pursuant to G.S. 114-11.6.

The special prosecutor testified that one of his duties was to try cases "where a conflict arises in the local District Attorney's Office and the local District Attorney wants to remove even the appearance of anything improper. Therefore, our value at least on my part, is not being an expert on the criminal law but rather being an outsider, someone who comes in and makes an independent judgment and this is what I have attempted to do in this case." The federal courts have recognized that referring a case to an independent prosecutor ordinarily insulates any original impermissible motive that may have existed on the part of the referring officer. *See United States v. Erne, supra,* 576 F. 2d at 216-217 (possible improper discriminatory motive on part of the initial IRS agent prior to referral was insufficient to taint entire administrative process). *See also United States v. Gervasi,* 562 F. Supp. 632 (N.D. Ill., E.D. 1983) (alleged vindictiveness on the part of initial state prosecutors is not attributable to subsequent federal prosecutors).

In summary, the defendant has failed to carry his burden of either showing that he was singled out for prosecution or that an

invidious purpose invaded or overrode the prosecutorial decision to seek a presentment and indictment against him. Accordingly, the trial court correctly denied defendant's motion to dismiss the indictment on the basis of selective and discriminatory prosecution.

III

[5] Defendant also challenges the trial court's denial of his motion to quash and dismiss the superseding indictment on the ground that it was obtained as a result of impermissible prosecutorial vindictiveness in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Defendant argues that the addition of a fourth count in the superseding indictment increased the charges against him and increased his potential punishment, thereby entitling defendant to a presumption of prosecutorial vindictiveness. Defendant argues further that the presumed vindictiveness, or appearance of vindictiveness, was not satisfactorily countered or explained by the prosecutor and that he is therefore entitled to have his conviction vacated and the charges dismissed. We do not agree.

A

First, the defendant's claim of vindictiveness depends upon acceptance of his characterization of the superseding indictment as imposing *additional* charges and subjecting him to *increased* punishment. However, the record does not support this claim. As to punishment, the trial court ruled that Counts III and IV, intimidating and interfering with a witness, would be considered to be one offense for the purposes of trial. Later, the trial court instructed the jury and framed the issues so that the jury could find the defendant guilty of no more than one offense. Therefore, the defendant was not subjected to increased punishment as a result of the second indictment.

Furthermore, the record reveals that defendant moved to dismiss Count III of the original indictment pursuant to G.S. 15A-954(a)(10) and G.S. 15A-952(d) for failure to state an offense as required by G.S. 15A-924(a)(5). In essence, that statutory provision requires that a criminal pleading contain a "plain and concise" factual statement in each count which asserts facts supporting every element of the criminal offense with sufficient precision to apprise

the defendant of the conduct which is the subject of the accusation. Although original Count III failed to allege specific facts in support of the elements of the offenses charged, it did allege that defendant "did unlawfully, willfully and intentionally *attempt to interfere with*, attempt to deter, *attempt to intimidate*, attempt to prevent and *did interfere with*, deter, *intimidate*, and prevent" witness Bobby McMillan from attending and testifying in court in violation of G.S. 14-226, "intimidating or interfering with witnesses." Moreover, it is clear that the real problem with original Count III lay not in its failure to state an offense, but rather in the fact that it stated four separate offenses (two acts of attempt and two acts of commission) in a single count, and was therefore properly subject to quashal and dismissal. *See* G.S. 15A-924(b) (a duplicitous count is subject to a defendant's motion to dismiss if, *inter alia*, the state fails to make a timely election). In other words, the prosecutor included *all* of the potential charges against defendant stemming from his conversation with witness McMillan on 19 August 1982 in the original indictment, and the superseding indictment contained no new or additional charge of a criminal offense that was not originally alleged.

Where a motion to quash is granted, the defendant is not entitled to a discharge, but is subject to further prosecution on a new indictment. *State v. Barnes*, 253 N.C. 711, 117 S.E. 2d 849 (1961). The trial court's order of dismissal forced the prosecutor to review the facts and the law and decide whether to seek a second and more perfectly drawn indictment. The special prosecutor testified that, upon review, he thought that Count III "might be possibly duplicitous and that is the reason I put [it], therefore, in the two separate counts." He characterized his motive as "an attempt to be very very careful in pleading. Your Honor has [sic] just quashed the . . . third count of the indictment and I certainly did not want to have that count quashed a second time. It would not have looked good for the State, therefore, I tried very hard to draft this as carefully as I could to pass mustard [sic]."

Nothing else appearing, it is entirely proper for the prosecutor to seek a second and more perfect indictment. *State v. Moffitt*, 9 N.C. App. 694, 177 S.E. 2d 324 (1970), *cert. denied*, 281 N.C. 626, 190 S.E. 2d 472 (1972). The gist of the offense under G.S. 14-226 is the obstruction of justice. *State v. Neely*, 4 N.C. App. 475, 166 S.E. 2d 878 (1969). As explained to the trial court, the

prosecutor concluded that G.S. 14-226 prohibited two distinct offenses—(1) intimidating and (2) interfering with witnesses. The allegations contained in original Count III were then divided into two counts in order to avoid any possibility of having the second indictment quashed on the ground of duplicity. "Ordinarily, an indictment which charges two separate offenses in a single count is bad for duplicity." *State v. Beaver*, 14 N.C. App. 459, 461, 188 S.E. 2d 576, 578 (1972). Provided that the charges were originally set out in the defective indictment, the prosecutor may upon motion and leave of court amend the indictment and state the charges upon which he desires to proceed at trial in separate counts. *Id.*; *State v. Williamson*, 250 N.C. 204, 108 S.E. 2d 443 (1959). Essentially, this is what occurred in the case under discussion, and under the circumstances, defendant has shown neither an increase in the number of charges brought against him nor an increase in his potential punishment under the superseding indictment.

B

Second, even if defendant had been subjected to additional charges and increased punishment under the superseding indictment, he has demonstrated no denial of due process. Defendant has neither alleged actual vindictiveness nor shown himself to be entitled to a presumption of prosecutorial vindictiveness under current constitutional doctrine. As was aptly stated in *United States v. Gallegos-Curiel*, 681 F. 2d 1164, 1167 (9th Cir. 1982):

> The doctrine of vindictive prosecution must not be misapplied by blurring the distinction between what is actual retaliation and what is presumed. The presumption applies only to the extent it reflects the very real likelihood of actual vindictiveness.

The doctrine of presumed vindictiveness was first developed in *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), in recognition of the fact that the existence of a retaliatory motive in any particular case would be extremely difficult to prove. There the Court acknowledged that due process guarantees that a defendant may not be punished for successfully challenging his conviction, and in order to assure the absence of such a retaliatory motivation, held that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the

reasons for doing so must appear. If no such objective reasons appear in the record, vindictiveness can be presumed.

In *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed. 2d 628 (1974), the Court considered the presumption of vindictiveness in the context of prosecutorial behavior. There the defendant was convicted of a misdemeanor in District Court. He then appealed to the Superior Court. Before his misdemeanor trial de novo was held, the prosecutor obtained a felony indictment against the defendant, covering the same conduct charged in the misdemeanor warrant. The Court observed that under the two-tier system the prosecutor has a considerable stake in discouraging convicted misdemeanants from appealing and obtaining a trial de novo, and that the opportunities for vindictiveness presented thereby were such "as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case." 417 U.S. at 27, 94 S.Ct. at 2102, 40 L.Ed. 2d at 634. In so ruling, the Court emphasized that

> the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of "vindictiveness."

Id.

The availability of the presumption of vindictiveness in the context of pretrial proceedings was definitively addressed by the Supreme Court in *United States v. Goodwin*, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed. 2d 74 (1982). There, the defendant requested a jury trial on pending misdemeanor charges after unsuccessful plea negotiations with the prosecutor. After the case was assigned to an Assistant United States Attorney, the defendant was indicted and convicted on a felony charge. He alleged vindictive prosecution. The Supreme Court analyzed the timing and nature of the right which the defendant had exercised, concluded that the circumstances did not present a realistic likelihood of vindictiveness and held that a presumption of vindictiveness was not warranted in that pretrial setting.

First, the Court cautioned against adopting an inflexible presumption of prosecutorial vindictiveness in any pretrial setting.

> In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystalized. In contrast, once a trial begins—and certainly by the time a conviction has been obtained—it is much more likely that the state has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.

457 U.S. at 381, 102 S.Ct. at 2493, 73 L.Ed. 2d at 85. The Court continued:

> In addition, a defendant before trial is expected to invoke procedural rights that inevitably impose some "burden" on the prosecutor. Defense counsel routinely file pretrial motions to suppress evidence; to challenge the sufficiency and form of an indictment; to plead an affirmative defense; to request psychiatric services; to obtain access to government files; to be tried by jury. It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter. The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates.

Id. at 481, 102 S.Ct. at 2493, 73 L.Ed. 2d at 85-86.

After considering the timing of the defendant's action, the *Goodwin* court analyzed the nature of the rights asserted—the not guilty plea and request for a jury trial—and concluded that these did not force the duplicative expenditure of prosecutorial resources as did the asserted rights in *Pearce* and *Blackledge*. In those cases, it was feared that the institutional bias against the retrial of decided issues and the possibility that a formerly convicted defendant might go free might motivate a retaliatory or vindictive reaction. The same considerations were not implicated by the pretrial plea of not guilty and request for a jury trial.

Following the standards established in *Pearce*, *Blackledge* and *Goodwin*, the Ninth Circuit Court of Appeals, in *United States v. Gallegos-Curiel*, *supra*, stated the rule as follows:

> When there is no evidence of actual vindictiveness and the only question is whether it must be presumed, cases involving increased charges or punishments after trial are to be sharply distinguished from cases in which the prosecution increases charges in the course of pretrial proceedings.
>
> * * *
>
> In every case alleging inferred vindictive prosecution, there must be a threshold showing of vindictiveness or the likelihood of it before the court is justified in inquiring into the prosecutor's actual motives. The exercise of routine or clearly necessary defense motions in the pretrial stage does not meet the threshold for more detailed inquiry and does not suffice to raise the presumption of vindictiveness.

681 F. 2d at 1167, 1169.

Defendant Rogers contends that he is entitled to the presumption of prosecutorial vindictiveness because the second indictment, with its increased number of charges, was not brought as a result of any newly discovered evidence but simply as an immediate reaction to the defendant's successful exercise of his statutory right to move for dismissal of one of the counts of the original indictment. Defendant contends, therefore, that this was "an obvious attempt to reinstate the charges which the court had just the day before dismissed" and that the promptness of the action itself "indicates the motives of the prosecution." Finally, defendant argues that the explanation given by the special prosecutor for the increased number of counts in the second indictment was inadequate to dispel the appearance of vindictiveness.

Obviously, promptness alone does not demonstrate "vindictiveness." Furthermore, as we stated above, it was entirely proper for the prosecutor to seek a second and more expertly drafted indictment upon dismissal of the third count of the first indictment for pleading defects. *See State v. Barnes*, *supra*; *State v. Moffitt*, *supra* and *State v. Williamson*, *supra*. Moreover, as the Supreme Court stated in *Goodwin*, it is unrealistic to assume, as

defendant would have us do, that the prosecutor's *probable* response to the defendant's routine filing of a pretrial motion challenging the sufficiency and form of an indictment was to seek to penalize and deter. As the *Goodwin* court observed:

> To presume that every case is complete at the time an initial charge is filed, however, is to presume that every prosecutor is infallible—an assumption that would ignore the practical restraints imposed by often limited prosecutorial resources.

457 U.S. at 382 n. 14, 102 S.Ct. at 2493, 73 L.Ed. 2d at 86.

Additionally, it must be remembered that nothing else appearing, "a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule." *Goodwin, supra* at 384, 102 S.Ct. at 2494, 73 L.Ed. 2d at 87. The presumption applies only where the *realistic* likelihood of actual vindictiveness is clearly demonstrated by circumstances such as existed in *Pearce* and *Blackledge*. Here, to the contrary, defendant's pretrial motion "is an integral part of the adversary process in which our criminal justice system operates." *United States v. Goodwin, supra*. Under these circumstances, no realistic likelihood of prosecutorial vindictiveness has been demonstrated and a presumption of vindictiveness is wholly unwarranted. The defendant, therefore, has not shown a denial of due process in the bringing of his case to trial.

IV

Next, defendant contends that the trial court erred by denying defendant's motions to dismiss Counts I and IV made at the close of the State's evidence and at the close of all the evidence. Inasmuch as the defendant elected to offer evidence he is deemed to have waived his motion to dismiss Counts I and IV at the close of the State's evidence and may only challenge denial of the motion to dismiss at the close of all the evidence. *State v. Leonard*, 300 N.C. 223, 266 S.E. 2d 631, *cert. denied*, 449 U.S. 960, 101 S.Ct. 372, 66 L.Ed. 2d 227 (1980).

> In ruling on a motion to dismiss the trial court is to consider the evidence in the light most favorable to the State. (Citation omitted.) In so doing, the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence; contradictions and discrepancies do

> not warrant dismissal of the case—they are for the jury to resolve. *Id.* The court is to consider all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State. *Id.* The defendant's evidence, unless favorable to the State, is not to be taken into consideration. (Citations omitted.) However, when not in conflict with the State's evidence, it may be used to explain or clarify the evidence offered by the State. *Id.* In ruling on the motion, evidence favorable to the State is to be considered as a whole in determining its sufficiency.

State v. Earnhardt, 307 N.C. 62, 67, 296 S.E. 2d 649, 652-653 (1982).

Count I

Count I of the superseding indictment charged, in substance, that the defendant, a licensed attorney, had stood bail bond for a person not a member of his immediate family, in violation of G.S. 15A-541. Defendant admits that the evidence proved (1) that the defendant was on the date in question an attorney licensed to practice law in North Carolina, (2) that the defendant became a surety on a bail bond for Paula Ann Gately, and (3) that Paula Ann Gately was not a member of the defendant's immediate family. However, defendant argues that in addition to these three elements, the State must show (4) that the defendant knew there was a law prohibiting him from becoming a surety and (5) that the defendant intended to break the law.

It is defendant's contention that the State failed to prove that "defendant understood that the law in question was written to prevent him from signing bonds for anyone not a member of his immediate family" because Magistrate Ray testified on direct examination that he told defendant that an attorney could not sign bonds for "defendants" and on cross-examination that an attorney couldn't go bond for a "client." Further, that the evidence as a whole showed that at the time defendant signed the bond, "he mistakenly but in good faith believed that the statute allowed him to act as he was doing." We find defendant's argument to be without merit.

[6] With respect to defendant's fourth proposed element, ignorance of the law, if it were to be considered at all, would

theoretically be a defense and not an element of the crime. Thus, the State did not have to prove that defendant was aware of the law to make its case. In any event, it is axiomatic that "ignorance or mistake of law will not excuse an act in violation of the criminal laws." 21 Am. Jur. 2d, Criminal Law § 142, p. 278 (1981). *See also* 22 C.J.S., Criminal Law § 48 (1961). Therefore, defendant's claim is legally without basis (as well as being utterly preposterous) because ignorance of the law is not a valid defense.

Factually, defendant fares no better because the magistrate twice informed the defendant and put the defendant on notice that there was at *least* a legal "problem" with *an attorney* signing the bail bond. Any purported discrepancies in Magistrate Ray's testimony regarding the prohibition's application to "clients" or "defendants" are (1) not properly considered in testing the sufficiency of the State's evidence, *State v. Earnhardt, supra* and (2) not relevant under G.S. 15A-541 whose prohibition applies to non-family members. Moreover, defendant refused the Magistrate's offer to read the statute, stating that he was "aware" of it. It defies belief that the defendant would first willfully attempt to remain in ignorance of the law and then invoke this alleged ignorance in his defense. Thus, there is absolutely no merit in defendant's claim regarding "ignorance of the law."

Defendant's fifth proposed element, "intent to break the law," would appear to be, in part, a rephrasing of his fourth element regarding ignorance of the law, and in that respect, his contention is without merit. As to a mental state requirement itself, G.S. 15A-541 provides simply that "No . . . attorney . . . may in any case become surety on a bail bond for any person other than a member of his immediate family." As we noted earlier, there are no reported cases involving violations of G.S. 15A-541.

[7] Although the statute itself does not state that the act must be done "intentionally" or "willfully," the indictment under which defendant was tried did contain such language. In addition, the jury was instructed as to the first count as follows:

> Fourth, that at the time the defendant became a surety for Paula Ann Gately, if you find that he did so, that he did so while knowing that there existed a law prohibiting his doing so . . .

> . . . and that the defendant did so knowingly and intentionally . . .

We conclude that the mental state required under G.S. 15A-541 is nothing more than the general intent to do the proscribed act; that is, for the attorney to intend or knowingly to become surety on a bail bond for any person other than a member of the attorney's immediate family. The language in the jury instruction regarding "knowledge that there existed a law prohibiting his doing so" must be considered mere surplusage.

The rationale behind the prohibition of a statute such as G.S. 15A-541 was well stated in an early case from South Dakota.

> Attorneys and counselors at law are officers of the court, and the object of the statute evidently was to disqualify them from becoming sureties, not only in suits in which they might be retained as attorneys or as counsel, but in all cases pending in the courts; and thereby relieve them, not only from the importunities of their own clients to become sureties in suits in which they were attorneys, but from the solicitation of other attorneys or persons whom they might feel a delicacy in refusing. As officers of the court, it was deemed proper to protect them from becoming *quasi* principals in any litigation before the courts in which they were not directly interested as parties.

Towle v. Bradley, 2 S.D. 472, 50 N.W. 1057, 1058 (1892).

[8] In the case under discussion, there was ample evidence of intent to overcome defendant's motion to dismiss. There is no question that defendant knowingly and of his own free will signed the bail bond for Paula Ann Gately, to whom he was not related. In addition to testifying that he informed Rogers that the General Statutes prohibited attorneys from signing bail bonds for defendants and that Rogers nevertheless stated his intention to proceed, Magistrate Ray testified as follows:

> A. Well, the, the policy that I have at the Magistrate's Office is that once you inform an attorney what the statute is and he wants to put the bond in his name, I do that. The reason for it—
>
> Q. Okay—

COURT: Let him finish his answer.

A. —Is so there won't be any argument in the courtroom. I don't have a law degree. I don't argue with a lawyer. *I inform him and let him be aware of the violation and if he insists on having it in his name, then I go ahead and do it, make a copy of it for my file.* We had similar cases and that's why this is the policy that I use. (Emphasis added.)

The defendant's conviction on Count I is clearly supported by the evidence presented.

Count IV

[9] The evidence, taken in the light most favorable to the State, including all of the evidence admitted, whether competent or incompetent, and so much of the defendant's evidence that clarifies the State's evidence, *State v. Earnhardt, supra,* is also sufficient to support the defendant's conviction on Count IV, attempting to interfere with a State's witness. First, defendant indicated his belief to both Officer Mizelle and Assistant District Attorney Dombalis that the case would have to be dismissed if the witness (McMillan) did not arrive. When McMillan did arrive, the defendant muttered "shit" and immediately summoned his client, McMillan and Officer Mizelle into the conference room. These three parties, McMillan, Gately and Mizelle, all testified to the effect that Rogers, Gately and McMillan reached an "agreement" that Ms. Gately would pay for all of the damages incurred on the night of the accident if McMillan would agree not to press charges. Further, that since McMillan would no longer be needed, he could leave the courthouse. McMillan also testified that defendant "said he had a good chance of getting it [the DUI case] throwed out" because the police had never seen Ms. Gately drive while she was under the influence of alcohol.

The Assistant District Attorney testified that after McMillan returned to the courtroom, she asked him what had happened:

> . . . and he said that Mr. Rogers, the defendant in this case, Ms. Gately, Mr. McMillan and himself had worked out some kind of an agreement where the damages would be dismissed, or that Mr. McMillan's damages would be paid for and he wouldn't testify and all the charges would be dropped.

Detective Munday testified from his present recollection that when he interviewed the defendant:

> In the conversation he admitted to me that in the conference room that he offered to pay Bobby McMillan's hospital bill, any damages to his vehicle if he would drop the charges.

Further, that McMillan, upon interview, told Munday the following:

> He stated to me that Rogers told him that he would pay for his damages to his vehicle. Also, he would pay for the hospital bill if he would agree not to press charges.

Finally, defendant's own testimony establishes his attempt to reach an agreement with McMillan concerning Gately's cases and his only excuse for dismissing the State's witness on his own accord was "bad judgment" on his part.

Defendant was convicted only of attempting to interfere with a witness in violation of G.S. 14-226. An attempt is an overt act in partial execution of a criminal design which falls short of actual commission but which goes beyond mere preparation to commit. *State v. Price*, 280 N.C. 154, 184 S.E. 2d 866 (1971). In the present case, the witness had second thoughts and returned to the courtroom. The defendant's actions and statements considered as a whole, however, constituted overt acts designed to induce the State's witness to leave so that defendant could obtain a dismissal of both the DUI and hit and run charges against his client, Paula Ann Gately. It is clear that the defendant had no authority to either dismiss the State's witness or to negotiate a dismissal for the criminal charges pending against Gately. The District Attorney, who is a constitutional officer, N.C. Const. Art. IV, § 18 (Cum. Supp. 1983), is the only person authorized to dismiss a criminal charge in this context. *State v. Furmage*, 250 N.C. 616, 109 S.E. 2d 563 (1959). It is abundantly clear from the evidence presented that defendant's efforts on behalf of Ms. Gately went far beyond representing his client "zealously within the bounds of the law," *see* Code of Professional Responsibility, Canon 7, and constituted a direct attempt to interfere with a State's witness who was under subpoena to testify in a named case. Therefore, the issue was properly submitted to the jury and defendant's conviction on Count IV must be upheld.

V

[10] Defendant's final arguments concern the terms of the sentence he received for his criminal convictions and the court's simultaneous entry of a civil order imposing the identical terms of discipline under the court's inherent authority to discipline attorneys.

The defendant received the maximum sentence of six months imprisonment for violating G.S. 15A-541 and the maximum sentence of two years imprisonment for violating G.S. 14-226. No fines were imposed, both sentences were suspended and defendant placed on unsupervised probation for five years. The court imposed seven conditions of probation; defendant makes no objection to the first five conditions, but contends that conditions six and seven are improper and impermissible. We disagree.

The two contested probationary conditions are as follows:

> (6) The defendant, this date, is to surrender his North Carolina Law License and Identifying Card to the North Carolina State Bar for eighteen (18) months. This eighteen (18) months revocation and suspension of license may be reduced to as little as six (6) months if the defendant satisfies the State Bar that he has (a) moral qualifications, competency and learning in the law within the range of competency demanding of attorneys by law in Civil and Criminal cases, (See *State v. Vickers*, 306 N.C. 90, 1982). (b) Satisfy the North Carolina State Bar that his physical and mental condition is such that it does not interfere with his handling of cases and advising clients.
>
> (7) The defendant is not to engage in the practice of law or hold himself out as an attorney during the period of revocation and suspension.

These two conditions are permitted by G.S. 15A-1343(b)(17), which provides:

> (b) Appropriate Conditions.—When placing a defendant on probation, the court may, as a condition of the probation, require that during the period of probation the defendant comply with one or more of the following conditions:
>
> * * *

(17) Satisfy any other conditions reasonably related to his rehabilitation.

Although defendant contends that the revocation and suspension of his law license is not reasonably related to his rehabilitation, the probationary judgment itself indicates otherwise. The terms show that defendant could reduce his license suspension to as little as six months if he satisfies the State Bar as to his competency to resume the practice of law with regard to his moral qualifications, competency, legal knowledge and physical and mental condition.

The record of defendant's sentencing hearing shows the trial court's evident and justifiable concern that the defendant was lacking in the areas of legal learning, knowledge, competency and the moral qualifications demanded of attorneys in civil and criminal cases and that the public needed to be protected pending his rehabilitation. The record in this case amply supports the court's concern. The defendant was convicted of attempting to interfere with a witness in violation of G.S. 14-226, the gist of which has been termed the "obstruction of justice." *State v. Neely, supra.* He was also convicted of violating G.S. 15A-541, which is directed towards officers of the court. Defendant's defense of ignorance of the law, "bad judgment" and his actions in advising Paula Ann Gately to prosecute a legal action against Bobby McMillan when there was no legal or factual basis for the action demonstrate a marked lack of legal competence, if not moral disqualification for the practice of law. The other terms of probation are equally well supported by the testimony at defendant's trial. Thus, the suspension of defendant's law license is reasonably related to his conduct and his rehabilitation.

> It has long been the accepted rule in North Carolina that within the limits of the sentence authorized by law, the character and the extent of the punishment imposed is within the discretion of the trial court and is subject to review only in cases of gross abuse.

State v. Goode, 16 N.C. App. 188, 189, 191 S.E. 2d 241, 241-242 (1972). The defendant has shown no abuse of discretion, gross or otherwise, in the trial court's sentence. Inasmuch as we find no abuse of discretion in the probationary judgment imposed for defendant's criminal violations, we deem it unnecessary to ad-

dress the issues directed toward the identical terms of the court's civil disciplinary order.

VI

Defendant presents a number of other questions for review concerning, *inter alia*, the trial court's evidentiary rulings and the destruction of the original tape recording of his interview by Detective Munday. We have carefully reviewed these and other issues defendant has attempted to raise in the context of his various arguments and find them to be without merit.

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

No error.

Chief Judge VAUGHN and Judge WEBB concur in the result.

SALLY CITRINI v. HAMPTON GOODWIN, AND GOODWIN REALTY, INC.

No. 8210SC1337

(Filed 15 May 1984)

1. Contracts § 19— evidence of novation—issue for jury

In an action in which plaintiff sought to recover one-half of all commissions arising from the sale of property, the trial court erred in granting plaintiff's motion for directed verdict where defendant introduced evidence of the affirmative defense of novation which conflicted with plaintiff's oral testimony. Plaintiff offered testimony that an employment agreement with defendant had nothing to do with an earlier agreement concerning commissions from the sale of property, and defendant testified that he intended by the later agreement to change the earlier agreement in accordance with discussions which occurred when plaintiff started to work for him. He also introduced evidence that listings were renewed shortly after the second agreement and expert testimony that, under the customs of the real estate business, no commissions were due under such agreements after the listings expired or after negotiations were interrupted. Defendant also elicited testimony from plaintiff that she accepted a commission on one of the subject tracts at a rate set by the employment contract.

2. Contracts § 17.2— error to direct verdict against defendant on affirmative defense of termination of original contract

In an action concerning real estate commissions, the trial court erred in directing a verdict against defendant on the affirmative defense of termination

of contract where the contract did not contain an expiration date, and where some 15 months after execution of the contract, defendant told plaintiff the contract was terminated, and there were no listings or options on the subject property at that time.

3. **Brokers and Factors § 6— right to commission—evidence that tract sold "tied in" with the sale of the other tract**

In an action concerning real estate commissions, the trial court erred in granting a directed verdict for defendant at the close of plaintiff's evidence on the issue of whether one of the tracts sold "tied in" with the sale of the others. Plaintiff introduced evidence that the tracts were listed together, that she had introduced defendant to the owner of the tract in question at which time defendant obtained the first listing, and that the property eventually sold to related buyers. This was more than a scintilla of evidence that the tract was "tied in," as the term was used in the contract between plaintiff and defendant, with the others.

4. **Rules of Civil Procedure § 50— waiver of right to assign error to denial of directed verdict motion**

Defendant waived the right to assign error to the denial of his motion for a directed verdict made at the close of plaintiff's evidence where, after presenting his own evidence, he did not renew his motion at the close of all the evidence. App. R. 10(b)(3).

APPEAL by both parties from *Brewer, Judge.* Judgment entered 30 July 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 28 November 1983.

Sanford, Adams, McCullough & Beard, by Charles C. Meeker and Catherine B. Arrowood, for plaintiff Citrini.

Akins, Mann, Pike & Mercer, P.A., by J. Jerome Hartzell, and Harrell & Titus, by Richard C. Titus, for defendant Goodwin.

BECTON, Judge.

This case presents various issues concerning contract law and directed verdicts in contract cases. Plaintiff Citrini operated a realty business in Durham, and, with an eye toward marketing their property, she made preliminary contact with the owners of contiguous portions of a large tract in a prime development area. Citrini directed her efforts to establishing a friendly relationship with the landowners, who were mostly elderly farm folk. Before she started trying to sell the property, however, Citrini decided to close down her business. She therefore introduced defendant Goodwin to the landowners in order to have them list their prop-

erty with Goodwin's agency, Goodwin Realty, Inc. (The parties have stipulated that Goodwin and Goodwin Realty are the same entity; they are hereafter referred to simply as Goodwin.)

On 25 April 1979, Citrini and Goodwin executed an agreement which provided that they would split the commissions from the sale of the subject property in half:

> This is to certify that Sally Porter Citrini, Realtor, and Hampton Goodwin with Goodwin Realty have a mutual agreement that if any of the property along Old Raleigh Road belonging to the A. J. Hall estate and all the Morris properties sells, they shall split the commission in half before any co-brokering commitments on the part of either party. This agreement shall also include any adjacent properties that tie in with the sale of the Hall or Morris properties. The commission checks shall be viewed by both parties before negotiating the checks. Mrs. Citrini shall give 15% of her commission to Realty Horizons/Consumer United Realty as per her employee contract with her firm.

Goodwin listed the subject properties for sale beginning in April, 1979. In early 1980, Citrini worked for Goodwin as a contract agent for several weeks. Before commencing employment she signed the following agreement.

> Agreement between Goodwin Realty, Inc. and Contract Employee
>
> Sally Citrini is associated with Goodwin Realty, Inc. as an independent Contract Agent, to conduct business from office of Goodwin Realty, Inc.
>
> The rate of pay to Sally Citrini is a percentage commission comprised of 40% Commission—Listings; 40% Commission—Sales from sales listed and sold through Goodwin Realty, Inc. Office.
>
> All MLS & Co.-Brokerage or associated sales made by Sally Citrini are 50-50 with principal office of Goodwin Realty, Inc.
>
> Where involved, reciprocal referral fees are 20%.

Contract agent — Sally Citrini agrees to furnish all supplies and necessary products to operate as a contract agent under Goodwin Realty, Inc.

Goodwin's exclusive listings of the subject property expired at various times in 1979 and 1980. No Goodwin listings were in effect on any of the property after July 1980. About that time, Goodwin told Citrini that all their contracts had terminated. In 1981, negotiations began between Goodwin and another real estate agent who represented the eventual buyers of the property. The first options were executed in early 1981. The sales took place during 1981 and 1982, and Goodwin and the buyers' agent co-brokered, or split, the commissions, totalling some $125,000. Citrini took no part in sales themselves, and Goodwin did not offer to pay her any portion of the commissions.

Citrini filed this action in September 1981, seeking to recover one-half of all commissions arising from the sale of the subject property. At trial, Goodwin obtained a directed verdict relative to one of the tracts at the close of Citrini's evidence; the trial court denied Goodwin's motion as to the other tracts. Citrini then successfully moved for a directed verdict on the remaining issues at the close of all the evidence. The trial court awarded Citrini one quarter of the total commissions (equal to one-half of Goodwin's share). Both parties appeal.

I

The main issue advanced by both sides in their appeals concerns the propriety of the respective directed verdicts. Because we conclude that both parties introduced sufficent evidence to withstand the motions for directed verdict, we hold that the trial court erred on both motions, and we remand for a new trial on all issues.

This case principally required judicial construction of contracts. Contract interpretation depends in the first instance on the language of the instrument itself. When a written contract is free from ambiguity, its interpretation is a question of law for the court and in such cases directed verdict is appropriate. *Falls Sales Co. v. Asheville Contracting Co.*, 292 N.C. 437, 233 S.E. 2d 569 (1977). Similarly, if the legal effect of the second contract alone dictates whether the second contract supersedes a prior

agreement, it is a question of law for the court. *Tomberlin v. Long*, 250 N.C. 640, 109 S.E. 2d 365 (1959).

If, on the other hand, the contract is ambiguous, its interpretation usually requires a factual determination of the intent of the parties; on conflicting evidence of intent, the jury must resolve the issue. *MAS Corp. v. Thompson*, 62 N.C. App. 31, 302 S.E. 2d 271 (1983). The effect of ambiguous language is ordinarily for the jury. *Cape Fear Electric Co. v. Star News Newspapers, Inc.*, 22 N.C. App. 519, 207 S.E. 2d 323, *cert. denied*, 285 N.C. 757, 209 S.E. 2d 280 (1974). Of course, if the purported contract is so patently ambiguous that no enforceable obligation can be discerned, there is no valid contract. *Matthews v. Matthews*, 2 N.C. App. 143, 162 S.E. 2d 697 (1968).

II

With the foregoing general principles in mind, we first address the directed verdict in favor of Citrini entered at the close of all the evidence. Citrini asserted as grounds (1) that the evidence showed the existence of a contract, obviously meaning the agreement of April, 1979, and Goodwin's breach thereof; and (2) that Goodwin had failed as a matter of law to prove any of his affirmative defenses. The court granted the motion upon considering Goodwin's various defenses. Goodwin assigns error, both because there was evidence that the original contract was no longer in effect and because there was evidence supporting his affirmative defenses.

[1] One of the defenses was novation, that is, that the January 1980 agreement superseded the April 1979 agreement. The 1980 contract does not show on its face whether it supersedes the 1979 contract, and therefore directed verdict on the contract itself would have been improper. *Penney v. Carpenter*, 32 N.C. App. 147, 231 S.E. 2d 171 (1977). It provided that Citrini would receive certain commissions on "listings" and "sales from sales listed." These terms present ambiguities, to the extent that they may mean *all* listings and sales or only those listings and sales generated during the current term of employment. Citrini offered her oral testimony that the later agreement had nothing to do with the earlier agreement and evidence that she had contacted Goodwin at various times after July 1980 regarding commissions allegedly due her. Goodwin testified that he intended by the later

agreement to change the earlier agreement in accordance with discussions which occurred when Citrini started to work for him. He also introduced evidence that listings were renewed shortly after the second agreement and expert testimony that, under the customs of the real estate business, no commissions were due under such agreements after the listings expire or after negotiations are interrupted (as here). Goodwin also elicited testimony from Citrini that she accepted a commission on one of the subject tracts at a rate set by the later contract. This constitutes at least *prima facie* evidence of novation.

On motion for a directed verdict, the court must consider the evidence in the light most favorable to the non-moving party along with every reasonable inference to be drawn therefrom. *Odell v. Lipscomb*, 12 N.C. App. 318, 183 S.E. 2d 299 (1971). If the non-movant has produced any evidence more than a scintilla to support each element of the claim or defense, the court should deny the motion, and a directed verdict entered over such evidence is error. *Hong v. George Goodyear Co.*, 63 N.C. App. 741, 306 S.E. 2d 157 (1983). As noted above, Goodwin introduced evidence of novation which conflicted with Citrini's oral testimony. The trial court thus erred in granting Citrini's motion on this affirmative defense and in taking the issue from the jury. *Penney v. Carpenter.*

III

[2] Under the facts of this case, novation constituted a complete defense to an action on the original contract. *See Housing, Inc. v. Weaver*, 52 N.C. App. 662, 280 S.E. 2d 191 (1981), *aff'd*, 305 N.C. 428, 290 S.E. 2d 642 (1982); 66 C.J.S. *Novation* §§ 22-25 (1950). Ordinarily, then, we would not need to address the trial court's rulings on the other affirmative defenses in reversing the directed verdict on the original contract and the judgment thereon. However, the court also granted a directed verdict for Citrini on the affirmative defense that the original contract had been terminated. Since this ruling was also error and since the issue will undoubtedly arise upon retrial, we address it here.

The contract did not contain an expiration date or other indicia of duration. In July of 1980, some fifteen months after execution of the contract, Goodwin told Citrini the contract was terminated; there were no listings or options on the subject prop-

erty at that time. Citrini apparently took no further action until early 1981.

A contract which contains no definite term as to its duration is terminable at will by either party upon reasonable notice after a reasonable time. *Atkinson v. Wilkerson*, 10 N.C. App. 643, 179 S.E. 2d 872 (1971), *rev'd on other grounds*, 285 N.C. 215, 204 S.E. 2d 17 (1974); *Hardee's Food Systems, Inc. v. Hicks*, 5 N.C. App. 595, 169 S.E. 2d 70 (1969); *see also* N.C. Gen. Stat. § 25-2-309 (1965). The court here ruled that whether the contract had been effective for a reasonable time was a jury question, but that defendant's failure to give "notice of intent to terminate at a subsequent specific date" constituted unreasonable notice as a matter of law. The court apparently believed that the law requires a specific procedure for notice; this constituted an erroneous preference for form over substance, since the law requires only that notice be reasonable under the circumstances. Usually this means prior notice. *See City of Gastonia v. Duke Power Co.*, 19 N.C. App. 315, 199 S.E. 2d 27, *cert. denied*, 284 N.C. 252, 200 S.E. 2d 652 (1973); *J. C. Millett Co. v. Park & Tilford Dist. Corp.*, 123 F. Supp. 484 (N.D. Cal. 1954). But on at least one occasion this Court has approved notice effective immediately. *Cabarrus Mem. Hosp. v. Whitley*, 18 N.C. App. 595, 197 S.E. 2d 631 (1973). Considering that in this case, Goodwin notified Citrini of his intent to terminate in July 1980, she took no action in response, and no performance or other activity occurred for at least six months thereafter, we conclude that there was at the very minimum a jury question as to whether notice became effective sometime during the six-month period. *See Cabarrus Mem. Hosp.* To hold otherwise would place undue emphasis on the formal mechanics of notice, to the detriment of reasonable commercial practice. Persons giving notice in improper form would remain at the mercy of the other party indefinitely. Therefore, we conclude that the court should not have taken the notice issue from the jury in this case.

IV

[3] The court granted a directed verdict to Goodwin at the close of Citrini's evidence on the issue of commissions on one of the tracts, the Guess tract, which was not named in the contract itself but which Citrini claimed "tied in" with the sale of the others.

Goodwin asserted that Citrini had presented insufficient evidence to bring the Guess tract within the scope of the 1979 contract. Citrini contends the ruling was erroneous.

The key language on this question is the phrase "ties in." It is not sufficiently unambiguous that its application rested solely with the court. *See Falls Sales Co. v. Asheville Contracting Co.* The dictionary provides no definite guidance: "tie in" means "to bring into connection with something relevant: join in a unified whole." Webster's Third New International Dictionary 2391 (1966). Citrini therefore properly introduced extrinsic evidence to show its interpretation and application. She introduced evidence that the tracts were listed together, that she had introduced Goodwin to Guess at which time he obtained the first listing, and that the property was eventually sold to related buyers. Goodwin does not dispute these assertions. Goodwin merely asserts that the tracts were not sold together or to the same purchaser. It therefore appears that Citrini produced more than a scintilla of evidence that the Guess tract was "tied in" with the others, and the directed verdict at the close of her evidence was error. *Hong v. George Goodyear Co.*

V

[4] We next consider Goodwin's unsuccessful general motion for directed verdict made at the close of Citrini's evidence. Goodwin, after presenting evidence, did not renew his motion at the close of all the evidence. Instead, Citrini moved for a directed verdict, and the court granted it after extensive argument and discussion. No motion by Goodwin at the close of all the evidence appears in the record.

Ordinarily, when a defendant's motion for directed verdict at the close of the plaintiff's evidence is denied, he waives the right to assign error to the denial by presenting his own evidence.

> 'Technically a party waives his right to a directed verdict, if the motion is made at the close of his opponent's case, and thereafter he introduces evidence in his own behalf. However he may renew the motion at the close of all the evidence. If the party fails to renew the motion he may not move for judgment notwithstanding the verdict nor may he claim error on appeal from denial of the motion at the close

> of the opponent's evidence. The renewed motion will be judged in the light of the case as it stands at that time. Even though the court may have erred in denying the initial motion, this error is cured if subsequent testimony on behalf of the moving party repairs the defects of his opponent's case.'

Overman v. Gibson Products Co., 30 N.C. App. 516, 519, 227 S.E. 2d 159, 161 (1976) (quoting 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2534, at 588-90 (1971) (describing procedure under identical federal rule)). The rationale for the waiver rule was set forth by the United States Supreme Court:

> Without going into the question whether the motion was properly made in this case, it is sufficient to say that defendant waived it by putting in his testimony. A defendant has an undoubted right to stand upon his motion for a non-suit, and have his writ of error, if it is refused; but he has no right to insist upon his exception, after having subsequently put in his testimony and made his case upon the merits, since the court and jury have the right to consider the whole case as made by the testimony. It not infrequently happens that the defendant himself, by his own evidence, supplies the missing link, and, if not, he may move to take the case from the jury upon the conclusion of the entire testimony. [Citations omitted.]

Bogk v. Gassert, 149 U.S. 17, 23, 37 L.Ed. 631, 634, 13 S.Ct. 738, 739-40 (1893); *see* 5A J. Moore & J. Lucas, *Moore's Federal Practice* § 50.05 (2d ed. 1984) (policy still applicable). The rule is consistent with North Carolina procedure before the adoption of the Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1-183 (1953) (motion for nonsuit waived by introduction of evidence). The waiver rule also mirrors the rule now in effect in criminal cases. North Carolina Rules of Appellate Procedure 10(b)(3) (July 7, 1983). Accordingly, we hold that in view of this consistent policy Goodwin waived his right to complain of the denial of his motion on appeal.

A review of Goodwin's own evidence demonstrates the wisdom of the rule. Although he now vigorously contends that Citrini's evidence showed that the 1979 contract had expired, and that the directed verdict should therefore have been granted, Goodwin himself testified as to his "peculiar circumstances" with respect to Citrini at the time the properties were sold. His co-

broker corroborated Goodwin's testimony by stating that he had "advanced" Goodwin certain monies in departure from ordinary practice. This testimony, while not supplying the "missing link," served to materially support Citrini's case as evidence of conduct acknowledging the existence of a continued obligation to Citrini. This assignment of error is accordingly without merit.

VI

The trial court made various rulings on parol evidence to which Goodwin now assigns error. Since no issues reached the jury, no prejudice could have resulted. Nevertheless, to avoid confusion upon retrial, we address the questions briefly here.

A. Citrini introduced in evidence the April 1979 contract, which defendant claims violated the parol evidence rule. Since that rule bars evidence of *prior agreements*, and since Citrini also introduced the 1980 contract, Goodwin contends that the rule barred any testimony as to the earlier agreement. This argument, while appealing, overlooks the fact that Citrini contended from the first, and the contracts allowed the interpretation, that the 1980 contract did not supersede the 1979 contract. It further overlooks the fact that the 1980 agreement was not yet in evidence at the time the 1979 agreement was introduced. This ruling was therefore correct.

B. The trial court also allowed Citrini to testify over Goodwin's objection that she did not, by signing the 1980 agreement, intend to change the 1979 agreement. Her testimony as to her conduct or the statements she made to others (for example, her telephone conversations with Goodwin after the 1980 agreement was signed) expressing such intent was proper. Absent fraud or mistake, however, the undisclosed intention of one party does not constitute relevant evidence of the effect of an agreement. *Root v. Allstate Insur. Co.*, 272 N.C. 580, 158 S.E. 2d 829 (1968). Citrini argues incorrectly that the novation issue makes the "undisclosed intent" testimony admissible. *See Commercial Nat'l Bank v. Charlotte Supply Co.*, 226 N.C. 416, 38 S.E. 2d 503 (1946) (same rules apply, "perhaps with added propriety"). Consequently, evidence of the parties' undisclosed or secret intent is not admissible.

C. Goodwin contends that the trial court improperly sustained an objection to his question to Citrini regarding Citrini's

professional relationship with Goodwin in 1979. We agree, and summarily dispose of this issue. It does not appear that the 1979 contract established any sort of professional relationship which would bar such evidence, since it was merely an agreement to split commissions.

D. Goodwin contends that the trial court erred in excluding certain questions propounded to Citrini concerning customary real estate practices. Citrini testified that she had sold realty for only a brief period before going out of business, and that she was unfamiliar with commercial sales. Absent some better foundation, then, the trial court did not abuse its discretion in excluding the opinion testimony asked for. *See generally* 1 H. Brandis, *North Carolina Evidence* §§ 122-24 (2d rev. ed. 1982).

E. Finally, Goodwin offered evidence regarding negotiations concerning listings and their effect on contract duration which the trial court excluded. The 1979 agreement does not on its face indicate that it contains all the terms of the contract. The 1979 contract does not contain any expiration terms, and the evidence of negotiations is not inconsistent with the agreement in any way. Consequently, parol evidence should have been admitted. *Craig v. Kessing*, 297 N.C. 32, 253 S.E. 2d 264 (1979); 2 H. Brandis, *North Carolina Evidence* § 252 (2d rev. ed. 1982).

VII

Because there must be a new trial on all issues, the correctness of the judgment becomes a moot question. Therefore, we reverse the orders directing verdicts for each party and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges HILL and JOHNSON concur.

ROBERT D. LAWSON, EMPLOYEE, PLAINTIFF v. CONE MILLS CORPORATION, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8310IC770

(Filed 15 May 1984)

Master and Servant § 68— doctor's testimony failing to indicate plaintiff informed of occupational disease—finding of no jurisdiction improper

The Industrial Commission erred in dismissing plaintiff's claim for lack of jurisdiction on the ground that he failed to file his claim within two years after he was notified of the nature and work-related cause of his disease since plaintiff's doctor's testimony showed that he did not so inform plaintiff. An employee must be informed clearly, simply and directly that he has an occupational disease and that the illness is work-related to trigger the running of the two-year period set forth in G.S. 97-58. Plaintiff's doctor was so inexact in his diagnostic summary that he used the term "emphysema" and "chronic obstructive lung disease" interchangeably. Further, it was not enough for the medical authority to "assume" he told plaintiff his disease "may have been" work related since such a vague recollection by a physician should not serve to forever bar a worker from pursuing his claim for compensation.

APPEAL by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 11 April 1983. Heard in the Court of Appeals 2 May 1984.

Plaintiff was born on 20 June 1912. In 1941 he began working in Cone Mills' White-Oak plant. He worked there until 1953. He returned to work at the White-Oak site in 1956 and worked until 1957. He returned again in 1964 and worked until he left on sick leave in 1976. In June 1977 he formally retired from his employment. During most of his employment plaintiff worked in the spinning department six days a week and on the clean-up crews on Sundays. During the time plaintiff worked for the defendant employer the air in the mill was very dusty and dirty. Plaintiff also smoked during this period.

During his employment plaintiff began experiencing breathing problems including chest tightness, shortness of breath and a cough. During 1976, plaintiff consulted Dr. Ziessman about his breathing problem. Dr. Ziessman's diagnosis of and advice to plaintiff are the matters in controversy in this case.

On 19 December 1980, plaintiff filed a claim with the Industrial Commission for an occupational disease caused by ex-

posure to cotton dust. On 15 September 1981, defendants filed a motion to dismiss the claim on the basis that it was not filed within two years after the employee was informed by medical authority of his occupational disease, or within two years after his disability occurred. A hearing was held, and on 21 July 1982 a Deputy Commissioner entered an Opinion and Award dismissing plaintiff's claim for lack of jurisdiction, because he failed to file his claim within two years after his disability occurred or within two years after he was notified of the nature and work-related cause of his disease. Plaintiff appealed. On 11 April 1983 the Industrial Commission entered an Opinion and Award adopting the Opinion and Award of the Deputy Commissioner. Commissioner Clay dissented. Plaintiff appealed.

McNairy, Clifford & Clendenin, by Michael R. Nash and Harry Clendenin, III, for plaintiff.

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

WELLS, Judge.

The issue presented by this appeal is whether the Industrial Commission erred in dismissing plaintiff's claim because it was not timely filed. N.C. Gen. Stat. § 97-58 (1979) in pertinent part provides:

> . . .
>
> (b) . . . The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has same.
>
> (c) The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement as the case may be. . . .

Our supreme court has held that when these provisions are interpreted *in pari materia* they require an employee who seeks to recover for disability resulting from an occupational disease to give notice or file a claim within two years of the time when he is first informed by competent medical authority of the nature and work-related cause of the disease. *Taylor v. Stevens & Co.*, 300 N.C. 94, 265 S.E. 2d 144 (1980). This two year statute of limitation

is a condition precedent with which plaintiff must comply in order to confer jurisdiction on the Industrial Commission to hear the claim. *Poythress v. J. P. Stevens*, 54 N.C. App. 376, 283 S.E. 2d 573 (1981), *disc. rev. denied*, 305 N.C. 153, 289 S.E. 2d 380 (1982).

Findings of fact by the Industrial Commission, except those relating to jurisdictional facts are conclusive on appeal when supported by any competent evidence even if there is evidence to support contrary findings. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982). Findings of fact relating to jurisdiction are not conclusive even though supported by some evidence in the record. *Id.* The reviewing courts have a duty to make their own independent findings of jurisdictional facts based upon its consideration of the entire record. *Dowdy v. Fieldcrest Mills*, 308 N.C. 701, 304 S.E. 2d 215 (1983), *rehearing denied*, --- N.C. ---, 311 S.E. 2d 590 (1984).

The Deputy Commissioner made the following pertinent findings of fact which were adopted by the Industrial Commission:

. . .

3. In approximately 1966, plaintiff first noticed that he was having breathing problems. He became tired and short of breath easily. He began to experience chest tightness and developed a cough. His problems became progressively worse. (In April 1976, he was examined by Dr. Harvey A. Ziessman who diagnosed his condition as chronic obstructive pulmonary disease.) . . . (Dr. Ziessman told plaintiff that his condition was caused by cigarette smoking and probably cotton dust exposure from his employment in the mill.) . . . (He told plaintiff in either April or June, 1976 that plaintiff had "brown lung" and that cotton dust was a contributing factor in his lung disease so he should leave the mill.) . . . To the extent plaintiff's testimony differs from this finding, it is not found to be credible.

. . .

7. Plaintiff did not file his claim within two years after his disablement from his occupational lung disease or within two years after he was first informed by competent medical authority of the nature and work-related cause of the disease.

. . .

Commissioner Clay stated in his dissent that "the medical expert's testimony on what he told the plaintiff in 1976 is too vague and indeterminate to constitute a medical diagnosis."

In *Taylor v. Stevens & Co., supra,* the court made it clear that in order for the two year period to start running under G.S. § 97-58(b) and (c), plaintiff (1) had to be notified by competent medical authority of the nature of his disease and (2) that the cause of his disease was work-related. There is no dispute that plaintiff suffers from an occupational disease. The question we must decide is whether Dr. Ziessman informed plaintiff regarding the nature and work-related nature of his disease. The pertinent portions of Dr. Ziessman's testimony on these questions are as follows:

Q. (Mr. Cowan) Dr. Ziessman, has Mr. Robert David Lawson been a patient of yours?

A. Yes.

Q. Do you have his records with you?

A. Yes.

Q. Do you recall when you first saw Mr. Lawson?

A. The first time was April 16, 1976.

Q. What was the reason you saw Mr. Lawson at that time?

A. At that time he was complaining of shortness of breath, coughing, wheezing.

Q. Do your records reflect whether or not Mr. Lawson was working at that time?

A. He told me that he was planning to stop working as of July 1st.

Q. Do your records reflect that he was working in the textile industry at that time? Is that right?

A. That's right.

Q. Do your records reflect whether or not Mr. Lawson was smoking at that time?

A. Yes. At that time he said he was smoking about 8 to 10 cigarettes a day.

Q. This was in April of 1976?

A. Yes.

Q. Have you continued to see Mr. Lawson after April of 1976?

A. Yes. I've been seeing him on a regular basis since then.

Q. Okay. When was the last time you saw Mr. Lawson?

A. October 12, 1981. No. Yes. Yes. October 12, 1981.

Q. Dr. Ziessman, do you recall having a conversation with Mr. Lawson about the cause of his lung disease?

A. We've yes. We've talked about the factors that could be contributing to his lung disease.

Q. Let me refer you specifically, Dr. Ziessman, to your office records on June 4, 1976.

A. Yes.

Q. Would you relate to us, in your own words, what occurred during that visit with Mr. Lawson, as reflected in your office notes?

A. That was a follow-up visit to his first appointment, and other tests had been done after that first visit, and my *impression* at that time was that *he had chronic lung disease* that was *due* to smoking and *possibly cotton dust.*

Q. Did you discuss that with Mr. Lawson?

A. Yes.

Q. Tell us as best you recall, using your office notes to refresh your memory, if they do, the discussion you had with Mr. Lawson on June the 4th, 1976 about the cause of his chronic obstructive lung disease.

A. *Well, it's difficult to recall exactly the conversation we had. I know that I specifically told him not to smoke. He's already told me he's retiring so I'm sure I didn't press that issue any further,* and I told him I needed to see him in a couple of months and see how he's progressing under those two circumstances, no smoking and not working.

Q. Dr. Ziessman, I'm going to show you defendant's exhibit number 2, a copy of which I've already given to Mr. Clendenin, and ask you first if you recognize that?

A. Yes.

Q. Is that the original of a letter with your signature on it?

A. Yes.

Q. And does defendant's exhibit number 2, Dr. Ziessman, accurately summarize your office records and the conversation you've had with Mr. Lawson while he's been your patient?

A. It was meant to be a summary, yes.

Q. Would you read us, Dr. Ziessman, the second paragraph in defendant's exhibit number 2?

A. "It is clear from my records that we had discussed the underlying cause of his pulmonary disease, probably a combination of smoking and byssinosis."

Q. Would you tell us, as best as you recall, what you told Mr. Lawson more specifically in relation to the sentence you just read?

A. Well, really just basically what I said is that there's no doubt that smoking contributed to his chronic lung disease and very likely that cotton dust from where he was working also contributed to it.

Q. Do your records reflect when that conversation took place?

A. I suspect it was a combination of those first two visits. How much I told him the first time and how much I told him the second I don't remember details.

Q. It would have been either the April 1976 or the June 1976 visit.

A. Yes. *I can't tell from my notes how much in detail I went into it, but certainly I discussed it as far as I stated it.*

Q. And when you say discussed it as far as you stated it, tell us what you—

A. Well, *I also recommended that he stop smoking and that since he told me he stopped working I'm sure I didn't press that point any further.*

Q. Did you tell him, as best you recall Dr. Ziessman, why he should stop working in the textile mill?

A. Just because the cotton dust may, I assume and all I can do is assume, I didn't write specifically in my notes what I said but assuming by what I wrote in the diagnosis and what I wrote about my recommendations, *I assume that I told him that it was, although I didn't know how much, it was a contributing factor to his pulmonary dysfunction.*

Q. What was a contributing factor to his pulmonary dysfunction?

A. Both of them, the smoking and the cotton dust.

Q. Okay. Now, do you recall having a conversation with Mr. Lawson prior to June of 1977 where you discussed the probability or possibility of a collapsed lung?

A. No.

Q. Do you recall having a conversation with Mr. Lawson about emphysema?

A. Well, you know, *I use emphysema and chronic lung disease interchangeably, chronic obstructive pulmonary disease.*

. . .

CROSS EXAMINATION BY MR. CLENDENIN:

Q. Dr. Ziessman, a few minutes ago you said in response to a question from Mr. Cowan that you assumed these things you discussed with Mr. Lawson. Do I understand by that answer that you don't recall the specific conversations?

A. I recall, you know, I've seen him a number of times so I remember them all as sort of one conversation. I can't, in my mind, separate which was in April and which was in June and so on, but certainly we talked about those things. Sure.

Q. Are there any notations in your records to indicate a specific thing or specific things that you told the patient, Mr. Lawson? By that I mean do you have in your office records a notation saying told the patient this, told the patient that?

A. Sure. Well, my June office visit, June 4, 1976, what I wrote down in the records was no smoking parenthesis retired, and what that, you know, records are just reminders about what went on and essentially that means to me that I told him not to smoke and that since he was retiring that, you know, that factor was taken care of.

Q. You said that since he was retired you didn't press that issue. Does that mean that you would not have discussed in any detail with him his cotton mill employment because he was no longer in a cotton mill?

A. I know that we have talked about the cotton dust contributing to his pulmonary problem as that being a factor in contributing to it.

. . .

Q. Do your notes indicate whether you ever discussed with him the medical term byssinosis as opposed to the slang term brown lung?

A. It's probably unlikely that I used the term byssinosis. More likely I used the term brown lung, but I may have mentioned both of them. Certainly I didn't press the terminology, but certainly brown lung, for sure, was mentioned. Byssinosis may or may not have been.

Q. When you say you didn't press the terminology, what do you mean?

A. I just mean that I can't be sure that I said byssinosis, you know, I certainly would have said brown lung. I may have used the term byssinosis. At that time I was concerned about treating his symptoms and not so much with how much was due to what or terminology or that kind of thing.

. . .

(Emphasis added.)

An employee must be informed clearly, simply and directly that he has an occupational disease and that the illness is work-related to trigger the running of the two-year period set forth in G.S. § 97-58. *McKee v. Spinning Company*, 54 N.C. App. 558, 284 S.E. 2d 175, *disc. rev. denied*, 305 N.C. 301, 291 S.E. 2d 150 (1982). Dr. Ziessman's testimony shows that he did not so inform plaintiff. We are particularly concerned that Dr. Ziessman was so inexact in his diagnostic summary as to say that he used the terms "emphysema" and "chronic obstructive lung disease" interchangeably. Further, we emphasize that it is not enough for the medical authority to "assume" he told a worker his disease "may have been" work related. Such a vague recollection by a physician should not serve to forever bar a worker from pursuing his claim for compensation.

Given the vague and contradictory testimony of Dr. Ziessman, we agree with Commissioner Clay that the evidence fails to show that in 1976 plaintiff had been sufficiently informed of the nature and work relatedness of his disease to trigger the running of the two year period under the statute. If Dr. Ziessman's testimony shows anything, it shows that in 1976 not even he was completely convinced that plaintiff suffered from an occupational disease. This being the case, it would be unfair, inequitable, and wrong to bar plaintiff's recovery on jurisdictional grounds. We therefore vacate the Commission's Opinion and Award and remand for consideration of plaintiff's claim on the merits.

Vacated and remanded.

Judges BECTON and JOHNSON concur.

ROGER STEPHEN WELLS, D/B/A WELLS BROTHERS DAIRY v. FRENCH BROAD ELECTRIC MEMBERSHIP CORPORATION

No. 8328SC739

(Filed 15 May 1984)

1. Appeal and Error § 9— moot questions

Assignments of error relating to evidence of damages and submission of a contributory negligence issue were moot where the jury found that plaintiff was not damaged by defendant's negligence.

2. Evidence § 48.2— qualification of expert—no abuse of discretion

The trial court did not abuse its discretion in permitting plaintiff's witness to testify as an expert on mastitis control but not as an expert on dairy farming where the witness necessarily drew upon his knowledge of dairy farming in testifying about mastitis control.

3. Evidence § 40.1— non-expert testimony properly excluded

In an action to recover damages for mastitis suffered by plaintiff's dairy herd allegedly as the result of excess voltage supplied by defendant electric utility to plaintiff's electric milking machines, the trial court did not commit prejudicial error in refusing to allow plaintiff's father to testify how many cows died between 1977 and 1980 where a proper foundation for the cause of their death was not laid; nor was it prejudicial error to strike his testimony that a certain amount of voltage caused the mastitis since plaintiff's father was not qualified as an expert.

4. Evidence § 25— exclusion of photograph

The trial court did not commit prejudicial error in refusing to admit a photograph to illustrate a witness' testimony where the witness had already testified as to the subject matter of the photograph, and where it does not appear in the record how the photograph would have been used to illustrate his testimony.

5. Electricity § 4— electric supplier—instructions on duty to ultimate purchaser

In an action to recover damages for mastitis suffered by plaintiff's dairy herd allegedly as the result of excess voltage supplied by defendant electric utility to plaintiff's electric milking machines, the trial court did not err in refusing to give plaintiff's requested instruction that the distributor of a dangerous product is under a duty to the ultimate purchaser, when ordinary care so requires, to give adequate warning of any foreseeable dangers arising out of its use and is liable to the purchaser for injury resulting from failure to perform this duty since (1) the evidence did not conclusively support a duty to warn in that the record was void of evidence that defendant should have known of the potential deleterious effects of excess voltage on dairy herds; (2) the proposed instruction incorrectly stated the law in that it failed to contain the element of knowledge and failed to state that the supplier is subject to liability only where there is no reason to believe that users will realize the dangerous condition of the product; and (3) the trial judge correctly instructed the jury on the applicable law that the standard of care owed by a supplier of electricity to the public is the highest degree of care because of the dangerous nature of electricity.

APPEAL by plaintiff from *Burroughs, Judge.* Judgment entered 23 November 1982 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 30 April 1984.

This action was brought by plaintiff, a dairy farmer, to recover for damages alleged to have been sustained as a result of the negligence of defendant, an electric utility that serviced plain-

tiff's dairy barn. In its answer, defendant pleaded contributory negligence as a bar to plaintiff's claims.

Plaintiff alleged that, since 1977, a percentage of his dairy herd has suffered from mastitis, an inflammation of the udder caused by infection. The evidence showed that when cows suffer from mastitis, their milk must be poured out and cannot be used. In severe cases, there is no hope that the animal will recover. This is what happened in the instant case, and the plaintiff consequently sold the infected cattle for beef in order to salvage some of their value.

At some point after the occurrence of mastitis in his dairy herd, plaintiff contacted various experts in the hope of discovering what caused the infection. As a result of his inquiries, plaintiff became convinced that "stray voltage" was responsible for the mastitis. That is, plaintiff determined that the voltage of the electricity supplied by defendant and utilized by plaintiff's electric milking machines was too great. Because of the excess voltage, the cows received electric shocks from the machines, which caused them to hold in their milk, as a result of which they contracted mastitis, and were ultimately sold for slaughter. Plaintiff's contention at trial was that the stray voltage was caused by the defendant electric utility's negligent failure to balance their power lines, and was also caused by faulty or loose connections at the transformer. Plaintiff further contended that, in any event, defendant had a duty to warn plaintiff about the causal link between stray voltage and mastitis.

Defendant introduced evidence that tended to refute the allegations of negligence, namely, that discovery of the causal connection between the amount of electricity supplied to dairy barns and the incidence of mastitis is quite recent and to some extent speculative. Defendant's evidence also tended to show that the facts of this case do not sufficiently support the element of proximate cause, i.e., that other factors independent of stray voltage might have been responsible for the mastitis problem plaintiff had with the herd. At trial, the jury returned a verdict in favor of the defendant and the plaintiff appeals.

Gudger, Reynolds, Ganly & Stewart, by Joseph C. Reynolds, for plaintiff appellant.

Morris, Golding and Phillips, by William C. Morris, Jr., for defendant appellee.

VAUGHN, Chief Judge.

[1] We first dispose of two of plaintiff's assignments of error on mootness grounds. Plaintiff assigns error to the trial court's failure to admit certain evidence relating to loss of production damages, and also assigns error to the submission of the contributory negligence issue to the jury. Because the jury found that the plaintiff was not damaged by defendant's negligence, both these assignments are rendered moot.

Appellate courts will not decide moot or academic questions, *Rice v. Rigsby*, 259 N.C. 506, 518, 131 S.E. 2d 469, 477 (1963), and the jury's answer to one issue which determines the rights of a party can render an exception concerning other issues moot, and thus not required to be considered on appeal. *Dodd v. Wilson*, 46 N.C. App. 601, 265 S.E. 2d 449, *review denied*, 301 N.C. 235, 283 S.E. 2d 131 (1980). Where, as here, the jury has returned a verdict in defendant's favor, this Court need not address errors relating to the determination of damages or remedies. *See, e.g., Foods, Inc. v. Super Markets*, 288 N.C. 213, 217 S.E. 2d 566 (1975) (where jury determined that supermarket, on termination of biscuit supply contract, was not required to pay for leftover labels and packaging materials, assignments of error relating to UCC remedies allegedly available became moot). Nor need we address the propriety of submitting the issue of contributory negligence to the jury. Where a jury determines that plaintiff was not injured by a defendant's negligence, exceptions to the charge on issue of contributory negligence are moot. *Scism v. Holland*, 12 N.C. App. 405, 183 S.E. 2d 282 (1971).

In its third argument, plaintiff groups together a number of loosely connected exceptions. These exceptions are generally concerned with the trial court's refusal to qualify certain witnesses as experts, and its refusal to allow certain opinion testimony of these witnesses. It is first necessary to eliminate certain of the listed exceptions from our consideration on various grounds unrelated to the merits of the objections. In particular, answers

were never given to many of the questions to which plaintiff excepted. It was incumbent upon plaintiff to get these answers in the record out of the presence of the jury if he wished to preserve his right to have this Court consider whether the excluded evidence was properly omitted. *See Heating Co. v. Construction Co.*, 268 N.C. 23, 30, 149 S.E. 2d 625, 630 (1966).

[2] In reviewing the assignments to which the right to appellate review was properly preserved, we find no error. In particular, the trial court allowed one of plaintiff's witnesses to testify as an expert on mastitis control but not as an expert on dairy farming. As a practical matter, by allowing the witness to testify as an expert in mastitis control, the witness necessarily drew upon his knowledge of dairy farming in responding to counsel's questions, the two subjects being interrelated. There was therefore no abuse of discretion, and such abuse is necessary before a trial court's failure to qualify an individual as an expert witness may be reversed. *State v. Puckett*, 54 N.C. App. 576, 284 S.E. 2d 326 (1981).

Plaintiff also lists numerous exceptions in support of his argument that certain of defendant's objections to the testimony of non-expert witnesses were erroneously sustained. Once again, we remove from our consideration some of these exceptions where plaintiff's counsel never had the witness respond to the question outside of the jury's presence so that the answer could be preserved for appellate review. In addition, the trial court ruled correctly in excluding testimony where the time period inquired about was outside the three years prior to the institution of the action. *See* G.S. 1-52(5) (statute of limitations for negligence actions).

[3] The remaining exceptions pertaining to the testimony of non-expert witnesses may be reviewed on meritorious grounds; again, we find no error. Reviewing these exceptions briefly seriatim, we find it was not prejudicial error to refuse to allow plaintiff's father to testify how many cows died between 1977 and 1980 where a proper foundation for the cause of their death was not laid, nor was it prejudicial error to strike his answer to another question in which he stated that a certain amount of voltage caused the mastitis. Plaintiff's father was not qualified as an expert and therefore should not have been permitted to guess the cause of the cows' disease.

[4] Exclusion of a photograph of an isolation transformer built under plaintiff's direction to cure the stray voltage problem was proper. Plaintiff's counsel stated to the trial court that the photograph was only to illustrate the witness's testimony, and the witness had already testified as to the subject matter of the photograph. No prejudicial error therefore inhered. Furthermore, it does not appear in the record how the photograph would have been used to illustrate his testimony. *See Fleming v. R.R.*, 236 N.C. 568, 73 S.E. 2d 544 (1952) (no prejudicial error from exclusion of photograph).

Similarly, the evidentiary ruling that excluded a document which purported to corroborate a witness's testimony concerning pounds of milk and amount of butterfat produced by plaintiff's herd was not reversible error. Furthermore, such evidence goes to the issue of damages only and questions relating to damages are moot for purposes of this appeal. *See* discussion, *supra*. Testimony by defendant's general manager as to what his employees discovered on inspecting the electrical poles on plaintiff's farm was properly excluded as hearsay.

Finally, it was proper to refuse to allow the general manager to state whether he had advised customers other than plaintiff of potential dangers arising from the effect of stray voltage on dairy herds. First, the general manager testified he was unaware of such a problem until plaintiff advised him of it; second, no evidence in the record gives rise to a duty on the general manager's part to communicate such advice to his customers.

[5] Plaintiff lastly contends that the trial court erred in refusing to give a requested instruction to the jury, which stated in pertinent part that:

> The distributor of a dangerous product is under a duty to the ultimate purchaser when ordinary care so requires, to give adequate warning of any foreseeable dangers arising out of its use. The distributor is liable to the purchaser for injury resulting to persons or property from failure to perform this duty.

We hold that the trial court did not err in refusing to so instruct the jury. First, the evidence does not conclusively support a duty to warn. It appears from his testimony that defendant's

general manager was not aware of the possibility that stray voltage caused the mastitis until he was notified by plaintiff and plaintiff's father. Where there is no such actual knowledge, the next step is to examine the record to determine whether defendant had constructive knowledge of the hazards associated with stray voltage. The record is devoid of evidence that defendant, through its agents, should have known of the potential deleterious effects of stray voltage on dairy herds: the evidence instead showed that scientific discovery of this theory is recent, research still ongoing, and findings on this subject inconclusive.

Second, we note that the proposed instruction incorrectly states the law. The supplier of a dangerous product is under a duty to warn only when he or she has actual or constructive knowledge that the product is dangerous for the use for which it is supplied. The proposed instruction fails to contain the element of knowledge. *See Stegall v. Oil Co.*, 260 N.C. 459, 464, 133 S.E. 2d 138, 142 (1963), for a correct statement of the law. The *Stegall* case also indicates that the supplier is subject to liability only where there is no reason to believe that users will realize the dangerous condition of the product. The proposed instruction does not address this issue either, and Judge Burroughs was under no obligation to correct the defects in the proposed instruction so that it conformed with applicable law. *See King v. Higgins*, 272 N.C. 267, 270, 158 S.E. 2d 67, 70 (1967).

Third, the judge's charge to the jury included instructions that the standard of care owed by a supplier of electricity to the public is the highest degree of care because of the dangerous nature of electricity. *Snow v. Power Co.*, 297 N.C. 591, 596, 256 S.E. 2d 227, 231 (1979) (company supplying electricity "must use a high degree of foresight and must exercise the utmost diligence consistent with the practical operation of its business"). *Accord, Beck v. Carolina Power and Light Co.*, 57 N.C. App. 373, 377, 291 S.E. 2d 897, 901, *aff'd*, 307 N.C. 267, 297 S.E. 2d 397 (1982) (standard is due care, which means commensurate care under the circumstances). The trial judge thus not only refused to give an improper proposed instruction, he correctly instructed the jury on the pertinent law in this area.

Plaintiff received a fair trial, free from error.

No error.

Judges BRASWELL and EAGLES concur.

SON-SHINE GRADING, INC. v. ADC CONSTRUCTION COMPANY, A GEORGIA CORPORATION; RALEIGH PROPERTIES, LTD., A GEORGIA LIMITED PARTNERSHIP; AND ASBURY SNOW, JR., GENERAL PARTNER

No. 8310SC968

(Filed 15 May 1984)

Contracts § 18— oral modification—contract requiring written modification—waiver of requirement

In an action in which plaintiff sought to recover from defendant general contractor for clearing, excavating and grading the grounds of an apartment complex, the trial court properly found that the original provisions of the contract dealing with measurement of rock removed from the job site were modified even though the contract stated that the provisions could not be altered except by a written change, and the modification had occurred pursuant to a parol agreement. The provisions of a written contract may be modified or waived by subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract have been modified or waived, even though the instrument involved provides that only written modifications shall be binding. Further, the project superintendent had authority to bind the corporate defendant by the oral modification.

APPEAL by defendants from *Britt, Samuel E., Judge.* Judgment entered 1 March 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 17 February 1984.

In this civil action plaintiff seeks to recover under a subcontract between it and the general contractor, defendant ADC Construction Company, for clearing, excavating and grading the grounds of an apartment complex constructed for Raleigh Properties, Ltd. Before the contract was entered into the parties knew that the 11-acre construction site contained many visible boulders and rock outcroppings, but since the amount of sub-surface rock that would have to be removed was not known, it was agreed that plaintiff would be paid extra for each cubic yard of rock removed at varying rates according to the type of equipment that had to be employed in accomplishing it. The contract also provided that

the amount of rock removed had to be measured by ADC's engineers, who were not usually on the site, and that the contract could not be altered except by a written change order executed by one of its officers.

In April, 1981 a significant amount of rock required removal, and, as a consequence, so plaintiff contends, its contract with ADC was modified to waive measurement of rock by ADC's engineers and permit the measurements to be made by plaintiff's and ADC's on-site personnel. The modification was allegedly made during a conference between certain of plaintiff's officials and defendant's Field Superintendent Jack Mabe on April 7, 1981, and the next day plaintiff wrote and delivered the following letter to him:

A D C Construction Company
ATTN: Mr. Jack Mabe
Deep Hollow Drive
Raleigh, North Carolina 27612

Subject: Raleigh Garden Apartments

Dear Mr. Mabe,

This writing is to confirm our job site meeting of yesterday concerning the removal of rock. Those present were Jack Mabe, Delmar Ivey, Tony Long, and Wayne Britt. Following are items concerning the agreements made with reference to the removal of additional rock if encountered:

1. It appears vast quantities of rock are subject to be encountered on subject site. Prior to our meeting and this writing, several small areas have already required the use of a dozer with ripper.

2. Due to the various times an engineering firm would be required to measure quantities with time being of upmost importance (job behind schedule), the measuring of rock will be accomplished by on site personnel.

3. Trench rock removal is to be measured by you and Delmar using the average end method with daily tickets being made; same as used when we were undercutting.

4. When rock is encountered in the general excavation that can be removed (ripped w/Cat D8K Dozer), Tony Long will mark a copy of his field engineering drawings (by BNK) with the elevations noted where rock depth started. You are to check with him daily and mark your drawings accordingly.

5. Any/all rock that is removed by any methods will be disposed on site.

6. Payments—Due to high cost in removing, trench rock will be invoiced and paid for monthly. Ripped rock will be computed upon completion of rough grading and invoiced at such time.

Jack, if the above statements/agreements are incorrect or if you are not in complete agreement, please advise.

Sincerely,

/S/H. Wayne Britt

H. Wayne Britt

Neither ADC nor Mabe responded to the letter and during the rest of construction the rock removed was measured as therein stated. None of plaintiff's invoices thereafter submitted, all of which included amounts of rock removed without being measured by ADC's engineers, were disputed upon receipt, but several were paid, less retainage, though belatedly. In August, 1981, however, when ADC was quite behind in paying and the balance claimed by plaintiff amounted to more than $145,000, ADC refused to pay, citing that its engineers had not measured the rock removals itemized on several bills. Plaintiff then stopped work on the project, sued for monies allegedly due, and filed a notice of claim of lien against the property. Defendants denied plaintiff's claim and counterclaimed for the cost of work performed by another grading company, alleging that plaintiff, rather than it, had breached the contract.

The matter was heard by Judge Britt, sitting without a jury. At the close of all the evidence the judge directed verdict against defendants on the counterclaim, and after making extensive findings of fact and conclusions of law, entered judgment for plain-

tiff in the sum of $136,219.27. Among other things, the judgment was based on findings of fact and conclusions that the written contract was modified by ADC's field superintendent, as plaintiff contended, and that ADC breached the contract and plaintiff did not.

Smith, Debnam, Hibbert & Pahl, by Carl W. Hibbert, for plaintiff appellee.

Merriman, Nicholls, Crampton, Dombalis & Aldridge, by W. Sidney Aldridge, and Fishman, Freeman & Gordon, Atlanta, Georgia, by Richard Allen Gordon, for defendant appellants.

PHILLIPS, Judge.

The dominant question for our determination is whether ADC's Field Supervisor, Jack Mabe, had authority to modify the contract with plaintiff by dispensing with the requirement that ADC's engineers measure the rock that plaintiff removed from the construction site. The several other questions posed by the appellants in their brief are subordinate to and controlled by this one. If Mabe had authority to, and did, modify the contract, whether ADC ratified the change, as the court also found and defendants dispute, is not crucial to plaintiff's case; if the contract was modified to permit removed rock to be measured in the ways specified in plaintiff's letter summarizing the modifications agreed to, defendants' contention that measurements made in accord therewith were too inexact and unreliable to support the damages awarded, merits little or no discussion; and, finally, if the contract was modified and ADC's refusal to pay thereunder was a breach, as the court also found, it necessarily follows that ADC's counterclaim, based on the theory that it had performed the contract and plaintiff had breached it, had no basis and the court could not have erred in dismissing it, as defendants contend. On the other hand, if the contract was not modified by Mabe, plaintiff's judgment must be set aside and ADC's counterclaim reinstated. The nature of the deviation from the written contract is such that it almost answers the question for us without further resort to the evidence. The modification imposed no new obligation of any kind on ADC and relieved plaintiff of no obligation to it; instead it relieved ADC of the necessity of having its engineers on the site every time rock had to be measured, named the ex-

perienced construction employees of plaintiff and ADC that would do the measuring instead of the engineers, and specified the methods that they would use while so doing.

Pertinent to the dominant issue presented, the trial court made the following findings of fact:

> 11. That ADC's Jack Mabe as Field Superintendent was on the job site constantly (until June, 1981, and succeeded in that capacity by Frank Costin), supervising construction and dealing with subcontractors such as Son-Shine.
>
> . . . .
>
> 14. That on the Raleigh Garden Project, ADC's Jack Mabe had a wide range of responsibility and authority which was manifested by his conduct, and increased to some extent due to his representing an out-of-state general contractor (ADC).
>
> 15. That on this particular project, Jack Mabe, in his dealings with Son-Shine, exhibited his apparent authority in representing ADC by authorizing and requesting Son-Shine to do certain tasks outside the scope of the written agreement, including but not limited to:
>
> a. drain and undercut (silt removal) a large pond on the site;
>
> b. relocate a sewer line and manhole;
>
> c. sell diesel fuel and gasoline to ADC;
>
> d. rent equipment to ADC for its use.
>
> . . . .
>
> 19. That Son-Shine was paid by ADC for most of the above items requested (and more specifically for the pond and sewer line work) in the earlier stages of the project.
>
> . . . .
>
> 21. That Son-Shine first encountered subsurface rock on the job site in April, 1981, and thereafter a meeting was held on April 7, 1981, between Son-Shine's Wayne Britt and ADC's Jack Mabe concerning procedures to be followed in measur-

ing rock quantities. That the letter written by Wayne Britt on April 8, 1981 (see plaintiff's Exhibit 18) was a memorandum of the oral agreement and was delivered to Jack Mabe on or about April 8, 1981.

22. That certain procedures for measuring quantities of rock were agreed upon by ADC and Son-Shine at the April 7, 1981 meeting, and that thereafter these procedures were substantially complied with by Son-Shine.

It is well established under our law that: The provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract have been modified or waived, even though the instrument involved provides that only written modifications shall be binding. *W. E. Garrison Grading Co. v. Piracci Construction Co., Inc.*, 27 N.C. App. 725, 221 S.E. 2d 512 (1975), *rev. denied*, 289 N.C. 296, 222 S.E. 2d 695 (1976). The foregoing and other findings of fact, abundantly supported by evidence, are clearly sufficient, in our opinion, to support the trial judge's conclusion that the contract terms governing the measurement of the amount of rock removed was modified by a mutual oral agreement. The defendants' contention that written authority from a company officer had to be shown is rejected. ADC chose to conduct this large, ongoing project through Mabe, who could not possibly carry out the project efficiently without authority to make such minor changes in the project and the methods of accomplishing it as the exigencies of the situation required. That that was the understanding of ADC, as well as the plaintiff, is clearly inferable from the various events recited, and by the additional fact, as the evidence plainly shows, that the job was already behind and more delays were inevitable unless ADC kept its engineers at plaintiff's beck and call for an extended period at considerable expense or measured the rock with on-site personnel. That Mabe had authority from ADC to purchase work and materials not even referred to in the written contract at a cost of several thousand dollars is certainly some evidence that he likewise had authority to expedite his employer's business by having rock that was covered by the written contract measured by other construction personnel that were already there.

Furthermore, even if Mabe's modification of the written contract had not been authorized by ADC, that deficiency was rendered irrelevant by ADC's own actions thereafter. ADC did not exist just in Atlanta, where its officers and home offices were, as defendants in effect contend; it was also at the site of the project in great force, constructing much of it and supervising the rest. Like any other legal entity, ADC was bound to know the status of its own business and the movement and activities of its own members, the employees of a corporation being, in effect, what arms, legs, ears and eyes are to an individual. Thus, ADC knew from observation, bills received, and the whereabouts and work of its own employees that great quantities of rock were being excavated on this project without its engineers being sent to the scene or doing the measuring; and it also knew that the measuring was being done by site personnel without the project being delayed by the absence of its own engineers. Knowing these things and that it was its obligation, not plaintiff's, to have its engineers there when needed, ADC nevertheless permitted its engineers to work elsewhere, continued to accept plaintiff's excavation work without the measurement of its engineers, and even paid on various of plaintiff's invoices. In doing so, ADC ratified the modification made and the appellants are estopped to deny Mabe's authority to make it. *Boddie v. Bond*, 154 N.C. 359, 70 S.E. 824 (1911). To hold otherwise would be to penalize plaintiff for ADC's own derelictions, which the law does not permit.

Though a discussion of the other questions presented by defendants is not required for the reasons earlier stated, we nevertheless note that their claim that the amounts awarded plaintiff for removing rock is supported only by measurements made by methods that are unreliable and uncertain is without merit. Apart from the fact, which is answer enough, that the methods used to measure the rock involved were those that ADC itself agreed to and regularly used, measurement being the joint task of Mabe and certain of plaintiff's employees under the modification, the record contains plenary evidence that those methods are inherently reliable, reasonably accurate, and generally approved by construction personnel in this area.

Affirmed.

Judges WELLS and BRASWELL concur.

JAMES B. WILLIS, JR. v. THOMAS H. RUSSELL AND SHELBY M. FREEMAN

No. 833SC239

(Filed 15 May 1984)

1. **Architects § 2— action for fees—sufficiency of evidence**

The evidence was sufficient for the jury to find that defendants engaged plaintiff architect upon express terms to either design and supervise an entire condominium project or just to do the schematic design phase of the project where it tended to show that plaintiff offered to perform certain architectural design services for defendants in exchange for certain compensation; the discussions between the parties dealt with both the entire condominium project and the schematic design; and defendants told plaintiff to begin the work, approved his work as it proceeded, and approved the fee and profit schedules which plaintiff sent them.

2. **Damages § 3.5— loss of profits by breach of contract**

Prospective profits prevented or interrupted by breach of contract are generally recoverable when it appears that it was reasonably certain that such profits would have been realized except for the breach of contract, that such profits can be ascertained and measured with reasonable certainty, and that such profits may reasonably be supposed to have been within the contemplation of the parties when the contract was made.

3. **Architects § 2— architectural services—quantum meruit recovery**

The measure of damages for architectural services under an implied contract or *quantum meruit* theory is the reasonable value of the services rendered, less any benefits received.

4. **Appeal and Error § 6— directed verdict for plaintiff upon motion by defendants—earlier refusals to direct verdict—no right of appeal by defendants**

Where the trial court entered a directed verdict in favor of plaintiff upon motion by defendants, defendants' appeal from the trial court's earlier refusals to either direct a verdict in their favor or to direct a verdict for plaintiff in a lesser amount has the effect of opposing the directed verdict entered upon their motion and must be dismissed.

5. **Contracts § 26— unexecuted contract—competency for corroboration**

An unexecuted written contract for architectural services which, according to plaintiff architect, had been orally agreed to by the parties was admissible only for the purpose of corroboration.

Judge WELLS concurring in result.

APPEAL by plaintiff and cross-appeal by defendants from *Reid, Judge*. Judgment entered 3 December 1982 in Superior Court, CARTERET County. Heard in the Court of Appeals 8 February 1984.

Plaintiff's action seeks damages of $73,939 for breach of contract and his evidence tended to show the following: Defendants employed plaintiff, an architect, to help them develop a large condominium project that would meet the approval of the town boards. Plaintiff offered to help them obtain the needed variances if defendants would retain him as the architect for the project, and the defendants agreed thereto. Plaintiff obtained the variances in January of 1981, and shortly thereafter presented defendants with a cost estimate for the 160 unit project, including a fee breakdown for each stage of his work. The estimated cost for the entire project was $10,000,000, and plaintiff's fee was 2.25%, or $225,000. The first phase of plaintiff's work involved schematic design, which accounted for 15% of his total projected work on the project, or $33,750 in fees. Defendants indicated that the fees stated were acceptable.

Before proceeding, defendants decided to seek corroboration of the cost estimates and compare plaintiff's plans to existing condominiums. During February of 1981 plaintiff sent them "red letter" figures specifying what part of the fees would be "hard cost" needed up front and what part could be deferred until a construction loan was obtained. This fee schedule also showed that 25% of the fees would be plaintiff's profit. Plaintiff informed defendants that $10,000 to $15,000 in "hard money" would be needed to make plans and obtain preliminary permits from the town where the project would be located, and later submitted a "hard money" fee of $15,301 for doing the schematic design for 80 of the units. The defendants decided to pursue the project and on 2 March 1981 instructed plaintiff to go ahead with the work.

Plaintiff began the schematic design phase of the project, and showed the defendants his alternative design possibilities on 10 March 1981. Plaintiff also delivered a proposed written contract covering his services and compensation, in which fees and profits due were specifically set forth. On 19 March 1981 defendants told plaintiff they would not sign the contract because it was too complicated; but they assured him they were going ahead with the project and wanted him as the architect. They also approved his design work and promised to sign a simpler contract after plaintiff stated that the costs and fees were the same as submitted in February. Meanwhile, plaintiff continued to prepare drawings for the project.

On 23 March 1981 defendant Russell told plaintiff that the project had been delayed or halted. He then stated that defendants had found another architect who would do the work without requiring any money in advance. Defendant Russell handed plaintiff a $1,000 check, which brought the amount plaintiff received from the defendants for the work he had done in March of 1981 to a total of $2,000. Plaintiff was told to send a bill to the defendants for what they owed him and that they would pay it; at that time three-fourths of the schematic design work had been done. Plaintiff spent 31 hours on the project in March of 1981 and his assistant architect spent 131 hours.

On 2 April 1981 plaintiff submitted a bill for $73,939. It charged defendants $4,405 for the preliminary work such as obtaining the zoning variances, $18,984 for completing 75% of the schematic design work, $8,438 for his profit on the schematic design phase, and $47,812 for his profit on the other phases of the project. Defendants were credited with $5,700 already paid. Defendants did not pay the bill and construction has not begun on the condominiums.

At the close of plaintiff's evidence defendants moved for a directed verdict on the grounds that (1) plaintiff failed to prove the existence of a contract, and (2) the condominiums could not have been built due to the zoning laws. The motion was denied. Defendants then moved for a directed verdict in favor of the plaintiff in the amount of $3,970. This figure was arrived at under a *quantum meruit* theory based on plaintiff's hourly rate and the number of hours actually worked. This motion was also denied, the court stating that the value of plaintiff's services was a jury question. Counsel for defendants then asked the court what an appropriate *quantum meruit* value would be, and the court responded that 75% of $15,301 would be the maximum, apparently because the February fee schedule specified $15,301 as the amount of "hard money" needed to complete the schematic design phase of the project and 75% of that work had been done.

Defendants next moved for a directed verdict in favor of plaintiff for $7,032.50, and this motion was allowed. In doing so, the court stated, in substance, that: From the plaintiff's evidence, defendants only agreed to pay and were obligated to pay $15,301, which included $4,591 for outside consultants that were never

engaged; and that since that left a total of $10,710 due for schematic design fees and the schematic design work was 75% complete when defendants terminated plaintiff's services, plaintiff had earned $8,032.50 according to the trial court, against which defendants had already paid $2,000, thereby leaving a balance of $6,032.50. To achieve the final sum of $7,032.50, the court added an extra $1,000 for plaintiff's troubles. Defendants' counterclaim was dismissed in a separate judgment. Plaintiff appealed the grant of defendants' motion for directed verdict in the amount of $7,032.50, while defendants cross-appealed the denial of their first two motions for directed verdict.

Mason and Phillips, by L. Patten Mason, for plaintiff appellant and cross appellee.

Bennett, McConkey & Thompson, by Thomas S. Bennett, for defendant appellee and cross appellant Thomas H. Russell.

Wheatly, Wheatly & Nobles, by C. R. Wheatly, Jr., for defendant appellee and cross appellant Shelby M. Freeman.

PHILLIPS, Judge.

Both parties assign error to the trial court ruling on defendants' motions for directed verdict. The appropriate standard of review is set forth in *Koonce v. May*, 59 N.C. App. 633, 634, 298 S.E. 2d 69, 71 (1982):

> A motion by a defendant for a directed verdict under G.S. 1A-1, Rule 50(a) of the Rules of Civil Procedure tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. On such a motion, plaintiff's evidence must be taken as true and considered in the light most favorable to the plaintiff, giving plaintiff the benefit of every reasonable inference to be drawn therefrom. A directed verdict for the defendant is not properly allowed unless it appears as a matter of law that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish. [Citations omitted.]

Although the directed verdict was in plaintiff's favor, it was granted upon defendants' motion, over plaintiff's objection, and deprived plaintiff of the chance of recovering a great deal more than the judgment provided for. Under the circumstances, the

evidence must be viewed in the light most favorable to plaintiff. When so viewed, it is clear that a prima facie case of breach of contract was made out, which the jury, rather than the court, should have decided. Furthermore, even if plaintiff's evidence had failed to make out a case for breach of contract by defendants and it had been proper to dispose of the case by the *quantum meruit* issue, it was error for the court to undertake to decide it instead of submitting it to the jury.

[1] According to the evidence previously summarized: Plaintiff offered to perform certain architectural design services for defendants in exchange for certain compensation; their discussions dealt with both the entire condominium project and the schematic design, and the fees to be paid therefor were clearly stated. Defendants told plaintiff to begin the work, approved his work as it proceeded, and approved the fee and profit schedules received. A jury could properly find therefrom that defendants expressly contracted with plaintiff for either the schematic design work or for the entire project on the fee basis that plaintiff testified was discussed. Defendants' refusal to execute a written contract so providing does not necessarily establish that plaintiff's services were not accepted, as defendants contend; the intent of the parties controls such matters, and acceptance may be manifested orally or by conduct, as well as by a signature. *Executive Leasing Associates, Inc. v. Rowland*, 30 N.C. App. 590, 592, 227 S.E. 2d 642, 644 (1976). In our view this evidence was sufficient to support the claim that the defendants engaged plaintiff upon express terms to either design and supervise the entire condominium project or just do the schematic design phase.

[2, 3] Upon retrial, therefore, it will be for the jury to determine whether the parties contracted at all, and, if so, whether for the entire project or just the schematic design. If the jury finds that there was a contract for the entire project based on the fee schedule referred to and defendants breached it, the measure of damages would include plaintiff's prospective profits, as well as the fees for work performed. The general rule in this state is that prospective profits prevented or interrupted by breach of contract are recoverable when it appears:

> (1) that is is reasonably certain that such profits would have been realized except for the breach of the contract, (2) that

such profits can be ascertained and measured with reasonable certainty, and (3) that such profits may be reasonably supposed to have been within the contemplation of the parties, when the contract was made, as the probable result of a breach.

Perkins v. Langdon, 237 N.C. 159, 171, 74 S.E. 2d 634, 644 (1953). But, of course, if the jury finds that the parties had no express contract, it would then be appropriate for them to consider issues of implied contract and *quantum meruit*. In which event, of course, the measure of damages will be the reasonable value of the services rendered, less any benefits received, *Doub v. Hauser*, 256 N.C. 331, 123 S.E. 2d 821 (1962), rather than the formula the trial court used. But, since damages, at least beyond a nominal amount, are never presumed, for plaintiff to recover any substantial sum under a *quantum meruit* theory, evidence will be required as to the reasonable value or market value of his services and those of any of his assistants or employees that contributed to the work that was done for the defendants. *Harrell v. W. B. Lloyd Construction Co.*, 41 N.C. App. 593, 255 S.E. 2d 280 (1979). The value of plaintiff's services will not have to be determined, however, if the jury first decides that the parties had an express contract and defendants breached it; for, with minor exceptions irrelevant to this appeal, our law permits people to contract as they see fit and enforces agreements so made according to their terms.

[4] Since the judgment in plaintiff's favor was entered pursuant to defendants' insistence and instigation, they cannot be heard in opposition thereto, and their appeal from the judge's earlier refusals to either direct a verdict in their favor or to direct a verdict for plaintiff, but in a lesser amount than finally ordered, has that effect. It is inherent in our law and practice that litigants may not blow hot and cold at the same time, and defendants' appeal is dismissed.

[5] Nevertheless, we discuss briefly, since the question may arise again upon retrial, defendants' contention that the written contract, which the parties never executed, was erroneously received into evidence during the trial. That the paper was not signed is immaterial, since the contract sued on was oral, not written, and a contract for architectural services does not have to

be in writing. Since the paper contained matters that, according to plaintiff, had been discussed by the parties and orally agreed to, it was admissible, *but only for the purposes of corroboration.* In receiving the exhibit into evidence over defendants' objection, however, the court commented, "And it should be received for whatever weight the jury wants to attach to it." Though the case was later taken from the jury and we do not know how they would have been instructed in regard to it, the remark indicates that the judge received the exhibit as substantive evidence, which it was not. Thus, upon retrial, if the paper is again offered into evidence, its admission should be limited accordingly.

As to plaintiff's appeal, reversed and remanded for a new trial.

As to defendants' cross-appeal, dismissed.

Judge BRASWELL concurs.

Judge WELLS concurs in result.

Judge WELLS concurring in result.

I agree that defendants' appeal should be dismissed. I also agree that plaintiff should have a new trial. On retrial, the jury should be instructed that defendant, by its motion for directed verdict for plaintiff, has judicially admitted owing plaintiff at least $7,032.50.

STATE OF NORTH CAROLINA v. DENNIS LEE CHURCH

No. 8323SC624

(Filed 15 May 1984)

1. Criminal Law § 75.2— confession—possibility of lower bond—no improper inducement

The trial court properly found and concluded that a statement by an officer regarding defendant's bond did not render defendant's confession involuntary where the promise by the officers to "see" if they could lower defendant's bond was not related to defendant's escape from the charges against him, but

only referred to a purely collateral advantage which was "entirely disconnected from the possible punishment or treatment defendant might receive."

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

An officer's promise that the district attorney would "be notified" of defendant's cooperation did not render defendant's confession involuntary since the defendant could not have reasonably thought that the statement was a promise for a lighter sentence.

APPEAL by defendant from *Mills, Judge.* Judgment entered 12 November 1982 in Superior Court, WILKES County. Heard in the Court of Appeals 12 January 1984.

On 12 July 1982, defendant, Dennis Lee Church, was arrested and charged with six felonies involving alleged violations of The Controlled Substances Act. While in custody, the defendant made certain statements concerning his involvement with the charges. On 9 November 1982, a jury trial was held. At trial, defendant objected to the introduction of his statement. A *voir dire* was then conducted for the purpose of ruling on the admissibility of the statement. At the conclusion of the hearing, the trial judge overruled defendant's objection and allowed the statement into evidence. At the close of all the evidence, defendant entered a plea of guilty pursuant to a plea arrangement with the State. As a part of the plea arrangement, defendant appeals from the adverse ruling on his motion to suppress.

Attorney General Edmisten, by Assistant Attorney General Barry S. McNeill, for the State.

Vannoy, Moore and Colvard, by Anthony R. Triplett, for defendant appellant.

JOHNSON, Judge.

The issue before this Court is whether the trial court erred in denying defendant's motion to suppress his confession. We find no error and, therefore, affirm the judgment.

At the *voir dire* to determine the voluntariness of defendant's confession, the State's evidence tended to show that on 12 July 1982, the defendant, Dennis Lee Church, was arrested at approximately 8:00 p.m. and charged with six felonies involving alleged violations of the North Carolina Controlled Substances

Act. Defendant was held in custody at the Wilkes County Sheriff's Department under a $100,000 bond. The defendant was advised of his *Miranda*[1] rights and was asked by Agent John Stubbs, a State Bureau of Investigation Specialist, whether he would be willing to cooperate with the investigation. The defendant asked Officer Stubbs whether he (the defendant) could be kept out of prison if he cooperated. The officer told defendant that the only thing they could promise was that the District Attorney would be made aware of his cooperation. The defendant did not give any statement that night.

The following day, defendant requested to talk with Officer Stubbs; he had decided to cooperate with the officer under the previously discussed terms. Officer Stubbs arrived and the defendant was given his *Miranda* rights. Defendant indicated that he understood his rights and signed a waiver form. Between the hours of 4:00 and 5:00 p.m., defendant made certain inculpatory statements concerning his involvement in the narcotics violation. The evidence also showed that the defendant expressed concern about the amount of the bond and that the officers advised the defendant that they could not assure that the bond would be lowered but that they would see what they could do.

At the conclusion of the *voir dire*, the trial judge, in overruling defendant's motion, made the following findings of fact and conclusions of law: the defendant was in custody at the Wilkes County jail on 12 July and 13 July 1982, having been charged with serious drug law violations; no statement had been taken from the defendant on 12 July; on July 13, Agent Stubbs talked with the defendant after defendant waived his *Miranda* rights; the officer testified that the defendant knowingly, intelligently, freely and voluntarily waived his rights to an attorney. The court found that the officers indicated that the defendant did not appear sleepy, confused or in pain, but that the defendant was alert and responsive and was not under the influence of drugs or alcohol. The court further found that there were no threats made to the defendant to elicit his statement and that the officer did tell the defendant that if he (the defendant) cooperated, the District Attorney would be notified of such cooperation. The officers further told the defendant that they would see if they could

1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

get his bond reduced. Finally, the court found that the defendant had offered no evidence which indicated that his statement was not freely and voluntarily given. The court concluded as a matter of law that the statement the defendant gave on the afternoon of 13 July 1982, while in custody, was freely and voluntarily given after a full and complete examination of defendant's understanding of his right to remain silent and his right to the assistance of counsel. Accordingly, the confession was admitted into evidence. At trial, the defendant presented no evidence.

[1] The defendant's principal argument is that the trial judge erred in denying his motion to suppress the inculpatory statements on the grounds that the officers held out a hope of benefit in exchange for his confession—that if he cooperated the District Attorney would be notified of his cooperation and that they would see if they could get the defendant's bond lowered, and that these circumstances rendered the confession involuntary.

It is well established that "a confession cannot be received in evidence where the defendant has been influenced by any threat or promise; . . . a confession obtained by the slightest emotions of hope or fear ought to be rejected." *State v. Roberts*, 12 N.C. (1 Dev.) 259, 260 (1827). *Accord State v. Booker*, 306 N.C. 302, 293 S.E. 2d 78 (1982). "When a defendant properly objects to the admission of the confession or moves to suppress same, the trial judge should conduct a preliminary inquiry to determine whether the confession is voluntary." *Id.* at 308, 293 S.E. 2d at 81. The court determines whether the confession was voluntary, and thus admissible, by looking at the totality of circumstances. *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983). "In making this determination the trial judge must find facts; and when the facts are supported by competent evidence, they are conclusive on the appellate courts. However, the conclusions of law drawn from the findings of fact are reviewable by the appellate courts." *State v. Booker, supra* at 308, 293 S.E. 2d at 81.

In the instant case, the trial court concluded as a matter of law that the defendant's confession was voluntarily given. The defendant contends that the conclusion is erroneous. He contends that this confession was involuntary; that he would not have made the statement if he did not expect a hope or benefit—reduction of his bail and notice to the District Attorney that he had cooperated—in exchange for his confession.

With respect to the bond contention, the law in this state is quite clear. It has been held that "any improper inducement generating hope must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage." *State v. Pruitt*, 286 N.C. 442, 458, 212 S.E. 2d 92, 102 (1975). *Accord State v. Booker, supra* at 308, 293 S.E. 2d at 81 ("inducement to confess whether it be a promise, a threat or mere advice must relate to the prisoner's *escape* from the criminal charge against him").

In *State v. Cannady*, 22 N.C. App. 53, 54, 205 S.E. 2d 358, *cert. denied*, 285 N.C. 664, 207 S.E. 2d 763 (1974), this Court held that the fact that "defendants might have made their statements with the hope that lower bond would be set . . . does not render their statements involuntary." Similarly, in *United States v. Ferrara*, 377 F. 2d 16, 18 (2nd Cir.), *cert. denied*, 389 U.S. 908, 88 S.Ct. 225, 19 L.Ed. 2d 225 (1967), the court held that the defendant's statement was not involuntary because the federal agent told him that if he cooperated, the agent was sure his bond would be reduced.

Here, the promise by the officers to "see" if they could lower defendant's bond was not related to defendant's escape from the charges against him, *State v. Booker, supra*, but only referred to a purely collateral advantage which was "entirely disconnected from the possible punishment or treatment defendant might receive." *Id.* The lower bond merely meant that defendant would not have to await trial while incarcerated. It did not have any effect on the charges or ultimate punishment. The fact that defendant may have made his statement with the hope that lower bond would be set does not render his statement involuntary. *State v. Cannady, supra.* Accordingly, the trial court properly found and concluded that the statement by Officer Stubbs regarding defendant's bond did not render the confession involuntary.

[2] Defendant also contends that his confession was involuntary because Officer Stubbs told him that if he cooperated, the District Attorney would "be notified" of his cooperation. We do not agree.

In *State v. Branch*, 306 N.C. 101, 291 S.E. 2d 653 (1982), the issue was whether the officers' statement to the defendant that, "the only promise we could make was that we would talk with the District Attorney if he made a statement which admitted his in-

volvement," induced the defendant to involuntarily make a confession in the hopes of lighter punishment. The court held that the statement could not have reasonably led the defendant to believe that he would receive easier treatment. "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." 306 N.C. at 109, 291 S.E. 2d at 659. *See also State v. Young*, 33 N.C. App. 689, 236 S.E. 2d 309 (1977) (officer's statement to defendant that he would tell the solicitor if defendant cooperated did not render defendant's subsequent confession involuntary) and *State v. Muse*, 280 N.C. 31, 185 S.E. 2d 214 (1971), *cert. denied*, 406 U.S. 974, 92 S.Ct. 2409, 32 L.Ed. 2d 674 (1972) (statement made by SBI Agent that he would "let it be known" did not show that defendant's statements were obtained by hope or fear). Finally, we note that in *State v. Jackson*, *supra*, the court held that an officer's statement "it would certainly come out in court that he cooperated," did not provide a basis to hold that the defendant's confession was induced by hope.

The case at bar is virtually indistinguishable from *Branch*, *Young*, *Muse* and *Jackson*. In each case, the confessions were held to be admissible. Accordingly, we hold that the confession at bar is also admissible. The record clearly shows that the officers did not promise the defendant that he would not receive an active prison sentence, but only that they would make the District Attorney "aware" of his cooperation. As in *Branch* and *Young*, the defendant could not have reasonably thought that Officer Stubbs' statement was a promise for a lighter sentence. We conclude that the defendant's statement was neither induced nor rendered involuntary by the officer's statement, and that the confession was properly received into evidence by the trial judge.

Finally, we find no merit in defendant's contention that the trial judge failed to make any explicit findings of fact as to whether he was under the influence of pain pills or valium at the time of the confession. As was noted in *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E. 2d 540, 548 (1982), "[i]f there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal." This

resolution may be express or implied, but in any event, once made, is conclusive on appeal. *Id.*

In the instant case, the trial judge, after hearing and weighing the evidence and observing the demeanor of the witnesses, found as a fact that "the officer indicated that he [defendant] appeared alert and appeared to be understanding what was going on and that in the officer's opinion the defendant was not under the influence of any drug or alcohol . . ." Implicit in this "finding" is the trial judge's resolution of the conflict in the evidence in the State's favor. While the better practice would be for the trial judge to state such a resolution expressly, the finding is, nevertheless, supported by the evidence and conclusive on appeal.

In conclusion, we have carefully reviewed the record and find

No error.

Judges ARNOLD and PHILLIPS concur.

ERNEST EARL OWENSBY v. ELIZABETH UPTON OWENSBY

No. 8327DC638

(Filed 15 May 1984)

Divorce and Alimony § 27— divorce, alimony, custody and support proceeding— abuse of discretion in award of attorneys' fees

The trial judge abused his discretion in awarding only $6,750 in attorneys' fees to defendant's attorneys for legal services rendered on behalf of defendant over a period of 15 months in a hotly contested divorce action where defendant's attorneys documented over 700 attorney hours and 86 paralegal hours of work.

Chief Judge VAUGHN dissenting.

APPEAL by defendant from *Hamrick, Judge.* Judgment entered 18 January 1983 in District Court, CLEVELAND County. Heard in the Court of Appeals 9 April 1984.

Plaintiff filed an action for divorce from bed and board, custody and absolute divorce. Defendant answered and counter-

claimed for alimony pendente lite, permanent alimony, child custody and support, divorce from bed and board and attorney fees. The case was vigorously contested.

Prior to the trial for alimony pendente lite, child custody and support, five depositions were taken and numerous motions and pleadings were filed by both parties. On 28 June 1982, the trial court granted to defendant custody of and support for the two minor children, temporary alimony and attorney fees of $2500 ("as partial payment" for services rendered "to this point on behalf of the wife and children"). Defendant was also ordered to vacate plaintiff's house. On 2 August 1982, the court order was amended to the extent that plaintiff was ordered to pay $1500 in attorney fees "for partial payment for the services . . . rendered to date in this case on behalf of the defendant in addition to the $2500 attorneys fees previously ordered," for a total of $4000 in attorneys' fees. On 22 November 1982, plaintiff was ordered to pay an additional $250 as attorneys' fees to defendant's attorneys.

Subsequent to the first trial and prior to the jury trial for divorce from bed and board and permanent alimony, additional pleadings were filed, depositions taken, and hearings held. On 18 January 1983, plaintiff was granted a divorce from bed and board from defendant and the court found that defendant was not entitled to alimony because she had committed adultery. At the conclusion of this trial, defendant's attorneys, members of a Charlotte law firm, filed an affidavit for attorneys' fees along with an itemized statement of time spent by defendant's attorneys. Attorney hours were billed at $75.00 per hour, and paralegal hours were billed at $35.00 per hour. After deducting the $4000 previously paid by plaintiff, defendant's affidavit showed a balance of $55,152.64 in attorneys' fees and costs incurred. The trial judge found that defendant was unemployed and had no immediate income and that plaintiff was "of sufficient financial means to defray counsel expenses for the lawsuit." The trial judge then recited factors which he considered in determining the amount of the fee (difficulty of questions of law, customary charges, etc.) and awarded an additional sum of $2500 as a "reasonable fee" to defendant's attorneys. Thus, a total of $6,750 in attorneys' fees were awarded to defendant's attorneys.

Defendant appeals from the court orders awarding attorney fees.

Murchison, Guthrie & Davis, by Dennis L. Guthrie and K. Neal Davis, for defendant-appellant.

Hamrick, Mauney, Flowers, Martin & Deaton, by Fred A. Flowers, for plaintiff-appellee.

EAGLES, Judge.

Defendant assigns as error an abuse of discretion in the trial judge's award of $6,750 in attorneys' fees to defendant's attorneys for legal services rendered on behalf of defendant throughout all stages of this litigation. We agree that the trial judge erred.

Our Supreme Court has declared that, in alimony cases, "the guiding principle behind the allowance of counsel fees is to enable the dependent spouse, as litigant, to meet the supporting spouse, as litigant, on substantially even terms by making it possible for the dependent spouse to employ adequate and suitable legal representation." *Clark v. Clark*, 301 N.C. 123, 136, 271 S.E. 2d 58, 67 (1980). In determining the proper amount of counsel fees to be awarded, the trial court is under an obligation to consider "the nature and worth of the services rendered, the magnitude of the task imposed upon counsel, and reasonable consideration for the parties' respective conditions and financial circumstances." *Id.* On appeal, the issue is whether, upon consideration of all these circumstances, the amount of counsel fees awarded was "so unreasonable as to constitute an abuse of discretion." *Id.*

The facts before the court here included: a sworn affidavit by defendant's attorneys that their normal charges were $75.00 per hour for attorney services and $35.00 per hour for paralegal services; a sworn affidavit by another Charlotte attorney that his customary charge in domestic cases was between $60.00 and $120.00 per hour; a detailed accounting of time expended by defendant's attorneys and their paralegals between 18 September 1981 and 14 January 1983 (totalling 711 attorney hours and 86.7 paralegal hours); a detailed accounting of out-of-pocket costs (filing fees, deposition fees, etc.) advanced by defendant's attorneys in excess of $2790.00; the fact that the litigation was vigorously contested and spanned 15 months; and the fact that plaintiff's net

worth was over $2 million while defendant had no income and no substantial assets.

The court here concluded "as a matter of law that defendant is entitled to have reasonable counsel fees to be set by the Court; that the plaintiff has the ability to pay the amount set; and the attorneys for the defendant have rendered valuable services so as to be entitled to receive a fee, and the fee hereafter awarded is justified." The court then recited that it considered, *inter alia*, the time and labor spent by defendant's attorneys, the customary charge for similar services, the amount involved in the controversy, the cost of overhead in practicing law in Mecklenburg County, and the previous sums awarded as attorneys' fees to defendant.

Reasonable attorneys' fees must be available to dependent spouses in domestic cases because, as our Supreme Court has noted:

> The ends of justice require that both sides of a controversy such as this be fully explored and presented to judge and jury before decision is made. Defendant was, and is, entitled to adequate representation. Such representation, under the circumstances disclosed here, is not always readily available to a wife. Many attorneys are reluctant to take domestic relations cases under any circumstances, for the demand which a bitterly contested divorce and custody case make upon the lawyers involved are time-consuming, strenuous, and tension-creating. This is more especially true of the demands which the penniless wife makes upon the time of her attorneys, for her dependence upon them is absolute. There are few lawyers who would be willing, or could afford, to take her case without the expectation of receiving adequate compensation in the end.

Stanback v. Stanback, 270 N.C. 497, 509, 155 S.E. 2d 221, 230 (1967).

We note that, after out-of-pocket costs advanced by defendant's attorneys of more than $2,790.00 are deducted from the total $6,750.00 attorneys' fee award, the trial judge here effectively awarded only $3,960.00 for the time and services rendered by defendant's attorneys over a period of 15 months in a hotly contested divorce action where defendant's attorneys documented

over 700 attorney hours and 86 paralegal hours of work. The inadequacy of such a fee shocks the conscience, especially in the face of the great disparity in financial positions between the supporting spouse (with a net worth of $2.3 million) and the dependent spouse (with no income and no substantial assets). The trial judge's conclusion of law here (that defendant's attorneys were entitled to a reasonable fee, etc.) was correct and consistent with the findings of fact. However, in the face of the well-documented evidence of the nature and worth of the services rendered, the magnitude of the task imposed upon counsel, and the financial positions of the respective spouses, we hold that an award of $6,750.00 was not a "reasonable fee" and was, in fact, so unreasonable as to constitute an abuse of discretion.

Remand for new hearing on attorneys' fees.

Judge BRASWELL concurs.

Chief Judge VAUGHN dissents.

Chief Judge VAUGHN dissenting.

The amount to be awarded as attorney fees is within the sound discretion of the trial judge and is unappealable except for abuse of discretion. I cannot say that the amount awarded is so unreasonable as to constitute an abuse of discretion by Judge Hamrick. The judge made numerous findings of fact to which there is not a single exception. The majority refers to "facts" before the court. I must point out, however, that the matters recited by the court are not facts but only evidence tending to show facts. The court did not find them to be facts. The court made no findings as to the time and expense reasonably necessary in the defense of the action. Although defendant was entitled to meet plaintiff on equal terms, there is nothing in the record before us to distinguish this case from any other District Court domestic case except that plaintiff is a wealthy man. There is not a single exception to the Court's failure to find any fact except its failure to find that the reasonable value of the legal services performed was $55,152.64. Where there are no exceptions to the findings of fact, the only question presented is whether the fact found supports the conclusions recorded by the court. Most

likely, the judge not only considered the time spent on the case but also considered what he thought was reasonably necessary to have been spent. The jury found against defendant on every issue including findings that she committed adultery and offered such indignities to plaintiff as to render his condition intolerable. Certainly, the merits of a defendant's cause is a factor the trial judge should consider, even though plaintiff is a wealthy man. The statute authorizing attorney fees was not designed to encourage litigation or generate a multitude of pleadings and discovery.

If we are to go behind the court's findings of fact, which an appellate court should not do in the absence of an appropriate exception, I must note that some of counsel's time is billed for a study of the equitable distribution laws. It may be that the trial judge gave some consideration to what might be coming to defendant from that source. I also note that an unusual amount of time billed appears to be for talking with the defendant. As all attorneys who are familiar with domestic relations cases know, clients in those cases will talk to you all day and most of the night if the attorney lets them and it isn't costing them anything.

It may well be that, as a trial judge, I would have taxed plaintiff with a higher fee. It may be that the next trial judge will award more. I do not believe, however, that an appellate court should continue to remand the case until some trial judge sets a fee that suits our fancy.

On the record before me I can't say that the judge abused his discretion. I, therefore, vote to affirm.

RUDOLPH C. STONE AND AUDREY L. STONE v. MARK G. LYNCH, SECRETARY OF THE DEPARTMENT OF REVENUE

No. 8310SC451

(Filed 15 May 1984)

1. Taxation § 28— union strike benefits—income or gift—what law applies

The statute providing that accounting methods selected by the State "shall follow as nearly as practicable the federal practice," G.S. 105-142(a), does not apply to a decision as to whether union strike benefits constitute income or a gift under North Carolina law; nor does federal law provide the rule of decision.

2. Taxation §§ 27, 28— union strike benefits—income or gift

Union strike benefits constitute a gift to the recipient under North Carolina law and were thus properly excludable from the recipient's taxable income where the union assistance was based upon a moral rather than a legal obligation.

APPEAL by plaintiffs from *Farmer, Judge.* Judgment entered 17 December 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 9 March 1984.

Smith, Patterson, Follin, Curtis, James & Harkavy, by J. David James, for plaintiff appellants.

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

BECTON, Judge.

We must decide in this case whether union strike benefits are taxable as income to the recipient under North Carolina law, or whether they qualify as a gift, thereby allowing the taxpayer to exclude them from taxable income. We reverse the trial court, and we hold that the benefits constitute a gift and that plaintiff taxpayers are entitled to a refund on income tax paid on strike benefits.

I

The Communications Workers of America (CWA) organized a local in early 1979 at plaintiff Rudolph Stone's place of employment.[1] Plaintiff joined CWA in September, 1979, and several weeks later the local went out on strike. The strike lasted about eight weeks, ending on 29 November 1979. Although it had no legal obligation to do so, CWA provided financial assistance to the strikers, including plaintiff. CWA made these payments, based on need, from information supplied by the strikers. During the strike, plaintiff received $1,879.95 in benefits, for groceries, utilities, household, medical, and other expenses. On his tax return for 1979, plaintiff reported the $1,879.95 as "non-taxable" income, based on information from CWA that it considered the benefits a gift to him. The Department of Revenue subsequently

1. Plaintiff Audrey Stone received no taxable income during the tax year in question. She is only a nominal party to this action.

notified plaintiff that it considered the benefits taxable income. Plaintiff paid the deficiency and sued for a refund; from an order denying relief, he appeals.

II

The definition of gross income under the North Carolina law is very broad. *See* N.C. Gen. Stat. § 105-141(a) (Supp. 1983). However, the law provides certain exceptions, including the following exclusion pertinent to this case: "The words 'gross income' do not include the following items, which shall be exempt from taxation under this Division . . . . (3) The value of property acquired by gift, bequest, devise or descent. . . ." N.C. Gen. Stat. § 105-141(b) (Supp. 1983). Each side urges a differing construction of the word "gift." How we define that statutory term will decide the outcome of this case.

Plaintiff argues that North Carolina law should supply the rule of decision, and that the definition of gift should be that used in *Foreman Mfg. Co. v. Johnson, Comm'r of Revenue*, 261 N.C. 504, 135 S.E. 2d 205 (1964). The State takes a contrary view and argues that the trial court correctly applied the federal standard, which allows a significantly narrower exclusion under virtually identical statutory language. *See* 26 U.S.C. § 102(a) (1982); *Comm'r v. Duberstein*, 363 U.S. 278, 4 L.Ed. 2d 1218, 80 S.Ct. 1190 (1960). When North Carolina and federal statutes contain identical language, federal interpretations are instructive to supplement North Carolina decisions. *See Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978). This applies especially to income taxation law in which the North Carolina decisions are few by comparison and the state and federal systems are closely interrelated. Our courts have relied heavily on federal tax decisions in the past, as, for example, in the *Foreman* case itself.

[1] Nevertheless, we believe that when North Carolina's appellate courts have supplied rules of decision, those must control. Our Supreme Court has expressly rejected arguments that federal decisions, even those interpreting identical language, control the courts of this State in the interpretation of state law. *Bulova Watch Co. v. Brand Distributors, Inc.*, 285 N.C. 467, 206 S.E. 2d 141 (1974). An examination of the North Carolina income tax statutes supports our conclusion. The General Assembly has

specifically provided at numerous places therein that the State shall follow federal practice. *See* N.C. Gen. Stat. § 105-141(b)(9), (10), (17), (19), (23) (Supp. 1983) (exclusions from gross income); N.C. Gen. Stat. § 105-144(b) (Supp. 1983) (definition of gain and loss); N.C. Gen. Stat. § 105-145(e) (Supp. 1983) (like kind exchanges); N.C. Gen. Stat. § 105-147(8), (16), (20) (Supp. 1983) (deductions). The absence of such language in G.S. § 105-141(b)(3) leads to the inference that, by exclusion, the legislature intended federal practice *not* to control it. *See State ex rel. Hunt v. Reinsurance Facility*, 302 N.C. 274, 275 S.E. 2d 399 (1981) (applying maxim *"expressio unius est exclusio alterius"*). It is true that N.C. Gen. Stat. § 105-142(a) (1979) provides that accounting methods selected by the State "shall follow as nearly as practicable the federal practice. . . ." This provision, however, does not *mandate* use of federal accounting practices. *See Watson v. Watson Seed Farms, Inc.*, 253 N.C. 238, 116 S.E. 2d 716 (1960) (use of federal practice permitted); *In re Virginia-Carolina Chem. Corp.*, 248 N.C. 531, 103 S.E. 2d 823 (1958) (similar; policy explained). And our Supreme Court has held that G.S. § 105-142(a) does not authorize any deductions not specifically authorized by North Carolina statute, *In re Fleishman*, 264 N.C. 204, 141 S.E. 2d 256 (1965), nor does it require use of federal tax treatments. *State ex rel. Comm'r of Revenue v. Speizman*, 230 N.C. 459, 53 S.E. 2d 533 (1949). Classification of certain payments as gifts does not appear to be an "accounting method." *See* 26 U.S.C. § 446 (1982); Black's Law Dictionary 18 (5th ed. 1979). We, therefore, hold that G.S. § 105-142(a) (1979) does not apply and that federal law, while instructive, does not provide the rule of decision.

We turn then to the only North Carolina case which has construed G.S. § 105-141(b)(3) (Supp. 1983), *Foreman*. In *Foreman*, an officer-stockholder of a corporation forgave a $70,000 debt owed him by the corporation. The corporation sued for a refund of taxes assessed on the forgiveness of debt, and the Supreme Court ruled that the forgiveness constituted a contribution to capital, which was, under the tax circumstances of the case, the equivalent of a gift. The *Foreman* Court ruled:

> The value of property acquired by gift is excluded from both State and Federal income tax. G.S. 105-141(b)(3); Int. Rev. Code of 1954 § 102. A gift is usually defined as a voluntary transfer of property by one to another without any con-

> sideration therefor. Theoretically, a contribution by a stockholder increases the resources of the corporation and the value of all the stock, including his own, proportionately. This business aspect removes such a transaction from the concept of a pure gift. However, such a gift to a corporation necessarily constitutes a gift to the other stockholders.
>
> In *American Dental Co.*, . . . the Supreme Court held that the gratuitous release by creditors of accrued rent and interest on merchandise purchased constituted a gift to the corporation which was not subject to income tax. The court said: 'The fact that the motives leading to the cancellation were those of business or even selfish, if it be true, is not significant. The forgiveness was gratuitous, a release of something to the debtor for nothing, and sufficient to make the cancellation here gifts within the statute.' [Citation omitted.] The creditors-donors in *American Dental Co.* were not stockholders. When a creditor who is a stranger to the corporation forgives its debt to him, the forgiveness is exempt from income tax under the exclusion of gifts. When a stockholder gratuitously cancels the debt the corporation owes him, the transaction is denominated a contribution to capital. [Citations omitted.]
>
> We hold that the forgiveness of the debt in question constituted a contribution to the capital of the plaintiff corporation and was therefore not taxable income.

261 N.C. at 507, 135 S.E. 2d at 208 (quoting *Helvering v. American Dental Co.*, 318 U.S. 322, 331, 87 L.Ed. 785, 791, 63 S.Ct. 577, 582 (1943)).

Of importance to the present case is the *Foreman* Court's reliance on the cited language from *American Dental Co.* By adopting the language that business or selfish motives are insignificant in determining classification as a gift, and by focusing solely on the legal obligations of the donor, the Court effectively rejected, *for North Carolina income tax purposes*, the test adopted by the United States Supreme Court in *Duberstein*, some four years before *Foreman*. The *Duberstein* Court looked beyond the legal and moral obligations of the parties to the donor's intent to recompense the donee for past services or to induce future beneficial services. The *Duberstein* Court found a clear distinction

between the traditional meaning of "gift" and its definition under the tax statutes. The holding in *Foreman*, on the other hand, means that for North Carolina income tax purposes the definition of gift remains what it was at common law: "a voluntary transfer of property by one to another without any consideration therefor." *Id.* at 507, 135 S.E. 2d at 208; *Ex parte Barefoot*, 201 N.C. 393, 160 S.E. 365 (1931).

[2] We now apply the foregoing test to the facts of this case. It is unquestioned (a) that the benefits were property, (b) that they were voluntarily transferred by CWA, and (c) that the transfer was to another—that is, to plaintiff. The crucial element therefore becomes whether there was any consideration for the transfer. The trial court found as fact that "Union assistance was based upon *moral* obligation." (Emphasis added.) Plaintiff performed certain strike duties; the court found that "Plaintiff was morally obliged to perform strike duties." Both parties concede that these findings are conclusive. The trial court did not find that CWA had any *legal* obligation of any kind to pay benefits, or that there was any other consideration for their payment. We find nothing in the record supporting such a conclusion.

Therefore, the only possible consideration for the payment of the benefits was the moral obligation owed by CWA to plaintiff and plaintiff's moral obligation to participate in strike duties. It is firmly settled, however, that except in cases of consanguinity or similar relationship, or when there is some antecedent debt or legal obligation, a moral obligation alone does not constitute consideration. *See Carolina Helicopter Corp. v. Cutter Realty Co.*, 263 N.C. 139, 139 S.E. 2d 362 (1964); *Cruthis v. Steele*, 259 N.C. 701, 131 S.E. 2d 344 (1963); *Exum v. Lynch*, 188 N.C. 392, 125 S.E. 15 (1924); *see also* Restatement (Second) of Contracts §§ 71-73 (1981); 17 C.J.S. *Contracts* § 90 (1963); 38 C.J.S. *Gifts* § 7 (1943); 17 Am. Jur. 2d *Contracts* §§ 130-133 (1964); 38 Am. Jur. 2d *Gifts* §§ 1-2 (1968). No special relationship exists between these parties, and we discern no antecedent obligation or agreement which would cause the moral obligation to become sufficient consideration. We therefore hold that the benefits were a gift by CWA to plaintiff and thus properly excludable from plaintiff's taxable income for 1979. G.S. § 105-141(b)(3) (Supp. 1983).

The State makes much of the fact that CWA's payments to plaintiff exceeded what plaintiff should have received under

CWA's own needs guidelines. Under *Foreman*, however, the amount paid appears irrelevant: if anything, the excessive payments underscore the gratuitous nature of the benefits, since nothing "extra" was required of plaintiff in exchange for the overage. We also note in passing that even under federal law, the most recent action of the United States Supreme Court was to uphold a verdict that strike benefits are excludable from income. *United States v. Kaiser*, 363 U.S. 299, 4 L.Ed. 2d 1233, 80 S.Ct. 1204 (1960).

The judgment of the court below must therefore be reversed, and the case remanded for entry of judgment in favor of plaintiff.

Reversed.

Judges WEBB and EAGLES concur.

LOIS L. HUDSON, JOE HUDSON, JENNELL H. RATTERREE, ELLEN HUDSON, BRUCE HUDSON, DAVID P. LOWDER, W. H. LOWDER, J. R. LOWDER, CYNTHIA L. PECK, MICHAEL LOWDER, AND DOUGLAS LOWDER, ON BEHALF OF ALL STAR MILLS, INC. v. ALL STAR MILLS, INC., MALCOLM M. LOWDER, PATTY S. LOWDER, HENRY C. DOBY, JR., JOHN M. BAHNER, JOHN P. ROGERS, ERNEST H. MORTON, JR., CHARLES E. HERBERT, DONALD R. BILLINGS, MOORE & VAN ALLEN, A PARTNERSHIP, BROWN, BROWN & BROWN, A PARTNERSHIP

No. 8320SC863

(Filed 15 May 1984)

Receivers § 1.2— attack on validity of receivership—collateral actions not permissible

Attacks on the validity of receiverships by collateral actions are not permissible under North Carolina law. Therefore, where all plaintiffs' allegations were properly subject to the jurisdiction of a receivership action over which a judge retained jurisdiction, the trial court properly entered summary judgment for defendants.

APPEAL by plaintiffs from *Preston, Judge*. Judgment entered 31 May 1983 in STANLY County Superior Court. Heard in the Court of Appeals 13 April 1984.

In 1973, W. H. (Horace) Lowder was convicted in federal court of income tax evasion. At trial in district court and on appeal to the Fourth Circuit Court of Appeals he represented himself. His conviction was upheld. He retained the firm of Brown, Brown, and Brown to petition for rehearing. When the petition failed, the Brown firm and the firm of Arent, Fox, Kintner, Plotkin and Khan of Washington, D.C. petitioned the United States Supreme Court for a writ of certiorari. This petition was also denied. The Brown firm also represented Horace in an attempt to have his sentence reduced and a plea that he be allowed to serve his sentence in the Stanly County Jail.

Sometime following this representation, Malcolm Lowder approached the Brown firm regarding problems with the family corporation. The law firm of Moore and Van Allen was associated to deal with this problem.

In 1979, Malcolm M. Lowder and his two sons instituted an action against Horace and several family corporations including All Star Mills, Inc., and All Star Industry, Inc. Malcolm and his sons sought damages and other relief based upon Horace's alleged unlawful conduct and abuse of his authority as a director and chief executive officer of the corporations. Malcolm specifically requested a receiver be appointed to manage the assets of the family corporations pending the trial of the action on its merits. On 9 February 1979, Judge Seay entered an order appointing receivers for the corporations and enjoining Horace from interfering with the authority of the receivers. On 14 February 1979, Judge Seay entered a supplemental receivership order in which he authorized the appointment of the law firm of Moore and Van Allen as counsel and the firms of Brown, Brown and Brown and Arent, Fox, Kintner, Plotkin and Khan as tax counsel for the corporations. On 21 February 1979, Horace was found in contempt of court for his failure to cooperate with the receivers.

In March 1979, Horace filed a grievance with the North Carolina State Bar, alleging that the Brown firm had revealed confidential information obtained at the time the Brown firm represented him in his various petitions before the federal courts on his tax convictions. The State Bar found no probable cause and dismissed the action.

On 24 April 1979, Horace filed a Chapter XI bankruptcy proceeding, the effect of which was to reinvest the receivership corporations' assets in himself. The proceeding was converted to a Chapter X proceeding and trustees were appointed. Following the dismissal of the bankruptcy proceeding the matters returned to the jurisdiction of Judge Seay's court because of his order retaining jurisdiction.

In May 1980, Judge Seay entered an order allowing fees for the attorneys, receivers and accountants. In *Lowder v. Mills, Inc.*, 301 N.C. 561, 273 S.E. 2d 247 (1981) (Lowder I), our supreme court affirmed Judge Seay's orders retaining jurisdiction and the appointment of the receivers. In *Lowder v. Mills, Inc.*, 60 N.C. App. 275, 300 S.E. 2d 230, *aff'd in part and reversed in part*, 309 N.C. 695, 309 S.E. 2d 193 (1983) (Lowder II), this court held that the trial court was correct in denying a motion to disqualify Brown, Brown, and Brown and Moore and Van Allen from appearing in the action and in denying a motion to vacate the receivership order.

Following the entry of these orders in the receivership action, which is still pending in Stanly County Superior Court, Horace and the intervening defendants brought this action alleging that the Brown firm had disclosed confidential information to Malcolm and Patty Lowder and Moore and Van Allen and that these parties and the receivers, trustees and their attorneys were involved in a conspiracy to cause All Star Mills' financial ruin by dissipating its assets, reducing the value of its stock and destroying the value of the corporation. The complaint also alleged that the receivers acted negligently by employing Malcolm to run the corporation, that the defendants attempted to create unnecessary attorney fees for the receivership and entered into an unwise tax settlement. Identical suits were filed on behalf of three other corporations. The parties by stipulation agree that a decision in this action will be binding in all four actions. Horace and various other parties have also filed three suits which are now before this court regarding other matters relating to the receiverships.

On 31 May 1983, Judge Preston entered an order dismissing this action as to all parties pursuant to their motions to dismiss. From this order the plaintiffs appealed.

DeLaney, Millette, DeArmon and McKnight, by Ernest S. DeLaney for the plaintiffs.

Moore, Van Allen and Allen, by Randel E. Phillips for defendants Malcolm M. Lowder and Patty S. Lowder.

Jones, Hewson & Woolard, by Harry C. Hewson for defendants Henry C. Doby, Jr. and John M. Bahner.

Hartsell, Hartsell & Mills, P.A., by W. Erwin Spainhour for defendant John P. Rogers.

Wade and Carmichael, by R. C. Carmichael, Jr., for defendant Ernest H. Morton, Jr.

Nichols, Caffrey, Hill, Evans & Murrelle, by William L. Stocks and Everett B. Saslow, Jr., for defendant Charles E. Herbert.

Walker, Palmer & Miller, P.A., by James E. Walker for defendant Donald R. Billings.

Golding, Crews, Meekins, Gordon & Gray, by James P. Crews for defendant Moore & Van Allen.

Bailey, Brackett and Brackett, by Martin L. Brackett, Jr., for defendant Brown, Brown, and Brown.

WELLS, Judge.

The sole question presented for review is whether the trial court erred in granting defendants' motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure. It is apparent from the wording of the order of dismissal that the trial court considered the record of proceedings in *Lowder v. All Star Mills, Inc.*, No. 79CVS015, a civil action pending in the Stanly County Superior Court. Pursuant to the provisions of Rule 12(b)(6), defendants' motions were thus converted to Rule 56 motions for summary judgment. *See Smith v. Insurance Co.*, 43 N.C. App. 269, 258 S.E. 2d 864 (1979) and cases and authorities cited therein. Accordingly, we treat the trial court's order as constituting entry of summary judgment for defendants. Summary judgment is proper when it appears that even if the facts as claimed by plaintiff are taken as true, there can be no recovery. *Doggett v. Welborn*, 18 N.C. App. 105, 196 S.E. 2d 36, *cert. denied*, 283 N.C. 665, 197 S.E. 2d 873 (1973).

The allegations of plaintiffs' complaint reflect attempts to circumvent the pending receivership action through collateral attacks. Attacks on the validity of receiverships by collateral actions are not permissible under North Carolina law. In *Hall v. Shippers Express*, 234 N.C. 38, 65 S.E. 2d 333, *pet. to reh. dismissed*, 234 N.C. 747, 66 S.E. 2d 640 (1951) our supreme court held that where a receivership court has jurisdiction over a matter the only remedy is through the receivership proceeding. The court, in response to a creditors suit, which alleged that the receivership was instituted to defraud creditors, refused to permit a collateral attack saying: "[T]he court being one of competent jurisdiction in receivership proceedings, and having acquired jurisdiction of the parties and the subject matter in controversy, it may not be interfered with by any other court of co-ordinate authority. . . . 'That court which first takes cognizance of the controversy is entitled to retain jurisdiction until the end of the litigation, to the exclusion of all interference by other courts of concurrent jurisdiction.' " (Citations omitted.)

First, plaintiffs contend that the Brown firm obtained confidential information from Horace and communicated it to Malcolm and Peggy Lowder and Moore and Van Allen. This matter was previously at issue in the receivership action and is therefore not subject to collateral attack. *See Lowder II, supra.* Next, plaintiffs attempt to attack the appointment of the receivers because Horace was not represented by counsel. Under the rule established in *Hall v. Shippers Express, supra*, this is clearly not permitted.

Plaintiffs further complain about the receivers having enjoined Horace from participating in the business and about their alleged attempts to create unnecessary attorney and accounting fees. These matters are clearly within the purview of the receivership action and cannot be collaterally attacked. Plaintiffs further object to the tax settlement entered into by the receivers and contend the receivers have otherwise mismanaged the subject companies. Here again, the tax matters were at issue in *Lowder II, supra*, and the other issues are clearly ancillary to the receivership proceeding and must be raised there.

Finally, plaintiffs attempt to attack the receivers' and bankruptcy trustees' actions relating to the bankruptcy pro-

ceeding. Again, these actions may be properly addressed only in the receivership and bankruptcy proceeding.

Having determined that all plaintiffs' allegations are properly subject to the jurisdiction of the receivership action over which Judge Seay retained jurisdiction, we, therefore, hold that the trial court properly entered summary judgment for defendants.

Affirmed.

Judges BECTON and JOHNSON concur.

RICHARD H. AVERY AND WIFE, ANNA H. AVERY; AND CLAUDE H. CRISP AND WIFE, MARTHA L. CRISP v. W. G. HADDOCK AND WIFE, MATTIE D. HADDOCK

No. 832DC214

(Filed 15 May 1984)

1. Reformation of Instruments § 5— mutual mistake—burden of proof

Because of the strong presumption in favor of the correctness of an instrument as written and executed, a party seeking to reform a written instrument on grounds of mutual mistake must establish the alleged mistake by strong and persuasive evidence.

2. Estates § 4— life estate—termination of remainder interest

The owner in fee of a parcel of land that is subject to a life estate, nothing else appearing, is vested with the remainder interest in the life estate, and upon the death of the life tenant, the life estate terminates by operation of law and the interest of the remainderman becomes possessory.

3. Reformation of Instruments § 7— mutual mistake—sufficiency of evidence

The evidence was clear, cogent and convincing that the parties intended that a deed from defendants to plaintiffs should convey all interests in a 62.24-acre tract of land, subject to a third party's life estate in a one-half acre portion thereof, and to the extent that the deed does not reflect this clear intent, there was a mutual mistake of the parties which plaintiffs are entitled to have corrected by the court.

APPEAL by defendant from *Ward, Judge.* Judgment entered 10 November 1982 in District Court, BEAUFORT County. Heard in the Court of Appeals 7 February 1984.

This is a civil action wherein plaintiffs seek reformation of a deed conveying certain property from defendants to plaintiffs Avery on the ground of mutual mistake.

On or about 20 January 1978, defendants and plaintiffs Avery entered into a contract wherein plaintiffs obtained an option to purchase from defendants certain land, consisting of 62.24 acres. The pertinent terms of that option contract are set out below:

> That, for and in consideration of the sum of Two Thousand ($2,000.00) Dollars to them in hand paid, the receipt of which is hereby acknowledged, said parties of the first part do hereby give and grant unto said party of the second part the right and option to purchase from said parties of the first part a certain tract or parcel of land in Chocowinity Township, Beaufort County, North Carolina, described as follows:
>
> That land described in that deed dated December 2, 1975 from Billy James Haddock and wife, LaRue Haddock, to W. G. Haddock and, Mattie D. Haddock, which deed is of record in Book 729, page 628, and hereby referred to.
>
> 1. This option shall exist and continue to and including April 30, 1978, but no longer.
>
> 2. If the party of the second part elects to purchase said land under this option the purchase price therefor shall be Fifty-six Thousand ($56,000.00) Dollars in cash. Provided, however, that the Two Thousand ($2,000.00) Dollars paid for this option shall apply on the purchase price leaving a balance of Fifty-four Thousand ($54,000.00) Dollars.

The deed conveyed to defendants a tract of land totalling 62.24 acres. Following the metes and description of the land in that deed, the following language appears:

> There is excepted from the hereinabove description the following parcel of land:
>
> [There follows in the deed a metes and bounds description of a parcel of land, of 0.5 acres size, that occupies one corner of the 62.24 acre tract.]
>
> Reference is made to a map entitled "Property of Lawrence M. Mayo and wife, Velma P. Mayo, life estate."

The map referred to shows the boundary lines of the Mayo life estate, some of which are shared with the larger tract as appears on the maps submitted as exhibits by the parties. Following this language on the same deed referred to in the option contract, there is the following paragraph:

> It is the intention of this deed to convey to the parties of the second part the fee simple title to the large tract as herein described and also to convey to the parties of the second part the vested remainder of R. Guy Mayo, Jr. and wife, Jeannette Barrow Mayo, which they hold in the exception that is hereinbefore set out, subject to the life estate of Velma P. Mayo and husband, Lawrence Murray Mayo, so that the result of this deed is that fee simple title to the hereinabove described property is vested in the parties of the second part, together with a vested remainder in the parcel of land described in the exception which is subject only to the life estates of Velma P. Mayo and husband, Lawrence Murray Mayo.

On 20 April 1978, defendants executed a deed wherein they purported to convey to plaintiffs Avery the same 62.24 acres owned by them and described in their deed, the one referred to in the contract. This deed from defendants to plaintiffs Avery was similar in all essential respects to the earlier deed except that it did not contain the paragraph, quoted above, that expressed the intention to convey to the grantees the remainder interest in the Mayo life estate.

Subsequently, the Averys, by various intervening conveyances, transferred the land to plaintiffs Crisp, who took possession of it by deed executed 16 March 1982. Thereafter, Richard Avery had a conversation with W. G. Haddock in which he learned that Haddock claimed the remainder interest in the Mayo life estate. Upon investigation, Mr. Avery discovered the discrepancy between the deed in to defendants as grantees and the deed out from defendants as grantors. The same discrepancy is reflected in the subsequent deeds from plaintiffs Avery, grantors, to plaintiffs Crisp, grantees.

On 8 April 1982, plaintiffs gave notice of *lis pendens* and filed a complaint seeking to reform the 20 April 1978 deed from defendants to plaintiffs Avery to include the paragraph stating the

intention to convey to the grantees the remainder in the Mayo life estate. Plaintiffs alleged that the omission of that paragraph was inadvertent and the result of mutual mistake. Defendants answered contending that the deed actually executed by them, conveying the property to the Averys, contains the description of the property referred to in the option contract. Defendants denied that the alleged omission was inadvertent.

The action came on for a non-jury trial in District Court in October 1982. Evidence and testimony were presented by both parties. On 10 November 1982, the court entered judgment for plaintiffs, concluding that the following pertinent findings were based on "clear, cogent and convincing" evidence:

> 4. That it was understood by the parties to that Deed that defendants conveyed along with the lands described in the above paragraph their vested remainder in and to that portion of the land described in Paragraph No. 3 which was subject to the life estate of Velma P. Mayo and husband, Lawrence Murray Mayo.
>
> 5. By mutual mistake of the defendants, W. G. Haddock and Mattie D. Haddock and of the plaintiffs, Richard H. Avery and Anna H. Avery, the conveyance of the aforesaid vested remainder interest was omitted from said Deed.

The court concluded that the intention of the parties was that the remainder in the Mayo life estate be conveyed by the same deed in which the 62.24 acre tract was conveyed. The court further concluded that the omission alleged by plaintiffs was inadvertent and the result of the parties' mutual mistake of fact. From this judgment, defendant appealed.

Carter, Archie and Hassell, by Sid Hassell, Jr., for plaintiff-appellees.

Wilkinson and Vosburgh, by James R. Vosburgh, for defendant-appellants.

EAGLES, Judge.

In their first argument, defendants contend that the plaintiffs failed to carry their burden of proving, by clear, cogent and convincing evidence, that the deed executed on 20 April 1978 did not

represent the intention of the parties to the conveyance. We disagree.

[1] Both parties refer us to the recent case of *Hice v. Hi-Mil*, 301 N.C. 647, 273 S.E. 2d 268 (1981), which was also an action to reform a deed on grounds of mutual mistake. In that case, our Supreme Court noted that there is a " 'strong presumption in favor of the correctness of the instrument as written and executed,' " *Id.* at 650, 273 S.E. 2d at 270, *quoting Clements v. Insurance Co.*, 155 N.C. 57, 61, 70 S.E. 1076, 1077 (1911), because it must be assumed that the parties to the instrument knew what they were doing. The Court further noted that this presumption was strictly applied where deeds were involved. Because of this presumption, a party seeking to reform a written instrument on the grounds of mutual mistake must establish the alleged mistake by strong and persuasive evidence.

With these principles in mind, we turn to the record before us and find that plaintiffs clearly carried their burden of establishing the mutual mistake alleged. The 20 January 1978 option contract, signed by defendants and notarized, recites in its terms that the property with respect to which the option was purchased was the same property described in the deed to defendants from their grantors. That deed conveys to defendants all 62.24 acres, including the remainder in the Mayo life estate. No deed or other instrument was referred to in the contract.

The deed that was prepared allegedly in accordance with the option contract describes the same 62.24 acre tract and purports to convey all of defendants' interest in that land to the Averys. The deed notes the existence of the Mayo life estate and recites a metes and bounds description of it but is silent regarding the intent of the parties with respect to it. This is the deed that was executed by the parties.

Neither defendant W. G. Haddock nor plaintiff Richard Avery, who principally conducted the transaction, possesses much formal education and neither reads well. There is conflicting evidence as to whether the deed was read to the parties at the closing. The option contract set the full price of the land described therein at $56,000: $2,000 for the option to purchase and the $54,000 balance to be paid upon the exercise of the option. The option was effective until 30 April 1978. Mr. Haddock never-

theless testified that he did not think that the Averys were exercising their option when they paid him $54,000 at the closing.

[2] It is well established that the owner in fee of a parcel of land that is subject to a life estate, nothing else appearing, is vested with the remainder interest in the life estate. Upon the death of the life tenant, the life estate terminates by operation of law and the interest of the remainderman becomes possessory. *See* G.S. 29-2; *e.g., Brown v. Brown*, 168 N.C. 4, 84 S.E. 25 (1915). *See generally*, 28 Am. Jur. 2d *Estates* § 57 (1966); 31 C.J.S. *Estates* §§ 30-33 (1964); 5 N.C. Index 3d *Estates* §§ 3-4 (1977); 4A Thompson on Real Property, §§ 1984-87 (Replacement 1981); Webster's Real Estate Law in North Carolina, §§ 46-47 (Hetrick Rev. 1981).

With this in mind, we note that the deed in question is sufficient to convey the entire interest in the 62.24 acres, including the remainder in the life estate, to the grantees. The paragraph indicating that the intent of the deed was to transfer also the grantor's remainder interest in the life estate is not necessary to achieve that result.

[3] We hold that the uncontradicted documentary evidence—the option contract and the executed deed—is clear, cogent and convincing evidence that the parties intended to convey all interests in the entire 62.24 acres, subject to the Mayo's life estate in the one-half acre. To the extent that the deed does not reflect this clear intent, there was a mutual mistake by the parties that the plaintiffs are entitled to have corrected by the court. *Hice v. Hi-Mil, supra.*

Defendants next argue that the evidence does not support the findings and that the findings do not support the conclusions of law. In view of the foregoing discussion, we find this argument to be without merit.

The judgment of the District Court is

Affirmed.

Judges HEDRICK and HILL concur.

REGINA GAIL D. MITCHELL AND DONALD MITCHELL v. PETER E. PARKER, PETER E. PARKER, M.D., P.A., DANIEL C. HALL AND FORSYTH COUNTY HOSPITAL AUTHORITY, INC.

No. 8321SC655

(Filed 15 May 1984)

Physicians, Surgeons, and Allied Professions § 20.1— malpractice action—directed verdict for defendants improper

In a medical malpractice action, the trial court erred in directing verdict for defendants where plaintiffs' evidence, viewed in the light most favorable to plaintiffs, was sufficient to require submission of the case to the jury. The evidence tended to show that the femme plaintiff developed a post-operative infection; defendants used Garamycin to treat the infection; Garamycin is a "nephrotoxic medication" that can cause kidney damage; the femme plaintiff became nephrotoxic on 19 October 1977; defendants failed to discontinue the drug at the first sign of nephrotoxicity; defendant discontinued the monitoring for nephrotoxicity; failure to discontinue the Garamycin when BUN was going out of normal ranges was in contravention of good medical practice; and the femme plaintiff now suffers from severe, permanent, and progressive kidney damage.

APPEAL by plaintiffs from *DeRamus, Judge.* Judgment entered 8 November 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 10 April 1984.

This is a civil action instituted by plaintiffs for personal injuries and loss of consortium caused by the alleged negligence of defendants in treating plaintiff, Mrs. Regina Mitchell, for a post-operative infection. Answers denying negligence, alleging contributory negligence, and pleading the statute of limitations were filed on behalf of all defendants. At the conclusion of plaintiffs' evidence, defendants moved for and were granted directed verdicts. From a judgment directing verdicts for defendants, plaintiffs appealed.

Narron, Holdford, Babb, Harrison & Rhodes, P.A., by William H. Holdford, and Yarborough & Yarborough, by Charles H. Yarborough, Jr., for plaintiffs, appellants.

J. Robert Elster and Michael L. Robinson for defendants, appellees, Peter E. Parker and Peter E. Parker, M.D., P.A.

Bell, Davis & Pitt, P.A., by William Kearns Davis, for defendant, appellee, Daniel C. Hall.

HEDRICK, Judge.

The sole question presented on appeal is whether the court erred in directing verdicts for defendants.

When a defendant moves for a directed verdict in a medical malpractice case, the question raised is whether plaintiff has offered evidence of each of the following elements of his claim for relief: (1) the standard of care; (2) breach of the standard of care; (3) proximate causation; and (4) damages. *Lowery v. Newton*, 52 N.C. App. 234, 237, 278 S.E. 2d 566, 570, *reconsideration of denial of disc. rev. denied*, 304 N.C. 195, 291 S.E. 2d 148 (1981). On such motion, plaintiff's evidence is to be viewed in the light most favorable to plaintiff. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E. 2d 678, 680 (1977). A directed verdict for defendant is improper "unless it appears as a matter of law that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." *Id. Tice v. Hall*, 63 N.C. App. 27, 28, 303 S.E. 2d 832, 833 (1983), *aff'd*, 310 N.C. 589, --- S.E. 2d --- (1984).

The evidence considered in the light most favorable to plaintiffs tends to show the following:

Mrs. Mitchell is a thirty-five-year-old woman with a history of obesity. Over the years, Mrs. Mitchell has tried various means of weight reduction, including drug therapy and surgery. On 29 September 1977, Dr. Parker, assisted by Dr. Hall, a medical resident, performed a gastric segmentation designed to limit Mrs. Mitchell's food intake by reducing the size of her stomach. On or about the second post-operative day Mrs. Mitchell developed a serious infection for which Dr. Parker prescribed Garamycin and other medication.

Defendants were aware that Garamycin is a "nephrotoxic medication" that can cause kidney damage. Kidney functioning is commonly monitored by two tests yielding measures of serum creatine and blood urea nitrogen (hereinafter BUN). BUN measurements between fifteen and twenty are considered to be within the normal range. Defendants administered Garamycin from 10 October to 24 October 1977. On 17 October 1977, Mrs. Mitchell's BUN level was thirteen and on 19 October her BUN level was twenty-two. Garamycin was discontinued on 24 October

but no BUN and creatinine tests were done at that time. Defendants did not check the BUN and creatinine levels again until 1 November 1977, at which time Mrs. Mitchell's BUN level was over 200 and her creatinine level was 24. As a result of the toxicity caused by administration of Garamycin, Mrs. Mitchell suffered permanent kidney damage. Because of this injury, plaintiffs' marital relationship suffered, and the couple did not have sexual relations for approximately two years after the surgery.

We think this evidence ample to permit the jury to find that Mrs. Mitchell suffered injury proximately caused by the administration of Garamycin and that Mr. Mitchell suffered loss of consortium. Whether the court properly directed verdicts for defendants thus depends on the sufficiency of plaintiffs' evidence to raise jury issues as to the applicable standard of care and as to breach of that standard.

N.C. Gen. Stat. Sec. 90-21.12 provides:

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

Our examination of the record reveals sufficient evidence of "the standards of practice among members of the same health care profession" in regard to the use of Garamycin. Dr. Parker, one of the defendants in the case, testified as follows:

> [a]nybody that's on Garamycin we watch carefully.
>
> . . .
>
> Garamycin is a very potent antibiotic that you use when absolutely necessary when you have a patient that is dangerously ill.
>
> . . .

The clinical observations I expect to see where the Garamycin is causing problems with the patient's kidneys would be the urine output.

. . .

The chief ways of seeing whether the patient is having nephrotoxicity is by BUN and creatinine at that time.

. . .

And when you reach a point where it appears that the BUN and creatinine are starting to gradually climb, you have to stop the drug.

Additional evidence of the standard of care was presented by Dr. Furhman, an expert witness called by plaintiffs, who testified:

[W]hen any medication has a known and well reported toxic side effect, it is incumbent on the physician to be aware of and to monitor in whatever way is appropriate to determine that it might be present.

. . .

When a patient is being administered Gentamycin [Garamycin], usually one monitors a couple of things. One monitors urinary output to determine that it is adequate. Secondly, one would usually monitor the creatinine in conjunction with the blood urea nitrogen as an indication of early impairment that might not be observable by measuring just urinary output.

. . .

If one determines that there is an elevation of blood urea nitrogen and creatinine, depending upon the indication it's being used for, one should certainly check the fact that that elevation is a true one, but if it can be documented that there is an impairment, one of the things to consider is that the medication should be stopped because the abnormality can be a progressive one.

. . .

> If the medications were stopped at the first time they were going out of normal range, that would be consistent with good medical care.

Examination of the record also reveals evidence that defendants breached the standard of care. Dr. Parker testified:

> The range of normal with BUN is between fifteen and 20, in that area for normal people.
>
> . . .
>
> I knew that on the 19th it [BUN] was climbing. It [BUN] was 22 on the 19th. . . .
>
> . . .
>
> With the readings which were received on October 19th I did not think it essential to continue to monitor the BUN and creatinine because we—we had planned to stop the antibiotic soon if her condition continued the way it was.

We conclude that plaintiffs' evidence, viewed in the light most favorable to plaintiffs, was sufficient to require submission of the case to the jury. There was testimony that Mrs. Mitchell was nephrotoxic on 19 October 1977; that defendant failed to discontinue the drug at the first sign of nephrotoxicity; that defendant discontinued the monitoring for nephrotoxicity; that failure to discontinue the Garamycin when BUN was going out of normal ranges was in contravention of good medical practice; and that Mrs. Mitchell now suffers from severe, permanent, and progressive kidney damage. Given these facts, we hold that it was error for the judge to remove the case from the jury and direct a verdict for defendants.

While defendants contend that directed verdicts for defendants should be upheld on the independent ground of Mrs. Mitchell's contributory negligence, we find no evidence in the record of such negligence on the part of plaintiff and thus reject defendants' argument in this regard. We similarly reject defendant Hall's contention that directed verdict was proper as to him because he at all times acted under defendant Parker's supervision and control. The record shows that defendant Hall assisted with Mrs. Mitchell's gastric segmentation, that he ordered medication to be administered to Mrs. Mitchell, that he signed

many of Mrs. Mitchell's hospital progress notes, and that he made rounds with defendant Parker and discussed Mrs. Mitchell's condition and treatment. This evidence is clearly sufficient to raise an inference as to defendant Hall's negligence in treating Mrs. Mitchell, and we hold the court erred in directing a verdict as to defendant Hall.

Reversed and remanded.

Judges ARNOLD and WELLS concur.

GABE KAIMOWITZ v. DUKE LAW JOURNAL

No. 8314SC788

(Filed 15 May 1984)

Contracts § 27.1— existence and breach of contract—genuine issues of material fact

The evidence on motion for summary judgment was sufficient to raise genuine issues of material fact as to the existence and breach of a contract between plaintiff attorney and defendant Duke Law Journal for plaintiff to write a book review for publication by defendant.

ON writ of certiorari to review the orders of *Preston, Judge*, entered in Superior Court, DURHAM County, on 16 August and 16 December, 1982. Heard in the Court of Appeals 3 May 1984.

Plaintiff filed this action on 28 April 1981, alleging the existence of a contract between plaintiff and defendant and a breach of that contract by defendant, and seeking compensatory damages in the amount of $10,000.00. By order entered 16 August 1982, the court granted summary judgment for defendant. Plaintiff filed notice of appeal on 20 August 1982 and, under the appeal entries signed by Judge Preston on 23 August, was allowed thirty days within which to make up and serve his proposed record on appeal. Plaintiff submitted a proposed record on appeal on 23 September and on 24 September defendant filed a motion to dismiss plaintiff's appeal on the grounds that it was not timely filed. On 18 October plaintiff sought judicial settlement of the record on appeal. On 16 December, following a hearing on both motions, Judge

Preston allowed defendant's motion to dismiss the appeal and denied plaintiff's request for settlement of the record. Plaintiff sought review of the orders entered 16 August and 16 December by petition for writ of certiorari, which was allowed by this Court on 1 March 1983.

Gabe Kaimowitz, pro se, for plaintiff, appellant.

Powe, Porter and Alphin, P.A., by Patricia H. Wagner, for defendant, appellee.

HEDRICK, Judge.

Plaintiff first assigns as error the court's grant of summary judgment for defendant, contending that the pleadings and affidavits before the trial judge were sufficient to raise genuine issues of material fact as to the existence of a contract between the parties, the terms of the contract, and breach of the contract by defendant. We agree and thus hold that the court erred in granting summary judgment for defendant. We base our decision on an examination of the record, which discloses the following information:

Defendant Duke Law Journal is a student organization that periodically publishes material of legal interest. Plaintiff is an attorney, licensed to practice in New York and Michigan.

Plaintiff's complaint, filed on 28 April, 1981, contains the following allegations:

> (6) On or about March 6, 1980, the then project editor of the defendant Duke Law Journal solicited in writing from the plaintiff a book review of *Before Beyond the Best Interests of the Child* by Freud et al . . . (See Attachment A).
>
> (7) The plaintiff accepted the defendant Journal's offer to write the book review, said acceptance being in March of 1980. Plaintiff's acceptance was confirmed in writing by the defendant Vernon on March 13, 1980 (See Attachment B) and the submission date for the review was set at May 8, 1980. Defendant Vernon indicated in his March 13, 1980 letter that the initial editing and cite checking of the plaintiff's review would be scheduled for the week following May 7, 1980.

(8) Between March 13, 1980 and May 8, 1980, the plaintiff diligently performed work, labor and services for the defendants in reading the subject book, doing the necessary research and in compiling and writing the solicited book review. Said book review was submitted by the plaintiff to the defendants Vernon and Duke Law Journal by the May 8, 1980 deadline.

(9) Despite the fact that during the summer of 1980, the plaintiff was available at the address and telephone number which he had provided to the defendant Vernon and other agents of the defendant Law Journal, the plaintiff received no communications from the defendants over the summer months of 1980.

(10) During the last week of August, 1980, the plaintiff went to the office of the defendant Law Journal and spoke with the defendant Vernon concerning the book review. At that time the defendant Vernon confirmed the acceptance of the review and assured the plaintiff that the review was of "publishable quality," although the defendant Vernon stated that he had problems with the plaintiff's "verbal style."

(11) In August of 1980, the defendant Vernon assured the plaintiff that he, the plaintiff, could continue to list the review on his resume as an article to be published.

(12) Despite the defendant Vernon's acceptance of the plaintiff's review and despite his assurances that the review was of "publishable quality" and would be published, the defendant Vernon, acting as the agent of the defendants herein, breached the contract between the parties by informing the plaintiff both verbally and in writing in October of 1980 that the review was not of publishable quality, and by refusing to publish the review in the defendant Law Journal. (See Attachment C). Upon information and belief, the actual basis for the defendant Vernon's ultimate decision not to publish plaintiff's review was Mr. Vernon's personal disagreement with the content of the review, particularly the criticism of the subject book expressed in the review.

(13) The plaintiff has at all times performed according to the contract between the plaintiff and the defendants. Such

services performed by the plaintiff were reasonably worth $2500.00.

The verified answer filed by defendant denied all of the above allegations, based on defendant's assertion that "Defendant Duke Law Journal is without knowledge or information sufficient to form a belief as to the truth of the allegations." Defendant's motion for summary judgment was supported solely by the affidavits of three men who serve as deans of three law schools. Each affidavit contained identical information. That supplied by Paul Carrington, Dean of Duke Law School, is set out below:

> 1. I am the Dean of Duke Law School. In that capacity, I have become personally familiar with the policies and procedures of the Duke Law Journal concerning acceptance for publication of articles and book reviews solicited by the Law Journal.
>
> 2. An article or book review submitted pursuant to solicitation from the Law Journal must be of publishable quality before it will be considered for publication. Whether an article or review is of publishable quality depends on the ultimate determination of an editorial board after an initial evaluation by a screening editor. The Law Journal does not guarantee publication of an article or book review to any writer. Moreover, unless expressly agreed, no writer receives financial compensation from the Law Journal for time spent in research or writing of an article or review submitted for publication.
>
> 3. In my experience as Dean, I have had substantial contact with deans, faculty, and law review staffs at many other law schools throughout the United States. Through these contacts, I have learned that Duke Law Journal's policies and procedures with respect to articles and reviews solicited for publication are generally accepted by all of the comparable law journals of which I have knowledge.

In response to defendant's motion, plaintiff filed an affidavit in which he repeated and elaborated on the allegations contained in the complaint and set out above.

On a motion for summary judgment, the movant bears the burden of demonstrating to the court that there exists no genuine

issue of material fact and that he is entitled to judgment as a matter of law. *Pitts v. Pizza, Inc.*, 296 N.C. 81, 249 S.E. 2d 375 (1978). We find the statements of our Supreme Court in *Baumann v. Smith*, 298 N.C. 778, 260 S.E. 2d 626 (1979) dispositive of the case before us:

> The . . . affidavit [submitted by the defendant in support of his motion for summary judgment] did not challenge or alter the fact that the complaint alleged, and the answer denied, the existence of a contract between the parties. The defendants did not meet their burden of proof, and we hold that summary judgment was not "appropriate" within the meaning of Rule 56(e). To hold otherwise would permit a movant under these circumstances to deprive the opposing party of a trial even though a genuine issue of material fact is presented.

Id. at 782, 260 S.E. 2d at 628-29. In this case, as in *Baumann*, defendant has failed to carry its burden. Because a genuine issue of material fact as to the existence of a contract between plaintiff and defendant is raised by the pleadings and plaintiff's affidavit, summary judgment for defendant was improper.

Our disposition of this case renders unnecessary a discussion of plaintiff's second assignment of error.

Reversed and remanded.

Judges ARNOLD and PHILLIPS concur.

ALLAN S. MEADE & ASSOCIATES, INC. AND ALLAN S. MEADE, INC. v. MURRAY D. McGARRY AND WIFE, KATHRYN B. McGARRY; JOSEPHINE M. BROWN, TRUSTEE; AND WACHOVIA MORTGAGE COMPANY

No. 8326SC791

(Filed 15 May 1984)

1. Contracts § 2.5— summary judgment for defendants proper—reformation of contract not shown

In an action in which plaintiffs sought to recover sums allegedly due on a contract for construction of a personal residence, the trial court properly

granted summary judgment for defendants where plaintiffs failed to support their claim for reformation of contract to allow substitution of parties. The equitable remedy of reformation of contract is available when the agreement expressed in the contract differs from the actual agreement of the parties because of mutual mistake, and in the instant case, the record was unequivocal in establishing that the corporate plaintiff with a limited general contractor's license entered into the contract with defendants, that the same corporation performed the contract, and that the sums paid by defendants were deposited in the account of the corporation with the limited general contractor's license and not with the corporation with the unlimited general contractor's license.

2. Contracts § 6.1— contract over limit of contractor's license—owner unable to waive licensing requirement

There was no merit to a limited general contractor's argument that defendant homeowners waived the statutory licensing requirement and are estopped from asserting the requirements as a defense to plaintiff's action since "nothing in the licensing statute authorizes a person with whom an unlicensed contractor deals to waive the requirements of the statute."

APPEAL by plaintiffs from *Snepp, Judge.* Judgment entered 16 March 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 3 May 1984.

This is a civil action wherein plaintiffs seek to recover sums allegedly due on a contract for construction of a personal residence, to have the sum due be declared a lien on the property, and to have the contract reformed by substituting for the name of one plaintiff the name of the other. The record reveals the following:

Plaintiffs are North Carolina corporations engaged in the business of general contracting. Allan S. Meade and his wife each own a fifty percent interest in each corporation. Mr. Meade is the president and treasurer of each company, and his wife is vice president and secretary. Allan S. Meade & Associates, Inc. (hereinafter "Associates, Inc."), was incorporated in September, 1975, and obtained a limited general contractor's license approximately one year later. Associates, Inc., renewed this license annually and, under its provisions, could serve as a general contractor only on projects not exceeding $125,000.00 in value. Allan S. Meade, Inc. (hereinafter "Meade, Inc."), was incorporated in December, 1979, and holds an unlimited general contractor's license, issued 25 July 1980.

In July 1980 plaintiff Associates, Inc., entered into a written contract with defendants, Mr. and Mrs. McGarry, to construct a

residence on property owned by the McGarrys at an original contract price of $267,000.00. Additional costs increased the total price of the dwelling to $286,418.93. Defendants have paid plaintiff Associates, Inc., a total of $233,565.24.

By this action, plaintiffs seek to recover the balance of $52,853.69. Plaintiffs also ask that the contract be reformed by substituting "Allan S. Meade, Inc." for "Allan S. Meade & Associates, Inc." in the contract and "any other writings arising out of or in any way connected with said contract."

On 29 October 1982 defendants filed a motion for summary judgment based upon their contentions that Associates, Inc. is barred from recovery because of its limited general contractor's license and that the evidence, considered in the light most favorable to the plaintiffs, fails to support plaintiffs' claim for reformation of the contract. On 16 March 1983 the court granted summary judgment for defendants. Plaintiffs appealed.

Perry, Patrick, Farmer & Michaux, P.A., by Richard W. Wilson, for plaintiffs, appellants.

Berry, Hogewood, Edwards & Freeman, P.A., by Dean Gibson, for defendants, appellees.

HEDRICK, Judge.

[1] In Assignment of Error No. 1, plaintiffs contend summary judgment for defendants was inappropriate because the forecast of evidence revealed at least two genuine issues of material fact. In relation to their claim for reformation of the contract, plaintiffs argue that the question of the parties' intent was one for the jury. Plaintiffs' contentions in respect to this argument are set out in their brief as follows:

> It is Plaintiffs' position that both Plaintiffs and Defendants, McGarry, intended for the construction contract to be entered into by a contractor having a general contractors license in an amount sufficient to cover the planned construction. Therefore, inasmuch as Plaintiff, Associates, Inc., had a limited license . . . and Plaintiff, Meade, Inc., had an unlimited license, it was mutually intended that Plaintiff, Meade, Inc., be the contractor under the contract. . . .

However, due to an inadvertence and mutual mistake of the parties, Plaintiff, Associates, Inc., executed the contract.

The equitable remedy of reformation of contract is available when the agreement expressed in the contract differs from the actual agreement of the parties because of mutual mistake, mistake of one party induced by fraud of the other, or mistake of the draftsman. *Durham v. Creech*, 32 N.C. App. 55, 231 S.E. 2d 163 (1977). As a general rule, of course, it is presumed that an instrument is correct as written and executed. *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 273 S.E. 2d 268 (1981). This presumption may be rebutted when plaintiff proves by clear and convincing evidence that: "[(1)] a material stipulation was agreed upon by the parties to be incorporated in the instrument as written; and [(2)] that such stipulation was omitted from the instrument by mistake, either of both parties, or of one party, induced by the fraud of the other, or by the mistake of the draftsman." *Light v. Equitable Life Assurance Society*, 56 N.C. App. 26, 32-33, 286 S.E. 2d 868, 872 (1982).

In the instant case, the record is unequivocal in establishing that Associates, Inc., entered into the contract with defendants, that Associates, Inc., performed the contract, and that the sums paid by defendants were deposited in the account of Associates, Inc. Indeed, Mr. Meade testified in his deposition that Meade, Inc. "had nothing to do with the McGarry job." Mr. Meade also testified that he was aware throughout negotiations with defendants and performance of the contract that Associates, Inc., was the company that was responsible for building the McGarry residence. Affidavits by defendants McGarry contain the following statements:

2. From the beginning of our negotiations through all phases of construction, I understood that my [spouse] and I had entered into a contract with Allan S. Meade & Associates, Inc., and with no other company.

3. During the negotiations of the subject contract and through all phases of the construction of our residence, I was not aware that Allan S. Meade was an officer or shareholder of any corporation other than Allan S. Meade & Associates, Inc.

4. I did not learn of the existence of Allan S. Meade, Inc. until the filing of this lawsuit.

We think this and other evidence contained in the record falls far short of raising an issue as to the existence of mutual mistake. Indeed, when the evidence is considered in the light most favorable to plaintiffs, it indicates that plaintiffs were mistaken, if at all, only about the legal effect of entering into a contract for an amount exceeding the statutory limit. Plaintiffs have produced no forecast of evidence suggesting that they are able to rebut the presumption that the written agreement between the parties accurately reflects their actual agreement.

[2] Plaintiffs further contend that a genuine issue of material fact exists as to "whether Defendants, McGarry, with full knowledge that Plaintiff, Associates, Inc. held a limited contractors license, allowed, Plaintiff . . . to furnish labor and materials under the subject construction contract." Plaintiffs' argument in this regard is "that Defendants waived and are estopped from asserting licensing requirements as a defense to Plaintiffs' action." Plaintiffs have cited no cases and we have found none holding that an owner may waive the statutory licensing requirement. We find the statements of this Court, in *Construction Co. v. Anderson*, 5 N.C. App. 12, 20, 168 S.E. 2d 18, 23 (1969) persuasive: "[N]othing in the licensing statute authorizes a person with whom an unlicensed contractor deals to waive the requirements of the statute or grants the unlicensed contractor immunity merely because he advises one of his customers that he is acting in violation of the statute."

By their final assignment of error plaintiffs contend that, even if there were no genuine issues of material fact, summary judgment was nevertheless inappropriate because defendants were not entitled to judgment as a matter of law. Plaintiffs base their argument in this regard on the now defunct doctrine of substantial compliance, specifically and emphatically rejected by our Supreme Court in *Brady v. Fulghum*, 309 N.C. 580, 308 S.E. 2d 327 (1983). This assignment of error is without merit.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

ORIENT POINT ASSOCIATES v. DEAN COY PLEMMONS, DEAN CAROL PLEMMONS, AND STEPHEN H. CORWIN

No. 833DC740

(Filed 15 May 1984)

Boundaries § 15.1— boundary dispute—whether roadway had moved—summary judgment

In an action to quiet title in which the disputed issue was whether a roadway which was a common boundary line between plaintiff's and defendants' lands had been moved to its present location since defendants' land was conveyed to defendants' predecessor in title in 1966, summary judgment was properly entered for plaintiff where plaintiff's evidence showed that no issue of fact existed as to the road's location, and where defendants failed to rebut plaintiff's evidence in that they failed to provide evidence which specified the location of the roadway in 1966.

APPEAL by defendants from *Ragan, Judge*. Judgment entered 1 April 1983 in Superior Court, PAMLICO County. Heard in the Court of Appeals 30 April 1984.

Hollowell & Hollowell by Richard Greenwald for plaintiff appellee.

Stubbs & Chesnutt by Jerry F. Waddell for defendant appellants.

BRASWELL, Judge.

This action to quiet title to land in Pamlico County arose through a dispute over the location of a common boundary line, a roadway, which separates the plaintiff's and the defendants' land. These parties do not dispute the other's chain of title or the fact that their properties abut one another with the roadway as the common boundary. Instead they have stipulated that the issue to be decided "is whether or not the roadway has been moved to its present location since the date [1966] upon which the Defendants' predecessor acquired title to their premises." Pursuant to its motion, the trial court granted summary judgment in favor of the plaintiff.

The contentions of the parties are as follows: Prior to 20 April 1966 James S. Ellis, and his wife, Lura, owned a ten-acre tract of land in the Town of Oriental. On this date, the Ellises con-

veyed to the defendants' predecessor in title approximately one acre lying between a creek or a gut to the south and the south side of a roadway to the north. These defendants now hold title to this acre. The balance of the Ellis Tract was later conveyed to the plaintiff's predecessor in title, and subsequently purchased by the plaintiff who now holds title to the tract. The defendants contend that this roadway, constituting a boundary between the defendants' and plaintiff's property, has moved southward from its original location "at some time during the past twenty-six years," encroaching upon the defendants' property. The plaintiff on the other hand insists that the twenty-five-foot roadway in question has remained unchanged in its present location since before 20 April 1966 and that the land lying within the road and the lands to the north of the roadway are a part of the plaintiff's tract of land.

The sole question presented for our review is whether the trial court erred in granting summary judgment for the plaintiff. Summary judgment is proper, according to G.S. 1A-1, Rule 56(c), where " 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.' " *Lowe v. Bradford*, 305 N.C. 366, 368-69, 289 S.E. 2d 363, 365-66 (1982). Once the movant demonstrates that no material issues of fact exist, the burden shifts to the nonmovant to set forth specific facts showing that genuine issues of fact remain for trial. *Id.*

In support of its motion, the plaintiff introduced affidavits of seven people who stated that they have been familiar with the roadway and its location since before 20 April 1966. Each affiant stated that the roadway has remained in its present location from that time until the present, that it has not been moved during this period of time, and that this knowledge of the roadway's location is based upon their use and observation of the roadway during this time. The affidavits of Dr. James S. Ellis and his wife, Lura, the original grantors of this ten-acre tract, reveal that in the Spring of 1962 they planted maple seedling trees on both sides of the roadway, that these trees were still growing there when the tract was sold in 1966, and that when Dr. Ellis visited the property in 1981 these trees continued to grow at the places along the roadway where they were originally planted. The con-

tinued presence of these trees reinforced the other affiants' knowledge that the roadway has not changed locations since before 1966. The plaintiff also offered the affidavit of a registered surveyor, Hugh Harris, Jr., who has personally been familiar with the Ellis land for forty years and the roadside trees for twenty years, and who in 1982 surveyed the property for the plaintiff. The 1966 deed to the defendants' predecessor in title describes the one-acre property as follows:

> [O]n the south side of the road leading to the James S. Ellis cottage . . . ; BEGINNING in the southern edge of said road at an iron stake which marks the northwest corner of the property [adjacent, being the northeast corner of the property herein described] . . . and running thence South 33° West 120 feet to an iron stake near the head of a gut, known as Ellis' gut; thence down and with Ellis' gut 286 feet to a stake in the center of said gut; thence North 33° East 278 feet to an iron stake in the aforesaid road; thence South 55½° East with the road 250 feet to the beginning, containing one acre, more or less.

Mr. Harris' survey was in accord with the calls given in this 1966 deed with the exception of the distance between the southwest corner of the property located at the gut and the northwest corner of the property on the southern side of the road. Mr. Harris measured this boundary from the edge of the gut to the road, not from the center of the gut as the deed indicated. In the survey, this call was determined to be North 33° 07′ East 245 ± feet to the road. This same boundary in the deed was recorded as North 33° East 278 feet to the road. Yet, if the distance from the center of the gut to the edge of the gut is added, even using the measurement given in the defendants' 1982 survey of 29.5 feet, the distance of this boundary is 274.5 ± feet, thus making all the calls and distances of the survey and the deed substantially the same. Mr. Harris' survey shows geographically that the road has not moved from its original 1966 location. From this evidence and the other affidavits offered, we hold that the plaintiff has demonstrated that no issue of fact exists with regard to the road's location and that the burden now shifts to the defendants to rebut this evidence and to show that a genuine issue of fact does in fact remain.

To meet their burden, the defendants offered an affidavit given by one of the defendants, Dean C. Plemmons, and an affidavit and a map made by their surveyor, Joseph R. Brochure. As the trial judge determined, we agree that the Brochure map and affidavit offered no evidence relevant to the question of whether or not the roadway has been moved since 20 April 1966. Mr. Brochure in his affidavit states that

> During my survey, I discovered two existing iron pipes which *apparently purported* to represent the northeast and northwest boundaries of the property. While the deed description calls for the property lines to extend to a 25-foot right of way, the existing iron pipes are not located either in or at the edge of the existing 25-foot roadway. Rather the iron pipes are located at the edge of a line of small maple trees running along with but neither in or with the edge of the existing 25-foot roadway. (Emphasis added.)

The discovery of these iron pipes is not evidence of where the 1966 road was located. Rather, it tends to show that the road today has not moved since 1962 when the trees were planted along its sides. Mr. Brochure's statement that in his lay opinion the trees are only ten to twelve years old is not sufficient to rebut the plaintiff's evidence that the trees were in fact planted twenty-two years ago. Similarly, the Brochure survey does not provide evidence as to where the road was originally located and to where it has presently moved. The survey only shows a "Proposed 25' R/W southern line." It does not show where the defendants contend the 1966 road was located. To establish a genuine issue of fact, the survey at least must have shown from where the road has moved and to what extent the road now encroaches upon the defendants' property.

The affidavit of Dean C. Plemmons also is not evidence based on specific facts which show that the road has moved. In his affidavit, this defendant states that the road used to "veer" in a northwesterly direction toward the Ellis home at the northeast corner of the property when bought in 1966, and that "[t]he roadway as presently located has, in my opinion, been moved in a southerly direction from its location when I first became acquainted with it in 1966." Yet, he fails to support this conclusion that the road has moved with any specific facts showing where

the 1966 road was located and how that location differs from its present location.

In a nutshell, the defendants have failed to rebut the plaintiff's evidence because they have failed to provide evidence which specifies exactly where the 1966 road was located. For instance, to demonstrate a difference between Point A and Point B, there must be facts presented tending to show the location of each. Likewise, to show that the present road is located further south than the road in 1966, there must be some evidence as to where the 1966 road was located. The defendants in response to a motion for summary judgment can no longer rely only on their allegations that the present road somehow, at some time, moved some distance south onto their property. *See* G.S. 1A-1, Rule 56(e). Because the defendants have failed to offer evidence tending to establish the presence of a genuine issue of fact, we hold that the trial court properly allowed summary judgment for the plaintiff.

Affirmed.

Chief Judge VAUGHN and Judge EAGLES concur.

WESLEY LAFAYETTE FLINN, JR. v. ANITA LOUISE JONES LAUGHINGHOUSE

No. 8326SC768

(Filed 15 May 1984)

1. **Rules of Civil Procedure § 60— jurisdiction to hear motion to set aside order setting aside adoption properly found**

In an action instituted by plaintiff to set aside a clerk's order setting aside a final order of defendant's adoption, pursuant to G.S. 1A-1, Rule 60, the trial court had jurisdiction to hear plaintiff's motion since plaintiff was not notified or made a party to the adoption nullification proceeding initiated by the defendant.

2. **Adoption § 1— child involved without standing to question validity of adoption proceeding**

G.S. 48-28 prohibits any direct or collateral attack in adoption proceedings except by a biological parent or guardian of the child. It makes no provision for attack by the child. Further, nothing in the statute requires that she be

represented by counsel or that a guardian ad litem be appointed, the statute does not require her consent, and G.S. 48-6(b) does not require the child's natural father to give his consent or to be made a party.

APPEAL by defendant from *Grist, Judge*. Order entered 10 May 1982 in Superior Court, MECKLENBURG County. Appeal also from *Snepp, Judge*. Order entered 11 April 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 May 1984.

This action arises out of a dispute between the plaintiff and the defendant over the right to inherit the estate of Frank Jones. Plaintiff is his nephew. The defendant was born 10 July 1955 out of the marriage of Louise Jones and Frank Jones. However, on 17 June 1957, Frank Jones was granted an absolute divorce from Louise Jones. In his petition for divorce, Frank Jones alleged he and Louise Jones had lived separate and apart since October 1953 (18 months prior to defendant's birth). In August 1959, Louise Jones married Ned P. Laughinghouse, who adopted the defendant for life, the final decree being entered 5 October 1960.

In the petition for adoption an affidavit from Louise Jones Laughinghouse, defendant's mother, was filed, alleging that separation from and after October 1953, and that under G.S. 48-6(b) the consent of Frank Jones was not required. He gave no consent and was not made a party to the adoption proceeding.

Frank Jones died intestate in South Carolina on 1 December 1979. On 17 July 1980, defendant filed a motion to set aside the final order of her adoption with the clerk of court for Mecklenburg County. A hearing was held and on 8 August 1980 an order was entered declaring the final order adopting defendant for life heretofore entered on 5 October 1960 null and void. Plaintiff took no part in these proceedings.

On 15 February 1982, plaintiff instituted a separate action in the Superior Court of Mecklenburg County to set aside the clerk's order of 8 August 1980. Defendant's answer asserted lack of jurisdiction in the Superior Court of Mecklenburg County. Defendant also filed a separate motion for judgment on the pleadings. On 10 May 1982, the trial judge entered an order denying defendant's motion to dismiss for lack of jurisdiction and for judgment on the pleadings. On 13 April 1983, the court entered

an order denying defendant's motion for summary judgment and allowing plaintiff's motion for summary judgment, and entered an order vacating the order of 8 August 1980 in the adoptive proceedings. Defendant appeals.

Thigpen and Hines, P.A., by James C. Smith for plaintiff appellee.

George C. Collie for defendant appellant.

HILL, Judge.

[1] Defendant first assigns as error the trial court's denial of his motion to dismiss plaintiff's independent action, alleging the trial court had no jurisdiction over the subject matter of this controversy. Defendant contends the clerk of superior court has exclusive original jurisdiction in adoption proceedings unless an appeal has been taken from the decision of the clerk.

Rule 60 of the Rules of Civil Procedure establishes steps to provide relief from a judgment or order of court. The rule states specifically: "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action." G.S. 1A-1, Rule 60(b). Rule 60(c) incidentally establishes the same power in judges with respect to judgments rendered by the clerk. Rule 60(b) defines areas from which relief can be obtained, including fraud and "[a]ny other reason justifying relief from the operation of the judgment." G.S. 1A-1, Rule 60(b)(6). The broad language of Rule 60(b)(6) gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice. *Brady v. Town of Chapel Hill*, 277 N.C. 720, 178 S.E. 2d 446 (1971); *Norton v. Sawyer*, 30 N.C. App. 420, 227 S.E. 2d 148, *cert. denied*, 291 N.C. 176, 229 S.E. 2d 689 (1976).

Since plaintiff was not notified or made a party to the adoption nullification proceeding initiated by the defendant, the plaintiff was empowered fully to bring an independent action to vacate the clerk's order. See *Strickland v. Hughes*, 273 N.C. 481, 160 S.E. 2d 313 (1968); *Carpenter v. Carpenter*, 244 N.C. 286, 93 S.E. 2d 617

(1956). We conclude plaintiff's action falls within the parameters of G.S. 1A-1, Rule 60.

[2] Defendant next argues the trial judge erred in granting summary judgment for the plaintiff and entering an order vacating the clerk's order in the adoption proceeding, and in denying defendant's motion for summary judgment. Defendant contends she had standing to attack her adoption because (1) she was not represented by counsel or a guardian ad litem at her adoption proceeding; (2) she did not consent to her adoption; and (3) her alleged natural father, Frank Jones, was not made a party to defendant's adoption proceeding.

An examination of the record reveals the original adoption proceeding to be in proper form. Furthermore, G.S. 48-28 governs who has standing to question the validity of adoption proceedings and it provides as follows:

> *Questioning validity of adoption proceeding.*—(a) After the final order of adoption is signed, no party to an adoption proceeding nor anyone claiming under such a party may later question the validity of the adoption proceeding by reason of any defect or irregularity therein, jurisdictional or otherwise, but shall be fully bound thereby, save for such appeal as may be allowed by law. No adoption may be questioned by reason of any procedural or other defect by anyone not injured by such defect, *nor may any adoption proceeding be attacked either directly or collaterally by any person other than a biological parent or guardian of the person of the child.* The failure on the part of the clerk of the superior court, the county director of social services, or the executive head of a licensed child-placing agency to perform any of the duties or acts within the time required by the provisions of this section shall not affect the validity of any adoption proceeding.
>
> (b) The final order of adoption shall have the force and effect of, and shall be entitled to, all the presumptions attached to a judgment rendered by a court of general jurisdiction. (Emphasis added.)

• This statute clearly prohibits any direct or collateral attack in adoption proceedings except by a biological parent or guardian of the child. See *Hicks v. Russell*, 256 N.C. 34, 123 S.E. 2d 214

(1961). It makes no provision for attack by the child. Nothing in the statute requires that she be represented by counsel or that a guardian ad litem be appointed. Nor does the statute require her consent.

G.S. 48-6(b) does not require her natural father to give his consent or to be made a party. This statute provides:

> In all cases where a court of competent jurisdiction has rendered a judgment of divorce on the grounds of separation between the natural mother of a child and her husband, the consent of the husband shall not be required for the adoption of a child of the wife, begotten during the period of separation determined by the court in the divorce action as the basis of its judgment, and the husband need not be made a party to the adoption proceeding.

The South Carolina divorce between defendant's mother and Frank Jones was based on a separation of the parties from and after October 1953. Defendant was born in June 1955. It is apparent the child was "begotten during the period of separation determined by the court in the divorce action as the basis of its judgment." G.S. 48-6(b). Defendant has no standing under North Carolina law to attack her adoption.

The decision of the trial judge entering summary judgment in favor of plaintiff and vacating the clerk's order is

Affirmed.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. JAMES HORNE, AKA JIM HORNE

No. 8313SC1060

(Filed 15 May 1984)

Arrest and Bail § 11.4— refusal to remit forfeited bail bond

The trial court did not abuse its discretion in refusing to remit a portion of a forfeited $100,000 bail bond to the sureties on the bond where the evidence showed that when the defendant failed to appear for trial, he was

awaiting sentencing in Florida but was not incarcerated in that state, and that the sureties knew of the date set for defendant's trial, where defendant was and the identity of his Florida attorney but made no attempt to obtain defendant's presence for his trial in North Carolina. G.S. 15A-544(e).

APPEAL by defendant-sureties from *Hobgood (Robert H.), Judge.* Order entered 23 May 1983 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 30 April 1984.

Attorney General Rufus L. Edmisten by Assistant Attorney General David Roy Blackwell for the State.

Ward and Smith by David S. Morris and William Joseph Austin, Jr.; Of Counsel Frink, Foy and Gainey by Henry G. Foy for surety-appellants.

Prevatte, Prevatte & Peterson by James R. Prevatte, Jr. and R. Glen Peterson for appellee, Brunswick County Board of Education.

BRASWELL, Judge.

The defendant "skipped" his bail bond. The State wants the money for the benefit of the county school fund. The court entered a judgment of forfeiture on 14 February 1983. On 4 May 1983 the sureties, James D. Couey and wife, Martha B. Couey, moved to remit the judgment. The court denied the motion for remission on 23 May 1983. The sureties appeal.

The defendant failed to appear for his court date of 4 October 1982. A surety appearance bond for $100,000 for the offenses of conspiracy to traffic and trafficking in marijuana had been executed earlier by the Coueys and secured by a deed of trust on certain lands.

The grounds for relief alleged in the motion to remit are: (1) the sureties' attorney was on vacation when the judgment of forfeiture was entered on 14 February 1983, and the attorney "never received notice that a judgment would be prayed for and entered on February 14, 1983," [there is no record evidence to support this ground and was abandoned by the surety-appellants on appeal] and (2) because "it was impossible for the Defendant to be in the Brunswick County Superior Court on October 4, 1982," they "have a meritorious defense."

No exceptions were taken to any of the trial judge's fourteen findings of fact. In summary, those binding facts show that the defendant was *not incarcerated* in the State of Florida on 4 October 1982, although he had entered pleas of guilty and was awaiting sentencing. His Florida attorney had instructed him not to leave until he was sentenced. The guilty pleas were entered on 20 September 1982, but Horne was not sentenced, or taken into custody in Florida, until 2 November 1982. James Couey was aware of the Brunswick County court date of 4 October 1982 before 4 October. The defendant had telephoned Attorney William D. Ezzell on or about 26 or 27 October 1982, stating that "he was not coming back to the State of North Carolina."

James Couey did not go to Florida, nor did he arrange to send anyone to Florida to obtain the defendant's presence for court even though Couey knew of the court date, knew where the defendant was, and knew the identity of his Florida attorney. Although Couey is not in the business of making bonds, he had made two prior bonds and fully understood he was putting up property as security for the bond. Couey also had actual knowledge and notice of his responsibilities as bail bondsman.

As to surety Martha B. Couey, the court found and concluded that she was served with the notice of order of forfeiture, that there was no evidence that she did not understand the nature and consequences of executing a legal document, that there is a presumption that she fully understood the nature and consequences of signing together, with her husband, and that the forfeiture was properly entered on 14 February 1983. No exceptions were taken to these findings and conclusions.

The surety-appellants make two exceptions. The first challenges the conclusion of law, "[t]hat there exists no meritorious defense for the remission of any of this judgment," and the second exception challenges the adjudicatory part of the order that holds "remission is denied." The questions presented for review allege that the trial judge applied "the wrong legal standard to determine whether the judgment of forfeiture should be remitted," and that the judge abused his discretion by refusing to remit any part of the bail bond. We disagree and affirm.

The statutory law governing remission of forfeited bail bonds is contained in G.S. 15A-544(e) and (h). Subsection (e) provides that

"the court may direct that the judgment be remitted in whole or in part, upon such conditions as the court may impose, if it appears that justice requires the remission of part or all of the judgment." Subsection (h) provides that "[f]or extraordinary cause shown, the court . . . may, after execution, remit the judgment in whole or in part and order the clerk to refund such amounts as the court considers appropriate." As there has been no execution on the judgment before us, subsection (h) is inapplicable, and we apply subsection (e) alone.

Since the statute says "may" remit, the decision to do so or not is a discretionary one. We review only for an abuse of discretion. In order to exercise judicial discretion in a manner favorable to a surety, the judge must determine in his discretion that justice requires remission. Here, the trial judge exercised his responsibility by conducting the hearing, finding the facts, and making the conclusions of law. The facts as found do not compel the conclusion that "justice requires" the forfeiture be remitted in whole or in part. The conclusions fail to show any abuse of discretion in the discretion applied by the trial judge to the uncontested facts.

The theory of the hearing below, based upon the sureties' own written motion and the statute, is that justice requires that the trial court recognize their meritorious defense of excusable absence because of the defendant's inability to attend court. However, the facts conclusively show that the defendant was not incarcerated, and there was no evidence of personal sickness or death. On the contrary, the showing is that justice required the defendant's presence, rather than his absence. Even though the sureties are lay persons, and not professionals in the bonding business, they knowingly executed a defendant's bail bond and had the responsibility to produce the defendant for all his required court appearances.

It is immaterial in this case that the judge's order did not include a use of the statutory words "justice requires." With the impossibility of attendance allegation unsubstantiated, and with the record devoid of facts showing justice required relief, as a matter of law it would have been an abuse of discretion to have remitted in whole or in part the judgment of forfeiture. Let execution upon the judgment issue by the Clerk of Superior Court upon certification of this opinion to the trial court.

As said in *Taylor v. Taintor*, 83 U.S. 366, 371-72, 21 L.Ed. 287, 290 (1873): " 'The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge. (Citation omitted.)' "

Affirmed.

Chief Judge VAUGHN and Judge EAGLES concur.

PATRICK H. McARTHUR, III v. ANN M. McARTHUR

No. 838DC506

(Filed 15 May 1984)

Divorce and Alimony §§ 20.2, 21.9— separation agreement precluding equitable distribution

A prior separation agreement fully disposed of the spouses' property rights arising out of the marriage, and the trial court properly granted summary judgment on defendant wife's counterclaim for equitable distribution of certain personal property. The absence of a recital that this is the "entire agreement" in the separation agreement constituted a matter of form, not substance, and the fact that the property contested was not specifically described in the agreement could not suffice to avoid the unmistakably clear general provisions of the separation agreement.

APPEAL by defendant from *Kenneth R. Ellis, Judge*. Judgment entered 24 January 1983 in District Court, WAYNE County. Heard in the Court of Appeals 16 March 1984.

Philip A. Baddour, Jr. for plaintiff appellee.

Gulley and Barrow, by Jack P. Gulley, for defendant appellant.

BECTON, Judge.

Defendant wife seeks reversal of an order granting summary judgment on her counterclaim for equitable distribution of certain personal property in an action for an absolute divorce. We hold that a prior separation agreement fully disposes of the spouses' property rights arising out of the marriage, and we therefore affirm.

I

The parties entered into a separation agreement on 24 June 1980. The Equitable Distribution Act (the Act), N.C. Gen. Stat. § 50-20 (Supp. 1983), was thereafter enacted. The Act applies to all divorce actions instituted on or after 1 October 1981. Plaintiff husband filed an action for an absolute divorce on 29 September 1982. The wife counterclaimed, seeking equitable distribution of husband's partnership interests in certain businesses. Husband raised the separation agreement as a defense in his Reply. The divorce was granted; thereafter, husband also obtained summary judgment on the counterclaim solely on the basis of the verified pleadings, which included the separation agreement.

II

The wife claims that the grant of summary judgment was error, since (1) the separation agreement does not specifically address the assets in question; (2) the agreement does not contain an "entire agreement" clause or other language indicating an intent to cover assets other than those specifically identified in the agreement; and (3) none of the waivers in the agreement apply.

III

A separation agreement is a contract and, therefore, its meaning is ordinarily determined by the same rules used to interpret any other contract. *Lane v. Scarborough*, 284 N.C. 407, 200 S.E. 2d 622 (1973). When a separation agreement is in writing and free from ambiguity, its meaning and effect is a question of law for the court. *Id.* The agreement at issue provided for the distribution of certain specifically described real and personal property. It set certain cash payments as part of the property settlement, and separately made provision for defendant's support, medical, and other expenses. The agreement contained the following pertinent provisions relating to other property:

> *DIVISION OF PROPERTY. All other jointly owned personal properties of the parties has* [sic] *been amicably divided* between them. Each party agrees that the other party shall have said property *free and clear of all claim* [sic] which they may have against it.
>
> . . .

MUTUAL RELEASE OF ALL PROPERTY CLAIMS. Husband and wife grant, release, and forever quitclaim each to the other, all right, title, interest, claim and demand whatsoever in the real estate of which either is now seized or may hereafter become seized; and *each releases all rights he or she now has or may hereafter acquire in the personal estate of the other*, whether such rights arise under any statute of distribution or by virtue of any right of election or otherwise; and each waives any right of administration in the estate or any benefit under any existing will of the other or under any statute of succession, in the event of the death of the other. The provisions of this paragraph are subject to all rights and claims which either party may have against the other or against his or her estate under and pursuant to the terms of this agreement.

WAIVERS OF CLAIMS AGAINST ESTATE. Husband does hereby waive, release, discharge, quitclaim and renounce unto the wife and her heirs and assigns, and *wife does hereby waive, release, discharge, quitclaim and renounce* unto husband and his heirs and assigns:

(a) All other rights, claims, demands and obligations of every kind and character for past and future support and maintenance and for property settlement. [Emphasis added.]

These provisions are sufficiently clear that the trial court could properly render judgment as a matter of law. In the face of this language and the careful disposition of the other marital property, the absence of a recital that this is the "entire agreement" obviously constitutes a matter of form, not substance. The fact that the property contested here is not specifically described in the agreement also cannot suffice to avoid these unmistakably clear general provisions.

To rule otherwise would impermissibly open up to attack many separation agreements entered into before the effective date of the Act. It would also run counter to the established law of North Carolina, which has given effect to general language of the sort used here absent evidence of coercion or other unfairness. *Cone v. Cone*, 50 N.C. App. 343, 274 S.E. 2d 341, *disc. rev. denied*, 302 N.C. 629, 280 S.E. 2d 440 (1981); *Bost v. Bost*, 234

N.C. 554, 67 S.E. 2d 745 (1951); *see also Lane v. Scarborough* (implying term from general release).

The enactment of the Act has no effect on this result. The Act did not purport to change the general validity of separation agreements or modify existing agreements. It provides:

> 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.

G.S. § 50-20(d) (Supp. 1983). The wife does not attack the validity of the agreement, nor does she allege any breach thereof.

The wife relies instead on several New Jersey and New York cases which distinguish between support and property settlement agreements, and which hold that an agreement dealing solely with support allows a subsequent action for an equitable distribution. *See, e.g., Smith v. Smith*, 72 N.J. 350, 371 A. 2d 1 (1977). The agreement in *Smith* resulted in the transfer of no substantial assets to the dependent spouse, however, and principally provided for regular support. It contained nothing purporting to be a property settlement, but had instead a recitation that it was in settlement of all claims for support and maintenance. The court found it to be a support agreement and nothing more and allowed the action. In view of the property division and waivers detailed above, the rule in *Smith* does not apply to this case.

We therefore conclude that the court properly granted summary judgment for plaintiff. No error of law appearing, the judgment is

Affirmed.

Judges WEBB and EAGLES concur.

STATE OF NORTH CAROLINA v. JAMES ROMEO CALDWELL

No. 834SC627

(Filed 15 May 1984)

1. **Criminal Law § 102.6— *prosecutor's argument to jury—presenting prejudicial facts not introduced into evidence—prejudicial error***

A prosecutor committed prejudicial error by stating in his argument to the jury that one of the State's witnesses was in jail and that when he asked the witness to testify the witness had answered in an unpleasant manner and that that was why he had failed to testify. No evidence regarding the witness' whereabouts had been presented, although he was quoted, to defendant's detriment, and it was error to present facts in the argument that had not been introduced into evidence.

2. **Conspiracy § 6— sufficiency of evidence**

The evidence was sufficient to convict defendant of conspiring to sell and deliver marijuana where the evidence tended to show that an undercover agent was introduced to a co-conspirator and sought to purchase a quarter pound of marijuana; after obtaining a car, the co-conspirator, the driver of the car, the agent and the agent's informant drove to defendant's house; the co-conspirator went to the house and talked with defendant; the co-conspirator and defendant then left in another car and when they returned about thirty minutes later, the co-conspirator gave the agent a bag containing $60 worth of marijuana and the agent gave the co-conspirator $60; and the co-conspirator then gave some of this money to defendant, who was standing by the carport approximately thirty feet from where the drug transaction occurred.

3. **Conspiracy § 3— co-conspirator acting as agent for buyer—no merit to theory that they were but one person legally**

Defendant's conviction for conspiracy to sell and deliver marijuana was not improper because of the Wharton Rule where the co-conspirator acted as agent for the buyer of the marijuana since there was no merit to defendant's theory that the agent and the buyer were but one person legally.

APPEAL by defendant from *Reid, Judge.* Judgment entered 10 February 1983 in Superior Court, SAMPSON County. Heard in the Court of Appeals 12 January 1984.

Defendant, tried for conspiring to sell and deliver marijuana, possession with intent to sell marijuana and the sale of marijuana, was convicted of the conspiracy count, but acquitted of the other charges.

Attorney General Edmisten, by Assistant Attorney General Walter M. Smith, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Marc D. Towler, and James R. Glover, for the defendant appellant.

PHILLIPS, Judge.

Defendant contends the trial court erred in four respects. His first three contentions have no merit, but his fourth does and a new trial is required.

[1] The meritorious contention is based on the District Attorney's argument to the jury. McAllister, the alleged co-conspirator, was not present during the trial, and thus did not testify in support of the State's theory. In his closing argument, defense counsel questioned why the State failed to call McAllister as a witness. In his argument, the District Attorney stated that McAllister was in jail and that when he asked McAllister to testify he answered in an unpleasant manner. Defendant objected to these remarks, but his objection was overruled. No evidence regarding McAllister's whereabouts had been presented, although he was quoted, to defendant's detriment, by some of the State's witnesses. Though counsel is allowed wide latitude in arguing cases to the jury, the bounds do not include presenting prejudicial facts not introduced into evidence. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975). By so arguing, the District Attorney, in effect, testified that McAllister was in jail and uncooperative, and the jury could have easily inferred therefrom that McAllister was in jail because he had been convicted of the offenses that defendant was being tried for. From the earliest time, "traveling outside the record" in jury argument has been disapproved by our courts. *State v. Goode*, 132 N.C. 982, 43 S.E. 502 (1903). The prejudicial effect of these ill-advised remarks is, we think, self-evident.

Though we hold that they have no merit, we briefly discuss defendant's other contentions, since the questions might be raised at retrial. Defendant's first contention is that undercover agent Conerly's testimony regarding certain statements that McAllister made to him concerning defendant's participation in the drug deal was erroneously received into evidence. But the testimony was of-

fered for the limited purpose of showing only that the statements were made, and the court so instructed the jury. This did not violate the hearsay rule. 1 Brandis N.C. Evidence § 141 (2d ed. 1982).

[2] The next contention is that the evidence was insufficient to prove the conspiracy charge. In our opinion, the evidence viewed favorably to the State, as the law requires, contains substantial evidence of every material element of the charge, *State v. Locklear*, 304 N.C. 534, 284 S.E. 2d 500 (1981), and defendant's motion to dismiss the charge of conspiracy was properly denied. The evidence tended to show that: Conerly, an undercover agent, was introduced to McAllister and sought to purchase a quarter pound of marijuana; after obtaining a car, McAllister, Willie Wilson, the driver of the car, Conerly and Conerly's informant drove to defendant's house, Conerly, Wilson and the informant remaining in the car while McAllister went to the house and talked with defendant. McAllister and defendant then left in another car and when they returned about thirty minutes later, McAllister gave Conerly a bag containing $60 worth of marijuana and Conerly gave McAllister $60. McAllister then gave some of this money to defendant, who was standing by the carport approximately thirty feet from where the drug transaction occurred. This evidence covered in a very substantial way, we believe, all the elements of conspiring to sell and deliver marijuana, and submitting the issue to the jury was not error. The argument that the evidence becomes sufficient to convict only by stacking inference on inference, in violation of *State v. LeDuc*, 306 N.C. 62, 291 S.E. 2d 607 (1982), is rejected. The cases are not similar. In *LeDuc* there was only circumstantial evidence to link the defendant to the conspiracy; no evidence put him at the criminal scene and there was no evidence that he received any money from the transaction; whereas, in this case, there was evidence not only that defendant was present when the illicit transaction occurred, but that he received money from it as well.

[3] Defendant finally contends that his conviction was improper because of the Wharton Rule. Under the Wharton Rule when a substantive offense necessarily requires the participation of two people and no more than two people are shown to have been involved in the agreement to commit the offense, the charge of conspiracy will not lie. *State v. Langworthy*, 92 Wash. 2d 148, 594 P.

2d 908 (1979); 4 Charles E. Torcia, *Wharton's Criminal Law* § 731 (14th Ed. 1981). Defendant contends that even if there was sufficient evidence from which the jury could find that he agreed to obtain marijuana for the undercover agent, he was not guilty of conspiracy because only two people were involved in the crime. The claim is based on the premise that McAllister acted as agent for the buyer of the marijuana, and that therefore they were but one person legally. We cannot agree. One of the hallmarks of a conspiracy is that each conspirator is an agent for the others. Furthermore, there was evidence that defendant and McAllister conspired to sell marijuana to some third person. The fact that the third person approached McAllister for aid in purchasing the marijuana does not mean that McAllister and the third person must be considered as one.

New trial.

Judges ARNOLD and JOHNSON concur.

W. H. LOWDER, ON BEHALF OF HENRY C. DOBY, JR. AND JOHN BAHNER, CO-RECEIVERS OF ALL STAR INDUSTRIES, INC. v. HENRY C. DOBY, JR., JOHN BAHNER, MOORE & VAN ALLEN, A PARTNERSHIP, BROWN, BROWN AND BROWN, A PARTNERSHIP, JOHN P. ROGERS, COBLE, MORTON, GRIGG & ODOM, A PARTNERSHIP, MORTON & GRIGG, A PARTNERSHIP, CHARLES E. HERBERT, BILLINGS, BURNS & WELLS, A PARTNERSHIP, HENRY C. DOBY, JR. AND JOHN M. BAHNER, CO-RECEIVERS OF ALL STAR INDUSTRIES, INC.

No. 8320SC728

(Filed 15 May 1984)

Receivers § 1.2— collateral attack on receivership

An action by plaintiff alleging that the receivers, bankruptcy trustees and their attorneys negligently failed to file and prosecute an action to recover a debt due to the insolvent corporation constituted an improper collateral attack on the receivership court's jurisdiction.

APPEAL by plaintiff from *Preston, Judge*. Judgment entered 31 May 1983 in STANLY County Superior Court. Heard in the Court of Appeals 13 April 1984.

This is one of seven actions filed by W. H. (Horace) Lowder seeking to attack collaterally a receivership action involving seven interlocking family corporations including All Star Industries, Inc.

In this action plaintiff alleges that the receivers, bankruptcy trustees, and their attorneys negligently failed to file and prosecute an action to recover a debt due to Industries. A lawsuit to collect the debt had been filed and was pending as of the date the briefs were filed.

Upon motions of the defendants, Judge Preston entered an order dismissing plaintiff's action. From that order plaintiff appealed.

DeLaney, Millette, DeArmon and McKnight, P.A., by Ernest S. DeLaney, for plaintiff.

Jones, Hewson & Woolard, by Harry C. Hewson, for defendants Henry C. Doby, Jr. and John Bahner.

Golding, Crews, Meekins, Gordon & Gray, by James P. Crews, for defendant Moore & Van Allen.

Bailey, Brackett & Brackett, by Martin L. Brackett, Jr., for defendant Brown, Brown, and Brown.

Hartsell, Hartsell & Mills, P.A., by W. Erwin Spainhour, for defendant John P. Rogers.

Wade and Carmichael, by R. C. Carmichael, Jr., for defendants Coble, Morton, Grigg & Odom and Morton & Grigg.

Nichols, Caffrey, Hill, Evans & Murrelle, by William L. Stocks and Everett B. Saslow, Jr., for defendant Charles E. Herbert.

Walker, Palmer & Miller, P.A., by James E. Walker, for defendant Billings, Burns & Wells.

WELLS, Judge.

This is yet another in the series of vexatious collateral attacks on a corporate receivership. The factual background for this action is set forth in *Hudson v. All Star Mills, Inc.*, 68 N.C. App. 447, 315 S.E. 2d 514, *disc. rev. denied*, 311 N.C. 755, --- S.E. 2d

--- (1984). The sole question presented for review is whether the trial court erred in granting defendants' motions to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure. It is apparent from the wording of the order of dismissal that the trial court considered the record of proceedings in *Lowder v. All Star Mills, Inc.*, No. 79CVS015, a civil action pending in the Stanly County Superior Court. Pursuant to the provision of Rule 12(b)(6), defendants' motions were thus converted to Rule 56 motions for summary judgment. *See Smith v. Insurance Co.*, 43 N.C. App. 269, 258 S.E. 2d 864 (1979) and cases and authorities cited therein. Accordingly, we treat the trial court's order as constituting entry of summary judgment for defendants.

All Star Industries, Inc. is currently involved in a receivership action in Stanly County Superior Court. This is an attempt by plaintiff to circumvent these proceedings. In *Hall v. Shippers Express*, 234 N.C. 38, 65 S.E. 2d 333, *pet. to reh. dismissed*, 234 N.C. 747, 66 S.E. 2d 640 (1951) our supreme court held that when a receivership court has jurisdiction over a matter the only remedy is through the receivership proceedings. In *Hall* the court, in addressing an attack on a receivership by creditors, said: "[T]he court being one of competent jurisdiction in receivership proceedings, and having acquired jurisdiction of the parties and the subject matter in controversy, it may not be interfered with by any other court of co-ordinate authority."

Plaintiff's suit alleging a failure to collect properly the funds owed to All Star Industries, Inc., is clearly a collateral attack on the receivership court's jurisdiction; therefore, it is not proper and the trial court correctly dismissed the action.

Even if plaintiff could have properly filed the action, the pleadings reveal two further bars to recovery. First, plaintiff is attempting to sue the federal bankruptcy trustees and their attorneys in state court. This they could not do. Secondly, plaintiff is attempting to bring an action for failure to prosecute an action to recover the debt when the public record clearly shows that an action to collect the alleged debt is now pending.

Having determined that this action is an impermissible attack on the receivership court's jurisdiction, we, therefore, hold that the trial court's judgment must be and hereby is affirmed.

Affirmed.

Judges BECTON and JOHNSON concur.

JAMES FOX HOWARD, ADMINISTRATOR OF THE ESTATE OF ELIZABETH HUNTER HOWARD v. OCEAN TRAIL CONVALESCENT CENTER, JAMES TUCKER D/B/A TUCKER ELECTRIC COMPANY, JAMES W. EVANS D/B/A SOUTHPORT ELECTRICAL SERVICE, JOHNSON CONTROLS, INC., AND ROBERT L. COWAN, INDOOR COMFORT CONTRACTORS, INC. D/B/A TEMPERATURE CONTROL COMPANY

No. 8313SC577

(Filed 15 May 1984)

Appeal and Error § 6.2— interlocutory appeal

A court's orders denying defendants' motions to dismiss, one defendant's motion to quash service of an amended complaint, and the trial court's order allowing plaintiff to amend his complaint to realign the parties were all interlocutory and not appealable.

APPEAL by defendants from *Hobgood, Judge*. Judgment entered 7 March 1983 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 4 April 1984.

On 27 May 1981, plaintiff filed this action against defendant Ocean Trail Convalescent Center (Ocean Trail) for personal injury and wrongful death of plaintiff's intestate. Defendant Ocean Trail filed an answer and third party complaint against Evans and Johnson Controls. Defendants Evans and Johnson each filed an answer to defendant Ocean Trail's third party complaint.

On 20 September 1982, with consent of defendant Ocean Trail, plaintiff filed an amended complaint against defendants Ocean Trail, Evans, Johnson Controls, Tucker, Cowan, and Indoor Comfort Contractors. Defendants Evans and Johnson Controls, each filed motions pursuant to Rules 12 and 41(b) to dismiss plaintiff's amended complaint on the grounds that the amendment was made after responsive pleadings and without leave of court or consent of all adverse parties. Defendant Tucker filed an answer to the amended complaint which included as defense motions to dismiss pursuant to Rules 12 and 41(b) and a motion to quash service of the amended complaint pursuant to Rule 12.

On 9 February 1983, plaintiff filed a motion to amend the pleadings if it was determined that leave of court was required. The motion asked that defendants Tucker, Cowan, and Indoor Comfort be added as parties defendants, relating back to the filing of the amendment and to the service of process on these additional defendants.

On 7 March 1983, the motions came on for hearing. Third party defendants' motions to dismiss were denied, defendant Tucker's motion to quash service of the amended complaint was denied, and plaintiff's motion to amend the complaint to realign the parties was allowed. Defendants Evans, Johnson Controls, and Tucker appeal.

I. Murchison Biggs and Prevatte & Prevatte, for plaintiff-appellee.

Marshall, Williams, Gorham & Brawley, by William Robert Cherry, Jr., for defendant-appellant Evans, d/b/a Southport Electrical Service.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Richard T. Feerick, for defendant-appellant Johnson Controls, Inc.

McLean, Stacy, Henry & McLean, by Everett L. Henry, for defendant-appellant Tucker, d/b/a Tucker Electric Company.

EAGLES, Judge.

Defendants Evans, Johnson Controls, and Tucker each assign as error the trial court's denial of their motions to dismiss. We hold that the court's order denying defendant's motions to dismiss was interlocutory, does not affect a substantial right, and is therefore not appealable. Denial of a motion to dismiss is interlocutory because it simply allows an action to proceed and will not seriously impair any right of defendants that cannot be corrected upon appeal from final judgment. *Godley Auction Co., Inc. v. Myers*, 40 N.C. App. 570, 253 S.E. 2d 362 (1979). The avoidance of a trial is not a "substantial right" that would make such an interlocutory order appealable under G.S. 1-277 or G.S. 7A-27(d). *Davis v. Mitchell*, 46 N.C. App. 272, 265 S.E. 2d 248 (1980).

Denial of defendant Tucker's motion to quash service of the amended complaint was also interlocutory, does not affect a

substantial right, and is not immediately appealable. Our Supreme Court has held that the G.S. 1-277(b) provision for "immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of defendant" applies to the state's authority to bring a defendant before its courts ("minimum contacts" considerations), not to challenges of sufficiency of process and service. *Love v. Moore*, 305 N.C. 575, 291 S.E. 2d 141 (1982).

Defendants assign as error the order allowing plaintiff to amend the complaint to realign the parties, and this assignment of error is also premature and not appealable. The order granting the motion to amend is obviously not a final judgment but is interlocutory. *Funderburk v. Justice*, 25 N.C. App. 655, 214 S.E. 2d 310 (1975). No "substantial right" is at stake, so there is no right to immediate appeal on this issue.

For the reasons given above, this appeal is

Dismissed.

Judges WEBB and BECTON concur.

JOHN DOUGLAS v. WILLIAM LAND PARKS

No. 8314SC225

(Filed 15 May 1984)

Attorneys at Law § 5.1; Election of Remedies § 4— personal injury action—acceptance of settlement—attorney malpractice—election of remedies

Plaintiff client's election to affirm a settlement of his personal injury action precluded a malpractice action against defendant attorney based upon alleged inadequate representation in the personal injury action.

APPEAL by plaintiff from *Godwin, Judge.* Judgment entered 15 July 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 7 February 1984.

Plaintiff appeals from allowance of defendant's motion for directed verdict in a malpractice action.

Loflin & Loflin, by Robert S. Mahler, Thomas F. Loflin III, and Dean A. Shangler, for plaintiff appellant.

Haywood, Denny & Miller, by George W. Miller, Jr., for defendant appellee.

JOHNSON, Judge.

The facts giving rise to this action are that defendant, an attorney licensed in North Carolina, represented plaintiff in a personal injury action to recover damages for injuries plaintiff sustained in an automobile collision. The action proceeded to trial, and directed verdict was entered against plaintiff. Plaintiff then obtained additional counsel and filed a motion to vacate the judgment and award a new trial. Defendant was not discharged as plaintiff's counsel but instead worked with the new counsel.

Before the motion to vacate the judgment and award a new trial was heard, a settlement was reached. The settlement was for $4,452, which was $1,452 higher than any prior settlement offer.

Subsequently, plaintiff instituted this action against defendant alleging negligence in the representation in the personal injury action. The court granted a directed verdict for defendant. Plaintiff appeals.

In considering whether a directed verdict is proper, "the evidence must be taken as true and considered in the light most favorable to plaintiff. When so considered, the motion should be allowed if as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff." *Farmer v. Chaney*, 292 N.C. 451, 452-53, 233 S.E. 2d 582, 584 (1977); *see also Pergerson v. Williams*, 9 N.C. App. 512, 517, 176 S.E. 2d 885, 888 (1970). Defendant argues that the directed verdict was proper because "when plaintiff entered into the judgment and accepted the proceeds called for therein, he was thereafter estopped from presenting this claim. He exercised an election of remedies."

Our Supreme Court has stated that

> [t]he doctrine of election is founded on the principle that where by law or by contract there is a choice of two remedies which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the pros-

> ecution of the other. A party cannot, either in the course of litigation or in dealing *in pais*, occupy inconsistent positions. . . . But the doctrine of election applies only where two or more existing remedies are alternative and inconsistent. If the remedies are not inconsistent, there is no ground for election.

Irvin v. Harris, 182 N.C. 647, 653, 109 S.E. 867, 870 (1921). Further, "[t]he purpose of the doctrine . . . is not to prevent recourse to any remedy, but to prevent double redress for a single wrong." *Smith v. Oil Corp.*, 239 N.C. 360, 368, 79 S.E. 2d 880, 885 (1954).

Here, the thrust of plaintiff's claim is that defendant's representation in the personal injury action "was not what is required of a competent practitioner and that he [is] entitled to recover consequential damages for such inadequate representation that amounts to a breach of contract." Essentially the argument is that if defendant had provided adequate representation, plaintiff would have recovered damages at trial. The purpose of the attorney-client relationship was for defendant to recover damages for plaintiff. After the trial, however, plaintiff entered into a compromise agreement. By entering into the agreement, he agreed that this was the amount of damages he would accept as full compensation for his injuries.

Our research has not revealed, nor have the parties cited, a case with identical facts. A case involving similar principles, however, is *Davis v. Hargett*, 244 N.C. 157, 92 S.E. 2d 782 (1956). In *Davis* the plaintiff had been injured in a wreck due to the negligence of two cab drivers. The defendant became plaintiff's confidential adviser. He took plaintiff out of the hospital and placed him in an "outhouse" with unsanitary living conditions. When agents of the cab drivers' insurance company met with plaintiff about settling the claim, defendant threatened to withhold medical treatment if plaintiff did not accept the settlement offer. Plaintiff, in response to defendant's threat, settled the claim for $5,000, even though it allegedly was worth $35,000. Plaintiff then brought an action against defendant seeking the additional $30,000. Plaintiff argued that

> his original cause of action was property, wrongfully taken from him by the defendants, and that in this situation he had the legal right to elect as between two remedies, that is, (1)

to rescind the compromise settlement and prosecute his original cause of action, or (2) to affirm the compromise settlement and recover damages from defendants for the difference in value between the true worth of his original cause of action and the consideration actually received by him in the settlement.

Id. at 162, 92 S.E. 2d at 785.

The Court held that plaintiff had to make an election of remedies. If he rescinded the settlement, then he could either prosecute his original action against the cab drivers or bring an action against defendant. If, however, he chose to affirm the compromise, then he could not bring an action against either.

Similarly, here plaintiff had the election to either rescind or affirm the settlement. He chose to affirm it, and his election precludes a malpractice action against his attorney in the original action. Thus, the court correctly granted defendant's motion for directed verdict, and the judgment is

Affirmed.

Judges ARNOLD and BECTON concur.

LYNN D. JACKSON v. MARVIN E. JACKSON

No. 8327DC754

(Filed 15 May 1984)

Divorce and Alimony § 23.3— child custody and support—jurisdiction of motion in the cause

Where plaintiff's complaint sought child custody and support and alimony without divorce, and the issues of child custody and support were ruled on by the trial court, the trial court retained jurisdiction to entertain and rule on defendant's motion in the cause for child custody and support and sequestration of the marital home for the use and benefit of the children.

APPEAL by plaintiff from *Bowen, Judge*. Order entered 16 February 1983 in District Court, CLEVELAND County. Heard in the Court of Appeals 1 May 1984.

Plaintiff, wife, appealed from the denial of her motion, made pursuant to N.C. Gen. Stat. Sec. 1A-1, Rule 60(b)(4), North Carolina Rules of Civil Procedure, to set aside an order awarding custody of and support for the minor children born of the marriage union between plaintiff and defendant. The record discloses the following:

On 21 January 1981 plaintiff filed an action in District Court, seeking child custody and support, alimony, sequestration of the marital home for the use and benefit of the children, and legal fees. On 31 March 1981 defendant, husband, filed an answer and counterclaim, asking for custody of and support for the minor children, a divorce from bed and board, possession and use of the marital home, alimony, and legal fees. On 11 January 1982, after a trial without a jury, the court entered an order pursuant to N.C. Gen. Stat. Sec. 1A-1, Rule 41(b), North Carolina Rules of Civil Procedure, dismissing plaintiff's claims. In that order the court made detailed findings of fact and conclusions of law, including the following:

> 6. That all the evidence in the case shows that the plaintiff is a fit and proper person, but that the best interest of the children would be served by their being and remaining in the custody of the defendant.
>
> . . .
>
> 1. That the plaintiff has not shown any evidence to support her prayer for relief for the custody of the minor children.
>
> 2. That the defendant and the minor children have lived in the home located at Rt. 5, Shelby, North Carolina, and the plaintiff has failed to show any reason why the home should be sequestered for the sole occupancy of the plaintiff the minor children [sic]; but, to the contrary, the evidence is that the status quo which is now existing should continue in the best interest of the minor children.
>
> . . .
>
> 4. That the children are now in the custody, control and supervision of the defendant, and therefore he is providing for their support.

Also in the order dated 11 January 1982 the court dismissed defendant's counterclaim without prejudice "based on the statement of attorney for the plaintiff that he had not been served with a copy of the answer." On or about 19 March 1982 defendant filed a motion in the cause for custody of and support for the children and sequestration of the marital home for the use and benefit of the children. On 30 April 1982 District Court Judge Hamrick entered an order in which he made findings of fact and conclusions of law and which awarded defendant custody of and support for the minor children and sequestered the marital home. On 25 January 1983 plaintiff filed a motion pursuant to N.C. Gen. Stat. Sec. 1A-1, Rule 60(b)(4), North Carolina Rules of Civil Procedure, to set aside the judgment dated 30 April 1982 as being void. Plaintiff appealed from an order denying her Rule 60(b)(4) motion.

O. Max Gardner, III, for plaintiff, appellant.

No counsel contra.

HEDRICK, Judge.

The one question presented by this appeal is whether the District Court had jurisdiction to entertain defendant's motion in the cause and enter the order dated 30 April 1982. Plaintiff contends that "the District Court was without jurisdiction to entertain a motion in the cause since no cause existed after the entry of the order of dismissal."

N.C. Gen. Stat. Sec. 50-13.5(b)(5) provides that an action for custody or support of minor children may be brought "[b]y motion in the cause in . . . an action for alimony without divorce." In the instant case, the record reveals that plaintiff sought alimony without divorce in the action filed 21 January 1981 as well as child support and custody. The court's dismissal of plaintiff's claim for alimony operated as a final adjudication on the merits. Rule 41(b), North Carolina Rules of Civil Procedure. The court's ruling on plaintiff's claims for custody and support cannot be said to be a final adjudication, however, since "the issue of custody and support remains *in fieri* until the children have become emancipated." *In re Holt*, 1 N.C. App. 108, 112, 160 S.E. 2d 90, 93 (1968). Where custody and support are brought to issue by the pleadings, the court retains continuing jurisdiction over these

matters even when the issues are not determined by the judgment. *Kennedy v. Surratt*, 29 N.C. App. 404, 224 S.E. 2d 215 (1976). Here, where the issues of custody and support were raised in plaintiff's complaint and ruled on by the trial judge, we think it clear that the court retained jurisdiction to entertain and rule on defendant's motion in the cause. Consequently, we uphold the court's action in denying plaintiff's Rule 60(b)(4) motion to set aside the order dated 30 April 1982.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

SHIRLEY CASPER INGRAM AND HARRY NATHAN CASPER, THROUGH HIS ATTORNEY IN FACT, DORIS C. CLOER, PETITIONERS v. GLENN CRAVEN, HELEN KONOPA, WILLIAM M. CRAVEN, DORIS CRAVEN, WILLIAM RAY LUDWICK, JOHN E. LUDWICK, SUSIE LUDWICK WILSON, ELLEN LUDWICK MARSH, MARY LUDWICK SCHMITT, ELIZABETH LUDWICK WATKINS, RAYMOND LUDWICK, JR., GLENN CASPER, JR., MILDRED CASPER CORBETT, AND BESSIE BURROW, FORMERLY BESSIE CASPER, ADDITIONAL RESPONDENT, RESPONDENTS, AND MARY CATHERINE CHEEK CRAVEN, INTERVENOR

No. 8319SC672

(Filed 15 May 1984)

1. Trial § 5— no error in allowing former attorney to remain in courtroom

In an action concerning the partition of land, the trial court did not err in allowing appellants' former attorney to remain in the courtroom as a commissioner in partition proceedings even though he had filed a pleading adverse to appellants' interests after appellants terminated his services.

2. Partition § 3.2— partition proceedings—refusal to join purchasers—no error

In a special proceeding for the partition of certain land held as a tenancy in common, there was no error and the court did not express an opinion by refusing to join the purchasers at the partition sale which followed as parties since the ruling took place outside the presence of the jury and since there was no possibility the purchasers would have contributed in any way to the issue at trial, the title to the land *before* the most recent purchase.

APPEAL by petitioner Ingram and additional respondent Burrow from *Freeman, Judge*. Judgment entered 31 January 1983 in

Superior Court, ROWAN County. Heard in the Court of Appeals 11 April 1984.

Ottway Burton, P.A., by Ottway Burton, for petitioner Shirley Casper Ingram and additional respondent Bessie Casper Burrow, appellants.

Steven E. Lawing for respondent William M. Craven and intervenor respondent Mary Catherine Cheek Craven, appellees.

BECTON, Judge.

This appeal is without merit, for the simple reason that the unchallenged verdict of the jury necessarily and conclusively compels our ruling that appellants, Shirley Casper Ingram and her mother, Bessie Casper Burrow, cannot have suffered harm from the errors alleged.

I

Appellants initiated a special proceeding for the partition of certain land held as a tenancy in common. Appellees challenged appellants' right to share in the land or proceeds, relying on a deed allegedly executed by appellant Burrow and her deceased husband. The deed purported to transfer the Burrows' entire interest, on which appellant Ingram's interest depends, to appellees. The clerk held the disputed portion of the partition sale proceeds pending final resolution of the matter on appeal. A jury trial in Superior Court produced a verdict that the disputed deed was properly executed by appellants, and the court entered judgment thereon in favor of appellees.

II

[1] When the trial began, appellants moved that their former attorney be "excused" because he filed a pleading adverse to appellants' interest after appellants terminated his services. The trial court denied appellants' motion, and we affirm. The attorney was present in the courtroom, but the record affirmatively discloses that he did not represent anyone or take part in or affect the trial in any way. He was present as the Commissioner in the partitioning proceedings. Moreover, our Constitution guarantees that courts shall be open; indeed, this is one of the sources of the courts' greatest strength. N.C. Const. Art. I, § 18 (1970); *In re*

Nowell, 293 N.C. 235, 237 S.E. 2d 246 (1977). We find no justification for excluding the attorney from the courtroom. The court did not err in allowing him to remain.

III

[2] The jury decided one question: whether a deed transferring appellants' interest to appellees was validly executed. Appellants do not attack the jury's verdict except by suggesting that the court "inadvertently gave an expression of opinion" by refusing to join the purchasers at the partition sale as parties. That ruling took place outside the presence of the jury, however. Appellants do not suggest, nor can we discern, any possibility that the parties not joined would have contributed in any way to the issue at trial, the title to the land *before* the most recent purchase.

IV

Therefore, since appellants have not shown prejudicial error as to the verdict, or other unfairness in the trial, the facts found by the jury are conclusive. *Morris v. Wrape*, 233 N.C. 462, 64 S.E. 2d 420 (1951). The verdict establishes that appellants have no interest in the subject property. If appellants have no interest on the subject property, other errors in the trial or prior proceedings are harmless as to them. *Coburn v. Roanoke Land and Timber Corp.*, 260 N.C. 173, 132 S.E. 2d 340 (1963) (defining "aggrieved party"); *Bullin v. Moore*, 256 N.C. 82, 122 S.E. 2d 765 (1961) (jury finding on decisive issue rendered any error on other issues harmless). Appellants thus also lack standing to challenge any transactions by which their former attorney may have received undue amounts from the proceeds of the sale.

V

Appellants received a fair trial and have shown no prejudicial error therein. Their other assignments of error are not properly before this Court.

No error.

Judge WELLS concurs in the result.

Judge JOHNSON concurs.

W. H. LOWDER v. MALCOLM M. LOWDER, PATTY S. LOWDER, BROWN, BROWN & BROWN, A PARTNERSHIP, AND MOORE & VAN ALLEN, A PARTNERSHIP

No. 8320SC818

(Filed 15 May 1984)

Judgments § 37.4— estoppel to relitigate issue

Plaintiff is estopped to relitigate the issue of whether defendant law firm divulged confidential information about plaintiff to the other defendants where this issue was litigated and decided against plaintiff by the appellate courts in a prior action in which plaintiff attempted to have defendant law firm disqualified from representing the other defendants based upon the same allegations.

APPEAL by plaintiff from *Preston, Judge.* Judgment entered 31 May 1983 in STANLY County Superior Court. Heard in the Court of Appeals 13 April 1984.

This is one of seven actions filed by W. H. (Horace) Lowder seeking to attack collaterally a receivership action involving seven interrelated family corporations. The factual background for this action is set forth in *Hudson v. All Star Mills, Inc.*, 68 N.C. App. 447, 315 S.E. 2d 514, *disc. rev. denied*, 311 N.C. 755, --- S.E. 2d --- (1984).

In this action plaintiff alleges that the law firm of Brown, Brown and Brown wrongfully disclosed to the other defendants confidential information obtained while Brown was attempting to gain review of plaintiffs' tax evasion convictions. He further alleges that this confidential information was used by all the defendants as a basis to bring the receivership action entitled *Malcolm M. Lowder v. All Star Mills, Inc.*, Stanly County No. 79CVS015 which is currently pending.

All defendants moved to dismiss the complaint. On 31 May 1983, Judge Preston after taking judicial notice of the record in the receivership action entered an order dismissing this action. From this order plaintiff appeals.

DeLaney, Millette, DeArmon, and McKnight, P.A., by Ernest S. DeLaney, for plaintiff.

Moore, Van Allen and Allen, by Randel E. Phillips, for defendants Malcolm M. Lowder and Patty S. Lowder.

Bailey, Brackett and Brackett, P.A., by Martin L. Brackett, Jr., for defendant Brown, Brown and Brown.

Golding, Crews, Meekins, Gordon & Gray, by James P. Crews, for defendant Moore & Van Allen.

WELLS, Judge.

The sole issue raised by this appeal is whether the trial court properly dismissed plaintiff's complaint. The motions to dismiss were made pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure. It is apparent from the wording of the order of dismissal that the trial court considered the record of proceedings in *Lowder v. All Star Mills, Inc.*, No. 79CVS015, *supra*. Pursuant to the provisions of Rule 12(b)(6), defendants' motions were thus converted to Rule 56 motions for summary judgment. *See Smith v. Insurance Co.*, 43 N.C. App. 269, 258 S.E. 2d 864 (1979) and cases and authorities cited therein. Accordingly, we treat the trial court's order as constituting entry of summary judgment for defendants. Summary judgment is proper when it appears that even if the facts as claimed by plaintiff are taken as true, there can be no recovery. *Doggett v. Welborn*, 18 N.C. App. 105, 196 S.E. 2d 36, *cert. denied*, 283 N.C. 665, 197 S.E. 2d 873 (1973).

The question of whether Brown, Brown and Brown divulged confidential information to the other parties was litigated and decided against Horace by this court in *Lowder v. Mills, Inc.*, 60 N.C. App. 275, 300 S.E. 2d 230, *aff'd in part, rev'd in part*, 309 N.C. 695, 309 S.E. 2d 193 (1983). In that action Horace attempted to have the Brown firm and the Moore and Van Allen firm disqualified from representing the Lowders based upon these same allegations. The trial court refused to disqualify the attorneys. That order was affirmed by this court. Plaintiff is estopped to relitigate this issue. *See King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973).

For the reasons stated, we hold that the trial court properly entered summary judgment for defendants.

Affirmed.

Judges BECTON and JOHNSON concur.

W. H. LOWDER, J. R. LOWDER, AND ROSA M. LOWDER v. JOHN P. ROGERS, CHARLES E. HERBERT, HENRY C. DOBY AND JOHN M. BAHNER

No. 8320SC819

(Filed 15 May 1984)

Receivers § 1.2— collateral attack on receivership action—impermissible

Plaintiffs' attempt to have some court, other than a receivership court, declare that seized property did not fall within the control of the receivership court was an impermissible attempted collateral attack on a receivership action.

APPEAL by plaintiffs from *Preston, Judge.* Judgment entered 31 May 1983 in STANLY County Superior Court. Heard in the Court of Appeals 13 April 1984.

This is one of seven actions filed by W. H. (Horace) Lowder and other members of his family seeking to attack collaterally a receivership action involving seven interlocking family corporations owned by the Lowder family.

In this action the plaintiffs allege that the defendants, who were the duly appointed receivers and bankruptcy trustees for the family corporations, improperly took possession of certain real and personal property belonging to the plaintiffs.

Upon motions of the defendants, Judge Preston entered an order dismissing plaintiffs' action. From this order plaintiffs appealed.

DeLaney, Millette, DeArmon, and McKnight, P.A., by Ernest S. DeLaney, for plaintiffs.

Hartsell, Hartsell & Mills, P.A., by W. Erwin Spainhour, for defendant John P. Rogers.

Nichols, Caffrey, Hill, Evans & Murrelle, by William L. Stocks, and Everett B. Saslow, Jr., for defendant Charles E. Herbert.

Jones, Hewson & Woolard, by Harry C. Hewson, for defendants Henry C. Doby and John M. Bahner.

WELLS, Judge.

The factual background surrounding this action is set forth in *Hudson v. All Star Mills, Inc.*, 68 N.C. App. 447, 315 S.E. 2d 514, *disc. rev. denied*, 311 N.C. 755, --- S.E. 2d --- (1984). The sole question that we must determine is whether the trial court erred in granting defendants' motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure. It is apparent from the wording of the order of dismissal that the trial court considered the record of proceedings in *Lowder v. All Star Mills, Inc.*, No. 79CVS015, a civil action pending in the Stanly County Superior Court. Pursuant to the provision of Rule 12(b)(6), defendants' motions were thus converted to Rule 56 motions for summary judgment. *See Smith v. Insurance Co.*, 43 N.C. App. 269, 258 S.E. 2d 864 (1979) and cases and authorities cited therein. Accordingly, we treat the trial court's order as constituting entry of summary judgment for defendants.

The receivership order directed the receivers

. . .

> to take possession of the assets, facilities, and offices of the corporate defendants, together with all of their records, correspondence, books of account, corporate minute books and all other corporate records, and the Receivers shall continue, manage, and operate the businesses until further order of this Court.

The plaintiffs' complaint is in essence an attempt to have some court other than the receivership court declare that the seized property does not fall within the control of the receivership court. This is not permissible. In *Hall v. Shippers Express*, 234 N.C. 38, 65 S.E. 2d 333, *pet. to reh. dismissed*, 234 N.C. 747, 66 S.E. 2d 640 (1951), our supreme court in ruling on an attempted collateral attack on a receivership action said:

> [T]he [receivership] court being one of competent jurisdiction in receivership proceedings, and having acquired jurisdiction of the parties and the subject matter in controversy, it may not be interfered with by any other court of co-ordinate authority.

Having determined that this action is an impermissible collateral attack on the receivership court's jurisdiction, the judgment of the trial court must be and is affirmed.

Affirmed.

Judges BECTON and JOHNSON concur.

JUNIE AUSTIN DAY; PEARL AUSTIN PRESNELL; MARY AUSTIN ANDERSON AND DORIS AUSTIN KIRBY v. SADIE HUFFMAN COFFEY, ADMINISTRATRIX OF THE ESTATE OF J. GRANT HUFFMAN; SADIE HUFFMAN COFFEY AND HUSBAND, JACK COFFEY; THOMAS JACK HUFFMAN AND WIFE, ANN C. HUFFMAN

No. 8325SC571

(Filed 15 May 1984)

Appeal and Error § 6.6— order dismissing complaint with leave to amend—premature appeal

Purported appeal by plaintiffs from an order which dismissed their complaint but allowed leave to amend was interlocutory and premature.

APPEAL by plaintiffs from *Morgan, Judge.* Order entered 18 April 1983 in Superior Court, CALDWELL County. Heard in the Court of Appeals 24 April 1984.

W. P. Burkhimer for plaintiff appellants.

Wilson, Palmer & Cannon, P.A., by Hugh M. Wilson and John S. Arrowood, and Beverly T. Beal, P.A., by Christopher L. Beal, for defendant appellees.

BECTON, Judge.

Plaintiffs attempt to appeal from an order dismissing their complaint. Since the court granted plaintiffs leave to amend, however, the purported appeal is interlocutory, and we therefore dismiss.

The complaint alleged that plaintiff Day's interest in various tracts of land was fraudulently conveyed to defendants' predecessors in title. Plaintiffs sought removal of the cloud on their alleged title or damages for the lost value of the land, as well as lost rents and timber profits. They alleged in addition damage re-

sulting from violations of the United States Constitution, the Constitution of North Carolina, federal civil rights law, and North Carolina unfair trade practices law. Defendants moved to dismiss all claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1983). The court granted the motion as to the constitutional and statutory claims. It also granted it as to the cloud on title and fraud claims, but allowed plaintiffs leave to amend their Complaint within thirty days. The order instructed plaintiffs to file separate complaints identifying more specifically the land involved, the nature of plaintiffs' interest(s) therein, and the manner in which defendants allegedly perpetrated the frauds. Rather than file amended complaints, plaintiffs gave notice of appeal.

We confront, apparently for the first time under our Rules of Civil Procedure, the question of the appealability *by plaintiffs* of an order which dismissed their complaint but allowed leave to amend. It is established under our Rules of Civil Procedure that orders allowing amendments cannot be appealed by the *opposing* party. *O'Neill v. Southern Nat'l Bank*, 40 N.C. App. 227, 252 S.E. 2d 231 (1979); *see also Williams v. Denning*, 260 N.C. 539, 133 S.E. 2d 150 (1963). Can the party be allowed to amend appeal?

Decisions of the federal courts under Rule 12 of the Federal Rules of Civil Procedure have uniformly held that when an action is dismissed with leave to amend, the proceeding is still pending and an appeal is interlocutory. *See Kozemchak v. Ukrainian Orthodox Church*, 443 F. 2d 401 (2d Cir. 1971); *Tietz v. Local 10, Int'l Ass'n of Bridge, Structural and Ornamental Ironworkers*, 525 F. 2d 688 (8th Cir. 1975); *Borelli v. City of Reading*, 532 F. 2d 950 (3d Cir. 1976). The federal decisions rely at least in part on Rule 58 of the Federal Rules of Civil Procedure, which defines a judgment as, among other things, a ruling "that all relief shall be denied." *See Tietz v. Local 10.* Our rules contain the same language. N.C. Gen. Stat. § 1A-1, Rule 58 (1983). When the court allows amendment, relief in the trial court has not been entirely denied and appeal is premature. Our long-established policy forbidding fragmentary interlocutory appeals also supports application of the federal rule. Plaintiffs have an opportunity to correct the deficiency in the trial court without affecting their cause of action. Prosecuting an appeal, when simple and economical corrective measures might be taken without prejudice in the trial court, is exactly the sort of wasteful procedure which our appellate courts

have consistently disapproved. We therefore hold that plaintiffs' attempted appeal is interlocutory and dismiss it forthwith.

The fact that plaintiffs have alleged unfair trade practices does not affect this result. Assuming without deciding that such a claim is proper, the action would lie, if at all, against Harve Austin, the perpetrator of the fraud, or his estate. N.C. Gen. Stat. §§ 75-1.1, -16 (1981); N.C. Gen. Stat. § 28A-18-1 (1976); *see Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E. 2d 271 (1980). Plaintiffs have not named Harve Austin or his estate as a defendant. *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E. 2d 797 (1976) (separation of underlying claim and punitive damage claim made order appealable), therefore does not apply.

Appeal dismissed.

Judges WEBB and EAGLES concur.

LESSIE SIMMONS, PLAINTIFF v. C. W. MYERS TRADING POST, INC., DEFENDANT

No. 8321DC746

(Filed 15 May 1984)

Appeal and Error § 6.2— appeal from dismissal of claim for treble damages interlocutory

Plaintiff's attempted appeal from an order dismissing her claim for treble damages was interlocutory pursuant to G.S. 1-277 and G.S. 1A-1, Rule 54(b). Had plaintiff waited until final judgment had been entered on the verdict, plaintiff could have obtained review of the interlocutory ruling.

APPEAL by plaintiff from *Tanis, Judge*. Judgment entered 21 February 1983 in District Court, FORSYTH County. Heard in the Court of Appeals 1 May 1984.

This is a civil action wherein plaintiff seeks to recover damages for breach of an express warranty in relation to the sale of a mobile home to plaintiff by defendant. Plaintiff also seeks treble damages pursuant to the provisions of N.C. Gen. Stat. Secs. 25A-44(4), 75-1.1, and 75-16.

Legal Aid Society of Northwest North Carolina, Inc., by Ellen W. Gerber and Kate Mewhinney, for plaintiff, appellant.

Herman L. Stephens for defendant, appellee.

HEDRICK, Judge.

At the close of plaintiff's evidence, the defendant made the following motion:

> Your Honor, pursuant to Rule 50 of the North Carolina Rules of Civil Procedure, I would make a motion for a directed verdict dismissing the plaintiff's claim under G.S. Section 25A-44(4) and Section 25A-2, that claim being for treble damages for a violation of the prohibition in Section 20 of—including any provision or language in the contract—in a contract of—under the retail—that is under the application of retail installment sales account which would exclude, modify, limit or alter the terms of an express warranty. As grounds therefor, my argument would be . . .

The record indicates the trial court ruled on defendant's motion as follows:

> All right, considering North Carolina G.S. 25-2-316, 25A 20 and 25-2202, I rule that, as a matter of law, that there is an express warranty in the contract as stated in the next to the last paragraph in the contract . . . and as to all other implied warranties, they are eliminated by the phrase, leased as is, therefore, the contract does not show as a matter of law any disclaimer of express warranty and is to be considered under 25A 20. Now, where does that leave us.

After the foregoing ruling, the following issues were submitted to and answered by the jury as indicated:

> ISSUE 1: Did the defendant, C. W. Myers Trading Post, Inc., breach the warranty given to plaintiff, Lessie Simmons, to repair the items listed in the contract?
>
> ANSWER: *Yes.*
>
> ISSUE 2: What was the value of the 1969 Fleetwood Trailer at the time it was delivered to the plaintiff?
>
> ANSWER: *$3,500.00.*

ISSUE 3: What was the value of the 1969 Fleetwood Trailer as warranted by the defendant?

ANSWER: *$5,500.00.*

ISSUE 4: What amount, if any, was actually expended by the plaintiff, Lessie Simmons, in repairing the items listed in the contract?

ANSWER: *$75.00.*

On *21 February* 1983 the court entered judgment on the verdict that plaintiff recover of the defendant $655.88. On *14 February* 1983 the plaintiff signed and filed the following notice of appeal:

> Plaintiff appeals from the ruling of the Trial Court on February 2, 1983, in open court granting defendant's Motion for Directed Verdict at the close of plaintiff's evidence dismissing plaintiff's claim for relief under the North Carolina Retail Installment Sales Act, §§ 25A-20 and 25A-44 (4).
>
> This the 14 day of February, 1983.

Plaintiff has attempted to appeal from an interlocutory order dismissing her claim for treble damages. Plaintiff has no right of immediate appeal from an interlocutory order. N.C. Gen. Stat. Sec. 1-277 and N.C. Gen. Stat. Sec. 1A-1, Rule 54(b), North Carolina Rules of Civil Procedure. Plaintiff could have obtained review of the interlocutory ruling on appeal from the final judgment, but she has not appealed from the final judgment.

Appeal dismissed.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. WILLIAM JONES, JR.

No. 8327SC461

(Filed 15 May 1984)

ON remand from the North Carolina Supreme Court by order filed 5 April 1984.

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

Robert W. Clark, Assistant Public Defender, for the defendant appellant.

Defendant was indicted for first degree arson and was convicted of attempting to burn in violation of G.S. 14-67.

Before VAUGHN, Chief Judge, and Judges Hill and Johnson.

This case was first disposed of by this Court by an unpublished opinion filed 6 December 1983 which found no error in defendant's trial.

The evidence showed that defendant and several others went to the bus station in Gastonia to "mess around with the whores." Defendant told one female there that "We'll burn you whores out." About 12:30 a.m. defendant went to the Southern Hotel in Gastonia, where that female lived. He took bed sheets into a bathroom of the hotel and arranged them into three piles. He then set them on fire. We regarded the three piles of sheets as devices arranged for a particular purpose—to set fire to the hotel, which was occupied by a number of people. Since the defendant was not convicted of first degree arson but was convicted under G.S. 14-67, we felt that the fact that the building was occupied was not an element of the offense and could be considered as an aggravating factor. We agreed with the trial judge who found as an aggravating factor, under G.S. 15A-1340.4(a)(1)g that: "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."

We subsequently received the following order from the Supreme Court:

Upon consideration of the Defendant's petition filed in this matter for a writ of certiorari to the North Carolina Court of Appeals to review its decision, the petition is allowed for the sole purpose of entering the following order:

> The case is remanded to the North Carolina Court of Appeals for further remand to the Superior Court, Gaston County, for resentencing without the application of the aggravating factor listed in G.S. 15A-1340.4(a)(1)g. By order of the Court in conference, this the 3rd day of April 1984.

This case is, therefore, remanded to the Superior Court in accordance with the foregoing order.

Remanded.

STATE OF NORTH CAROLINA v. FRANKLIN D. GARDNER, JR.

No. 8327SC966

(Filed 5 June 1984)

1. **Constitutional Law § 77; Criminal Law § 161.1— questioning defendant concerning failure to make statement to officers—waiver of right to object**

Defendant waived his right to object to the cross-examination of him concerning his failure to give a statement to the police after his arrest in violation of his constitutional right to remain silent where trial counsel made no objections to the cross-examination and an exception was inserted into the record in violation of App. R. 10(b), and where defendant on appeal does not assert plain error in his cross-examination as a basis for either the pertinent assignment of error or the corresponding argument in his brief.

2. **Criminal Law § 111.1— instruction concerning elements of crime defendant previously charged with—no limiting instruction required**

There was no merit to defendant's contention that the trial judge erroneously instructed the jury on the elements of common law robbery, an offense defendant was not charged with, where the record revealed that defendant testified on direct examination that he had been convicted of common law robbery, that he was out on parole on the night of the offense and that as a condition of his parole, he could not travel to Gastonia. Since evidence of this prior crime was elicited as a part of defendant's defense and the definition was given for the purpose of clarifying an issue raised by defendant, the trial judge was not required to give a limiting instruction.

3. Burglary and Unlawful Breakings § 7— conviction for felonious breaking and entering and felonious larceny—no error

The offenses of breaking or entering and larceny are not lesser-included offenses of one another; therefore, defendant could be properly convicted of felonious breaking and entering and felonious larceny.

Judge WELLS dissenting in part and concurring in part.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 19 January 1983 in Superior Court, GASTON County. Heard in the Court of Appeals 13 March 1984.

Defendant was tried on charges of felonious breaking, entering and larceny. He was found guilty as charged and sentenced to concurrent six-year sentences.

Evidence for the State tends to show that during the evening of 7 July 1982 the home of Travis and Norma Barrow in Gastonia was broken into. Barrow testified that a console television, stereo, three guns, jewelry, a file cabinet and calculator were among the items taken.

Bobby Grigg offered the only evidence linking defendant to the crimes. He testified that he had known defendant for about eight years. Around 6:00 p.m. on 7 July 1982, Grigg was at his parents' house across from the Barrows' residence. Defendant and a man Grigg did not know stopped by the house and picked Grigg up. The three men drove around until 7:30 p.m., and defendant then returned Grigg to his parents' house. Later that evening as Grigg was walking to a friend's house, defendant and his companion drove up and asked Grigg to accompany them to Blacksburg, South Carolina.

On the way to Blacksburg, Grigg noticed guns, a television and stereo in the car. When Grigg asked defendant where he had obtained these items, defendant responded that he had broken into the Barrows' home. Defendant and his companion then removed a file cabinet from the car, tore the drawers out, retrieved a gun from one of the drawers and threw the cabinet in a field.

Grigg further testified that when he, defendant and his companion reached Blacksburg, defendant sold the guns to Bobby Cooper. Defendant took the television and stereo to his sister's house in Gaffney, South Carolina. The three men spent the night

with defendant's parents in Blacksburg. The next morning defendant's father drove Grigg to Gastonia.

A detective with the Cherokee County Sheriff's Department in Gaffney, South Carolina testified that three guns were recovered from Bobby Cooper. Barrow indicated that these guns looked like the ones taken from his home.

Defendant testified that he spent the evening of 7 July with his girl friend in Gaffney from 6:00 p.m. until midnight. His girl friend's testimony was consistent with this alibi. Defendant's father testified that he saw his son at home around 6:00 p.m. on 7 July. He later observed his son in bed around 1:00 a.m. Defendant was still in bed when his father left for work at 5:00 a.m. Defendant's father testified that he did not see Grigg in his home on 7 July and did not give him a ride to Gastonia.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Henry T. Rosser, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler and Assistant Appellate Defender James A. Wynn, Jr., for defendant appellant.

ARNOLD, Judge.

Defendant brings forward three assignments of error in his brief regarding his cross-examination, the court's conduct during the jury's deliberation and his conviction of felonious breaking and entering. We conclude that no reversible error was committed by the trial court.

[1] Defendant first assigns error to his cross-examination involving whether he gave the arresting officer a statement. He contends that his constitutional rights against self-incrimination and to due process of law were violated on cross-examination.

On direct examination defendant testified that his relationship with Grigg was not good, because Grigg had damaged defendant's car in 1979 and had stolen diet pills from him. Defendant further testified that prior to 7 July 1983 Grigg became angry with him, because he refused to lend Grigg money. Thereafter, on cross-examination, the following exchange occurred:

Q. Are you saying he's concocted this entire story because you didn't loan him some money when you were playing pool?

A. To tell you the truth, I don't know why he's got me in on this.

Q. You don't have any idea, do you?

A. No, sir.

Q. Did you have an occasion to talk with Detective Duncan?

A. No, sir.

. . . .

Q. You ever talk to any detective about this?

A. I talked to one. When they looked me up, they come and got me off my job, and I went down there in Gaffney, and they locked me up over there, and a detective and plain clothes and officer in a uniform come down there and got me and brought me up here.

Q. What, if any, statement did you give that officer?

A. Any statement?

Q. Yes, sir.

A. I didn't give him no statement.

Q. You didn't give him a statement, did you?

A. No, sir. He was asking me questions about this break-in.

Q. And you didn't give a statement, did you?

A. No, sir. I didn't know what he was talking about.

Defendant now argues that this cross-examination concerning defendant's failure to give a statement to the police after his arrest violated his constitutional right to remain silent. He bases his argument upon *State v. Lane*, 301 N.C. 382, 271 S.E. 2d 273 (1980). In *Lane* the North Carolina Supreme Court found a violation of defendant's constitutional rights where defendant was

asked on cross-examination if he had previously told police, any of the district attorneys or anyone else about the alibi to which he testified at trial. The Court concluded, "Since we cannot declare beyond a reasonable doubt that there was no reasonable possibility that this evidence might have contributed to defendant's conviction, we hold that it was sufficiently prejudicial to warrant a new trial." *Id.* at 387, 271 S.E. 2d at 277.

Defendant also relies upon *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976). The United States Supreme Court found error where defendants during their trial related for the first time that they were "framed" by narcotics agents and were cross-examined about their post-arrest silence concerning the "frame."

Both *Lane* and *Doyle* are distinguishable from the case before us, in that the defendant here was merely asked if he gave the arresting officer a statement. No clear implication was made regarding defendant's failure to tell the officer about his alibi. Defense counsel in *Lane* and *Doyle* also made timely objections to the cross-examination and these objections were overruled. Counsel properly preserved for appellate review these specific objections and assignments of error. Trial counsel in the present case made no objections to the cross-examination. Instead, appellate counsel, who is different from trial counsel, has sifted the record and inserted exceptions to the cross-examination in the record on appeal.

On numerous occasions our Supreme Court has stated "that a failure to except or object to errors at trial constitutes a waiver of the right to assert the alleged error on appeal. (Citations omitted.)" *State v. Oliver*, 309 N.C. 326, 334, 307 S.E. 2d 304, 311 (1983). This doctrine of waiver has been applied where appellant has raised constitutional errors in the introduction of evidence for which he noted no objection. *State v. Mitchell*, 276 N.C. 404, 172 S.E. 2d 527 (1970).

The subsequent insertion of "exception" in the record and trial transcript is also a violation of App. R. 10(b). "Were the rule otherwise, an undue if not impossible burden would be placed on the trial judge." *State v. Black*, 308 N.C. 736, 740, 303 S.E. 2d 804, 806 (1983).

The defendant on appeal violated App. R. 10(b) and waived his right to except to his cross-examination by not objecting to this evidence at the trial level.

Our distinguished colleague in his dissent has concluded that the allowance of defendant's cross-examination was "plain error," thus necessitating a new trial. As supporting authority he cites the application of the plain error rule in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983) (where defendant failed to object to jury instructions) and *State v. Black, supra* (where defendant failed to object to the admission of evidence). These cases are distinguishable, because the defendants therein specifically suggested plain error or highly prejudicial error to the appellate court by brief on that specific assignment of error.

The defendant on appeal has not asserted plain error in his cross-examination as a basis for either the pertinent assignment of error or the corresponding argument in his brief. He asserts only constitutional violations arising from his cross-examination. Since defendant did not object to cross-examination, he has waived any appellate review of these alleged violations.

Our Supreme Court recently adopted rules consistent with our holding.

> 1. A party may not, after trial and judgment, comb through the transcript of the proceedings and randomly insert an exception notation in disregard of the mandates of Rule 10(b).
>
> 2. Where no action was taken by counsel during the course of the proceedings, the burden is on the party alleging error to establish its right to review; that is, that an exception, "by rule or law was deemed preserved or taken without any such action," or that the alleged error constitutes plain error.
>
> In so doing, a party must, prior to arguing the alleged error in his brief, (a) alert the appellate court that no action was taken by counsel at the trial level, and (b) establish his right to review by asserting in what manner the exception is preserved by rule or law or, when applicable, how the error amounted to a plain error or defect affecting a substantial right which may be noticed although not brought to the at-

tention of the trial court. We caution that our review will be carefully limited to those errors

> 'in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's findings that the defendant was guilty." '

State v. Odom, 307 N.C. at 660, 300 S.E. 2d at 378 (emphasis in original).

State v. Oliver, supra at 335-336, 307 S.E. 2d at 312.

[2] Defendant next assigns error to the trial judge's conduct during jury deliberation. After the jury began deliberating, they returned to the courtroom and requested the judge to define common law robbery. The jury continued their deliberation after the judge defined this offense.

Defendant concedes that he made no objection to the trial judge's definition, but argues that plain error was committed. He contends that the judge erroneously instructed the jury on the elements of common law robbery, an offense defendant was not charged with. He adds that the judge should have, at least, supplemented the definition with a limiting instruction; and that his failure to do so permitted the jury to consider defendant's prior conviction of common law robbery as substantive evidence of his propensity to commit the crimes of breaking, entering and larceny. We find no merit to this assignment of error.

The record on appeal reveals that defendant testified on direct examination that he had been convicted of common law robbery in 1980, that he was out on parole on 7 July 1982 and that as a condition of his parole he could not travel to Gastonia. The record further shows that the judge did not mention defend-

ant's prior conviction in his charge. Since evidence of this prior crime was elicited as part of defendant's defense and the definition was given for the purpose of clarifying an issue raised by defendant, the trial judge was not required to give a limiting instruction.

A limiting instruction is required only when evidence of a prior conviction is elicited on cross-examination of a defendant and the defendant requests the instruction. *See State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1978). In addition, evidence regarding prior convictions of a defendant is merely a subordinate feature of the case and, absent a request, the court is not required to give limiting instructions. *See State v. Witherspoon*, 5 N.C. App. 268, 168 S.E. 2d 243 (1969).

[3] In defendant's remaining assignment of error he argues that he was erroneously convicted of felonious breaking and entering, because this crime is a lesser included offense of the felonious larceny for which he was also convicted. A recent decision by this Court refutes this argument. In *State v. Smith*, No. 8316SC547 (filed 21 February 1984), certified to S.Ct. (30 March 1984), we concluded that "the offenses of breaking or entering and larceny, which require proof of different elements, are clearly separate and distinct crimes, neither one a lesser included offense of the other."

For the foregoing reasons, we find in defendant's trial

No error.

Judge BRASWELL concurs.

Judge WELLS concurs in part and dissents in part.

Judge WELLS dissenting in part and concurring in part.

I believe that the cross-examination of defendant as to his refusal to give the police a statement following his arrest violated defendant's constitutional rights against self-incrimination and denied him due process of law. The United States Supreme Court has held that ". . . 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." *Doyle v. Ohio*, 426 U.S. 610 (1976). *Doyle* was decided on facts which clearly indicate that a *Miranda* warning had been given. The record in the case *sub judice* is silent as to whether defendant was informed of his *Miranda* rights, but this distinction is of no import to this question. Chief Justice Branch, writing for our Supreme Court on this matter, stated:

> [W]e attach little significance to the fact that *Miranda* warnings were not given. With or without such warnings defendant's exercise of his right to remain silent was guaranteed by Article 1, Section 23, of the North Carolina Constitution and the fifth as incorporated by the fourteenth amendment to the United States Constitution. . . . Thus, any comment upon the exercise of this right, nothing else appearing, was impermissible.

(Citation omitted), *State v. Lane*, 301 N.C. 382, 271 S.E. 2d 273 (1980).

The state contends that *Doyle v. Ohio, supra* and *State v. Lane, supra* are not applicable to this case because the prosecutor did not ask why defendant failed to tell the police of his alibi, but only why he did not mention Griggs' ill will toward him when he was arrested. A close examination of the record reveals that this is not the case. While some of the prosecutor's questions relate to defendant's failure to tell the police of Griggs' motive to frame him, others are specifically directed to defendant's failure to give a statement about the break-in. Even if all the objectionable cross-examination had related to defendant's failure to tell the police of Griggs' possible motive for framing him, I fail to find any distinction which would render *Doyle* and *Lane* inapplicable. Interpreting the cross-examination in the light urged by the state, defendant is still being impeached by his post-arrest silence. Clearly defendant had no duty to inform the police of Griggs' motive, and the state's attempts to impeach defendant for his post-arrest silence are obviously a violation of his rights against self-incrimination as articulated in *Doyle* and *Lane*.

Next the state argues that defendant has waived his right to assert this error because his counsel failed to object to the prosecutor's questions at trial. It has long been the rule in North Carolina that an objection to, or a motion to strike, an offer of evidence must be made contemporaneously with the contested ac-

tion; and unless such objection was made, the party was held to have waived his right to object. *See State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978). Recently, however, in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983) our Supreme Court adopted the "plain error" rule with respect to a defendant's failure to object to jury instructions under Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure. This rule was extended to failure to object to rulings, such as evidentiary rulings, governed by Rule 10(b)(1), in *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983). In both cases the Supreme Court quoted with approval the following interpretation of the rule:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the . . . [error] had a probable impact on the jury's finding that the defendant was guilty." (Emphasis in original.)

United States v. McCaskill, 676 F. 2d 995 (4th Cir.), *cert. denied*, --- U.S. ---, 103 S.Ct. 381, 74 L.Ed. 2d 513 (1982). An examination of the record in this case indicates that there was a denial of defendant's fundamental rights of due process and against self-incrimination and that this error had a probable impact on the jury's verdict. My decision is based upon the following factors. This is a close case where the only evidence of defendant's guilt is the testimony of Griggs, who had served a prison sentence for breaking or entering and larceny and who was implicated in this crime by fingerprints found on the stolen file cabinet. Defendant, who also had a previous criminal record, relied upon an alibi defense which was supported by two witnesses. In this situation the crucial question for the jury was the credibility of defendant and Griggs. Defendant offered an explanation as to why Griggs would lie and implicate him. I believe that the prosecutor's effective, albeit improper, questions regarding defendant's failure to

inform the police of Griggs' motive probably substantially contributed to the jury's verdict. Therefore, for the trial court to allow such cross-examination was "plain error" which necessitates the granting of a new trial.

For the reasons given, I must respectfully dissent as to the majority disposition of defendant's first assignment of error. I concur as to the disposition of defendant's second assignment of error.

RICHARD KENT HUFF, JR. v. HARVEY LOUIS CHRISMON

No. 8323SC350

(Filed 5 June 1984)

1. **Damages § 12.1— punitive damages—sufficiency of complaint**

Plaintiff's complaint was sufficient to state a claim for punitive damages where it set out detailed allegations of negligence and then alleged that defendant's conduct "was willful, wanton, unlawful, culpable and in reckless and total disregard of the foreseeable consequences."

2. **Damages § 11.1— punitive damages against intoxicated drivers**

Punitive damages are recoverable in this state against intoxicated drivers in certain situations without regard to the drivers' motives or intent.

3. **Appeal and Error § 62— compensatory and punitive damages—right to trial before same jury**

Where the trial court erroneously allowed defendant's motion to dismiss plaintiff's claim for punitive damages, a new trial will also be allowed on the issue of compensatory damages since the parties are entitled to have plaintiff's claims for both punitive and compensatory damages heard before the same judge and jury.

4. **Costs § 3; Rules of Civil Procedure § 68— offer of judgment—recovery of less than offer—liability for costs**

Where defendant filed an offer of judgment of $3,000 prior to trial, and the jury ultimately returned a verdict less favorable than the offer, the trial court erred in ordering defendant to pay the costs of the action including all expert witness fees. G.S. 1A-1, Rule 68(a).

APPEAL by plaintiff and cross-appeal by defendant from *Davis, Judge.* Judgment entered 29 October 1982 in Superior Court, YADKIN County. Heard in the Court of Appeals 16 February 1984.

Plaintiff brought this action to recover both compensatory and punitive damages allegedly incurred in an automobile collision. In his answer defendant denied the allegations of negligence and willful and wanton conduct. He pleaded contributory negligence as a defense.

Immediately prior to trial, the court allowed defendant's motion to dismiss the punitive damages claim pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. Defendant thereafter stipulated to liability, and the case proceeded to trial on the one issue of compensatory damages. At the conclusion of the evidence, the jury awarded plaintiff $1,510.40 in damages. Defendant was taxed with the costs of the action including expert witness fees. Both parties have appealed.

Shore & Hudspeth, by N. Lawrence Hudspeth, III, for plaintiff-appellant-appellee.

Everett & Everett, by James A. Everett, for defendant-appellee-appellant.

ARNOLD, Judge.

Plaintiff has assigned error to the order dismissing his claim for punitive damages. He also assigns error to the denial of his motion to set the verdict aside and for new trial on the grounds that the verdict was against the greater weight of the evidence. Defendant has assigned error to that portion of the judgment taxing him with costs of the action. We agree with plaintiff that the trial court erroneously dismissed the claim for punitive damages. We also find merit to defendant's cross-assignment of error. The judgment is therefore reversed, and the case is remanded for new trial.

Plaintiff first argues that the trial court erred in dismissing his claim for punitive damages and in refusing to allow him to present evidence of defendant's intoxication at the time of the collision. It appears from the record on appeal that the trial court may have dismissed plaintiff's claim for punitive damages on two grounds: (1) that the allegations in plaintiff's complaint were insufficient to state a claim for punitive damages; and (2) that notwithstanding the sufficiency of plaintiff's pleadings, punitive damages may not be assessed against impaired drivers in North

Carolina. We conclude that under the "notice theory" of pleading, plaintiff's complaint sufficiently gave defendant notice of a claim for punitive damages. We also find support in this jurisdiction for the recovery of punitive damages against impaired drivers.

Under the "notice theory" of pleading contemplated by Rule 8(a)(1) of the Rules of Civil Procedure, the complaint need no longer allege facts or elements showing aggravating circumstances which would justify an award of punitive damages.

> A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial.

Sutton v. Duke, 277 N.C. 94, 104, 176 S.E. 2d 161, 167 (1970).

[1] In the case before us, the plaintiff alleged in his complaint that at approximately 12:15 a.m. on 3 June 1978 his vehicle was approaching the intersection of U.S. Highway 601 and U.S. Highway 421 in Yadkinville in a southward direction. Plaintiff stopped in the left turn lane and waited for the light to turn green. While plaintiff was stopped, defendant approached the intersection from the north, drove his vehicle through the red light and collided with the front of plaintiff's vehicle. Plaintiff further alleged in his complaint:

> 6. That immediately prior to and at the time of the collision herein complained of, defendant was negligent in that he operated said vehicle as follows:
>
> a. He operated said vehicle without keeping a proper and careful lookout.
>
> b. He operated said vehicle at a speed greater than was reasonable and prudent under the circumstances then existing.
>
> c. He failed to keep said vehicle under reasonable and proper control.
>
> d. He operated said vehicle in a careless and heedless manner with wanton, willful and reckless disregard of the rights and safety of others.

e. He operated said vehicle without due caution and circumspection and at a speed and in a manner so as to endanger or be likely to endanger persons or property.

f. He failed to stop said vehicle at a duly erected traffic signal, showing red for his direction of travel, in violation of North Carolina General Statute 20-158.

g. He failed to drive said vehicle in the right-hand lane of the highway, in violation of North Carolina General Statute 20-146.

h. He operated said vehicle while under the influence of intoxicating liquor, in violation of North Carolina General Statute 20-138.

7. The collision herein complained of and the resulting injuries to plaintiff as hereinafter set out resulted solely and proximately from the willful, wanton, unlawful, culpable and reckless negligence of defendant.

8. The negligence of defendant as hereinabove set out constitutes the proximate cause of the resulting injuries sustained by plaintiff. . . .

. . . .

10. Defendant's conduct herein complained of was willful, wanton, unlawful, culpable and in reckless and total disregard of the foreseeable consequences and plaintiff is therefore entitled to recover of and from defendant an award of punitive damages in the sum of at least $20,000.00.

These allegations are clearly sufficient to give defendant notice of the events or transactions forming the basis of the claim for punitive damages and to allow him to prepare for trial.

We find support for our conclusion in two recent cases decided by the North Carolina Supreme Court. In *Shugar v. Guill*, 51 N.C. App. 466, 277 S.E. 2d 126, *modified and affirmed*, 304 N.C. 332, 283 S.E. 2d 507 (1981), the plaintiff alleged in his complaint that the defendant, "without just cause, did intentionally, willfully and maliciously assault and batter the plaintiff, inflicting upon him serious and permanent personal injuries. . . ." We held that based on these allegations the trial court improperly denied de-

fendant's motion to dismiss the claim for punitive damages. Our Supreme Court modified the decision noting that under the adoption of the "notice theory" of pleading in the 1970 Rules of Civil Procedure, the pleading was sufficient to state a claim for punitive damages.

In a recent medical malpractice action, the plaintiff set out detailed allegations of negligence in his complaint and then pleaded the issue of punitive damages as follows:

FOURTH COUNT

48. The negligent acts and omissions of Deen and Hall committed during the course of their professional treatment of Henry were gross and wanton, evidencing a reckless disregard for the rights and safety of their patient Henry.

49. The gross, wanton negligence of Deen and Hall was the direct, proximate cause of the wrongful death of Henry.

50. Because of the intentional or reckless, wanton conduct of Deen and Hall towards Henry, particularly within the context of the physician-patient relationship in which Henry relied upon the professional competence and integrity of those Defendants, Deen and Hall are liable to Plaintiff for substantial punitive damages.

Henry v. Deen, 61 N.C. App. 189, 300 S.E. 2d 707 (1983), *rev'd*, 310 N.C. 75, 310 S.E. 2d 326 (1984). Our Court considered these allegations under the new rules regarding notice pleading and concluded that the claim for punitive damages was properly dismissed. In reversing our decision, the Supreme Court held that the foregoing complaint gave sufficient notice of a claim against defendants Deen and Hall for punitive damages.

Plaintiff here sets out detailed allegations of negligence and then alleges that defendant's conduct "was willful, wanton, unlawful, culpable and in reckless and total disregard of the foreseeable consequences. . . ." Pursuant to the Supreme Court's rulings in *Shugar* and *Henry*, the motion to dismiss the claim for punitive damages was improperly allowed.

[2] To resolve the issue of whether punitive damages are recoverable in this State against intoxicated drivers, an examination of the pertinent law in this State and other jurisdictions is

helpful. Approximately 25 jurisdictions have addressed this issue, and a majority of 20 have indicated that recovery is permissible. *See* Comment, *Punitive Damages and the Drunken Driver*, 8 Pepperdine L. Rev. 117 (1980).

North Carolina has recognized the recovery of punitive damages in automobile collision cases where there is an intentional, malicious or wilful act. *Hinson v. Dawson*, 244 N.C. 23, 92 S.E. 2d 393 (1956).

> Where malicious or wilful injury is not involved, wanton conduct must be alleged and shown to warrant the recovery of punitive damages. Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others.

Id. at 28, 92 S.E. 2d at 397. In applying these rules of law the *Hinson* court found that a prayer for punitive damages was justified where plaintiff alleged that the defendant driver, who had defective vision, suddenly and without warning made a left turn across the path of the automobile driven by plaintiff's intestate; and that the defendant owner knew about the driver's defective vision and still permitted him to drive.

We have found only one case in our jurisdiction where the issue of punitive damages in an automobile case involving a drinking driver was discussed. In *Brake v. Harper*, 8 N.C. App. 327, 174 S.E. 2d 74, *cert. denied*, 276 N.C. 727 (1970), Judge Vaughn (now Chief Judge), writing for the Court, concluded that punitive damages were proper to punish intentionally wrongful conduct. The court held, however, "that under the facts of this case the court properly declined to submit the issues as to punitive damages." *Id.* at 329, 174 S.E. 2d at 76.

The facts in *Brake* reveal that around 1:00 a.m. plaintiff was operating a vehicle and defendant was driving immediately behind her. A third vehicle passed both parties, and defendant then attempted to pass plaintiff. Upon observing a car approaching him, defendant cut back into the right lane and struck the back of plaintiff's car. At trial the investigating officer testified that, in his opinion, defendant was under the influence of alcohol. No basis was given for this opinion. He admitted that he could not remember the results of defendant's breathalyzer test but did recall that it was below .10.

Commentators have reasoned that this Court in *Brake*, upon deciding that there must be an intent to injure before punitive damages are recoverable, aligned itself with those jurisdictions allowing the recovery of punitive damages against drinking drivers but placing an extremely strict burden of proof upon plaintiffs. *See* Comment, *Punitive Damages and the Drunken Driver*, 8 Pepperdine L. Rev., *supra*, and Note, *TORTS-Damages-The Drinking Driver and Punitive Damages*, 7 Wake Forest L. Rev. 528 (1971). As the latter commentator noted, however, the *Brake* court clearly did not intend to deny punitive damages as a matter of law in all cases involving drinking drivers.

> [A]lthough the North Carolina Court of Appeals did not explore the possibility of awarding punitive damages in any other set of circumstances involving a drinking driver than that set out in *Brake*, neither did the court slam the door completely on the issue. The court points out that its holding is based on the particular facts in the *Brake* case. The facts in *Brake* tend to point up a dubious factor, that of the investigating officer's opinion regarding the defendant driver's intoxication which was unconfirmed through failure to introduce into evidence the exact results of the breathalyzer test. Thus, the *Brake* decision is not apparently implicative of a growing disfavor of the doctrine of punitive damages in North Carolina, but rather of a conservative application.

Id. at 538.

After examining *Brake v. Harper*, *supra*, and *Hinson v. Dawson*, *supra*, we believe that the language therein is not inconsistent with the application of the doctrine of punitive damages against impaired drivers in certain situations without regard to the drivers' motives or intent.

In *Hinson v. Dawson*, *supra*, the court emphasized that wanton conduct may warrant the recovery of punitive damages and defined such conduct as being "in conscious and intentional disregard of and indifference to the rights and safety of others." *Id.* at 28, 92 S.E. 2d at 397. Licensed drivers are aware that driving while intoxicated threatens the safety of others. A driver who drinks excessively and then drives his automobile at a high rate of speed on a busy street crowded with pedestrians would clearly be exhibiting wanton conduct. Although the court in *Brake v.*

Harper, supra, equated intentional wrongdoing with wantonness, we reiterate that its decision to affirm the lower court's denial of punitive damages appears to have been based more on the conduct of the defendant driver and particularly the lack of evidence regarding defendant's intoxication rather than defendant's motive or intent.

Our rationale for the application of the doctrine of punitive damages against impaired drivers in certain situations where there is no intentional injury was expressed by the Superior Court of Pennsylvania in *Focht v. Rabada*, 217 Pa. Super. 35, 268 A. 2d 157 (1970). In reversing the lower court's denial of punitive damages as a matter of law, the Pennsylvania court stated, "[w]e believe that driving while under the influence of intoxicating liquor with its very great potential for harm and serious injury may under certain circumstances be deemed 'outrageous conduct' and 'a reckless indifference to the interests of others' sufficient to allow the imposition of punitive damages." *Id.* at 40, 268 A. 2d at 160. The court continued, "In certain factual circumstances the risk to others by the drunken driver may be so obvious and the probability that harm will follow so great that outrageous misconduct may be established without reference to motive or intent." *Id.* at 41, 268 A. 2d at 161.

In the case before us, plaintiff was not allowed to introduce any evidence regarding the conduct of the defendant including his intoxicated condition. Since plaintiff properly pleaded a claim for punitive damages, this evidence was erroneously excluded. On retrial the court may direct a verdict in defendant's favor on the punitive damages claim only after such evidence is presented and the court determines that the evidence, when considered in the light most favorable to plaintiff, is insufficient to carry the issue of punitive damages to the jury. *Shugar v. Guill*, 304 N.C. 332, 283 S.E. 2d 507 (1981).

There appears to be a growing trend in this State to maximize the punishment and deterrence which impaired drivers are subjected to. This trend is seen in the recent enactment of the "Safe Roads Act" with its stiff penalties for impaired drivers. G.S. 20-138.1 *et seq.* N.C. Session Laws (1983). This State's growing concern and outrage stemming from injuries and deaths caused by impaired drivers is further seen in our courts' recognition of a common law dram shop liability.

In *Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E. 2d 584, *disc. rev. denied*, 309 N.C. 191, 305 S.E. 2d 734 (1983), we held "that a licensed provider of alcoholic beverages for on-premises consumption may be held liable for injuries or damages proximately resulting from the acts of persons to whom beverages were illegally furnished while intoxicated." *Id.* at 2, 303 S.E. 2d at 586. We, therefore, reversed the order dismissing plaintiff's complaint for both compensatory and *punitive damages*. Pursuant to the "Safe Roads Act," a person who negligently sells alcohol to an underage minor is now subject to civil liability in an amount up to $500,000, if that minor has an accident while driving impaired. G.S. 18B-121 *et seq.* N.C. Session Laws (1983).

We believe that punitive damages, when used in conjunction with the sanctions of the "Safe Roads Act," are consistent with the trend to maximize punishment and deterrence of impaired drivers and would have a far-reaching impact.

[3] Plaintiff has also assigned error to the trial court's failure to set aside the $1,510.40 verdict for compensatory damages and to allow a new trial. Plaintiff claims that the verdict was against the greater weight of the evidence. We need not consider the sufficiency of the evidence, since we conclude that the parties are entitled to have plaintiff's claims for both punitive and compensatory damages heard before the same judge and jury.

The North Carolina Supreme Court has applied this reasoning in situations where plaintiff has taken an immediate appeal from the dismissal of his claim for punitive damages. *Newton v. Insurance Co*, 291 N.C. 105, 229 S.E. 2d 297 (1976). The Court noted that since the interlocutory order dismissing plaintiff's claim for punitive damages affected a "substantial right" of plaintiff, the order was immediately appealable under both G.S. 1-277 and G.S. 7A-27(d). *Id.* at 109, 229 S.E. 2d at 300. *See also, Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976).

Defendant's Cross-Appeal

[4] In the judgment awarding plaintiff compensatory damages, the court ordered defendant to pay the costs of the action including all expert witness fees. Defendant assigns error to the assessment of the costs against him. Both the facts and law support his position.

The record on appeal shows that prior to trial defendant filed an offer of judgment in the amount of $3,000. Plaintiff rejected this offer, and the jury ultimately returned a verdict less favorable than the offer. Rule 68(a) of the Rules of Civil Procedure provides: "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." *See, e.g., Purdy v. Brown*, 307 N.C. 93, 296 S.E. 2d 459 (1982). Pursuant to this Rule, the costs were erroneously assessed against defendant. However, since we are reversing the judgment and remanding the matter for new trial on both claims for damages, the assessment of costs will depend upon the judgment finally obtained by plaintiff. *Scallon v. Hooper*, 58 N.C. App. 551, 293 S.E. 2d 843, *cert. denied*, 306 N.C. 744, 295 S.E. 2d 480 (1982).

Reversed and remanded.

Judges WHICHARD and BECTON concur.

BILL MARTIN v. HARTFORD ACCIDENT AND INDEMNITY COMPANY

No. 8318SC849

(Filed 5 June 1984)

Attorneys at Law § 7— action against principal on bond—surety not liable for attorney fees

The surety on a bond given to cover purchases of livestock was not liable for attorney fees expended by the seller in a successful action against the buyer-principal to recover the purchase price of the livestock since (1) no North Carolina statute permits such an award of attorney fees to a creditor; (2) it does not appear that the principal is liable for attorney fees and the surety thus cannot be made liable for them; (3) the Packers and Stockyards Act, which required the bond, does not provide for an award of attorney fees against a surety; and (4) the bond itself did not provide for attorney fees. The Court of Appeals declined to adopt a rule permitting attorney fees when a defendant's breach of contract has caused litigation involving the plaintiff, but had such rule been adopted, it would have been inapplicable under the circumstances of this case.

APPEAL by plaintiff from *Rousseau, Judge.* Judgment entered 20 April 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 7 May 1984.

This is an action brought by plaintiff, a dealer in cattle, against defendant indemnity company, who, as surety, issued its bond to cover purchases of livestock made by Jim Heath Cattle Company ("Heath"), a Missouri corporation. Plaintiff filed this action in order to recover attorney's fees he expended in an earlier successful action brought against Heath to recover the purchase price of the livestock he sold to Heath.

The parties are not in dispute about the events leading up to this appeal, which are as follows: Between 1 May 1980 and 3 May 1980, plaintiff sold cattle to Heath for approximately $82,000. Heath was the principal on a bond issued by defendant in the amount of $60,000 to insure payment to sellers of cattle, such a bond being required by the Packers and Stockyards Act, 1921.

Plaintiff's attempts to obtain the purchase price from the buyer were unsuccessful, and plaintiff retained counsel to assist him in collecting the amount owed. The attorney filed proof of claim with defendant on 7 July 1980. Defendant acknowledged receipt of the claim and indicated by a letter dated 17 July 1980 it would be back in touch with the plaintiff in two weeks; however, no further communication transpired between the parties. Plaintiff's attorney then contacted a law firm in Kansas City, Missouri, apparently because Heath operated out of Missouri. This firm recommended that plaintiff file suit immediately against Heath because many other claims were being filed against Heath at that time. Suit was filed on 27 August 1980, and a consent judgment for the full amount of the purchase price of the livestock was entered in plaintiff's favor on 24 November 1980. Heath then received an SBA loan and was able to pay plaintiff for the cattle. The foregoing proceedings cost plaintiff in excess of $40,000 in attorney's fees. Plaintiff, believing that defendant's failure to respond to and honor its claim was responsible for its incurring these fees, put defendant indemnity company on notice to pay them. Defendant refused to pay, and plaintiff filed this action against defendant to recover these attorney's fees.

Plaintiff moved for summary judgment. In its order, the trial court denied plaintiff's motion and instead granted summary judgment in favor of defendant. From this order, plaintiff appeals.

Walker, Ray, Simpson, Warren & Swiggett, by Richard M. Warren and Perry N. Walker, for plaintiff appellant.

Henson, Henson & Bayliss, by Perry C. Henson and Paul D. Coates, for defendant appellee.

VAUGHN, Chief Judge.

The general rule applicable to this case is that in the absence of any statutory liability therefor, attorney's fees and expenses of litigation incurred by plaintiff against a defendant are not recoverable as an item of damage, either in a contract or a tort action. *Construction Co. v. Development Corp.*, 29 N.C. App. 731, 225 S.E. 2d 623, *review denied*, 290 N.C. 660, 228 S.E. 2d 459 (1976). *See generally* Hightower's N.C. Law of Damages, §§ 9-1 and 9-2. We here affirm the trial court's order and hold that the general rule applies to this case and that attorney's fees are not recoverable by plaintiff from defendant surety. In reaching our decision, we have reviewed pertinent North Carolina authority, including basic concepts of surety law, the terms of the bond itself, provisions of the Packers and Stockyards Act, pursuant to which the bond was issued, and case law from other jurisdictions, yet we are not persuaded that plaintiff is entitled to attorney's fees from the cattle buyer's surety.

First, no North Carolina statute permits an award of attorney's fees to a creditor proceeding against a surety in like circumstances. One noted authority in insurance law emphasizes the necessity for express statutory authorization before such fees may be awarded:

> As a general rule, and apart from special contract provisions, express statutory authorization of the recovery of the attorneys' fees is required, for in the absence of a statute allowing it, one successfully maintaining an action on an insurance policy is not entitled to recover . . . attorneys' fees.

15A Couch on Insurance 2d (Rev. ed. 1983) § 58:124 (and cases therein cited). North Carolina adheres to this principle. *Perkins v. Insurance Co.*, 4 N.C. App. 466, 167 S.E. 2d 93 (1969) (attorney's fees not regarded as court costs unless otherwise provided by statute).

Only one North Carolina statute addresses the issue of attorney's fees when an insurer has wrongfully denied a claim, and although a surety is functionally an insurer, this statute does not apply to the case before us. G.S. 6-21.1 permits the judge to allow the successful plaintiff a reasonable attorney's fee in a suit against an insurance company upon a finding by the court that there was an unwarranted refusal by the insurer to pay the claim of plaintiff-insured which constitutes the basis of the suit, where the judgment is $5,000 or less. The policy behind this statute, as articulated by our Supreme Court, is to provide relief for an injured party where it might not be feasible to bring suit if that party has to pay an attorney out of the proceeds. *Hicks v. Albertson*, 284 N.C. 236, 200 S.E. 2d 40 (1973).

Turning next to case law, we encounter few North Carolina cases on point, but note that the extant authority indicates attorney's fees are not recoverable here. *See Donlan v. Trust Co.*, 139 N.C. 212, 51 S.E. 924 (1905). Moreover, general principles of suretyship also buttress the defendant surety's position. It has been said that sureties are liable only for that amount for which their principal is liable as long as it does not exceed the amount of the bond, *State v. Guarantee Co.*, 207 N.C. 725, 178 S.E. 550 (1935), and nowhere does it appear that Jim Heath, the principal on the bond, is or was liable for attorney's fees. In the consent judgment obtained by plaintiff against Heath, no provision was made for attorney's fees, and accordingly, the surety cannot be made liable for them. *See Fausett Builders v. Glove Indemnity Co.*, 247 S.W. 2d 469, 220 Ark. 301 (1952) (denying attorney's fees where no provision made therefor in bond, on theory that surety's liability cannot exceed principal's).

The Packers and Stockyards Act does not provide for an award of attorney's fees against a surety, only authorizing attorney's fees to enforce reparation orders in federal district court. 7 U.S.C.A. § 210(f). In cases where plaintiffs have sought attorney's fees under the Act in circumstances analogous to ours, courts have uniformly applied the general rule which denies attorney's fees absent a state statute otherwise providing. *See Hays Livestk. Com'n. Co., Inc. v. Maly Livestk. Com'n. Co., Inc.*, 498 F. 2d 925, 933 (10th Cir. 1974) (stating general rule); *Lewis v. Goldsborough*, 234 F. Supp. 524 (E.D. Ark. 1964) (question of attorney's fees governed by state law).

The bond itself could have validly provided for attorney's fees. It did not. The bond only refers to "the purchase price of all livestock." This language contrasts with the terms of the bond involved in *National Union Fire Ins. Co. v. Denver Brick & Pipe Co.*, 162 Colo. 519, 427 P. 2d 861 (1967), by which the surety accepted liability for "all costs, damage and expense by reason of the principal's default under the contract." The court interpreted this language as obligating the surety to pay attorney's fees where the surety failed to correctly assess its legal liability and was thus responsible for the ensuing litigation. Although the holding in *Denver Brick* was predicated on language more inclusive than the language before us, even the inclusion of such broader language in a bond will not always permit the recovery of attorney's fees. In *Federal Surety Co. v. Basin Const. Co.*, 91 Mont. 114, 5 P. 2d 775 (1931), where the surety obligated itself through its bond to pay "any and all damages, directly arising by failure of the principal to perform faithfully said contract," the court concluded that this language was "not intended to include attorney's fees, but rather the usual and ordinary damages resulting from a breach of the contract." *Id.* at 126, 5 P. 2d at 778.

Cognizant that North Carolina does not currently authorize the recovery of attorney's fees in the type of situation exemplified by the facts at bar, plaintiff urges us to adopt for the first time in this State a judicial exception to the general rule disallowing attorney's fees in civil cases, absent statute or contractual agreement. This proposed exception was thus stated by a Virginia court:

> [W]here a breach of contract has forced the plaintiff to maintain or defend a suit with a third person, he [or she] may recover the counsel fees incurred . . . in the former suit provided they are reasonable in amount and reasonably incurred.

Owen v. Shelton, 221 Va. 1051, 1055-6, 277 S.E. 2d 189, 192 (1981), *quoting Hiss v. Friedberg*, 201 Va. 572, 577, 112 S.E. 2d 871, 876 (1960) (where real estate broker failed to disclose certain information to his clients, the owners, and litigation resulted between owners and purchasers because of this failure, owners were awarded attorney's fees in subsequent suit against broker).

There seems to be a strong implication in cases construing this exception that the act of the insurer giving rise to the litigation must be wrongful, *e.g.*, *City of Cedarburg L. & W. Com'n. v. Glens Falls Ins. Co.*, 42 Wis. 2d 120, 166 N.W. 2d 165 (1969) (defining issue as whether litigation expenses incurred by plaintiff in a collateral suit against "third party wrongdoers" may be recovered). *See also* 2A Couch on Insurance 2d (Rev. ed. 1984) § 21:41-2 (noting that where statute imposes penalty on insurer for failure to pay claim in form of attorney's fees, refusal to pay must be in bad faith or vexatious). In *Cedarburg*, the defendant-insurer had denied a claim under a fire insurance policy, whereupon plaintiff successfully sued the party actually responsible. In the collateral suit, the plaintiff was attempting to recover from the insurer attorney's fees incurred in the principal suit on the theory that the original denial of the claim was wrongful and that "plaintiff was damaged because it incurred certain litigation expenses which caused plaintiff's net recovery to be less than its actual damages." *Id.* at 123, 166 N.W. 2d at 167.

In its opinion, the Supreme Court of Wisconsin first reiterated the majority rule that attorney's fees are not recoverable absent statutory or contractual authority. No Wisconsin statute was applicable and the policy did not provide for attorney's fees. The court nevertheless allowed the plaintiff to recover these fees by adopting the exception that plaintiff urges upon us here, *i.e.*, attorney's fees will be allowed when a defendant's breach of contract has caused litigation involving the plaintiff. Besides requiring proof of causation, the court identified additional elements required to be proven before the exception permitting recovery of fees would apply, namely, that

> it is necessary to determine that the defendants had reasonable notice of the object and pendency of the third party action and an opportunity to decide whether to join in the prosecution or contribute to the expense thereof.

Id. at 125, 166 N.W. 2d at 168.

Conceding that the proposed exception presents an alternative to the rule disallowing attorney's fees, we nonetheless decline to modify the rule beyond those exceptions currently embodied by North Carolina statutes. The majority viewpoint, and in our opinion the better one, leaves the matter of a creditor's right

to recover attorney's fees from a surety for a breach of its bond causing the creditor to sue on the initial claim to the consideration of the legislature.

We emphasize, however, that even had we adopted the judicial exception proposed by appellant, that party would still not be entitled to attorney's fees as the exception is not applicable to the facts of this case. Most significantly, the record reveals no wrongful action or bad faith on the defendant's part. Although the letter by which defendant responded to plaintiff's claim suggested that defendant would be able to respond within two weeks, the particular failure of the defendant to do so, and the general lack of further communication between the parties are not equivalent to a formal unwarranted denial of the claim. That is, we do not believe that taking no action on a claim amounts to a denial of that claim, and hence defendant cannot be guilty of a wrongful action in this regard.

The two week period expired on or about 1 August 1980, and upon the advice of his attorneys, plaintiff instituted the original suit against Heath later that month. Under the express terms of the bond, no suit would lie against the surety until 180 days from the date of the transaction giving rise to the claim had expired. As the defendant argues, the purpose of this is to "allow the dust to settle." Since the purchases were made on 1 to 3 May 1980, 180 days had not yet expired when defendant failed to take action on plaintiff's claim and when plaintiff filed suit against Heath. By the time 180 days were up, the dust had indeed settled and plans had been made for Heath to pay plaintiff the money owed. At that point, plaintiff had no claim against defendant on the bond. By the very terms of the bond, then, defendant was guilty of no wrongful action. Plaintiff knew he had the option of waiting for the 180 days to elapse and recovering $60,000 from defendant when he filed suit against Heath for the full amount owed. Plaintiff was not compelled by defendant's actions to institute suit against Heath, but rather made a choice between two alternatives. Plaintiff cannot now complain of the legal fees he incurred as one of the consequences of this choice.

Furthermore, as the bond was in the amount of $60,000, and plaintiff sued Heath for more than $80,000, it is clear that plaintiff would have had to employ counsel in any event to fully recover

on his claim. Also, it is not clear that defendant had any notice of the original suit or an opportunity to participate therein, as the *Cedarburg* case suggests are necessary prerequisites to the recovery of attorney's fees.

Finally, we note that there are jurisdictions whose courts have held in similar situations that attorney's fees are not recoverable. *See Faulkner Concrete Pipe Co. v. United States F. & G. Co.*, 218 So. 2d 1 (Miss. 1968) (holding that although contractor was liable to supplier for attorney's fees pursuant to contract between them, supplier could not recover attorney's fees from surety where neither provided for in bond nor allowable by statute); *Town of East Longmeadow v. Maryland Casualty Co.*, 348 Mass. 722, 206 N.E. 2d 54 (1965) (counsel fees in action against surety to recover for breach of its obligation on performance bond guaranteeing appraising contract were not recoverable).

Affirmed.

Judges BRASWELL and EAGLES concur.

EDDIE KENNETH SMITH v. McDOWELL COUNTY BOARD OF EDUCATION, KEITH WELDON GILLESPIE, AND ROY HOLLIFIELD

No. 8329SC677

(Filed 5 June 1984)

Schools § 11— accident involving driver education vehicle—not school transportation service vehicle—state court rather than Industrial Commission retaining jurisdiction

In an action arising from an automobile accident involving a driver education vehicle owned by a county board of education, the trial court erred in finding the driver education vehicle was a "school transportation service vehicle" and, as such, finding that the vehicle came under the exclusive jurisdiction of the Industrial Commission, pursuant to G.S. 143-300.1. G.S. 115C-42, G.S. 115C-215, and G.S. 115C-216(a).

APPEAL by plaintiff from *Burroughs, Judge.* Order entered 15 February 1983 in Superior Court, McDOWELL County. Heard in the Court of Appeals 11 April 1984.

Smith v. McDowell Co. Bd. of Education

This is an action brought by plaintiff, Eddie Kenneth Smith, for personal injuries resulting from a collision between a vehicle operated by the plaintiff and a driver education vehicle owned by the McDowell County Board of Education and operated at the time by a student driver (defendant Keith Weldon Gillespie), under the control and supervision of a driver education instructor (defendant Roy Hollifield). Plaintiff's complaint alleged the following: On 10 August 1978, plaintiff, a Deputy Sheriff, was operating a McDowell County Sheriff's Department car on an emergency call, traveling west on Highway 70 in McDowell County, near Marion, North Carolina. The defendant, Keith Weldon Gillespie, was operating a driver education vehicle under the supervision of Roy Hollifield. The vehicle is owned by the McDowell County Board of Education. With the blue light flashing and siren on, plaintiff was attempting to pass defendants' vehicle when said vehicle turned left into the path of plaintiff's vehicle, causing a collision and serious bodily injury to plaintiff. The complaint was later amended to allege that the McDowell County Board of Education has purchased liability insurance and thus waived its governmental immunity to the extent of the coverage, pursuant to G.S. 115C-42.

A motion, answer and counterclaim was filed by defendants on 29 October 1981. In addition, the defendants served a motion to amend their answer to allege the lack of subject matter jurisdiction as to the defendant McDowell County Board of Education. Apparently, the motion was not filed with the court. However, in a trial brief submitted to the court, defendants asserted that the court had no jurisdiction since the vehicle involved was a "school transportation service vehicle" and, as such, all tort claims involving the vehicle came under the exclusive jurisdiction of the Industrial Commission, pursuant to G.S. 143-300.1. On 15 February 1983, an order was entered stating the following:

> The Motion of Defendant McDowell County Board of Education that it be dismissed from this action is hereby allowed and this action is dismissed as to The McDowell County Board of Education.

Plaintiff appeals from the foregoing order dismissing the school board as a party defendant.

Donald F. Coats, for plaintiff appellant.

Dameron and Burgin, by Charles E. Burgin, for defendant appellee, McDowell County Board of Education.

JOHNSON, Judge.

The sole question for determination on this appeal is whether the trial court erred in dismissing the action as to the McDowell County Board of Education (hereafter the "Board"), a party defendant. The basis for the dismissal by the trial court was G.S. 143-300.1, which provides in substance that claims against county and city boards of education for accidents involving "school buses or school transportation service vehicles" shall be heard and determined by the North Carolina Industrial Commission under the state Tort Claims Act, G.S. 143-291 *et seq.* The record reveals that the plaintiff would otherwise be entitled to proceed against the Board in Superior Court pursuant to G.S. 115C-42, on the basis of the Board's waiver of governmental immunity by its act of obtaining liability insurance.[1]

G.S. 143-300.1 provides, in pertinent part, as follows:

(a) The North Carolina Industrial Commission shall have jurisdiction to hear and determine tort claims against any county board of education or any city board of education, which claims arise as a result of any alleged mechanical defects or other defects which may affect the safe operation of a public school bus or school transportation service vehicle resulting from an alleged negligent act of maintenance personnel or as a result of any alleged negligent act or omission of the driver of a public school bus or school transportation service vehicle when:

(1) The salary of that driver is paid or authorized to be paid from the State Public School Fund, and the driver is an em-

1. G.S. 115C-42, by its own terms, apparently does not apply to the type of claims which are covered by G.S. 143-300.1, for its proviso states as follows:

> Provided, that this section shall not apply to claims for damages caused by the negligent acts or torts of public school bus, or school transportation service vehicle drivers, while driving school buses and school transportation service vehicles when the operation of such school buses and service vehicles is paid from the State Public School Fund.

ployee of the county or city administrative unit of which that board is the governing body, or

(2) The driver is an unpaid school bus driver trainee under the supervision of an authorized employee of the Department of Transportation, Division of Motor Vehicles, or an authorized employee of that board or a county or city administrative unit thereof, and which driver was at the time of the alleged negligent act or omission operating a public school bus or school transportation service vehicle in the course of his employment by or training for that administrative unit or board.

As a preliminary matter, we agree with defendant that except for guidance as to what a "school transportation service vehicle" is, the above-quoted statute clearly vests jurisdiction over claims against county boards of education for accidents involving school buses or school transportation service vehicles in the North Carolina Industrial Commission when the following factors are present:

(1) If there is an accident, and if the accident involved the operation of a public school bus or school transportation service vehicle, and

(2) If the accident resulted from the negligence of the driver of a public school bus or school transportation service vehicle, and

(3) If the salary of such driver is paid from the state public school funds, and

(4) If the driver is an employee of the county or city administrative unit, and

(5) If the driver was at the time of the alleged negligent act operating a school bus or a school transportation service vehicle in the course of his employment.

The narrow issue before us, whether the phrase "school transportation service vehicle" embraces a driver education vehicle, is one of first impression under G.S. 143-300.1. Plaintiff urges that the phrase "school transportation service vehicle" be construed narrowly and contextually; that is, to include only those vehicles which perform the service of transporting children to

and from school and related school activities. In other words, to include only "service vehicles" that are akin to "school buses" in function, if not form. Such a definition would, therefore, exclude driver education vehicles. Defendant, on the other hand, contends that the phrase "embraces all vehicles owned by a board of education other than school buses which serve a transportation need of the board of education when that need is mandated by the legislature." Further, that since driver education training is a mandated duty, driver-training automobiles come within the definition of "school transportation service vehicles."

As a general matter, the applicable statute is in derogation of sovereign immunity, therefore, it must be strictly construed and its terms must be strictly adhered to. *Teer Co. v. Highway Commission*, 265 N.C. 1, 143 S.E. 2d 247 (1965); *Withers v. Board of Education*, 32 N.C. App. 230, 231 S.E. 2d 276 (1977). Furthermore, the wording in the Tort Claims Act generally, and in G.S. 143-300.1 particularly, is clear and unambiguous. Therefore, the words used must be given their natural or ordinary meaning. *Alliance Co. v. State Hospital*, 241 N.C. 329, 85 S.E. 2d 386 (1955). The legislative intent and purpose in enacting the Act must be ascertained from the wording of the statute, and rule of liberal construction cannot be applied to enlarge its scope beyond the meaning of its plain and unambiguous terms. *Id.* Accordingly, defendant's overly broad definition of "school transportation service vehicle" must be rejected.

As originally enacted, G.S. 143-300.1 applied to claims involving public school bus drivers. In 1961, the provision was amended to include "school transportation service vehicles when the salary of such driver is paid from the State Nine Months School Fund." Session Laws, 1961, c. 1102, ss. 1-3. However, no definition of the phrase was provided. We conclude that the phrase includes vehicles which perform the service of transporting children to and from school and related school activities: including those vehicles which perform functionally like the traditional yellow "school bus," such as school activity buses or vans. In addition, the phrase may include service vehicles used in the maintenance of the aforesaid vehicles; vehicles such as a pickup or gas truck owned by the local boards of education for the purpose of servicing the school buses themselves. The intent of the legislature in amending the statute to include service vehicles as well as school

buses must have been primarily and simply to include those motor vehicles which are the functional equivalents of a school bus, but are not technically buses, such as vans, and also such service vehicles as are used in their maintenance. Certainly there is no indication in the statute itself that the legislature intended to include driver education vehicles under this provision, and to do so under the guise of statutory construction would, in reality, amount to an act of judicial legislation rather than interpretation.

Furthermore, although we reject defendant's broad definition of the disputed phrase, we note that even if it were to be adopted, the definition would not, by its own terms, cover a driver education vehicle because such a vehicle does not serve a *transportation need* of the board of education. Rather, such vehicles plainly serve the *educational purpose* of training high school students in the operation of motor vehicles. Therefore, they are more closely analogous in function to the table saws in a shop class than they are to the school buses which transport students to and from the school building.

Support for this reading of the questioned phrase may be found in G.S. Chap. 115C, Article 14, "Driver Education." G.S. 115C-215 mandates that a program of driver training and safety education courses in the public schools be organized and administered under the general supervision of the Superintendent of Public Instruction. G.S. 115C-216(a) requires, *inter alia*, local boards of education to provide, "as a part of the program of the public high schools in this state a course of training and instruction in the operation of motor vehicles and to make such courses available for all persons of provisional license age. . . ." Subsection (b) of that statute authorizes the local boards of education to include in the budget the expense necessary to install and maintain a driver education course "as an item of *instructional service*." Clearly, the driver-training vehicle itself is a necessary component in the driver education courses mandated by G.S. 115C-215 and G.S. 115C-216, and must, therefore, be considered as a component of *school instructional service* rather than *school transportation service*. The mere fact that a driver education vehicle is a motor vehicle which ordinarily may serve a "transportation" function does not bring it within the phrase "school transportation service vehicle" as that phrase is used in G.S. 143-300.1.

The main thrust of that statute is directed toward accidents involving drivers of school buses while acting in the course of their employment, that is, in transporting children to and from school. As amended, the statute allows actions against local school boards to be brought before the Industrial Commission if an otherwise covered accident occurs, but involves another type of vehicle serving the school transportation function. Under G.S. 143-300.1, the extent of liability is limited to that provided under the Tort Claims Act. *See* G.S. 143-291 (amount of damages awarded may not exceed the sum of one hundred thousand dollars ($100,000) cumulatively to all claimants on account of injury and damage to any one person). In contrast, the defendant Board's governmental immunity is alleged to have been waived to the extent of its liability insurance coverage; to the sum of one million dollars ($1,000,000). Therefore, although it is evident that the McDowell County Board of Education would benefit from a broad interpretation of G.S. 143-300.1 in this case, other local boards of education which have not elected to waive their governmental immunity under G.S. 115C-42 would be subjected to liability for accident claims neither expressly nor impliedly covered by the phrase "school transportation service vehicle."

Therefore, we hold that a driver education vehicle is not a "school transportation service vehicle" as that phrase is used in G.S. 143-300.1. Accordingly, the trial court erred in dismissing plaintiff's tort action as to the defendant McDowell County Board of Education pursuant to G.S. 143-300.1 as that statute vesting jurisdiction in the Industrial Commission does not cover accidents involving a driver education vehicle which is being operated by a student driver under the supervision and control of a driver education instructor.

Reversed and remanded.

Judges WELLS and BECTON concur.

LARRY DOUGLAS ALEXANDER v. MARTHA CABLE ALEXANDER

No. 8328DC391

(Filed 5 June 1984)

Divorce and Alimony § 21.9— denial of equitable distribution—findings insufficient to support ultimate disposition of the marital property

An order in a divorce action of unequal division of the marital property may be justified only if the trial court finds that facts exist which compel the conclusion that an equal division would not be equitable. In the case *sub judice*, the trial court's findings were not sufficient to support its ultimate disposition of the parties' marital property and were insufficient to allow the Court of Appeals to determine from the record the basis upon which the trial court reached its legal conclusion, and the trial court's conclusion that an equal division of the parties' marital property would not be equitable was not supported by its findings.

APPEAL by plaintiff from *Styles, Judge.* Judgment entered 16 December 1982 in BUNCOMBE County District Court. Heard in the Court of Appeals 6 March 1984.

Following the separation of the parties on 20 November 1980, plaintiff filed his action for absolute divorce on 23 November 1981. Defendant counterclaimed for alimony, child custody, and equitable distribution of marital property. The divorce action was severed for trial and judgment for divorce was entered 2 April 1982. On 22 March 1982, an order was entered denying defendant alimony *pendente lite*, awarding custody of the parties' two minor children to plaintiff, and ordering the parties to arrange reasonable visitation between defendant and the children. On 28 May 1982, defendant moved the trial court for full visitation rights. On 23 July 1982, an order was entered denying defendant any visitation pending a psychiatric examination. In that order, the trial court found that during a previous separation of the parties, defendant physically removed the children and their belongings from their home and that on that occasion and on the occasion of the final separation, defendant asked the children to leave the home; that defendant had physically abused the children; and that the children were afraid of defendant. It appears that defendant later abandoned her effort to gain custody.

At the hearing on defendant's claim for equitable distribution and alimony, the evidence pertinent to the issues in this appeal

tended to show, in addition to the history of the case stated above, that the parties owned a residence in Clay County and also owned real property adjacent to their residence. All of this property, comprising 6.4 acres of land, was acquired by the parties as tenants in common. The land was acquired in part with the aid of a gift and a loan to the parties from defendant's mother and in part with funds obtained through a mortgage loan, negotiated in 1971. In 1979, the appraised value of this real estate was between $60,000.00 and $73,000.00. The balance due on the residence mortgage was approximately $12,500.00. Before the separation, plaintiff paid the mortgage payments of $101.00 per month; since their separation defendant has made the payments.

At the time they separated, the parties owned miscellaneous household furnishings, a 1979 Ford (or Dodge) truck, a 1970 Ford Maverick automobile, three motorcycles, two lawn mowers, three cameras, a movie projector, a chain saw, some guns, and some power tools. At the time of separation, plaintiff owned 225 shares of stock in Litton Industries, which he sold in 1980 for $3,868.00, and plaintiff was the beneficiary of a vested retirement pension fund, valued at the time of trial at approximately $7,000.00.

At the time of the trial, plaintiff owned no real property other than the marital property in Clay County, while defendant owned a mobile home located on a .08 acre lot in Clay County, which is adjacent to the marital property that was inherited from her mother. Defendant's lot and mobile home are free of debt. Defendant also had about $3,700.00 in bank accounts, while plaintiff's bank accounts totaled about $350.00.

Plaintiff was employed, making about $19,000.00 a year. Defendant, a licensed cosmetologist and real estate broker was not employed.

Plaintiff was in good health. Defendant had been treated by a psychiatrist, but was not receiving current treatment or taking medication. Defendant suffered from paranoia and it would be difficult for her to maintain employment, but she is employable. Her condition is manageable and curable, but she will be in need of treatment for some extended period of time.

Following the hearing, the trial court entered an order in which it denied defendant's claim for alimony, but found and con-

cluded that an equal distribution of marital property would not be equitable. The order awarded defendant the parties' residence and adjoining land and awarded plaintiff the few personal belongings he took with him when the parties separated, plus his pension fund. In our opinion, we will discuss the trial court's findings and conclusions more specifically.

Gray, Kimel & Connolly, P.A., by David G. Gray, for plaintiff.

Riddle, Shackelford & Hyler, P.A., by George B. Hyler, Jr., for defendant.

WELLS, Judge.

In the record on appeal plaintiff has grouped nineteen exceptions under one assignment of error, and in his brief has presented fifteen of those exceptions in one argument. Plaintiff's exceptions, so lumped together, present issues of law as to whether the evidence supports findings of fact, as to whether the findings of facts support conclusions, and as to whether the judgment is supported by the evidence and conclusions. Such procedure is in clear violation of Rules 10 and 28 of the Rules of Appellate Procedure and therefore this appeal is subject to dismissal. Because of the important questions apparent in the appeal, we deem it appropriate, in our discretion, to consider plaintiff's appeal on its merits.

North Carolina's Equitable Distribution of Marital Property Act (the Act), N.C. Gen. Stat. § 50-20 and -21 (1983 Cum. Supp.), provides for the equitable distribution of marital property upon divorce. A threshold requirement of the Act is for the trial court, by appropriate findings of fact, to determine what property owned by the parties to the divorce constitutes "marital property." G.S. § 50-20(a). The rights of the parties to such property vest at the time of filing of the divorce action, G.S. § 50-20(k), but in a G.S. § 50-6 divorce (i.e., based on one year's separation) as is the case here, the property must be valued as of the time of separation of the parties, G.S. § 50-21(b). The division of property is to be accomplished by using "net value," G.S. § 50-20(c); but the statute does not define "net value." Resorting to accepted standards of statutory construction, we give the term "net value" its ordinary and commonly understood interpretation:

i.e., market value, if any, less the amount of any encumbrance serving to offset or reduce market value.

Having determined what property has properly vested as marital property and its net value at the time of separation, the trial court must then make an equal division of such property "unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property equitably." G.S. § 50-20(c). In making these determinations, the court must consider the following factors:

(1) The income, property, and liabilities of each party at the time the division of property is to become effective;

(2) Any obligation for support arising out of a prior marriage;

(3) The duration of the marriage and the age and physical and mental health of both parties;

(4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects;

(5) The expectation of nonvested pension or retirement rights, which is separate property;

(6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker;

(7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse;

(8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage;

(9) The liquid or nonliquid character of all marital property;

(10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the

economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party;

(11) The tax consequences to each party; and

(12) Any other factor which the court finds to be just and proper.

We are persuaded, and so hold, that this statute sets forth a presumption of equal division which requires that the marital property be equally divided between the parties in the usual case and in the absence of some reason(s) compelling a contrary result. If, in a particular case, the court concludes after its careful and clearly articulated consideration of all of the statutory factors and of any non-statutory factor raised by the evidence which is reasonably related to the rights to, interest in, and need for the marital property, that an equal division is not equitable, the trial court may properly order an unequal division, but should state in its order the basis and reasons for its division. In other words, the trial court should clearly set forth in its order findings of fact based on the evidence which support its conclusion that an equal division is not equitable. Such a proper order should not be disturbed on appeal unless the appellate court, upon consideration of the cold record, can determine that the division ordered by the trial court, has resulted in an obvious miscarriage of justice.

With these principles in mind, we now address plaintiff's assignments of error. Plaintiff has attacked a number of the trial court's findings of fact as not being supported by the evidence. The trial court's findings, such as they were, appear to be supported by the evidence and are therefore binding on us. We do note, however, that the findings as to how the parties acquired their marital residence property are somewhat confusing, but since the trial court classified this property as marital property, these findings are not *ipso facto* erroneous. The trial court's findings, however, are not sufficient to support its ultimate disposition of the parties' marital property and are not sufficient to allow us to determine from the record the basis upon which the trial court reached its legal conclusions. *See Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982). The findings were deficient in the following specific respects.

First, the findings failed to establish the net value of the parties' marital property, either personal or real, at the time of the parties' separation.

Second, the findings as to G.S. § 50-20(c)(1) dealt only with plaintiff's income, did not mention defendant's income or ability to earn[1] and did not reach the matter of the property of the parties, nor their liabilities, at the time the division of the property was to become effective.

Third, there were no findings as to the age or mental or physical health of the parties.[2]

Fourth, although the evidence showed plaintiff to be the custodial parent, there were no findings as to plaintiff's need to occupy *or own* the marital residence or plaintiff's needs to own or use its household effects.

Fifth, there were no findings as to the liquid or nonliquid character of the parties' marital property.

For clarity, we note that some of the conclusions entered by the trial court were actually findings of fact.

For the reasons we have given, the trial court's conclusion that an equal division of the parties' marital property would not be equitable is not supported by its findings of fact. Additionally, we emphasize that upon remand, an order of unequal division may be justified only if the trial court finds that facts exist which compel the conclusion that an equal division would not be equitable.

This matter must be remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges ARNOLD and BRASWELL concur.

1. The evidence showed that although defendant was unemployed, she was both a licensed real estate broker and a licensed cosmetologist.

2. Although the trial court recited medical testimony bearing on defendant's mental health, such recitations do not constitute findings of fact.

TOWN OF NAGS HEAD v. ROBERT C. TILLETT; ZENOVA P. TILLETT; BRADFORD NEIL LOY; PETER L. MARSHALL AND WIFE, FLORA COSTIN MARSHALL; DOROTHY HAND WAGONER AND HUSBAND, JAMES L. WAGONER, SR.; RICHARD L. RUSSAKOFF AND WIFE, RISE GURY RUSSAKOFF; JAMES T. RYCE AND WIFE, SUSAN RYCE; AND E. CROUSE GRAY, JR., TRUSTEE

No. 831SC789

(Filed 5 June 1984)

1. **Declaratory Judgment Act § 4; Municipal Corporations § 30— deeds in violation of sudivision ordinance—action to have declared void**

A town could not use a declaratory judgment action pursuant to G.S. 1-254 to have various deeds to property in the town declared null and void as being in violation of the town's subdivision ordinance.

2. **Municipal Corporations § 30— deeds violating subdivision ordinance—action to have declared void**

A town was not authorized by G.S. 160A-375 to have deeds to property in the town declared null and void because the conveyances violated the town's subdivision ordinance since that statute was not intended to invalidate conveyances of real property; nor could the town enjoin such conveyances under the statute since the conveyances had already been completed at the time the town's action was filed.

3. **Municipal Corporations § 30.10— lot violating subdivision ordinance—denial of building permit**

The trial court erred in requiring a town to issue a building permit to defendants for a lot which does not meet the requirements of the town's subdivision ordinance. G.S. 160A-389.

APPEAL by plaintiff from *Stevens, Judge.* Judgment entered 5 April 1983 in Superior Court, DARE County. Heard in the Court of Appeals 8 May 1984.

On 10 June 1974, the Town of Nags Head (Town) codified its subdivision ordinance pursuant to G.S. 160A-371 and 372 of the North Carolina General Statutes. Section 17-10 of the ordinance enumerates those enforcement penalties and remedies authorized by G.S. 160A-375. Section 17-11 of the ordinance prohibits the issuance of a building permit in an unapproved subdivision. Section 17-22(c) of the ordinance prohibits any lot from being sold or offered for sale until final approval of a subdivision plat is granted and the subdivision improvements are dedicated to the town and the plat certified. Section 17-24 of the ordinance establishes the requirements of street rights-of-way and paved streets, and Sec-

tion 17-27 sets out the standards of design and construction of subdivision streets.

On 20 July 1977, the Town adopted a revised zoning ordinance which prohibits the issuance of a building permit for lots which do not front upon a public right-of-way which is at least 30 feet wide. The required distance was increased to 40 feet by amendment on 20 October 1978. On 10 August 1977, the Town adopted Section 17-29(c) of the subdivision ordinance which requires all lots subdivided thereafter to front along a public street for a distance of not less than 50 feet.

The property which is the subject of this dispute is a 6.824 acre tract known as the northern portion of the Arthur P. Tillett property. On 31 March 1977, defendants Robert and Zenova Tillett took title to this tract. On 17 October 1977, the defendants Tillett conveyed one lot out of the tract to defendants Richard and Rise Gury Russakoff, and another lot to defendant Bradford Loy. The Tilletts also conveyed additional portions of the property to Loy by quitclaim deed. On 17 October 1980, Loy conveyed that property deeded to him by the Tilletts to defendants James and Susan Ryce. On 25 November 1980, the Ryces conveyed the property by deed of trust to defendant E. Crouse Gray as trustee for Loy. On 9 December 1980 the Russakoffs conveyed one-half undivided interests in that property deeded to them by the Tilletts to defendant Peter Marshall and defendant Dorothy Wagoner. This property was subsequently partitioned by Marshall and Wagoner on 24 March 1981. On 4 January 1982, defendants Ryce applied to the Town of Nags Head for a building permit, which application was denied on the grounds that the property was in violation of the Town subdivision ordinance.

On 29 March 1982, the Town brought a declaratory judgment action against defendants seeking to invalidate and declare illegal the various conveyances made by defendants and to enjoin the transfer of the property. The specific relief prayed for by the Town was as follows:

> 1. For a declaratory judgment declaring all of the deeds, plats and deed of trust as set out and enumerated in Paragraphs IV through X of the complaint as void, of no force and effect and in violation of the Town of Nags Head Subdivision

Ordinance and applicable statutes of the State of North Carolina, and

2. That a notation be placed upon all of said documents which are recorded in the office of the Register of Deeds of Dare County, North Carolina, that said documents are void, illegal and of no force and effect or, in the alternative, said documents be removed and stricken from the public records of the office of the Register of Deeds of Dare County, North Carolina, and

3. That the defendants, their successors, agents and attorneys be permanently enjoined from conveying any of said property in violation of the subdivision ordinance of the Town of Nags Head and applicable state laws, and

4. That all of said transactions as evidenced by the deeds of conveyances, plats and deed of trust being the subject of this action be rescinded, and

5. For such other and further relief as the plaintiff may be entitled in this action.

Defendants Ryce filed a counterclaim alleging that they were entitled to a mandatory injunction compelling the Town to issue them a building permit and enjoining the Town from interfering with their use of the property. After all parties moved for summary judgment, the trial court entered an order on 5 April 1983 dismissing the Town's action on the grounds that the complaint failed to state a claim upon which relief could be granted. The order also enjoined the Town from denying a building permit to defendants Ryce. From this order, the Town filed notice of appeal.

Kellogg, White, Evans, Sharp and Michael, by Thomas L. White, Jr., for plaintiff appellant.

Shearin and Archbell, by Norman W. Shearin, Jr., for defendant appelless Loy, Marshall, Wagoner, Russakoff, and Gray.

Leroy, Wells, Shaw, Hornthal and Riley, by L. P. Hornthal, Jr., for defendant appellees Ryce.

McCown and McCown, by Wallace H. McCown, for defendant appellees Tillett.

ARNOLD, Judge.

The Town contends that the trial court erred in dismissing its declaratory judgment action and in ruling that it be enjoined from denying a building permit to defendants Ryce. We affirm the order as it dismisses the action. The Town is not empowered to obtain the relief it seeks. We vacate the judgment, however, as to its ruling enjoining the Town from denying the building permit.

[1] The statute cited by the Town as authority for its action to invalidate the deeds and conveyances of defendants is G.S. 1-254, which states:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.

Although the Town is correct in its assertion that this statute permits the validity of a deed to be determined by a declaratory judgment action, we find that the Town went beyond the scope of any statutory authority in attempting to use such an action to have the various deeds in question declared null and void.

In the case of *Farthing v. Farthing*, 235 N.C. 634, 70 S.E. 2d 664 (1952), the Supreme Court of North Carolina stated:

> The Declaratory Judgment Act, G.S. Ch. 1, Art. 26, is designed to provide an expeditious method of procuring a judicial decree construing wills, contracts, and other written instruments and declaring the rights and liabilities of parties thereunder. It is not a vehicle for the nullification of such instruments. *Id.* at 635, 70 S.E. 2d at 665.

Although in *Farthing* the Court was presented with the question of whether the Declaratory Judgment Act could properly be used to nullify a will, rather than a deed, we find the same rationale applies where a deed is asked to be declared "void, illegal and of no force and effect." Had the Town merely attempted to seek a

declaration of the rights and liabilities of the parties with regard to the property in question this action may have been appropriate. To request the court to find that the conveyances are void as a matter of law, however, is beyond the scope of the Declaratory Judgment Act.

The statute which embodies the penalties for transferring lots in an unapproved subdivision is G.S. 160A-375, which provides:

> If a city adopts an ordinance regulating the subdivision of land as authorized herein, any person who, being the owner or agent of the owner of any land located within the jurisdiction of that city, thereafter subdivides his land in violation of the ordinance or transfers or sells land by reference to, exhibition of, or any other use of a plat showing a subdivision of the land before the plat has been properly approved under such ordinance and recorded in the office of the appropriate register of deeds, shall be guilty of a misdemeanor. . . . The city may bring an action for injunction of any illegal subdivision, transfer, conveyance, or sale of land, and the court shall, upon appropriate findings, issue an injunction and order requiring the offending party to comply with the subdivision ordinance.

[2] We find that the Town's attempt to use this statute to nullify the deeds in question is misplaced. A case which sheds some light on this issue is *Marriot Financial Services v. Capital Funds*, 288 N.C. 122, 217 S.E. 2d 551 (1975). In that case the plaintiff sought to rescind a conveyance from the defendant on the grounds that it was illegal and void because in violation of the Raleigh subdivision ordinance. In holding that the enabling legislation for that ordinance did not intend to invalidate conveyances of real property, the North Carolina Supreme Court stated the following:

> Pursuant to the ordinance, anyone who described any land in a deed by reference to a subdivision plat which has not been properly approved and recorded is guilty of a crime, punishable as a misdemeanor. The offense is expressly designated, and punishment for its violation clearly stated. The General Assembly has carefully designated the offense, the offender, and the penalty and has made specific provisions to insure

> enforcement. The inference is 'that the Legislature has dealt with the subject completely and did not intend, in addition thereto, that the drastic consequences of invalidity should be visited upon the victim of the offender by mere implication.' To hold that the enactment, either expressly or by plain implication, indicates a legislative intent to invalidate the sale of property absent compliance with the subdivision ordinance would visit upon the unfortunate purchasers 'a penalty far greater than, and out of all proportion to, the penalty imposed upon the wrongdoer himself.' *Id.* at 134-35, 217 S.E. 2d at 559-60 (quoting *In re Estate of Peterson*, 230 Minn. 478, 42 N.W. 2d 59 (1950)).

Applying the Court's analysis to the case at bar, we conclude that G.S. 160A-375 does not provide the Town with a means of having the conveyances declared void and without force and effect.

Perhaps anticipating an unfavorable ruling, the Town sought in its declaratory judgment action not only to nullify the deeds, but also to enjoin defendants and their successors from conveying any of the property in a manner that would violate the subdivision ordinance. We find, however, that, again, G.S. 160A-375 provides no relief.

It is established law that an injunction will not lie to restrain an act which already has been completed at the time of the institution of the action. *Nicholson v. State Education Assistance Authority*, 275 N.C. 439, 168 S.E. 2d 401 (1969). Since the conveyances complained of by the Town already had been completed at the time the action was filed, there was no act which the Town could rightfully have enjoined. In fact, similarly to the statute which is the subject of *Marriot, supra*, G.S. 160A-375 provides that those defendants alleged to have violated the subdivision ordinance may be guilty of misdemeanors. If so, the appropriate remedy for the Town is to have these defendants charged with misdemeanors in criminal court.

Moreover, the language of G.S. 160A-375 permitting the Town to seek an injunction "requiring the offending party to comply with the subdivision ordinance" is necessarily limited to any threatened future subdivisions or conveyances of the property. Since there is no suggestion in the record that any of defendants Marshall, Wagoner or Ryce, the current owners, intend to further

subdivide the land, we must find that the statute is of no help to the Town in this action.

It appears to this Court that the Town is simply seeking to accomplish a result which it lacks the power to achieve. In fact, we are somewhat puzzled as to why the Town decided to undertake this action. Once defendants Ryce's request for a building permit was denied there was no need for further action by the Town, unless, of course, it wanted to file criminal charges as permitted by G.S. 160A-375. In fact, it would appear that any action involving these parties would most logically have been initiated by defendants Ryce as a result of the Town's denial of their application for a building permit.

[3] In conclusion, we find that the order of the trial court is affirmed as to its finding that the Town has failed to state a claim upon which relief could be granted. That portion of the judgment, however, which orders that the Town is "permanently enjoined from denying the defendants Ryce a building permit for their said property, or otherwise interfering with the lawful use of said property" is vacated. The Town may take "any appropriate action" under G.S. 160A-389 in order to prevent unlawful construction in violation of its subdivision ordinance. In the case at bar, the lot of defendants Ryce does not front along a public street for a distance of at least 50 feet as is required by Section 17-29(c) of the Town's subdivision ordinance. Furthermore, the lot does not abut a street having a width of not less than 20 feet and a right-of-way width of at least 40 feet as is required by Section 17-27. Perhaps most significantly, the subdivision of the lots making up the Tillett tract, including the lot of defendants Ryce, was never submitted to and approved by the Town as is required by Section 17-11 of the Town subdivision ordinance. This lot clearly did not meet the standards of the subdivision ordinance of the Town of Nags Head. In view of this fact, it was error for the trial court to require the Town to issue a building permit to defendants Ryce.

The order of the trial court is, therefore, affirmed as it dismisses the action and vacated as it enjoins the Town from denying the building permit to defendants Ryce.

Affirmed in part and vacated in part.

Judges HEDRICK and PHILLIPS concur.

IN RE: WILLIAM JASON SHIELDS, A MINOR CHILD

No. 8326DC755

(Filed 5 June 1984)

Appeal and Error § 19— appeal in forma pauperis—failure to request in apt time

The trial court erred in allowing respondent to appeal *in forma pauperis* from a judgment terminating his parental rights where he did not properly request permission to proceed *in forma pauperis* within ten days from the expiration of the session at which judgment was rendered as required by G.S. 1-288, and the appellate court obtained no jurisdiction of the appeal.

APPEAL by respondent William Robert Shields from *Jones, Judge*. Judgment entered 14 December 1982 in District Court, MECKLENBURG County. Heard in the Court of Appeals 1 May 1984.

On 7 September 1982, petitioner Mecklenburg County Department of Social Services filed a petition seeking to terminate the parental rights of respondent William R. Shields with respect to his minor child, William Jason Shields. At a hearing conducted 22 November and 23 November 1982, the trial court found that the child had been neglected and that respondent had failed to pay child support and lacked basic parenting skills. At the conclusion of the hearing, the court determined that respondent's parental right should be terminated, and orders were signed to that effect on 14 December 1982.

Respondent filed notice of appeal on 22 December 1982. On 18 January 1983, respondent moved to appeal *in forma pauperis*, which motion was granted on 14 March 1983.

James F. O'Neil for respondent appellant William R. Shields.

Ruff, Bond, Cobb, Wade and McNair, by Robert S. Adden, Jr., and Moses Luski, for petitioner appellee Mecklenburg County Department of Social Services.

Gary L. Murphy, Guardian ad litem, for appellee.

ARNOLD, Judge.

Respondent William R. Shields contends that the trial court erred in allowing testimony as to child support payments made by

respondent to the Department of Social Services and further contends that the order terminating his parental rights is not supported by the evidence. We refuse to consider these contentions, however, since respondent did not timely file his petition to proceed *in forma pauperis* as required by G.S. 1-288.

Appeals *in forma pauperis* from juvenile actions tried in district court are governed by the provisions of G.S. 1-288, the requirements of which are mandatory and must be observed. *In re Burrus*, 275 N.C. 517, 169 S.E. 2d 879 (1969). Failure to comply with these requirements deprives the appellate court of any jurisdiction. *Prevatte v. Prevatte*, 239 N.C. 120, 79 S.E. 2d 264 (1953). The statute provides that when an appealing party is "unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal," he shall "*during the session at which the judgment was rendered or within 10 days from the expiration by law of the session*, make affidavit that he is unable by reason of his poverty to give the security required by law, and that he is advised by a practicing attorney that there is error in matter of law in the decision of the court in said action. The affidavit must be accompanied by a written statement from a practicing attorney of said court that he has examined the affiant's case, and is of opinion that the decision of the court, in said action, is contrary to law." G.S. 1-288. (Emphasis added.)

In the case before us the session at which judgment was entered expired 30 November 1982, but was extended until 14 December 1982 when the judgment terminating respondent's parental rights was entered. Accordingly, respondent had until 24 December 1982 to properly request permission to appeal *in forma pauperis*. He did not so proceed, however, until 18 January 1983. Under these circumstances, it was error for the trial court to allow respondent leave to proceed *in forma pauperis*. The appeal is, therefore,

Dismissed.

Judges HEDRICK and PHILLIPS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 JUNE 1984

BARBER STEAMSHIP LINES v. REVCO No. 8310SC1043	Wake 82CVS8928	Reversed & Remanded
CENTURY COMMUNICATIONS v. HOUSING AUTH. OF WILSON No. 837SC61	Wilson 81CVS126	Affirmed
CHATEAU BUILDERS v. BAKER No. 8310DC874	Wake 81CVD7608	Affirmed
HA v. MANEY No. 8316SC894	Scotland 79CVS379	Affirmed
HAMILTON v. MERCY HOSPITAL No. 8326SC1129	Mecklenburg 82CVS1510	Dismissed
HUGHES v. NORRIS INDUSTRIES No. 8310IC1137	Industrial Commission I-0279	Affirmed
IN RE RINK v. RINK No. 8326DC657	Mecklenburg 78J233 78J497	Affirmed
LAGASSE v. GARDNER No. 8329SC848	Transylvania 79CVS253	Affirmed
MCMANUS v. GAMBILL No. 8323SC1108	Wilkes 81CVS445	No Error
MCNEELY v. SADDLECRAFT, INC. No. 8330SC1096	Jackson 80CVS167	Reversed
MARTIN v. THARPE No. 8323SC545	Wilkes 81CVS1306	Affirmed
MARTIN v. WILKINS No. 8310SC290	Wake 82CVS7594	Affirmed
MELTON v. MELTON No. 834DC241	Duplin 82CVD421	Vacated in part; Affirmed in part
MILLWOOD v. BARGER CONSTRUCTION No. 8310IC915	Industrial Commission H-9194	Affirmed
NCNB v. ZAGORA No. 8319SC384	Rowan 81CVS753	No Error

NCNB v. WATSON No. 8325DC1243	Caldwell 83CVD146	Vacated & Remanded
PHILLIPS v. PHILLIPS No. 8314DC769	Durham 79CVD1251	Affirmed
SHEW v. SHEW No. 8325DC1051	Caldwell 79CVD455	Affirmed
SHIPMAN v. SHELEY No. 8310SC851	Wake 81CVS9165	Affirmed
SIMMONS v. BROADNAX No. 836SC602	Halifax 80CVS153	Affirmed
STATE v. ALLEN No. 8315SC862	Alamance 82CRS3844	No Error
STATE v. CHATMAN No. 8321SC1063	Forsyth 81CRS48691	No Error
STATE v. CRUMP No. 8320SC1272	Stanly 83CRS5193	No Error
STATE v. DIGGS No. 8317SC1046	Rockingham 83CR578	No Error
STATE v. DREW No. 831SC1049	Chowan 82CRS816	No Error
STATE v. FOWLER No. 8327SC1162	Gaston 83CRS4610 83CRS4611	No Error
STATE v. HOCKADAY No. 8310SC1029	Wake 82CRS73107	No Error
STATE v. JENRETTE No. 835SC1072	New Hanover 82CRS19644 82CRS19645	New Trial
STATE v. JONES No. 8310SC1082	Wake 80CRS31800	No Error
STATE v. POWELL No. 834SC1186	Onslow 83CRS6803	No Error
STATE v. SCOTT No. 8316SC1052	Scotland 82CR6627	No Error
STATE v. SIMPSON No. 833SC1086	Craven 83CRS858	No Error
STATE v. STOKES No. 8321SC1080	Forsyth 83CRS8259	Affirmed
STATE v. WILLIAMS No. 833SC976	Pitt 82CRS15039	No Error

STATE v. WILLIAMS No. 839SC1111	Vance 82CRS2476	Affirmed
STATE v. WOODS No. 833SC1078	Craven 82CRS12620 82CRS12722	Affirmed
STATE ex rel. v. STRAW ENTERPRISES No. 8310SC1126	Wake 83CVS2376	Affirmed
TAYLOR, INC. v. McRORIE No. 8321DC914	Forsyth 83CVD1354	Reversed & Remanded
TODD v. MARYLAND CASUALTY CO. No. 8313SC485	Bladen 82CVS203	Affirmed
TRUSTEES OF ROWAN COLLEGE v. HAMMOND ASSOCIATES No. 8319SC34	Rowan 82CVS407	Affirmed in part; reversed & remanded in part
WALL v. WALL No. 8315DC843	Alamance 82CVD587	Reversed & Remanded

RONALD L. GIBSON v. KATHLEEN W. GIBSON

No. 8326DC302

(Filed 5 June 1984)

1. **Divorce and Alimony § 24.9— child support amount properly determined and established**

The amount of child support was properly determined and established by the trial court, and there was no merit to defendant's contentions that the monthly child support expenses were not supported by the evidence; that one-third of the total fixed expense was erroneous because it failed to account for a substantial amount of visitation that plaintiff had with the minor child; that the needs and expenses of defendant and minor child were not supported by the evidence; that defendant's expenses were unreasonable; that plaintiff's income and ability to pay child support were not properly determined; and that the trial court failed to consider the substantial visitation privileges plaintiff had.

2. **Divorce and Alimony § 27— award of attorney's fees to defendant unsupported**

In an action for child *support*, the trial court failed to make certain findings required by G.S. 50-13.6 to support the award of attorney's fees. The trial court failed to find that plaintiff refused to provide adequate support under the circumstances existing at the time the action was instituted, and such a finding was required in order to award attorney's fees in this case.

APPEAL by plaintiff from *Brown, Judge.* Judgment entered 18 October 1982 in District Court, MECKLENBURG County. Heard in the Court of Appeals 14 February 1984.

This appeal arose from a judgment entered in an action for child support and child custody. The judgment appealed from directed plaintiff to pay to defendant certain sums for child support and counsel fees.

Plaintiff husband and defendant wife were married on 1 January 1977. One child was born of the marriage on 31 January 1980. On 2 June 1981, the parties separated. In a separate action, judgment of divorce was entered on 3 September 1982. On 2 December 1981, plaintiff filed an action in which he requested that the court vest custody of the minor child in defendant and allow plaintiff liberal visitation privileges. In the same action, plaintiff requested the court to determine the financial needs of the child and establish an appropriate amount of child support to be paid by the parties. Defendant did not file an answer.

On 6 May 1982, the District Court (Saunders, Judge) entered an order vesting custody of the child in defendant mother and setting up a visitation schedule. On 25 June 1982, a notice of hearing was filed in which plaintiff was informed that defendant had filed a claim for the establishment of child support in accordance with plaintiff's complaint. On 15 September 1982, defendant filed the following motion:

> COMES NOW the defendant, KATHLEEN W. GIBSON, by and through the undersigned counsel, and pursuant to Rule 7 and G.S. 50-13.6 for an Order taxing her counsel fees against the plaintiff, and as grounds for said Motion, shows unto the Court that this is an action or proceeding for the custody of the minor child, that she is an interested party acting in good faith who has insufficient means to defray the expense of the suit, and that the plaintiff has refused to provide support which is adequate under the circumstances existing at the time of the institution of this action or proceeding.

The hearing on defendant's claim for child support and her motion seeking an award of counsel fees was held on 15, 16 and 17 September at a non-jury term of District Court.

On 18 October 1982, the court entered an order in which it made findings of fact regarding the income and expenses of the parties and the financial needs of the child. The court concluded (1) that the parties' personal expenses were reasonable, (2) that the defendant required financial assistance from plaintiff to cover the expenses of the minor child, (3) that the amount of support was

> reasonable and necessary and fair to all parties and meets the reasonable needs of the child for his health, education and maintenance having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party and of the facts of this particular case.

and (4) that the plaintiff has the means and ability to pay the child support awarded. Based on these findings and conclusions, the court directed plaintiff to pay child support of $475.00 per month.

Regarding defendant's motions for an award of counsel fees, the court made the following pertinent findings of fact:

> 30. That the defendant's attorney has rendered to her valuable services, said services covering the period June 15, 1982 through September 17, 1982.
>
> 31. That the total time expended by defendant's counsel excluding the time spent by a paralegal and with regard to all aspects of this matter including custody is in excess of 23 hours.
>
> 32. That the Court cannot determine from the evidence the exact amount of time spent in the defendant's child support claim alone but does find from the evidence that said representation consists of not less than 15 hours.
>
> 33. That the value of said services is not less than $1,500.00.
>
> 34. That the defendant has paid to her counsel previously the sum of $1,000.00 in regard to this representation.
>
> . . .
>
> 37. That the defendant is an interested party (being the mother of the child involved in a child support hearing) and is acting in good faith.
>
> . . .
>
> 40. That the defendant does not have sufficient income or assets to defray legal expenses.

Based on these findings, the court concluded that defendant was entitled to partial counsel fees of $500.00, the amount of the unpaid balance, to be paid by plaintiff. From the entry of the judgment, plaintiff appealed.

Tucker, Hicks, Sentelle, Moon and Hodge, by Fred A. Hicks, for plaintiff appellant.

Kennedy, Covington, Lobdell and Hickman, by Richard D. Stephens, for defendant appellee.

EAGLES, Judge.

In this appeal, plaintiff makes several arguments which present two questions for our consideration: (1) whether the amount of child support was properly determined and established by the trial court and (2) whether it was proper for the trial court to award attorney's fees to defendant.

I

[1] With respect to the first question, plaintiff makes several contentions. Plaintiff first contends that the trial court's judgment directing him to pay $475.00 per month in child support is not supported by the conclusions of law, that the conclusions are not supported by the findings of fact and that the findings of fact are not supported by the evidence. In *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980), a child support case, our Supreme Court considered the role of the trial court as finder of fact generally and with regard to child support cases specifically. Speaking through Justice Exum, the Court said:

> Where, as here, the trial court sits without a jury, the judge is required to "find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." [Citations omitted.] The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law. . . .
>
> . . .
>
> Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions, conclusions must support the judgment. . . .

Id. at 712, 714, 268 S.E. 2d at 188-90.

a.

Specifically, plaintiff first contends that the finding that defendant's monthly child support expenses totalled $655.10 per

month is not supported by the evidence. We disagree. In reaching this total, the court found the fixed expenses of the minor child to be $298.33 per month, or one-third of the $895.01 that it found to be the total fixed expense of the defendant and the minor child together. Plaintiff argues that it was error for the court to use this "arbitrary" figure when there was evidence of specific figures for some of those expenses. For the same reason, plaintiff argues that the court erred in finding that "the exact percentage of each fixed expense which can be apportioned to the support of this child cannot be determined on a 'line item' basis from the evidence in this record."

The evidence relied on by plaintiff in support of these contentions is defendant's testimony that some items of fixed expense would probably be reduced if the child were not living with her. A review of the transcript shows that this testimony was conjecture, not based on actual experience. The trial court was not obliged to believe or accept it. Furthermore, plaintiff presented no evidence as to the fixed expenses of the minor child on which the court could have based other findings.

On the other hand, the court noted that the findings it made as to fixed expenditures were based on actual past expenditures. These findings are supported by defendant's Affidavit of Financial Status and past records that were part of defendant's exhibits at the hearing. We note further that the figures found by the court reflect reductions in some items of expense listed on defendant's Affidavit of Financial Status.

b.

Plaintiff also contends that the court's use of the figure of one-third of the total fixed expenses was erroneous because it fails to account for the substantial amount of visitation that plaintiff has with the minor child. Plaintiff argues that this substantial visitation relieves defendant of some of the fixed expenses of the child. This Court considered and rejected a similar argument in *Evans v. Craddock*, 61 N.C. App. 438, 300 S.E. 2d 908 (1983). There we held that whether credit was allowed for time spent in visitation with the non-custodial parent depended on the facts of the particular case and was a matter within the court's discretion. *See also Jones v. Jones*, 52 N.C. App. 104, 278 S.E. 2d 260 (1981). The fact that a child spends a certain amount of time with one

parent does not necessarily mean, as plaintiff would have us assume, that his reasonable and necessary living expenses are incurred proportionally.

Also in *Evans v. Craddock, supra,* we held that a formula that used one-third of the custodial parent's total expense to establish the reasonable needs of the child was unfair and impermissible where the total figure included the expenses of the custodial parent's new husband. We also noted in that case that the trial court had made no findings as to the reasonableness of the custodial parent's living expense figures. Here, the expense figures in defendant's Affidavit of Financial Status included expenses only for herself and the child—defendant not having remarried. Furthermore, the trial court not only found that defendant's living expenses were reasonable, but reduced several of the figures on the Affidavit before making that finding.

With the exception of the amount of scheduled visitation, plaintiff has presented no evidence on which the court could have based other findings regarding the child's expenses and needs. We note also that there is no allegation or proof that plaintiff used all of his scheduled visitation time. To the extent that there is conflicting evidence regarding the fixed expenses of the minor child, the trial court, sitting as the finder of fact, resolved the conflict and found facts accordingly. Plaintiff has failed to show either how the fixed expenses of the child, as found by the court, are not supported by the evidence or how the court's use of one-third of the total fixed expenses of defendant and the child to establish that figure was arbitrary or unfair. Plaintiff's contentions in this regard are without merit.

c.

Plaintiff next contends that the court's findings as to the needs and expenses of defendant and the minor child are not supported by the evidence. We disagree. Defendant's Affidavit of Financial Status not only provides ample evidentiary support for the findings regarding the fixed expenses of defendant and the child, as noted above, but also supports the findings regarding individual needs and expenses. Plaintiff nevertheless argues that, because *his* analysis of defendant's check records does not support the court's findings regarding defendant's average monthly living expenses, that those findings lack evidentiary support. This

argument is based on the assumption, for which there is no support in the record, that defendant pays for everything with a check or charge card. The argument also ignores defendant's record testimony that she had been living with relatives, had used funds from her savings account, had sold some of her assets and had borrowed money from her father. Plaintiff's contention in this regard lacks merit.

d.

Plaintiff next contends that the court's conclusion that defendant's expenses are reasonable under the circumstances is not supported by proper findings. Plaintiff has favored us with no argument, other than his bare allegation, in support of this contention. Accordingly, we find this contention to be without merit and overrule the related exceptions and assignment of error.

e.

Plaintiff next contends that the court's conclusion regarding his income and ability to pay the child support awarded are not based on findings that indicate that the court took "due regard" of the factors enumerated in *Coble v. Coble, supra,* and held in that case to be required by G.S. 50-13.4(c). We disagree.

As we pointed out above, the trial court made extensive findings regarding the incomes, assets, and expenses of both parties and the minor child. Likewise, also as noted above, those findings are amply supported by the record evidence. The trial court concluded, based on its findings, that the amount of support ordered was both reasonable and necessary under the circumstances. The court also concluded, based on its findings, that the plaintiff had the means and ability to pay the child support awarded. It is well established that the amount of child support determined to be appropriate is a matter that is within the discretion of the trial court. *Coble v. Coble, supra; Beall v. Beall,* 290 N.C. 669, 228 S.E. 2d 407 (1976). Plaintiff has failed to establish how the court's conclusions regarding the appropriateness of the amount of child support awarded and his ability to pay it are in any way improperly drawn from the findings of fact. We do not find the amount to be *per se* unreasonable in light of the circumstances apparent to us and plaintiff has failed to demonstrate how the court abused its

discretion. Absent such a showing, the award of the trial court may not be disturbed by us. *Beall v. Beall, supra; Evans v. Craddock, supra.* Plaintiff's contention that the child support awarded was unreasonable or unfair is without merit.

f.

Plaintiff next contends that the trial court erroneously failed to consider his substantial visitation privileges in determining the amount of child support that he should pay. Plaintiff couples this argument with a formula which he claims the court should have used to determine the appropriate amount of support to be paid by each party. This formula allocates support for the minor based on the percentage of its life that the child spends with each parent. A similar argument based on the same underlying theory was considered and rejected above. For reasons already stated, we reject this argument. Further, we are aware that our courts have approved the use of formulae to aid in the appropriate disposition of child support cases. *Hamilton v. Hamilton,* 57 N.C. App. 182, 290 S.E. 2d 780 (1982). Cases where the use of a formula is most strongly encouraged are those where "considerations of fairness dictate a substantial departure from the standard award." *Id.* at 184, 290 S.E. 2d at 781. However, the use of a formula is not mandatory and, in any event, the court would not be obliged to use the one suggested by plaintiff. Absent a showing that the court abused its discretion, we may not disturb the trial court's award. *Beall v. Beall, supra; Hamilton v. Hamilton, supra.* Plaintiff's contention is without merit.

II

[2] The second question before us involves the award of attorney's fees to defendant. Plaintiff contends that the present action is one for *support* only and that the court failed to make certain findings required by statute to support the award of attorney's fees. We agree with the plaintiff.

G.S. 50-13.6 provides in pertinent part:

> Counsel fees in actions for custody and support of minor children.—In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion

> order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; . . . .

The complaint in this matter puts the issues of custody and support before the court. Defendant contends therefore that the action is one for custody and support within the meaning of the statute. However, considering a similar situation in the case of *Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980), the Supreme Court reversed our holding to that effect. In so doing, the Supreme Court held that where the issue of custody has been settled and is not at issue when the trial court enters subsequent orders dealing only with child support, the action is one for *support only.*

The present case differs from *Hudson* in that the issue of custody had been settled in *Hudson* by a consent order entered twenty months prior to the order concerning the child support while here the issue of custody, though uncontested, was settled by the judgment of the court some five months prior to the entry of the child support judgment. What appears to be important, however, is not how the custody issue was settled or when but that it was settled and was not at issue when the judgment concerning support was entered.

Where the action is one for custody or custody and support, the first sentence of G.S. 50-13.6 applies and the court may award attorney's fees to an interested party if it finds (1) that the party acted in good faith and (2) that the party lacks the means to defray the expense of the suit. Where the action is solely one for support, *Hudson* holds that attorney's fees may be awarded provided the court finds in addition "that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of institution of the action or proceeding." G.S. 50-13.6; *Hudson v. Hudson, supra* at 472-73, 263 S.E. 2d at 724.

Here the court characterizes the action as one for custody and support. Accordingly, its award of counsel fees is based on

findings that defendant acted in good faith and lacked the means to defray the expense of the action. Under the principles set forth in *Hudson, supra,* however, this action is one for support only and the additional finding requirement of G.S. 50-13.6 is thereby invoked. Our examination of the judgment discloses that the trial court did not find that plaintiff has refused to provide adequate support under the circumstances existing at the time the action was initiated. Such a finding is required in order to award attorney's fees in this case. Its absence compels us to vacate the award of attorney's fees and remand this case for additional findings as required by G.S. 50-13.6. We note incidentally that the expenses on which the award of counsel fees was based appear to relate solely to defendant's child support claim.

Plaintiff next argues that the evidence is insufficient to support findings and conclusions justifying the award of attorney's fees to defendant. Because we have vacated that award and remanded the case for additional findings, we need not address that argument.

That part of the judgment directing the payment of child support by plaintiff is affirmed.

That part of the judgment awarding attorney's fees to defendant is vacated and the case is remanded for further proceedings in accordance with this opinion.

Affirmed in part, vacated and remanded in part.

Judges HEDRICK and HILL concur.

STATE OF NORTH CAROLINA v. EVERETT LEE LEWIS

No. 833SC822

(Filed 5 June 1984)

1. Constitutional Law § 45— refusal to permit dismissal of appointed counsel

Defendant did not make an unequivocal demand to represent himself, and the trial court thus did not err in refusing to permit defendant to dismiss his appointed attorney and make his own final closing argument, where defendant asked to be allowed to testify in his own defense when his attorney conceded

in his closing argument that defendant was not totally innocent; the trial court refused to permit defendant to reopen the evidence; defendant stated that he preferred his attorney "not to finish it anymore"; when the court stated that it would not allow defendant to make any closing statement to the jury, defendant asked whether the record was going to reflect that he had not been allowed to take the stand or dismiss his attorney; and defendant had expressed dissatisfaction with his attorney on other occasions during the trial, and when pressed by the court for a decision as to whether he wished to represent himself, he indicated that he did not wish to do so and allowed the attorney to continue.

2. Kidnapping § 1.2— removal without victim's consent—sufficiency of evidence

The evidence was sufficient for the jury to find that defendant removed the victim from the trailer where she was residing without her consent so as to support his conviction of kidnapping where it tended to show that defendant broke into the trailer, stuffed something in the victim's mouth to keep her from screaming, and hit the victim's mother in the face with his fist when she entered the room; defendant was emotionally out of control and acted like a madman; defendant told the women he had a knife although he never displayed one; defendant ordered the women about and said that the victim had to go with him and the victim's mother when they left the trailer; and the victim and her mother were fearful of defendant because of his words and actions and felt constrained to do as he told them.

3. Criminal Law § 34.2— evidence showing other crimes—harmless error

A deputy sheriff's testimony which revealed to the jury that defendant was being sought on other warrants at the time he was arrested on the instant charges was erroneously admitted, but such error was not so prejudicial as to entitle defendant to a new trial in view of the overwhelming evidence against defendant.

4. Criminal Law § 138— sexual offense—kidnapping—age of victim as aggravating circumstance

The trial court erred in finding as an aggravating factor in sentencing defendant for second-degree sexual offense and first-degree kidnapping that the victim was very young where the victim was 17 years old at the time of the crimes, since the victim was not so extremely young as to make her age reasonably related to the purposes of sentencing.

APPEAL by defendant from *Llewellyn, Judge.* Judgments entered 17 February 1983 in Superior Court, CARTERET County. Heard in the Court of Appeals 13 February 1984.

Defendant was convicted of misdemeanor breaking or entering, second degree sexual offense, first degree kidnapping, second degree kidnapping and attempted second degree rape, and sentenced to a term of imprisonment. From the judgments entered, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General William R. Shenton, for the State.

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

WEBB, Judge.

[1] Defendant first argues the trial court committed reversible error in refusing to allow him to dismiss his attorney and make his own final closing argument. After defendant's attorney conceded in his closing argument that defendant was not totally innocent, defendant asked to be allowed to testify in his own defense. The court treated defendant's request as a motion to reopen the evidence and denied it. In response, defendant stated that he preferred that his attorney "not to finish it anymore." When the court stated that it would not allow defendant to make any statement to the jury in closing, defendant asked whether the record was going to reflect that he had not been allowed to take the stand or dismiss his attorney. He was told that it would.

It is well settled that a defendant has a constitutional right to represent himself without an attorney when he voluntarily and intelligently elects to do so. *See Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975); *State v. Robinson*, 290 N.C. 56, 224 S.E. 2d 174 (1976). But in order for a defendant to be entitled to represent himself, he must make an unequivocal demand to do so. *See State v. Gerald*, 304 N.C. 511, 284 S.E. 2d 312 (1981). We do not believe that defendant's comments when considered in the light of all the facts constituted an unequivocal demand for self-representation.

Defendant's comments must be considered in the context of what occurred previously in this case. From the very beginning, defendant expressed dissatisfaction with his court-appointed attorney and sought to have him removed both at the preliminary hearing and at the arraignment. The court advised defendant that if the attorney was removed, defendant would either have to hire his own attorney or represent himself. Defendant decided to continue to be represented by the attorney until he retained other counsel. Defendant did not in fact retain other counsel and proceeded to trial represented by the appointed attorney. At trial, defendant and his attorney disagreed strongly over whether a

certain line of questioning should be pursued on cross-examination. During the court's discussions with defendant and the attorney regarding the disagreement, the court advised defendant of his right to represent himself and asked him repeatedly whether he wished to represent himself or be represented by his attorney. Defendant's answers clearly show he did not wish to represent himself. It appears that the sole purpose of defendant's complaining was not to get his attorney removed but was to get the court to order the attorney to conduct the defense in accordance with defendant's directions.

In light of defendant's previous disruptive behavior, the court could reasonably have interpreted defendant's remark that he preferred that his attorney not finish it anymore as simply one further expression of his dissatisfaction with the attorney's performance rather than as a serious request to dismiss the attorney. When defendant made similar comments earlier in the trial and was pressed by the court for a decision as to whether he wished to represent himself, he indicated that he did not wish to do so and allowed the attorney to continue. If defendant truly wanted to represent himself, he should have made a clear and unequivocal demand to do so rather than merely suggesting it through his offhand remarks as he did. Furthermore, defendant cannot claim he was surprised or prejudiced by his attorney's remarks during the closing statement because the attorney had made a similar remark in his opening statement. We hold the court did not commit reversible error in refusing defendant's request.

[2] Defendant next assigns as error the court's denial of his motion to dismiss the charge of kidnapping Hope Oglesby. G.S. 14-39(a) provides that one of the essential elements of kidnapping is that the confinement, restraint or removal of the victim be without the victim's consent. Defendant contends the evidence was insufficient for the jury to find beyond a reasonable doubt that defendant removed Hope Oglesby from the trailer where she was residing without her consent.

The evidence viewed in the light most favorable to the State, as it must be on a motion for nonsuit, *see State v. Conrad*, 293 N.C. 735, 239 S.E. 2d 260 (1977), shows the following: Early in November 1982, Peggy Oglesby, who had been dating the defendant for almost two years, terminated her relationship with de-

fendant, thus making him very angry. After the break-up, Mrs. Oglesby moved out of her house and into a trailer owned by a friend because she was afraid of defendant. At about 3:00 or 3:15 a.m. on 20 November 1982, Mrs. Oglesby's 17-year-old daughter, Hope, who was sleeping on a couch in the trailer, awakened to find defendant on top of her. Defendant stuffed something in her mouth and told her to go to the back bedroom. He told Hope he had a knife. Hope knocked defendant's hands away from her mouth and screamed, awakening her mother.

When Mrs. Oglesby opened the bedroom door, defendant hit her on the forehead with his fist and knocked her back on the bed. Defendant then told her he was sorry and expressed his love for her. He told Mrs. Oglesby and Hope to lie on the bed with their hands behind their backs. Defendant did not threaten or mistreat them but was emotionally out of control and acted like a madman. He talked about still loving Mrs. Oglesby and not wanting to end their relationship. During the incident, defendant left the bedroom a couple of times to get some fresh air and once to get a drink from the refrigerator. Although Mrs. Oglesby had a loaded pistol in the bedroom, she did not get it.

Defendant told Mrs. Oglesby and Hope that he wanted them to drive him back to the place where he was staying. Mrs. Oglesby asked him to let Hope stay but defendant said she had to go with them. He walked Mrs. Oglesby and Hope to the car. He told them not to try anything funny and that he would let them go if they took him where he wanted to go. Mrs. Oglesby testified they went with defendant because they were afraid not to and that she did not go with him of her own free will. Hope testified that her mother told her to comply with defendant's instructions because she was afraid of what would happen. Although defendant held Hope's arm as he walked her to the car, he did not physically force her to go with him, nor did she struggle. Just outside the trailer park, defendant ordered Mrs. Oglesby to stop at a deserted gas station whereupon he got out for a moment and put something in the car. Although the women could have driven off and left defendant, Mrs. Oglesby refused her daughter's request to do so because she said she did not want defendant to get away. Defendant directed Mrs. Oglesby to drive to the end of a deserted road. Once there, defendant turned off the car and took the keys.

Subsequently, defendant tied the women up and the sexual offenses occurred.

We believe the evidence is sufficient for the jury to find beyond a reasonable doubt that Hope Oglesby did not leave the trailer of her own free will but did so only because she feared for the safety of herself and her mother. The evidence tends to show that Hope and her mother were fearful of defendant because of his words and actions and felt constrained to do as he told them. They said defendant was emotionally out of control and acted like a madman. Defendant told the women he had a knife and although he never displayed one, he did use a significant amount of force during the incident. He broke into the trailer, laid on top of Hope, stuffed something in her mouth to keep her from screaming, and hit Mrs. Oglesby in the face with his fist when she entered the room. He ordered the women about and said that Hope *had* to go with him and Mrs. Oglesby when they left the trailer. The fact defendant did not physically force Hope to leave with him is not determinative because the use of actual physical force or violence is not always necessary to the commission of the offense of kidnapping. *See State v. Bruce*, 268 N.C. 174, 150 S.E. 2d 216 (1966). The fact the women did not escape by driving away while at the gas station is irrelevant because at that point defendant had already taken Hope from the trailer without her consent, thus the kidnapping had already occurred. We find this assignment of error to be totally without merit.

[3] Defendant assigns as error the trial court's refusal to declare a mistrial when the deputy sheriff revealed to the jury that defendant was being sought on other warrants at the time he was arrested on the instant charges. While testifying, the deputy sheriff stated:

> "I came over to the Sheriff's Department and I got in touch with Frank Galizia and Special Agent Larry Smith and met with us here, and so we set up the, for them to meet Peggy Oglesby and for them to get in the car there and then to go on out there and proceed on out there to pick up Everett, because see, I had other warrants for him and that's one of the reasons why I had an interest in it, and—in catching him."

The general rule is that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. *See State v. Duncan*, 290 N.C. 741, 228 S.E. 2d 237 (1976); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). Although the admission of this evidence was probably erroneous, we do not believe it was so prejudicial as to entitle defendant to a new trial. In view of the overwhelming evidence against defendant, we do not believe there is any reasonable possibility that a different result would have been reached at the trial had this evidence not been admitted. Thus, defendant has failed to show he is entitled to relief. *See* G.S. 15A-1443.

[4] Lastly, defendant contends the trial court erred in finding as an aggravating factor in sentencing him on the convictions of second degree sexual offense and first degree kidnapping that the victim was very young. We agree. This Court has previously stated that under some circumstances the extreme old age or extreme youthfulness of the victim may increase the offender's culpability because of the victim's relative defenselessness. *See State v. Gaynor*, 61 N.C. App. 128, 300 S.E. 2d 260 (1983). Here, the victim was 17 years old at the time the offenses occurred. We do not believe that a 17-year-old rape or kidnapping victim is so extremely young as to make her age reasonably related to the purposes of sentencing. We hold defendant is entitled to a new sentencing hearing on his convictions of second degree sexual offense and first degree kidnapping.

No error in defendant's trial; remand for re-sentencing in case numbers 82CRS9769 and 82CRS9771.

Chief Judge VAUGHN and Judge JOHNSON concur.

MILDRED JONES v. ALL AMERICAN LIFE INSURANCE COMPANY

No. 836SC360

(Filed 5 June 1984)

1. **Rules of Civil Procedure § 56— affidavits in opposition to summary judgment motion not timely filed—court's discretion to allow additional time**

The trial court had authority under G.S. 1A-1, Rule 56(f) to allow defendant additional time to file affidavits in opposition to plaintiff's motion for summary judgment, and the trial court did not abuse its discretion in so allowing.

2. **Insurance § 35— issue as to whether plaintiff killed or procured the killing of insured—right to life insurance proceeds—disqualification under common law**

Although plaintiff did not fit the statutory definition of "slayer" because she had not been convicted of killing the insured, G.S. 31A-3(3), defendant's evidence that plaintiff killed or procured the killing of the insured nevertheless created a common law defense to plaintiff's claim for life insurance proceeds, and the defense was properly submitted to the jury. The "preponderance of the evidence" standard of proof applied to this civil action.

3. **Evidence § 15— irrelevant evidence admitted—not prejudicial**

In an action seeking payment of insurance proceeds, testimony that there were tire tracks beside the insured's body was irrelevant; however, it had no probative value and could not have prejudiced plaintiff in the context in which it was offered.

4. **Evidence § 25— use of slides of body to illustrate medical examiner's testimony—proper**

In an action to compel payment of life insurance proceeds, use of slides of the insured's body to illustrate the medical examiner's testimony was proper where the testimony was relevant to defendant's theory of the case.

5. **Evidence § 15.2— evidence having probative value and properly admitted**

In an action to compel payment of life insurance proceeds where defendant insurance company refused to pay the policy proceeds to plaintiff on the ground that she had murdered the insured, testimony that plaintiff's son did not cooperate with investigating officers who came to her house with a search warrant had some probative value and was properly admitted where one of defendant's theories was that plaintiff procured her sons to kill the insured.

6. **Evidence § 33— statement offered to prove truth of matter asserted—no hearsay**

In an action to compel payment of life insurance proceeds where defendant refused to pay on the ground that plaintiff had murdered the insured, testimony that the insured had stated that he was going to change the beneficiary of his life insurance policy was not hearsay since it was not offered to prove the truth of the matter asserted.

Judge PHILLIPS dissenting.

APPEAL by plaintiff, and cross-appeal by defendant, from *Strickland, Judge.* Judgment entered 19 November 1982 in Superior Court, HALIFAX County. Heard in the Court of Appeals 5 March 1984.

Plaintiff was the named beneficiary of a life insurance policy issued by defendant on the life of Felbert Hilliard, who died of a gunshot wound between 6:00 p.m. and 2:00 a.m. on 17-18 June 1981. Defendant refused to pay the policy proceeds to plaintiff on the ground that she had murdered Hilliard, and plaintiff brought this action seeking to compel payment. Judgment was entered for defendant, barring any recovery by plaintiff of proceeds under the policy, upon a jury verdict that plaintiff willfully and unlawfully killed or procured the killing of Hilliard.

Plaintiff appeals.

Frank W. Ballance, Jr., for plaintiff appellant.

Allsbrook, Benton, Knott, Cranford & Whitaker, by J. E. Knott, Jr., and L. McNeil Chestnut, for defendant appellee.

WHICHARD, Judge.

PLAINTIFF'S APPEAL

[1] Plaintiff contends the court erred in considering defendant's affidavits in opposition to her motion for summary judgment when the affidavits were not filed in a timely manner. Plaintiff's motion for summary judgment was initially heard on 24 May 1982, at which time defendant did not have proper affidavits in opposition. The court exercised its discretion in regulating trial proceedings, and its discretion under G.S. 1A-1, Rule 56(f), by allowing defendant ten additional days to file affidavits. Defendant filed its affidavits on 29 July 1982, and the court apparently considered those affidavits in denying plaintiff's motion on 12 August 1982.

The court had authority under G.S. 1A-1, Rule 56(f) to allow defendant additional time. It followed the preferred practice of waiting until discovery was complete, and the contentions of both parties were properly presented, before ruling on the motion. *See American Travel Corp. v. Central Carolina Bank*, 57 N.C. App.

437, 441, 291 S.E. 2d 892, 895, *disc. rev. denied*, 306 N.C. 555, 294 S.E. 2d 369 (1982). We find no abuse of discretion.

Plaintiff presents several contentions related to the single question of whether the court erred in allowing a trial and jury verdict on the issue of whether plaintiff killed or procured the killing of Hilliard. Defendant's evidence showed the following:

Hilliard died of a small caliber bullet wound to his head. Plaintiff owned a twenty-five caliber pistol.

Plaintiff and Hilliard had lived together from 1978 to 1981. About two months before his death Hilliard left plaintiff and began living with his father.

Plaintiff was the beneficiary of Hilliard's life insurance policy. Shortly before his death Hilliard stated that he intended to change the beneficiary.

Law enforcement officers searched plaintiff's house and car the day after Hilliard's death. The house carpet was damp from a recent steam cleaning, and the bed sheets had just been washed. Plaintiff denied that she had attempted to clean up any blood. A forensic serologist employed by the S.B.I. conducted a luminol test, however, which revealed blood residue on the bed and carpet.

A blood clot was discovered on the rear bumper of plaintiff's car which matched Hilliard's blood type. The floor mat in the trunk of plaintiff's car had been removed, and the trunk had been washed out. The trunk contained rust-like material. A piece of carpet containing rust-like material was discovered in an incinerator in plaintiff's yard. Hilliard's body contained linear abrasions and a tire or grease mark, which suggested that it had been dragged out of a car trunk.

Hilliard died between 6:00 p.m. and 2:00 a.m. on 17-18 June 1981. Plaintiff was at work from 2:00 p.m. until midnight on 17 June 1981, but her eighteen and nineteen-year-old sons were at her house. Hilliard was last seen alive by a fellow employee who had left him at plaintiff's house at 4:45 p.m. that evening.

[2] The foregoing circumstantial evidence sufficed to create an issue of fact for the jury as to whether plaintiff killed or procured

the killing of Hilliard. She had a motive to kill him, he was killed after stopping at her house, and considerable physical evidence suggested that he had been killed there and that his body had been removed in her car. Plaintiff's sons were available to perform or assist with the killing, regardless of whether she was present. Under the standard of proof applicable to ordinary civil actions, *viz.*, proof by the preponderance of the evidence, *Wyatt v. Queen City Coach Co.*, 229 N.C. 340, 342, 49 S.E. 2d 650, 652 (1948), such evidence was adequate to support the verdict.

Plaintiff never was charged in a criminal action with the killing of Hilliard, and she contends that the absence of a criminal conviction bars defendant from using a "slayer" defense to her action for the insurance proceeds. Although plaintiff does not fit the statutory definition of "slayer" because she has not been convicted of killing Hilliard, G.S. 31A-3(3), she nonetheless is barred by the common law from receiving the proceeds. "It is a basic principle of law and equity that no [one] shall be permitted to take advantage of his [or her] own wrong, or [to] acquire property as a result of his [or her] own crime." *Garner v. Phillips*, 229 N.C. 160, 161, 47 S.E. 2d 845, 846 (1948). This common law rule survived the enactment of G.S. 31A, Article 3, and it applies to cases outside the purview of the slayer statute. *Quick v. United Benefit Life Ins. Co.*, 287 N.C. 47, 56-57, 213 S.E. 2d 563, 569 (1975). Defendant's evidence that plaintiff killed or procured the killing of Hilliard thus created a common law defense which properly was submitted to the jury. Plaintiff's motions for summary judgment, directed verdict, judgment notwithstanding the verdict, and a new trial therefore were properly denied.

Plaintiff contends that if defendant's evidence did create a legal defense, it should be held to the criminal standard of proof, *viz.*, proof "beyond a reasonable doubt." *See State v. Riera*, 276 N.C. 361, 367, 172 S.E. 2d 535, 539 (1970). She cites no authority in support of this position. Plaintiff brought a civil action, and the "preponderance of the evidence" standard thus applies. *In re Wilkins*, 294 N.C. 528, 550-51, 242 S.E. 2d 829, 842 (1978). "The required degree of proof is not changed by the fact that the conduct with which a party is charged amounts to a crime." 2 H. Brandis, *North Carolina Evidence* § 212, at 162 (2d ed. 1982).

Plaintiff assigns error to several evidentiary rulings. We find no prejudicial error.

[3] Plaintiff objected to testimony that there were tire tracks beside Hilliard's body. Because no evidence connected the tracks with plaintiff or her car, this testimony was not relevant. For the same reason, however, it had no probative value and could not have prejudiced plaintiff in the total context in which it was offered.

Plaintiff argues that witnesses in addition to the person who performed the luminol test erroneously were allowed to testify concerning the purposes and results of the test. This argument has no basis in the evidence because, at the time plaintiff objected, the witnesses only testified that they observed the luminol test being performed, and as to what they observed.

[4] Plaintiff objected to use of slides of Hilliard's body to illustrate the medical examiner's testimony. The slides illustrated markings on the body and other features which were the subject of the testimony. The testimony was relevant to defendant's theory of the case, especially to the suggestions that linear markings on Hilliard's back were made by the rear bumper of plaintiff's car, and that the blood clot on the bumper was left there when the body was removed from the trunk. The court thus properly allowed the slides to be used for illustrative purposes.

[5] Plaintiff objected to testimony that her son did not cooperate with investigating officers who came to her house with a search warrant. One of defendant's theories was that plaintiff procured her sons to kill Hilliard. Testimony as to one son's opposition to an investigation thus had some probative value and properly was admitted.

[6] Plaintiff objected, on hearsay grounds, to testimony that Hilliard had stated that he was going to change the beneficiary of his life insurance policy. This testimony was not hearsay because it was not offered to prove the truth of the matter asserted. Regardless of whether Hilliard actually intended to change the beneficiary, the fact that he told several people he would was evidence from which the jury could infer that plaintiff knew she was about to lose her status as beneficiary, thereby giving her a motive to kill Hilliard.

Plaintiff contends the court erred in refusing to allow a deputy sheriff to testify as to whether a warrant had been issued or a

bill of indictment submitted against her. Plaintiff subsequently was allowed to testify, however, that she had not been arrested and charged with murder, and that no bill of indictment had been served on her. Assuming, *arguendo*, that the original exclusion was error, it clearly was rendered harmless by plaintiff's subsequent testimony.

DEFENDANT'S CROSS APPEAL

Defendant acknowledges that it would benefit from the relief sought in its cross appeal only in the event of a remand for further proceedings. In light of our disposition of plaintiff's appeal, we thus need not respond to the cross appeal.

No error.[1]

Chief Judge VAUGHN concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

Though I agree that the evidence was sufficient to establish that the insured, Felbert Hilliard, was killed in plaintiff's house sometime during the eight-hour period referred to, in my opinion it was not sufficient to establish that plaintiff either killed him or procured his killing. The evidence leads only to surmise and speculation; the greater likelihood that it suggests to me being that he was killed spontaneously in a brawl or fight by one or both of the boys during the six hours that plaintiff was at work and not there, and that her only involvement was in trying to conceal what one or both of the boys had done.

1. As to the comments in the dissenting opinion regarding the issue submitted resulting in a nonunanimous verdict, the issue submitted was "Did . . . the plaintiff willfully and unlawfully kill Felbert Hilliard or procure his killing?" The common law rule that no one shall be permitted to acquire property as a result of his own crime would bar plaintiff from recovering under the policy whether she killed Hilliard or procured his killing. The result is thus the same regardless of whether some jurors subscribed to the killing theory and others to the procuring theory, and plaintiff could not have been prejudiced by any disagreement among the jurors in this regard.

Furthermore, the either/or "Mother Hubbard" type issue submitted to the jury was ambiguous on its face and did not result in the unanimous verdict that our law requires. For all we know some jurors found that she killed him, others found that she had him killed, and twelve jurors would have never agreed to either theory.

My vote is to vacate the judgment and remand with instructions to enter verdict and judgment for the plaintiff.

DONALD S. COLLINS v. BEVERLY ANN DAVIS (WILLIAMS)

No. 8325SC282

(Filed 5 June 1984)

1. **Trusts § 13.1— resulting trust—sufficiency of evidence**

Plaintiff's evidence was sufficient to establish a resulting trust where it tended to show that plaintiff and defendant were living together; at least $4,500 of plaintiff's money, which had been placed in defendant's checking account, was used with plaintiff's consent in purchasing a house and lot that was titled in defendant's name; and the money was not a gift but was given to defendant because of an agreement by the parties that if they got married title would be put in both their names and if they did not marry the property would be sold and plaintiff would be paid from the proceeds.

2. **Quasi Contracts and Restitution § 2.1— unjust enrichment—sufficiency of evidence**

Plaintiff's evidence was sufficient to support his claim of unjust enrichment where it tended to show that, while he and defendant were living together, he contributed to the purchase and improvement of a house and lot, the title of which was placed in defendant's name with the understanding that if the parties got married he would be made a joint record owner and if they did not marry the place would be sold and he would be repaid from the proceeds.

3. **Contracts § 6— purchase and improvement of house—express or implied contract—unmarried couple living together—public policy—illicit intercourse as consideration**

Plaintiff's action to recover for money expended and labor performed on a house and lot which was titled in defendant's name while the parties were living together prior to plaintiff's divorce from another woman was not dismissible on the ground of public policy. If money expended and work performed by plaintiff was in consideration for illicit intercourse, plaintiff's claims would be founded on illegality and thus unenforceable, and where plaintiff's evidence

was susceptible to such interpretation, a question of fact was presented for the jury rather than a question of law for the court.

4. **Equity § 1.1— clean hands doctrine—unmarried couple living together**

The "clean hands" doctrine did not preclude plaintiff's action to recover for money expended and labor performed on a house and lot which was titled in defendant's name while the parties were living together before plaintiff's divorce from another woman.

Judge BRASWELL dissenting.

APPEAL by plaintiff from *Griffin, Judge*. Judgment entered 28 October 1982 in Superior Court, CATAWBA County. Heard in the Court of Appeals 10 February 1984.

In this civil action plaintiff seeks to recover $10,000 for money and labor allegedly expended on real property titled in defendant's name. He alleges that while he and defendant were living together, before his divorce from another woman, he contributed to the purchase and improvement of a house and lot, the title of which was placed in her name with the understanding that if they got married he would be made a joint record owner and that if they did not marry the place would be sold and he would be repaid from the proceeds. Three alternative theories for relief are alleged in the complaint and amendment to it—resulting trust, unjust enrichment, and a contract to pay for labor done and monies loaned. Defendant's answer denies the material allegations and asserts that any monies and labor expended by plaintiff on her property were gifts; she also counterclaimed for $20,000 because of housekeeping services allegedly rendered for plaintiff during the three years they lived together, and $10,000 because of his failure to marry her as promised. On the eve of trial defendant filed a written motion asking that plaintiff's action be dismissed as against public policy for the alleged reason that it is based on an illegal consideration, "to wit, illegal sexual services and adultery on the part of plaintiff." Upon the trial of the case, at the end of plaintiff's evidence, the court directed a verdict against him on all claims and defendant abandoned her counterclaims.

Tate, Young, Morphis, Bogle and Bach, by Thomas C. Morphis, for plaintiff appellant.

Randy D. Duncan for defendant appellee.

PHILLIPS, Judge.

Though the sole question presented for review is whether the trial court erred in directing a verdict against plaintiff and dismissing his case, answering it is a two step process. So far as the record reveals, the dismissal was on the grounds of public policy and the sufficiency of the evidence was not a factor; nevertheless, if the evidence in fact was insufficient to support any of the claims asserted, plaintiff had no right to a jury trial and the directed verdict was proper. Thus, before discussing the grounds upon which the case was apparently dismissed, we will first determine whether it was dismissible in any event because plaintiff's evidence was insufficient to raise a jury question on either of the alternative claims alleged—resulting trust, unjust enrichment, and a loan of money and furnishing of labor upon a promise to pay therefor. In doing so, of course, we are obliged to view the evidence in the light most favorable to plaintiff. *Hawks v. Brindle*, 51 N.C. App. 19, 275 S.E. 2d 277 (1981).

[1] Equity devised the theory of resulting trust to effectuate the intent of the parties in certain situations where one party pays for property, or part of it, that for different reasons is titled in the name of another. In *Mims v. Mims*, 305 N.C. 41, 46-47, 286 S.E. 2d 779, 783-784 (1982), our Supreme Court said:

> A resulting trust arises 'when a person becomes invested with the title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for the benefit of another. . . . A trust of this sort does not arise from or depend on any agreement between the parties. It results from the fact that one man's money has been invested in land and the conveyance taken in the name of another.' (Citation omitted.) The trust is created in order to effectuate what the law presumes to have been the intention of the parties in these circumstances—that the person to whom the land was conveyed hold it as trustee for the person who supplied the purchase money. (Citations omitted.) '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. . . .' (Citation omitted.)

As to this claim, plaintiff testified that: At least $4,500 of plaintiff's money, placed in defendant's checking account, was used with his consent in purchasing or paying for the property that was titled in her name; the money was not a gift, but was given to her because of their agreement that if they got married title would be put in both their names, and if they did not marry the property would be sold and he would be paid from the proceeds. This evidence, in our view, was sufficient to support the claim that a resulting trust in plaintiff's favor existed with respect to the property involved.

[2] The doctrine of unjust enrichment was devised by equity to exact the return of, or payment for, benefits received under circumstances where it would be unfair for the recipient to retain them without the contributor being repaid or compensated. To invoke the unjust enrichment doctrine, however, more must be shown than that one party voluntarily benefited another or his property. *Wright v. Wright*, 305 N.C. 345, 289 S.E. 2d 347 (1982). One situation where the doctrine does arise, though, is where one's property is improved or paid for in reliance upon the owner's unenforceable promise to convey the land or some interest in it to the contributor. *Union Central Life Insurance Co. v. Cordon*, 208 N.C. 723, 182 S.E. 496 (1935). Quite clearly, we think, plaintiff's evidence falls under the authority of this case and was sufficient to support plaintiff's unjust enrichment claim. And, of course, that the evidence referred to also supports the other claim that the money was loaned and labor was done in reliance upon defendant's promise to pay therefor is too plain to require discussion.

[3] Since plaintiff's evidence was sufficient to support the claims alleged, was the case dismissible on the grounds of public policy, as the trial court ruled? In directing a verdict against plaintiff, the court stated:

> [I]t is undisputed that the parties knew plaintiff was married at the time of the purchase of the house, and that plaintiff was married during the time the parties lived together and actually remained married until August 1982, and that, as a matter of law, the plaintiff is not entitled to equitable relief under the totality of the evidence, in that the arrangement violates the public policy of North Carolina and is in derogation of the sanctity of marriage and other laws. . . .

Though the evidence does show, as the court stated, that during the period the parties lived together and the house was bought, plaintiff was married to another woman, as defendant well knew, we nevertheless are of the opinion that that did not authorize the court to dismiss plaintiff's case. The court's judgment, in effect, stands for the proposition that couples living together while one is known to be still married to another are incapable of entering into enforceable express or implied contracts for the purchase and improvement of houses, or for the loan and repayment of money. So far as we have been able to ascertain, that proposition is not the law of this state, or any other, for that matter. Our research has discovered no authority or case to that effect, and defendant's brief refers us to none. Of course, if the money that plaintiff gave defendant and the work that he did on the place was in payment or consideration for illicit sexual intercourse, as defendant contends, all of the claims would be founded on illegality and thus unenforceable. But the record contains no testimony that plaintiff paid or did what he did in payment for illicit intercourse that had already occurred, or in exchange for defendant's promise to continue the illicit relationship in the future; and, if plaintiff's evidence is nevertheless susceptible to that interpretation, and we are inclined to believe that it is, that certainly is not the only way it can be interpreted. Thus, the question was one of fact for the jury, rather than one of law for the court. Furthermore, under our law, illegality is an affirmative defense and the burden of proving it is on the one that asserts it. Rule 8(c), N.C. Rules of Civil Procedure; *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E. 2d 521 (1973); *Brown v. Kinsey*, 81 N.C. 245 (1879).

[4] The court may have dismissed plaintiff's case in reliance upon the "Clean Hands" doctrine; but this doctrine has no application to the circumstances recorded. Equity is not limited to those that have led blameless lives; its doors are not automatically closed to those that are immoral. 30 C.J.S. *Equity* § 98 (1965). The clean hands doctrine denies equitable relief only to litigants who have acted in bad faith, or whose conduct has been dishonest, deceitful, fraudulent, unfair, or overreaching in regard to the transaction in controversy. 27 Am. Jur. 2d *Equity* § 136 (1966). Our Supreme Court, in discussing this principle, has said: " 'Clean hands' connotes absence of sharp practice and bad faith on the part of the party seeking equity, not complete freedom from

negligence and gullibility." *Branch Banking & Trust Company v. Gill, State Treasurer*, 286 N.C. 342, 364, 211 S.E. 2d 327, 342 (1975). Though the record clearly shows that the parties were involved in an immoral relationship, it contains no evidence that plaintiff acted dishonestly, deceitfully, fraudulently, or unfairly either toward the defendant personally or with respect to the purchase and improvement of the property that is the subject of this case. So while we disapprove of plaintiff's breach of his marital vows to his former wife, who is not involved in this case, and his immoral liaison with the defendant, we nevertheless are constrained to hold that neither the doors of law nor equity are closed to him in this case.

The judgment appealed from is therefore reversed and a new trial ordered.

New trial.

Judge WELLS concurs in result.

Judge BRASWELL dissents.

Judge BRASWELL dissenting.

I respectfully dissent and would vote to affirm the order of the trial judge.

At the willing risk of being called an old fogy, I cannot accept that it is either equity or law to place the stamp of approval of public policy upon the undisputed facts in this case. Adultery is still against the law in North Carolina. Living in adultery is the consideration that formed the basis of this real estate transaction. Each party knew that the plaintiff was married to another at all the times involved. The man, the plaintiff, has, in legal effect, given a gift to his paramour. The illegal relationship bars the plaintiff's right to any recovery.

Here, the parties did not live together under color of marriage in a good faith belief of a legal marriage. In such a situation equity would come to the aid of the parties in a division of property acquired during the relationship.

It strains the public policy of the law against adultery to contrive to aid nonmarital cohabitation by engrafting any form of resulting trust or unjust enrichment theory on the illicit conduct in this record. The court should not lend its hand to aid either party. *See* Annot., 3 A.L.R. 4th, 13, 49 (1981).

ETHEL LEE RIVES v. GREAT ATLANTIC AND PACIFIC TEA COMPANY

No. 8310SC113

(Filed 5 June 1984)

Negligence § 57.5— slipping on grapes on grocery store floor—sufficiency of evidence of failure to maintain premises in safe condition

In an action in which plaintiff sought to recover damages for injuries sustained by her when she slipped and fell on some loose grapes on the floor of defendant's grocery store, the trial court erred in directing a verdict for defendant where the evidence tended to show that the grapes on which plaintiff slipped came from an open box in a shopping cart in the middle of the floor rather than from the produce counter; it was the busiest day of the week for the store in the beginning of its rush hour; therefore, it was foreseeable that numerous people might handle the grapes in the cart; the produce manager was aware that customers rummage through produce looking for the freshest items; he knew at least one customer would be handling the grapes that were in the shopping cart which he had rolled into the middle of the floor; and given such circumstances, a reasonable man would have foreseen that there was a substantial risk that customers would accidentally drop some grapes on the floor around the shopping cart and that someone might slip on them. It was also foreseeable that the risk of an accident was greater than usual because of the number of people expected to be in the store at the time, and because the shopping cart was placed in the middle of the produce aisle where customers would not expect to find dropped produce on the floor.

APPEAL by plaintiff from *Farmer, Judge*. Judgment entered 22 September 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 11 January 1984.

Plaintiff seeks to recover damages for injury sustained by her when she slipped and fell on some loose grapes on the floor of defendant's grocery store. At the close of the plaintiff's evidence, the court granted the defendant's motion for a directed verdict. Plaintiff appealed.

The evidence viewed in the light most favorable to the plaintiff shows the following: On the morning of 6 October 1979, a

Saturday, defendant's produce manager, Mr. Franks, and an employee were in the stockroom of defendant's store when a customer came to the door and asked if the store had any grapes fresher than those out on the display counter. Although the store was having a special on grapes that day, Mr. Franks had not yet restocked the grape display. Mr. Franks placed some boxes of fresh grapes in a shopping cart to be brought out for the customers. One box was wedged into the child's seat of the cart and was slightly tilted. The top was removed from this box so that the customer could get to the grapes. Mr. Franks placed this shopping cart in the middle of the produce aisle and left it there.

Around 10:00 a.m. that day, plaintiff was shopping near the produce aisle when she left her cart for a moment and walked over to the grape display. She examined the grapes, turned, and started to return to her cart. When she was six or seven feet away from the produce aisle and close to the shopping cart with the grapes in it, she slipped and fell on several loose grapes. Plaintiff had been watching where she was going just before she fell but did not recall looking down at the floor and did not see the grapes. The produce aisle was clean and well lit. After she fell, plaintiff observed grapes on the bottom of her shoe and a smear on the floor where she had slipped. The grapes were pale green and about the size of marbles. The floor tile in the store was a light color with green and a little mingled brown in it. Plaintiff did not know how the grapes got on the floor. As a result of her fall, plaintiff fractured the fifth metatarsal in her left foot. After plaintiff fell, the store manager came over to help her. Plaintiff testified that the manager wheeled the cart with the grapes in it around, said "I've told them and told them not to bring these things out here until they're ready to be put up," and then pushed the cart back to the stockroom. It is not clear from the evidence how long the cart with the grapes had been in the aisle before plaintiff fell.

Mr. Franks testified that, after the accident, he pushed the shopping cart containing the grapes back to the stockroom because he was afraid someone else might fall. He could not remember if the store manager told him to do this. He assumed that the grapes on which plaintiff slipped were dropped on the floor by the customer who had asked for some fresher grapes. He was aware of the potential hazards of grapes and other produce

falling on the floor and was trained to keep an eye on the floor. He knew that customers generally rummage through the produce to find the freshest items, which can cause produce to fall on the floor. He said the employees in the produce department constantly watch the floor for loose material, sweeping and cleaning it three or four times a day. Defendant has a procedure manual for the produce department which has a section on grapes, which says that employees should prevent serious accidents by keeping a constant vigil for grapes that have fallen on the floor and by using astroturf mats. Mr. Franks had never been told to put astroturf mats under the grape display.

The evidence further tends to show that Saturday is traditionally the busiest day of the week at defendant's grocery store and that the rush hour usually begins around 10:00 a.m. The store manager agreed that grapes easily fall off their stem and that customers are somewhat clumsy in handling them. He admitted that several falls had occurred in his store in 1979 prior to plaintiff's accident.

Michaels and Jernigan, by Leonard T. Jernigan, Jr., for plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner and Hartzog, by Ronald C. Dilthey, for defendant appellee.

WEBB, Judge.

We believe the trial court erred in directing a verdict for the defendant. It is well established that the owner or proprietor of a business is not an insurer of the safety of his customers, however, the proprietor has the duty to exercise ordinary care to keep the aisles and passageways of his store, where customers are expected to go, in a reasonably safe condition so as not to expose customers unnecessarily to danger, and to give warning of hidden dangers and unsafe conditions of which he knows or, in the exercise of reasonable supervision and inspection, should know. *See Long v. Food Stores*, 262 N.C. 57, 136 S.E. 2d 275 (1964); *Powell v. Deifells, Inc.*, 251 N.C. 596, 112 S.E. 2d 56 (1960); *Lee v. Green and Co.*, 236 N.C. 83, 72 S.E. 2d 33 (1952). A proprietor is charged with knowledge of an unsafe condition on his premises created by his own negligence, or the negligence of his employee acting within

the scope of his employment, or of an unsafe condition of which his employee has notice. *Long, supra,* at 60, 136 S.E. 2d at 278.

Plaintiff contends defendant's employee, Mr. Franks, negligently created an unsafe and hazardous condition when he left the shopping cart containing the tilted, open box of grapes in the middle of the produce aisle unattended and failed to promptly inspect the area for fallen grapes and remove the cart from the produce aisle after the customer had selected her grapes. The evidence tends to show that the grapes on which plaintiff slipped came from the open box in the shopping cart rather than from the produce counter. Most likely, the grapes were dropped on the floor by a customer though it is conceivable that the grapes fell out of the box as Mr. Franks pushed the cart down the aisle or when he stopped the cart. Either way, the jury could reasonably infer that Mr. Franks' action in putting the cart in such a position caused the ultimate hazard of grapes on the floor and thus proximately caused plaintiff's accident.

Mr. Franks was aware that customers rummage through produce looking for the freshest items, which can cause produce to fall on the floor, and he knew that produce on the floor can cause serious accidents. He knew at least one customer, the customer requesting the freshest grapes, would be handling the grapes that were in the shopping cart, and should have realized that other people were likely to handle the grapes also because the store was having a special on grapes that day, and the grapes on the display counter were not as fresh as those in the shopping cart. It was the busiest day of the week for the store and the beginning of its rush hour; therefore, it was foreseeable that numerous people might handle the grapes.

Given such circumstances, we believe a reasonable man would have foreseen that there was a substantial risk that customers would accidentally drop some grapes on the floor around the shopping cart and that someone might slip on them. It was also foreseeable that the risk of an accident was greater than usual because of the number of people expected to be in the store at the time, and because the shopping cart was placed in the middle of the produce aisle where customers would not expect to find dropped produce on the floor. Nevertheless, Mr. Franks left the shopping cart in the aisle unattended and did not return to in-

spect the area after the customer had selected her grapes to see if any grapes had been dropped on the floor. He did not place astroturf mats around the cart to reduce the risk of an accident as instructed by the procedure manual, nor did he take any other precautionary measure to protect the customers from the potential hazard. In addition, one could reasonably infer from the manager's comment, "I've told them and told them not to bring these things out here until they're ready to be put up," that it was not a safe practice to leave a cart containing produce in the middle of the aisle as was done here, and that the employees were aware of this. We believe the jury could reasonably infer from the evidence that defendant failed to maintain the aisles of its store in a reasonably safe condition; therefore, the question of defendant's negligence should have been submitted to the jury.

Moreover, this is not a case where the defendant is entitled to a directed verdict based on the plaintiff's contributory negligence. The basic issue with respect to contributory negligence is whether the evidence shows, as a matter of law, that the plaintiff failed to keep a proper lookout for her own safety.

> "When a defendant moves for a directed verdict on the grounds that the evidence establishes plaintiff's contributory negligence as a matter of law the question before the trial court is whether 'the evidence taken in the light most favorable to plaintiff establishes her negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury rather than the trial judge.' (Citations omitted.)"

Norwood v. Sherwin-Williams Co., 303 N.C. 462, 468-69, 279 S.E. 2d 559, 563 (1981).

Here, plaintiff said she was looking where she was going, that the grapes were pale green and very small, and that the color of the floor tile was a light color with some green in it. The evidence shows the grapes were located near the shopping cart in the middle of the aisle where customers are less likely to expect to find loose produce on the floor. We do not believe this evidence allows no reasonable inference except plaintiff's negligence: that a

reasonably prudent and careful person exercising due care for his or her safety would have looked down and seen the grapes on the floor, as is required to support a directed verdict for defendant on this issue. *See Norwood, supra*, at 469, 279 S.E. 2d at 563.

We hold that plaintiff presented sufficient evidence to submit the issues of defendant's negligence and her contributory negligence to the jury, and that the entry of a directed verdict for defendant was improper. The judgment of the trial court is

Reversed.

Judges WELLS and WHICHARD concur.

STATE OF NORTH CAROLINA v. RAYMOND CHARLES CREASON

No. 8319SC899

(Filed 5 June 1984)

1. **Constitutional Law § 67— confidential informant—disclosure of identity not required**

The trial court was not required by G.S. 15A-978(b) or by constitutional decisions to compel the State to disclose the identity of a confidential informant so that defendant could attempt to show by the informant that an affidavit for a search warrant was false.

2. **Narcotics § 5— guilty of possessing LSD with intent to sell or deliver—improper verdict**

An indictment alleging that defendant possessed LSD "with intent to sell or deliver" alternatively charged two crimes of possessing LSD with intent to sell it and possessing LSD with intent to deliver it, and a verdict finding defendant guilty of possession of LSD with intent to sell or deliver it was uncertain and insufficient to convict defendant of either of the crimes charged since some jurors could have found defendant guilty of possessing the LSD with intent to sell while others could have found him guilty of possessing it with intent to deliver. However, since the verdict shows that the jurors unanimously found that defendant feloniously possessed the LSD, the verdict will be treated as a verdict convicting defendant of the lesser-included offense of possession of LSD.

APPEAL by defendant from *Long, James M., Judge.* Judgment entered 30 March 1983 in Superior Court, ROWAN County. Heard in the Court of Appeals 15 February 1984.

Tried under two separate indictments, defendant was convicted of possession of both marijuana and LSD with intent to sell or deliver, in violation of G.S. 90-95(a)(1).

On 28 October 1982 Deputy M. W. Shue of the Rowan County Sheriff's Department received information from vice officers in the Lexington Police Department that the defendant was actively engaged in the selling of illegal drugs from his residence in Rowan County. The Lexington officers put Deputy Shue in touch with an informant who had previously proven to be reliable, and Shue sent him to defendant's house to buy drugs if any were for sale. Thereafter, the informant bought some LSD from defendant and reported that defendant still had both LSD and marijuana, as well as other illegal drugs, on his premises. Using this information, Deputy Shue obtained a search warrant, and assisted by other officers, searched defendant's house and found a considerable amount of marijuana and LSD. Prior to trial defendant moved under G.S. 15A-925 for a bill of particulars to require the State to disclose the name, address, and occupation of the confidential informant, and also moved under G.S. 15A-974 to suppress all evidence obtained during the search. At the hearing thereon, Deputy Shue and the two Lexington police officers who put him in touch with the informant testified for the State; and Stephen Young testified for the defendant, claiming they were together at a bar in Woodlief at the time when the informant was allegedly at defendant's house buying and observing illegal drugs.

Attorney General Edmisten, by Assistant Attorney General James Peeler Smith, for the State.

Appellate Defender Stein, by Assistant Appellate Defenders Ann B. Petersen and James A. Wynn, Jr., for defendant appellant.

PHILLIPS, Judge.

[1] Defendant's main contention is that the trial judge erred in denying his motion to require the State to disclose the name of the confidential informant. The contention is not grounded upon the claim that the informant was a transactional witness whose identity was discoverable under *Roviaro v. United States*, 353 U.S. 53, 1 L.Ed. 2d 639, 77 S.Ct. 623 (1957), but upon the claim that without the information he cannot show that the search war-

rant was without proper support and therefore void. Although an affidavit made to obtain a search warrant carries a presumption of validity, it can be challenged after the warrant has been issued; but to succeed, the challenger must establish that a false statement was included, either to the affiant's knowledge or with reckless disregard for the truth, and that the false statement was necessary for a finding of probable cause. Under *Franks v. Delaware*, 438 U.S. 154, 57 L.Ed. 2d 667, 98 S.Ct. 2674 (1978), if a defendant offers to prove the invalidity of a search warrant, he must be given the opportunity at a hearing before the judge to establish the truth of his claim by a preponderance of the evidence; and if he succeeds, the fruits of the search must be excluded. Judge Long conducted the hearing required by *Franks*, but found that defendant had failed to prove that the affidavit for the search warrant was false. The finding as such is not attacked by defendant, which would have been unavailing in any event, since it is supported by competent evidence. Instead, the bootstrap claim is made that disclosure was required because without that information he cannot prove that the search warrant affidavit was false. We disagree and thus overrule this assignment of error.

In this state, whether an informant's identity must be disclosed is governed in large part by G.S. 15A-978, which in pertinent part provides as follows:

> (b) In any proceeding on a motion to suppress evidence pursuant to this section in which the truthfulness of the testimony presented to establish probable cause is contested and the testimony includes a report of information furnished by an informant whose identity is not disclosed in the testimony, the defendant is entitled to be informed of the informant's identity unless:
>
> (1) The evidence sought to be suppressed was seized by authority of a search warrant or incident to an arrest with warrant; or
>
> (2) There is corroboration of the informant's existence independent of the testimony in question.
>
> The provisions of subdivisions (b)(1) and (b)(2) do not apply to situations in which disclosure of an informant's identity is required by controlling constitutional decisions.

Manifestly, disclosure in this instance was not required under either subdivision, since defendant was attempting to suppress evidence seized pursuant to a search warrant, and Deputy Shue's version of the informant's participation was corroborated; not only by the testimony of the two Lexington officers that had been using the informant, but also by the fact that the contraband that the informant described was found on defendant's premises, along with the marked bills that the deputy gave the informant to buy the drugs with. Thus, if defendant was entitled to disclosure, it was only because of "controlling constitutional decisions." No constitutional decision which requires that a defendant be apprised of a confidential informant's identity so that he may prepare for a *Franks* hearing as to the falsity of a search warrant affidavit has been found by us, and no such decision has been called to our attention by counsel. In the absence of an authoritative directive to that effect, we decline to rule that the Constitution requires disclosure under the circumstances presented.

The importance of confidential informants in the enforcement of narcotics laws has been extensively discussed in many cases and need not be repeated here. *See McCray v. Illinois*, 386 U.S. 300, 18 L.Ed. 2d 62, 87 S.Ct. 1056, *reh. denied*, 386 U.S. 1042, 18 L.Ed. 2d 616, 87 S.Ct. 1474 (1967). Disclosure of a confidential informant's identity has been required only when the issue involved was guilt or innocence and the informant participated in the alleged criminal transaction. *See Roviaro v. United States*, *supra*. The reasons for disclosure are less compelling when the question is the preliminary one of probable cause for conducting a search, *State v. Collins*, 44 N.C. App. 141, 260 S.E. 2d 650 (1979), *aff'd*, 300 N.C. 142, 265 S.E. 2d 172 (1980), and the defendant's guilt is so plain as to almost be indisputable. In this instance, disclosure could not facilitate the exoneration of an innocent man, but it could impede the enforcement of our drug laws. Under the circumstances, therefore, defendant's need for disclosure must yield to the State's need to preserve the confidentiality of its informant.

Defendant next contends that his right to a fair trial was prejudiced by the bad faith attempts by the prosecutor and Deputy Sheriff Shue to introduce evidence known to be inadmissible. Bypassing the fact that many of the questions and answers, now marked in the transcript with typed in exceptions, were not ob-

jected to as the rules require, the contention is without merit. The questions and answers concerned things found on defendant or in defendant's home, including the marked money and two collections of pills, but they were not found during the search authorized by the warrant, and the court refused to admit them. The proposed exhibits and the proffered testimony concerning them were harmless in our opinion. What was much more damaging, we think, were the quantities of LSD and marijuana that were received into evidence, rather than the other objects which were excluded.

[2] But the defendant's final contention, that the verdict on the LSD count does not support the judgment because it is ambiguous, is well taken. Since the illegal traffic in drugs, like other commerce, is kept going by a variety of different acts and functions, the General Assembly has made many of them unlawful. Except under certain circumstances not relevant hereto, G.S. 90-95(a)(1) makes it unlawful for any person "[t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance." Since manufacturing, selling and delivering are not the same acts, this statute establishes six different crimes—three based on the different acts of manufacturing, selling or delivering a controlled substance, and three more based on possessing a controlled substance with the intent to either manufacture, sell or deliver it. G.S. 90-95(d)(1) closes the circle, as it were, by making the mere possession of LSD and certain other controlled substances, if unauthorized, a lesser included felony of the greater offense banned by the preceding section. *State v. Smith*, 27 N.C. App. 568, 219 S.E. 2d 516 (1975). By its indictment, based on G.S. 90-95(a)(1), the State charged that defendant "feloniously did possess with intent to sell or deliver a controlled substance, namely 46 units of Lysergic Acid Diethylamide." Thus, two distinct crimes in the alternative were charged—possessing LSD with intent to sell it, or possessing LSD with intent to deliver it—and the verdict, in the same disjunctive form, was "Guilty of possession of Lysergic Acid Diethylamide with intent to sale [sic] or deliver it." Since so far as the record shows, some jurors could have found defendant guilty of possessing the LSD with intent to sell, while others could have found him guilty of possessing it with intent to deliver, and it does not positively appear, as our law requires, that all twelve jurors found him guilty

of the same offense, the verdict is uncertain and therefore insufficient to support his conviction of either of the crimes charged. *United States v. Gipson*, 553 F. 2d 453 (5th Cir. 1977); *State v. Albarty*, 238 N.C. 130, 76 S.E. 2d 381 (1953). But since the verdict shows that the jurors unanimously found that defendant feloniously possessed the LSD, rather than order a new trial on this count, we choose, as the law authorizes in such situations, to regard the verdict as convicting defendant of the lesser included offense of possession of LSD, which issue was also before the jury, and remand for re-sentencing accordingly. *State v. Baldwin*, 61 N.C. App. 688, 301 S.E. 2d 725 (1983).

In Case No. 82CRS12266, in which defendant was convicted of felonious possession of marijuana with intent to sell *and* deliver, we find

No error.

In Case No. 82CRS12267, in which defendant was convicted of possessing Lysergic Acid Diethylamide with the intent to sell *or* deliver, we remand for entry of judgment as on a verdict of the lesser included offense of possession of LSD.

Remanded for re-sentencing.

Judges WELLS and BRASWELL concur.

AGL, INC. T/A MOTHER FLETCHER'S, PETITIONER v. N.C. ALCOHOLIC BEVERAGE CONTROL COMMISSION, RESPONDENT, AND THE TOWN OF BLOWING ROCK, INTERVENOR-RESPONDENT

No. 8310SC846

(Filed 5 June 1984)

Intoxicating Liquor § 2.4— repeal of malt beverage and unfortified wine permits— no error

A trial court properly affirmed an order issued by the North Carolina Alcoholic Beverage Control Commission cancelling petitioner's malt beverage and unfortified wine permits where petitioner failed to meet the qualification of G.S. 18B-1000(6) in that its gross receipts from alcoholic beverages in

January through July of 1982 were greater than its gross receipts from non-alcoholic beverages and food. There was no merit to petitioner's contention that its rights must be determined under the statute in effect at the time of the election concerning alcoholic beverages in its town, G.S. 18A-52(k). G.S. 18B-100 and Sections 10 and 11 of Chapter 412.

APPEAL by petitioner from *Bailey, Judge.* Judgment entered 9 March 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 7 May 1984.

Petitioner appeals from a trial court order affirming an order issued by respondent, the North Carolina Alcoholic Beverage Control Commission (the Commission), cancelling petitioner's malt beverage and unfortified wine permits.

The pertinent facts are:

Following a local election in 1977 in which citizens of Blowing Rock voted to allow on-premises sales of beer and wine by Grade A restaurants and hotels, petitioner, in 1980, obtained permits to sell beer and wine. Petitioner held such permits until December 1982 when the Commission found that petitioner did not meet the statutory definition of "restaurant" and was not qualified to hold said permits. Petitioner then instituted court action to reverse the Commission's decision. Before trial, the Town of Blowing Rock was allowed to intervene as a party respondent.

Parker, Sink, Powers, Sink & Potter, by William H. Potter, Jr., for petitioner-appellant.

David S. Crump, Special Deputy Attorney General, for respondent North Carolina ABC Commission.

Clement & Miller, by Charles E. Clement, for respondent-intervenor Town of Blowing Rock.

VAUGHN, Chief Judge.

I.

The issue on this appeal is whether the Commission erred in cancelling petitioner's permits to sell beer and wine after finding that petitioner was not a *bona fide* restaurant under G.S. 18B-1000(6). Our scope of inquiry in reviewing the Commission's application and interpretation of G.S. 18B-1000(6) is governed by

the Administrative Procedure Act, G.S. 150A-51(4). Pursuant to G.S. 150A-51(4), a court reviewing the Commission's interpretation of a statute may employ *de novo* review and substitute its own judgment for that of the Commission. *Savings and Loan League v. Credit Union Comm.*, 302 N.C. 458, 276 S.E. 2d 404 (1981). After reviewing the legislative history of the Alcoholic Beverage Control Laws and based upon the record, we have found no error in the Commission's determination.

Chapter 18A of the General Statutes, enacted to regulate the sale of alcoholic beverages, was in effect in 1980 when petitioner received its permits. G.S. 18A-52(k) defined restaurant, in pertinent part, as "a business . . . engaged primarily and substantially in preparing and serving meals." Following the 1981 Session Laws, effective 1 January 1982, Chapter 18A of the General Statutes was repealed and replaced by Chapter 18B, which contains in G.S. 18B-1000(6) a definition of restaurant substantially similar to the definition in G.S. 18A-52(k), but with an additional qualification. *See* 1981 N.C. Sess. Laws, Ch. 412, § 2. G.S. 18B-1000(6), in pertinent part, provides: "To qualify as a restaurant, an establishment's gross receipts from food and non-alcoholic beverages shall be greater than its gross receipts from alcoholic beverages." The facts here showed that petitioner did not meet the new qualification in the G.S. 18B-1000(6) definition of restaurant since its gross receipts from alcoholic beverages in January through July 1982 were greater than its gross receipts from non-alcoholic beverages and food.

II.

Petitioner contends that the proper statute to apply in determining whether petitioner is a restaurant qualified to sell beer and wine is G.S. 18A-52(k) and that the Commission erred in applying G.S. 18B-1000(6). We disagree.

Generally, the unconditional repeal of a statute takes away rights given by the repealed statute. *In re Incorporation of Indian Hills*, 280 N.C. 659, 186 S.E. 2d 909 (1972). The legislation repealing Chapter 18A and enacting Chapter 18B of the General Statutes is contained in Chapter 412 of the 1981 Session Laws. Section 11 of Chapter 412 prescribes the unconditional repeal of Chapter 18A and adoption of Chapter 18B. In pertinent part, Section 11 provides: "This act shall become effective January 1, 1982

. . ."[1] Pursuant to this provision, as of 1 January 1982, petitioner's permits, though perhaps valid under prior law, became invalid under G.S. 18B-1000(6).

An exception to the general rule regarding the unconditional repeal of a statute occurs when the repealing act contains a "savings clause" preserving pre-existing rights. *See Heath v. Board of Commissioners*, 292 N.C. 369, 233 S.E. 2d 889 (1977); *see also id.* Petitioner contends, in effect, that Section 10 of Chapter 412 contains a "savings clause" preserving the validity of its permits issued under the old definition of restaurant in G.S. 18A-52(k).

After examining the language in Section 10 and in light of the recognized principle in favor of construing provisions with reference to each other, we disagree with petitioner's proposed interpretation. *See Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980). Section 10 provides:

> All sales of alcoholic beverages which were approved in elections held before the effective date of this act remain valid under the terms of those elections except as G.S. 18B-603 allows the issuance of permits that were not authorized under the comparable provisions of Chapter 18A. Any ABC permit issued before the effective date of this act remains valid until its expiration date, or until suspended or revoked or replaced with the equivalent permit issued under Chapter 18B.

1981 N.C. Sess. Laws, Ch. 412, § 10. We interpret this section as authorizing the sale of alcoholic beverages approved in elections held before the effective date of Chapter 18B. Section 10, in this case, preserves the effect of the 1977 election by the Town of Blowing Rock to permit on-premises sales of beer and wine by Grade A restaurants and hotels. It does not, however, preserve the validity of petitioner's permits. Section 10 specifically provides that permits like petitioner's issued before the enactment of Chapter 18B become invalid upon expiration, *or* upon suspension, revocation, or replacement. In this case, petitioner's permits became invalid upon the Commission's justifiable revocation.

1. Pursuant to Section 11, the provisions in Chapter 18B concerning city and county elections for the sale of alcoholic beverages became effective upon ratification.

In construing G.S. 18B-1000(6) so as to apply to petitioner, we have effectuated the avowed legislative intent underlying Chapter 18B to "establish a uniform system of control over the sale . . . of alcoholic beverages in North Carolina, and to provide procedures to insure the proper administration of the ABC laws under a uniform system throughout the State." G.S. 18B-100. In affirming the revocation of petitioner's permits, we have heeded the legislative mandate to liberally construe Chapter 18B "to the end that the sale . . . of alcoholic beverages shall be prohibited except as authorized in this Chapter." G.S. 18B-100; *see Pie in the Sky v. Board of Alcoholic Control*, 55 N.C. App. 655, 286 S.E. 2d 649, *review denied and appeal dismissed*, 305 N.C. 760, 292 S.E. 2d 575 (1982).

In *Pie in the Sky, supra*, after analyzing the legislative intent underlying the Alcoholic Beverage Control Laws as expressed in G.S. 18A-1, the Chapter 18A counterpart to G.S. 18B-100, we affirmed an order by the Commission like the one here revoking the permits of an establishment in the Town of Blowing Rock on the grounds that such establishment did not qualify as a *bona fide* restaurant under the effective statute, G.S. 18A-52(k). Like our application of G.S. 18A-52(k) to the establishment in *Pie in the Sky*, our application of G.S. 18B-1000(6) to petitioner's establishment here accords with the avowed legislative purpose underlying the enactment of the Alcoholic Beverage Control Laws. G.S. 18B-100, *et seq.*

Petitioner attempts to distinguish *Pie in the Sky* on the grounds that G.S. 18A-52(k) became effective *before* the Town's 1977 election whereas G.S. 18B-1000(6) did not become effective until 1982, five years *after* the Town's election. Petitioner contends, in effect, that its rights must be determined under the statute in effect at the time of the election, in this case, G.S. 18A-52(k). Petitioner's contention, however, has no merit here.

The timing of an election, though significant in determining rights pursuant to G.S. 18A-52(k) is irrelevant in determining rights pursuant to G.S. 18B-1000(6). The 1977 Session Laws enacting G.S. 18A-52(k) provide in pertinent part: "This act shall apply only to those counties or municipalities wherein elections are held under G.S. 18A-52 *subsequent* to the ratification of this act." 1977 N.C. Sess. Laws, Ch. 149, § 2. (Emphasis added.) Because of this

provision, it was necessary to our holding in *Pie in the Sky* to find that the election had occurred after the effective date of G.S. 18A-52(k). The 1981 Session Laws enacting Chapter 18B contain no similar provision limiting the application of the act. By express legislative mandate, G.S. 18B-1000(6), effective 1 January 1982, prohibits the authorized sale of beer and wine by petitioner.

III.

We have examined petitioner's other assignments of error and have determined that they are without merit.

We find no merit in petitioner's contention that the trial court order violated its due process rights. The right to sell beer and wine has its foundation in a validly issued permit and does not exist as a constitutional or property right. *Hursey v. Town of Gibsonville*, 284 N.C. 522, 202 S.E. 2d 161 (1974).

Affirmed.

Judges BRASWELL and EAGLES concur.

KATHLEEN COBLE PATTERSON (WIDOW); AGNES COBLE WHITE AND HUSBAND, ARTHUR I. WHITE; HELEN COBLE BYERS AND HUSBAND, DILLARD M. BYERS; REBECCA COBLE ROBERTSON AND HUSBAND, WILSON A. ROBERTSON; CORNELIA COBLE STANTON AND HUSBAND, ROBERT G. STANTON, AND ROSS COBLE AND WIFE, NOTIE J. COBLE v. WACHOVIA BANK & TRUST COMPANY, N.A., AS TRUSTEE

No. 8315SC351

(Filed 5 June 1984)

Deeds § 9— deeds of gift—deeds reciting consideration and under seal

The evidence supported the trial court's determination that deeds from deceased's sons to deceased were deeds of gift and void because they were not recorded within two years after their execution as required by G.S. 47-26, and that deceased thus did not own the land in question at her death, although the deeds each recited a consideration of $10 and were under seal.

APPEAL by plaintiffs from *McLelland, Judge.* Judgment entered 24 September 1982 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 17 February 1984.

The purpose of this declaratory judgment proceeding is to establish the ownership of approximately 106.7 acres of land that all the parties admit was owned at one time by the late Mattie Thompson Coble. Plaintiffs are six of her seven children and their spouses, if any; defendant Trustee represents the interest of the other child, Cecil P. Coble, who died 18 April 1980. Plaintiffs alleged, in substance, that: Mattie Thompson Coble owned a farm consisting of approximately 297 acres at the time of her death on 11 October 1978; they own an undivided 6/7ths of it by inheritance and defendant's testator and trustor owns the other 1/7th; and their title is wrongfully clouded by defendant's claim that Cecil P. Coble, whose interest it represents, owned approximately 106.7 acres of the land when he died. In its answer, defendant denied that Mattie Thompson Coble owned any land at all at her death, and alleged, in substance, that: All the land involved in this case was conveyed to her two sons, Ross Coble and Cecil P. Coble, many years earlier; and they thereafter voluntarily partitioned it between them in such a manner that Cecil became the owner of the 106.7 acres referred to in the complaint and Ross became the owner of the rest. The case was heard by Judge McLelland sitting without a jury.

The parties stipulated to many facts, including the following: For many years before 8 February 1962, Mattie Thompson Coble owned more than 300 acres of land and had five grown daughters and two grown sons, who are either parties to or represented in this case. On that day, 8 February 1962, Mattie Thompson Coble did the following three things in regard to her property: (1) she deeded certain of her real property not involved in this lawsuit to her daughter, Cornelia; (2) she deeded all the rest of her real estate, amounting to approximately 297 acres, to her sons, Cecil and Ross Coble, jointly in fee simple, subject only to her life estate; and (3) she executed her will. In the will she bequeathed all of her personal property in equal amounts to her five daughters, left nothing to her two sons, and explained the dispositions so made as follows:

> I desire to say that the reason that has prompted me to leave all of my earthly possessions to my five daughters and none to my two sons (Cecil P. Coble and Ross Coble), is due to the fact that I have heretofore by deed conveyed all of my

> lands to my said two sons, and that they have therefore received more than their equal share of my said estate.

Within a few weeks, however, before the month of February, 1962 was over, Cecil P. Coble and Ross Coble, joined by their wives, executed separate warranty deeds conveying their undivided one-half interests in the land received from their mother, Mattie Thompson Coble, back to her. Each deed contained a recital that it was executed "in consideration of the sum of Ten Dollars ($10.00) and other valuable considerations." The deed from Mrs. Coble to her sons was duly recorded on 19 April 1962, a few weeks after it was executed; but the deeds from the sons back to her were not recorded until more than eighteen years later, on 29 August 1980, which was also after both Mattie Thompson Coble and Cecil P. Coble had died. Sixteen months or so after the death of Mattie Thompson Coble, on 12 February 1980, Ross Coble and Cecil Coble, with the joinder of their wives, executed and delivered certain quitclaim deeds to each other. By the two quitclaim deeds that Ross Coble and his wife executed, they remised, released and conveyed to Cecil and his wife all their interest in approximately 106.7 acres of the land involved in this case. By the two quitclaim deeds that Cecil and his wife executed, they remised, released and conveyed all their interest in the remaining acreage, approximately 191 acres, to Ross and his wife. Shortly thereafter, on 18 April 1980, Cecil P. Coble died, leaving a will that conveyed his real property to defendant bank, subject to certain trusts. The quitclaim deeds from Ross Coble and his wife to Cecil Coble and his wife were recorded on 12 June 1980; the quitclaim deeds from Cecil Coble and his wife to Ross Coble and his wife were recorded on 6 August 1980.

All the documents stipulated to were received in evidence, as was the testimony of certain of the plaintiffs and others. At the end of the evidence, after making various findings of fact and conclusions of law, Judge McLelland adjudged that Mattie Thompson Coble had no interest in the 106.7 acres of land referred to and that its fee simple owner, subject to the will of Cecil P. Coble, is the defendant Trustee.

Charles N. Stedman for plaintiff appellants.

Petree, Stockton, Robinson, Vaughn, Glaze and Maready, by Jackson N. Steele and Jeffrey C. Howard, for defendant appellee.

PHILLIPS, Judge.

The basis for adjudging that Mattie Thompson Coble did not own the land involved at her death is that the deeds from Ross and Cecil Coble back to her were void, because they were deeds of gift and were not recorded within two years after their execution, as G.S. 47-26 requires. Since the deeds in question admittedly were not recorded until more than eighteen years after their execution and G.S. 47-26 plainly states, without exception or equivocation, that a deed of gift that is not recorded within two years after execution is void, the preliminary question that arises is whether the court's conclusion of law that the deeds were deeds of gift is supported by adequate findings of fact. The trial court's finding of fact pertinent thereto was as follows:

> (13) None of the conveyances [referred to] . . . were supported by the payment of consideration in money or money's worth, nor was consideration exchanged in the form of a promise for a promise or in any other manner.

This finding so clearly supports the conclusion that the deeds were deeds of gift, we proceed to the remaining and decisive question, which is whether the findings are supported by competent evidence. If they are, the findings are conclusive. *Brooks v. Brooks*, 12 N.C. App. 626, 184 S.E. 2d 417 (1971). In our opinion, the finding that the deeds were without consideration is supported by competent evidence and the judgment appealed from must be affirmed.

Under the provisions of G.S. 105-228.28, *et seq.*, every person who deeds real estate away for a consideration must pay the county an excise tax based on the consideration involved, but no tax is required of those who give property away. Yet, though the evidence shows that the property was worth over $90,000, and the plaintiff Ross Coble, the only living person with personal knowledge as to the consideration involved, if there was any, is the one who had the deeds eventually recorded, no excise stamps

were ever affixed to the deeds by the grantors. Nor did Ross Coble, who testified at the hearing, or anyone else, present any evidence that any payment or promise of payment was made or received because of the deeds. He did testify, however, though not very clearly, and apparently not very convincingly, at least as the trial judge heard it, that he and Cecil deeded the land back to their mother for her to hold for each of them to farm during his lifetime, and to distribute to her surviving issue after both of them died. Though this testimony does tend to support the contention that the deeds were given in consideration of Mattie Coble's promise to hold the land in trust, its weight and credibility was for the trial court, who categorically found that the deeds were not given in exchange for a promise or consideration of any kind. The judge's evaluation of this evidence is understandable, particularly in view of the other pertinent evidence that was before him. Their mother, who was 24 years older than Cecil and 28 years older than Ross, could hardly have been reasonably expected to hold the land until their deaths; she did not revise her will to dispose of the land at her death; and when she did die and her will was probated, neither Ross nor any of the other children objected to the land not being included in her estate. Not long thereafter, Ross and Cecil hired a surveyor to map and divide the land—and through the mutual quitclaim deeds, in effect, agreed to and did partition it. Finally, after his brother Cecil died, as his own testimony shows, Ross expressed interest in buying the land held by the defendant Trustee, if it could be obtained at a reasonable price, and did not begin contending that he and the other children owned the land until the Bank put it on the market for sale at a beginning price of $90,000.

The plaintiffs' several contentions that various evidence was improperly received or rejected are without merit and require no discussion. Their last reliance, likewise unwarranted, is upon the legal implications that arise from the recorded facts that the deeds recited a consideration and also were under seal. While it is true, as plaintiffs contend and numerous appellate decisions of this Court and our Supreme Court have stated, that recitals in a deed are presumed to be correct, that is only a presumption and the law does not stop there. Under suitable circumstances our law has long permitted deed recitals of all kinds to be overcome by proof, including even the recital that it is a deed; and deed

recitals of consideration have been overcome by proof in many cases. *See Penninger v. Barrier*, 29 N.C. App. 312, 224 S.E. 2d 245, *rev. denied*, 290 N.C. 552, 226 S.E. 2d 511 (1976); *Harris v. Briley*, 244 N.C. 526, 94 S.E. 2d 476 (1956). Furthermore, even if the consideration recitals in the two deeds to Mattie Thompson Coble had either been accepted as, or proven to be, true, that would not necessarily require, as plaintiffs contend, a reversal of the judgment appealed from. Both reason and eminent authority suggest otherwise. In *Kirkpatrick v. Sanders*, 261 F. 2d 480 (4th Cir. 1958), *cert. denied*, 359 U.S. 1000, 3 L.Ed. 2d 1029, 79 S.Ct. 1138 (1959), deeds conveying two parcels of Wilkes County land, each worth more than $20,000, were held to be deeds of gift under G.S. 47-26, even though it appeared that the recited considerations of $100 in one deed and $1 in the other were actually paid. In language that reason can hardly refute, Chief Judge Sobeloff stated: "The District Judge correctly held that, in any event, the payment of these nominal amounts would not convert the gifts to transfers for a valuable consideration." *Id.* at 482. Thus, we doubt that the trial judge would have concluded, or been required to conclude, that the deeds involved here were not deeds of gift if the parties had even stipulated that the $20 recited in the two deeds was paid for land that was worth $90,000.

Finally, though our courts have also stated in many cases that a seal on a deed "imports" consideration or gives rise to a presumption that consideration was present, that presumption, too, from the nature of things, is overcomeable by proof. If not, there would be no such thing in this State as a deed of gift and the Legislature would have done a vain and foolish thing in enacting G.S. 47-26. Because one of the classic requirements for a deed in this State has always been and still is that the paper be under seal. *Turlington v. Neighbors*, 222 N.C. 694, 24 S.E. 2d 648 (1943); Hetrick, *Webster's Real Estate Law in North Carolina* § 197 (rev. ed. 1981).

Affirmed.

Judges WELLS and BRASWELL concur.

STATE OF NORTH CAROLINA v. ROY RHINEHART

No. 8330SC1124

(Filed 5 June 1984)

1. **Rape and Allied Offenses § 4.3— evidence of prosecutrix's prior consensual intercourse with former boyfriend properly excluded**

In a prosecution for second-degree rape and second-degree sexual offense, evidence of the complainant's prior consensual intercourse with her former boyfriend earlier in the evening of defendant's alleged offenses did not qualify for admission under the closely resembling pattern exception of G.S. 8-58.6(b)(3). It was evidence of a single episode, of which defendant had no knowledge, in a situation at least closely akin to "dating-type circumstances." As such, cross-examination regarding it properly was excluded under G.S. 8-58.6(c) as "irrelevant to any issue in the prosecution." G.S. 8-58.6(b).

2. **Rape and Allied Offenses § 6— second-degree rape—instructions on consent sufficient**

In a prosecution for second-degree rape and second-degree sexual offense, the trial court's instructions on consent were clearly sufficient to convey the substance of defendant's request for a charge that consent is a defense to the crime of rape.

3. **Criminal Law §§ 46, 112— lack of instructions regarding cessation of flight proper**

There was no error in the trial court refusing to instruct, after its instructions concerning evidence of flight as an admission or showing consciousness of guilt, that the jury could consider the cessation of flight and return in determining whether the combined circumstances amounted to an admission or show of consciousness of guilt.

APPEAL by defendant from *Kirby, Judge.* Judgment entered 9 June 1983 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 8 May 1984.

Defendant appeals from a judgment of imprisonment entered upon a jury verdict finding him guilty of second degree rape and second degree sexual offense.

Attorney General Edmisten, by Associate Attorney Newton G. Pritchett, Jr., for the State.

Noland, Holt, Bonfoey & Davis, P.A., by J. Lynn Noland, for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court erred in denying him the opportunity to cross-examine the complainant regarding her prior sexual conduct with her former boyfriend on the night of the alleged rape and sexual offense. Evidence adduced at an *in camera* hearing pursuant to G.S. 8-58.6 established that earlier in the evening of the alleged offenses the victim had driven her former boyfriend, whom she had dated for four years, from a night spot to his home, and that she had engaged in sexual intercourse with him while there. The court ruled, following the hearing, that the complainant's consensual intercourse earlier that night was not relevant for any purpose other than to attack her credibility. It thus excluded the evidence pursuant to G.S. 8-58.6(c).

Defendant cites *State v. Fortney*, 301 N.C. 31, 269 S.E. 2d 110 (1980), and *State v. Younger*, 306 N.C. 692, 295 S.E. 2d 453 (1982), in support of his argument that the court erred in excluding this evidence. In *Fortney* prior sexual conduct of the complainant on the night of the alleged rape was not at issue. In *Younger*, while such conduct was at issue, the holding that evidence thereof should have been admitted was not based on its relevancy and probativeness, but on its capacity to impeach the complainant's credibility in light of a prior inconsistent statement. We find neither *Fortney* nor *Younger* controlling.

The main thrust of defendant's argument is that the evidence was admissible under the exception to the rape shield statute which allows evidence of the sexual behavior of the complainant if it

> [i]s evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented.

G.S. 8-58.6(b)(3). This Court found evidence of such a pattern, and held that it should have been admitted, in *State v. Shoffner*, 62 N.C. App. 245, 302 S.E. 2d 830 (1983). The evidence excluded there "suggest[ed] that the prosecuting witness was the initiator, the

aggressor, in her sexual encounters." *Id.* at 248, 302 S.E. 2d at 832-33. Her "*modus operandi* was to accost men at clubs, parties (public places) and make sexual advances by putting her hands 'all over their bodies.'" *Id.* at 248, 302 S.E. 2d at 833. Seven witnesses, including the defendants, testified "that on the date of the alleged offense the prosecuting witness came to the residence of defendants and while there made sexual advances [toward one defendant] by putting her hand inside [his] pants, and suggested that the parties present have an orgy." *Id.* at 247, 302 S.E. 2d at 832. The evidence of the prosecuting witness's sexual behavior on past occasions was held to conform sufficiently to the defendants' version of what happened on the occasion of their alleged offenses that it should have been admitted under the closely resembling pattern exception of G.S. 8-58.6(b)(3).

Here, by contrast, there was no such evidence of prior sexually aggressive conduct on the part of the complainant, and defendant offered no evidence of prior sexual advances which the complainant made to him. The evidence showed only that earlier in the evening defendant and the complainant had danced together two or three times at a public bar; that "she was laughing and cuttin' up with him, jokin'"; and that "[s]he . . . just talked to him a lot."

Defendant suggests that the facts that earlier in the evening the complainant had driven her former boyfriend home, and had engaged in consensual intercourse with him, indicate that her sexual encounter with defendant, when she drove him home or to some other location several hours later, also was consensual. Uncontroverted evidence established, however, that defendant was unaware of the prior sexual encounter between the complainant and her former boyfriend. He thus could not have inferred consent therefrom. Further, as a Florida court noted in interpreting a statute similar to G.S. 8-58.6(b)(3), "one episode of sexual intercourse . . . before the assault hardly establishes a 'pattern of conduct or behavior' on the part of the victim; and the evidence of having slept with her boyfriend on one occasion bears no relation to the issue of whether the victim consented." *Hodges v. State*, 386 So. 2d 888, 889 (Fla. Dist. Ct. App. 1980); *see also Winters v. State*, 425 So. 2d 203, 204 (Fla. Dist. Ct. App. 1983) (a "few isolated instances" of consensual sexual activities between the complainant and other persons held not to present a "pattern of

conduct or behavior" sufficient to meet test of statute); *McElveen v. State*, 415 So. 2d 746, 748 (Fla. Dist. Ct. App. 1982) ("three specific instances of sexual activity" held "not so repetitive or frequent as to establish a 'pattern of behavior' "). Finally, this Court has held that a complainant's activity with "other third parties" in "dating-type circumstances" properly was found not material, and that the defendant had failed "to 'establish the basis of admissibility of such evidence' under subsection (b)(3)." *State v. Smith*, 45 N.C. App. 501, 503-04, 263 S.E. 2d 371, 373 (1980).

We hold that evidence of the complainant's prior consensual intercourse with her former boyfriend earlier in the evening of defendant's alleged offenses did not qualify for admission under the closely resembling pattern exception of G.S. 8-58.6(b)(3). It was evidence of a single episode, *Hodges, supra*, of which defendant had no knowledge, in a situation at least closely akin to "dating-type circumstances," *Smith, supra*. As such, cross-examination regarding it properly was excluded under G.S. 8-58.6(c) as "irrelevant to any issue in the prosecution." G.S. 8-58.6(b).

Defendant contends the court erred in excising from the complainant's written statement to a deputy sheriff regarding the events of the evening in question the sentence, "Charles Sutton [the former boyfriend] and I had intercourse when I took him home." For the reasons set forth above, we hold that the court properly withheld this evidence from the jury also.

[2] Defendant contends the court erred in denying his request that it instruct the jury as follows:

> I further charge you that consent is a defense to the crime of rape. If you should find that the complainant consented to the act or acts as charged or that the complainant behaved in such a manner as to lead the Defendant to reasonably believe that the complainant consented to the acts as charged then it would be your duty to find the Defendant not guilty of the charges herein.

"[T]he . . . court is not required to give a requested instruction in the exact language of the request. However, when the request is correct in law and supported by the evidence in the case, [it] must give the instruction in substance." *State v. Monk*, 291 N.C. 37, 54, 229 S.E. 2d 163, 174 (1976).

The court here instructed that before the jury could find defendant guilty, the State had to prove beyond a reasonable doubt, *inter alia*, "[t]hat [the complainant] did not consent [,] [i]t was against her will." It further instructed that "[c]onsent . . . induced by fear is not consent at law." We hold these instructions clearly sufficient to convey the substance of defendant's request for a charge that consent is a defense to the crime of rape.

The remainder of the requested instruction draws upon language of the closely resembling pattern exception of G.S. 8-58.6(b)(3). That provision establishes a standard for determining admissibility of evidence. It was not intended to, and does not, provide a legal definition of consent by the complainant with regard to sexual acts at issue in rape or sexual offense trials. The court thus properly declined to give this portion of the requested instruction.

[3] Defendant finally contends the court erred, following its instruction that "[e]vidence of flight may be considered . . . in determining whether the combined circumstances amount to an admission or show a consciousness of guilt," in refusing his request that it further instruct that: "Likewise, you may also consider the cessation of flight and return in determining whether the combined circumstances amount to an admission or show a consciousness of guilt."

A requested instruction is properly declined unless it is "correct in law and supported by the evidence in the case." *Monk, supra.* Defendant cites no authority, and we are aware of none, establishing the legal accuracy of his assertion that cessation of flight may be viewed as conduct influenced by an innocent conscience. Assuming such, *arguendo*, the evidence did not support the requested instruction. It showed that upon being informed that the complainant "[w]as going to get [him] for rape," defendant hitchhiked from Canton to Asheville, where he remained until the following day. He then "decided that [he]'d just come back home and . . . face up to it." Upon his return he was advised that a warrant awaited him and that he should call a certain number. Instead of doing so, he went to bed and remained there until the sheriff came to arrest him. His conduct thus was more indicative of mere inertia than of actual cessation of flight. We hold that the court was not required to give the requested instruction.

No error.

Judges WEBB and HILL concur.

WILLIE LEE FREEMAN v. RELIANCE INSURANCE COMPANY

GRADY LEE CHAMBLEE AND WIFE, LEVONIA E. CHAMBLEE v. RELIANCE INSURANCE COMPANY

No. 836SC824

(Filed 5 June 1984)

1. **Appeal and Error § 6.2— partial summary judgment—damages issue left for trial—premature appeal**

Defendant had no right of immediate appeal from an order of partial summary judgment which determined the issue of liability and left only the question of damages for trial.

2. **Appeal and Error § 6.2— partial summary judgment—determination of plaintiff's rights—right of immediate appeal**

One plaintiff could appeal from the entry of partial summary judgment which determined all of his rights and eliminated him from further participation in the lawsuit.

3. **Insurance § 129— fire insurance—cancellation by lender which financed premium**

A fire insurance policy was cancelled as to plaintiff owner at the time of a fire where plaintiff gave the lender which financed the policy premium a power of attorney to cancel the policy for failure of plaintiff to make timely installment payments, and the lender had mailed a cancellation notice to plaintiff and to the insurer prior to the fire.

APPEAL by plaintiff Freeman and defendant from *Barefoot, Judge.* Order entered 22 March 1983 in HERTFORD County Superior Court. Heard in the Court of Appeals 4 May 1984.

In 1981 Freeman owned a motel and restaurant which was subject to a note secured by a deed of trust held by Planters National Bank. In May, 1981, Freeman obtained a fire insurance policy from defendant, covering the motel and restaurant. The policy included a mortgagee clause, naming Planters National Bank as payee. In September, 1981, Planters National Bank assigned the note and deed of trust to plaintiffs Chamblee without

notifying defendant. The property was heavily damaged by fire on 31 December 1981, and the separate actions brought by plaintiffs Freeman and Chamblee against the defendant for recovery under the policy were joined for trial.

Thereafter, the trial court granted defendant's motion for summary judgment against Freeman on the ground that the insurance policy had been cancelled as to Freeman before the fire. The trial court also granted the Chamblees' motion for summary judgment against Freeman on the grounds that the deed of trust and note had been validly assigned to the Chamblees and that they were entitled to payment from defendant under the mortgagee clause of the insurance policy. The trial judge denied defendant's motion for summary judgment against the Chamblees on the ground that the insurance policy remained valid as to the Chamblees since they had not been given notice of the cancellation of the policy. The only issue left remaining for trial after entry of partial summary judgment was the amount of defendant's liability to the Chamblees under the insurance policy. At trial, the judge determined that defendant owed the Chamblees $35,391.03, which represents the unpaid portion of the note, less the sum recovered by the Chamblees after the foreclosure sale of the property. Plaintiff Freeman and defendant appealed from entry of the orders of partial summary judgment of the trial court, entered on 25 April 1983.

Law firm of Carter W. Jones, by Carter W. Jones, Charles A. Moore and Kevin M. Leahy, for plaintiff Freeman.

Cherry, Cherry, Flythe and Overton, by Thomas L. Cherry and Larry S. Overton, for plaintiffs Lee Chamblee and Levonia Chamblee.

Battle, Winslow, Scott & Wiley, P.A., by J. B. Scott, for defendant.

WELLS, Judge.

Orders of the superior court may be classified either as final judgments, which dispose of the cause as to all parties, or interlocutory orders, which are made during the course of the action and dispose of fewer than all issues or parties, *Veazey v. Durham*, 231 N.C. 357, 57 S.E. 2d 377 (1950). The proper means of

appealing from either a final judgment or a nonappealable interlocutory order is by entering an exception to the final judgment in the case. *Id.* If an interlocutory order affects a substantial right of a party, however, an immediate appeal is permitted. *Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240, *appeal dismissed*, 301 N.C. 92 (1980).

[1] In the case at bar, the orders of the trial court denying defendant's motion for summary judgment against the Chamblees and granting the Chamblees' motion for summary judgment against defendant determined the issue of liability and left only the question of damages for trial. Such an order does not affect a substantial right and is therefore not immediately appealable, *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979). Therefore, defendant Reliance could properly appeal only from the final judgment in the case. *Id.* Because defendant appealed only from the entry of partial summary judgment, its appeal must be dismissed, *Simmons v. C. W. Myers Trading Post, Inc.*, 68 N.C. App. 511, 315 S.E. 2d 75 (1984). (*Compare Steele v. Cincinnati Ins. Co.*, --- Ga. ---, 311 S.E. 2d 470 (1984) adopting the opposite rule in Georgia.)

[2] In contrast, the trial court's orders effectively determined all of plaintiff Freeman's rights and eliminated him from further participation in the lawsuit. The entry of partial summary judgment therefore affected a substantial right of Freeman and was immediately appealable. It appears that Freeman acted properly in appealing from the entry of summary judgment against him, and we turn therefore to consider the merits of his appeal.

It is well established that "[s]ummary judgment is the device whereby judgment is rendered if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, 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." *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). The party moving for summary judgment has the burden of establishing that no genuine issue of material fact remains and that he is entitled to judgment as a matter of law, *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982). The trial court's entry of summary judgment is subject to full review on appeal. *Id.*

[3] Freeman first contends that the trial court erred by granting defendant's motion for summary judgment against him, on the ground that a genuine issue of material fact remained concerning whether the insurance policy had been cancelled as to Freeman before the fire. The record before us shows unrebutted evidence that Freeman was late in paying several installments due to the company which financed his insurance policy and that letters of cancellation and reinstatement were issued. While the parties stress the importance of different events in their briefs, they do not appear to disagree concerning the existence of the aforementioned transactions. The dispute thus appears to turn upon the legal effect of acknowledged events rather than upon a question of fact.

We turn now to consider the merits of the trial court's legal conclusions based upon the record before us. Reliance issued the insurance policy to Freeman through its agent, Greene-Bryant Insurance Co., providing one year of insurance for $1,565.00. Freeman financed the amount due under the policy through IPBS, Inc. The financing agreement between Freeman and IPBS provided that IPBS would pay $1,565.00 to Reliance at the time the agreement was signed and that Freeman would repay IPBS in nine monthly installments. Under the financing agreement, IPBS was given authority to act as attorney-in-fact for Freeman, including the power to require Reliance to cancel the insurance policy, if payments by Freeman to IPBS were not timely made. The installment payments for September and October 1981 were not paid on time, and IPBS thereafter mailed a notice of cancellation to Greene-Bryant Insurance Company and Freeman. The cancellation notice was received about 10 November 1981, but IPBS reinstated the policy on 30 November 1981, when payment for the September and October premiums was made.

Freeman then failed to remit a timely payment for the installment due on 1 November 1981, and IPBS mailed a cancellation notice to Freeman and Greene-Bryant Insurance Company 10 days later, to become effective 28 November 1981. Freeman contends that the policy was reinstated by IPBS in a letter dated 9 December 1981, and that Freeman paid both the November and December installments. Freeman has failed to include the IPBS letter of 9 December 1981 in the record, however, and we are therefore unable to determine the legal effect of its contents.

Based on the evidence in the record, we hold that the policy had been cancelled as to Freeman at the time of the fire on 31 December 1981. IPBS possessed a valid power of attorney from Freeman and had the authority thereunder to cancel the insurance policy for failure by Freeman to make timely installment payments. We conclude, therefore, that no material issue of fact remained for trial and that entry of summary judgment against Freeman, in favor of defendant was proper as a matter of law.

Freeman next contends that the trial court erred in granting the plaintiffs Chamblees' motion for summary judgment against him, on the ground that a genuine issue of material fact remained concerning whether the Chamblees were entitled to collect under the mortgagee clause of the insurance policy. Our examination of the record in this case fails to disclose that Freeman has filed any claims against the Chamblees, or has in any way become a proper party to the lawsuit between the Chamblees and defendant. Because Freeman had made no claims against the Chamblees, there was no request for relief upon which the entry of the order of summary judgment could operate. The order was therefore a legal nullity.

Affirmed in part and vacated in part.

Judges BECTON and JOHNSON concur.

Izard v. Hickory City Schools Bd. of Education

MICHAEL DWAYNE IZARD, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, ELOISE IZARD v. THE HICKORY CITY SCHOOLS BOARD OF EDUCATION AND JACK C. KETNER, H. ALLEN MITCHELL, CHARLES BAGBY, WILLIAM P. PITTS, BILLY L. McCURRY, LOIS YOUNG, RUEBELLE NEWTON, EACH INDIVIDUALLY AND JOINTLY AND SEVERALLY IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF SAID BOARD OF EDUCATION; AND COLLEGE PARK JR. HIGH SCHOOL, AND H. DONNELL HAVNAER, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS PRINCIPAL, COLLEGE PARK JR. HIGH SCHOOL, AND BOYCE R. ROBERTS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS INSTRUCTOR, INDUSTRIAL ARTS CLASS, COLLEGE PARK JR. HIGH SCHOOL; OTHER PERSONS, WHOSE NAMES ARE PRESENTLY UNKNOWN, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS EMPLOYEES OF THE HICKORY CITY SCHOOL SYSTEM, AND THEIR AGENTS, AND SUBORDINATES AND EMPLOYEES

No. 8325SC750

(Filed 5 June 1984)

1. **Negligence § 30.1— use of electric saw in school—injury—insufficient evidence of negligence**

In an action instituted to recover damages as a result of an injury to plaintiff's hand incurred while cutting a piece of wood with a power saw in his school class, the trial court properly granted defendant teacher's motion for summary judgment where defendant teacher gave plaintiff and his classmates a 20-minute review session about the proper use and operation of the power saw in question, including specific instruction as to all necessary safety precautions; plaintiff was required to view this instruction despite his protests that he was already familiar with the proper use of the saw; defendant teacher spent another 20 minutes using plaintiff's wood to demonstrate how to measure, cut, and glue the wood properly; and in accordance with regular procedure, the teacher then told the class that if any student did not wish to use the machinery, the teacher would make the necessary cuts himself.

2. **Negligence § 35.1— contributory negligence as a matter of law properly found**

In an action to recover damages as a result of an injury, the trial court properly found that plaintiff's injury was the result of his own contributory negligence where the evidence was uncontradicted that, despite being fully instructed and warned about the proper use of a power saw, plaintiff carelessly moved his hand into the path of the blade, thereby injuring himself.

Judge PHILLIPS concurring in the result.

APPEAL by plaintiffs from *Phillips, Herbert O., III, Judge.* Judgment entered 1 April 1983 in Superior Court, CATAWBA County. Heard in the Court of Appeals 1 May 1984.

On 17 February 1982, plaintiff Michael Izard was a 14-year-old student at College Park Intermediate School in Hickory,

North Carolina and was assigned to the shop class of defendant Boyce Roberts, an industrial arts and occupational education instructor at the school. While cutting a piece of wood with a power saw in class, Izard severed several fingers from his left hand. Plaintiffs instituted this action to recover damages as a result of that injury.

Izard had previously attended Swannanoa Training School, where he had learned to use an electric saw somewhat similar to the one used in Roberts' class at College Park Intermediate School. Moreover, Izard had received instruction from Roberts in the use of the Rockwell power saw and had, in fact, been supervised in the correct operation of the saw without incident on other occasions.

On 28 May 1982, plaintiffs filed suit to recover for the injury sustained by Izard, contending that Roberts was negligent in failing to properly instruct and warn Izard about the use of the machine. Roberts answered, denying negligence and pleading Izard's contributory negligence in causing his own injury. On 17 December 1982, Roberts moved for summary judgment, which motion was granted by the trial court on 1 April 1983. From this order, plaintiffs appeal.

Harbinson, Harbinson and Parker, by Jason R. Parker, for plaintiff appellants.

Petree, Stockton, Robinson, Vaughn, Glaze and Maready, by G. Gray Wilson, for defendant appellee.

ARNOLD, Judge.

[1] Plaintiffs contend that the trial court erred in granting defendant Roberts' motion for summary judgment in that different inferences could have been drawn as to whether Roberts' negligence or Michael Izard's own contributory negligence was the proximate cause of Izard's injury. We disagree and affirm the order of the trial court.

In order to recover for negligence, plaintiff must establish (1) a legal duty, (2) a breach thereof, and (3) proximate cause of the injury. *Matthieu v. Piedmont Natural Gas Co.*, 269 N.C. 212, 152 S.E. 2d 336 (1967). In addition, North Carolina case law has stated that a teacher has a duty to abide by that standard of care "which

a person of ordinary prudence, charged with his duties, would exercise under the same circumstances." *Kiser v. Snyder*, 21 N.C. App. 708, 710, 205 S.E. 2d 619, 621 (1974) (quoting *Luna v. Needles Elementary School District*, 154 Cal. App. 2d 803, 316 P. 2d 773 (1957)). That duty generally amounts to an obligation to warn a student of known hazards, particularly those damages which he may not appreciate because of inexperience. *Id.*

In the case at bar, defendant Roberts gave Izard and his classmates a 20-minute review session about the proper use and operation of the power saw in question, including specific instruction as to all necessary safety precautions. Izard was required to view this instruction despite his protests that he was already familiar with the proper use of the saw as a result of his experience at Swannanoa Training School. Moreover, Roberts spent another 20 minutes using Izard's wood to demonstrate how to measure, cut, and glue the wood properly. In accordance with regular procedure, Roberts then told the class that if any student did not wish to use the machinery, Roberts would make the necessary cuts himself. We find this evidence establishes that Roberts did not violate the standard of care required of him by law.

[2] Defendant Roberts contends that the evidence presented to the trial court showed that Michael Izard's injury was the result of his own contributory negligence rather than any negligence on the part of Roberts. We agree. A 14-year-old boy is presumed capable of contributory negligence to the same extent as an adult in the absence of evidence that he lacked the capacity, discretion and experience which would ordinarily be possessed by a boy of that age. *Welch v. Jenkins*, 271 N.C. 138, 155 S.E. 2d 763 (1967). All the evidence indicates that, at the time of the accident, Michael Izard was a normal 14-year-old boy of ordinary capacity, discretion and experience. He was, therefore, capable of contributory negligence.

We recognize the principle that summary judgment is not often awarded with regard to negligence cases, but is appropriate only in exceptional cases. *Roberson v. Griffeth*, 57 N.C. App. 227, 291 S.E. 2d 347, *cert. den.* 306 N.C. 558, 294 S.E. 2d 224 (1982). Moreover, we are also aware of the fact that nonsuit for contributory negligence is a proper remedy only where the plaintiff's own evidence discloses contributory negligence so clearly that no

other reasonable conclusion may be drawn therefrom. *Snelling v. Roberts*, 12 N.C. App. 476, 183 S.E. 2d 872, *cert. den.* 279 N.C. 727, 184 S.E. 2d 886 (1971).

In the case at bar, the evidence presented to the trial court appears uncontradicted that, despite being fully instructed and warned about the proper use of the power saw, Michael Izard carelessly moved his hand into the path of the blade, thereby injuring himself. As his own deposition testimony states:

> I knew I was supposed to take a board and sweep the other board away so I wouldn't cut my hand but I moved my hand across there and got it up into the blade . . . I was not looking at the blade when I got my hand into it. I was looking at the piece of wood that I was going to push off the floor.

Even when considered in the light most favorable to the plaintiffs, we find this testimony clearly establishes that Michael Izard's injury was the result of his own contributory negligence. Furthermore, the meticulous instruction by Roberts about the proper use of the power saw met the standard of care required of him by law, thereby absolving him of liability. In conclusion, we hold that there is no genuine issue of material fact as regards the negligence of either party. The order of the trial court awarding defendant's motion for summary judgment is, therefore,

Affirmed.

Judge WEBB concurs.

Judge PHILLIPS concurs in the result.

Judge PHILLIPS concurring in result.

Though I agree that the order of summary judgment was correctly entered in that the evidence was insufficient to establish defendant Roberts' negligence, I do not agree that the evidence established plaintiff's contributory negligence as a matter of law. According to his affidavit, plaintiff had no experience at all and very little instruction in handling the particular type saw he was injured by, and it is a matter of common knowledge that the proper use of machines which require coordinating movements of the operator, as this one plainly did, often depends more upon habit

and practice than it does thought. In my opinion, plaintiff's failure to do what he had been instructed to do, though evidence of negligence, was also in keeping with his inexperience and inability, and, therefore, no proper basis for concluding that he was contributorily negligent as a matter of law. In my view, what the ordinary, reasonable and similarly inexperienced person would do under like circumstances is clearly a question of fact for the jury, rather than a question of law for judges.

WILLIAM GUTHRIE KILPATRICK, III AND SHIRLEY SILER KILPATRICK, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR JOHN CHRISTOPHER KILPATRICK, A MINOR CHILD v. UNIVERSITY MALL SHOPPING CENTER, A PARTNERSHIP, NORTH HILLS, INC., A GENERAL PARTNER, NORTH HILLS PROPERTIES, INC., A GENERAL PARTNER, PROVIDENT LIFE AND ACCIDENT COMPANY, A GENERAL PARTNER; AND UNIVERSITY MALL MERCHANTS ASSOCIATION, A CORPORATION, AND ANHEUSER-BUSCH, INC., A CORPORATION, AND HARRIS, INC., A CORPORATION

DANIEL G. BADGETT AND BARBARA TUCK BADGETT, INDIVIDUALLY, AND DANIEL G. BADGETT, AS GUARDIAN AD LITEM FOR LANCE JEFFREY BADGETT, A MINOR CHILD v. UNIVERSITY MALL SHOPPING CENTER, A PARTNERSHIP, NORTH HILLS, INC., A GENERAL PARTNER, NORTH HILLS PROPERTIES, INC., A GENERAL PARTNER, PROVIDENT LIFE AND ACCIDENT COMPANY, A GENERAL PARTNER; AND UNIVERSITY MALL MERCHANTS ASSOCIATION, A CORPORATION, AND ANHEUSER-BUSCH, INC., A CORPORATION, AND HARRIS, INC., A CORPORATION

No. 8315SC509

(Filed 5 June 1984)

1. Negligence § 30.1— negligence action—no duty owed to plaintiffs

In an action to recover for injuries received by minor plaintiffs when they were struck by a car while watching the Anheuser-Busch Clydesdale Horse Show in a shopping center parking lot, defendants Anheuser-Busch and a local beer distributor were entitled to directed verdicts where there was no evidence that such defendants owed any duty to the spectators at the horse show to control the parking lot or that they had the authority or power to control the parking lot.

2. Joint Ventures § 1— joint enterprise—absence of control

In an action to recover for injuries received by minor plaintiffs when they were struck by a car while watching the Anheuser-Busch Clydesdale Horse Show in a shopping center parking lot, any negligence on the part of the shopping center's agents could not be imputed to defendants Anheuser-Busch and a

local beer distributor under a "joint enterprise" theory where there was no evidence that such defendants had any right to control the shopping center's parking lot.

APPEAL by plaintiffs and defendants from *Clark, Giles R., Judge.* Judgment entered 27 December 1982 in Superior Court, ORANGE County. Heard in the Court of Appeals 16 March 1984.

On 25 February 1981, minor plaintiffs John Christopher Kilpatrick and Lance Jeffrey Badgett were struck and injured by an automobile driven by Mildred Cheek Cox while they attended a performance of the Anheuser-Busch Clydesdale Horse Show at University Mall Shopping Center which was sponsored, produced and provided by defendants. Ms. Cox and a passenger had been watching the performance from inside her car. They decided to leave before the performance was over, and Ms. Cox drove her car into the crowd that was watching the performance. Both minor plaintiffs suffered substantial injuries.

On 28 August 1981, a judgment of settlement was entered between Ms. Cox and John Christopher Kilpatrick by his parents as guardians ad litem whereby it was ordered that the minor child should have and recover $24,821.00 from Ms. Cox and her liability insurance carrier "in full and complete satisfaction and discharge of all her liability owed to the minor child." On 8 September 1981, a similar judgment of settlement was entered between Ms. Cox and Lance Jeffrey Badgett by Daniel G. Badgett as guardian ad litem whereby it was ordered that $18,725.00 be paid by Ms. Cox and her liability insurance carrier to the minor child "in full, final and complete settlement of any and all claims . . . on the part of Lance Jeffrey Badgett against Mildred Cheek Cox."

On 18 December 1981, William Guthrie Kilpatrick, III and Shirley Siler Kilpatrick, Individually and as Guardian Ad Litem for John Christopher Kilpatrick, filed a negligence action against defendants. On 15 February 1982, Daniel G. Badgett and Barbara Tuck Badgett, Individually and Daniel G. Badgett, as Guardian Ad Litem for Lance Jeffrey Badgett, filed a negligence action against defendants. The cases were consolidated and tried before a jury.

In the Kilpatrick case, the jury returned a verdict of $10,000.00 for the minor plaintiff and $56,000.00 for the parents.

The trial judge reduced the verdict for the parents in the Kilpatrick case by the $24,821.00 previously paid by Ms. Cox, awarding them $31,179.00. In the Badgett case, the jury returned a verdict of $10,000.00 for the minor plaintiff and $35,000.00 for the parents. The trial judge reduced the verdict for the parents in the Badgett case by the $18,725.00 previously paid by Ms. Cox and $1,000.00 paid to Mr. and Mrs. Badgett by University Mall Merchants Association, awarding them $15,275.00.

Judgment in each action was entered on 27 December 1982. Plaintiffs and defendants appealed. Since that time, plaintiffs and defendants University Mall Shopping Center, North Hills, Inc., North Hills Properties, Inc., Provident Life and Accident Company, and University Mall Merchants Association have settled their differences. Appeals now before this court are those of defendant Anheuser-Busch, Inc., defendant Harris, Inc., and plaintiffs.

Newsom, Graham, Hedrick, Bryson, Kennon & Faison, by William P. Daniell, and Samuel Roberti for plaintiffs Badgett, et al.

Winston, Blue & Rooks, by J. William Blue, Jr., for plaintiffs Kilpatrick, et al.

Glenn and Bentley, by Robert B. Glenn, Jr., for defendant Anheuser-Busch, Inc.

Teague, Campbell, Conely & Dennis, by C. Woodrow Teague and George W. Dennis III, for defendant Harris, Inc.

EAGLES, Judge.

I.

[1] Defendants Anheuser-Busch and Harris, Inc. (Harris) assign as error the trial court's denial of their motions for directed verdict and judgment notwithstanding the verdict. These motions test the legal sufficiency of the evidence to take the case to the jury and support a verdict for the nonmoving party. On defendant's motion for a directed verdict, all the evidence must be considered in the light most favorable to plaintiff. Here, defendants were only entitled to directed verdicts or judgments notwithstanding the verdict if plaintiffs failed as a matter of law to

establish the elements of actionable negligence or if the evidence showed contributory negligence as a matter of law. See *Everhart v. LeBrun*, 52 N.C. App. 139, 277 S.E. 2d 816 (1981).

In order to establish negligence, plaintiffs must first show the existence of a legal duty owed by defendant to plaintiffs to use due care and then show a breach of that duty. *Meyer v. McCarley & Co., Inc.*, 288 N.C. 62, 215 S.E. 2d 583 (1975). However, no liability attaches unless the negligence charged was the proximate cause of the injury, rather than a remote cause or one merely causing a condition providing an opportunity for other causal agencies to act. *Corprew v. Geigy Chemical Corp.*, 271 N.C. 485, 157 S.E. 2d 98 (1967).

Here, plaintiffs alleged that defendants had a duty to provide to the spectators a safe place to observe the performance and that defendants were negligent in failing to adequately control the shopping center parking lot. Defendants Anheuser-Busch and Harris contend, and we agree, that the record is devoid of evidence to show that Anheuser-Busch and/or Harris owed any duty to the spectators to control the parking lot of the shopping center. Indeed, there was no evidence to show that either Anheuser-Busch or Harris had the authority or power to control the parking lot. All the evidence tends to show that Anheuser-Busch and Harris's duties were limited to meeting with the representatives of the mall to pick out a site for the exhibition that would be adequate in size for the performance, arranging for lodging for the crew and stabling for the horses, and controlling the Clydesdales during the exhibition so as to prevent injury to the spectators by the horses. There was no evidence of any breach of these duties. Because there was no evidence of a breach of duty owed by defendants Anheuser-Busch and Harris to plaintiffs, there was no actionable negligence on the part of these defendants.

II.

[2] Although we hold that plaintiffs here failed as a matter of law to establish the elements of actionable negligence as to defendants Anheuser-Busch and Harris, we now address the "joint enterprise" theory by which plaintiffs seek to impute negligence of other defendants to Harris and Anheuser-Busch.

Under a "joint enterprise" theory, the negligence of one party may be imputed to others when there exists: (1) "a community of interest in the object and purpose of the undertaking" *and* (2) "an equal right to direct and govern the movements and conduct of each other in respect thereto." *James v. Atlantic & East Carolina R.R. Co.*, 233 N.C. 591, 598, 65 S.E. 2d 214, 219 (1951). Under the facts here, we find that the second required element, that of equal right to control, is clearly missing. The *James* court noted that "the control required is the legal right to exercise control." *Id.* Plaintiffs brought forth no evidence to show that defendants Anheuser-Busch and/or Harris, Inc. had any right to control the shopping center's parking lot. We therefore hold that any negligence on the part of those whose duty it was to control the parking lot, i.e., the shopping center's agents, may not be imputed to defendants Anheuser-Busch and Harris, Inc.

III.

Because we hold (1) that there was no actionable negligence on the part of defendants Anheuser-Busch and Harris and (2) that any negligence on the part of the shopping center may not be imputed to these defendants, we reverse the judgments and remand for entry of directed verdicts in favor of Anheuser-Busch and Harris.

Because of this disposition of defendants' appeal, it is unnecessary for us to consider plaintiff's assignments of error concerning expert witness testimony and the trial court's reduction of the jury verdict.

Reverse and remand.

Judges WEBB and BECTON concur.

CATHLEEN R. ELLIS v. RAYMOND C. ELLIS

No. 8310DC671

(Filed 5 June 1984)

1. **Divorce and Alimony § 21.9; Statutes § 3— equitable distribution statute not unconstitutionally vague**

North Carolina's equitable distribution statute, G.S. 50-20, is not unconstitutionally vague in that it sets forth reasonably clear guidelines and definitions for courts to interpret and administer it uniformly and in accordance with the legislative intent.

2. **Divorce and Alimony § 21.9— failure to state factors considered in determining whether equal division of marital property would be equitable—no reversible error**

While the better practice in a divorce case would be for the court to specifically state in the judgment that it concluded that an equal division of the marital property would not be equitable, and that it had considered the enumerated factors as required in reaching this conclusion, the court is not required to state this. In the present case, by stating in the judgment that the parties "are entitled to an equitable distribution of all separate and marital property," and by distributing the marital property in what appeared to be an unequal manner, the court by implication indicated that an equal distribution would not be equitable.

APPEAL by defendant from *Sherrill (Russell, III), Judge.* Judgment entered 24 January 1983 in District Court, WAKE County. Heard in the Court of Appeals 10 April 1984.

Defendant husband appeals from a judgment of the Wake County District Court distributing the marital property of the parties pursuant to G.S. 50-20. The parties were married on 4 December 1976 and separated on 29 October 1981. On 24 January 1983, the trial court granted plaintiff an absolute divorce from defendant on grounds of adultery stipulated to by defendant. That same day a hearing was held on the parties' applications for equitable distribution. At the close of plaintiff's evidence, defendant moved to dismiss the proceeding on the grounds that G.S. 50-20 is unconstitutional, which motion was denied.

In its judgment of equitable distribution, the court made detailed findings of fact which are uncontested. Based upon such findings, the court concluded that the parties "are entitled to an equitable distribution of all separate and marital property." The court then identified the separate property of each party and dis-

tributed the marital property. As part of its distribution of the marital property, the court concluded that plaintiff was entitled to sole possession of a 27-acre tract of land which was titled in the names of both parties and ordered:

> "That the defendant is hereby divested of all right, title and interest in that approximately 27 acres of land more particularly described in Deed Book 2609, Page 14, Wake County Registry, and a copy of this Judgment shall be recorded among the records in the Wake County Registry showing a conveyance from Raymond C. Ellis, III to Cathleen Anne Rubens."

The court further ordered that the parties execute any and all documents necessary to effectuate the terms of the judgment.

Boxley, Bolton and Garber, by Ronald H. Garber, for plaintiff appellee.

Robert A. Hassell for defendant appellant.

WEBB, Judge.

[1] Defendant first argues that G.S. 50-20 is unconstitutionally vague on its face and as applied in this case. He contends the statute is so ambiguous that it allows orders to be drawn obscurely, and that it inadequately distinguishes between marital and separate property. The constitutional doctrine that statutes may be held void for vagueness is designed to require that statutes adequately warn people of conduct required of them. G.S. 50-20 does not govern conduct by people but assuming the doctrine is applicable in this case, we do not believe the statute is unconstitutionally vague.

The test for determining whether a statute is unconstitutionally vague was set forth by our Supreme Court in *In re Burrus*, 275 N.C. 517, 169 S.E. 2d 879 (1969), *aff'd*, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed. 2d 647 (1971) as follows:

> " 'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' (Citations omitted.) Even so, impossible standards of statutory

> clarity are not required by the constitution. When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met. (Citation omitted.)"

275 N.C. at 531, 169 S.E. 2d at 888. A statute must be examined in the light of the circumstances in each case, and the person who contests the validity of the statute has the burden of showing that the statute provides inadequate warning as to the conduct it governs or is incapable of uniform judicial administration. *See In re Biggers*, 50 N.C. App. 332, 274 S.E. 2d 236 (1981).

We believe G.S. 50-20 sets forth reasonably clear guidelines and definitions for courts to interpret and administer it uniformly and in accordance with the legislative intent. The United States Supreme Court has recognized that there are certain areas where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision. *See Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed. 2d 605 (1974). We feel the distribution of marital property upon dissolution of a marriage is one such area. The equitable distribution statutes of other states have been similarly attacked on vagueness grounds and have been upheld. *See Painter v. Painter*, 65 N.J. 196, 320 A. 2d 484 (1974) (the words "equitable distribution" set forth a standard which is not unconstitutionally vague); *Fournier v. Fournier*, 376 A. 2d 100 (Me., 1977) and *In re Marriage of Thornqvist*, 79 Ill. App. 3d 791, 399 N.E. 2d 176 (1979) (the fact an equitable distribution statute does not delineate all the factors which a court must consider in reaching its decision does not render the statute unconstitutionally vague). We hold that North Carolina's equitable distribution statute, G.S. 50-20, is not unconstitutionally vague.

[2] Defendant next contends the judgment of equitable distribution in this case is neither valid nor binding because it allegedly fails to meet the required statutory form for distributing marital property. In support of his contention, defendant alleges that there are the following four errors in the form of the judgment which cause it to be fatally defective: (1) the court failed to state that it had concluded that an equal division in this case would not be equitable; (2) the court failed to state that it had considered

the factors enumerated in G.S. 50-20(c) in reaching its decision; (3) the court failed to properly convey defendant's interest in the 27-acre tract of land to plaintiff in that the court merely divested defendant of his interest and did not vest such interest in plaintiff; and (4) the court erred in attempting to allocate separate property as well as marital property in the judgment. We do not agree that there is any required statutory form for judgments of equitable distribution, nor do we agree that the judgment in this case is fatally defective as alleged by defendant.

G.S. 50-20(c) states that "[t]here shall be an equal division . . . of marital property unless the court determines that an equal division is not equitable." By stating in the judgment that the parties "are entitled to an equitable distribution of all separate and marital property" and by distributing the marital property in what appears to be an unequal manner, the court by implication indicated that an equal distribution would not be equitable in this case. There is nothing in the record which indicates that the court ignored the mandate of the statute or failed to consider the enumerated factors. The property distribution ordered by the court is supported by the findings of fact and appears to be a fair and reasonable distribution. While we believe the better practice in a case such as this would be for the court to specifically state in the judgment that it had concluded that an equal division of the marital property would not be equitable, and that it had considered the enumerated factors as required in reaching this conclusion, we do not believe the court is required to state this. We believe the judgment in the present case is sufficiently specific without this additional conclusion for us to determine that the trial court correctly applied the law.

Furthermore, we find no merit in the remaining arguments presented by defendant with respect to the alleged invalidity of the judgment. We believe the language in the judgment was sufficient to convey defendant's interest in the 27-acre tract of land to plaintiff in accordance with Rule 70 of the North Carolina Rules of Civil Procedure. Moreover, we do not interpret the language in the judgment as demonstrating an attempt by the court to allocate the parties' separate property. The court merely identified what property belonging to the spouses was separate property, thereby indicating that only the remaining property was marital property and thus eligible for distribution. We hold the

judgment of the trial court is valid and binding in all respects and must be affirmed.

Affirmed.

Judges HILL and WHICHARD concur.

HOWARD DALE HUNTER, SR., T/A HUNTER'S GROCERY v. ALCOHOLIC BEVERAGE CONTROL COMMISSION

No. 8310SC454

(Filed 5 June 1984)

Intoxicating Liquor § 2.4— revocation of off-premise malt beverage and wine permits

Petitioner's off-premise malt beverage and unfortified wine permits were properly revoked on the ground that petitioner allowed the consumption of malt beverages upon the licensed premises where the evidence tended to show that six months after petitioner was denied an on-premise malt beverage permit, petitioner built an annex to his store in which his son operated a recreation center and in which beer was sold without an on-premise permit, and that there was a hole in the common wall shared by the store and the annex which was covered by a flag and through which, on at least one occasion, cases of beer were passed from the store into the annex, since the evidence permitted reasonable inferences that beer from petitioner's store was being sold in the recreation center and that the store and the recreation center were in fact a single business.

APPEAL by petitioner from *Bowen, Judge*. Judgment entered 3 February 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 9 March 1984.

Petitioner appeals from a judgment of the Wake County Superior Court affirming the order of respondent Alcoholic Beverage Control Commission revoking petitioner's off-premise malt beverage and unfortified wine permits. The respondent Commission initiated action against petitioner when it received a complaint that petitioner had violated the State Alcoholic Beverage Control laws and/or regulations by allowing the consumption of malt beverages upon his licensed premises on or about 12 January 1982 and 23 January 1982 while only having an off-premise permit for such beverages. A hearing was held before a

hearing officer of the Commission on 2 March 1982. Based upon the evidence presented, the hearing officer concluded that petitioner was guilty of the alleged violations and recommended that the permits issued to petitioner be revoked. The findings of fact, conclusions of law, and recommendation of the hearing officer were subsequently adopted by the Full Commission after a hearing on 30 April 1982. Petitioner appealed the order of the Commission to the superior court which affirmed the order in all respects. From the judgment entered, petitioner appealed.

The evidence tends to show the following: Petitioner was issued off-premise malt beverage and unfortified wine permits for his package store known as Hunter's Grocery on 9 January 1980. One year later, petitioner applied for an on-premise malt beverage permit which was denied. In July of 1981, petitioner built an addition to his package store which he leased to his son, Howard Hunter, Jr., for a term of one year. The addition, or annex, shares a common wall with the package store but has a separate entrance and a separate parking lot. Sometime after petitioner and his son entered into the lease, the son opened up a game room/private club known as Hunter's Recreation Center in the annex.

In October, 1981, a hearing was held before a hearing officer of the Commission concerning a charge that petitioner had permitted persons to consume malt beverages upon his licensed premises on or about 10 September 1981 while holding only an off-premise permit. At that hearing, all of the evidence related to the consumption of malt beverages in the annex known as Hunter's Recreation Center. The hearing officer determined that the package store and the recreation center were in fact being operated as a single business and that the recreation center was a part of the licensed premises. Based on the findings and recommendation of the hearing officer, the Commission ordered that petitioner's malt beverage and wine permits be suspended for 60 days, such suspension to be suspended for one year on the condition that petitioner commit no further violations of the alcoholic beverage control laws and regulations.

With respect to the alleged violations that are the subject of the present appeal, the evidence tends to show that on 12 January 1982, Officer Bob Emory entered Hunter's Recreation

Center for the purpose of attempting to purchase and consume malt beverages on the premises. While there, he purchased two beers and observed other people buying and drinking beer. There was a bar in the recreation center with a cooler behind it and a cash register on top of it. On 23 January 1982 around 8:00 p.m., he again went to the recreation center and bought a beer and drank it. He saw the bartender in the recreation center pull aside a Confederate flag which was hanging on the wall common with the package store and saw that the flag was covering up a hole in the wall about the size of a cinderblock. Officer Emory could see through the hole into the package store. He then saw three women in the package store pass nine cases of beer through the hole to the bartender who stacked the cases on the bar in the recreation center. This beer was later put into the cooler behind the bar.

A witness for petitioner testified that he was working on a heating system for the recreation center and the package store and that it had been necessary for him to remove a 12 by 8 inch block from the common wall so that he could install a heating duct. Petitioner also testified that the block had been removed from the wall so that heating ducts could be installed. He said he did not see anyone pass cases of beer through the hole in the wall on 23 January 1982, but that he had sold several cases of beer to a girl that night who was having a private anniversary party in the recreation center and that it was possible she had passed the beer she purchased through the hole.

Richard G. Miller for petitioner appellant.

Attorney General Edmisten, by Special Deputy Attorney General David S. Crump, for respondent appellee.

WEBB, Judge.

The question presented by this appeal is whether there is competent evidence to support the hearing officer's findings of fact and conclusions of law adopted by the Commission which are based on the assumption that petitioner's store and the recreation center were in fact only one business, and not two separate businesses. The findings of the Alcoholic Beverage Control Commission, after proper hearing, are conclusive if supported by competent, material and substantial evidence. *See C'est Bon, Inc. v.*

Board of Alcoholic Control, 279 N.C. 140, 146, 181 S.E. 2d 448, 451-52 (1971); *Keg, Inc. v. Board of Alcoholic Control*, 277 N.C. 450, 456, 177 S.E. 2d 861, 865 (1970); *Parker v. Board of Alcoholic Control*, 23 N.C. App. 330, 332, 208 S.E. 2d 727, 729 (1974).

We believe that the circumstantial evidence, the family relationship between petitioner and his son, and the evidence showing that petitioner had previously attempted to obtain an on-premise malt beverage permit constitutes sufficient evidence to support the conclusion that the two businesses were in fact one business, and that the recreation center was included within the premises covered by the malt beverage and wine permits issued to petitioner. The evidence shows that six months after petitioner applied for an on-premise malt beverage permit, which was denied, petitioner built an annex to his store in which his son operated a recreation center and in which beer was sold without an on-premise permit. The testimony of Officer Emory tends to show that there was a hole in the common wall shared by the store and the annex which was covered by a flag and through which, on at least one occasion, cases of beer were passed from the store into the annex. Based on such evidence, the hearing officer and the Commission could reasonably infer that beer from petitioner's store was being sold in the recreation center, and that the store and the recreation center were in fact so interrelated as to constitute a single business.

Petitioner also contends the Commission erred in failing to allow him to present any further evidence at the hearing before it on 30 April 1982. There is nothing in the record before this Court which indicates that the Commission improperly disallowed any evidence tendered by petitioner at the hearing; therefore, this argument is meritless.

We hold the findings of fact, conclusions of law, and order of the respondent Commission are supported by competent, material and substantial evidence. The judgment of the superior court is affirmed in all respects.

Affirmed.

Judges BECTON and EAGLES concur.

LUMBERMENS MUTUAL CASUALTY COMPANY v. GOLDIE PEARL SMALLWOOD, TERESA ANN BRITT, ANTHONY CHARLES HUTCHINSON AND THOMAS WAYNE NEW

No. 8310SC444

(Filed 5 June 1984)

Insurance § 87.2— entitlement to coverage under automobile policy—resident of same household—permission of owner to drive automobile

In a declaratory judgment action instituted by the insurer of an automobile in which the plaintiff sought a judicial determination of its liabilities under the policy, the trial court erred in granting plaintiff's motion for summary judgment since there was a genuine issue as to whether the driver of the automobile was a resident in her mother's household and as to whether she was operating the vehicle with the permission of its owner.

DEFENDANT appeals from *Bailey, Judge.* Judgment entered 25 February 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 8 March 1984.

On 31 January 1981, an automobile owned by Anthony Charles Hutchinson and being operated by Teresa Ann Britt overturned causing injury to Thomas Wayne New, who was a passenger in the vehicle. On 22 December 1981, New filed suit against Hutchinson, Britt and Goldie Pearl Smallwood, Britt's mother, seeking compensation for the injuries he received in the accident.

Plaintiff Lumbermens Mutual Casualty, the insurer of Smallwood, instituted a declaratory judgment action in which it sought a judicial determination of its liabilities under the policy it issued to Smallwood. The policy contains the following provisions:

LUMBERMENS MUTUAL CASUALTY COMPANY . . .

(a) agrees with the insured . . . [t]o pay on behalf of the insured all sums which the insured shall become legally obligated to pay damages because of . . . bodily injury . . . arising out of the ownership, maintenance or use of . . . any non-owned automobile. . . .

The policy further defines those persons afforded coverage as:

PERSONS INJURED

The following are insureds under Part I:

. . . .

(b) With respect to a non-owned automobile,

. . . .

(2) any relative, but only with respect to a private passenger automobile or trailer, provided his actual operation . . . is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission. . . .

. . . .

DEFINITIONS

. . . .

"relative" means a relative of a named insured who is a *resident* of the same household.

Plaintiff alleged in its complaint that Teresa Ann Britt was not entitled to coverage under the policy in that she was not a resident of the same household as Goldie Pearl Smallwood and was not, at the time of the accident, driving the vehicle with the permission of its owner. On 23 July 1983, plaintiff filed a motion for summary judgment in which it contended that the depositions and pleadings in the declaratory judgment action showed no genuine issue of material fact. Upon the granting of this motion, defendant Thomas Wayne New gave notice of appeal.

Warrick, Johnson and Parsons, by Dale P. Johnson, and Lanier and Fountain, by Russell J. Lanier, Jr., for defendant appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner and Hartzog, by Dan M. Hartzog, for plaintiff appellee.

ARNOLD, Judge.

Defendant contends that the trial court erred in granting plaintiff's motion for summary judgment in that there is a genuine issue of material fact as to whether Teresa Ann Britt was a resident in her mother's household at the time of the accident and as to whether she was operating the automobile with the permission of Anthony Charles Hutchinson, the owner of the vehicle. We

agree that there are genuine issues as to both questions and find that the court committed error in granting plaintiff's motion for summary judgment.

Defendant bases his contention regarding the residency of Teresa Ann Britt on the affidavits of various persons who averred that she in fact appeared to be living with her mother at the time of the accident and on the answer filed by Britt in which she stated she was a resident of her mother's household. We find that this evidence raises at the very least an issue of fact which should be passed upon by a jury.

Under Rule 56(c) of the North Carolina 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 a judgment as a matter of law." However, upon ruling on a motion for summary judgment, the court must look at the record in the light most favorable to the party opposing the motion. *Patterson v. Reid*, 10 N.C. App. 22, 178 S.E. 2d 1 (1970).

For defendant to prevail in this matter, there must first be a finding that there is some question about whether Teresa Ann Britt was a "resident" of her mother's household at the time of the accident. "The words 'resident,' 'residing' and 'residence' are in common usage and are found frequently in statutes, contracts and other documents of a legal or business nature. They have, however, no precise, technical and fixed meaning applicable to all cases." *Jamestown Mutual Insurance Co. v. Nationwide Mutual Insurance Co.*, 266 N.C. 430, 435, 146 S.E. 2d 410, 414 (1966). One of the more complete definitions is found in the case of *Watson v. North Carolina Railroad Company*, 152 N.C. 215, 67 S.E. 502 (1910): "Residence is dwelling in a place for some continuance of time, and is not synonymous with domicile, but means a fixed and permanent abode or dwelling as distinguished from a mere temporary locality of existence; and to entitle one to the character of a 'resident,' there must be a settled, fixed abode, and an intention to remain permanently, or at least for some time, for business or other purposes." *Id.* at 209, 67 S.E. at 503.

At her deposition, Teresa Ann Britt testified that she "had a blue and white trailer that was parked right behind my Mom and

I was living there on January 31, 1981. Prior to that, I had been living with my mother." Moreover, when questioned specifically about her residence, the following exchange occurred:

Q. And at that time you were supporting yourself?

A. Yes sir.

Q. And living in your trailer?

A. Yes.

Q. And you were not a resident of your mother's house?

A. I was not.

On the other hand, defendant has introduced numerous affidavits purporting to show that Teresa Ann Britt was living with her mother at the time of the accident and that, in fact, the trailer in which Teresa Ann Britt contends she was residing was not connected to water, sewer or gas and had broken windows and doors, making it unsuitable for occupancy. Moreover, Britt contended in her answer that she was a resident of her mother's household. In examining the record in the light most favorable to defendant, it appears that the aforementioned evidence does in fact establish a genuine issue as to whether, at the time of the accident, Teresa Ann Britt had established a "permanent abode" in either her mother's house or in the nearby trailer. Certainly reasonable men could reach different conclusions about her residency. *See Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972). As there is conflicting evidence as to whether Britt was living with her mother or in a separate trailer on 31 January 1981, we conclude that this question must be answered by a jury.

As for the second question of whether Britt drove the vehicle with the permission of its owner, we, again, find the existence of a genuine issue of material fact. Although Anthony Clark Hutchinson testified in his deposition that he never allowed Britt to use his automobile, there were in evidence affidavits from area residents who stated that they had, in fact, seen Britt drive Hutchinson's car on other occasions. Moreover, Britt stated in her answer that she thought she had had Hutchinson's permission to drive the vehicle. We find that the conflicting nature of this forecast of evidence warrants that the question of whether Britt

operated the vehicle with the permission of its owner be submitted to a jury.

Upon our finding that there are genuine issues both as to the question of whether Britt was a resident in her mother's household and as to the question of whether she was operating the vehicle with the permission of its owner, we hold that the order of the trial court granting plaintiff's motion for summary judgment is

Reversed.

Judges WELLS and BRASWELL concur.

MORRIS V. WARD, GUARDIAN AD LITEM FOR LAURA A. WARD, MINOR v. OUIDA B. NEWELL AND PRISSY NEWELL, D/B/A TARA FARMS

No. 8310DC254

(Filed 5 June 1984)

1. **Bailment § 1— bailment of horse**

When plaintiff purchased a mare from defendants and the parties agreed that the mare would remain in defendants' custody for a certain period of time because her foal was not yet weaned from her, a bailment was created, and defendant bailees were required to exercise ordinary care in caring for the mare.

2. **Bailment § 3.3— negligence of bailees in permitting mare to become pregnant**

Plaintiff's evidence was sufficient for the jury on the issue of negligence by defendant bailees in placing a mare purchased by plaintiff from defendants in a pasture with a stallion, thereby allowing the mare to become pregnant and making her unsuitable for use as a show horse.

3. **Bailment § 3.1— negligence of bailees in permitting mare to become pregnant—damages—requiring documents to register foal**

In an action to recover damages for the negligence of defendant bailees in placing plaintiff's mare in a pasture with a stallion so that she became pregnant, the trial court erred in ordering defendants to execute documents necessary for the registration of a foal born to the mare where the jury was instructed to deduct the unregistered value of the foal in determining damages to be awarded to plaintiff.

APPEAL by defendants from *Barnette, Judge.* Judgment entered 12 October 1982 in District Court, WAKE County. Heard in the Court of Appeals 8 February 1984.

This is a civil action in which plaintiff seeks to recover damages resulting from the defendants' alleged negligence in placing a female horse purchased by plaintiff in a pasture with a stallion, thereby allowing the mare to become pregnant and making her unsuitable for the purpose for which she was purchased. The evidence tends to show the following facts: On 25 March 1980, the plaintiff Laura Ward, accompanied by her father, went to the defendants' place of business, Tara Farms, and contracted to buy a horse for the price of $1,150.00. Plaintiff paid $200 towards the price of the horse at that time. The horse, Nagasakie Nellie, is a mare and was bought for plaintiff to train and show as part of a 4-H project.

At the time the contract was entered, the mare had a five-day-old foal at her side which was not purchased by plaintiff. Because plaintiff and her family did not have facilities for caring for the foal, who was too young to be separated from the mare, the parties agreed that the mare would be left in the defendants' care and custody for a period of 30 days. It was later agreed that defendants would keep the mare for an additional period of time for which plaintiff paid a boarding fee. On 25 March 1980, defendants offered to re-breed the mare, but plaintiff specifically stated that she did not want the mare bred again because she wanted a show horse.

The mare remained under defendants' care and custody until 17 May 1980 when plaintiff paid the balance of the purchase price and took possession of the mare. At that time, plaintiff was not aware that the mare had been kept in a pasture with a stud or was pregnant. Plaintiff testified that she kept the mare in an enclosed pasture with another mare, and that to the best of her knowledge the mare was never exposed to a stud while she was in her possession. On one occasion shortly after plaintiff took possession of the mare, the mare escaped from the enclosure for a brief period of time. Plaintiff was able to track where the mare had gone and retrieve her. Plaintiff testified that the mare could not have gotten close to any studs while she was loose because there were not any in the vicinity of her family's farm.

On 22 February 1981, a veterinarian determined that the mare was pregnant. Both plaintiff and her father testified that when defendants were advised of this fact, defendants admitted that their stud was the sire, and asked that plaintiff pay a $200 stud fee for his services. At trial, one of the defendants admitted that after 25 March 1980, the mare had been kept in the same pasture as defendants' stud, and that plaintiff had not been advised of defendants' intention to put the mare to pasture with the stud. On 15 April 1981, the mare delivered a foal. Plaintiff testified that there were no indications of an abnormal pregnancy and that the foal was fully developed when born. Defendant Ouida Newell testified that the normal gestation period for a mare is 336 days. The plaintiff's father, Morris V. Ward, testified that he personally knew the normal gestation period for a horse is between 11 months and 11 months, 10 days.

Plaintiff sought damages for time spent caring for the horse; clothing purchased in anticipation of showing the horse which was not used; medical expenses of the mare before, during, and after delivery; the added cost of feed and other items of care for the foal; the anticipated cost of building a new paddock for the horses; and the anticipated cost of improving the horse stalls. In addition, plaintiff asked that the court order the defendants to execute a breeder's certificate and all other documents necessary for the registration of the foal born to the mare with the American Quarterhorse Association. The jury returned a verdict in favor of plaintiff and awarded damages of $1,800.00. In accordance with the verdict, the court ordered that the plaintiff recover from the defendants the sum of $1,800.00, together with the costs of the action, and that the defendants issue the breeder's certificate requested by plaintiff. Defendants appealed.

Savage and Godfrey, by David R. Godfrey, for plaintiff appellee.

Purser, Cheshire, Manning and Parker, by Joseph B. Cheshire, V and Barbara A. Smith, for defendant appellants.

WEBB, Judge.

Defendants assign as error the trial court's denial of their motions for a directed verdict and judgment notwithstanding the verdict, contending the evidence was not sufficient to support a

verdict for the plaintiff. On defendants' motions for directed verdict and judgment notwithstanding the verdict, the plaintiff's evidence must be taken as true, and all the evidence must be considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom. *See Maganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977).

[1] When the evidence is considered in the light most favorable to the plaintiff, it shows that on 25 March 1980, plaintiff purchased Nagasakie Nellie; however, it was agreed by the parties that the mare would remain in the defendants' custody for a certain period of time because her foal was not yet weaned from her. At that point, a bailment was created for the benefit of both parties, and the bailees, the defendants, were required to exercise ordinary care in caring for the mare. *See Hanes v. Shapiro*, 168 N.C. 24, 84 S.E. 33 (1915). Ordinary care has been defined as that degree of care which men of ordinary prudence take of their own property of a similar kind under like circumstances. *Id.* The bailees' failure to exercise the required degree of care is negligence. *Id.*

[2] In the instant case, the defendants kept the plaintiff's mare in a pasture with their stallion for over a month-and-a-half even though they were told by plaintiff that she did not want the mare to be rebred. After plaintiff obtained possession of the mare, it does not appear the mare came in contact with any stallions. Assuming that the normal gestation period for a horse is between 11 months and 11 months, 10 days, the mare was probably impregnated sometime between 5 May and 15 May 1980 which was during the time that defendants had custody of her. The defendants argue that there was no competent testimony from an expert witness as to the gestation period for a mare. Ouida B. Newell, a horse breeder, testified the gestation period for a mare is approximately 336 days. We believe this is competent evidence as to the gestation period. In addition, when defendants were told that the mare was pregnant, they admitted that their stud was the sire, and asked that plaintiff pay a stud fee for the stallion's services. We believe this evidence is certainly sufficient to permit the jury to find that the defendants were negligent, and that the plaintiff was damaged by such negligence. Therefore, we find no error in

the court's denial of defendants' motions for directed verdict and judgment notwithstanding the verdict.

[3] Defendants also contend the trial court erred in ordering them to execute a breeder's certificate and other documents necessary for the registration of the foal born 15 April 1981 with the American Quarterhorse Association. The court instructed the jury that they must deduct from the damages incurred by the plaintiff the present value of the foal. The court further instructed the jury, "[t]he evidence seems to indicate that the foal is presently unregistered and is worth two hundred to four hundred dollars." The court based its instruction on the testimony of the plaintiff and her father, both of whom testified that unregistered, the foal is worth only two to four hundred dollars.

Therefore, the jury deducted only the unregistered value of the foal in determining the amount of damages to be awarded to the plaintiff. Clearly, the foal would be more valuable if it were registered. Defendants argue that the court erred in limiting the setoff amount to the value of an unregistered foal while at the same time ordering defendants to issue documents which would increase the value of the foal significantly because such action results in double compensation for the plaintiff. We agree and hold that the portion of the judgment requiring the defendants to execute a breeder's certificate should be reversed and stricken from the judgment by the trial court. That part of the judgment awarding monetary damages to the plaintiff is affirmed. The judgment of the trial court is

Affirmed in part; reversed and remanded in part.

Chief Judge VAUGHN and Judge JOHNSON concur.

JACOB C. CANTRELL v. LIBERTY LIFE INSURANCE COMPANY

No. 8319SC526

(Filed 5 June 1984)

Insurance § 41— interpretation of "final discharge" from hospital—coverage of plaintiff's wife under policy

In an action to recover benefits under a group life and medical insurance policy which provided that coverage for an insured employee's dependent already in the hospital on the effective date of the policy, 1 September 1979, would be deferred until the defendant's final discharge from the hospital, the trial court properly found plaintiff's wife was covered for her hospitalization after 5 September 1979 where plaintiff's wife was admitted to Rowan Hospital on 31 August 1979 for evaluation of a heart condition; where that hospital discharged her on 5 September 1979; and where she then went by ambulance to Duke Medical Center, was admitted, and underwent open heart surgery incurring expenses in excess of $70,000.

APPEAL by defendant from *Albright, Judge.* Judgment entered 17 December 1982 and amended 1 February 1983 in Superior Court, ROWAN County. Heard in the Court of Appeals 2 April 1984.

Defendant issued to plaintiff's employer a group life and medical insurance policy with an effective date of 1 September 1979. Plaintiff, an employee eligible for coverage under the policy, enrolled in the plan. His wife qualified for coverage as his dependent.

Both the policy and the certificate issued to plaintiff provided that the effective date of coverage for an employee's dependent already in a hospital on 1 September 1979 would be deferred until the dependent's final discharge from the hospital. Plaintiff's wife was admitted to Rowan Hospital on 31 August 1979 for evaluation of a heart condition. That hospital discharged her on 5 September 1979. She then went by ambulance to Duke Medical Center where, after being examined for several hours, she was admitted. She underwent open heart surgery at Duke, incurring expenses in excess of $70,000.

Defendant refused to pay plaintiff's claim for insurance benefits on the ground that the policy did not become effective as to his wife until her discharge from Duke. The trial court, sitting without a jury, held that the effective date of coverage for plain-

tiff's wife was the date of her discharge from Rowan Hospital, and that defendant therefore was liable for most of the expenses incurred at Duke.

Defendant appeals.

Kluttz, Hamlin, Reamer, Blankenship & Kluttz, by Clarence Kluttz and Lewis P. Hamlin, Jr., for plaintiff appellee.

Moore, Van Allen and Allen, by William S. Patterson and Joseph W. Eason, for defendant appellant.

WHICHARD, Judge.

Defendant excepted to the following finding:

> The Court finds as a fact that plaintiff's discharge from Rowan Memorial Hospital on September 5, 1979, was a "final discharge from the hospital" in accordance with the practices of Rowan Memorial Hospital and within the meaning of this policy of insurance. Dr. Agner, who ordered his patient discharged from Rowan Memorial Hospital and referred her to Dr. Gallis at the Duke Medical Center, had no authority to order the admission of the patient to Duke Hospital and did not undertake to do so. Both Dr. Agner and the chief executive of Rowan Memorial Hospital have testified, and the Court finds, that the actions taken at Rowan Memorial Hospital amounted to a final discharge from Rowan Memorial Hospital.

As noted above, the policy and the certificate both stated that the effective date of coverage for a dependent already in *a* hospital on 1 September 1979 would be deferred until the dependent's final discharge from *the* hospital. Plaintiff's wife was in Rowan Hospital on 1 September 1979. Based on the foregoing finding that she was discharged on 5 September 1979, the trial court concluded that plaintiff's wife was covered by defendant's policy for her medical expenses incurred on and after 5 September 1979.

Defendant contends the finding of a "final discharge" within the meaning of the policy improperly was treated as a factual, rather than legal, issue. The distinction between what is properly a finding of fact and a conclusion of law is not always clear. The finding could be considered an ultimate fact, a mixed question of

fact and law, or an application of law to fact. There is authority that the meaning of language used in an insurance policy is a question of law, however. *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E. 2d 518, 522 (1970). Consequently, the finding that on 5 September 1979 plaintiff's wife finally was discharged from Rowan Hospital within the meaning of the policy should have been a conclusion of law.

A conclusion of law can support a judgment even though incorrectly denominated a finding of fact, however. *See Hodges v. Hodges*, 257 N.C. 774, 780, 127 S.E. 2d 567, 572 (1962). The other findings, which are based on competent and substantial evidence, support the conclusion that plaintiff's wife finally was discharged on 5 September 1979 within the meaning of the policy. The term "final discharge," as used in defendant's policy, is clear and unambiguous. "No ambiguity . . . exists unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend." *Wachovia, supra.* "[N]ontechnical words are to be given a meaning consistent with the sense in which they are used in ordinary speech, unless the context clearly requires otherwise." *Id.*

"Final discharge from the hospital" is a nontechnical phrase, not defined in any special way in the policy. Use of the article "the" indicates that when an insured's discharge from one hospital is final, the coverage becomes effective regardless of later admission to a different hospital. Plaintiff's wife's discharge from Rowan Hospital was final because that hospital had ended all responsibility for her care, and the discharge was not contingent upon her acceptance at Duke. While a doctor at Rowan referred her to Duke, he had no authority to admit her there.

Even if the policy term "final discharge" did not, by its normal, nontechnical meaning, clearly apply to plaintiff's wife's discharge from Rowan Hospital, the result would be the same. At most the meaning of the phrase would be ambiguous, and ambiguous terms in an insurance policy must be resolved in favor of the policyholder and against the insurer. *Id.*

Defendant maintains that the phrase "final discharge" must be construed in context with other policy provisions. Specifically, the part of the policy dealing with medical expense benefits provided that hospital confinements would be considered one period

of confinement unless separated by six months or due to unrelated causes. Defendant asked the court to find as a fact that plaintiff's wife was confined to Rowan Hospital and Duke for the same or related causes.

The evidence completely supported the requested finding, but the court properly declined to make it. The policy provision defining "hospital confinement" relates to computation of benefits, as the court correctly concluded, and has no bearing on the provision governing the effective date of coverage. Whether plaintiff's wife was confined to Duke and Rowan Hospital for related causes is thus irrelevant to the issue of the effective date of coverage.

Defendant contends that if the effective coverage date is 5 September 1979, plaintiff is limited to a $500 recovery due to a pre-existing condition exclusion and a transition endorsement. The "Expenses Excluded" provision limits benefits to $500 for medical services "if such medical care or services are received within the 3-month period immediately prior to the effective date of the Employee's or Dependent's insurance." Plaintiff only claims benefits for medical services received *after* the effective date, 5 September 1979. The preceding exclusion for services received *before* the effective date thus has no application.

Defendant argues that the intent of the "Expenses Excluded" provision was to exclude payment for medical services received at any time for sickness occurring within the three month period prior to the effective date of coverage. Language in the transition endorsement refers to and paraphrases the "Expenses Excluded" provision in a manner which supports defendant's argument. The "Expenses Excluded" provision is, however, clear and unambiguous on its face. The transition endorsement at best creates an ambiguity which must be resolved in plaintiff's favor; and by defendant's own admission, this endorsement has no application to this case.

Defendant assigns error to the admission of certain statements by plaintiff's employer concerning the effective date of the master policy. Because the court found in defendant's favor on this issue, these evidentiary rulings are not material.

A repetitive refrain of defendant's argument is that it was not its intent to provide coverage in a situation such as that

presented. We do not question the authenticity of that refrain. The language of the policy, however, given its normal, nontechnical meaning, results in coverage, or at most presents an ambiguity which must be construed against the insurer. The policy could, with considerable ease, have been written so as clearly to exclude coverage in the situation presented; but "it is the duty of the court to construe an insurance policy as it is written, not to rewrite it and thus make a new contract for the parties." *Allstate Ins. Co. v. Shelby Mutual Ins. Co.*, 269 N.C. 341, 346, 152 S.E. 2d 436, 440 (1967). In our view the trial court correctly construed the policy in question "as it is written."

Affirmed.

Chief Judge VAUGHN and Judge HILL concur.

RONALD LEE HORTON AND PHYLLIS B. HORTON v. STANLEY F. GOODMAN AND MARGARET GOODMAN

No. 8319DC503

(Filed 5 June 1984)

1. **Easements § 11— abandonment of easement—sufficiency of evidence**

The issue of abandonment of an easement in a roadway across defendants' land was properly submitted to the jury where there was evidence that a fence, on which there were several "no trespassing" signs, had been erected across the roadway by plaintiffs' predecessor in title and had remained there for at least six or seven years; the roadway had been bulldozed and crops had been planted there for a period of about three years; plaintiffs themselves had used an alternate route to reach their property; and plaintiffs had, in fact, been given an express right-of-way separate from the roadway in question.

2. **Rules of Civil Procedure § 15.2— amendment of pleadings to conform to evidence**

In an action to establish a prescriptive easement in a roadway, the trial court did not err in permitting defendants to present evidence of abandonment of the easement and to amend their pleadings to conform to the evidence of abandonment.

3. **Compromise and Settlement § 6— conversations not settlement negotiations—admissibility in evidence**

Conversations between the parties which occurred before the roadway at issue had become the subject of any controversy or dispute did not constitute

settlement negotiations of an existing dispute and were, therefore, properly allowed into evidence.

4. Easements § 11— prescriptive easement in roadway—evidence of alternative ways into property

Evidence that plaintiffs or their predecessors blocked the roadway in question with a fence and elected to take an alternate way into the homeplace was competent to show an intent to abandon an easement in the roadway.

APPEAL by plaintiff from *Montgomery, Judge.* Judgment entered 3 November 1982 in District Court, ROWAN County. Heard in the Court of Appeals 15 March 1984.

Plaintiffs own real property in Rowan County which is composed of two tracts of land totalling approximately 22 acres. It is the site of the Eli Beaver homeplace, which plaintiffs began restoring in 1980. Defendants own an adjoining 117-acre tract. The subject of this dispute is a road which runs over defendants' property and by which plaintiffs claim an easement by prescription.

The evidence introduced by plaintiffs to establish the existence of an easement by prescription was that Scott and George Beaver were born at the Eli Beaver homeplace during the early 1900's. After living at the homeplace the first 21 years of their lives, the Beavers moved away, but remained in Rowan County and returned to visit the homeplace on a regular basis until their mother died in 1956. At that time, they sold the property to J. L. Horton, Jr., who later sold to plaintiffs. The Beavers further testified that from their earliest childhood recollection until the property was sold in 1956 they and members of their family used the road in question without ever asking or receiving the permission of defendants and that the Beaver family maintained the road.

In addition to the nine-acre tract purchased from J. L. Horton, Jr., plaintiffs obtained the second 13-acre tract from Carl Overcash. Overcash testified that he had planted crops on the tract, including the road in dispute, for two or three years up until the 13 acres was sold to plaintiffs. Evidence was also introduced which established that in order to get to the Eli Beaver homeplace to begin restoring the house in 1980, plaintiffs went over the land of J. L. Horton rather than use the roadway. Moreover, J. L. Horton, Jr. testified that he had erected a fence

on the property now owned by plaintiffs, crossing the road in question, and that the fence, which had on it several "no trespassing" signs, had stood for six or seven years. Finally, J. L. Horton, Jr. testified that when he deeded the 13-acre tract to plaintiffs he also, by express grant, gave plaintiffs a 20-foot wide right-of-way, not over the roadway in question, but over his own property.

Plaintiffs filed suit on 13 November 1981, seeking to establish a right-of-way or easement over the land of defendants by injunctive relief. The jury found that plaintiffs had established an easement by prescription from the Horton property to Amity Hill Road, across defendants' property, but that this easement had been abandoned by plaintiffs or their predecessors. From this verdict, plaintiffs appeal.

Kluttz, Hamlin, Reamer, Blankenship and Kluttz, by Malcolm B. Blankenship, Jr., for plaintiff appellants.

Woodson, Hudson, Busby, Sayers, Lawther and Bridges, by Donald D. Sayers, for defendant appellees.

ARNOLD, Judge.

[1] Plaintiffs contend that the trial court erred in allowing the issue of abandonment of easement to be submitted to the jury in that there was insufficient evidence of abandonment. We disagree and find no error.

North Carolina case law has historically recognized the principle that an easement, whether created by grant or prescription, may be abandoned.

> An easement may be abandoned by unequivocable acts showing a clear intention to abandon and terminate the right, or it may be done by acts *in pais* without deed or other writing. The intention to abandon is the material question, and it may be proved by an infinite variety of acts. It is a question of fact to be ascertained from all the circumstances of the case.

Combs v. Brickhouse, 201 N.C. 366, 369, 160 S.E. 355, 356 (1931).

The court submitted the issue of abandonment to the jury after receiving evidence that a fence, on which there were several "no trespassing" signs, had been erected across the roadway and

had remained there for at least six or seven years, that the road had been bulldozed and crops had been planted there for a period of about three years, that plaintiffs themselves had used an alternate route to reach their property, and that plaintiffs had, in fact, been given an express right-of-way separate from the roadway in question. This evidence is sufficient to warrant the submission of the issue of abandonment to the jury in that it tends to establish the intention of plaintiffs to abandon or terminate the easement.

[2] Plaintiffs next contend that the court erred in receiving the evidence of abandonment in that the issue was not raised by the pleadings. They allege that the injection of this issue for the first time at trial constituted prejudicial surprise. Again, we disagree. This Court has previously held that the trial court has the inherent right to amend pleadings and "allow answers or other pleadings to be filed at any time. . . ." *Johnson v. Johnson*, 14 N.C. App. 40, 43, 187 S.E. 2d 420, 422 (1972). This power is discretionary unless it interferes with vested rights or is prohibited by statute. *Id.*

Since the original answer filed by defendants specifically alleged that plaintiffs used other means of access to the property, we fail to see how plaintiffs could have been surprised by the introduction of this and other evidence of abandonment at trial. As the Supreme Court held in *Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972). "Even when the evidence is objected to on the ground that it is not within the issues raised by the pleadings, the court will freely allow amendments to present the merits of the case when the objecting party fails to satisfy the court that he would be prejudiced in the trial on the merits." *Id.*, at 58, 187 S.E. 2d at 727. After finding no prejudice to plaintiffs, the trial court did not abuse its discretion in allowing evidence of abandonment to be presented.

[3] Plaintiffs next contend that the court erred in admitting evidence as to negotiations and offers to settle between the parties. We recognize the rule that evidence of an offer to compromise or settle a disputed claim will not be admitted. *Stein v. Levins*, 205 N.C. 302, 171 S.E. 96 (1933). However, "an offer to compromise necessarily implies an existing dispute, a claim to be adjusted, or a controversy to be settled." *Wilson County Board of Education v. Lamm*, 276 N.C. 487, 493, 173 S.E. 2d 281, 285 (1970).

In the case at bar, the testimony complained of by plaintiffs related to conversations between the parties which occurred before the roadway at issue had become the subject of any controversy or dispute. These discussions did not constitute settlement negotiations of an "existing" dispute, and were, therefore, properly allowed into evidence.

[4] Plaintiffs also contend that the court committed error in allowing evidence of alternate ways into the property in that this evidence was irrelevant and prejudicial. We find, however, that the evidence was relevant to show that plaintiffs did abandon the easement. The fact that plaintiffs or their predecessors blocked the road with a fence and elected to take an alternate way into the homeplace is inconsistent with their claim to the easement and tends to show their intent to abandon the roadway. *See Wilmington Furniture Co. v. Cole*, 207 N.C. 840, 178 S.E. 579 (1935).

We find no error in the trial and, therefore, deem it unnecessary to consider defendants' cross-assignment of error.

No error.

Judges WELLS and BRASWELL concur.

T. J. PARAMORE AND MILDRED PARAMORE v. INTER-REGIONAL FINANCIAL GROUP LEASING COMPANY

No. 823SC1282

(Filed 5 June 1984)

1. **Rules of Civil Procedure § 4— misstatement of defendant's name in captions of summons—amendment to correct properly allowed**

The misstatement of defendant's name in the captions on the summons and complaint was a harmless misnomer and without jurisdictional significance where the record left no doubt that the plaintiffs intended to sue IFG Leasing Company, the entity that leases the equipment involved, and that that company was the one that was served. G.S. 1A-1, Rule 4(b).

2. **Arbitration and Award § 2— error to enter stay pending outcome of arbitration—allegation agreement obtained by fraud or undue influence**

A trial court erred in staying an action concerning a lease agreement pending the outcome of arbitration where plaintiff alleged that the execution

of the lease agreement was obtained through fraud or undue influence and that its terms were unconscionable. If these allegations proved correct, there would be no contract to enforce by arbitration or otherwise, and G.S. 1-567.3(b) authorizes our courts to stay arbitration on a showing there is no agreement to arbitrate.

APPEAL by plaintiffs and defendant from *Lewis, John B., Jr., Judge*. Order entered 20 October 1982 in Superior Court, PITT County. Heard in the Court of Appeals 26 October 1983.

Plaintiffs own and operate a farm in Pitt County and in 1980 needed the use of a farm tractor with certain attachments in clearing new ground on their farm. Defendant, a Minnesota corporation, through various agents and dealers leases farm and other equipment in North Carolina and many other places. On March 28, 1980 a written lease agreement covering the use of a certain farm tractor and various attachments for a period of seven years was purportedly entered into between plaintiffs and defendant. The instrument contained provisions requiring plaintiffs to make fourteen semi-annual rental payments in the amount of $8,987.76 each and to arbitrate any disputes under the agreement in Minneapolis. In November, 1981, a dispute between the parties developed and defendant initiated the arbitration process, which the plaintiff T. J. Paramore acquiesced in at first by rating the arbitrators proposed by the American Arbitration Association and requesting that the arbitration be held in North Carolina, which defendant eventually agreed to. But in May, 1982 plaintiffs filed this action and obtained a temporary restraining order prohibiting defendant from continuing arbitration until the court directed otherwise.

Plaintiffs' complaint alleges, in substance, that: (a) Plaintiff Mildred Paramore did not sign the lease, her purported signature thereon is a forgery, and plaintiff T. J. Paramore executed the lease because of fraud and undue influence on the part of defendant's agent; (b) T. J. Paramore agreed to rent the equipment involved for a year and a half at an annual charge of $8,987.76 with the understanding that at the end of that time, when his new ground was cleared, he could either terminate the arrangement or continue it with other equipment suitable for routine farming activities; (c) the purported agreement is otherwise unenforceable because it contains several unconscionable and unfair provisions;

and (d) the arbitration process should be stayed until this litigation is concluded.

Defendant moved (1) to dismiss for lack of jurisdiction, citing that its name is IFG Leasing Company, whereas the captions of the complaint and summons designate Inter-Regional Financial Group Leasing Company as the defendant; and (2) that the action be stayed until arbitration is concluded as the lease agreement provides. Plaintiffs then moved for permission to file an amended complaint and summons designating IFG Leasing Company as the defendant. Upon the several motions being heard, the court entered an order (1) permitting plaintiffs to file an amended complaint; (2) denying plaintiffs' motion for a preliminary injunction; (3) denying defendant's motion to dismiss; and (4) staying the action pending the conclusion of the arbitration process.

Plaintiffs appealed the denial of their motion for a preliminary injunction and the granting of defendant's motion for a stay; defendant appealed the denial of its motions to dismiss and the allowance of plaintiffs' motion to amend the summons and complaint.

Wayland J. Sermons, Jr. for plaintiff appellants/appellees.

Gaylord, Singleton, McNally & Strickland, by A. Louis Singleton, for defendant appellee/appellant.

PHILLIPS, Judge.

[1] The defendant's appeal, which we discuss first since it involves a possible dismissal of the case, is without merit. Though IFG Leasing Company, the proper defendant in the case, was misnamed in the captions on the summons and complaint as Inter-Regional Financial Group Leasing Company (a non-existing company, apparently, though *Inter-Regional Financial Group* is a corporation that owns IFG Leasing Company), the summons was directed to IFG Leasing Company and that is the enterprise that copies of the summons and complaint were properly served on *three* times; by registered mail at its home office in Minneapolis, by registered mail to its process agent in Durham, and by the Sheriff of Durham County personally serving its process agent. Under principles long followed by the courts of this state, the misstatement of defendant's name in the captions was a harmless

misnomer and without jurisdictional significance. This holding is required, in our opinion, by *Bailey v. McPherson*, where our Supreme Court said that if a misnomer "does not leave in doubt the identity of the party intended to be sued, or, even where there is room for doubt as to identity, if service of process is made on the party intended to be sued, the misnomer or misdescription may be corrected by amendment at any stage of the suit." 233 N.C. 231, 235, 63 S.E. 2d 559, 562 (1951). The record here leaves no doubt but that plaintiffs intended to sue IFG Leasing Company, the entity that leased the equipment involved, and that that company is the one that was served.

Defendant's reliance upon *Crawford v. Aetna Casualty & Surety Company*, 44 N.C. App. 368, 261 S.E. 2d 25 (1979), *disc. review denied*, 299 N.C. 329, 265 S.E. 2d 394 (1980) and *Stone v. Hicks*, 45 N.C. App. 66, 262 S.E. 2d 318 (1980) is misplaced, as these cases involved circumstances radically different from those recorded here. In *Crawford*, the summons was directed to "Michigan Tool Company, a division of Ex-Cell-O Corporation," rather than Ex-Cell-O Corporation, a separate entity, which plaintiff wanted to hold; whereas here the summons, in compliance with the mandate of Rule 4(b) of the North Carolina Rules of Civil Procedure, was directed to "IFG Leasing Company" and that was the company served. And in *Stone* the person served was not the person that the summons was directed to. Thus, IFG Leasing Company was subject to the court's jurisdiction from the time copies of the complaint and summons were served on it, and the court did not err in permitting the misnomer to be corrected by appropriate amendments to the complaint and summons.

[2] But since the complaint contained several nullifying allegations, the court did err, in our opinion, in staying this action pending the outcome of arbitration, rather than vice versa. Because if plaintiff Mildred Paramore did not sign the lease; or if plaintiff T. J. Paramore's execution of it was obtained by fraud or undue influence; or if the lease agreement was against the policy of this state because its terms were unconscionable; then there would be no contract to enforce by arbitration or otherwise. G.S. 1-567.3(b) authorizes our courts to stay arbitration on a showing that there is no agreement to arbitrate; and such a showing was made by plaintiffs, who alleged there was no valid contract and supported that allegation by the affidavit of T. J. Paramore. Thus, before

proceeding further with arbitration, the validity of the supporting contract, including the agreement to arbitrate, should be determined. If it is invalid, there will be nothing to arbitrate; if it is valid, then the arbitration can be resumed and pursued without further interruption. Our holding would be otherwise if the parties were controlled by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, rather than our own act; for the federal act has been interpreted as not permitting arbitration to be stayed while the validity of the contract itself is being determined, though it is apparently otherwise when the existence or validity of just the arbitration clause is in issue. *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 18 L.Ed. 2d 1270, 87 S.Ct. 1801 (1967). But contrary to defendant's contention, the federal act does not apply to the situation recorded. As was pointed out in *Burke County Board of Education v. Shaver Partnership*, 303 N.C. 408, 279 S.E. 2d 816 (1981), our courts are required to apply the Federal Arbitration Act only when the parties contemplated that performance of the contract being litigated involves "substantial interstate activity." In the situation presented by the record the parties could not have contemplated that "substantial interstate activity" would be required in carrying out the contract. All the "activity" under the contract was to occur in North Carolina and the only thing that was to happen elsewhere was that defendant was to receive the rental payments at its office in Great Falls, Montana. The contract was solicited in this state by defendant's Lumberton, N. C. agent; the tractor, the subject and base of the agreement, was not shipped here from another state because of the contract, but was obtained from the lot of a Scotland Neck motor vehicle dealer, where it was parked, and transported to plaintiffs' Pitt County farm, where, according to the agreement, it had to remain until the lease expired. Thus, the Federal Arbitration Act has no application and upon remand, plaintiffs' issues of forgery, fraud and undue influence should be tried, and, if need be, a determination made as to the unconscionability of the agreement because of the several onerous, overreaching and unfair terms that plaintiffs refer to.

As to defendant's appeal

Affirmed.

As to plaintiffs' appeal

Reversed and remanded.

Judges WEBB and EAGLES concur.

DANIEL A. ROYER AND KAY S. ROYER v. WILLIAM RUSSELL HONRINE AND DANIEL D. GRIER, T/D/B/A SILVER DOLLAR SALOON, A PARTNERSHIP, AND SILVER DOLLAR SALOON, INC., A NORTH CAROLINA CORPORATION

No. 8326DC901

(Filed 5 June 1984)

Landlord and Tenant § 13.3— written notice of intent to renew lease—no waiver by lessors

Where a lease required written notice of an intent to extend 120 days prior to the expiration of the original term and an increased rental for the extended term, plaintiff lessors did not waive the written notice requirement by their acceptance of the original rent for 15 months after expiration of the original term and after they had received oral notice from the lessees of an intent to exercise their option to extend.

APPEAL by defendants from *Brown, Judge.* Judgment entered 31 May 1983 in District Court, MECKLENBURG County. Heard in the Court of Appeals 10 May 1984.

Action in summary ejectment against defendant holdover lessees. The trial judge sitting without a jury concluded the lessees had failed to give proper notice of extension of the lease in apt time, and entered judgment for plaintiff landlords. Defendants appeal.

Elam, Seaford, McGinnis & Stroud, by William H. Elam for plaintiff appellees.

Erwin and Beddow, P.A., by Fenton T. Erwin, Jr. for defendant appellants.

HILL, Judge.

This action for summary ejectment was initiated in small claims court. The magistrate ruled in favor of the defendants and

plaintiffs appealed. At the trial de novo the trial judge sitting without a jury entered judgment for plaintiffs allowing summary ejectment of defendants.

The lease agreement under which this controversy arises was entered into 31 May 1978 between Steve Fellos, the owner, and the defendants. Steve Fellos subsequently transferred title to the property to John Gallins and wife, Jean Gallins, on 23 January 1981. On 31 August 1982 John and Jean Gallins and Steve Fellos transferred title to Daniel Royer and wife, Mary Kay Royer. This conveyance provided that title to the premises was subject to the provisions of the lease.

The lease provided, *inter alia*, for an initial term of three years, beginning 2 June 1978 and ending 31 May 1981, and contained an option to extend the term for an additional term of three years to begin 1 June 1981 and end 31 May 1984. Further, the lease provisions required written notice of lessee's intention to exercise its option at least 120 days prior to the end of the term. Rent for the initial term was to be a total of $27,000.00 payable in equal monthly installments of $1,750.00 per month. If the option to extend the lease was exercised, rent would be payable based on a cost of living formula which would have increased the rent due the lessors.

In February 1981 William Honrine called Steve Fellos, indicating that the lessees desired to extend the lease. Fellos advised Honrine that it would be no problem, and discussed the matter with his brother-in-law, John Gallins. Fellos had sold the property to John and Jean Gallins, his brother-in-law and sister, in January 1981 to secure some indebtedness, and the Gallins were to hold title on a temporary basis until repaid. John Gallins advised Fellos that more rent could be obtained. Fellos failed to seek a higher rent, and the lessees continued to pay $1,750.00 monthly after the initial term of the lease expired. Fellos testified that the lessees were paying the rent and automatically the lease was extended: "I didn't raise the rent; I just kept collecting the rent; my brother-in-law kept collecting the rent." Fellos further testified he was supposed to call the lessees back but never did.

Plaintiffs acquired title to the property 31 August 1982 subject to the lease. They gave notice to the defendants on 14 August 1982 to vacate the premises no later than 31 December

1982. Plaintiffs did accept the rent check for September 1982 for $1,750.00.

The trial judge made findings of fact reciting the pertinent parts of the lease, and among his conclusions were the following: (1) the lease terminated 31 May 1981; and (2) the defendants never gave written notice to extend the lease, and never paid increased rentals after termination of the original period as required by the lease. However, an increased rental was tendered in September 1982 but refused by the plaintiffs. Based on extensive findings of fact and conclusions of law, the trial judge ordered summary ejectment of the defendants, and defendants appeal.

The crux of this lawsuit is whether the plaintiffs or their predecessors in title by their actions waived the requirement that written notice be given by the lessees to the lessors 120 days prior to 31 May 1981 to effectively exercise the option to extend the lease. We conclude there was no waiver by the lessors or their predecessors in title and affirm the decision of the trial judge.

When a lease specifies the manner and method by which the tenant may extend the term, compliance with such provisions are conditions precedent to the extension of the term. *Coulter v. Finance Co.*, 266 N.C. 214, 146 S.E. 2d 97 (1966). In those cases in which notice to extend the term is required, and none is given, the landlord may treat the tenant who holds over after the expiration of the original term as a trespasser and sue for possession; or, alternatively, the landlord may waive the notice and treat the tenant as holding the premises by virtue of an extension on the terms of the lease. *Realty Co. v. Demetrelis*, 213 N.C. 52, 194 S.E. 897 (1938).

The lessees contend that the lessors by receiving oral notice from lessees that they exercised their option to extend the lease and their acceptance of the original rent for some fifteen months after the expiration of the original term waived the requirement that written notice be given. We disagree.

The court in *Coulter, supra*, cites 32 Am. Jur., Landlord and Tenant, § 982 as correctly stating the rule as follows:

> If the lease provides for an additional term at an increased rental, and after the expiration of the lease the ten-

ant holds over and pays the increased rental, this is affirmative evidence on his part that he has exercised the option to take the lease for an additional term; but where, under such a lease, the tenant holds over after the expiration of the original term and does not pay the increased rental as provided by the lease, but continues to pay the original rental, which is accepted by the lessor, this negatives the idea of the acceptance of the privilege of an additional term.

Here the lessee first offered to pay the increased rent in September, 1982. The offer was refused.

We distinguish the case under review from *Kearney v. Hare*, 265 N.C. 570, 144 S.E. 2d 636 (1965), in which the court held a waiver of notice to exist when the landlord accepted the full amount of the rent in advance, following termination of the lease. Had there been no waiver the lessor could have sued for the unpaid portion of the rent due under the facts of this case.

We conclude the lessees were derelict in their duty to submit written notice of their election to extend the term of the lease and the lessors have not waived their rights to eject the lessees by accepting the rental due under the provisions of the old lease.

We have examined the remaining assignments of error brought forth by the defendants and find them moot in light of our holding herein.

The judgment of the trial court is

Affirmed.

Judges WEBB and WHICHARD concur.

AMERICAN TOURS, INC. v. LIBERTY MUTUAL INSURANCE COMPANY, A CORPORATION, AND EMPIRE INSURANCE COMPANY, A CORPORATION

No. 8326SC91

(Filed 5 June 1984)

Insurance § 87— underaged daughter as agent of lessee of leased vehicle—liability of insurance company on policy

The trial court properly found in a declaratory judgment action to determine the liability of defendant on a policy of automobile liability insurance that the lessee's daughter was acting as agent of her father at the time of an accident although the lessee violated the terms of the lease by allowing her to drive the vehicle, and defendant was liable for the full amount of the coverage provided. G.S. 20-279.21(g) and G.S. 20-281.

APPEAL by defendant Liberty Mutual Insurance Company from *Gaines, Judge*. Judgment entered 20 October 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 December 1983.

This is a declaratory judgment action to determine the liability of Liberty Mutual Insurance company on a policy of automobile liability insurance. The parties stipulated to the following facts. Borough Leasing Company is in the business of leasing automobiles. Liberty Mutual issued an automobile liability insurance policy to Borough which provided that additional assureds included Borough and its "lessees and rentees." Borough leased an automobile to Robert Mobley. The lease agreement provided that in no event would the vehicle be used by anyone who is not 21 years of age.

On 11 August 1977, Robert Mobley was driving a truck for his employer. On that date, he directed his 19-year-old daughter Beverly Mobley Ham to follow him in the leased vehicle from his home to his place of employment so that he would have a way to return home. Beverly Mobley Ham was involved in an accident with a vehicle owned by the plaintiff as she was following her father. The plaintiff recovered a judgment for $25,868.00 for property damage against Beverly Mobley Ham. The defendant refused to pay this judgment.

The court found that Robert Mobley was a "rentee or lessee" of the vehicle and Beverly Mobley Ham was acting as agent of

her father at the time of the accident although he violated the terms of the lease by allowing her to drive the vehicle. Judgment for $25,000.00, the full extent of the policy coverage, was entered against Liberty Mutual. Liberty Mutual appealed.

Myers, Ray and Myers, by R. Lee Myers, for plaintiff appellee.

Golding, Crews, Meekins, Gordon and Gray, by John G. Golding and David N. Allen, for defendant appellant Liberty Mutual Insurance Company.

WEBB, Judge.

We affirm the judgment of the superior court. At the time of the accident G.S. 20-281 provided in part:

> "From and after July 1, 1953, it shall be unlawful for any person, firm or corporation to engage in the business of renting or leasing motor vehicles to the public for operation by the rentee or lessee unless such person, firm or corporation has secured insurance for his own liability and that of his rentee or lessee, in such an amount as is hereinafter provided, ... Each such motor vehicle leased or rented must be covered by a policy of liability insurance insuring the owner and rentee or lessee and their agents and employees while in the performance of their duties against loss from any liability imposed by law for damages . . . subject to the following minimum limits: . . . five thousand dollars ($5,000) because of injury to or destruction of property of others in any one accident."

Pursuant to the requirement of the statute, Liberty Mutual provided a liability policy to Borough. The policy does not say that agents of lessees are covered. So far as we can determine, there has been no case which has dealt with the question of whether the requirements of G.S. 20-281 are a part of an automobile lessor's liability insurance policy. In interpreting G.S. 20-279.21, our Supreme Court said "the provisions of a statute applicable to insurance policies are a part of the policy to the same extent as if therein written . . . ." *Insurance Co. v. Casualty Co.*, 283 N.C. 87, 91, 194 S.E. 2d 834, 837 (1973). We see no reason why this rule should not apply to G.S. 20-281. We hold that the statu-

tory requirement of G.S. 20-281 that an automobile lessor's liability policy covers agents of the lessee is a part of the policy issued by Liberty Mutual to Borough, and an agent of Mr. Mobley at the time of the accident was covered.

The superior court concluded that Beverly Mobley Ham was an agent of Robert Mobley at the time of the accident. We believe this conclusion is correct. In driving the vehicle to his place of employment she was acting on his behalf and subject to his control. *See* Restatement (Second) of Agency § 1 (1958) for a definition of agency. If she was his agent, she was covered by the policy although Mr. Mobley violated the terms of the lease by letting her drive the automobile.

The defendant argues that G.S. 20-281 does not apply to agents of a lessee. The defendant says the first sentence of the statute defines the required coverage and it does not include agents of the lessee. It contends that to read the second sentence of the statute to require that agents of a lessee be covered interprets the statute to hold that the legislature gives a direct statement of purpose in the first sentence and materially alters the purpose in the second sentence. We do not believe the two sentences are in conflict. As we read them, the second sentence prescribes in more detail the coverage required by the first sentence.

The defendant also argues that the superior court erred in holding that Beverly Mobley Ham was the agent of Mr. Mobley at the time of the accident. It contends he knew he was violating the terms of the lease agreement when he allowed a person under 21 years of age to drive the automobile. We do not believe the fact that Mr. Mobley knowingly violated the terms of the lease agreement kept his daughter from being his agent if she otherwise fit the description. The defendant contends further that allowing Mr. Mobley to create an agency with his daughter broadens the scope of the coverage. We do not believe this is correct. If the policy covers agents of the lessee, its scope is not broadened when an agent is covered. The defendant argues further that it should be against public policy to allow Mr. Mobley to better himself by breaching his contract. There is also a policy against uninsured automobiles being on the highway. If the interpretation of the statute and insurance contract is to be based on policy, we believe this policy should prevail.

Finally, the defendant argues that if it is to be liable it should only be liable in the amount of $5,000, the statutory minimum at the time of the accident. It relies on *Woodruff v. Insurance Co.*, 260 N.C. 723, 133 S.E. 2d 704 (1963) and *Caison v. Insurance Co.*, 36 N.C. App. 173, 243 S.E. 2d 429 (1978), *later appealed*, 45 N.C. App. 30, 262 S.E. 2d 296 (1980). In each of those cases the insurance company had provided coverage in excess of that required by Chapter 20, Article 9A of the General Statutes. G.S. 20-279.21(g) provides specifically that any coverage which a policy provides in excess of or in addition to required coverage shall not be subject to the provisions of Article 9A. Relying on G.S. 20-279.21(g), the Courts in *Woodruff* and *Caison* held that as to excess coverage, the terms of the policy and not the statutory provision should govern. G.S. 20-281, which controls this case, is a part of Article 11 of Chapter 20. G.S. 20-279.21(g) does not apply to it. We have held that Liberty Mutual has provided coverage to Beverly Mobley Ham. We hold that Liberty Mutual is liable for the full amount of coverage provided.

Insurance Co. v. Broughton, 283 N.C. 309, 196 S.E. 2d 243 (1973) deals with G.S. 20-281 but there is not a question of agency involved in that case. It has no application to this case.

Affirmed.

Judges WELLS and WHICHARD concur.

STATE OF NORTH CAROLINA v. CHARLES LEE WHITE

No. 8311SC981

(Filed 5 June 1984)

1. Searches and Seizures § 24— affidavit for search warrant—confidential informants

A magistrate properly issued a warrant to search defendant's premises for shotguns used in a robbery on the basis of an officer's affidavit that a confidential informant who had previously given him information leading to five or more convictions had told him that the informant heard defendant and another person discussing a certain armed robbery, observed money taken in the robbery, and observed at the premises to be searched within the previous 24 hours a sawed-off shotgun and a .410 shotgun used in the robbery.

2. Arrest and Bail § 3.6— probable cause to arrest for armed robbery

Officers had probable cause to believe that defendant had committed a felony and thus could arrest defendant without a warrant where they had been told by an informant that the informant had heard defendant and another person discussing a certain armed robbery. G.S. 15A-401(b)(2)(a).

3. Criminal Law § 75— confession of black defendant—arrest by white officers—only one officer in interrogation room

The confession of a black defendant was not rendered involuntary by the fact that he was arrested by four white police officers or by the fact that only one officer was in the interrogation room with defendant.

4. Criminal Law § 138.1— more lenient sentence to codefendant

The trial court did not abuse its discretion in imposing a more severe sentence upon defendant than the sentence imposed upon a codefendant tried for the same crime two months earlier even though the codefendant may have been more culpable in committing the crime than defendant, the trial court found the same aggravating factor as to each defendant, and the trial court found a mitigating factor for the defendant which it did not find for the codefendant.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 17 May 1983 in Superior Court, LEE County. Heard in the Court of Appeals 14 March 1984.

The defendant was tried for armed robbery. Prior to the trial, a hearing was held on a motion by the defendant to suppress evidence seized in a search. The evidence at the *voir dire* hearing showed that C. A. Stone, a detective with the City of Sanford Police Department, applied for a warrant to search certain premises at 320 Price Street in Sanford. In his affidavit, he stated that a sawed-off shotgun and a .410-gauge shotgun constituted evidence of a crime and the identity of a person who had committed a crime. He stated further that a confidential informant who had proven himself reliable in the past by providing information leading to five or more arrests and convictions had told him that during the previous evening he had heard Ricky Goldston and Charles White discussing the armed robbery at the Burger Mint, that he observed money that was taken in the robbery, and had observed on the premises to be searched within the previous 24 hours the sawed-off shotgun and the .410 shotgun. The magistrate issued the search warrant. The court found facts based on this evidence and overruled the defendant's motion to suppress the admission of the two shotguns into evidence.

At the trial of the case, witnesses for the State testified as to the robbery of the Burger Mint on Wicker Street in Sanford, North Carolina. Terry Klomparens testified that he is a detective in the City of Sanford Police Department. The defendant moved to suppress testimony by Detective Klomparens as to any statement the defendant made to him. A *voir dire* hearing out of the presence of the jury was held and Detective Klomparens testified that he went to 320 Price Street in Sanford to execute a search warrant, that he found the defendant at this address and placed him under arrest for the robbery, that the defendant was fully advised of his right to have an attorney and his right to remain silent. Mr. Klomparens testified further that he carried the defendant to the Sanford Police Department where he was again advised of his rights. After the defendant had been advised of his rights at the police department, he waived his rights and confessed to the robbery. The defendant testified that he confessed as a result of the coercion of the police officers. The court made findings of fact consistent with the State's evidence and ordered the confession admitted into evidence.

The defendant was convicted of armed robbery and was sentenced to 25 years in prison. He appealed.

Attorney General Edmisten, by Assistant Attorney General Dennis P. Myers, for the State.

Harrington and Gilleland, by Robert B. Gilleland, for defendant appellant.

WEBB, Judge.

[1] The defendant's first assignment of error is to the admission into evidence of the two shotguns found in the search of the premises at 320 Price Street. Assuming the defendant had standing to challenge the legality of the search, we hold this assignment of error is without merit. In *Illinois v. Gates*, --- U.S. ---, ---, 103 S.Ct. 2317, 2332, 76 L.Ed. 2d 527, 548, *reh'g denied*, --- U.S. ---, 104 S.Ct. 33, 77 L.Ed. 2d 1453 (1983), the United States Supreme Court formulated a new test to judge the proper issuance of a search warrant. The Court said:

> "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circum-

> stances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed. (Citations omitted.)"

Whether we apply this test or the two-pronged test of *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969), we cannot hold the magistrate was in error in issuing the search warrant. The affidavit of Detective Stone stated he had received information from an informant who had previously given him information leading to five or more convictions. This established the reliability of the informant. He stated the informant told him he had heard the defendant and another person discussing the robbery and had seen at 320 Price Street the weapons used in the robbery. We believe the magistrate could conclude from this that there was probable cause that the defendant and his companion had told the informant about the robbery and showed him the guns used in it. We believe it establishes the fact that the informant spoke with personal knowledge. This satisfies the second prong of *Spinelli*. We also believe the magistrate could rely on the veracity and basis of knowledge of the informant to reach a common sense conclusion that there was a fair probability that the shotguns were evidence of a crime and they were located at 320 Price Street. We believe we must hold that the magistrate had a substantial basis for concluding that probable cause existed.

[2] In his second assignment of error, the defendant argues his confession should have been excluded. He says this is so because (1) he made the confession while he was under illegal arrest and (2) the confession was involuntary. As to his claim that he was under illegal arrest, he contends the officers had no right to arrest him without an arrest warrant. G.S. 15A-401(b)(2)(a) provides:

> Offense Out of Presence of Officer.—An officer may arrest without a warrant any person who the officer has probable cause to believe:
>
> a. Has committed a felony . . . .

When the officers went to 320 Price Street, they knew that an informant had told one of them that he had heard defendant discuss

the robbery. We believe this gave them probable cause to believe defendant had committed a felony and they could arrest him without a warrant.

[3] The defendant argues the confession was involuntary because he is a black man who was arrested by four white police officers, handcuffed and taken to police headquarters where he was alone in the interrogation room with Detective Klomparens when he was interrogated. The officers testified that no threats were made to the defendant and that he signed a written waiver of his rights before confessing. The defendant testified that he was threatened before he confessed. The court found facts based on the officers' testimony and we are bound by these findings of fact. The fact that the officers are white and the defendant is black and the fact that only one officer may have been in the interrogation room with the defendant does not make the confession involuntary. The defendant's second assignment of error is overruled.

The defendant argues under his third assignment of error that his motion to dismiss at the close of the evidence and his motion for appropriate relief should have been allowed. This argument is based on the premise that the confession was erroneously admitted and that it was error to admit the shotguns into evidence. This assignment of error is overruled.

[4] The defendant's last assignment of error is to the sentence imposed. He argues that his codefendant Ricky Goldston who was tried two months previously was more culpable in committing the robbery than was the defendant, that the court found the same aggravating factor as to each defendant, and found a mitigating factor for the defendant which it did not find for Ricky Goldston. The defendant received a sentence of 25 years and Ricky Goldston received a sentence of 17 years. The defendant argues that this disparity in sentencing amounts to an abuse of discretion by the court. The defendant's sentence was within the statutory maximum. We do not believe the factors cited by the defendant show an abuse of discretion by the court. *See State v. Harris*, 27 N.C. App. 385, 219 S.E. 2d 306 (1975).

No error.

Judges BECTON and EAGLES concur.

CITY OF STATESVILLE, NORTH CAROLINA v. GILBERT ENGINEERING CO.

No. 8322SC676

(Filed 5 June 1984)

1. **Arbitration and Award § 1— city's, not federal's, conditions on arbitration controlling**

In an action evolving from a grant obtained by the City of Statesville from the United States Environmental Protection Agency to construct improvements at a wastewater treatment plant where a contract was entered into with defendant to make the improvements, the City of Statesville's own general conditions dealing with arbitration controlled since the federal "General Conditions" stated in the federal regulations had not been specifically included, and since the EPA had been notified of the City of Statesville's election to include its own general conditions and the EPA had not expressed disapproval. Further, defendant's own conduct demonstrated its understanding that the federal "General Conditions" were not applicable since defendant had relied exclusively on the provisions of the City of Statesville's consulting firm's conditions when seeking extensions of time on the contract. Therefore, where the City of Statesville's general conditions allowed arbitration, if mutually acceptable, but contained no mandatory arbitration clause, the trial court correctly determined that federal regulations requiring mandatory arbitration did not apply. G.S. 1-567.18.

2. **Arbitration and Award § 1— federal conditions on arbitration not physically part of contract—not controlling**

In an action on a contract evolving from an environmental protection agency grant to plaintiff where plaintiff opted to substitute its own conditions for the federal "General Conditions" by not physically including the federal "General Conditions" in the contract, there was no merit to defendant's contention that the federal "General Conditions" concerning arbitration controlled where there was a conflict with plaintiff's own conditions. Further, the federal law in force at the time the contract was executed stated that arbitration was voluntary and that the parties must "mutually agree" to arbitrate.

APPEAL by defendant from *Russell G. Walker, Jr., Judge.* Order entered 24 January 1983 in Superior Court, IREDELL County. Heard in the Court of Appeals 11 April 1984.

Smith, Currie & Hancock, by Thomas E. Abernathy, IV and Neal J. Sweeney, and Raymer, Lewis, Eisele, Patterson & Ashburn, by Douglas G. Eisele, for defendant appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by George W. House, Michael D. Meeker and Charles C. Green, Jr., for plaintiff appellee.

BECTON, Judge.

This is an appeal pursuant to N.C. Gen. Stat. § 1-567.18 (1983) from an order granting plaintiff's motion to stay arbitration. We hold that the trial court correctly determined that regulations requiring mandatory arbitration did not apply, and we affirm.

I

Plaintiff, the City of Statesville (Statesville), obtained a grant in June 1976 from the United States Environmental Protection Agency (EPA) to construct improvements at a wastewater treatment plant. Statesville hired Peirson & Whitman, Inc. (P&W), a consulting firm, to prepare the extensive bid documents. EPA had promulgated regulations governing the content of the bid documents. 40 Fed. Reg. 58,602 *et seq.* (1975) (codified at 40 C.F.R. § 35.936 *et seq.* (1976)). One provision thereof, 40 C.F.R. § 35.938-4 (c)(6) (1976), required that EPA grantees physically include in their bid documents these governing regulations, 40 C.F.R. §§ 35.936, 35.938, 35.939 (1976). At the time of the grant, a provision of these governing regulations, 40 C.F.R. § 35-938-8(a) (1976) provided that: "Each construction contract must include the [federal] 'General Conditions' of the 'Contract Documents for Construction of Federally Assisted Water and Sewer Projects,' as revised" (the federal "General Conditions"). On 20 September 1976 EPA issued a "class deviation," an administrative variance which allowed *optional* inclusion of the federal "General Conditions." An EPA final rule dated 29 December 1976 and effective 1 February 1977 codified the option in a revised 40 C.F.R. § 35.938-8, by deleting 40 C.F.R. § 35.938-8(a) (1976), the mandatory inclusion provision. 41 Fed. Reg. 56,636 (1976) (codified at 40 C.F.R. § 35.938-8 (1977)). P&W had worked on federal contracts and preferred its own general conditions which allowed arbitration, if mutually acceptable, but contained no mandatory arbitration clause. P&W included its general provisions in the bid document, which later became the contract itself.

Bids opened in March 1977, and in July 1977 defendant Gilbert Engineering Co. (Gilbert) entered into a contract with Statesville. The contract document included the P&W conditions and the required regulations, but 40 C.F.R. § 35.938-8 appeared in its unrevised form, with the language requiring inclusion of the federal "General Conditions." Disputes arose almost immediately

regarding extensions of time due to weather delays. Gilbert completed the work in 1981. In October 1982 Gilbert demanded arbitration of the still unresolved disputes. From the grant of Statesville's motion to stay arbitration, Gilbert appeals.

The trial court sat as the finder of fact and made extensive findings of fact and conclusions of law. The findings are binding on appeal if supported by the evidence, even though there may be evidence to the contrary; conclusions of law are, however, reviewable *de novo* on appeal. *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E. 2d 189 (1980).

It is clear that Statesville had the option to include its own general conditions. The class deviation, in September 1976, provided that the inclusion of the federal "General Conditions" would be optional, at minimum, in contracts which had not already "gone to bid." It is undisputed that the EPA final rule, effective 1 February 1977, codified the option and that the project did not go to bid until March 1977.

II

[1] Did Statesville exercise its option? Although the federal regulations governing these contracts are lengthy, they did not direct how to exercise the option not to include the federal "General Conditions." Absent a stated procedure, the ordinary rules of contract formation apply.

Statesville's evidence showed that in a telephone conversation in late 1976, P&W notified the responsible EPA officials of Statesville's election to include its own general conditions. Moreover, the contract received EPA approval (there is no evidence of disapproval, and EPA apparently paid out the grant money), although the contract contains some forty pages of P&W's conditions. However, the unrevised version of 40 C.F.R. § 35.938-8, which required inclusion of the federal "General Conditions," had not been scratched out or changed by addendum. Either method would have been an acceptable way to indicate an election, according to testimony by an EPA grants specialist. We note, however, that the regulation which required inclusion of the EPA governing regulations, 40 C.F.R. § 35.938-4(c) (1976), does not allow on its face the *non-inclusion* of any of its separate provisions in the event of administrative amendments such as the class

deviation. The provision in question requires the *inclusion*, not the incorporation by reference, of the federal "General Conditions." 40 C.F.R. § 35.938-8(a) (1976). Under the circumstances, this means physical inclusion, since the regulations themselves were already incorporated by reference elsewhere, 40 C.F.R. § 35.938-4(c)(5) (1976), with a separate requirement that they be "included." 40 C.F.R. § 35.938-4(c)(6) (1976). Since the contract does not physically include the federal "General Conditions," the trial court could find that Statesville had properly opted to use its own conditions, and that the federal "General Conditions" therefore were not part of the contract. *Humphries v. City of Jacksonville.*

III

Gilbert's own conduct clearly demonstrates its understanding that the federal "General Conditions" are not applicable. Gilbert admitted reviewing the entire contract, including the P&W conditions. In a letter to Statesville dated December 1977, Gilbert relied exclusively on the provisions of the P&W conditions, when seeking an extension of contract time. In a letter dated August 1979, seeking an adjustment of the contract price, Gilbert relied instead on the federal "Supplemental General Conditions," 41 Fed. Reg. 56,638 (1976) (codified at 40 C.F.R. § 35 Subpart E, App. C-2 (1977)), which were indeed a mandatory provision of the construction contract. *See* 40 C.F.R. § 35.938-8 (1977). The first evidence that Gilbert considered the federal "General Conditions" applicable, other than Gilbert's oral testimony as to its subjective impressions, is the demand for arbitration filed late in 1982, over five years after the contract had been executed. It remains a fundamental principle of contract interpretation that the practical interpretation given a contract by the parties constitutes the best evidence of its meaning. *See Peaseley v. Virginia Iron, Coal & Coke Co.*, 282 N.C. 585, 194 S.E. 2d 133 (1974). Gilbert's own conduct provided solid evidentiary support for the court's order.

We therefore conclude that the trial court properly found that the contract included the P&W conditions.

IV

[2] Gilbert next contends that under Statesville's own conditions the federal "General Conditions" control whenever there is a conflict. We disagree.

Gilbert relies on the following language from the P&W Supplemental General Conditions: "In the event of conflict with other requirements of the Contract Documents, the following provisions must be complied with. . . ." The 1976 unrevised version of 40 C.F.R. § 35.938-8, which required inclusion of the federal "General Conditions," is among the "following provisions" of the P&W Supplemental General Conditions. As in part II, *supra*, in which we concluded that Statesville properly opted to substitute its own conditions for the federal "General Conditions" by not physically including the federal "General Conditions" in the contract, the physical inclusion of the federal "General Conditions" would have been a prerequisite to Gilbert's success on this argument.

V

Assuming, *arguendo*, that Gilbert's interpretation of the P&W Supplemental Conditions in part IV, *supra*, were correct, it still renders Gilbert little aid. An elementary rule of contract interpretation is the law in force at the time the contract is executed controls. *Town of Scotland Neck v. Western Sur. Co.*, 301 N.C. 331, 271 S.E. 2d 501 (1980). Gilbert relies on 40 C.F.R. § 35.938-8(b) (1976), which provides: "each construction contract must include the [federal] 'Supplemental General Conditions' set forth in Appendix C-2 to this subpart." The relevant amended version of Appendix C-2 was adopted effective 1 February 1977, before bidding opened. 41 Fed. Reg. 56,638 (codified at 40 C.F.R. § 35 Subpart E, App. C-2 (1977)). The preamble to Appendix C-2 expressly states that "[i]n case of any conflict between the standard [federal] 'General Conditions,' if elected to be used by a grantee, and Appendix C-2, Appendix C-2 provisions govern." 41 Fed. Reg. 56,635. Pursuant to Appendix C-2, arbitration is voluntary; the parties must "mutually agree" to arbitrate. 40 C.F.R. § 35 Subpart E, App. C-2 cl. 7. This conflicts directly with the mandatory arbitration provision in federal "General Conditions" and, therefore, the Appendix C-2 voluntary arbitration provision would govern. Gilbert attempts to circumvent this result by arguing that Statesville is bound by the law in force in July, 1976, at the time of the EPA grant. There is no authority for such a rule; to the contrary, the regulations themselves clearly differentiate the EPA grant agreements with the municipalities from the contracts the municipalities enter into with private firms. *See* 40 C.F.R. § 35.936-1 (1976). We are persuaded that the law in force at

the time Gilbert executed the contract, not at the time of the original grant, controls.

VI

We therefore conclude that the evidence supports the findings of fact, and the findings support the conclusions of law. The order appealed from is

Affirmed.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. RICKY DALE WILFONG

No. 8325SC930

(Filed 5 June 1984)

1. **Burglary and Unlawful Breakings § 5.8— breaking and entering—absence of consent of lessee**

The State's evidence was sufficient to show that defendant lacked consent of a lessee to enter her apartment so as to support his conviction of misdemeanor breaking and entering where it tended to show that after defendant was denied entry to the apartment by one lessee, the second lessee locked the doors and windows to the apartment; five minutes later, the second lessee heard the glass breaking in the back door; as the second lessee ran out the front door and started down the street, she looked back and saw defendant coming through the front door; defendant caught up with her and began to beat her; and after the crimes an officer observed a broken pane in the back door of the apartment.

2. **Criminal Law § 86.8— conduct of witness—collateral matter—necessity for cross-examination of witness**

In a prosecution for breaking and entering and assault on a female, testimony by defendant that the two occupants of the apartment where the crimes occurred were lesbians was not competent to show interest, bias or motive on the part of the prosecuting witness where defense counsel never cross-examined the prosecuting witness about an alleged sexual relationship with the other occupant of the apartment, since collateral conduct tending to show bias must first be called to the attention of the witness before it may be proved by others.

APPEAL by defendant from *Sitton, Judge.* Judgment entered 21 March 1983 in Superior Court, CATAWBA County. Heard in the Court of Appeals 16 February 1984.

Defendant was tried on charges of assault on a female and misdemeanor breaking or entering. He was found guilty of misdemeanor breaking or entering and sentenced to 18 months imprisonment. From his conviction and sentence, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Fred R. Gamin, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender David W. Dorey, for defendant.

ARNOLD, Judge.

Defendant has assigned error to the denial of his motion to dismiss the charge of misdemeanor breaking or entering for insufficiency of the evidence and to the court's refusal to admit certain evidence. We find no error in the trial.

[1] Defendant first argues that the evidence was insufficient to show that he was the perpetrator of the breaking or entering or that he lacked consent of the lessee to enter her apartment. He contends that since the evidence at trial raised no more than a suspicion or conjecture as to the commission of the offense, his motion to dismiss should have been granted.

In ruling on a motion to dismiss,

> [t]he evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court. . . . (Citations omitted.)

State v. Powell, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980). When viewed in this light, the State's evidence tends to show that on 2 December 1982 Thelma Shatley was living in an apartment in Hickory with Charlene Streeter. Around 2:30 or 3:30 on the morning of 2 December Shatley was awakened by Streeter and defendant as they conversed at the front door. The two talked for about thirty or forty-five minutes, and Streeter refused to let defendant in. Streeter then left the apartment. Immediately after Streeter's

departure, Shatley locked the front door and made sure the back door and windows were locked. Five minutes later Shatley heard the glass breaking in the back door. She ran out the front door onto the porch and started down the street. Shatley looked back and saw defendant coming through the front door. He caught up with her and began beating her with a stick.

Several hours after the alleged break-in and assault, an investigator with the Hickory Police Department went to the apartment and observed a broken pane in the back door. Shatley did not give defendant permission to enter the apartment, nor is there any evidence that Streeter consented to his entry.

We find no merit to defendant's argument that the State failed to show that defendant lacked the consent of Streeter to enter her apartment, and, therefore, failed to present sufficient evidence of a wrongful entry. From the evidence that several minutes after Streeter left the apartment after having denied defendant entry and after Shatley had locked the doors and windows to the apartment, the glass in the back door was broken, and defendant was seen running out of the front door; the jury reasonably could have inferred that Streeter did not give defendant consent to enter her apartment.

There is also no merit to defendant's allegation of insufficient evidence as to the defendant being the perpetrator of the break-in. Defendant emphasizes that Shatley did not see him enter the back door of the apartment and did not indicate whether she observed him run out the front door to the apartment or to the building in which the apartment was located. There is no evidence in the record that there was a separate door to the apartment building. On appeal, this Court may not consider evidence discussed in the brief outside the record. *State v. Flannery*, 31 N.C. App. 617, 230 S.E. 2d 603 (1976). The trial court properly denied defendant's motion to dismiss, since the evidence was sufficient to carry the case to the jury.

[2] During the direct examination of defendant, he was asked if he knew why Streeter and Shatley were living in the same apartment together. Defendant responded, "Yes, they were lesbians." The assistant district attorney moved to strike this response, and defense counsel requested to be heard on the motion. The trial court then allowed defense counsel to question defendant for the

record regarding his knowledge of such a relationship. Defendant gave the following testimony:

> Q. How do you know what the relationship is?
>
> A. Well, you see I have been knowing Charlene for years and we were in school together and Thelma she use to work at the Finefare and she paid Charlene rent and I have seen them down there and they sleep in the same bed. I will just put it like that. I know that much and she worked at Finefare and Charlene does or goes to Finefare and gets her and Charlene gives her money and stuff like that. I have lived around that neighborhood along time and everyone knows that.
>
> Q. Do you have an opinion as to Thelma reputation in the community?
>
> A. Yes sir.
>
> Q. What is that opinion?
>
> A. She is pretty well known, you know. . . . she is funny—
>
> Q. What do you mean by funny?
>
> A. She is gay.

After considering this testimony, the trial court allowed the State's motion to strike and instructed the jury not to consider defendant's answer that Streeter and Shatley were lesbians.

Defendant argues on appeal that his testimony should have been admitted to show interest, bias or motive on the part of Shatley. He suggests that his testimony tended to show that Shatley's accusations were the result of her jealousy over defendant's past and present relationship with Streeter. In support of his argument defendant cites two cases where this Court ordered a new trial because of the lower court's refusal to allow testimony showing bias on the part of State's witnesses. *State v. Erby*, 56 N.C. App. 358, 289 S.E. 2d 86 (1982); *State v. Becraft*, 33 N.C. App. 709, 236 S.E. 2d 306, *disc. rev. denied*, 293 N.C. 362, 237 S.E. 2d 850 (1977).

In *State v. Erby, supra*, this Court found prejudicial error in the trial court's refusal to allow defense counsel to ask a State's witness if she was in love with the decedent. Defendant was sub-

sequently convicted for the voluntary manslaughter of decedent. In *State v. Becraft, supra,* the State's witness, a robbery victim, denied on cross-examination that he was a homosexual and that he had propositioned the defendants prior to the robbery. Thereafter, the trial court would not allow one of defendants to testify that the victim had propositioned him and that he had refused. We held that this testimony should have been admitted to show bias on the part of the robbery victim toward the defendant.

Both *Erby* and *Becraft* are distinguishable from the case on appeal. Defense counsel sought to impeach the credibility of the State's witnesses in the two cited cases only after asking or attempting to ask these witnesses about certain conduct tending to show bias. Defense counsel here never cross-examined Shatley about an alleged sexual relationship with Streeter. "When the statement or conduct is 'collateral,' but tends to show bias, it must first be called to the witness's attention, thus giving him an opportunity to admit, explain or deny it, but, if denied, may be proved by others." 1 Brandis on North Carolina Evidence § 48 (Sec. rev. ed. 1982) at 182.

We believe that defendant's testimony was also inadmissible because its prejudicial effect outweighed its slight tendency to show bias on the part of Shatley. Specifically, defendant failed to present any evidence of a close relationship between himself and Streeter which would tend to make Shatley jealous. There was also no direct evidence of any homosexual relationship between the two women.

From the judgment appealed from, we find

No error.

Judges WHICHARD and BECTON concur.

In re Gwaltney

IN THE MATTER OF: DEBRA ANN GWALTNEY, LISA ANETTE GWALTNEY

No. 833DC341

(Filed 5 June 1984)

Parent and Child § 2.2— findings of fact supporting conclusions of law regarding child abuse and neglect—conclusions supporting disposition of custody

An order adjudicating respondents' two minor daughters to be abused and neglected and directing custody of the children in the County Department of Social Services was supported by the findings of fact and the conclusions of law where the findings indicated that the respondent-father had repeatedly sexually abused his two daughters; that as a result the children suffered serious emotional damage evidenced by withdrawal, aggressive behavior, guilt and anxiety; and that one of the children had "attempted suicide as a direct result of the behavior of the father respondent and the acquiescence of the mother respondent . . . to the sexual acts." G.S. 7A-517(1) and (21) and G.S. 50-13.2(a).

APPEAL by respondent from *Aycock, Judge.* Order entered 14 January 1983 in District Court, CRAVEN County. Heard in the Court of Appeals 16 February 1984.

Respondent Marie Anette Gwaltney is appealing from an order adjudging her two minor daughters to be abused and neglected and directing custody of the children in the Craven County Department of Social Services (hereinafter the Department). We hold that the findings of fact support the conclusions of law regarding abuse and neglect, and, in turn, the conclusions of law support the disposition of custody.

The Department initiated this proceeding by petitioning the district court for immediate custody and alleging that the minor children were both abused and neglected pursuant to G.S. 7A-517 (1) and (21). The court issued an immediate custody order placing the children with the Department. After several continuances the court heard evidence on the petition, adjudged the children to be abused and neglected and awarded custody to the Department.

In its order the court found that the following uncontested findings of fact were based upon clear and convincing evidence.

Debra Ann Gwaltney was born to respondent and her husband William Edgar Gwaltney, III on 15 October 1968. Lisa Anette Gwaltney was born on 19 January 1970. Both parents and children were present at the hearing and represented by counsel.

All parties to the action admitted the following allegations in the juvenile petition.

> I. The respondent father, William Edgar Gwaltney, III, has on numerous occasions:
>
> (1) within the past two years committed rape upon, incest with juvenile, Debra Ann Gwaltney, and forced her to perform various sexual acts with him in their home.
>
> (2) within the past year committed and attempted to commit various sexual acts on juvenile, Lisa Anette Gwaltney.
>
> (3) the referenced acts have created serious emotional damage to the juvenile as evidenced by withdrawals, aggressive behavior, overwhelming guilt, severe anxiety. In addition, juvenile, Debra Gwaltney, has attempted suicide as a direct result of the behavior of the father respondent, and the acquiescence of the mother respondent, Marie Anette Gwaltney, to the sexual acts.

The respondents denied the allegations in Part II of the petition that respondent-mother had allowed her daughters to be sexually abused and had directed them to commit perjury and not to testify against their father.

The court further found that during the year prior to 23 June 1982, the respondent-father entered his daughters' bedrooms at night, two to three times a week, and committed various sexual acts with them. During the two years prior to 23 June 1982, the respondent-mother was present in the home and knew that her husband was entering the bathroom while their daughters were bathing. Prior to the hearing the respondent-father pled guilty to incest and taking indecent liberties with a minor and is presently incarcerated.

The children's guardian ad litem recommended to the court that custody of the children remain with the Department; that Debra be placed in the physical custody of her maternal grandmother and that Lisa be placed in the physical custody of respondent-mother. These recommendations of physical placement were consistent with the wishes of the children.

Based upon these uncontested findings of fact, the court concluded that the children were neglected and abused; and that it

was in their best interest that custody be given to the Department with physical placement of Debra in the home of her maternal grandmother and physical placement of Lisa in the home of her mother under the Department's supervision. The court ordered custody based upon these conclusions. The court further ordered that the children continue counseling at the Neuse Mental Health Clinic; that visitation between Debra and her mother be as liberal as possible and that the Department request a review of the children's placement and custody in sixty days.

Kent G. Flowers, Jr., for petitioner appellee Craven County Department of Social Services.

Sumrell, Sugg & Carmichael, by Rudolph A. Ashton, III, for respondent appellant Marie Anette Gwaltney.

ARNOLD, Judge.

Respondent argues that the court erred in awarding custody to the Department because there were no findings of fact supporting the allegations against her as set out in the petition and no finding of fact that she was an unfit mother. She argues that the findings of fact were insufficient to rebut her "constitutional right to the natural and legal custody of her minor children."

The primary concern of the trial court in a custody matter, as mandated by G.S. 50-13.2(a), is the welfare of the child, and this concern outweighs the presumption favoring the award of custody to a natural parent. *In re Kowalzek*, 37 N.C. App. 364, 246 S.E. 2d 45, *disc. rev. denied and appeal dismissed*, 295 N.C. 734, 248 S.E. 2d 863 (1978). This Court in *Kowalzek* stated:

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

Id. at 368, 246 S.E. 2d at 47. The findings of fact in the order now before us support the conclusions of law that the children were abused and neglected and that the best interests of the children would be served if custody was awarded to the Department.

An abused juvenile is one whose parent:

c. Commits or allows the commission of any sexual act upon a juvenile in violation of law; . . . or

d. Creates or allows to be created serious emotional damage to the juvenile and refuses to permit, provide for, or participate in treatment. Serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal or aggressive behavior toward himself or others. . . .

G.S. 7A-517(1). A neglected juvenile is one "who does not receive proper care, supervision, or discipline from his parent . . .; or who lives in an environment injurious to his welfare. . . ." G.S. 7A-517(21).

As the findings of fact indicate, all parties admitted the allegations in Part I of the juvenile petition. These allegations were that the respondent-father had repeatedly sexually abused his two daughters; and that as a result the children suffered serious emotional damage evidenced by withdrawals, aggressive behavior, guilt and anxiety. Another admitted allegation under Part I of the petition was that Debra "has attempted suicide as a direct result of the behavior of the father respondent, *and the acquiescence of the mother respondent, Marie Anette Gwaltney, to the sexual acts.*" (Emphasis supplied.) The findings of fact further indicate that the respondent-mother was living in the home while her children were being sexually abused; and that she knew that her husband was entering the bathroom while his twelve and thirteen-year-old daughters were bathing. This latter finding shows that the respondent-mother was allowing situations to occur in the home which would tend to promote the sexual abuse.

The disposition of legal custody with the Department is also supported by the recommendations of the guardian ad litem and the wishes of the minor, Debra Ann Gwaltney. Pursuant to G.S. 7A-640, the court may consider the recommendation of a guardian ad litem concerning the needs of a juvenile. The courts may also consider the wishes of a child of suitable age. *See In re Peal*, 305 N.C. 640, 290 S.E. 2d 664 (1982). At the time of the hearing Debra was 14 years old.

The foregoing findings of fact amply support the adjudication of abuse and neglect and the order awarding custody to the Department. In light of this abuse and neglect, we find the trial court's disposition to be fair. The respondent-mother was given physical custody of one daughter and liberal visitation with the other daughter pending review of the custody and placement in sixty days. The order adjudicating the children to be abused and neglected and placing them in the legal custody of the Craven County Department of Social Services is

Affirmed.

Judges WHICHARD and BECTON concur.

FIBER INDUSTRIES, INC. v. SALEM CARPET MILLS, INC.

No. 8321SC608

(Filed 5 June 1984)

Customs and Usages § 1; Uniform Commercial Code § 7— evidence of usage of trade inadmissible—failure to prove usage of trade

In plaintiff fiber manufacturer's action to recover the purchase price of fiber sold to defendant carpet manufacturer in which defendant claimed it was entitled to an offset for losses suffered as a result of plaintiff's cessation of production of carpet fiber, evidence was not admissible under G.S. 25-2-202(a) to show a "usage of trade" obligating plaintiff to fill all orders by defendant during the projected market life of any carpet style which utilized fiber manufactured by plaintiff where it is clear that both parties intended that their purchase order and purchase acknowledgment forms should comprise all obligations between them. Furthermore, defendant's evidence was insufficient to show that the customary practice of the carpet industry placed on a manufacturer of carpet fiber a continuing obligation to fill all orders of a maker of a carpet utilizing that fiber. G.S. 25-1-205(2).

APPEAL by defendant from *Mills, Judge*. Judgment entered 21 February 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 5 April 1984.

Prior to 1980, Fiber Industries (Celanese) sold fiber to carpet manufacturers for their use in the making of carpets. Beginning in 1975, Salem Carpet bought trademarked "Fortrel" and "For-

tron" fiber from Celanese on an order-by-order basis. Celanese and Salem Carpet had no written agreement other than the individual purchase orders.

On 14 August 1980, Celanese announced that it was withdrawing from the carpet industry and would cease production of nylon and polyester staple by 31 December 1980. In its announcement, Celanese stated that "all carpet fiber customers will be supplied fiber in an orderly fashion until phase-outs are complete."

Salem Carpet continued to purchase the nylon fiber from Celanese after the decision to withdraw was announced and placed one final order in December of 1980, which was delivered and accepted. Salem Carpet refused to pay the purchase price of $407,128.40 and claimed an offset and counterclaim for approximately $400,000 for losses allegedly suffered as a result of Celanese's withdrawal from the carpet industry.

On 25 March 1981, Celanese filed suit against Salem Carpet for the purchase price plus interest. In its answer and counterclaim, Salem Carpet denied liability and asserted breach of contract on the part of Celanese. On 21 February 1983, the trial court granted Celanese's motion for summary judgment on all claims. From that order Salem Carpet appeals.

Petree, Stockton, Robinson, Vaughn, Glaze and Maready, by Jackson N. Steele and Daniel R. Taylor, Jr., for defendant appellant.

Brooks, Pierce, McLendon, Humphrey and Leonard, by James T. Williams, Jr. and Katherine A. McLendon, for plaintiff appellee.

ARNOLD, Judge.

Salem Carpet contends that the trial court erred in granting Celanese's motion for summary judgment in that Celanese breached an implied warranty established by "usage of trade" within the carpet industry. It is claimed that, in accordance with customary practice, Celanese was obligated to fill all orders made by Salem Carpet during the projected market life of any carpet style which utilized fiber manufactured by Celanese. We do not agree with this contention and affirm the order of the trial court.

The Uniform Commercial Code, as embodied in Chapter 25 of the North Carolina General Statutes, defines "usage of trade" as:

> any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question . . . G.S. 25-1-205(2).

In short, Salem Carpet claims that it was justified in expecting that all orders made on Celanese would be filled because, as was stated in the affidavit of J. Terris Hagan, vice president of marketing for Salem Carpet:

> in the carpet industry where a manufacturer of fiber makes available a branded fiber for use by a carpet manufacturer in the introduction of a new line or style, it is the standard practice, custom, and usage of trade in the carpet industry that the fiber manufacturer will fill all orders submitted by the carpet manufacturer for use in producing that style carpet and further that the fiber manufacturer will continue to make its branded fiber available for the useful life of the carpet style or for sufficient time to allow the carpet manufacturer to produce and sell sufficient carpet to recoup the large start-up expenses incurred in introducing and marketing a new line of branded carpet.

Before considering what constituted the standard practice in the carpet industry during the time Salem Carpet and Celanese contracted to buy and sell carpet fiber, it is necessary to examine the actual agreement which existed between them. Throughout the course of their relationship, the two parties transacted business on an order-by-order basis. Salem Carpet periodically placed orders for a stated amount of fiber and Celanese filled these orders as they were received. The standard Celanese order acknowledgment form provided:

> These terms and conditions [set out in the acknowledgment form] constitute the entire contract. No modification, limitation, waiver or discharge of this contract or of any of its terms shall bind Seller unless in writing and signed by Seller's authorized employee at its headquarters.

Salem Carpet's purchase order form contained similar language:

> This purchase order contains all the terms and conditions of the purchase agreement and shall constitute the complete and exclusive agreement between Seller and Purchaser. No modification, rescission or waiver of this purchase order or of any of its terms shall be effective unless in writing signed by the parties.

Since it is clear that both Salem Carpet and Celanese intended their respective purchase order forms to comprise any and all obligations they might have owed the other party, the question arises as to whether Salem Carpet can now introduce evidence to show that the usage of trade inherent in the carpet industry required Celanese to continue to fill its orders. The Uniform Commercial Code provides:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented (a) by course of dealing or usage of trade . . . G.S. 25-2-202(a).

The Code, therefore, allows Salem Carpet only to supplement or explain the terms of the written purchase orders. Since neither the forms of Salem Carpet nor those of Celanese contain any mention of a continuing obligation to sell carpet fiber or, in any way, to compensate Salem for its loss, it would appear that evidence as to usage of trade in the carpet industry is irrelevant as a matter of law. G.S. 25-2-202(a) clearly limits the use of trade usage evidence to that which *explains* or *supplements* the terms of the written agreement. We find the usage of trade evidence urged by Salem Carpet goes beyond merely explaining or supplementing existing terms, but, in fact, imposes additional obligations on Celanese. As this Court stated in *Recreatives, Inc. v. Travel-On Motorcycles Co.*, 29 N.C. App. 727, 225 S.E. 2d 637 (1976), "explanatory or supplemental information is not to be admitted when the '. . . court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.' " *Id.* at 730, 225 S.E. 2d at 639. *See* G.S. 25-2-202(b).

It is important to note that even if trade usage evidence were admissible in this case, Salem Carpet failed to establish a question of fact sufficient to survive Celanese's motion for summary judgment. The evidence proposed to show a "regularity of observance" in the carpet industry actually amounted to no more than self-serving affidavits of Salem Carpet employees. There was no independent evidence that the customary practice of the carpet industry places on a manufacturer of carpet fiber a continuing obligation to fill all orders of the maker of a carpet which utilizes that fiber. We find that Salem Carpet failed to meet its burden of showing a genuine issue of material fact as to the existence of such a trade usage in the carpet industry as is required by Rule 56 of the North Carolina Rules of Civil Procedure. The granting of the motion for summary judgment is, therefore,

Affirmed.

Judges WELLS and BRASWELL concur.

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST OF NORWOOD L. MILLS AND WIFE, THELMA T. MILLS, GRANTOR, TO HENSON P. BARNES, TRUSTEE, AS RECORDED IN BOOK 888 AT PAGE 877 OF THE WAYNE COUNTY REGISTRY. SEE APPOINTMENT OF SUBSTITUTE TRUSTEE AS RECORDED IN BOOK 985 AT PAGE 877 OF THE WAYNE COUNTY PUBLIC REGISTRY

No. 838SC596

(Filed 5 June 1984)

Mortgages and Deeds of Trust § 19.6; Principal and Agent § 6— order denying right to proceed with foreclosure—unauthorized signature on deed of trust

There was no error in the trial court's denying the substitute trustee the right to proceed with foreclosure after default on a note where the wife's signature on the note was unauthorized, in that the husband directed his secretary to sign his wife's name to the instrument, and where the evidence may have been indicative of the wife's lack of concern over the unauthorized signing by her husband's secretary, but was insufficient to establish that she in fact ratified the signature.

APPEAL by mortgagee from *Winberry, Judge.* Judgment entered 7 January 1983 in Superior Court, WAYNE County. Heard in the Court of Appeals 5 April 1984.

In April of 1976, Horace Smith made the second of two loans to Norwood L. Mills and his wife, Thelma T. Mills. To secure payment of the loans, which totaled $91,300, Norwood Mills signed a note and deed of trust to Henson P. Barnes as trustee for Horace Smith. Mr. Mills directed his secretary, Gloria Best, to sign his wife's name to these instruments.

After the Mills defaulted on the note in 1980, J. Darby Wood, substitute trustee, began foreclosure proceedings on two of the five tracts of land described in the deed of trust. It was at this time that Thelma Mills first learned of the existence of the note and deed of trust to which Gloria Best had signed Mrs. Mills' name.

After the assistant clerk of Superior Court ordered the foreclosure to proceed at a hearing on 16 December 1980, Norwood and Thelma Mills filed separate notices of appeal. On 3 January 1983 the appeal from the clerk's order was heard *de novo* before the Honorable Charles B. Winberry, who, on determining that Thelma Mills had neither signed the instruments nor authorized anyone to sign for her, entered an order denying the substitute trustee the right to proceed with the foreclosure. From this order, Horace Smith, the holder of the note, appeals.

Freeman, Edwards and Vinson, by George K. Freeman, Jr., for appellant.

William A. Dees, Jr., for appellee.

ARNOLD, Judge.

Appellant contends that the trial court erred in denying the substitute trustee the right to proceed with foreclosure. He claims that Thelma Mills ratified her unauthorized signature on the note and deed of trust, thereby binding her to the terms of the instruments. We do not agree with this contention and affirm the order of the trial court.

North Carolina case law requires that for a deed to be effective it must be signed by the grantor. *New Home Building Supply Co. v. Nations*, 259 N.C. 681, 131 S.E. 2d 425 (1963). Since there is no dispute that Gloria Best signed Thelma Mills' name to the deed of trust in question, it is ineffective as a matter of law. Appellant's only chance of recovery would, therefore, come from a

finding that Mrs. Mills did, in fact, ratify her unauthorized signature.

Ratification has been defined as:

> . . . the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him. *Breckenridge, Ratification in North Carolina,* 18 N.C. L. R. 308 (1940).

The evidence which appellant contends shows that Thelma Mills ratified her signature is that: 1) Mrs. Mills had known Gloria Best for some length of time and believed that Mrs. Best had no bad intent or motive in signing her name, 2) Mrs. Mills had the power and capacity to sign the note and deed of trust herself, 3) Mrs. Mills had knowledge of the facts surrounding the transaction in question, 4) Mrs. Mills failed to repudiate the unauthorized signing after receiving knowledge of the transaction, 5) Mrs. Mills received substantial benefits from the transaction which she failed to return, 6) Mrs. Mills failed to take any action against Gloria Best after receiving knowledge of the unauthorized signing, and 7) Mrs. Mills knew of similar unauthorized signings of her name by Gloria Best. Although this evidence may be indicative of Thelma Mills' lack of concern over the unauthorized signings by Mrs. Best, we find that it is insufficient to establish that she in fact ratified the signatures.

"Ratification is not a matter to be presumed; it must be proved. And the burden of proof rests upon him who alleges it." *Lawson v. Bank,* 203 N.C. 368, 373, 166 S.E. 177, 180 (1932) (quoting 1 F. Mechem on Agency, § 479, at 352 (2d ed. 1914)). Moreover, parol evidence and subsequent acts purporting to show approval of an unauthorized act are generally held to be insufficient to establish ratification of the act. *See Davenport v. Sleight,* 19 N.C. 381 (1837).

After considering all the evidence, Judge Winberry determined that appellant had not met his burden of proof by his finding that "Thelma T. Mills did not ratify or otherwise approve the act of Gloria Debra Best Flowers in affixing the name of Thelma T. Mills to said deed of trust." North Carolina case law clearly dictates that findings by a trial judge sitting without a jury "are

conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Williams v. Pilot Life Insurance Co.*, 288 N.C. 338, 342, 218 S.E. 2d 368, 371 (1975).

We conclude that the trial court was correct in its finding that Mrs. Mills did not ratify the signatures in question. The evidence relied on by appellant does not establish Thelma Mills' intent to actually *affirm* the unauthorized signatures, but only shows that she did not expressly disapprove of the signings. Deferring to the discretion of the trial court, we find that the order denying the trustee the right to proceed with foreclosure is

Affirmed.

Judges WELLS and BRASWELL concur.

ROBERT LEE BARNHILL, JR.; ROBIN RENEE BARNHILL AND ROBERT LEE BARNHILL, III v. PEGGY DUNCAN BARNHILL

No. 8316DC890

(Filed 5 June 1984)

Husband and Wife § 12— separation agreement—forfeiture of life estate in residence

The trial court's conclusion that defendant forfeited her life estate in a residence under the terms of a separation agreement giving defendant the right to use the residence for her lifetime solely for herself and her children and providing for termination of the life estate if the residence should be occupied as a residence by any other male person was supported by the trial court's findings that a male occupied the residence with defendant from 16 December 1981 to 5 January 1982 at which time defendant cooked his food and washed his clothes, that the male stayed overnight on at least one occasion, and that he received mail addressed to him at defendant's home.

ON writ of certiorari to review the judgment of *Ellis (B. Craig), Judge*, entered in District Court, ROBESON County, on 27 May 1982. Heard in the Court of Appeals 10 May 1984.

This is a civil action wherein plaintiffs seek to have the estate reserved for defendant in a certain deed declared forfeited.

After a trial, the judge made the following pertinent findings of fact and conclusions of law:

3. That on or about the 6th day of December, 1978, a certain agreement was entered into between the Plaintiff and the Defendant and that pursuant to said agreement the Plaintiff and the Defendant conveyed certain properties to Robbin Renee Barnhill and Robert Lee Barnhill, III with the following provisions contained in the Deed:

"The right and privilege of Peggy Duncan Barnhill to occupy and use said property as her residence and the residence of the parties of the second part is reserved for the lifetime of the said Peggy Duncan Barnhill or until her remarriage, but subject to restricted to the use of Peggy Duncan Barnhill, Robbin Renee Barnhill and Robert Lee Barnhill, III only, and specifically that no other male person shall occupy said dwelling as his residence. In the event of violation of said restriction by Peggy Duncan Barnhill her estate herein reserved shall be automatically forfeited and shall thereupon terminate."

4. That the separation agreement entered into by and between the Plaintiff and the Defendant contained the following language:

"It is contracted and agreed that the parties hereto will simultaneously with the execution of this Deed of Separation convey their residence and the lot upon which the same is located to their children, Robbin Renee Barnhill and Robert Lee Barnhill, III subject to the right of the said Peggy Duncan Barnhill to reside in said residence for her lifetime or until she remarries in the event said parties later divorce each other, provided and upon condition that she use the said residence solely for a residence for herself and her children and that the same shall not be occupied by any other male person. In the event said terms and conditions are violated then the privilege of the said Peggy Duncan Barnhill to occupy said residence shall automatically terminate."

5. That the home of the Defendant is located on the metes and bounds description contained in the Deed.

6. That the home of the Defendant was occupied by one Raymond Harry Williams, III on February 18, 1981, on March 3, 1981, on March 23, 1981 and on March 26, 1981. That the said Raymond Harry Williams, III occupied said dwelling with the Defendant, Peggy Duncan Barnhill from the 16th day of December, 1981 to the 5th day of January, 1982 at which time the said Peggy Duncan Barnhill cooked his food, washed his clothes and the said Raymond Harry Williams, III stayed overnight on at least one occasion. That the said Raymond Harry Williams, III had mail delivered to the home of the Defendant, Peggy Duncan Barnhill at said address in his own name.

CONCLUSIONS OF LAW

From the foregoing findings of fact the Court concludes as a matter of law:

1. That the terms of the Separation Agreement entered into between the Plaintiff, Robert Lee Barnhill and the Defendant, Peggy Duncan Barnhill, has been violated in that the residence occupied by Peggy Duncan Barnhill has been occupied by Raymond Harry Williams, III.

2. The privilege of the said Peggy Duncan Barnhill to occupy said residence shall automatically terminate.

3. The residence was occupied by Raymond Harry Williams, III as a residence.

4. That the provisions of the Deed have been violated in that said residence has been used for persons other than Peggy Duncan Barnhill, Robbin Renee Barnhill and Robert Lee Barnhill, III.

5. That by the acts of the said Peggy Duncan Barnhill her life estate in said property has terminated.

From a judgment decreeing that defendant's life estate be terminated and ordering defendant to pay costs of the action, defendant gave notice of appeal. We allowed defendant's petition for certiorari on 1 June 1983.

C. S. McIntyre, Jr., and Page & Baker, by Richmond H. Page, for plaintiffs, appellees.

E. C. Bodenheimer, Jr., and Robert D. Jacobson, for defendant, appellant.

HEDRICK, Judge.

Defendant's one assignment of error is set out in the record as follows:

> 1. That the trial court erred in ruling that Raymond Williams occupied and/or resided at the residence of Peggy Barnhill and the defendant submits that there was insufficient evidence submitted by the plaintiffs to prove by the greater weight of the evidence that Raymond Williams did either reside or occupy said residence.

This assignment of error purports to be based on exceptions to the court's denial of defendant's motion to dismiss, made at the close of plaintiffs' evidence, and to the judgment, announced in open court. In a case tried before the judge without a jury the court is required to make findings of fact as provided in N.C. Gen. Stat. Sec. 1A-1, Rule 52(a), North Carolina Rules of Civil Procedure. An exception to the denial of a Rule 41(b) motion "does not raise the question of whether the particular findings made by the court are supported by the evidence, but only the question of whether any findings could be made from the evidence which would support a recovery." *Pegram-West, Inc. v. Homes, Inc.*, 12 N.C. App. 519, 525-26, 184 S.E. 2d 65, 69 (1971). *See also Ayden Tractors v. Gaskins*, 61 N.C. App. 654, 301 S.E. 2d 523 (1983). Defendant's exception to the denial of her Rule 41(b) motion thus fails to raise the question of the sufficiency of the evidence to support the court's findings of fact. Because defendant did not except to the court's findings of fact, we will not review the evidence to see if it sufficiently supports the findings.

Defendant also excepted to entry of the judgment. Such an exception raises for review "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). In her brief defendant contends that the court's findings that Mr.

Williams "occupied said dwelling with the Defendant . . . from the 16th day of December, 1981 to the 5th day of January, 1982 at which time [defendant] cooked his food, [and] washed his clothes," that he "stayed overnight on at least one occasion," and that he received mail addressed to him at defendant's home were insufficient as a matter of law to support the court's conclusion that Mr. Williams occupied defendant's home "as a residence." We do not agree. We think these findings provide ample support for the conclusions of law and judgment entered by the trial court.

While we affirm the judgment declaring defendant's life estate forfeited, we note that our decision goes only to defendant's use of the property as a matter of right; her permissive use of the property is in no way affected by our holding today.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA ON RELATION OF THE NORTH CAROLINA MILK COMMISSION v. PET, INCORPORATED

No. 8310SC613

(Filed 5 June 1984)

Administrative Law § 5; Agriculture § 15— jurisdiction of Superior Court to amend order concerning Milk Commission case when amendment affected later action by Milk Commission

In an action where the Milk Commission found that defendant had violated the law by failing to submit reports and make records available to the Commission as authorized by G.S. 106-266.8(5), (12) and (14), and where the Commission suspended defendant's license to distribute milk in North Carolina; where defendant appealed from the order of the Commission to the Superior Court pursuant to G.S. 106-266.15(a), and the Superior Court ordered further proceedings in relation to the Milk Commission order be stayed and suspended "until a final decision is had by" the Superior Court; where the Commission amended its rules and regulations approximately two years subsequent to the entry of the Superior Court order and made a request for information from defendant pursuant to the new rule, the trial court had jurisdiction to modify the 1980 order by staying and enjoining the Commission from obtaining any of defendant's records revealing its production costs until a

final decision was rendered by the courts as to the merits of defendant's original appeal.

APPEAL by plaintiff from *Bailey, Judge.* Order entered 9 March 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 6 April 1984.

The plaintiff, the State of North Carolina on relation of the North Carolina Milk Commission (hereinafter "the Commission"), appeals from an order of the Wake County Superior Court enjoining the Commission from taking certain action against defendant with respect to defendant's refusal to disclose price and cost information requested by the Commission. This matter originated when the Commission by letter dated 17 November 1978 requested that the defendant, a licensed distributor of milk and milk products, file with the Commission cost data reflecting defendant's cost of processing and distributing milk and milk products, and certain price information. Defendant filed general cost and price information but refused to submit all of the information requested. The Commission notified defendant that its refusal to make records available to the Commission as authorized by G.S. 106-266.8(5) and (12), and its failure to submit reports containing the information requested by the Commission as authorized by G.S. 106-266.8(14) was a violation of the law, and that defendant was to appear before the Commission on 28 August 1979 to show cause why its license should not be revoked for such violation.

Defendant filed an answer with the Commission denying that it had violated any published regulation promulgated under the statutory authority of the Commission. Defendant also filed a motion to dismiss the action and a motion to quash the subpoena issued for the information on the grounds that the Commission's enabling statute, Chapter 106 of the General Statutes of North Carolina, was unconstitutional or was otherwise being illegally enforced. Subsequently, the Commission held a hearing on the alleged violations and denied defendant's motions. On 12 February 1980, the Commission adopted a resolution in which it found that defendant had violated the law by failing to submit reports and make records available to the Commission as authorized by G.S. 106-266.8(5), (12) and (14), and suspended defendant's license to distribute milk in North Carolina effective 17 March 1980. The resolution provided further for the waiver of said suspension

upon the payment by defendant of a $5,000.00 penalty to the Commission.

Defendant appealed from the order of the Commission to the superior court pursuant to G.S. 106-266.15(a). Defendant requested a trial *de novo* and a stay of the Commission's order pending final decision of the matter by the court. On 17 March 1980, Judge Bailey ordered "that all further proceedings in relation to the Order of the Milk Commission of February 12, 1980, be stayed and suspended until a final decision is had by this Court." Defendant's appeal from the order of the Commission has not yet been heard in superior court.

On or about 1 April 1982, the Commission amended its rules and regulations found at Title 4, Chapter 7 of the North Carolina Administrative Code by adding a new rule titled ".0514 UNIFORM SYSTEM FOR DETERMINING THE COST OF PROCESSING AND DISTRIBUTING MILK" (hereinafter "4 NCAC 7 .0514"). Under the new rule, the Commission set forth a detailed, uniform procedure to be used by distributors/processors in determining their cost of processing and distributing milk and milk products. The information required under the rule includes the same information requested by the Commission in its letter of 17 November 1978, only in greater detail.

Subsequently, the Commission made demands for cost data from defendant pursuant to 4 NCAC 7 .0514. The defendant filed a motion in the cause requesting that the court modify the 1980 order by staying and enjoining the Commission from obtaining any of defendant's records revealing its production costs until a final decision is rendered by the courts as to the merits of defendant's appeal. In an order entered 9 March 1983, Judge Bailey ordered as follows:

> "that all further proceedings in relation to the Order of the Milk Commission of February 12, 1980 and action by the Milk Commission under 4 NCAC 7 .0514 be stayed and suspended until final decision is had by this Court.
>
> . . . that the North Carolina Milk Commission and its members are enjoined from enforcement of N.C.G.S. §§ 106-266.8(5) and 106-266.8(12) and the Commission's regulations and policies promulgated pursuant thereto insofar as the

Commission seeks disclosure of Pet's records revealing the costs incurred by Pet in the processing or distribution of milk and dairy products or the prices charged by Pet at resale and wholesale for such products pending the further order of this Court."

From this order, plaintiff appealed.

Harris, Cheshire, Leager and Southern, by Samuel R. Leager, for plaintiff appellant.

Bailey, Dixon, Wooten, McDonald and Fountain, by Wright T. Dixon, Jr. and Gary K. Joyner, for defendant appellee.

WEBB, Judge.

The Milk Commission argues it was error for the superior court to amend an order in a 1980 case which amendment affected action taken by it in 1983. It contends its 1983 action is a separate case and the defendant must appeal from that order for a *de novo* hearing. The Milk Commission says the superior court has enjoined it from performing its statutory duties without any compliance with the requirements for an injunction.

We hold that the court did not err by entering an order in the action which was before it. The information requested by the Commission in the letter dated 17 November 1978 is essentially the same information the Commission requested pursuant to 4 NCAC 7 .0514, although the later request was in more detail. The request for information in each instance was to determine whether Pet was in compliance with the cost provisions of the law. *See* G.S. 106-266.19. We believe the superior court had jurisdiction to amend the 1980 order as it did.

Having determined the superior court had jurisdiction to amend the order, we hold that an appeal on the merits of the court's determination is premature. The order does not finally dispose of the case and is interlocutory. *See Veazey v. Durham*, 231 N.C. 357, 57 S.E. 2d 377, *reh'g denied*, 232 N.C. 744, 59 S.E. 2d 429 (1950). We do not believe it affects a substantial right claimed by the plaintiff which will work an injury to it if not corrected before an appeal from a final judgment. The order maintains the status quo until the case is determined on its merits.

For the reasons stated in this opinion, we hold that the appeal should be dismissed.

Appeal dismissed.

Judges BECTON and EAGLES concur.

BEASLEY PERRY, JR. v. LARRY WAYNE AYCOCK AND JOHN W. FISHER

No. 837SC615

(Filed 5 June 1984)

1. **Appeal and Error § 6.8— order granting summary judgment—right of immediate appeal**

An order granting summary judgment for defendants in a "pass and turn" automobile negligence case affected a substantial right of plaintiff and was immediately appealable where defendants' counterclaim for damages to their vehicle remains for adjudication, and there is a possibility of inconsistent verdicts in separate trials.

2. **Automobiles and Other Vehicles § 58.2— failure to give turn signal—genuine issue as to negligence**

In an action arising out of a collision which occurred when plaintiff attempted to pass a farm tractor which made a left turn, the evidence on motion for summary judgment presented an issue of material fact as to whether the driver of the tractor was negligent in failing to give a left turn signal, although the evidence showed that the driver of a pickup truck traveling immediately behind the farm tractor gave a left turn signal.

3. **Automobiles and Other Vehicles §§ 16.3, 77.1— failure to sound horn before passing—no contributory negligence per se**

Plaintiff's failure to sound his horn before he attempted to pass defendant's farm tractor did not constitute contributory negligence *per se*. G.S. 20-149(b).

APPEAL by plaintiff from *Peel, Judge*. Judgment entered 1 March 1983 in Superior Court, NASH County. Heard in the Court of Appeals 6 April 1984.

Evans & Lawrence, by Robert A. Evans, for plaintiff appellant.

Evans & Rountree, by Charles S. Rountree, for defendant appellee.

BECTON, Judge.

Plaintiff appeals from summary judgment for defendants in a "pass and turn" automobile negligence case. We hold that summary judgment was improperly granted.

I

This appeal arises from the following undisputed events. Plaintiff, Beasley Perry, Jr., was following a line of vehicles on a rural road. At the head of the line was a slow-moving farm tractor operated by defendant, Larry Wayne Aycock, followed by a pickup truck operated by Stuart Strickland. Aycock and Strickland were employees of defendant John W. Fisher. The tractor and pickup both had emergency flashers on. As Aycock approached a farm driveway leading off the road to the left, Perry attempted to pass the line of vehicles. At the same time, Aycock attempted a left turn. A collision resulted, causing personal injury and other damages to Perry. Perry later instituted this action for damages. Defendants answered, denying negligence on their part and alleging contributory negligence on Perry's part, and counterclaiming for damages to the tractor. Before trial commenced, defendants moved for summary judgment as to Perry's claim, based on the answers to interrogatories and the depositions. Plaintiff presented no evidence. From an order granting defendants' motion, plaintiff appeals.

II

[1] We address as a preliminary matter the appealability of the order. Defendants' Counterclaim for damage to the tractor remains for adjudication, and the order granting summary judgment does not contain a certification that there is "no just reason for delay." N.C. Gen. Stat. § 1A-1, Rule 54(b) (1983). Plaintiff's appeal is therefore premature unless the order affected a substantial right claimed by the appellant, and will work an injury to him if not corrected before an appeal from the final judgment. N.C. Gen. Stat. § 1-277 (1983); N.C. Gen. Stat. § 7A-27(d) (1981); *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E. 2d 797 (1976).

In a trial limited to defendant's Counterclaim, the jury could find that Perry was negligent and that defendants were not contributorily negligent, and thus allow defendants their requested

relief. Then, if the summary judgment on Perry's claim were reversed on appeal, a second jury could find that Perry was not contributorily negligent and that defendants were negligent. A distinct possibility of inconsistent verdicts in separate trials arises, and the order allowing summary judgment therefore affects a substantial right, the denial of which will work an injury to the appellant if not corrected before an appeal from a final judgment. *See Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982). We hold that this appeal is properly before this Court.

III

When a defendant moves for summary judgment in a negligence action and presents a forecast of evidence sufficient to entitle him to a directed verdict if the evidence were introduced at trial, the plaintiff must then present a forecast of evidence which, if introduced at trial, would be sufficient to avoid a directed verdict. If the plaintiff does not do so, summary judgment must be granted for the defendant. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). However, mere failure to respond with opposing affidavits or depositions does not automatically mean that summary judgment is appropriate. The moving party must still succeed on the strength of its evidence, and when that evidence contains material contradictions or leaves questions of credibility unanswered, the movant has failed to satisfy its burden. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1983); *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976).

IV

[2] As noted above, Perry did not submit any affidavits or depositions in opposition to defendants' motion. Defendants submitted evidence that although the pickup truck driver signaled a left turn, the tractor driver did not signal a left turn. There was other evidence that the tractor driver, Aycock, *did* give a hand signal, but it came from a witness who admitted that he did not pay great attention and whose answers to other questions were vague or inconsistent. Defendants' own evidence contained contradictions and unanswered questions of credibility and thus did not conclusively establish that Aycock signaled his turn.

Although failure to do so does not constitute negligence *per se*, the law requires the driver "of any vehicle" to give a "plainly

visible" signal to the operators of other vehicles who may be affected before beginning a turn. N.C. Gen. Stat. § 20-154(a) (1983). A farm tractor is a vehicle. N.C. Gen. Stat. § 20-4.01(49) (1983). Since defendants' evidence permitted a finding that Aycock did not signal, summary judgment based on lack of negligence by defendants would only be appropriate if the evidence established conclusively that Aycock had no duty to signal under the circumstances.

Defendants argue that the tractor and the pickup operated as a "unit" and that the pickup's signals should be considered as those of the tractor. They cite no authority for this novel proposition, however; it clearly constitutes an adaptation of the statutory standard of care to the circumstances of the case. Absent any more conclusive evidence that Aycock had no duty to signal, and in light of the undisputed fact that plaintiff did safely pass the pickup truck, we conclude that defendants' evidence did not suffice to justify summary judgment for defendants on the issue of Aycock's negligence.

V

[3] The same principles of law discussed above apply to summary judgment on issues of plaintiff's contributory negligence. *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E. 2d 287 (1978). Perry admitted that he did not sound his horn when he began to pass. There is no statutory requirement to do so. *See* N.C. Gen. Stat. § 20-149(b) (1983); *compare* G.S. § 20-149(b) (1965). Perry's failure to sound his horn thus did not constitute negligence *per se*; rather, he was subject to the common law duty to use reasonable care. *Lowe v. Futtrell*, 271 N.C. 550, 157 S.E. 2d 92 (1967). Absent a statutory requirement, a motorist is only required to sound his horn when reasonably necessary to give warning. *Lowe*; *Bell v. Wallace*, 32 N.C. App. 370, 232 S.E. 2d 305, *disc. rev. denied*, 292 N.C. 466, 233 S.E. 2d 921 (1977).

Defendants argue that *Lyerly v. Griffin*, 237 N.C. 686, 75 S.E. 2d 730 (1953) controls. We disagree. In *Lyerly*, our Supreme Court affirmed a nonsuit based on plaintiff's contributory negligence, because plaintiff did not sound his horn in passing, a statutory violation. Although the *Lyerly* Court did not explicitly label the statutory violation negligence *per se*, that clearly is its import, as our Supreme Court itself later recognized in *Cowan v. Murrows*

Transfer, Inc., 262 N.C. 550, 138 S.E. 2d 228 (1964). In response to the harsh rule enunciated in *Lyerly*, the relevant statute, G.S. § 20-149(b) (1953), has been amended twice to prevent any negligence *per se* interpretation. Indeed, the current version of the statute, G.S. § 20-149(b) (1983), does not even impose a duty to sound one's horn when passing. Therefore, *Lyerly* no longer applies. Perry's failure to sound his horn did not constitute negligence *per se*, and, therefore, did not, by itself, justify summary judgment for defendants.

Further, the various estimates of Perry's speed indicate that it fell far short of speed which, in itself, would qualify as reckless behavior. Significantly, Perry did safely pass the pickup, which a jury could find was the only vehicle he could have known was turning left. This evidence, taken together, does not compel a ruling that plaintiff did not exercise due caution under the circumstances. We therefore conclude that the evidence before the trial court established an issue for the jury, rather than summary judgment for defendants on the issue of plaintiff's contributory negligence.

VI

In short, summary judgment was improper on these facts. Neither defendants' lack of negligence nor Perry's contributory negligence was sufficiently established by the forecast of evidence. Therefore, the order appealed from must be

Reversed.

Judges WEBB and EAGLES concur.

VALLIE A. LEGGETT v. THOMAS & HOWARD COMPANY INC., D/B/A RED & WHITE QUALITY FOOD STORE OF FAIRMONT, NORTH CAROLINA

No. 8316SC432

(Filed 5 June 1984)

Negligence §§ 27, 29— customer slipping on wet floor—evidence of precautions taken by stores with similar floors improperly excluded—evidence of negligence sufficient to survive directed verdict

In an action evolving from plaintiff's falling on the wet floor in defendant's store, the trial court improperly excluded evidence of precautions taken by other stores with similar floors which were not taken by defendant store since the evidence was offered to establish a standard of care to which plaintiff claimed defendant should have conformed. The excluded evidence, together with the other evidence, was sufficient to have survived defendant's motion for a directed verdict where the evidence would have permitted the jury to find that defendant's floor was slick or slippery when wet; that defendant knew, or in the exercise of reasonable care should have known, that the floor was likely to become wet, and thus slick or slippery, on rainy days; that had defendant conformed to the customer usage in the community with regard to such floors, he would, in the exercise of ordinary care, have taken precautions against the floor becoming or remaining wet; the plaintiff slipped, fell, and was injured on defendant's floor on a rainy day at a time when the store had been open to customers for three hours or more; and that defendant's complete failure to take any precautions whatever with regard to the floor during that extended period of time was the proximate cause of plaintiff's fall and injury.

APPEAL by plaintiff from *Herring, Judge.* Judgment entered 12 January 1983 in Superior Court, ROBESON County. Heard in the Court of Appeals 8 March 1984.

Plaintiff slipped, fell, and fractured her hip while in defendant's store. She brought suit claiming that defendant negligently allowed water to accumulate on the floor, thus making it slick and dangerous to customers.

The trial court granted defendant's motion for directed verdict at the close of plaintiff's evidence. Plaintiff appeals.

Musselwhite, Musselwhite & McIntyre, by James W. Musselwhite and W. Edward Musselwhite, Jr., for plaintiff appellant.

Leonard, Shannonhouse, McNeely & MacMillan, by Thomas A. McNeely, for defendant appellee.

WHICHARD, Judge.

The directed verdict motion tested the legal sufficiency of the evidence to take the case to the jury and support a verdict for plaintiff. In ruling on the motion, the evidence had to be considered in the light most favorable to plaintiff, giving her the benefit of every reasonable inference to be drawn therefrom. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E. 2d 678, 680 (1977).

Plaintiff's evidence, so considered, showed the following:

Defendant's store had been open for business since 7:30 a.m. on the day of plaintiff's fall. Rain had been falling all morning, and customers and employees had been walking into the store from a wet parking lot. No mat lay at the store entrance when plaintiff walked in around 10:30 or 11:00 a.m., and defendant had not dry mopped or taken other precautions to prevent accumulation of water on the floor or to remove water therefrom.

Ten feet inside the entrance to defendant's store plaintiff slipped and fell. Her dress became soaked, and the floor around her was wet with what she believed to be water.

Defendant's floor tiling was impervious to water and was extremely slippery when wet. Plaintiff offered evidence, which the court excluded, that other store operators in the area with similar floor tiling found it necessary to take special precautions to guard against slipping by customers on rainy days. Defendant failed to use similar precautions, such as floor mats and mopping.

The trial court indicated that it was granting the directed verdict for defendant because plaintiff did not offer evidence that defendant had notice of any wet spot on its floor. It is true that a defendant cannot be held liable for an unsafe condition created by third parties or an independent agency unless the condition existed sufficiently long to give its employees notice and time to remedy it. *Powell v. Deifells, Inc.*, 251 N.C. 596, 600, 112 S.E. 2d 56, 58 (1960). A store owner has a duty, however, to exercise ordinary care to keep passageways for customers in a reasonably safe condition so as not to expose them unnecessarily to danger. *Id.* at 599, 112 S.E. 2d at 58. In *Powell* the owner's failure to put down mats and to dry mop on a rainy day was a significant factor

in the Court's holding that plaintiff had established a *prima facie* case of negligence. *Id.* at 600, 112 S.E. 2d at 59.

In affirming a compulsory nonsuit in a "slip and fall" case with facts similar to those here, our Supreme Court stated:

> There is an absence of any evidence showing that it is a common practice or precaution of prudent storekeepers or keepers of offices under similar conditions to have on rainy days a mat or other covering at the entrance of their stores or offices or on the floors of their stores or offices for invitees entering to wipe their feet on. . . . Plaintiff has no evidence tending to show that defendant did or omitted to do anything which a storekeeper or the keeper of an office of ordinary care and prudence would do under the same circumstances for the protection of its customers or other invitees.

Dawson v. Light Co., 265 N.C. 691, 694-95, 144 S.E. 2d 831, 834 (1965).

Here, by contrast, plaintiff offered evidence from two witnesses who managed stores which were located in the same county and contained the same kind of floor tile as defendant's. They would have testified that such tile is slick or slippery and dangerous when wet; that they thus took special precautions for the safety of customers on rainy days by placing mats both outside and inside, and by changing them as needed; and that they had the floors mopped regularly on such days when water was likely to accumulate. The trial court, however, excluded this evidence.

"A custom or usage in a particular business or community . . . is . . . frequently offered to establish a standard of care to which it is claimed that a party should have conformed . . . ." 1 H. Brandis, North Carolina Evidence § 95, at 364 (2d ed. 1982). "[E]vidence of the usual and customary conduct of others under similar circumstances is normally relevant and admissible, as an indication of what the community regards as proper, and a composite judgment as to the risks of the situation and the precautions required to meet them." W. Prosser, *The Law of Torts* § 33, at 166 (4th ed. 1971).

We believe the excluded evidence should, accordingly, have been admitted. It, together with the other evidence, would have

permitted a jury to find that defendant's floor was slick or slippery when wet; that defendant knew, or in the exercise of reasonable care should have known, that the floor was likely to become wet, and thus slick or slippery, on rainy days; that had defendant conformed to custom or usage in the community with regard to such floors, he would, in the exercise of ordinary care, have taken precautions against the floor becoming or remaining wet; that plaintiff slipped, fell, and was injured on defendant's floor on a rainy day at a time when the store had been open to customers for three hours or more; and that defendant's complete failure to take any precautions whatever with regard to the floor during that extended period of time was the proximate cause of plaintiff's fall and injuries. With the improperly excluded testimony in evidence, then, the case should have been allowed to go to the jury.

This is clearly "a borderline case." *See Ennis v. Dupree*, 258 N.C. 141, 145, 128 S.E. 2d 231, 234 (1962). This Court has noted that "[i]n 'borderline cases' such as this, juries, if allowed, will often terminate the proceedings with a verdict for defendants, thereby averting unnecessary and undesirable consumption of time by both the trial court and this Court." *Cunningham v. Brown*, 62 N.C. App. 239, 244, 302 S.E. 2d 822, 826, *disc. rev. denied*, 308 N.C. 675, 304 S.E. 2d 754 (1983). In such cases it is thus

> the better practice . . . for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury. If the jury returns a verdict in favor of the moving party, no decision on the motion is necessary and an appeal may be avoided. If the jury finds for the nonmoving party, the judge may reconsider the motion and enter a judgment notwithstanding the verdict under G.S. 1A-1, Rule 50(b), provided he is convinced the evidence was insufficient. On appeal, if the motion proves to have been improperly granted, the appellate court then has the option of ordering entry of the judgment on the verdict, thereby eliminating the expense and delay involved in a retrial.

Manganello, supra, 291 N.C. at 670, 231 S.E. 2d at 680.

For the reasons set forth above, the judgment directing a verdict for defendant is reversed, and the case is remanded for a new trial in accordance with this opinion.

Reversed and remanded.

Judges HEDRICK and JOHNSON concur.

DIXIE CHEMICAL CORPORATION v. JIMMY EDWARDS

No. 833SC779

(Filed 5 June 1984)

1. Accounts § 1— action on open account—summary judgment for plaintiff

Summary judgment was properly entered in favor of plaintiff in an action to recover on an open account for chemical fertilizers sold and delivered to defendant where plaintiff offered a verified, itemized statement of defendant's account, the evidence showed that the only charges contested by defendant have been paid when a payment made by defendant is applied to the oldest items on the account, and defendant only presented an affidavit which restated the unsupported allegations in his answer to the complaint and in his answers to plaintiff's interrogatories.

2. Rules of Civil Procedure § 56.4— affidavit insufficient to show genuine issue for trial

Defendant's assertion in an affidavit that he will produce chemical experts at trial to support his contentions is not a specific forecast of evidence sufficient to show that there is a genuine issue for trial. G.S. 1A, Rule 56(e).

APPEAL by defendant from *Llewellyn, Judge*. Judgment entered 17 March 1983 in Superior Court, CRAVEN County. Heard in the Court of Appeals 2 May 1984.

Stith and Stith by Robert S. Ryan for plaintiff appellee.

Bruce H. Robinson, Jr., for defendant appellant.

BRASWELL, Judge.

[1] The plaintiff sold and delivered chemical fertilizers to the defendant and performed services for him in connection with these fertilizer sales. The plaintiff maintained a running account for the defendant, and as of 25 September 1981, after making a

$7,000.00 payment on his account, the defendant owed the plaintiff $5,679.83. Since that time the defendant has received goods and services in the amount of $718.41. The plaintiff brought this action on an open account to recover the total amount owed of $6,398.24, plus interest as provided by law. *See Electric Service, Inc. v. Sherrod*, 293 N.C. 498, 238 S.E. 2d 607 (1977). The defendant in his answer has denied owing this sum. Upon the plaintiff's motion, the trial court granted summary judgment in favor of the plaintiff. The defendant asserts on appeal that this ruling was in error. We disagree and affirm.

The issue to be decided on appeal is whether the trial court properly granted the plaintiff's motion for summary judgment. G.S. 1A-1, Rule 56(c), states that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." The moving party has the burden of showing that no material issues of fact exist, such as by demonstrating through discovery that the opposing party cannot produce evidence to support an essential element of his claim or defense. *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E. 2d 363, 366 (1982). In rebuttal, the nonmovant must then set forth specific facts showing that genuine issues of fact remain for trial. *Id.*

In support of its motion, the plaintiff offered a verified, itemized statement of the defendant's account. G.S. 8-45 provides that "[i]n any actions instituted in any court of this State upon an account for goods sold and delivered . . . for services rendered, or labor performed . . . a verified itemized statement of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness." This statute was designed to facilitate the collection of accounts about which there is no bona fide dispute. *Electric Corp. v. Shell*, 31 N.C. App. 717, 230 S.E. 2d 576 (1976). The defendant's account was verified by the plaintiff's treasurer, L. Edward Cooper, Jr., who averred that he was familiar with the plaintiff's books and records and with the defendant's account and could testify as to their correctness. *See Service Co. v. Curry*, 29 N.C. App. 166, 223 S.E. 2d 565 (1976).

Although the defendant in his answer denies owing the plaintiff $6,398.24, he admits in his answers to the plaintiff's inter-

rogatories that the bill submitted as Exhibit "A" [the verified account statement] is "a correct statement" of the items received by the defendant with the exception of goods and services charged to the defendant's account on 30 June 1980. However, the defendant on 25 September 1981 paid $7,000 on his owed balance of $12,679.83 which was sufficient to cover charges made as of 21 May 1981. The remaining balance of $5,679.83 plus new charges after the 25 September 1981 payment of $718.41 make up the $6,398.24 total sued for by the plaintiff. Applying this $7,000 payment to the oldest items on the account which a creditor may do when the debtor at the time of payment fails to direct its application to any particular charge, the only charges contested by the defendant have been paid. *Lowery v. Wilson*, 214 N.C. 800, 200 S.E. 861 (1939). It is also interesting to note that although the defendant claims he did not receive the 30 June 1980 goods and services, he did not make this claim known until after this suit was filed 21 May 1982. In any event, the plaintiff also offered the affidavit of Radford Swindell who stated he mixed the ordered agricultural chemicals that the defendant now denies receiving, and the affidavit of Stanley Sawyer who confirms that these chemicals were applied to the lands specified by the defendant. We hold the plaintiff has met his burden in demonstrating that the defendant owes the stated amount and that no other genuine issue of fact exists for trial.

[2] The defendant now has the burden of showing that some material issue of fact does remain. G.S. 1A-1, Rule 56(e) precludes any party from prevailing against a motion for summary judgment through reliance on allegations unsupported by facts. *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 152, 229 S.E. 2d 278, 283 (1976). In his answer, the defendant denies owing the plaintiff for the goods and services provided and counterclaims, among other things, for damages in excess of $15,000 for permanent injury caused by the plaintiff's negligent mixture and application of chemicals to the defendant's lands. However, on 1 September 1982, the defendant filed a voluntary dismissal of his counterclaim against the plaintiff pursuant to G.S. 1A-1, Rule 41(a)(1)(i). In his answers to the plaintiff's interrogatories, the defendant states flatly his defense to this suit: "I do not owe the plaintiff any money because the plaintiff caused permanent injury to my property by negligently and willfully . . . mixing chemicals together

which destroyed and caused permanent injury to my property." Yet, the defendant fails to provide any specific facts to substantiate this allegation. The only evidence offered in opposition to the plaintiff's motion for summary judgment is the defendant's own affidavit in which he states:

> I have denied the essential allegations of the Complaint in the Answer . . . and I incorporate those denials into this Affidavit and again deny them. I also answered Interrogatories . . . and in my answers to Interrogatories, I explained that I did not receive all of the items that are listed on the open account and that I, therefore, deny that I owe for those items and incorporate my answers filed . . . into this Affidavit . . . . I also re-assert my defense in this Affidavit that I do not owe for items that I did receive because these items destroyed my crop . . . .
>
> I do not yet have expert witnesses but will present expert witnesses at the trial . . . to show that the chemicals . . . furnished . . . were responsible for destroying my crop . . . .

We hold that this affidavit alone is insufficient to withstand the plaintiff's motion for summary judgment. The affidavit only restates the unsupported allegations previously made by the defendant in his answer and in his answers to plaintiff's interrogatories. G.S. 1A-1, Rule 56(e) provides that "an adverse party may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." A motion for summary judgment allows one party to force his opponent to produce a forecast of evidence which he has available for presentation at trial to support his claim or defense. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). The defendant's assertion that he will produce chemical experts at trial is not a specific forecast as required by the rule. Because the defendant failed to offer evidence to rebut the plaintiff's showing that no genuine issue of fact existed for trial, we hold the trial court properly entered summary judgment for the plaintiff.

Affirmed.

Chief Judge VAUGHN and Judge EAGLES concur.

ANNA B. DOUB v. EUGENE M. DOUB

No. 8321DC741

(Filed 5 June 1984)

Divorce and Alimony § 20.2— enforcement of separation agreement—contract action

There was no error in a trial court's refusal to allow defendant to put on evidence of changed circumstances where plaintiff wife's action was clearly an action in contract to enforce the terms of a 1978 separation agreement. The provisions for alimony payments to plaintiff wife and other property distribution as provided by the separation agreement were clearly reciprocal and therefore not separable or modifiable; therefore, there was also no error in the trial court's denial of defendant's motions to amend his answer, pursuant to G.S. 1A-1, Rule 15(a), for the purpose of alleging a change in circumstances.

APPEAL by defendant from *Alexander, Judge.* Judgment entered 6 April 1983 in District Court, FORSYTH County. Heard in the Court of Appeals 30 April 1984.

Plaintiff and defendant, married in 1958, separated and entered into a property settlement agreement in 1977. In May of 1978, the parties entered into a separation agreement which provided, inter alia, that defendant husband would pay to plaintiff wife $900.00 per month in alimony.

In October of 1978, defendant husband was granted an absolute divorce based on one year's separation. The divorce judgment found as facts that all claims for support or alimony had been settled by the 1977 property settlement agreement and the 1978 separation agreement and ordered that these agreements be incorporated by reference and made a part of the judgment.

In May of 1982, plaintiff wife filed an independent action, alleging that defendant husband had breached the 1978 separation agreement by discontinuing alimony payments. Defendant husband answered that plaintiff wife had in fact breached her contractual obligations under the separation agreement and that there had been a material change in circumstances preventing him from meeting his obligations under the separation agreement. Prior to the hearing on this matter, defendant husband made motions to amend his answer which were denied.

Judgment was entered on 6 April 1983, awarding plaintiff wife $14,400.00 and ordering defendant to comply with the terms

of the separation agreement to make future alimony payments to plaintiff wife. Defendant appeals.

Morrow and Reavis, by John F. Morrow, for plaintiff-appellee.

Bruce C. Fraser for defendant-appellant.

EAGLES, Judge.

I.

Defendant's first assignment of error is to the trial court's refusal to allow defendant to put on his evidence of changed circumstances. Defendant contends that this action is in effect one to enforce a court order for the payment of alimony and is, therefore, modifiable by the court. We do not agree.

Plaintiff wife's action in this case was clearly an action in contract to enforce the terms of the 1978 separation agreement. Because the 1978 separation agreement was incorporated by reference into the 1978 court order granting defendant an absolute divorce, defendant contends that the provision for alimony payment is part of a court order and thus modifiable, pursuant to G.S. 50-16.9. We find, however, that the alimony provisions here fall within the following exception as set out by our Supreme Court.

> Even though denominated as such, periodic support payments to a dependent spouse may not be alimony within the meaning of the statute and thus modifiable if they and other provisions for a property division between the parties constitute reciprocal consideration for each other.

Rowe v. Rowe, 305 N.C. 177, 184, 287 S.E. 2d 840, 844 (1982). Here, the provisions for alimony payments are included in one subsection of an eleven part section in which the parties detail a "division and settlement of marital rights and remaining properties." The provisions for alimony payments to plaintiff wife and the other property distributions as provided by the 1978 separation agreement are clearly reciprocal and therefore not separable or modifiable.

Defendant urges that *Walters v. Walters*, 307 N.C. 381, 298 S.E. 2d 338 (1983), is dispositive. It announces a new rule that

every court approved separation agreement is to be considered as part of a court ordered judgment and is thus modifiable and enforceable by the contempt powers of the court. *Id.* at 386, 298 S.E. 2d at 342. We note that the rule announced in *Walters* applies only to judgments that were entered after 11 January 1983 and therefore does not affect the 1978 judgment in this case. Even if the *Walters* decision were construed to apply to a 1978 judgment, we believe that it would not control here. In this case, plaintiff has elected to sue defendant for breach of contract instead of invoking the contempt powers of the court to enforce the court ordered separation agreement. We do not read *Walters* as depriving plaintiff of the option of electing to sue for breach of contract. While defendant is free to present evidence of his change of circumstances by filing a motion in the cause to modify the alimony provisions of the 1978 court order, this action is based on breach of contract and evidence of changed circumstances is not relevant. The trial judge, therefore, did not err in excluding defendant's evidence of changed circumstances.

II.

Defendant husband also assigns as error the trial court's denial of his motions to amend his answer. Rule 15(a) of the North Carolina Rules of Civil Procedure states that leave to amend shall be freely given when justice requires. A motion to amend is addressed to the sound discretion of the trial judge, and denial will be upheld on appeal absent a clear showing of an abuse of discretion. *Edwards v. Edwards*, 43 N.C. App. 296, 259 S.E. 2d 11 (1979). We find no abuse of discretion in the denial of either of defendant's motions to amend.

Defendant's first motion to amend was for the purpose of alleging a change in circumstances. In this action for breach of contract, to have allowed defendant to amend his answer to allege a change of circumstances would have allowed him to assert a new legal theory. We hold that the filing of this motion nine months after the complaint was filed and one week before the trial was to begin would cause undue delay and would unduly prejudice the plaintiff. See *Henry v. Deen*, 310 N.C. 75, 310 S.E. 2d 326 (1984). There was therefore no abuse of discretion in the trial judge's denial of defendant's first motion to amend.

Defendant's second motion to amend his answer was for the purpose of making more specific the original answer's allegation that plaintiff wife had breached the contract. This issue had been adequately raised in defendant's original pleadings. Defendant was already entitled to introduce his evidence of specific instances of plaintiff wife's breach. There was no need to amend defendant's answer in this way and no abuse of discretion in the trial judge's denial of this motion to amend by defendant.

III.

We have carefully considered defendant's remaining assignments of error and find them to be without merit.

Affirmed.

Chief Judge VAUGHN and Judge BRASWELL concur.

JAMES M. HUDSON v. MORDEN DEAN ICARD

No. 8225SC1324

(Filed 5 June 1984)

Negligence § 29.1— improperly loading logging truck—negligence in failure to warn

In an action to recover for personal injuries sustained by plaintiff while helping unload defendant's logging truck as a favor to defendant, the evidence was sufficient to show negligence by defendant and failed to show contributory negligence by plaintiff as a matter of law where it tended to show that defendant improperly stacked the logs above the standards on the sides of the truck; defendant unfastened a chain binder on one side of the truck and asked plaintiff to unfasten the chain on the other side but did not caution him about the logs above the standards, and logs above the standards rolled from the truck and struck plaintiff when he unfastened the chain.

APPEAL by defendant from *Grist, Judge*. Judgment entered 22 July 1982 in Superior Court, BURKE County. Heard in the Court of Appeals 16 November 1983.

Plaintiff sued to recover for personal injuries allegedly sustained while helping defendant unload a logging truck. In the trial, the jury answered the negligence, contributory negligence,

and damages issues in plaintiff's favor and from judgment rendered on the verdict, defendant appealed.

The relevant evidence at trial was to the following effect: Both parties were in the business of hauling logs from the forests of Burke and adjacent counties; plaintiff had been so engaged for ten to twelve years, defendant for two or three. Though they had worked together at different times in the past, at the time of the accident each was working independently. During the week beginning Monday, November 26, 1979, defendant hauled logs to Mace's Sawmill every day and on Friday, November 30, when he stopped his loaded truck at a service station, plaintiff, who was not working that day, was there. Defendant asked plaintiff to ride with him to Mace's Sawmill and help unload the truck and they rode to the sawmill together in defendant's truck. The bed of the truck had standards several feet high on each side to keep the logs in place as the truck traveled down the road; and the logs were also held in place by a chain, affixed under each side of the truck, that ran across the top of the load. Upon arriving at the sawmill, defendant pulled the truck off the side of the road at the same place where previous loads had been left. He unloaded at that place because the roadside there inclined slightly from the driver's side toward the passenger side, making it easy for the logs to roll off the truck when the standards were tripped. After stopping the truck, defendant got out, crawled under the truck bed on his side, unfastened the chain binder, and asked plaintiff, who was still in the truck, to unfasten the chain on his side also. Plaintiff got out, crawled under the truck bed, and unfastened the chain on that side. As plaintiff was getting out from under the truck, he was struck by some logs that rolled off the truck. The logs that rolled off and hit plaintiff had been above the standards, and there was nothing to hold them in place after the chain was loosened. Plaintiff admittedly did not notice that some of the logs were above the standards before he unfastened the chain and gave as his reason for not looking that defendant had been logging a long time and he figured that he had loaded the truck properly with the logs below the standards. After he was hit, plaintiff noticed that the logs remaining on the truck were even with the standards. As a logger, plaintiff knew how to unfasten chain binders and that logs higher than the standards could roll off the truck when the chain was loosened or removed. Plaintiff

also knew that defendant had unfastened the chain binder on the other side.

Lester Mace, the sawmill owner, testified that: When the truck came in the logs were piled above the standards; the approved practice among loggers in that area was not to stack logs above the standards; but that trucks with logs loaded higher than the standards were frequently seen on the roads and at his mill; and anyone who does not look at the logs and standards before unfastening the chain is not being careful.

Defendant testified that: The load of logs was rounded up to a point on top; when he unloaded logs by himself he usually kept his eyes on the logs on the truck and everyone unloading logs should do the same.

Byrd, Byrd, Ervin, Blanton, Whisnant & McMahon, by Lawrence D. McMahon, Jr., for plaintiff appellee.

Van Winkle, Buck, Wall, Starnes and Davis, by Marla Tugwell, for defendant appellant.

PHILLIPS, Judge.

Defendant's two main contentions, asserted with equal force and earnestness, are that though the evidence was insufficient to establish his negligence, it established plaintiff's contributory negligence as a matter of law. These questions will be considered together, since they require an appraisal of the evidence, which in each instance must be viewed in the light most favorable to the plaintiff. When so viewed, the evidence was sufficient, in our opinion, to raise the inference that defendant was negligent, but it does not establish plaintiff's contributory negligence as a matter of law. Under the circumstances recorded, that defendant makes these two contentions cheek by jowl is rather incongruous, it seems to us. Since it was defendant's truck that was being unloaded and plaintiff was there just as a favor to him, we can conceive of no reason, and the evidence suggests none, why plaintiff should be deemed more responsible for the developments that occurred than defendant was; the circumstances, when viewed favorably for the plaintiff, rather require the opposite conclusion. The evidence that defendant improperly stacked the logs above the standards and asked plaintiff to unfasten the chain, after already

loosening it on his side, but did not caution him about the logs being above the standards, amply supports the jury's conclusion that defendant was negligent. But that plaintiff heeded defendant's request to unfasten the chain on his side without pausing to examine the arrangement of the chain and logs does not lead, in our opinion, to the inescapable conclusion that plaintiff was contributorily negligent. That defendant, an experienced logger, had loaded the truck, knew whether it was properly done, and made the request to loosen the chain on the spur of the moment, as it were, are circumstances that could cause some rational minds to conclude, it seems to us, that acting without further observation or inquiry was the response of a reasonable man. In the daily activities of life under circumstances similar to those recorded here, we do not believe that reasonably careful and prudent people always verify the safety of the conditions before acting on the requests of their informed and experienced friends. Our belief is rather that what conduct was appropriate in the situation that existed was entirely a question of fact for the jury. Though legal maxims, rubrics and shibboleths are of great utility in solving most problems that litigation involve, they are of no benefit whatever in determining what reasonable people would or should do in many of the situations that arise during life's changing course; but human experience and insight, the chief assets of our jury system, are of great benefit in making such determinations.

Defendant's several other assignments of error, based upon the court's failure to give certain instructions to the jury and upon other instructions being given, are likewise without merit. A review of the charge convinces us that, though not in the form requested by defendant, it was legally correct and free from prejudicial error.

No error.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. HARRY JEFFERSON

No. 8312SC997

(Filed 5 June 1984)

1. **Constitutional Law § 49— waiver of right to counsel—conflicting recollections of whether defendant informed of right to assigned counsel**

The Court denied defendant's motion, which was treated as a motion for appropriate relief pursuant to G.S. 15A-1415(b)(3), based on absence of knowing and voluntary waiver of counsel as a result of the alleged failure to inform defendant of his right to substitute appointed counsel after withdrawal of his original counsel where the record contained a stipulation that the court reporter had been unable to locate her notes from the hearing on waiver of counsel, and several affidavits executed several months after completion of the trial indicated conflicting recollections as to whether or not defendant was informed of his continuing eligibility for counsel, and where defendant signed a waiver of right to assigned counsel form and the trial judge certified that defendant had been "fully" informed of his right to assigned counsel.

2. **Arrest and Bail § 9.1— revocation of bond during trial—no error**

In a prosecution for breaking or entering and larceny, there was no error in the revocation of a bail bond and ordering that defendant be in custody until completion of trial pursuant to G.S. 15A-534(f) where the uncontroverted representations of the prosecuting attorney indicated "good cause" for the exercise of the court's discretion. Defendant did not exercise his right under G.S. 15A-534(f) to apply for new conditions of release.

3. **Constitutional Law § 74— no error in failing to warn defendant of his right against self-incrimination**

When a trial court advised defendant that he had a right not to testify, it exceeded the requirements imposed by the case law of this jurisdiction since the failure to warn a defendant appearing *pro se*, when he offered to testify in his own behalf, of his right against self-incrimination does not present error.

APPEAL by defendant from *Battle, Judge.* Judgment entered 1 March 1983 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 14 March 1984.

Defendant was charged with breaking or entering and larceny. He was found not guilty of breaking or entering and guilty of larceny. He appeals from a judgment of imprisonment.

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

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

WHICHARD, Judge.

[1] Defendant contends the court erred "in allowing [him] to represent himself where [he] did not make a knowing and voluntary waiver of his right to counsel because the court failed to advise [him] of his right to substitute appointed counsel if his original appointed counsel was dismissed due to irreconcilable conflict." The record contains the following:

WAIVER OF RIGHT TO ASSIGNED COUNSEL

As the undersigned party in this action, I freely and voluntarily declare that I have been clearly advised of my right to the assistance of counsel, that I have been fully informed of the charges against me, the nature of and the statutory punishment for each such charge, and the nature of the proceedings against me; that I have been advised of my right to have counsel assigned to assist me in defending against these charges or in handling these proceedings, and that I fully understand and appreciate the consequences of my decision to waive counsel.

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.

Signature of Defendant, Petitioner, Respondent
s/ HARRY N. JEFFERSON JR.

(Sworn to this the 9th day of Feb., 1983.)

CERTIFICATE OF JUDGE

I certify that the above named person has been fully informed in open Court of the nature of the proceeding or charges against him and of his right to have counsel assigned by the Court to represent him in this action; that he has elected in open Court to be tried in this action without the assignment of counsel; and that he has,

[X] executed the above waiver in my presence after its meaning and effect have been fully explained to him.

Date—2/9/83
Signature of Judge
s/ ROBERT L. FARMER

The record thus affirmatively discloses a knowing waiver of counsel after defendant was "fully" informed of his right to assigned counsel. These assignments of error are, on that account, overruled. *State v. Jones*, 52 N.C. App. 606, 609-10, 279 S.E. 2d 9, 11 (1981).

In settling the record on appeal the trial court ordered that (1) a stipulation that the court reporter had been unable to locate her notes on the hearing on waiver of counsel, and (2) four affidavits executed several months after completion of the trial, be made part of the record. The affidavits, in pertinent part, showed the following:

Defendant did not recall what the court told him when he signed the waiver form, and specifically did not recall whether it told him if he waived counsel and failed to retain counsel he would have to represent himself. The assistant public defender initially appointed to represent defendant, but subsequently allowed to withdraw, recalled that the court "did not advise defendant that he had a right to another appointed lawyer if he had an irreconcilable conflict with [him]." The prosecuting attorney, however, recalled that the court "informed the defendant that if [the assistant public defender] withdrew and the defendant wanted another court appointed attorney and was still eligible he would appoint him one."

The court did not indicate the purpose for ordering these materials made part of the record. We treat them as presenting a motion for appropriate relief, pursuant to G.S. 15A-1415(b)(3), based on absence of knowing and voluntary waiver of counsel as a result of the alleged failure to inform defendant of his right to substitute appointed counsel after withdrawal of his original appointed counsel. We consider the conflicting recollections of trial counsel, several months after the fact, in light of the trial court's certification, contemporaneously with the hearing, that it had

"fully" informed defendant of his right to assigned counsel; and we deny the motion.

Defendant contends the court erred in instructing the jury on the doctrine of possession of recently stolen property. He argues the evidence was insufficient to show that he had possession of the property in question. We find the evidence sufficient to warrant the instruction. This assignment of error is overruled.

[2] Defendant contends the court erred in revoking his bond during trial. The court took this action when the prosecuting attorney represented that defendant was "on several different bonds on several different charges" and that he had "information . . . that [defendant] was picked up sometime before this weekend . . . and . . . was released yesterday when his secured bond was made unsecure." He further represented that defendant had indicated that his mother had signed most of his bonds. He requested "that the Court be reassured as to the bond or change the bond to a secured status." The court responded that it would "let the defendant be in custody until [completion of] the trial."

"For good cause shown any judge may at any time revoke an order of pretrial release." G.S. 15A-534(f). The presumption is that the court "exercised a proper discretion in ordering the defendant into custody." *State v. Best*, 11 N.C. App. 286, 291, 181 S.E. 2d 138, 141, *cert. denied*, 279 N.C. 350, 182 S.E. 2d 582 (1971). Nothing in this record rebuts that presumption. The uncontroverted representations of the prosecuting attorney would appear to provide "good cause" for exercise of the court's discretion to "let the defendant be in custody until [completion of] the trial." Defendant did not exercise his right under G.S. 15A-534(f) to apply for new conditions of release. *See State v. Brooks*, 38 N.C. App. 445, 448-49, 248 S.E. 2d 369, 371-72 (1978). The court thus was not required to set such conditions. Finally, although counsel argues that the court's action adversely affected defendant's ability to secure attendance of witnesses and gather other evidence, the record contains no indication as to witnesses defendant would have secured or evidence he would have gathered. Defendant thus has failed to carry his burden of showing prejudice. *See State v. Able*, 13 N.C. App. 365, 367, 185 S.E. 2d 422, 423 (1971), *cert. denied*, 281 N.C. 514, 189 S.E. 2d 36 (1972). This assignment of error is overruled.

[3] Defendant contends that because he was unrepresented, the court erred in "failing to advise [him,] prior to his taking the stand[,] that his failure to testify would give rise to no presumption against him." The court did advise defendant that he had a right not to testify. It thereby exceeded the requirements imposed by the case law of this jurisdiction. This Court has found no error in the failure to warn a defendant appearing *pro se*, when he offered to testify in his own behalf, of his right against self-incrimination. *State v. Lashley*, 21 N.C. App. 83, 203 S.E. 2d 71 (1974). It has stated that "[t]he trial court [is] not required to make any special effort to accommodate a defendant proceeding *pro se*." *State v. Brooks*, 49 N.C. App. 14, 18, 270 S.E. 2d 592, 596 (1980). Our Supreme Court has stated: "When a defendant understandingly chooses to appear *pro se*, he does so at his peril and acquires no greater right or latitude than would be allowed an attorney acting for him." *State v. Cronin*, 299 N.C. 229, 244-45, 262 S.E. 2d 277, 287 (1980). We thus find no error in the failure to give the advice in question. This assignment of error is overruled.

No error.

Chief Judge VAUGHN and Judge PHILLIPS concur.

JAMES CASE, D/B/A ACE ENTERTAINMENT, PLAINTIFF v. GARY M. MILLER, EXECUTOR OF THE ESTATE OF LACY J. MILLER, DEFENDANT v. JAMES HORN, D/B/A HORN'S GARAGE AND WRECKER SERVICE, INTERVENOR

No. 8321SC466

(Filed 5 June 1984)

1. **Attachment § 8; Mechanics' Liens § 1— lien for towing and storage of attached vehicles—intervention in principal action**

Intervenor had a lien under G.S. 44A-2(d) for towing and storage of attached vehicles pursuant to a contract with the sheriff and had a right to intervene in the principal action for the purpose of asserting such lien. G.S. 1-440.43; G.S. 1A-1, Rule 24.

2. **Mechanics' Liens § 1— lien for towing and storage of attached vehicles—effect of sale of vehicles**

Intervenor's lien for the towing and storage of attached vehicles was not extinguished when possession of the vehicles was surrendered and they were

sold pursuant to court order prior to the intervention since the lien amount is collectable from the proceeds of sale. G.S. 44A-5.

3. **Mechanics' Liens § 1— lien for towing and storage—failure to file with executor**

Intervenor's claim of lien for towing and storage of attached vehicles was not barred because notice of the claim was not filed with the deceased defendant's executor within six months after the notice to creditors was published as provided by G.S. 28A-19-3(a).

4. **Mechanics' Liens § 1— extent of lien for towing and storage of attached vehicles**

Intervenor's lien for the towing and storage of attached vehicles pursuant to a contract with the sheriff was not limited to charges incurred within 180 days of commencement of storage. G.S. 44A-4(a).

APPEAL by defendant Executor from *Rousseau, Judge.* Judgment entered 4 November 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 12 March 1984.

Defendant's appeal is from a judgment ordering the Sheriff of Forsyth County to pay to the intervenor, Horn's Garage and Wrecker Service, $6,291 for storing cars levied on by the Sheriff, pursuant to an order of court. The merits of the principal action, in which plaintiff sued Lacy Miller for breach of contract, Miller counterclaimed, and after he died his Executor was substituted as a party defendant, are not involved in the appeal.

While the intervenor was a stranger to the case, with no interest in it, an order of attachment was issued, requiring the Sheriff to levy on and take possession of seven motor vehicles belonging to defendant. Having no means to tow the vehicles or any place to keep them, the Sheriff on 8 March 1980 engaged the intervenor to tow them to his garage and store them. The attached cars remained at the intervenor's garage and on 16 January 1981 the Sheriff petitioned the Clerk of Court for authority to sell them because the wrecker and storage bill then amounted to $6,000, was increasing daily, and would soon exceed their value. The Clerk granted the petition and on 30 January 1981 the Sheriff sold the vehicles at public sale for $7,435, which he still holds pending the court's authority to disburse it. On 26 March 1981 Horn moved to intervene in the case for the purpose of asserting his towing and storage lien in the amount of $6,291 against the car sale proceeds held by the Sheriff; and over defendant's objection Judge Seay allowed the intervention re-

quested on 15 April 1981. On 30 April 1981 the Sheriff filed a motion, showing that in carrying out the orders of the court he had incurred expenses in the amount of $6,291, which the parties refused to pay, and requested authority to pay Horn's bill for towing and storing the seven motor vehicles. On 8 May 1981, an order was entered dissolving the attachment proceedings, but directing the Sheriff to retain the sale proceeds of $7,435 until the intervenor's claim is adjudicated. On 18 October 1982, plaintiff and defendant voluntarily dismissed their claims and counterclaims against each other with prejudice, thereby leaving only the intervenor's claim for disposition. On 4 November 1982, after a hearing, the court found and concluded that the intervenor is entitled to be paid $6,291 from the funds held by the Sheriff and entered judgment directing the Sheriff to pay it.

White and Crumpler, by Fred G. Crumpler, Jr., G. Edgar Parker, and Randolph M. James, for defendant appellant Miller.

Morrow and Reavis, by Alvin A. Thomas, for intervenor appellee Horn.

PHILLIPS, Judge.

Defendant's contentions, based on eleven assignments of error, are many and varied. In short, he contends that Horn's Garage and Wrecker Service had no right to intervene in the case, and has no lien on the funds held by the Sheriff, either because one was never acquired or if acquired was lost for failing to comply with the law in one respect or another. In our opinion, none of defendant's contentions have merit and we affirm the judgment.

[1] That Horn had lien rights against the fund and was entitled to intervene in the case because of them could not be clearer. G.S. 44A-2(d) gives any "person who . . . tows or stores motor vehicles . . . pursuant to an express or implied contract with [the] legal possessor" thereof a lien on the vehicles for the charges incurred. Since the Sheriff, with whom Horn contracted to look after the vehicles, was a legal possessor, Horn had a lien on them from the time he began towing them away from defendant's place to his. And his lien was enforceable in this action under the explicit language of Rule 24 of the North Carolina Rules of Civil Procedure and G.S. 1-440.43. Rule 24 provides: "(a) Intervention of

Right. Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute confers an unconditional right to intervene." G.S. 1-440.43 provides:

> Any person other than the defendant who claims property which has been attached, or any person who has acquired a lien upon or an interest in such property, whether such lien or interest is acquired prior to or subsequent to the attachment, may
>
> . . . .
>
> (2) Intervene and secure possession of the property in the same manner and under the same conditions as is provided for intervention in claim and delivery proceedings.

Thus, having "acquired a lien" or "interest in such property," as Horn had certainly done by storing the cars for nearly a year, he had an unconditional right to intervene, which Rule 24 required the judge to enforce.

[2] Defendant's contention that Horn had no lien because possession of the vehicles was surrendered and they were sold prior to intervention fails to take other applicable statutes into account. The sale of property encumbered by a statutory lien does not extinguish the lien; instead, its obligations are collectable from the proceeds of sale. G.S. 44A-5. And while it is true that possessory liens generally terminate when the lienor relinquishes possession, that only applies when possession is surrendered *voluntarily*. G.S. 44A-3. Here, possession of the vehicles was surrendered in obedience to a court order directing their sale; and obedience to court orders does not work a forfeiture of one's rights.

[3] Nor is Horn's claim barred because notice of it was not filed with the defendant Executor within six months after the notice to creditors was published as G.S. 28A-19-3(a) provides. Because G.S. 28A-19-3(g) provides:

> Nothing in this section affects or prevents any action or proceeding to enforce any mortgage, deed of trust, pledge, lien (including judgment lien), or other security interest upon any property of the decedent's estate, but no deficiency judgment will be allowed if the provisions of this section are not complied with.

Since Horn had a valid lien, as we have already ruled, he could proceed against the property or the proceeds of its sale up to its value without filing the usual notice of claim.

[4] Finally, defendant's contention that if Horn has a lien, it is limited to charges incurred within 180 days of the commencement of storage is likewise mistaken. Though G.S. 44A-4(a), upon which defendant relies, does so provide, it does not stop there, its very next sentence being as follows: "Provided that when property is placed in storage pursuant to an express contract of storage, the lien shall continue and the lienor may bring an action to collect storage charges and enforce his lien at any time within 120 days following default on the obligation to pay storage charges." Because of this latter provision and the storage was under an express contract, Horn's right to collect did not end 180 days after the storage began, but 120 days after the default occurred. And since his contract with the Sheriff was not on the usual month to month or week to week basis, but was subject to the control of the court, as the course of the litigation required, if default had occurred even when the action to collect by intervention was filed, the record does not show it. Thus, the intervenor was, as His Honor ruled, entitled to collect for the full period claimed.

Affirmed.

Chief Judge VAUGHN and Judge WHICHARD concur.

DORA FAYE VOSHELL v. JAMES H. VOSHELL

No. 8325DC84

(Filed 5 June 1984)

1. **Divorce and Alimony § 19.3— separation agreement—modification—absence of changed circumstances**

The trial court erred in modifying a separation agreement where the facts did not support the conclusion that a substantial change of condition had occurred in that the changes that had occurred were inherent in the separation agreement.

2. **Divorce and Alimony § 18.16— award of attorney's fees error**

An award of attorney's fees in an action brought for modification of a separation agreement could not stand where the trial court made no finding as

to plaintiff's good faith in bringing the action even though the court found that plaintiff did not have sufficient income and assets with which to pay her attorney.

3. Divorce and Alimony § 21.6— payment of money in exchange for interest in marital home error

Where the rights of the parties with respect to the marital home were governed by a separation agreement, and the agreement called for a division of the proceeds after it was sold, it was error for the court to order defendant to pay $5,000 in exchange for her interest in the marital home where the property had still not been sold.

APPEAL by defendant from *Crotty, Judge.* Order entered 14 October 1982 in District Court, CATAWBA County. Heard in the Court of Appeals 8 December 1983.

The parties, who had been married and living in Catawba County for several years, separated under a written agreement in March, 1981, and plaintiff moved to LaGrange, Georgia where she had grown up. Under the terms of the agreement: The plaintiff wife received the household furnishings, a Volkswagen automobile, and custody of their one child; defendant husband agreed to pay her moving expenses, child support in the amount of $200 a month, and alimony in the amount of $200 a month for twelve months and $100 a month thereafter. It was also agreed that (a) the 1980 federal and state income tax refund payments, which were then due, would be divided equally between them; (b) the marital home would be sold by defendant and the proceeds equally divided, with defendant being permitted to occupy it during the interim; and (c) neither party would thereafter harass or molest the other.

In May of 1982, alleging abandonment and personal indignities, plaintiff instituted this action for child custody, child support and alimony. In answering, defendant asserted the separation agreement as a bar and counterclaimed for absolute divorce and breach of the non-molestation clause, alleging that she had repeatedly contacted and aggravated him since their separation. Plaintiff then filed a "Motion, Answer and Counterclaim," in which she asked that the alimony and child support payments be increased because of a change in circumstances, for equitable distribution of marital property, and dismissal of defendant's counterclaims. In the pleading, plaintiff admitted executing the separation agreement but averred that defendant's

breach of several of its terms rendered it without legal effect. The court later permitted plaintiff to redesignate the counterclaims as motions in the cause.

When the matter came on for hearing before the judge, without a jury, the parties stipulated that the issues were as follows:

> 1. Has there been a material change in circumstances to warrant a modification of the Separation Agreement dated March 11, 1981 and therefore entitle Plaintiff to an increase in alimony and/or an increase in child support;
>
> 2. Is Plaintiff entitled to equitable distribution of the marital property in view of the fact that she has executed the Separation Agreement dated March 11, 1981;
>
> 3. Is Defendant entitled to an absolute divorce based upon one year's separation;
>
> 4. Has Plaintiff breached the terms of the Separation Agreement;
>
> 5. If Plaintiff has breached the terms of the Separation Agreement, what if any damages is Defendant entitled to.

In an order containing detailed findings of fact, the judge concluded as a matter of law in pertinent part that there had been a substantial and material change of circumstances since the separation agreement was executed, necessitating modification "pursuant to N.C.G.S. 50-16.9," awarded plaintiff alimony of $200 per month and attorney's fees of $1,000, and directed defendant to pay plaintiff $5,000 in discharge of her equity in the marital home. And after finding that plaintiff violated the non-molestation agreement by making many harassing telephone calls and writing many harassing letters to defendant, the court awarded defendant $1 in damages therefor. Defendant appealed from all the provisions ordered.

Yount & Walker, by Rufus F. Walker, for plaintiff appellee.

J. Bryan Elliott for defendant appellant.

PHILLIPS, Judge.

Since the evidence presented at the hearing was not brought forward in the record, we must and do presume that the judge's findings of fact are supported by competent evidence. *Town of Mount Olive v. Price*, 20 N.C. App. 302, 201 S.E. 2d 362 (1973). Thus, the main questions remaining are whether the facts found support the conclusions made and judgment entered.

[1] By stipulating to the "change of condition" issue, the parties, in effect, agreed to give the separation agreement, which had not received the court's sanction, the status of a previously entered alimony and child support order. Though a dubious practice, it did no harm in this instance and we do not quibble about it; nevertheless, the facts found do not support the conclusion that a substantial change of condition had occurred and the judgment in that respect was erroneous. *Rowe v. Rowe*, 305 N.C. 177, 287 S.E. 2d 840 (1982). Defendant's situation has not significantly changed, as the facts found show. The only change of consequence is in plaintiff's situation; the job that she has in Georgia pays $3.92 an hour, whereas the one she had here paid $4.50; and she is now living in a rented house of inferior quality at a monthly cost of $250, whereas before she was living in her own home. But the separation agreement was made in contemplation of plaintiff leaving her home and job here to move back to Georgia; it was known that she would have to find a job and place to live when she got there and that whatever arrangements were made would necessarily be different from the arrangements that existed when she was here. Thus, though these changes have occurred, they are not the type that gives rise to legal relief; they were inherent in the agreement, cannot be the basis for revising it, and the order increasing defendant's alimony payments is therefore set aside. Because of the peculiar circumstances involved, however, and for the guidance of the parties, we interpret the order incorporating the agreement therein as being based on the conditions that existed after plaintiff was well settled in her new home, which is to say at the time of the hearing appealed from.

[2] The defendant's exception to the award of attorney's fees was also well taken. Attorney's fees can properly be awarded in custody and child support cases upon adequate findings that the moving party acted in good faith and has insufficient means to

defray the expense of the suit. *Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980). Though the court found that plaintiff does not have sufficient income and assets with which to pay her attorney, no finding was made as to plaintiff's good faith in bringing the action. Thus, the award of attorney's fees cannot stand.

[3] The order requiring defendant to pay plaintiff $5,000 in exchange for her interest in the marital home was likewise without authority. When this order was made, the rights of the parties with respect to the house were still governed by the separation agreement and the agreement calls for a division of the proceeds after it is sold. Agreements that have not been incorporated into a court order cannot be modified by the court except with the consent of the parties. *Holsomback v. Holsomback*, 273 N.C. 728, 161 S.E. 2d 99 (1968). As the order shows, the judge first modified the agreement to require defendant to pay the $5,000, then incorporated it into the order. Now that the agreement has been incorporated into the order of court, if the property still has not been sold, the arrangements in regard to it can properly be reconsidered by the trial court. *Walters v. Walters*, 307 N.C. 381, 298 S.E. 2d 338 (1983).

But the court's refusal to award defendant more than nominal damages for plaintiff's breach of the non-molestation clause is affirmed. Since the court found that defendant suffered no actual damage because of plaintiff's harassment and the evidence was not recorded, error has not been shown.

The parts of the order increasing plaintiff's alimony, awarding her attorney's fees, and directing defendant to pay plaintiff $5,000 are reversed, and the other parts of the order are affirmed.

Reversed in part; affirmed in part.

Judges ARNOLD and JOHNSON concur.

JACK T. JERSON v. CHRISTY LYNN JERSON (O'HERRON)

No. 8310DC1260

(Filed 5 June 1984)

Divorce and Alimony § 26— vacation of order modifying foreign child custody order

A district court order granting to an in-state mother temporary custody of a child whose custody had been granted to an out-of-state father by a foreign divorce decree must be vacated, although the majority of the panel of the Court of Appeals failed to agree on the basis for such decision.

Judge JOHNSON concurring in the result.

Judge WELLS dissenting.

APPEAL by plaintiff from *Creech, Judge.* Orders entered 28 October 1983 in District Court, WAKE County. Heard in the Court of Appeals 13 April 1984.

Ragsdale, Kirschbaum & Day, P.A., by William L. Ragsdale and Kathy A. Klotzberger, for plaintiff appellant.

Donald H. Solomon for defendant appellee.

BECTON, Judge.

An out-of-state father appeals from orders (a) granting temporary custody of a child to an in-state mother, and (b) denying his motions to dismiss the proceeding. We hold that the trial court failed to find facts sufficient to exercise its jurisdiction under the Uniform Child Custody Jurisdiction Act, N.C. Gen. Stat. § 50A-1 *et seq.* (Supp. 1983).

I

Plaintiff[1] husband and defendant wife obtained an Oklahoma divorce in 1979. The decree awarded custody of their minor child to the husband. The wife then moved to North Carolina, and the husband moved to Texas. Pursuant to the decree, the child visited

1. Although "defendant" wife initiated the action, styled "Motion in the Cause," in the North Carolina court, and is the only party to seek affirmative relief in this State, she designated her ex-husband, a non-resident, as plaintiff. While we strongly disapprove of such procedure, we follow the designations used for the sake of clarity.

the wife in North Carolina in the summer of 1983, and the wife refused to return him to Texas. Instead, she filed a motion in the cause in District Court, Wake County, seeking modification of the Oklahoma decree. Plaintiff husband gave notice of appeal from an order granting defendant wife temporary custody. After this Court denied the husband's petition for a writ of supersedeas, he withdrew his appeal. The husband then filed notice of dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 41 (1983), and a motion to dismiss for lack of jurisdiction, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1983), because the wife failed to properly commence an action pursuant to N.C. Gen. Stat. § 1A-1, Rule 3 (1983) and because the husband had already filed a notice of dismissal. The court set aside the Rule 41 notice of dismissal and denied the motion. The husband appeals.

II

Before making his motion to dismiss for lack of jurisdiction, the husband filed a notice of appeal, a petition for writ of supersedeas, a petition for writ of certiorari, and notice of dismissal. In North Carolina, virtually any action other than a motion to dismiss for lack of jurisdiction constitutes a general appearance in a court having subject matter jurisdiction. *See* N.C. Gen. Stat. § 1-75.7 (1983); *Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 203 S.E. 2d 769 (1974) (request for extension of time to plead; since changed by statute); *Alexiou v. O.R.I.P., Ltd.*, 36 N.C. App. 246, 243 S.E. 2d 412, *disc. rev. denied*, 295 N.C. 465, 246 S.E. 2d 215 (1978) (notice of appeal to district court); *Williams v. Williams*, 46 N.C. App. 787, 266 S.E. 2d 25 (1980) (participation in conference with plaintiff and court). The district court apparently had subject matter jurisdiction, N.C. Gen. Stat. § 50A-3 (Supp. 1983), although, as discussed below, it did not properly exercise it. We therefore hold that the husband entered a general appearance and waived his right to contest personal jurisdiction.

III

Therefore, the only general jurisdictional ground on which the husband may proceed is subject matter jurisdiction. Our Supreme Court, however, has recently held that denial of a motion to dismiss for lack of subject matter jurisdiction is interlocutory and not appealable. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E. 2d 182 (1982). Although we would ordinarily

dismiss this appeal, in our discretion we treat the appeal as a petition for writ of certiorari in order to clarify our position on the exercise of jurisdiction in child custody cases. N.C. Gen. Stat. § 7A-32(c) (1981).

IV

The court took jurisdiction of this case under the Uniform Child Custody Jurisdiction Act (UCCJA), G.S. § 50A-1 *et seq.* (Supp. 1983). The UCCJA contains a provision intended to limit access to the courts by parents who take "self-help" measures in defiance of foreign custody decrees, N.C. Gen. Stat. § 50A-8(b) (Supp. 1983):

> Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, *without consent* of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has *improperly retained the child after a visit* or other temporary relinquishment of physical custody. (Emphasis added.)

We have recently held that even when the district court has jurisdiction over the person of the out-of-state parent in an action to modify a foreign custody decree, it has no authority to exercise its jurisdiction without making findings of fact which support the conclusion that such exercise is required in the interest of the child, if the record shows that the parent seeking the modification has improperly retained the child. *Bryan v. Bryan*, 66 N.C. App. 461, 311 S.E. 2d 313 (1984). In *Bryan*, the record contained no findings at all that the interest of the child required exercise of its jurisdiction, and this Court accordingly vacated the custody order as beyond the authority of the lower court.

In this case the trial court's order did contain a recitation that it was in the best interest of the child that it assume jurisdiction. We hold that this does not comply with the stated policy of the UCCJA or with the case law. It would seriously weaken the express policy of the UCCJA, which seeks to deter unilateral actions to avoid foreign custody decrees, *see* G.S. § 50A-1(a)(5) (Supp. 1983), if our courts could exercise jurisdiction in cases such as this without finding *specific facts* supporting their actions. We have held conclusory recitations by courts of

other states insufficient, and fairness and uniform application of the UCCJA demand the same specificity of our courts. *Davis v. Davis*, 53 N.C. App. 531, 281 S.E. 2d 411 (1981) (California order insufficient to exercise jurisdiction); *see also Williams v. Richardson*, 53 N.C. App. 663, 281 S.E. 2d 777 (1981), *disc. rev. denied*, 304 N.C. 733, 288 S.E. 2d 382 (1982) (remanding for specific findings).

V

The trial court thus erred in concluding it had authority to exercise its jurisdiction. *Bryan v. Bryan.* Because of the other major procedural defects in the case, it would be pointless to remand for the purpose of making specific findings of fact. The order granting defendant custody is therefore

Vacated.

Judge JOHNSON concurs in the result.

Judge WELLS dissents.

Judge JOHNSON concurring in the result.

I, too, believe the Order granting defendant custody should be vacated, but for a different reason than stated by Judge Becton. In my view, no proper pleading was filed to enable the Wake County court to consider the custody issue. The wife did not file a Complaint; rather, she filed, as her initial pleading, a "Motion in the Cause," listing her out-of-state husband as the plaintiff. This, our rules of civil procedure and statutes will not permit. *See* N.C. Gen. Stat. §§ 1A-1, Rule 3 (1983); 50-13.5 (Supp. 1983); 50A-15 (Supp. 1983). Absent minimal compliance with our rules and statutes, as a threshold matter, the jurisdictional questions need not be reached.

Judge WELLS dissenting.

I am of the opinion that this appeal should not be entertained because of its interlocutory nature, it being an appeal from an order of temporary custody wherein the appellant's only valid grounds questions the subject matter jurisdiction of the trial court, which is interlocutory, and does not affect a substantial

right. *See Latch v. Latch*, 63 N.C. App. 498, 305 S.E. 2d 564 (1983). Under the circumstances, I do not agree that we should allow certiorari, and I therefore vote to dismiss the appeal.

IN THE MATTER OF: APPEAL OF WESLEYAN EDUCATION CENTER FROM DENIAL OF EXEMPTION APPLICATION FOR ITS PROPERTY FOR YEAR 1982

No. 8310PTC550

(Filed 5 June 1984)

Taxation §§ 22, 25.1 — listing of property held by non-profit corporation — failure to apply for tax exempt status — finding that property no longer exempt supported by evidence

Pursuant to G.S. 105-282.1(a), the Property Tax Commission properly found that a non-profit corporation's failure to apply for tax exempt status, after listing its property, prevented the Commission from granting an exemption for the property during the listing period. By the time the taxpayer applied for tax exempt status, the county's budget ordinance was established, and allowing removal of a taxpayer's listed property from the tax base after the listing period closed would clearly have jeopardized the county's budget. G.S. 159-13(a), G.S. 105-282.1(c), and G.S. 105-312(a)(3).

APPEAL by Taxpayer from the final decision of the North Carolina Property Tax Commission entered 28 February 1983. Heard in the Court of Appeals 3 April 1984.

On 4 March 1981 Kernersville Wesleyan Academy conveyed 54 acres of land to Wesleyan Education Center (hereinafter Taxpayer), a non-profit corporation. Since 1974 the property had been exempted from payment of ad valorem taxes. Taxpayer listed the property during the listing period for 1982 but did not apply for tax exempt status until 30 June 1982, approximately four months after the 1982 listing period had ended and after Taxpayer had been notified by the Forsyth County Tax Supervisor that the property was no longer exempt. Also on 30 June 1982 Taxpayer appeared before the Forsyth County Board of Equalization and Review to appeal the Supervisor's denial of tax exempt status for 1982. The Board denied exemption to the property on grounds that no application was filed by Taxpayer during the 1982 listing period.

On appeal to the North Carolina Property Tax Commission, the Taxpayer and County stipulated to the following issue: whether a tax supervisor or board of equalization and review has authority to grant an exemption for property which its owner had listed during the listing period but failed to file an application for exemption during this period. After considering the evidence of the parties and the law governing the taxation of property set out in the "Machinery Act," G.S. 105-271 *et seq.*, the Commission concluded:

> There is no authority, under the Machinery Act as presently written, for either the tax supervisor or the board of equalization and review to grant an exemption for property which its owner had listed during the listing period but for which its owner failed to file an application for exemption during the listing period.

From this final decision of the Commission, Taxpayer appeals.

Thomas & Coltrane, by Raymond D. Thomas, for appellant Wesleyan Education Center.

P. Eugene Price, Jr. and Jonathan V. Maxwell for appellee Forsyth County.

ARNOLD, Judge.

Taxpayer assigns error to the Commission's decision and argues that the Machinery Act presently allows either a county tax supervisor or board of equalization and review to grant an exemption when the owner has listed his property during the listing period but does not apply for exempt status until after this period. We disagree for the reasons given in the Commission's decision.

The Commission based its decision on the express mandate set out in G.S. 105-282.1(a):

> Every owner of property claiming exemption or exclusion from property taxes under the provisions of this Subchapter has the burden of establishing that the property is entitled thereto. Except as otherwise provided below, *every owner claiming exemption or exclusion hereunder shall annually, during the regular listing period, file an application therefor*

> *with the tax supervisor of the county in which the property would be subject to taxes if taxable.* (Emphasis added.)

The Commission emphasized that this statutory requirement allows no flexibility for the filing of an application for exemption after the listing period. The rationale for this strict application is "to enable the taxing officials to determine the reductions in their tax base prior to setting the tax rate."

Taxpayer here listed its property during the 1982 listing period, which ended on 2 March 1982. The property was therefore included in the tax base relied upon by the Tax Supervisor when he submitted projected revenues to the County Manager prior to 30 April as required by G.S. 159-10. The Board of County Commissioners was required to adopt a budget ordinance making appropriations and levying taxes upon this tax base not later than 1 July. G.S. 159-13(a). By the time Taxpayer applied for exempt status on 30 June, the County's budget ordinance was established. Allowing removal of a taxpayer's listed property from the tax base after the listing period has closed and the county has relied upon this tax base in projecting revenues and proposing a budget would clearly jeopardize the county's budget.

We find no merit to Taxpayer's argument that G.S. 105-282.1(c) allows either a tax supervisor or board of equalization and review to consider the merits of a late application for exemption of listed property. This statute provides in part:

> When an owner of property who is required to file an application for exemption or exclusion fails to do so, the tax supervisor shall proceed to discover the property as provided in G.S. 105-312. If upon appeal to the county board of equalization and review or board of commissioners, the owner demonstrates that the property meets the conditions for exemption, the exemption may be approved by the board at that time.

Taxpayer argues that the Commission's interpretation of the foregoing statute as allowing review of the exempt status of a taxpayer who fails to list his property, but denying a hearing to a taxpayer who lists his property and does not file an application for exemption until after the listing period, is absurd. This argument can be refuted on two grounds. First, the Legislature has

defined the phrase "to discover property" as "the determination that property has not been listed during a regular listing period and to the identification of the omitted item." G.S. 105-312(a)(3). This language is clear that property can only be discovered if it is not listed. G.S. 105-282.1(c), therefore, does not apply to Taxpayer's timely listed property. Second, an owner of discovered property which meets the conditions for exemption is allowed an exemption after the listing period, because his unlisted property was never included in the county's tax base. Granting an exemption to unlisted property would not jeopardize the budget adopted by the county.

Taxpayer's remaining assignment of error involves the constitutional validity of the Commission's interpretation of G.S. 105-282.1. Since this issue was not raised before the Board of Equalization and Review and since the one issue before the Property Tax Commission did not include constitutional questions, Taxpayer cannot raise the issue on appeal to this Court. *See White v. Pate*, 308 N.C. 759, 304 S.E. 2d 199 (1983).

The decision of the North Carolina Property Tax Commission is

Affirmed.

Judges WELLS and BRASWELL concur.

STATE OF NORTH CAROLINA v. THOMAS JUNIOR SHIELDS

No. 8320SC999

(Filed 5 June 1984)

Criminal Law § 86.3— cross-examination of defendant—false implication relating to convictions—error cured by instructions

While it was improper for the prosecutor falsely to imply during the cross-examination of defendant that he had in his hand documents which showed that defendant had been convicted of certain assaults after defendant had stated that he did not remember such convictions, the prejudicial effect of such impropriety was cured when the trial court instructed the jury that it was not to consider any questions or remarks concerning assaults involving defendant, especially where defense counsel failed to request a mistrial or additional instructions.

State v. Shields

APPEAL by defendant from *Seay, Judge*. Judgment entered 21 April 1983 in Superior Court, MOORE County. Heard in the Court of Appeals 14 March 1984.

Defendant was convicted of involuntary manslaughter for shooting and killing Leroy Smith during a nightclub parking lot fight. Perhaps because it happened about 2 o'clock in the morning, just after the club closed for the night, none of the several witnesses that allegedly saw the incident develop were able to clearly describe the circumstances that gave rise to the fight and shooting, and the different details involved were but little agreed to. One view expressed, however, was that a fist fight that defendant started developed as it did because he pulled a gun and shot the decedent several times; another view was that the decedent instigated a scuffle, during the course of which a pistol, that defendant was using as a club in defense of himself, "went off" two or three times.

Attorney General Edmisten, by Assistant Attorney General James E. Magner, Jr., for the State.

Van Camp, Gill & Crumpler, by James R. Van Camp, for defendant appellant.

PHILLIPS, Judge.

Defendant's sole assignment of error is based on the District Attorney's cross-examination of him while he was a witness for himself, as follows:

Q. Mr. Shields, what have you been tried and convicted of?

A. I been convicted for breaking and entering in '77.

Q. What else?

A. That's all I can remember so far.

Q. I'll ask you if you weren't convicted of assault and battery in 1979 on the 17th day of May?

A. I can't remember.

Q. I'll ask you if you weren't convicted of two counts of assault with a deadly weapon on the 27th day of July, 1979?

A. You asked me was I convicted of that?

Q. Yes, sir.

A. I can't remember.

Q. Well, Mr. Shields, if I showed you the court proceedings to show that would it help refresh your recollection?

MR. VAN CAMP: Objection.

COURT: Overruled.

Q. Would it if I showed you where you were convicted on a court proceeding—would it help you refresh your memory?

MR. VAN CAMP: The question assumes something not in evidence, if Your Honor please.

COURT: Overruled.

Q. Would it or wouldn't it?

A. You say if you bring me the papers showing me.

Q. Uh-huh.

A. Yeah, it would probably help me remember.

Q. All right. Do you remember a Mr. Johnny Belk, Mr. Carl Akins?

A. Repeat that again—Johnny Belk.

Q. Yes, sir. Do you remember a Mr. Johnny Belk or a Mr. Carl Akins?

At that point Judge Seay interrupted the proceedings, sent the jury out, and examined the District Attorney's documents. Discovering that the documents contained no indication that defendant had been convicted of the charges referred to, the judge informed counsel that he was going to instruct the jury to disregard all of the questions regarding prior convictions and further stated to defendant's attorney: "If my instructions are not sufficient I will be glad to hear from you as to what would be sufficient." When the jury returned, the judge gave the following instruction:

> Members of the jury, the Court is going to instruct you to disregard, put from your mind, strike from your recollection of the evidence in this case, any questions, any illusions [sic], any indications that the District Attorney made concerning certain assault offenses involving this defendant. That is not proper. You are not to consider it. You are to disabuse your mind of it and not consider it in any way or any fashion. . . .

Though no motion for mistrial or request for further instructions was made, defendant now contends that the District Attorney's suggestive use of court documents in the cross-examination should have been stopped earlier and its prejudicial effect was not eliminated by the judge's instruction.

Under our law a defendant charged with crime who takes the stand may be cross-examined, for purposes of impeachment, not only about prior criminal convictions, but also about specific misconduct *not resulting in either indictment or conviction.* 1 Brandis N.C. Evidence § 111 (1982). But it is grossly unfair and overreaching for a District Attorney during cross-examination to suggest or imply to a jury that he has documents in his hand which show that a defendant was convicted of something when that is not so, as happened here. After discovering that the District Attorney had exceeded the bounds of authorized cross-examination, Judge Seay, in a commendably emphatic way, told the jury that all the questions and answers objected to were improper and instructed them to disregard them. The efficacy of the judge's corrective measures must be evaluated in light of his remark to counsel that if the instructions were deemed insufficient he would be glad to hear further from him. As we view the record, this was an invitation to move for a mistrial if counsel was so disposed. Since no mistrial or other instructions were requested by defendant's able counsel, we can only conclude that, at the time, he regarded the measures taken as sufficient to erase the prejudice that no doubt had occurred. With more time to deliberate about it than counsel had, we nevertheless conclude that he was probably right. Since the instruction given was so broad and emphatic, and there being no evidence to the contrary, we must presume that the jury followed it and that the improper cross-examination was not a prejudicial factor in defendant's conviction.

No error.

Chief Judge VAUGHN and Judge WHICHARD concur.

SEVIL HORNE AND WIFE, NELL HORNE; MAJORIE MACDONALD AND HUSBAND, JOE MACDONALD; HELEN MARTIN AND HUSBAND, CECIL MARTIN; EUNICE HORNE, WIDOW AND WILLIE T. HORNE, WIDOW v. CHARLES FLACK, JR., AND WIFE, JANE FLACK

No. 8329SC402

(Filed 5 June 1984)

Judgments § 10— compliance with consent judgment—properly found

There was competent evidence in the record to support a trial court's ruling that plaintiffs had complied with a consent judgment *as the court interpreted it* where the evidence tended to show that the parties owned adjacent buildings which shared a common stairway; the stairway was on defendants' property, but plaintiffs had an easement to use it; the stairway was the sole access to the second and third stories of plaintiffs' building; in 1980 plaintiffs sued for an injunction to prevent defendants from denying them use of the stairway; the suit resulted in a consent judgment which permitted plaintiffs to continue use of the stairway, on condition that they sandblast their building; a county building inspector's certificate would be *prima facie* evidence of plaintiffs' compliance; questions of compliance and interpretation were for the court; and a building inspector filed a certificate which concerned the sandblasting of the front and back walls of the building and certified that he had examined the third exposed wall, and "that said wall is an old exposed brick wall and unpainted and sandblasting of this wall would not be necessary." G.S. 1A-1, Rule 52(a)(1)-(2).

APPEAL by defendants from *Burroughs, Judge.* Order entered 10 January 1983 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 7 March 1984.

Robert W. Wolf and George R. Morrow for defendant appellants.

Hamrick, Bowen, Nanney & Dalton, by Walter H. Dalton, for plaintiff appellees.

BECTON, Judge.

This case involves an appeal from an order declaring plaintiffs in compliance with a consent judgment. Finding no error of law, we affirm.

The parties own adjacent buildings which share a common stairway. The stairway is on defendants' property, but plaintiffs had an easement to use it; the stairway was the sole access to the second and third stories of plaintiffs' building. In 1980 plaintiffs sued for an injunction to prevent defendants from denying them use of the stairway; the suit resulted in a consent judgment in April 1982. The judgment permitted plaintiffs the continued use of the stairway, on condition that they sandblast their building. The sandblasting was to be certified by the county building inspector. The judgment provided that the inspector's certificate would be *prima facie* evidence of plaintiffs' compliance. It also provided that questions of compliance and interpretation were for the court.

The building inspector timely filed a certificate which confirmed the sandblasting of the front and back walls of the building. The inspector also certified that he had examined the third exposed wall, and "that said wall is an old exposed brick wall and unpainted and sandblasting of this wall would not be necessary." Subsequently, plaintiffs tried to go onto the property, but defendants ordered them off. Plaintiffs filed a motion to declare themselves in compliance with the consent judgment and defendants in non-compliance. From an order granting plaintiffs' motion, defendants appeal.

Defendants' sole challenge is to the sufficiency of the findings of fact and the evidence supporting them. The hearing involved a motion for declaration of compliance, and neither side requested findings of fact. The court did not have to "find the facts specially." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1)-(2) (1983); *Kolendo v. Kolendo*, 36 N.C. App. 385, 243 S.E. 2d 907 (1978).

The sole "finding of fact" included in the order was the following: "The Court, having reviewed the facts and the arguments of counsel, and having considered the certification of [the building inspector], finds that the plaintiffs are in compliance with the provisions . . . of said judgment." This "finding" constitutes nothing more than an erroneously-named, naked legal conclusion: it reveals nothing about what plaintiffs did or did not do to achieve compliance. As we noted above, however, the absence of factual findings is acceptable in this case under the North Carolina Rules of Civil Procedure. It is well established

that when the law does not require findings and none are made, the appellate court will presume that the court, on proper evidence, found facts to support its judgment. *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 276 S.E. 2d 521, *disc. rev. denied*, 303 N.C. 314, 281 S.E. 2d 651 (1981).

Assuming, *arguendo*, that the sufficiency of the evidence is properly before this Court, we still find no merit in the appeal. The consent order provided that the inspector's certificate would constitute *prima facie* evidence of compliance. The only defect in the certificate consisted of the inspector's statement that the one unpainted wall did not need sandblasting. The court, and not the inspector, had the power to interpret whether the judgment mandated sandblasting of *all* the walls, or only those requiring it. The better procedure would undoubtedly have been to obtain a judicial determination that the third wall did not need sandblasting before final inspection. The court had the certificate before it at hearing, however, and expressly stated that it had reviewed the certificate, the facts, and arguments of counsel. Under these circumstances, we hold that there was competent evidence in the record to support the court's ruling that plaintiffs had complied with the judgment *as the court interpreted it.* If the court had interpreted the judgment as defendants wished, it presumably would have ruled for them. Defendants have offered no evidence suggesting such a result, however, probably because there is none. On this record, any procedural error appears harmless.

We conclude that the order was proper in all respects, and must therefore be

Affirmed.

Judges WEBB and EAGLES concur.

THE FORTIS CORPORATION v. NORTHEAST FOREST PRODUCTS, DIVISION OF HARDWOOD LUMBER MFG. COMPANY, INC.

No. 8317DC828

(Filed 5 June 1984)

Appeal and Error §§ 41, 45— dismissal of appeal—absence of exceptions and assignments of error in brief—absence of evidence

Appeal is dismissed for failure of appellant's brief to contain references to the pertinent exceptions and assignments of error following each question presented for review, App. R. 28(b)(5), and for failure of the record to contain so much of the evidence as is necessary for an understanding of all errors assigned, App. R. 9(b)(1).

APPEAL by defendant from *Clark, Judge.* Judgment entered 19 April 1983 in District Court, STOKES County. Heard in the Court of Appeals 4 May 1984.

This is an action for monetary damages arising out of a lumber sales contract between the plaintiff-buyer, The Fortis Corporation and the defendant-seller, Northeast Forest Products. The complaint alleges that defendant shipped an inferior grade of lumber to plaintiff, and in so doing, materially breached the sales contract and breached the specific warranty of fitness for intended use. The defendant answered, denying the material allegations of the complaint.

The action was tried by the District Court Judge sitting without a jury. Apparently both the plaintiff and the defendant presented evidence at the trial. However, the record is devoid of any reference to that evidence. The trial court made findings of fact to the effect that defendant contracted with the plaintiff to deliver No. 3 common grade cedar siding and instead delivered siding marked "utility." Upon these findings, the court concluded as a matter of law that defendant materially breached the contract and delivered lumber that was not fit for the purpose intended by the plaintiff. Defendant was ordered to pay plaintiff damages in the sum of the purchase price, less a credit given for satisfactory lumber, plus interest as allowed by law from the date of judgment. Defendant appeals.

John Edward Gehring, for defendant appellant.

Stover, Dellinger & Browder, by James L. Dellinger, Jr., for plaintiff appellee.

JOHNSON, Judge.

Defendant assigns error to the trial court's conclusions of law regarding material breach of contract and breach of specific warranty of fitness for intended use on the ground that the trial court's findings of fact were inadequate to support its conclusions of law. Defendant also assigns error to the award of monetary damages on the ground that the trial court failed to make sufficient factual findings and conclusions of law with respect to the issue of damages.

Initially, we note that defendant has failed to comply with the Rules of Appellate Procedure in preparing the brief supporting its position on the questions presented. App. R. 28(b)(5) provides that the body of the brief shall contain a reference to the assignments of error and exceptions pertinent to the question presented immediately following each question presented for review. Defendant has presented two questions for review in its brief; neither question is followed by the appropriate reference.

More serious, however, is defendant's failure to comply with App. R. 9 (b)(1) in making up the record on appeal. Under Rule 9 (b)(1), the record in a civil action shall contain "so much of the evidence, set out in the form provided in Rule 9 (c)(1), as is necessary for understanding of all errors assigned." Rule 9 (c)(1) permits counsel to set out the evidence in either narrative or question and answer form, or to utilize the complete stenographic transcript of the evidence in the trial tribunal for this purpose. Defendant has chosen to do neither in this case.

The general rule is that in making findings of fact, the trial court is required only to make brief, pertinent and definite findings and conclusions about the matters in issue, but need not make a finding on every issue requested. *Trotter v. Hewitt*, 19 N.C. App. 253, 198 S.E. 2d 465, *cert. denied*, 284 N.C. 124, 199 S.E. 2d 663 (1973). A finding of such essential facts as lay a basis for the decision is sufficient under G.S. 1A-1, Rule 52 (a). *Id.* Further, the trial court's findings of fact have the force and effect of a ver-

dict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary. *Distributing Corp. v. Schofield*, 44 N.C. App. 520, 261 S.E. 2d 688 (1980). Therefore, in order to understand the errors defendant assigns, it is necessary for this Court to determine if there is *any* evidence to support the disputed findings and conclusions. Defendant's rule violations effectively preclude such review by this Court.

It is incumbent upon the appellant to see that the record on appeal is properly made up and transmitted to the appellate court. *West v. Reddick, Inc.*, 48 N.C. App. 135, 268 S.E. 2d 235 (1980), *rev'd on other grounds*, 302 N.C. 201, 274 S.E. 2d 221 (1981). The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects appeal to dismissal. *Marsico v. Adams*, 47 N.C. App. 196, 266 S.E. 2d 696 (1980). Defendant's rule violations have precluded the possibility of effective appellate review of the questions presented and this appeal must, accordingly, be

Dismissed.

Judges WELLS and BECTON concur.

PETER THEIL v. HENRY A. DETERING

No. 834SC562

(Filed 5 June 1984)

Attorneys at Law § 1.2; Pleadings § 1— complaint filed by out-of-state attorney not licensed to practice law in this state—complaint not a nullity

A trial court erred in finding that the filing of a complaint by an out-of-state attorney not licensed to practice in this state who had not complied with the provisions of G.S. 84-4.1 was a nullity, and the court erred in dismissing the complaint after plaintiff retained counsel licensed to practice in this state.

APPEAL by plaintiff from *Tillery, Judge*. Order entered 7 February 1983 in Superior Court, ONSLOW County. Heard in the Court of Appeals 4 April 1984.

This is a civil action in which plaintiff seeks to recover for personal injuries and damages sustained by him in an automobile accident which occurred on 27 December 1979 in Onslow County, North Carolina. Plaintiff is a resident of Ohio stationed at Camp Lejeune, North Carolina with the United States Marines. On 21 December 1982, a complaint was filed on behalf of plaintiff in Onslow County Superior Court by Thomas S. Erlenbach, an attorney licensed to practice in Ohio. Mr. Erlenbach was not, at that time, licensed to practice law in North Carolina, nor was he qualified to appear in this action pursuant to G.S. 84-4.

Defendant filed a motion to dismiss the complaint on 10 January 1983 on the grounds that plaintiff's attorney, Mr. Erlenbach, was not licensed to practice law in this state, had not complied with the provisions of G.S. 84-4.1, and therefore, was not qualified to appear in the action. For that reason, defendant claimed the filing of the complaint was a nullity. On 2 February 1983, an entry of appearance was filed by H. King McGlaughon, Jr., a licensed attorney in this state, undertaking the general representation of the plaintiff in this action. In an order entered 7 February 1983, the court allowed defendant's motion, dismissed the action, and held that the filing of the complaint was a nullity. Plaintiff appealed.

Gaylor, Edwards and McGlaughon, by H. King McGlaughon, Jr., for plaintiff appellant.

Stith and Stith, by F. Blackwell Stith, for defendant appellee.

WEBB, Judge.

The question presented by this appeal is whether the trial court erred in holding that plaintiff's complaint was a nullity because it was prepared and filed by an attorney not authorized to practice law in this state, and in dismissing plaintiff's action on that basis. If the complaint was, in fact, a nullity, then the court did not err in dismissing the action, and plaintiff has lost his claim for relief because the statute of limitations expired a few days after the complaint was filed. If the complaint was not a nullity, then plaintiff's action was instituted within the limitations period, and it was error for the court to dismiss it because plaintiff retained counsel licensed to practice in this state prior to the entry of the court's order.

While it does not appear that our courts have directly addressed the question whether a pleading filed by an attorney not authorized to practice law in this state pursuant to G.S. 84-4.1 is a nullity, we believe the Supreme Court's holding in *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E. 2d 629 (1983) settles the issue. In that case, a default judgment was entered for the plaintiff on the ground that the defendant's answer was filed by an out-of-state attorney who had not qualified under G.S. 84-4.1 to practice in North Carolina. The Court held that the default judgment was improperly entered because the answer, even though filed by an attorney not authorized to practice in this state, was on the record. *Id.* at 568, 299 S.E. 2d at 632. The Court said that plaintiff's remedy was to move to strike the answer, and then to move for entry of default and default judgment. *Id.* Because the plaintiff had not moved to strike the answer, it remained of record, and the clerk did not have authority to enter a default judgment.

We interpret *N.C.N.B.* as impliedly holding that a pleading filed by an attorney not authorized to practice law in this state is not a nullity. If such a pleading was a nullity, then the default judgment in *N.C.N.B.* would have been properly entered. By stating that a motion to strike was necessary in this situation, the Court indicated that a lawful pleading was in existence. A pleading which is a nullity has absolutely no legal force or effect, and may be treated by the opposing party as if it had not been filed. *See* Black's Law Dictionary 963 (5th ed. 1979).

We are aware that the Supreme Court's decision in *In re Smith*, 301 N.C. 621, 272 S.E. 2d 834 (1981) may be inconsistent with *N.C.N.B.* in that it could be interpreted as implying that any legal actions taken in the courts of this state by an attorney not authorized to practice in this state are null and void. In *Smith*, our Supreme Court held that an out-of-state attorney could not be held in and punished for willful contempt of court for his failure to comply with an order of the court directing him to appear as an attorney in a North Carolina case where the attorney had never acquired eligibility to appear in the case and therefore was never an attorney in the case admitted to limited practice in North Carolina. *Id.* at 633, 272 S.E. 2d at 842. The Supreme Court said that because the attorney was not authorized to practice law in this state, the court was without power to order him to appear

as an attorney in the North Carolina case, and the order to that effect was a nullity. *Id.* To the extent that *Smith*, is inconsistent with *N.C.N.B.* on this issue, we feel it was overruled by implication by the Court's decision in *N.C.N.B.*

In accordance with the Court's ruling in *N.C.N.B.*, we hold that the complaint in the instant case was not a nullity, and that the trial court erred in dismissing the action on that basis. The judgment of the trial court is

Reversed.

Judges BECTON and EAGLES concur.

MARGARET L. ELKS v. JAMES ERIC HANNAN

No. 833SC266

(Filed 5 June 1984)

Rules of Civil Procedure § 59; Trial § 50.1— misconduct of jurors—new trial

The trial court did not abuse its discretion in granting plaintiff a new trial for misconduct by the jury or the prevailing party pursuant to G.S. 1A-1, Rule 59(a)(2) because some jurors were observed during a court recess standing by defense counsel's table looking at a drawing which the court had refused to receive into evidence.

APPEAL by defendant from *Tillery, Judge.* Order entered 4 November 1982 in Superior Court, PITT County. Heard in the Court of Appeals 5 March 1984.

Plaintiff, a passenger on a motorcycle operated by defendant on one of Greenville's principal thoroughfares, sued for injuries sustained when the motorcycle ran into the curb and threw her to the pavement. From the outset, defendant contended that he was forced into the curb by a pickup truck that left the scene without stopping and he described the alleged driver to the police. Based thereon, a police artist made a composite drawing of the driver and the officers attempted to identify the vehicle and driver, but without avail. During the jury trial defendant offered to introduce the drawing into evidence, but the court rejected it, and the trial proceeded to verdict, which was in defendant's favor on the

negligence issue, and the jury was discharged. The next day, after making the customary motions for a new trial, which were overruled, counsel for plaintiff also moved for a mistrial based on information that the jury foreman and two or three other jurors had been observed during a court recess standing by defense counsel's table looking at the drawing that the court had refused to receive in evidence. The court conducted a post-trial hearing, during the course of which four jurors about the courthouse because of a subsequent trial were examined; though none of them had seen the drawing, one admitted that it was discussed during their deliberations about the case. After making appropriate findings and conclusions, the judge ordered a mistrial, and defendant appealed.

James, Hite, Cavendish & Blount, by M. E. Cavendish and Charles R. Hardee, for plaintiff appellee.

Williamson, Herrin, Stokes & Heffelfinger, by Mickey A. Herrin, and Dixon, Horne, Duffus & Doub, by J. David Duffus, Jr., for defendant appellant.

PHILLIPS, Judge.

At the threshold of this appeal, we are confronted with the fact that whether the order appealed from is deemed to be an order of mistrial, as the record states, or an order for a new trial, as we believe, it was certainly a discretionary order, interlocutory in nature, that was not immediately appealable. G.S. 1-277; G.S. 7A-27. Nevertheless, because of the posture that the case is in and its unusual circumstances, we have decided, as the law permits, to treat the appeal as a petition for certiorari and determine the issue raised now, rather than later. G.S. 7A-32(c).

As stated, we do not regard the order appealed from as being an order of mistrial. Though a trial judge in a civil case has the power, in his discretion, to order a mistrial at any time before the verdict is returned, 12 Strong's N.C. Index 3d, *Trial* § 9.2 (1978), that power to terminate a trial, which is what a mistrial does, necessarily ends after verdict has been returned, the jury discharged, and the trial is over. But there are other authorized means by which a trial judge can properly dissolve a trial that has been completed and permit another one. Under the provisions of Rule 59, N.C. Rules of Civil Procedure, a trial judge in his

sound discretion can grant a motion for a new trial for any of many apparently justifiable reasons, including misconduct of the jury or the prevailing party; and such order can be entered on the court's own initiative "for any reason for which it might have granted a new trial on motion of a party." As the following excerpts from the transcript show, Judge Tillery was apprehensive about the jury being affected by an exhibit that he refused to let them see, and clearly intended to nullify the trial and require a new one by whatever means were appropriate under the circumstances:

> THE COURT: Well, here is the point in which I cannot agree with you. I have no way of knowing [whether the jury was affected by the drawing], and neither do either of you, what other discussions may have gone on in the jury room, what may have entered the mind of the man that saw the picture. And it may well be, as you say, that it didn't make one particle of difference. But I don't know that. And for me to condone that picture being left on that table, I cannot do it. And whether it was intentional or purposeful, I don't know. I certainly prefer to believe it was accidental. But I am not going to punish that plaintiff by reason of something that David did. That picture was, for all intents and purposes, put in evidence, at least in that one man's mind when he saw it. And I instructed that jury that they should be guided by the evidence as they heard it and saw it in the courtroom. Since I don't know, I think your side has got to take the burden. Not his.
>
> I take it that you researched the proper method for me to go about putting this aside and conclude it is by mistrial?
>
> MR. HARDEE: I think so.
>
> THE COURT: Since the judgment has been signed?
>
> MR. HARDEE: Yes, sir.

In our judgment, a discretionary order, appropriate to the circumstances, that a trial judge is empowered and clearly intends to enter should not fail because it was inadvertently given the wrong nomenclature. We therefore consider the order as one granting a new trial for misconduct by the jury or prevailing party under the provisions of (a)(2) of the above-numbered rule. So

viewed, the record indicates no abuse of discretion in entering the order, and we will not disturb it. *Hamlin v. Austin*, 49 N.C. App. 196, 270 S.E. 2d 558 (1980). The order being discretionary, that the record does not positively show that the jury was prejudiced by the incident which occurred is unimportant; the significant and controlling thing for the purposes of this appeal is that the record does not show that the order was clearly erroneous or amounted to a manifest abuse of discretion. *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968).

Affirmed.

Chief Judge VAUGHN and Judge WHICHARD concur.

ELIZABETH D. LESSARD, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF DENISE RENEE LESSARD v. LOUIS RAYMOND LESSARD

No. 8326DC762

(Filed 5 June 1984)

1. **Courts § 2— jurisdiction in action to forfeit defendant's right to a share of deceased daughter's estate properly found**

In an action brought to forfeit defendant's right to a share of his deceased daughter's estate, the court properly found jurisdiction pursuant to G.S. 1-75.8(1) where the estate of the defendant's deceased daughter was personal property in this state and the relief demanded was to exclude the defendant from any interest in the property, and where no question was raised as to service pursuant to G.S. 1A-1, Rule 4(k).

2. **Divorce and Alimony § 19.1— no jurisdiction in an action for money judgment for arrearages in alimony and child support or to modify alimony decree**

A district court in Mecklenburg County had no jurisdiction in an action for money judgments for arrearages in alimony and child support and to modify an alimony decree because of a change in circumstances where there was a judgment in Cumberland County as to these matters.

APPEAL by defendant from *Todd, Judge*. Judgment entered 11 March 1983 in District Court, MECKLENBURG County. Heard in the Court of Appeals 1 May 1984.

The plaintiff instituted this action pursuant to G.S. 31A-2 to forfeit any right the defendant has to the estate of his deceased

daughter who was a resident of North Carolina. The defendant is a resident of Georgia and was served with a summons and complaint in that state. The plaintiff amended her complaint to allege a second cause of action based on a consent judgment for alimony and child support that had been entered between the parties in Cumberland County. She prayed for money judgments for accrued alimony and child support based on the Cumberland County judgment and an increase in alimony based on a change in circumstances.

The defendant moved to dismiss all claims. The court overruled the defendant's motion to dismiss. The defendant filed an answer and the court, after a hearing, entered a money judgment against defendant for the accrued support payments. It modified the Cumberland County judgment and ordered the defendant to pay $100.00 per month as alimony.

The defendant appealed.

Erwin and Beddow, by Fenton T. Erwin, Jr., for plaintiff-appellee.

Curtis, Millsaps & Chesson, by Joe T. Millsaps, for defendant-appellant.

HILL, Judge.

[1] The defendant assigns error to the denial of his motion to dismiss all claims. As to the action to forfeit defendant's right to a share of his deceased daughter's estate, he contends the court does not have jurisdiction through service of process on him. G.S. 1-75.8 provides in part:

> "A court of this State having jurisdiction of the subject matter may exercise jurisdiction in rem or quasi in rem on the grounds stated in this section. A judgment in rem or quasi in rem may affect the interests of a defendant in a status, property or thing acted upon only if process has been served upon the defendant pursuant to Rule 4(k) of the Rules of Civil Procedure. Jurisdiction in rem or quasi in rem may be invoked in any of the following cases:
>
> (1) When the subject of the action is real or personal property in this State and the defendant has or claims any lien or

interest therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein. This subdivision shall apply whether any such defendant is known or unknown."

The estate of the defendant's deceased daughter is personal property in this State and the relief demanded is to exclude the defendant from any interest in this property. No question has been raised as to service pursuant to Rule 4(k). This brings this action within the provisions of G.S. 1-75.8(1) and gives the court jurisdiction.

The defendant also contends the complaint shows on its face that he has not abandoned his children. He says this is so because it is alleged in the complaint that his support payments did not stop until May 1981 and this shows he has substantially complied with the court order for support. He argues that for this reason, the action should be dismissed under G.S. 1A-1, Rule 12(b)(6). We do not believe that from the allegations in the complaint that it clearly appears that plaintiff can prove no set of facts which will entitle her to relief. For this reason the action should not have been dismissed under G.S. 1A-1, Rule 12(b)(6). *See F.D.I.C. v. Loft Apartments*, 39 N.C. App. 473, 250 S.E. 2d 693, *disc. rev. denied*, 297 N.C. 176, 254 S.E. 2d 39 (1979). The motion to dismiss as to the first claim was properly denied.

[2] As to the defendant's motion to dismiss the action for money judgments for arrearages in alimony and child support and to modify the alimony decree because of a change in circumstances, we hold it was error not to grant this motion. There is a judgment in Cumberland County as to these matters. The District Court of Mecklenburg County has no jurisdiction as to them. *See Tate v. Tate*, 9 N.C. App. 681, 177 S.E. 2d 455 (1970).

Affirmed in part; reversed and remanded in part.

Judges WEBB and WHICHARD concur.

VALERIE ANN VINSON, PLAINTIFF v. KENNETH DEAN McMANUS, A MINOR BY HIS PARENTS, COLLEEN BOLTON McMANUS AND BOBBY RAY McMANUS; COLLEEN BOLTON McMANUS AND BOBBY RAY McMANUS, DEFENDANTS

No. 8326SC404

(Filed 5 June 1984)

1. **Rules of Civil Procedure § 8.1— statement of claim for relief**

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of her claim which would entitle her to relief. G.S. 1A-1, Rule 12(b)(6).

2. **Parent and Child § 8— liability of parents for assault by a child—sufficiency of complaint**

Plaintiff's complaint was sufficient to state a claim against defendant parents for an assault committed by their son where it alleged that defendant father ratified and consented to the tortious acts of his son by ignoring plaintiff's pleas for help and by failing to take any action to stop the son, and that defendant mother acted in concert with the son by assaulting plaintiff's companion.

APPEAL by plaintiff from *Snepp, Judge.* Judgment entered 1 March 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 March 1984.

Plaintiff filed a complaint in which she alleged that Kenneth Dean McManus, a 15-year-old minor, assaulted her by beating her repeatedly in the face, eyes and about her body with his fist. Plaintiff further alleged that the defendant mother acted in concert with her minor son by assaulting plaintiff's companion in like manner while the son assaulted the plaintiff, and that the defendant father ratified, approved and consented to the actions of his wife and son by ignoring plaintiff's pleas for help and by failing to take any action to stop his wife and son. Defendants filed a motion to dismiss the complaint against the adult defendants pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief may be granted. From the order of the court allowing the defendants' motion, plaintiff appealed.

Karen Zaman Mashburn for plaintiff appellant.

Michael P. Carr for defendant appellees.

WEBB, Judge.

[1] We believe the trial court erred in dismissing plaintiff's complaint against the defendant parents. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of her claim which would entitle her to relief. *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E. 2d 161, 165-66 (1970). In order to prevent dismissal under G.S. 1A-1, Rule 12(b)(6), "a party must (1) give sufficient notice of the events on which the claim is based to enable the adverse party to respond and prepare for trial, and (2) 'state enough to satisfy the substantive elements of at least some legally recognized claim. . . .' (Citations omitted.)" *Hewes v. Johnston*, 61 N.C. App. 603, 604, 301 S.E. 2d 120, 121 (1983).

[2] In the instant case, plaintiff seeks to hold the defendant parents liable for the wrongful act of their son. It has long been established that the mere fact of parenthood does not make individuals liable for the wrongful acts of their unemancipated minor children. *See Moore v. Crumpton*, 306 N.C. 618, 295 S.E. 2d 436 (1982). However, liability has been imposed on parents for the torts of their minor children in limited circumstances. In *Langford v. Shu*, 258 N.C. 135, 128 S.E. 2d 210 (1962), a parent was held liable for her participation in and consent to a practical joke played on a neighbor by her children which caused the neighbor to fall and injure herself. Our Supreme Court stated the rule of parental liability as follows:

> "Apart from the parent's own negligence, liability exists only where the tortious act is done by the child as the servant or agent of the parent, or where the act is consented to or ratified by the parent. . . . 'a parent may be liable for the consequences of failure to exercise the power of control which he has over his children, where he knows, or in the exercise of due care should have known, that injury to another is a probable consequence . . . . Failure to restrain the child, it is said, amounts to a sanction of or consent to his acts by the parent. . . . (A)s in all negligence cases, the issue in the last analysis is whether the parent exercised reasonable care under all the circumstances. . . .' (Citations omitted.)"

Id. at 139, 128 S.E. 2d at 212-13. *Langford* and other earlier cases may be interpreted as limiting a parent's liability for the acts of

his child to those situations in which the parent specifically approved the act of the child or in which the child acted strictly in the capacity of servant or agent for the parent.

In *Moore, supra,* at 623, 295 S.E. 2d at 440, our Supreme Court, while affirming a judgment dismissing an action against the parents for an assault by their minor son, stated "[t]he correct rule is that a parent of an unemancipated child may be held liable in damages for failing to exercise reasonable control over the child's behavior if the parent had the ability and the opportunity to control the child and knew or should have known of the necessity for exercising such control. (Citations omitted.)" We believe that under either *Langford* or *Moore* it was error to dismiss the action. Under the allegations of the complaint, the plaintiff could prove that the father ratified and consented to the tortious acts of his son by ignoring the plaintiff's pleas for help and by failing to take any action to stop the son, and that the mother acted in concert with the son by assaulting plaintiff's companion. This would be specific approval of the child's action under *Langford* or failure to restrain the child's action when they had the power to do so under *Moore*. In either case, the defendants would be liable.

For the reasons stated in this opinion, we reverse the judgment of the superior court.

Reversed and remanded.

Judges BECTON and EAGLES concur.

WALTER LEE OAKES AND S & W MOTOR LINES, INC. v. ERNEST CLIFTON JAMES AND THE CITY OF GREENSBORO

No. 8318SC767

(Filed 5 June 1984)

Automobiles and Other Vehicles § 59.1— automobile accident—sufficiency of evidence of negligence

A trial court erred in directing a verdict for defendants in an action arising from an automobile accident where the evidence tended to show that defendant driver was on a ramp leading into an interstate highway; pursuant

to G.S. 20-140.3(6) it was his duty to yield the right-of-way; defendant driver did not yield the right-of-way and a reasonable man would have done so; and the jury could also find that this failure to yield the right-of-way was the proximate cause of the collision between defendants' garbage truck and the plaintiffs' tractor-trailer.

APPEAL by plaintiffs from *Rousseau, Judge.* Judgment entered 31 March 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 1 May 1984.

Plaintiffs brought this action for personal injury and property damage. The plaintiffs' evidence showed that on 11 December 1979, Walter Lee Oakes was driving a tractor-trailer owned by S & W Motor Lines, Inc. in the right northbound lane of Highway 29 in Guilford County at a speed of 55 miles per hour. A pickup truck was traveling northward in the left northbound lane immediately beside him. Defendant James was operating a City of Greensboro garbage truck in the access ramp approaching Highway 29 in a northerly direction.

Walter Lee Oakes testified:

"I approached on up there, and he [James] just kept going on up the travel lane. And I looked back in my rear-view mirror to see if I could get over, because I knowed at one point over there he was going to try to come in. And I seen I couldn't get over there. So, I hit the brakes and started slowing it down so I could let him in. And he came in before I could get it slowed down enough.

. . . .

I let up off the accelerator so it would start slowing up.

. . . .

Well, I was applying the brakes just as I passed that ramp and kept applying them, and it still wasn't slowing up enough, and that pick-up was still back there on my back axle. And I kept applying the brakes a little hard. And then I see it was going to hit anyway at the Florida Street bridge, so I locked it down."

There was evidence that Ernest James was driving at a speed of 20 miles per hour when he entered Highway 29. There was a collision between the two vehicles.

At the close of the plaintiffs' evidence the court directed a verdict for the defendants. Plaintiffs appealed.

Alexander, Ralston, Pell and Speckhard, by Stanley E. Speckhard and Donald K. Speckhard, for plaintiff appellants.

Nichols, Caffrey, Hill, Evans and Murrelle, by Kenneth Kyre, Jr., for defendant appellees.

WEBB, Judge.

If the jury could not reasonably conclude that the negligence of Ernest Clifton James was a proximate cause of the accident or if all the evidence so clearly establishes that Walter Lee Oakes' negligence was a proximate cause of the accident that no other reasonable conclusion is possible, the dismissal at the end of the plaintiffs' evidence must be affirmed. *See Ragland v. Moore*, 299 N.C. 360, 261 S.E. 2d 666 (1980). Negligence is the failure to do what a reasonably careful and prudent person would have done or the doing of something which a reasonably careful and prudent person would not have done considering all the circumstances. *See* Prosser, *Handbook of the Law of Torts*, § 32 (1971) for a discussion on negligence.

We believe a jury could reasonably conclude that the negligence of Mr. James was a proximate cause of the collision. The evidence in the light most favorable to the plaintiffs shows that Mr. James was on a ramp leading into an interstate highway. It was his duty to yield the right-of-way. *See* G.S. 20-140.3(6). The jury could find from the evidence that Mr. James did not yield the right-of-way and a reasonable man would have done so. The jury could also find that this failure to yield the right-of-way was a proximate cause of the collision.

We do not believe that the only reasonable inference a jury could make from the evidence is that the negligence of Mr. Oakes was a proximate cause of the collision. The plaintiffs' evidence shows he was operating the tractor-trailer within the speed limits. He had the right to assume Mr. James would yield the right-of-way. *See Penland v. Green*, 289 N.C. 281, 221 S.E. 2d 365 (1976). There was a pickup truck in the adjoining lane so that he could not move to that lane. We do not believe the only inference the jury could make from this evidence is that Mr. Oakes did some-

thing a reasonable man would not have done or that he failed to do something a reasonable man would have done immediately prior to the collision.

The defendants argue that there is no evidence that Mr. James turned directly in front of Mr. Oakes. They say there is no testimony as to the distance between the vehicles of Mr. Oakes and Mr. James when Mr. James entered Highway 29. We believe that from the testimony of Mr. Oakes the jury could infer it was a very short distance.

Defendants also argue if Mr. James did not yield the right-of-way all the evidence shows that Mr. Oakes knew he would not do so and a jury could only infer that he did not take reasonable measures to avoid the collision. It is true that Mr. Oakes testified he knew Mr. James "was going to try to come in." We do not believe a jury would have to conclude from this that Mr. Oakes knew Mr. James would enter Highway 29 as he did. We believe it is a jury question whether Mr. Oakes kept his vehicle under control so as to avoid a collision.

For the reasons stated in this opinion, we hold it was error to allow the defendants' motion to dismiss.

Reversed and remanded.

Judges HILL and WHICHARD concur.

BELINDA BORDERS AND BENJAMIN COX v. P. J. NEWTON, CRAIG V. MURRAY, WALTER V. MURRAY, MARTHA ANN MURRAY, ANNIE MAE LAUGHORN, AND NEWTON BROTHERS REAL ESTATE COMPANY

No. 8321DC897

(Filed 5 June 1984)

1. Unfair Competition § 1— unfair trade practice—recovery of treble damages—no recovery of damages for fraud

Where plaintiffs recovered treble damages for an unfair trade practice under G.S. 75-1.1, they were barred from recovering additional damages for fraud based upon the same course of conduct.

2. Unfair Competition § 1— unfair trade practice—denial of attorney fees

The trial court did not abuse its discretion in denying attorney fees to plaintiff tenants in an action for unfair trade practices by defendant landlords and their rental agent. G.S. 75-16.1.

APPEAL by plaintiffs from *Alexander, Judge*. Judgment entered 17 April 1983 in District Court, FORSYTH County. Heard in the Court of Appeals 10 May 1984.

The defendants P. J. Newton, Craig V. Murray, Walter V. Murray, Martha Ann Murray, and Annie Mae Laughorn owned an apartment at 1659-B Lincoln Avenue in the City of Winston-Salem, which was managed by the defendant Newton Brothers Real Estate Company. On 1 February 1982 the plaintiffs inquired of Newton Brothers about renting the apartment. They were assured by Newton Brothers that the apartment was suitable for occupancy and on demand deposited $246.00 with Newton Brothers as an application fee, a security deposit, and one month's rent. Upon inspection they found the premises to be unsuitable for occupancy and uninhabitable. In fact the City of Winston-Salem had issued a Community Development Department order dated 22 January 1982 prohibiting defendants from renting the premises until repairs were made and a certificate of Fitness for Occupancy was issued. No such certificate had been entered at the time plaintiffs deposited their money. Newton was aware of the Order and the requirement for repairs at the time, and plaintiffs relied on his assurances of habitability. Newton refused to return the monies deposited by plaintiffs, and they were without funds to find alternative housing. Plaintiffs brought this action seeking a refund of their deposit, treble damages under Chapter 75 of the General Statutes, punitive and compensatory damages, and attorney fees. Specifically, plaintiffs seek damages because of alleged violations of the North Carolina Residential Rental Agreements Act, G.S. 42-38 *et seq.*; Tenant Security Deposit Act, G.S. 42-50 *et seq.*; and G.S. 75-1.1. Defendants counterclaimed for $1,200.00 arising under the lease.

Plaintiffs moved for partial summary judgment. The trial judge concluded defendants had violated the North Carolina Residential Rental Agreements Act and the Tenant Security Deposit Act and thereby had committed an unfair trade practice act by renting a dwelling in violation of the City Condemnation

Order. The judge assessed damages of $240.00 and trebled the same to $720.00 against the defendants, and concluded their counterclaim had no merit. Reserved for trial were the issues of fraud, additional compensatory damages, punitive damages and attorney fees.

The matter was tried before a jury. At the close of plaintiffs' evidence the judge directed a verdict for all defendants, and plaintiffs appealed.

Legal Aid Society of Northwest North Carolina, Inc., by Jane R. Wettach and Ellen W. Gerber, for plaintiff appellants.

Allman, Spry, Humphreys & Armentrout, and Clyde C. Randolph, Jr., for defendant appellees.

HILL, Judge.

The plaintiffs first argue the court erred in granting a directed verdict in favor of P. J. Newton and Newton Brothers Real Estate Company, contending there was sufficient evidence for the jury to consider that the defendants committed fraud. We disagree. Although plaintiffs technically presented sufficient evidence of fraud, defendants were nonetheless entitled to judgment as a matter of law.

[1] In the present case, the same course of conduct gave rise to causes of action for fraud and unfair trade practices under G.S. 75-1.1. When the same course of conduct gives rise to a traditional cause of action as well as a cause of action for violation of G.S. 75-1.1, damages may be recovered either for the traditional cause of action or for violation of G.S. 75-1.1, but not both. *Marshall v. Miller*, 47 N.C. App. 530, 268 S.E. 2d 97 (1980), *modified on other grounds and affirmed*, 302 N.C. 539, 276 S.E. 2d 397 (1981). Having recovered treble damages for defendants' violation of G.S. 75-1.1, plaintiffs were thereby barred from recovering additional damages for fraud. *Id., see Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975) (Huskins, J., concurring in result).

[2] Plaintiffs contend the court erred in denying their claim for attorneys' fees. The award of attorneys' fees under G.S. 75-16.1 is within the sound discretion of the trial judge. We find no abuse of that discretion.

We have examined the remaining assignments brought forth by plaintiffs and find them without merit.

The judgment of the trial court is

Affirmed.

Judges WEBB and WHICHARD concur.

ALAMANCE COUNTY HOSPITAL, INC. v. PRICE NEIGHBORS AND BETTE HOWARD, JOINTLY AND SEVERALLY

No. 8315DC884

(Filed 5 June 1984)

1. **Parent and Child § 7— hospital expenses of minor child—legal custody in mother—father not liable**

Defendant father was not liable for the hospital expenses of his minor child where the mother and father were divorced and the mother had legal custody of the child; the mother took the child to plaintiff hospital for two separate admissions and executed installment promissory notes to the hospital for payment of the child's hospital expenses; and there was no indication that defendant father had any notice or knowledge of the child's hospitalization or that plaintiff and defendant father had any arrangement regarding the payment of the child's medical expenses.

2. **Parent and Child § 7— non-custodial parent—no liability for child's medical care**

While parents are ordinarily liable for the support, maintenance, and care of their minor children, a non-custodial parent is not liable to a third-party provider of non-emergency care for a minor child absent some contractual relationship between such third party and the non-custodial parent.

APPEAL by plaintiff from *Allen (J. B.), Judge*. Order entered 12 May 1983 in District Court, ALAMANCE County. Heard in the Court of Appeals 10 May 1984.

This is a civil action wherein plaintiff hospital seeks to recover from the defendants, jointly and severally, the sum of $4,205.69 for hospitalization of and medical care for the minor daughter of defendants. The following facts are not controverted:

The defendants are the parents of Kimberly Renae Neighbors, now seventeen years old. The defendants were di-

vorced on 13 May 1970, and on 31 December 1975 defendant mother was granted primary custody of Kimberly. Defendant father is required by court order to pay thirty dollars a week for the support and maintenance of Kimberly.

On 4 June 1982 Kimberly was admitted to plaintiff hospital for treatment, and on 17 June she was readmitted. The total cost of the two admissions was $4,205.69. The hospital records disclose that defendant mother signed the admission form on 4 June, when the child was admitted. Nothing in the record indicates that defendant father signed any of the forms, or that he even knew Kimberly was hospitalized. The record does show that on 8 June 1982 defendant mother signed an installment promissory note agreeing to pay the hospital $25.00 a month for 53 months. On 26 June 1982 Ms. Howard signed another installment promissory note in which she agreed to pay plaintiff hospital $10.00 a month for 210 months.

Defendant father filed a motion under N.C. Gen. Stat. Sec. 1A-1, Rule 12(b)(6), North Carolina Rules of Civil Procedure, asking that the court dismiss plaintiff's complaint for failure to state a claim for relief. Defendant father also filed a motion under Rule 21 asking that his name be stricken as a party defendant on the grounds that "[h]e is not a necessary or proper party in this action." After a hearing on the motions the trial court entered an order granting defendant father's Rule 12(b)(6) and Rule 21 motions. Plaintiff appealed.

Vernon, Vernon, Wooten, Brown & Andrews, P.A., by T. Randall Sandifer, for plaintiff, appellant.

William T. Hughes for defendant father, appellee.

HEDRICK, Judge.

This appeal is subject to dismissal because it is from an order that "adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties." N.C. Gen. Stat. Sec. 1A-1, Rule 54(b), North Carolina Rules of Civil Procedure. We choose, however, to exercise our discretion and consider the appeal on its merits and affirm summary judgment for defendant father.

At the outset we note that, while the trial court allowed defendant's Rule 12(b)(6) motion, it considered matters outside of

the pleadings in doing so, which converted its ruling into one of summary judgment for the defendant. Accordingly, we consider whether the record reveals no genuine issue as to any material fact, entitling defendant father to judgment as a matter of law.

[1, 2] The record discloses that the defendants, mother and father, are divorced and that defendant mother has legal custody of the minor child. Defendant mother took Kimberly to plaintiff hospital for two separate admissions and executed two promissory notes payable to plaintiff hospital "for value received." Nothing in the record suggests that defendant father had any knowledge of his daughter's illness or hospitalization. There is no indication in the record that plaintiff notified defendant father of his daughter's admission, or that plaintiff and defendant father had any arrangement whatsoever regarding the payment of bills incurred for Kimberly's medical care. This record discloses no genuine issue as to any material fact with respect to plaintiff's claim against defendant father. While parents are ordinarily liable for the support, maintenance, and care of their minor children, a non-custodial parent is not liable to a third-party provider of non-emergency care for a minor child absent some contractual relationship between such third party and the non-custodial parent. We thus hold that on the uncontroverted facts disclosed by this record, defendant father is entitled to judgment as a matter of law.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

PEARL GOSS, BRENDA OEHLER, AND CHARLES RONALD OEHLER v. SAM STIDHAMS

No. 8323DC230

(Filed 5 June 1984)

Boundaries § 15.1— judgment in boundary dispute unsupported by evidence

In an action tried as a boundary dispute, a trial court's conclusion that "the boundary line between the parties runs in the middle of the abandoned old road" was not supported by the findings of fact or the evidence. Rather,

the evidence was clear that defendant's boundary line crossed the road to a tree and then ran with the southern edge of the road.

APPEAL by defendant from *Osborne, Judge.* Judgment entered 24 September 1982 in District Court, ASHE County. Heard in the Court of Appeals 7 February 1984.

William F. Lopp for defendant appellant.

Siskind & Lonon, by John P. Siskind, for plaintiff appellees.

BECTON, Judge.

Although this case was filed as an action in trespass, by stipulation of the parties, the case was tried "strictly as a boundary dispute," the plaintiffs and defendant disagreeing as to the proper beginning point, and the continuation, of their common boundary line. The parties further stipulated that the relevant deeds to plaintiffs and defendant were to be admitted into evidence; that the court-ordered survey performed by county surveyor, Bobby J. Oliver, was to be admitted into evidence; that the object denominated "Sugar Tree" on the right middle portion of the survey is accurately located on the plat, and is the sugar tree described in plaintiffs' two deeds; and that the "dashed area [on the survey] is an actually existing old roadbed."

Following a bench trial, the trial judge entered judgment awarding plaintiff all of the land in the dispute, and the defendant appeals. Nine of the defendant's twelve arguments on appeal concern evidentiary matters. Defendant's other three arguments concern whether the trial court's conclusion of law is supported by the evidence. We need not decide the evidentiary matters, since we find no evidence to support the trial court's conclusion of law.

In the decretal portion of its judgment, the trial court ordered, adjudged and decreed that "the boundary line between the parties lies in the middle of the abandoned old road as shown on court's exhibit #1 [the survey]." Before setting forth the findings of fact and conclusion of law which the trial court used to reach its result, we set forth the descriptions of the land involved in this dispute as contained in the deeds of the respective parties. The relevant description in plaintiff's exhibit 2 reads as follows:

> BEGINNING on a sugar tree at the old road, and running a westerly direction with the said old road to Wiley Elliott's corner; then a southern direction, with Wiley Elliott's line, to two red oaks on top of the mountain; then an easterly direction with the extreme height of the ridge with Walter Stansberry's line and Elihu Ham's line to a hickory corner; then a northern direction a straight line with Drury Greer's line to the BEGINNING, containing 14 acres, more or less.

Defendant's land is described in defendant's exhibit 10, as follows:

> BEGINNING at a watergap on Little Horse Creek in the old Drewey Greer line, running an eastward course with the Drewey Greer line to the old road, Drewey Greer corner; then with the old road to a gate, R. L. Ham's corner; then with R. L. Ham's line to the creek; then with the creek and Clora Elliott's line to the BEGINNING, containing 2 acres, more or less.

All the evidence shows, and no one contends otherwise, that the position of the Drury (sometimes spelled "Drewery") Greer corner, referred to in defendant's deed, is marked by the same sugar tree that is the common corner of, and beginning corner in, plaintiff's deed.

Considering these deeds, the stipulations of the parties, the testimony of witnesses and other evidence, the trial court made the following relevant findings of fact:

> The contentions of the parties have been surveyed by Bobby J. Oliver, Registered Surveyor, and are shown on Court's Exhibit #1, which is a part of the record in this case. There was at one time an old road as shown on Exhibit 1 running between the 2 dash lines from points A to C and B to D as shown on said exhibit. At one time this road was apparently in use but the evidence does not indicate whether it was a public road. At some point in time the road was abandoned. . . . The corner of the property lines for the Plaintiffs and the Defendant is at a sugar tree as shown on said exhibit, which tree is on the south bank above said old road. The calls in the Plaintiffs' deed, refer to 'running a westerly direction with the said old road,' and the calls in the Defendant's deeds refer to 'then with the old road to a gate.' None of the calls in either the Plaintiffs' deeds or the Defendant's deeds provide

> for any courses and distances or provide for any further elaboration as to where along the old road their lines run.

From these findings of fact, the trial court concluded "as a matter of law that the boundary line between the parties runs in the middle of the abandoned old road as shown on Court's Exhibit #1, regardless of the fact that the corner tree lies above said old road on the south bank of the road."

Defendant implicitly suggests that we would have to engage in judicial alchemy in order to uphold the trial court's judgment, arguing thusly: "To conceive of such a notion in order to establish the starting point for the next boundary line is illogical and without merit. . . ." Countering with his contention that it takes no amount of gymnastic skills to sustain the trial court's conclusion, plaintiff argues as follows:

> [T]he trial court's determination that the boundary line would extend to the center of the road was correct. 'It can be stated as a general rule that a call for a monument as a boundary line in a deed will convey the title of the land to the center of the monument if it has width.' J. Webster, *Webster's Real Estate Law In North Carolina* § 188 (Rev. Ed. 1981).
>
> An example of the general rule as cited by Webster, is the case of *White v. Woodard*, 227 N.C. 332, 333, 42 S.E. 2d 94, 95 (1947). In *White*, the Supreme Court of North Carolina stated, 'It is generally accepted that where a line is to run to a stream or to "a stake on the stream," and then with the stream, the intention is to extend the line to the middle of the stream as the true boundary, unless by the language employed the contrary appears.'
>
> Therefore, since the Plaintiffs' deed called for 'a sugar tree at the old road and running in a westerly direction with the said old road' (Plaintiffs' Exhibit #2, stipulated to on page 8 of the Record), the trial court was correct in finding that the boundary line between the parties runs in the middle of the abandoned old road.

Plaintiff cites good law. His reliance on the cited cases is misplaced, however. The facts are different. In this case, the tree, not the road, is the "monument" with width. Since the sugar tree is the common corner of the parties and their respective deeds

then describe a call running with the said old road, the trial court's conclusion that "the boundary line between the parties runs in the middle of the abandoned old road as shown on Court's Exhibit #1, regardless of the fact that the corner tree lies above said old road on the south bank of the road" is not supported by the findings of fact or the evidence. Rather, the evidence is clear that defendant's boundary line crosses the road to the sugar tree and then runs with the southern edge of the road.

Based on the foregoing, the judgment of the trial court is vacated, and the matter is remanded for entry of judgment in accordance with this opinion.

Vacated and remanded.

Judges ARNOLD and WHICHARD concur.

KAREN B. McMAHAN (GUZMAN) v. DAVID C. McMAHAN AND SEABOARD COASTLINE RAILROAD COMPANY

No. 8320DC870

(Filed 5 June 1984)

Constitutional Law § 24.7; Process § 9.1— no personal jurisdiction over non-resident defendant

No grounds existed for the exercise of *in personam* jurisdiction over the nonresident defendant, and the exercise of such jurisdiction would violate due process, where the trial court made no finding that defendant at any time had been in this state or had had any contacts therewith.

APPEAL by defendant David C. McMahan from *Honeycutt, Judge*. Judgment entered 11 May 1983 in District Court, UNION County. Heard in the Court of Appeals 8 May 1984.

Joe P. McCollum, Jr. for plaintiff appellee.

Robert L. Huffman for defendant appellant.

HILL, Judge.

Plaintiff seeks domestication of an order previously entered by the family court of Abbeyville, South Carolina, awarding to her custody of two minor children born of her marriage to the defendant, together with an award of child support. She also seeks an award of child support for one minor child, an award of the amount for which the defendant is in arrears, together with an award of attorney fees. She further prays an order be entered requiring Seaboard Coastline Railroad to garnish the wages of defendant pursuant to G.S. 110-136.

Defendant was mailed a copy of the complaint and notice to Abbeyville, South Carolina by registered mail, restricted delivery. Defendant moved to dismiss the action on the ground that he at no time had been a resident of North Carolina, and the court in this state had no jurisdiction over him. The motion was denied, and defendant appeals. The trial court made no finding that defendant had at any time either been in this state or had any contacts whatever therewith. The record contains no evidence to support such a finding had it been made. Thus, none of the grounds for the exercise of *in personam* jurisdiction under G.S. 1-75.4 are present; and exercise of such jurisdiction would violate the due process clause of the Fourteenth Amendment. *See Kulko v. California Superior Court*, 436 U.S. 84, 56 L.Ed. 2d 132, 98 S.Ct. 1690 (1978). The court thus erred in denying the motion to dismiss.

There are other avenues available to plaintiff which could provide her relief. Without leaving the state, plaintiff may proceed under the Uniform Reciprocal Enforcement of Support Act (URESA). G.S. 52A-1 *et seq.*; *see also Stevens v. Stevens*, 68 N.C. 234, 314 S.E. 2d 786 (1984). Plaintiff may also return to South Carolina to enforce the order entered in the family court in Abbeyville. See section 14-21-40 *et seq.* and 15-39-420, Code of Laws of South Carolina.

We reverse and remand for an order consistent with this opinion.

Reversed and remanded.

Judges WEBB and WHICHARD concur.

Blauvelt v. Landing

KAREN E. BLAUVELT, BY HER GUARDIAN AD LITEM, FRANK BLAUVELT, PLAINTIFF v. JOSEPH M. LANDING, CAPITAL CITY TRUCK GARAGE AND TRUCKING COMPANY, INC. AND LOUIS HOWARD WATKINS, DEFENDANTS v. WILLIAM FRANKLIN LANDING, ADDITIONAL DEFENDANT

No. 8310SC729

(Filed 5 June 1984)

Torts § 7— release entered into by employer not barring claims of employee

In an action evolving from an automobile accident, appellant's employer's release of all claims against the driver of the automobile involved did not operate to bar appellant's claims against the same driver since appellant did not agree to the release and has taken no action which would bar his claim against the other driver.

APPEAL by defendant Louis Howard Watkins from *Bailey, Judge.* Judgment entered 10 March 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 12 April 1984.

This action grew out of an accident involving an automobile being driven by Joseph Landing and a truck owned by Capital City Truck Garage and Trucking Company, Inc., driven by Louis Howard Watkins. Karen Blauvelt, a passenger in the Landing automobile, sued Joseph Landing, Capital City, and Louis Watkins. Capital City and Louis Watkins cross-claimed against Joseph Landing. Capital City settled its action against Mr. Landing and released all claims it had against him.

Joseph Landing made a motion for summary judgment on Louis Watkins' claim against him which was allowed. Louis Watkins appealed.

Hatch, Little, Bunn, Jones, Few and Berry, by E. Richard Jones, Jr., for defendant appellant Louis Howard Watkins.

Moore, Ragsdale, Liggett, Ray and Foley, by George R. Ragsdale and John N. Hutson, Jr., for defendant appellees Joseph M. Landing and William Franklin Landing.

WEBB, Judge.

The question posed by this appeal is whether Louis Watkins, an employee of Capital City, is barred in his claim against Joseph Landing by a release signed by Capital City for all its claims aris-

ing from the accident. We hold that Mr. Watkins is not so barred. Capital City had no power to bar Mr. Watkins' claim whatever release Capital City may have signed. It was error to grant the motion for summary judgment on Mr. Watkins' claim against Joseph M. Landing.

The appellee contends that the release was for personal injury as well as for property damage and, for this reason, Mr. Watkins' personal injury claim as well as Capital City's property damage claim was released. It does not matter what claims were purportedly released. Mr. Watkins is not bound by it since he did not agree to it. We do not believe *Battle v. Clanton*, 27 N.C. App. 616, 220 S.E. 2d 97 (1975), *cert. denied*, 289 N.C. 613, 223 S.E. 2d 391 (1976); *Bradford v. Kelly*, 260 N.C. 382, 132 S.E. 2d 886 (1963); and *McNair v. Goodwin*, 262 N.C. 1, 136 S.E. 2d 218 (1964), relied on by the appellee, are applicable. Each of those cases involved some action by a party which would bar his claim. In this case, Mr. Watkins has taken no action which would bar his claim.

The appellee also argues that Capital City would be liable to Joseph Landing, if at all, under the theory of respondeat superior and that a valid release as to master or servant would also release the other. The appellee says that for this reason, Joseph Landing having released Capital City has also released Louis Watkins and the release is reciprocal so that Mr. Watkins is also barred. Mr. Watkins has not pled the release given by Capital City or otherwise attempted to take advantage of it. We do not believe he is barred by it.

We hold it was error to grant the motion for summary judgment.

Reversed and remanded.

Judges HILL and WHICHARD concur.

LONNIE L. PRITCHARD AND MADORA L. PRITCHARD v. SNUG HARBOR PROPERTY OWNERS ASSOCIATION

No. 831DC413

(Filed 5 June 1984)

Deeds § 20— assessment covenants—unenforceable

The trial court properly granted plaintiffs' motion for summary judgment in an action brought to enjoin defendants from interfering with their use of a subdivision's recreational facilities where a previous Court of Appeals decision had found the identical restrictive covenants and bylaw provisions unenforceable due to vagueness. *Snug Harbor Property Owners Association v. Curran*, 55 N.C. App. 199 (1982).

APPEAL by defendant from *Parker, Judge*. Judgment entered 16 November 1982 in District Court, PERQUIMANS County. Heard in the Court of Appeals 7 March 1984.

Plaintiffs own Lot 3 in Section G of Snug Harbor Beach Subdivision, which they purchased from Yeopim Beach Corporation (YBC) in 1973 subject to certain restrictive covenants. One such covenant required lot owners to pay $18 a year to YBC or its successor in interest for "the maintenance and improvement of Snug Harbor Beach and its appearance, sanitation, easements, recreation areas and parks." The recreation areas in the subdivision include a swimming pool, tennis courts, clubhouse, sandy beach and park. YBC's interest in the development was later acquired by defendant association and its bylaws, phrased similarly to the restrictive covenants, also required lot owners to pay the annual $18 assessment. In 1975, under a bylaws provision authorizing amendments, defendant increased the annual assessment from $18 to $35, but the restrictive covenants have not been altered. In May of 1980, plaintiffs refused to pay the assessment of $35, but offered to pay $18, which defendant would not accept. Upon defendant forbidding them to use the recreational facilities, plaintiffs sued to enjoin defendant from interfering with their use, alleging that the amended dues increase was unauthorized and ineffective. By its answer, defendant claimed that the dues increase was both authorized and enforceable because of provisions in the restrictive covenants and bylaws, both as originally adopted and as later amended, and copies of these instruments were attached thereto as exhibits.

By stipulation, the trial was continued until the related case of *Snug Harbor Property Owners Association v. Curran*, 55 N.C. App. 199, 284 S.E. 2d 752 (1981), *rev. denied*, 305 N.C. 302, 291 S.E. 2d 151 (1982) was concluded. In that case and its companions, based on the identical restrictive covenants and bylaw provisions that are involved in this case, defendant sued various subdivision lot owners to collect annual assessments of $35 each allegedly past due, but the final decision was that the restrictive covenants and bylaws relied upon are unenforceable because they are too vague.

Plaintiffs then moved for summary judgment. Following a hearing thereon, the motion was granted and defendant was enjoined and restrained from prohibiting the plaintiffs from using the subdivision recreational facilities.

No brief filed for plaintiff appellees.

William J. Bentley, Sr. and Paul W. White, for defendant appellant.

PHILLIPS, Judge.

The only question raised by this lawsuit is defendant's right to prevent plaintiff lot owners from using the Snug Harbor Subdivision recreational facilities because of their refusal to pay the increased annual assessments of $35 as required by defendant's amended bylaws. Since a panel of this Court has already adjudged that defendant's amended bylaws in regard to assessments are unenforceable, it necessarily follows that defendant had no legal right under them to either collect the $35 or prevent plaintiffs from using the facilities, and that the injunction against defendant was properly entered. Defendant's contention that the court erred in refusing to accept its proof that plaintiffs approved the bylaws amendment and paid the increased amount for three or four years is not only without merit, it is irrelevant. In the previous case, which obviously controls this one, the assessments levied by defendant were adjudged to be uncollectable, not because of their amount or the invalidity of the amendment that increased them, but because the use that the money was to be put to was too vaguely and indefinitely described in the restrictive covenants, bylaws, amended bylaws, and association charter. Since these indefinite provisions, which have not been changed,

are too vague to support an express contract, as this Court held, they can hardly be enforceable under any other theory, legal or equitable. Thus, whether the plaintiffs approved the increase or voluntarily paid it for a time is beside the point—which is that, in the setting that now exists, they cannot be made to pay it. For us to enforce the arrangement under any theory, we would have to first render it more definite than the parties saw fit to do, and that is not our function.

Affirmed.

Chief Judge VAUGHN and Judge HILL concur.

ROBERT G. HOBGOOD, EMPLOYEE v. ANCHOR MOTOR FREIGHT, EMPLOYER AND ARGONAUT INSURANCE COMPANY, CARRIER

No. 8310IC771

(Filed 5 June 1984)

1. **Master and Servant § 96.1— ability of full Commission to modify award of Deputy Commissioner without hearing or having additional evidence**

Under its plenary powers the full Industrial Commission "may adopt, modify, or reject the findings of fact of the Hearing Commissioner, and in doing so *may weigh the evidence and make its own determination as to the weight and credibility of the evidence.*" Therefore, where the evidence conflicted on the issue of plaintiff's status, as arising in the course of his employment, at the time of an accident, the Deputy Commissioner's finding that the accident did not arise out of and in the course of plaintiff's employment was not conclusive.

2. **Master and Servant § 55.4— review of workers' compensation award—failure to show manifest abuse of discretion**

In a workers' compensation proceeding, defendants failed to show a manifest abuse of discretion on the part of the Commission in finding that an accident arose out of and in the course of an employee's employment.

APPEAL by defendants from order of the North Carolina Industrial Commission filed 14 February 1983. Heard in the Court of Appeals 2 May 1984.

Young, Moore, Henderson & Alvis, P.A., by B. T. Henderson, II and Joseph W. Williford, for defendant appellants.

White and Crumpler, by David R. Crawford, for plaintiff appellee.

BECTON, Judge.

Defendants appeal from an order of the North Carolina Industrial Commission (Commission) setting aside and modifying the opinion of the Deputy Commissioner. Finding that the Commission acted within its discretion and according to law, we affirm.

I

Robert G. Hobgood drove a truck for Anchor Motor Freight, delivering new cars to various cities in Eastern North Carolina and Virginia. After he had driven to Goldsboro and made a delivery there, he logged in as "off-duty" until he continued to Pinehurst the next day to make another delivery. While Hobgood was still at the Goldsboro delivery point, seated in the cab of the truck with a friend who had followed him from Virginia, a man smashed out the window and struck Hobgood with a pipe. The assailant demanded money. When Hobgood claimed to have none, the assailant shot him in the head.

Hobgood filed a worker's compensation claim with the Commission for his disabling injury. The Deputy Commissioner hearing the claim found and concluded that Hobgood's accidental injury did not arise out of and in the course of his employment with Anchor. Hobgood appealed to the Commission. His application for review merely designated the portions of the Deputy Commissioner's order to which he assigned error, and did not present any specific "good ground" for reconsideration. After reviewing the record, briefs, and arguments of the parties, but without taking additional evidence, the Commission modified the Deputy Commissioner's order by concluding that the accident *did* arise out of and in the course of Hobgood's employment, and by awarding medical expenses and total temporary disability payments accordingly. Defendants appeal.

II

[1] Defendants contend primarily that the Commission had no authority to modify the award of the Deputy Commissioner. Since

the evidence conflicted on the issue of Hobgood's status at the time of the accident, the defendants argue that the Deputy Commissioner's finding that the accident did not arise out of and in the course of his employment is conclusive. Our recent decision in *Pollard v. Krispy Waffle #1*, 63 N.C. App. 354, 304 S.E. 2d 762 (1983) compels us to reject this argument.

In *Pollard*, this Court reiterated the majority rule that only the findings of the Commission are conclusive, not those of the hearing officer. Under its plenary powers the Commission "'may adopt, modify, or reject the findings of fact of the Hearing Commissioner, and in doing so *may weigh the evidence and make its own determination as to the weight and credibility of the evidence.*' (Emphasis added.)" *Pollard*, 63 N.C. App. at 358, 304 S.E. 2d at 764 (quoting *Hollar v. Montclair Furniture Co.*, 48 N.C. App. 489, 497, 269 S.E. 2d 667, 672 (1980)); *see also Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E. 2d 577 (1976); *Robinson v. J. P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E. 2d 144 (1982). The Commission was therefore not bound by the findings of the Deputy Commissioner.

III

[2] Defendants contend that N.C. Gen. Stat. § 97-85 (1979) requires appellants to the Commission to affirmatively show "good ground" for review. As this Court held in *Lynch v. M. B. Kahn Const. Co.*, 41 N.C. App. 127, 254 S.E. 2d 236, *disc. rev. denied*, 298 N.C. 298, 259 S.E. 2d 914 (1979), the Commission's powers of review are plenary, and the Commission's discretionary determination of "good ground" will not be reviewed absent a showing of manifest abuse.

The Commission relied expressly on the decisions of our Supreme Court in *Jackson v. Dairymen's Creamery*, 202 N.C. 196, 162 S.E. 359 (1932) and *Clark v. Burton Lines, Inc.*, 272 N.C. 433, 158 S.E. 2d 569 (1968), which are still good law. *Jackson* and *Clark* establish that an employee, like Hobgood, whose work entails travel away from the employer's premises, acts within the course of his employment continuously during the trip, unless there is proof of "distinct" *(Clark)* or "total" *(Jackson)* departure on a personal errand. Considering *Jackson* and *Clark*, the fact that Hobgood was in the employer's truck at the point of delivery,

whether he was logged on- or off-duty, does not determine his employment status.

We therefore conclude that the Commission correctly applied the law, and that defendants have shown no manifest abuse of discretion. The order is therefore

Affirmed.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. JAMES BERNARD McDERMOTT, III

No. 8320SC972

(Filed 5 June 1984)

1. **Automobiles and Other Vehicles § 113.1— death by vehicle—sufficiency of evidence**

The evidence was sufficient for the jury in a prosecution for death by vehicle.

2. **Criminal Law § 122.1— reading testimony to jury during deliberations**

The trial court did not err in permitting the court reporter to read a portion of one witness's testimony to the jury after the jury had retired. G.S. 15A-1233(a).

APPEAL by defendant from *Seay, Judge*. Judgment entered 19 May 1983 in Superior Court, MOORE County. Heard in the Court of Appeals 21 May 1984.

Defendant was convicted of the misdemeanor of death by vehicle in connection with the death of Wendell Ritter. He received a sentence of eight to twelve months and appealed.

Attorney General Edmisten by Assistant Attorney General Marilyn R. Rich, for the State.

Seawell, Robbins, May & Rich, by P. Wayne Robbins, for defendant-appellant.

Before Judges WEBB, BECTON and EAGLES.

[1] Both defendant and the State presented evidence. Defendant moved to dismiss the charge at the close of the State's evidence and to dismiss the charge and for a directed verdict at the close of all the evidence. He assigns as error the trial court's denial of those motions. Defendant argues that the evidence was not sufficient to support the charge of death by vehicle. Our review of the record in this case disclosed that there was ample evidence to support the charge submitted to the jury and that the court properly denied defendant's motions. Defendant's contention is without merit.

[2] We have also carefully considered defendant's contention that it was error for the trial court to allow the court reporter to read a portion of one witness's testimony to the jury after the jury had retired. G.S. 15A-1233(a) clearly permits the trial court to do this. Defendant's contention is without merit.

We hold that defendant had a fair trial, free from prejudicial error.

No error.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 MAY 1984

Continued from page 357.

ALLEN v. BRIEF ROAD DEVELOPMENT No. 8326SC678	Mecklenburg (82CVS7081)	Affirmed
ALSOBROOK v. ALSOBROOK No. 8327DC784	Cleveland (82CVD661)	Reversed and Remanded
BROWN v. BROWN No. 8313SC1058	Columbus (81CVS594)	Affirmed
BROWN v. INTEGON LIFE INS. No. 8321SC1022	Forsyth (82CVS5565)	Affirmed
CHERRY v. STATON No. 8327DC806	Gaston (82CVD924) (82CVD926) (82CVD927) (82CVD928)	Affirmed
CITY OF LEXINGTON v. ARCHIE'S No. 8322DC610	Davidson (82CVD1107)	Reversed
CRUMPLER v. STEWART No. 8318DC871	Guilford (82CVD7292)	Affirmed
GOODIN v. F & F BUILDERS No. 8310IC865	Industrial Commission (I-0637)	Affirmed
KING v. HILL & GREEN No. 8326SC277	Gaston (80CVS1982)	No Error
RAYMER v. RAYMER No. 8322SC810	Iredell (82CVS640)	Affirmed
ROBERTS v. ROBERTS No. 8321DC1070	Forsyth (81CVD2422)	No Error
SCOTT v. THORNE No. 8321DC809	Forsyth (81CVD3811)	Affirmed
STATE v. BEYAH No. 8314SC883	Durham (78CRS18126)	No Error
STATE v. BOGAN No. 8326SC956	Mecklenburg (83CRS59936)	No Error
STATE v. LANCASTER No. 839SC1085	Granville (83CRS182)	No Error

STATE v. McLEAN No. 8312SC1016	Hoke (83CRS802)	No Error
STATE v. PAYTON No. 833SC880	Carteret (82CRS9917)	Affirmed
STATE v. SEGER No. 8315SC835	Alamance (82CRS11367)	Affirmed
STATE v. SMITH No. 8312SC1094	Cumberland (82CRS45352)	No Error
STATE v. STATON No. 832SC982	Martin (83CRS149)	Trial, No Error; Sentence, Remanded
STATE v. TAYLOR No. 8326SC907	Mecklenburg (82CRS78506)	No Error
STATE v. THOMPSON No. 832SC953	Martin (83CRS512)	No Error
STATE v. TUTEN No. 832SC1127	Beaufort (83CR1377)	No Error
STATE v. WATERS No. 8312SC1007	Cumberland (82CRS44454)	No Error
STATE v. WATTS No. 8321SC945	Forsyth (83CRS11094)	No Error

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

ABATEMENT

§ 6. Priority of Institution of Actions

In an action involving a title dispute, where the court appointed a surveyor prior to the parties entering into voluntary dismissal and instituting a subsequent action, the subsequent action did not prevent the surveyor from requesting expenses in the prior action. *Ward v. Taylor*, 74.

ACCORD AND SATISFACTION

§ 1. Nature and Essentials of Agreement

Defendant's defense of accord and satisfaction could not properly be raised by motion. *Towery v. Anthony*, 216.

ACCOUNTS

§ 1. Open Accounts

Summary judgment was properly entered in favor of plaintiff in an action to recover on an open account for chemical fertilizers sold to defendant. *Dixie Chemical Corp. v. Edwards*, 714.

ADMINISTRATIVE LAW

§ 5. Availability of Review by Statutory Appeal

A trial court had jurisdiction to modify its 1980 order which stayed further proceedings by the Milk Commission against defendant by again staying and enjoining a subsequent order by the Milk Commission pursuant to new rules enacted by the Commission until a final decision is rendered by the courts as to the merits of defendant's original appeal. *State ex rel. Milk Commission v. Pet, Inc.*, 701.

ADOPTION

§ 1. Nature, Construction and Operation of Statutes in General

G.S. 48-28 prohibits any direct or collateral attack in adoption proceedings except by a biological parent or guardian of the child. *Flinn v. Laughinghouse*, 476.

ADVERSE POSSESSION

§ 25.1. Sufficiency of Evidence in Particular Cases

In an action to establish a prescriptive easement in a road, the trial court did not err in determining that the evidence was insufficient to rebut the presumption of permissive use by plaintiffs' predecessors in title. *Amos v. Bateman*, 46.

AGRICULTURE

§ 15. Validity and Construction of Statutes Relating to Production, Sale and Distribution of Milk

A trial court had jurisdiction to modify its 1980 order which stayed further proceedings by the Milk Commission against defendant by again staying an enjoining a subsequent order by the Milk Commission pursuant to new rules enacted by the Commission until a final decision is rendered by the courts as to the merits of defendant's original appeal. *State ex rel. Milk Commission v. Pet, Inc.*, 701.

APPEAL AND ERROR

§ 6. Right to Appeal Generally

Where the trial court entered a directed verdict in favor of plaintiff upon motion by defendants, defendants' appeal from the trial court's earlier refusals to either direct a verdict in their favor or to direct a verdict for plaintiff in a lesser amount must be dismissed. *Willis v. Russell*, 424.

§ 6.2. Finality as Bearing on Appealability; Premature Appeals

An order compelling the parties to arbitrate is interlocutory and does not affect a substantial right and does not work an injury to the appellant if not corrected before an appeal from a final judgment. Nor does G.S. 1-567.18(a) provide a right to appeal from an order compelling arbitration. *The Bluffs v. Wysocki*, 284.

A court's orders denying defendants' motions to dismiss, one defendant's motion to quash service of an amended complaint, and the trial court's order allowing plaintiff to amend his complaint to realign the parties were all interlocutory and not appealable. *Howard v. Ocean Trail Convalescent Center*, 494.

Plaintiff's attempted appeal from an order dismissing her claim for treble damages was interlocutory. *Simmons v. C. W. Myers Trading Post*, 511.

Defendant had no right of immediate appeal from an order of partial summary judgment which determined liability and left only the question of damages for trial. *Freeman v. Reliance Ins. Co.; Chamblee v. Reliance Ins. Co.*, 620.

One plaintiff could appeal from the entry of partial summary judgment which determined all of his rights and eliminated him from the lawsuit. *Ibid.*

§ 6.6. Appeals Based on Motions to Dismiss

Purported appeal by plaintiffs from an order which dismissed their complaint but allowed leave to amend was interlocutory and premature. *Day v. Coffey*, 509.

§ 6.8. Appeals on Motions for Nonsuit or Judgment on the Pleadings

An order granting summary judgment for defendants in a "pass and turn" automobile negligence case was immediately appealable. *Perry v. Aycock*, 705.

§ 7. Parties Who May Appeal; "Party Aggrieved"

A shareholder and a former shareholder of a corporate judgment debtor were not "parties aggrieved" and had no standing to appeal from the appointment of a receiver for the corporation. *Lone Star Industries v. Ready Mixed Concrete*, 308.

§ 19. Appeals in Forma Pauperis

The trial court erred in allowing respondent to appeal *in forma pauperis* from a judgment terminating his parental rights where he did not properly request permission to proceed *in forma pauperis* in apt time. *In re Shields*, 561.

§ 24. Necessity for Objections, Exceptions and Assignments of Error

Where petitioner violated App. R. 9(b)(1)(xi), 10, 10(b)(2), and 28(b)(5), petitioner's appeal was subject to dismissal for failure to follow the mandatory Rules of Appellate Procedure. *Wiseman v. Wiseman*, 252.

§ 24.1. Form of Exceptions and Assignments of Error

Plaintiff's attempt to raise a question of whether the court erred by its failure to award him attorney's fees in the present action was ineffectual since the proper method to have preserved this issue for review would have been to cross-appeal. *Stanback v. Westchester Fire Ins. Co.*, 107.

APPEAL AND ERROR — Continued

A cross-assignment of error by defendants will not be considered where the appellate court upheld defendant's favorable judgment on plaintiff's appeal. *Nationwide Mut. Fire Ins. Co. v. Allen*, 184.

Defendant's attempt to argue certain issues on appeal was ineffectual where the proper method to have preserved the issues for review would have been to cross-appeal rather than to attempt to raise the issues by cross-assignments of error. *Whedon v. Whedon*, 191.

§ 31.1. Necessity and Timeliness of Objections

Failure to make a contemporaneous objection to portions of the jury charge constituted a waiver of the right to challenge the instructions on appeal. *Lee v. Keck*, 320.

§ 41. Requirement of Transcript for Case on Appeal

Appeal is dismissed for failure of appellant's brief to contain references to the pertinent exceptions and assignments of error and for failure of the record to contain so much of the evidence as is necessary for an understanding of the errors assigned. *Fortis Corp. v. Northeast Forest Products*, 752.

§ 42. Conclusiveness and Effect of Record; Matters Properly Included

The trial court erred in refusing to allow defendant insurer to make an offer of proof for the record of a spontaneous utterance made by plaintiff's wife which may have implicated plaintiff in setting the family automobile afire. *Nix v. Allstate Ins. Co.*, 280.

§ 52. Invited Error

The defendant in a medical malpractice action did not open the door to the admission of evidence of the original prayer for relief which stated a specific demand for monetary relief exceeding $10,000 in violation of G.S. 1A-1, Rule 8(a)(2). *Carter v. Carr*, 23.

§ 62. New Trial in General

Where the trial court erroneously allowed defendant's motion to dismiss plaintiff's claim for punitive damages, a new trial will also be allowed on the issue of compensatory damages. *Huff v. Chrismon*, 525.

ARBITRATION AND AWARD

§ 1. Arbitration Agreements

In an action by a group of investors against a group of security dealers and brokerage firms, the trial court did not err in denying defendants' motions to stay proceedings in the trial court pending arbitration of the matters raised in plaintiffs' complaint. *Blow v. Shaughnessy*, 1.

In an action evolving from a grant obtained by the City of Statesville from the United States Environmental Protection Agency to construct improvements at a wastewater treatment plant, where the City of Statesville's general conditions allowed arbitration, if mutually acceptable, but contained no mandatory arbitration clause, the trial court correctly determined that federal regulations requiring mandatory arbitration did not apply. *City of Statesville v. Gilbert Engineering Co.*, 676.

In an action on a contract evolving from an environmental protection agency grant to plaintiff where plaintiff opted to substitute its own conditions for the

ARBITRATION AND AWARD — Continued

federal "General Conditions" by not physically including them in the contract, there was no merit to defendant's contention that the federal "General Conditions" concerning arbitration controlled where there was a conflict with plaintiff's own conditions. *Ibid.*

§ 2. Agreements to Arbitrate as Bar to Action

When the parties submitted themselves to the jurisdiction of the court in a child custody and support action, they waived their rights to arbitration arising under a separation agreement and foreclosed their rights to enter into a subsequent arbitration agreement concerning child custody and support. *Rustad v. Rustad*, 58.

An order compelling the parties to arbitrate is interlocutory and does not affect a substantial right and does not work an injury to the appellant if not corrected before an appeal from a final judgment. Nor does G.S. 1-567.18(a) provide a right to appeal from an order compelling arbitration. *The Bluffs v. Wysocki*, 284.

A trial court erred in staying an action concerning a lease agreement pending the outcome of arbitration where plaintiff alleged that the execution of the lease agreement was obtained through fraud or undue influence and that its terms were unconscionable. *Paramore v. Inter-Regional Financial*, 659.

ARCHITECTS

§ 2. Fees for Architectural Services

The evidence was sufficient for the jury to find that defendants engaged plaintiff architect upon express terms to either design and supervise an entire condominium project or just to do the schematic design phase of the project. *Willis v. Russell*, 424.

The measure of damages for architectural services under an implied contract theory is the reasonable value of the services rendered less any benefits received. *Ibid.*

ARREST AND BAIL

§ 3.6. Right of Officers to Arrest without Warrant; Legality of Arrest for Robbery

Officers had probable cause to believe that defendant had committed a robbery and thus could arrest defendant without a warrant. *S. v. White*, 671.

§ 9.1. Propriety of Release on Bail and Revocation of Bail

In a prosecution for breaking or entering and larceny, there was no error in the revocation of a bail bond and ordering that defendant be in custody until completion of trial. *S. v. Jefferson*, 725.

§ 11. Liabilities on Bail Bonds in General

Ignorance of the law is not a valid defense to a charge against an attorney for becoming a surety on a bail bond for a person who is not a member of his immediate family, and the State's evidence was sufficient to support conviction of defendant attorney for such crime. *S. v. Rogers*, 358.

§ 11.4. Liabilities on Bail Bonds; Judgments against Sureties

The trial court did not abuse its discretion in refusing to remit a portion of a forfeited $100,000 bail bond to the sureties on the bond. *S. v. Horne*, 480.

ASSAULT AND BATTERY

§ 14.6. Sufficiency of Evidence of Assault on a Law Enforcement Officer

The trial court properly failed to dismiss the charge of assault on a police officer. *S. v. Davis*, 238.

ASSIGNMENTS

§ 1. Transactions Constituting Assignments

A "hold harmless" agreement between the general contractor of a highway construction project and a subcontractor's surety did not constitute an assignment of a claim against the State in violation of G.S. 147-62 but was an indemnity agreement, and the indemnitee was the real party in interest with standing to challenge the Department of Transportation's assessment of liquidated damages under the contract. *Ledbetter Brothers v. N.C. Dept. of Transportation*, 97.

ATTACHMENT

§ 8. Claims of Third Persons

Intervenor had a lien for towing and storage of attached vehicles pursuant to a contract with the sheriff and had a right to intervene in the principal action to assert such lien. *Case v. Miller*, 729.

ATTORNEYS AT LAW

§ 1.2. Unauthorized Practice of Law

A trial court erred in finding that the filing of a complaint by an out-of-state attorney not licensed to practice in this state who had not complied with the provisions of G.S. 84-4.1 was a nullity. *Theil v. Detering*, 754.

§ 3.1. Nature and Extent of Attorney's Authority

The trial court in a medical malpractice action did not err in denying plaintiff's motion for relief from a judgment on the ground that plaintiff's husband had discussed the facts of her case with the attorney who represented defendant at trial. *Carter v. Carr*, 23.

§ 5.1. Liability for Malpractice

Plaintiff client's election to affirm a settlement of his personal injury action precluded a malpractice action against defendant attorney based upon inadequate representation in the personal injury action. *Douglas v. Parks*, 496.

§ 7. Fees Generally

The surety on a bond given to cover purchases of livestock was not liable for attorney fees expended by the seller in a successful action against the buyer-principal to recover the purchase price of the livestock. *Martin v. Hartford Accident and Indemnity Co.*, 534.

§ 12. Disbarment Proceedings; Grounds

The revocation of defendant attorney's license to practice law for 18 months with the provision that the period of revocation could be reduced to as little as 6 months if defendant satisfied the State Bar of certain moral and competency qualifications was a proper condition of defendant's probation for the crimes of improperly posting bail bond for a person who was not a member of his immediate family and for attempting to interfere with a State's witness. *S. v. Rogers*, 358.

AUTOMOBILES AND OTHER VEHICLES

§ 11.4. Accidents Involving Vehicles Parked on Shoulder

In a negligence action in which plaintiff sued for the property damage to his truck suffered when defendant crashed his truck into the plaintiff's dump truck after being blinded by the setting sun, the trial court properly failed to instruct on contributory negligence. *Adams v. Mills*, 256.

§ 16.3. Duty to Warn of Passing

Plaintiff's failure to sound his horn before he attempted to pass defendant's farm tractor did not constitute contributory negligence *per se*. *Perry v. Aycock*, 705.

§ 43. Plaintiff's Pleadings; Sufficiency of Allegations of Negligence Generally

Plaintiff's allegation that defendant "was negligent in other respects not herein set forth" availed plaintiff nothing. *Hord v. Atkinson*, 346.

§ 52. Sufficiency of Evidence of Speed Competition on Highway

Evidence that defendant's automobile was being chased by another vehicle did not require the trial court to charge on willful speed competition. *Hord v. Atkinson*, 346.

§ 53. Failing to Stay on Right Side of Highway Generally

The evidence did not require the trial court to charge the jury on defendant's failure to yield to an overtaking vehicle. *Hord v. Atkinson*, 346.

§ 58.2. Turning; Collisions between Vehicles Going Same Direction

The evidence on motion for summary judgment presented an issue of material fact as to whether the driver of a turning tractor was negligent in failing to give a left turn signal. *Perry v. Aycock*, 705.

§ 59.1. Entering Highway from Access Road

A trial court erred in directing a verdict for defendant in an action arising from an automobile accident. *Oakes v. James*, 765.

§ 62.3. Striking Pedestrians while Walking Along Streets or Highways

Evidence that defendant motorists failed to see a pedestrian upon the roadway at night before striking him constituted some evidence that defendant was negligent in failing to keep a proper lookout. *Troy v. Todd*, 63.

§ 83.2. Contributory Negligence of Pedestrians while Standing or Walking along Highway

Evidence tending to show that plaintiff's intestate was walking in defendant's lane of travel with his back toward the traffic was some evidence of negligence by plaintiff's intestate but did not constitute contributory negligence *per se*. *Troy v. Todd*, 63.

§ 87.5. Intervening Negligence of other Drivers

The trial court properly instructed the jury on insulating negligence in an action by a passenger to recover for injuries received when the automobile in which she was riding was struck from the rear by another vehicle which had been chasing it. *Hord v. Atkinson*, 346.

§ 113.1. Sufficiency of Evidence of Homicide

The evidence was sufficient for the jury in a prosecution for death by a vehicle. *S. v. McDermott*, 786.

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 137. Failure to Heed Police Siren

The evidence that defendant failed to stop for a blue light and siren was sufficient to withstand defendant's motion for directed verdict. *S. v. Davis*, 238.

BAILMENT

§ 3.3. Liabilities of Bailee to Bailor; Sufficiency of Evidence

Plaintiff's evidence was sufficient for the jury on the issue of negligence by defendant bailees in placing a mare purchased by plaintiff from defendants in a pasture with a stallion so that the mare became pregnant and was unsuitable for use as a show horse. *Ward v. Newell*, 646.

BANKS AND BANKING

§ 4. Joint Accounts

Where one spouse deposits funds into a joint account with the other, the other is designated the depositor's agent, with authority to withdraw the funds, and a depositing spouse, as principal, may bring an action in conversion against the withdrawing spouse to recover funds which that spouse has converted as agent. *Myers v. Myers*, 177.

§ 23. Merger Generally

In a bank merger, the surviving bank or its transferee has the legal right to enforce the claim of a promissory note. *Carolina First Nat'l Bank v. Douglas Gallery of Homes*, 246.

Rule 25(d) does not authorize a merged bank to continue prosecuting an action. *Ibid.*

BASTARDS

§ 3. Time for Prosecution

The three year statute of limitations contained in G.S. 49-4 barred the State from charging defendant with a violation of G.S. 49-2, failure to support an illegitimate child. *S. v. Caudill*, 268.

BILLS AND NOTES

§ 18. Parties in Actions on Notes

In a bank merger the surviving bank or its transferee has the legal right to enforce the claim of a promissory note. *Carolina First Nat'l Bank v. Douglas Gallery of Homes*, 246.

In an action on a promissory note by a merged bank, the absence of the surviving bank, the real party in interest, from the action did not warrant a directed verdict, but the trial court should have granted a continuance to permit the real party in interest to be substituted or should have corrected the defect by an *ex mero motu* ruling. *Ibid.*

BOUNDARIES

§ 14. Court Surveys

A court-appointed surveyor's lack of party status in a case involving a boundary dispute did not make his motion for unpaid expenses improper. *Ward v. Taylor*, 74.

CONSTITUTIONAL LAW

§ 24.7. Jurisdiction over Nonresident Individuals

No grounds existed for the exercise of personal jurisdiction over the nonresident defendant, and the exercise of such jurisdiction would violate due process under the minimum contacts test. *McMahan v. McMahan*, 777.

§ 28. Due Process and Equal Protection Generally in Criminal Proceedings

Defendant attorney failed to show that he was subjected to unconstitutional selective prosecution for standing bond for a person not a member of his family. *S. v. Rogers*, 358.

Defendant attorney was not subjected to impermissible prosecutorial vindictiveness because the prosecutor obtained a superseding indictment containing two counts relating to intimidating and interfering with witnesses after one count in the original indictment relating thereto had been dismissed for duplicity. *Ibid.*

§ 45. Right to Appear Pro Se

Defendant did not make an unequivocal demand to represent himself, and the trial court thus did not err in refusing to permit defendant to dismiss his appointed attorney and make his own final closing argument. *S. v. Lewis*, 575.

§ 48. Effective Assistance of Counsel

A defendant convicted of second-degree murder was not denied the effective assistance of counsel by the failure of his counsel to investigate and assert the defense of insanity. *S. v. Martin*, 272.

§ 49. Waiver of Right to Counsel

The Court denied defendant's motion for appropriate relief based on absence of knowing and voluntary waiver of counsel as a result of the alleged failure to inform defendant of his right to substitute appointed counsel after withdrawal of his original counsel. *S. v. Jefferson*, 725.

§ 67. Identity of Informants

The trial court was not required by statute or constitutional decisions to compel the State to disclose the identity of a confidential informant so that defendant could attempt to show by the informant that an affidavit for a search warrant was false. *S. v. Creason*, 599.

§ 74. Self-Incrimination Generally

The failure to warn a defendant appearing *pro se*, when he offered to testify in his own behalf, of his right against self-incrimination does not present error. *S. v. Jefferson*, 725.

§ 77. Waiver of Right against Self-Incrimination

Defendant waived his right to object to the cross-examination of him concerning his failure to give a statement to the police after his arrest in violation of his constitutional right to remain silent where trial counsel made no objections to the cross-examination and an exception was inserted into the record in violation of App. R. 10(b). *S. v. Gardner*, 515.

CONTRACTS

§ 2.5. Offer and Acceptance Generally; Substitution of Parties

In an action in which plaintiffs sought to recover sums allegedly due on a contract for construction of a personal residence, the trial court properly granted sum-

CONTRACTS — Continued

§ 27.1. Actions on Contracts; Sufficiency of Evidence of Existence of Contract

The evidence on motion for summary judgment raised a genuine issue of material fact as to breach of contract between plaintiff attorney and defendant Duke Law Journal for plaintiff to write a book review for publication by defendant. *Kaimowitz v. Duke Law Journal*, 463.

CORPORATIONS

§ 6. Right of Stockholders to Maintain Action

Plaintiff failed to show an abuse of discretion in a trial court's denial of his motion for attorneys' fees under G.S. 55-55(d) dealing with shareholder derivative actions. *Miller v. Ruth's of North Carolina, Inc.*, 40.

COSTS

§ 3. Taxing of Costs in Discretion of Court

Where the jury returned a verdict less favorable than an offer of judgment, the trial court erred in ordering defendant to pay the costs of the action including all expert witness fees. *Huff v. Chrismon*, 525.

COURTS

§ 2. Jurisdiction Generally

In an action brought to forfeit defendant's right to a share of his deceased daughter's estate, the trial court properly found jurisdiction pursuant to G.S. 1-75.8(1). *Lessard v. Lessard*, 760.

§ 21.5. Conflict of Laws between States; Tort Actions

The law of South Carolina governed an action for unfair trade practices since that state had the most significant relationship to the occurrence giving rise to the action. *Andrew Jackson Sales v. Bi-Lo Stores*, 222.

§ 21.7. Conflict of Laws between States; Contract Actions

The law of Georgia governed the validity of a covenant not to compete in an employment contract entered in that state. *Wallace Butts Ins. Agency v. Runge*, 196.

CRIMINAL LAW

§ 34.2. Defendant's Guilt of other Offenses; Admission of Inadmissible Evidence as Harmless Error

A deputy's testimony which revealed to the jury that defendant was being sought on other warrants at the time he was arrested on the instant charges was harmless error. *S. v. Lewis*, 575.

§ 34.5. Admissibility of Evidence of other Offenses to Show Identity of Defendant

In a prosecution for armed robbery, the trial court did not err in allowing the State to introduce evidence during the rebuttal stage of the trial tending to show that defendant committed another robbery. *S. v. Cunningham*, 117.

§ 46. Flight of Defendant as Implied Admission

There was no error in the trial court refusing to instruct, after its instructions concerning evidence of flight as an admission or showing of consciousness of guilt,

CRIMINAL LAW — Continued

§ 98.2. Sequestration of Witnesses

The trial judge did not abuse his discretion by allowing an officer to hear another officer's identification of defendant as the driver of a car. *S. v. Davis*, 238.

§ 102.6. Prosecutor's Jury Argument

A prosecutor commited prejudicial error by stating in his argument to the jury that one of the State's witnesses was in jail and that when he asked the witness to testify the witness had answered in an unpleasant manner and that that was why he had failed to testify. *S. v. Caldwell*, 488.

§ 111.1. Particular Miscellaneous Instructions

There was no merit to defendant's contention that the trial judge erroneously instructed the jury on the elements of common law robbery, an offense defendant was not charged with. *S. v. Gardner*, 515.

§ 112. Instructions on Presumptions

There was no error in the trial court refusing to instruct, after its instructions concerning evidence of flight as an admission or showing consciousness of guilt, that the jury could consider the cessation of flight and return in determining whether the combined circumstances amounted to an admission or show of consciousness of guilt. *S. v. Rhinehart*, 615.

§ 122.1. Jury's Request for Additional Instructions

The trial court did not err in permitting the court reporter to read a portion of one witness's testimony to the jury after the jury had retired. *S. v. McDermott*, 786.

§ 138. Severity of Sentence

The trial judge could not refuse to consider evidence of strong provocation and duress or coercion because defendant pled not guilty and presented an alibi defense. *S. v. Brooks*, 298.

In a prosecution for felonious breaking and entering and felonious larceny, the trial court erred in finding as aggravating factors that the offenses were committed for hire or pecuniary gain, and that the defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants. Further, the court erred in failing to find as a mitigating factor that at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offenses to law enforcement officers. *S. v. Gore*, 305.

The trial court erred in finding as an aggravating factor that a lesser sentence would depreciate the seriousness of the crime committed. *S. v. Martin*, 272.

The trial court erred in failing to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing prior to arrest. *Ibid.*

The trial court did not err in failing to find as a mitigating factor for second-degree murder that the relationship between defendant and the victim was extenuating. *Ibid.*

The trial court erred in finding as an aggravating factor in sentencing defendant for second-degree sexual offense and first-degree kidnapping that the victim was very young where the victim was 17 years old. *S. v. Lewis*, 575.

CRIMINAL LAW — Continued

§ 138.1. Severity of Sentence; More Lenient Sentence to Codefendant

The trial court did not err in imposing a more severe sentence upon defendant than that imposed upon a codefendant tried earlier even though the codefendant may have been more culpable, the court found the same aggravating factor as to each defendant, and the court found an additional mitigating factor for defendant. *S. v. White*, 671.

§ 142.3. Particular Conditions of Probation Held Proper

The revocation of defendant attorney's license to practice law for 18 months with the provision that the period of revocation could be reduced to as little as 6 months if defendant satisfied the State Bar of certain moral and competency qualifications was a proper condition of defendant's probation for the crimes of improperly posting bail bond for a person who was not a member of his immediate family and for attempting to interfere with a State's witness. *S. v. Rogers*, 358.

§ 161.1. Necessity for and Form and Requisites of Exceptions Generally

Defendant waived his right to object to the cross-examination of him concerning his failure to give a statement to the police after his arrest in violation of his constitutional right to remain silent where trial counsel made no objections to the cross-examination and an exception was inserted into the record in violation of App. R. 10(b). *S. v. Gardner*, 515.

CUSTOMS AND USAGES

§ 1. Generally

Evidence was not admissible under the U.C.C. to show a "usage of trade" obligating plaintiff fiber manufacturer to fill all orders by defendant carpet manufacturer during the projected market life of a carpet style utilizing fiber manufactured by plaintiff. *Fiber Industries v. Salem Carpet Mills*, 690.

DAMAGES

§ 2. Compensatory Damages Generally

Prospective profits prevented or interrupted by breach of contract are recoverable when it appears that it was reasonably certain that such profits would have been realized except for the breach of contract. *Willis v. Russell*, 424.

§ 7. Liquidated Damages

A liquidated damages clause of a highway construction contract did not require only substantial performance to preclude the assessment of liquidated damages, and liquidated damages could properly be assessed for failure to complete sign and guardrail work on time. *Ledbetter Brothers v. N.C. Dept. of Transportation*, 97.

The liquidated damages provision of a highway construction contract was not an unenforceable penalty and was valid. *Ibid.*

§ 11.1. Circumstances where Punitive Damages Appropriate

Punitive damages are recoverable against intoxicated drivers without regard to the drivers' motives or intent. *Huff v. Chrismon*, 525.

§ 12.1. Pleading Punitive Damages

Plaintiff's complaint was sufficient to state a claim for punitive damages. *Huff v. Chrismon*, 525.

DEAD BODIES

§ 3. Mutilation

Where a medical examiner receives a death report and then makes a subjective determination that an autopsy is advisable and in the public interest, his actions are within the scope of his authority and he is immune from liability unless his actions are motivated by malice or corruption. *In re Grad v. Kaasa*, 128.

A genuine issue of materal fact was presented as to whether defendant medical examiner acted in reckless disregard of plaintiff's rights by conducting an autopsy on the body of plaintiff's husband. *Ibid.*

DECLARATORY JUDGMENT ACT

§ 4. Availability of Remedy in Particular Controversies

A town could not use a declaratory judgment action to have various deeds to property in the town declared void as being in violation of the town's subdivision ordinance. *Town of Nags Head v. Tillett*, 554.

DEEDS

§ 9. Deeds of Gift

The evidence supported the trial court's determination that deeds from deceased's sons to deceased were deeds of gift and void because they were not recorded within two years after their execution. *Patterson v. Wachovia Bank & Trust Co.*, 609.

§ 12. Estates Created by Instruments Generally

Where the granting clause of a 1924 quitclaim deed gave all "right, title and interest" in land to the grantee and the habendum gave the grantee the land "for and during the term of her natural life," the deed conveyed only a life estate to the grantee. *Robinson v. King*, 86.

§ 20. Restrictive Covenants in Subdivisions

The trial court properly granted plaintiffs' motion for summary judgment in an action brought to enjoin defendants from interfering with their use of the subdivision's recreational facilities where a previous Court of Appeals decision had found the identical restrictive covenants and bylaw provisions unenforceable due to vagueness. *Pritchard v. Snug Harbor Property Owners Association*, 781.

§ 20.7. Restictive Covenants; Enforcement Proceedings

The trial court erred in applying the reasonable use test for surface water drainage cases in an action to enforce a restrictive covenant governing drainage easements in a residential subdivision. *Woodward v. Cloer*, 331.

DIVORCE AND ALIMONY

§ 8. Abandonment

The evidence supported a trial court's finding and conclusion that plaintiff abandoned defendant. *Roberts v. Roberts*, 163.

§ 11. Indignities to the Person which Render Life Burdensome

The trial court properly considered the evidence that plaintiff physically abused defendant where plaintiff neither alleged nor raised the defense of condonation. *Roberts v. Roberts*, 163.

DIVORCE AND ALIMONY — Continued

§ 14.3. Sufficiency of Evidence of Adultery

The trial court erred in admitting into evidence defendant's testimony that on the occasions plaintiff abandoned her, he would move into his house and live there alternately with two women since the testimony implied acts of adultery. *Roberts v. Roberts*, 163.

§ 17. Alimony upon Divorce from Bed and Board Generally

In an action in which the trial court awarded defendant divorce from bed and board, alimony and attorney's fees, the evidence was insufficient to support the award of alimony. *Roberts v. Roberts*, 163.

§ 17.3. Amount of Alimony upon Divorce from Bed and Board

There was no error in the trial court allowing a witness to testify concerning his computation of defendant's prospective tax liability on her alimony receipts even though the witness was never formally accepted by the trial court as an expert witness. *Whedon v. Whedon*, 191.

§ 18.16. Attorney's Fees

An award of attorney's fees in an action brought for modification of a separation agreement could not stand where the trial court made no finding as to plaintiff's good faith in bringing the action. *Voshell v. Voshell*, 733.

§ 19.1. Jurisdiction to Modify Decree

A district court in Mecklenburg County had no jurisdiction in an action for money judgments for arrearages in alimony and child support and to modify an alimony decree because of a change in circumstances where there was a judgment in Cumberland County as to these matters. *Lessard v. Lessard*, 760.

§ 19.3. Modification of Decree; Requirement of Changed Circumstances

The trial court erred in modifying a separation agreement where the facts did not support the conclusion that a substantial change of condition had occurred. *Voshell v. Voshell*, 733.

§ 20.2. Divorce as Affecting Right to Alimony; Effect of Separation Agreements

There was no error in a trial court's refusal to allow defendant to put on evidence of changed circumstances where plaintiff wife's action was clearly an action in contract to enforce the terms of a 1980 separation agreement. *Doub v. Doub*, 718.

§ 20.3. Attorney's Fees

In an action for divorce from bed and board, the trial court erred in awarding attorney's fees where it failed to make the required findings of fact upon which a determination of the reasonableness of the fees could be based, and where the issues of dependency in the amount of alimony had been vacated. *Roberts v. Roberts*, 163.

It was the trial court's duty, when presented with plaintiff's motion for an involuntary dismissal of defendant's request for attorneys' fees, to examine the quality of defendant's evidence and make a ruling on the merits. *Whedon v. Whedon*, 191.

§ 21.6. Enforcement of Alimony Awards; Effect of Separation Agreements

Where the rights of the parties with respect to the marital home were governed by a separation agreement, and the agreement called for a division of the

DIVORCE AND ALIMONY — Continued

proceeds after it was sold, it was error for the court to order defendant to pay $5,000 in exchange for her interest in the marital home where the property had still not been sold. *Voshell v. Voshell*, 733.

§ 21.9. Equitable Distribution of Marital Property Generally

A separation agreement entered into between plaintiff and defendant was a property settlement and was an insurmountable bar to defendant's claim for equitable distribution. *Dean v. Dean*, 290.

A prior separation agreement fully disposed of the spouses' property rights arising out of the marriage, and the trial court properly granted summary judgment on defendant wife's counterclaim for equitable distribution of certain personal property. *McArthur v. McArthur*, 484.

An order in a divorce action of unequal division of the marital property may be justified only if the trial court finds that facts exist which compel the conclusion that an equal division would not be equitable. *Alexander v. Alexander*, 548.

North Carolina's equitable distribution statute is not unconstitutionally vague in that it sets forth reasonably clear guidelines and definitions for courts to interpret and administer it uniformly and in accordance with the legislative intent. *Ellis v. Ellis*, 634.

While the better practice in a divorce case would be for the court to specifically state in the judgment that it concluded that an equal division of the marital property would not be equitable, and that it had considered the enumerated factors as required in reaching this conclusion, the court is not required to state this. *Ibid.*

§ 23.3. Child Custody and Support; Jurisdiction after Divorce

Where the issues of child custody and support had been ruled on by the trial court, the trial court retained jurisdiction to entertain defendant's motion in the cause for child custody and support and sequestration of the marital home for the benefit of the children. *Jackson v. Jackson*, 499.

§ 24. Child Support Generally

A lump sum award of back child support was proper where it was based upon amounts actually expended on behalf of the child. *Warner v. Latimer*, 170.

§ 24.1. Determining Amount of Child Support

The evidence supported the trial court's determination that $500 per month in child support from defendant father was required to meet the reasonable needs of the child. *Warner v. Latimer*, 170.

§ 24.2. Effect of Separation Agreements on Amount of Child Support

The trial court properly found that a separation agreement contemplated that $500 of the amount paid by plaintiff husband to defendant wife for support each month was for child support and that plaintiff was entitled to reduce his support by $500 per month after he was given custody of the children. *Rustad v. Rustad*, 58.

§ 24.9. Child Support; Findings

The amount of child support was properly determined and established by the trial court. *Gibson v. Gibson*, 566.

§ 26. Modification of Foreign Orders Generally

The trial court erred in determining the question of enforceability of a Massachusetts custody order based on whether it complied with the terms of G.S. 50-13.5(d)(2) rather than the provisions of the UCCJA. *Copeland v. Copeland*, 276.

ELECTRICITY — Continued

§ 5. Position of Wires in General

The trial court erred in entering summary judgment for defendant power company in an action to recover for the death of plaintiff's intestate who was electrocuted when he entered a cabinet used in connection with defendant's electric distribution lines. *Cole v. Duke Power Co.*, 159.

EMINENT DOMAIN

§ 2. Acts Constituting a "Taking"

There was a taking of the plaintiff's property when the defendant placed buildings on the ground over the plaintiff's underground wires so that the plaintiff could not reach the wires even though there was no evidence that the wires were not now functioning properly. *Century Communications v. Housing Authority of City of Wilson*, 293.

EQUITY

§ 1.1. Nature of Equity

The "clean hands" doctrine did not preclude plaintiff's action to recover for money expended and labor performed on a house and lot which was titled in defendant's name while the parties were living together before plaintiff's divorce from another woman. *Collins v. Davis*, 588.

EVIDENCE

§ 11. Transactions or Communications with Decedent or Lunatic in General

The Dead Man's Statute did not operate to exclude the admission of the will and power of attorney of plaintiff's deceased husband. *Craig v. Calloway*, 143.

§ 11.8. Waiver of Right to Rely on Dead Man's Statute

Service by defendants of interrogatories concerning transactions or communications with the deceased, which elicited without objection otherwise incompetent evidence, constituted a waiver by defendant of the protection of G.S. 8-51 in an action for fraud and unfair trade practices. *Lee v. Keck*, 320.

§ 15. Relevancy of Evidence in General

In an action seeking payment of insurance proceeds, testimony that there were tire tracks beside the insured's body was irrelevant; however, it had no probative value and could not have prejudiced plaintiff in the context in which it was offered. *Jones v. All American Life Ins. Co.*, 582.

§ 15.2. Relevancy and Competency of Evidence; Particular Circumstances

In an action to compel payment of life insurance proceeds where defendant insurance company refused to pay the policy proceeds to plaintiff on the ground that she had murdered the insured, testimony that plaintiff's son did not cooperate with investigating officers who came to her house with a search warrant had some probative value and was properly admitted where one of defendant's theories was that plaintiff procured her sons to kill the insured. *Jones v. All American Life Ins. Co.*, 582.

EVIDENCE — Continued

§ 22.1. Evidence at Former Trial or Proceeding of Another Case Arising from same Subject Matter

There was no error in the trial court's making findings of fact based upon the deposition taken in another action arising from the same subject matter. *Stanback v. Westchester Fire Ins. Co.*, 107.

§ 25. Photographs

The trial court did not commit prejudicial error in refusing to admit a photograph to illustrate a witness' testimony. *Wells v. French Broad Elec. Mem. Corp.*, 410.

In an action to compel payment of life insurance proceeds, use of slides of the insured's body to illustrate the medical examiner's testimony was proper. *Jones v. All American Life Ins. Co.*, 582.

§ 32.1. Extrinsic Evidence Affecting Writings; Requirement of Integration

The parol evidence rule permits the introduction of extrinsic evidence where a writing only partially integrates the agreement and the evidence does not contradict the writing. *Craig v. Calloway*, 143.

§ 33. Hearsay Evidence in General

In an action to compel payment of life insurance proceeds where defendant refused to pay on the ground that plaintiff had murdered the insured, testimony that the insured had stated that he was going to change the beneficiary of his life insurance policy was not hearsay. *Jones v. All American Life Ins. Co.*, 582.

§ 34.4. Admissions by Nonparties or Third Persons

A statement by the partner of the defendant in a medical malpractice action that plaintiff's vein graft had been inserted backwards was not competent as an admission but was inadmissible hearsay. *Carter v. Carr*, 23.

§ 35. Declarations Constituting Part of the Res Gestae

Declarations made by a participant or a bystander in response to an unusual event without opportunity to reflect or fabricate are admissible as spontaneous utterances. *Nix v. Allstate Ins. Co.*, 280.

The trial court erred in refusing to allow defendant insurer to make an offer of proof for the record of a spontaneous utterance made by plaintiff's wife which may have implicated plaintiff in setting the family automobile afire. *Ibid.*

§ 45. Evidence as to Value

Plaintiff was properly allowed to give her opinion as to the reasonable fair market value of her house on the date of purchase. *Kenney v. Medlin Construction & Realty*, 339.

§ 48. Competency and Qualifications of Experts in General

The trial court could have properly found that a witness was qualified to testify as an expert in the field of land use and values, and the court's failure formally to find that the witness was an expert was not prejudicial error. *Duke v. Hill*, 261.

A witness who was qualified as an expert in the building of residential structures was properly permitted to give an opinion as to the quality of workmanship in and damage to plaintiff's house although he admitted he did not know what caused the damage. *Kenney v. Medlin Construction & Realty*, 339.

HIGHWAYS AND CARTWAYS — Continued

§ 9.1. Actions Against the Highway Commission; Proceedings before Board of Review

An agreement concerning an easement and construction of telephone, water and sewer lines across plaintiffs' property to two rest areas on I-85 constituted a highway construction contract pursuant to G.S. 136-28.1(d), and plaintiffs were therefore required to submit their claim to the State Highway Administrator prior to bringing an action against the Department of Transportation for breach of the agreement. *Allan Miles Cos. v. N.C. Dept. of Transportation*, 136.

HOMICIDE

§ 30.3. Submission of Guilt of Lesser Offenses; Involuntary Manslaughter

Involuntary manslaughter was not a lesser included offense of first-degree murder allegedly committed by intentionally firing a shot into a vehicle occupied by the victim. *S. v. Ataei-Kachuei*, 209.

HOSPITALS

§ 3.2. Liability of Noncharitable Hospital for Negligence of Employees

In a medical malpractice action, the trial court erred by granting the defendant-hospital's motion for summary judgment where there was a genuine issue of fact as to the hospital's liability for the negligence of a nurse anesthetist on agency principles. *Parks v. Perry*, 202.

HUSBAND AND WIFE

§ 12. Separation Agreements; Revocation

Defendant forfeited her life estate in a residence under a separation agreement providing for termination of the life estate if the residence should be occupied as a residence by any other male person. *Barnhill v. Barnhill*, 697.

INJUNCTIONS

§ 10.1. Proceedings in Another State

The trial court properly ruled that plaintiff employer's commencement of an identical suit in South Carolina to enforce a covenant not to compete only minutes after a North Carolina court entered an order dissolving a temporary restraining order prohibiting a violation of the covenant was calculated to harass defendant and frustrate the denial of injunctive relief, and the trial court's order enjoining plaintiff from proceeding with the South Carolina lawsuit pending the outcome of the North Carolina action was proper. *Wallace Butts Ins. Agency v. Runge*, 196.

INSURANCE

§ 35. Right to Proceeds Where Beneficiary Causes Death of Insured

Although plaintiff did not fit the statutory definition of "slayer," defendant's evidence that plaintiff killed or procured the killing of the insured nevertheless created a common law defense to plaintiff's claim for life insurance proceeds, and the defense was properly submitted to the jury. *Jones v. All American Life Ins. Co.*, 582.

INSURANCE — Continued

§ 41. Health Insurance; Inception of Sickness

In an action to recover benefits under a group life and medical insurance policy which became effective on 1 September 1979, the trial court properly found plaintiff's wife was covered for hospitalization after 5 September 1979. *Cantrell v. Liberty Life Ins. Co.*, 651.

§ 87. Automobile Liability Insurance; "Omnibus" Clause; Drivers Insured

The trial court properly found in a declaratory judgment action to determine the liability of defendant on a policy of automobile liability insurance that the lessee's daughter was acting as agent of her father at the time of the accident although the lessee violated the terms of the lease by allowing her to drive the vehicle, and defendant was liable for the full amount of the coverage provided. *American Tours, Inc. v. Liberty Mutual Ins. Co.*, 668.

§ 87.2. Automobile Liability Insurance; Drivers Insured; Proof of Permission to Use Vehicle

In a declaratory judgment action instituted by the insurer of an automobile in which the plaintiff sought a judicial determination of its liabilities under the policy, the trial court erred in granting plaintiff's motion for summary judgment since there was a genuine issue as to whether the driver of the automobile was a resident in her mother's household and as to whether she was operating the vehicle with the permission of its owner. *Lumbermens Mutual Casualty Co. v. Smallwood*, 642.

§ 121. Fire Insurance; Provisions Excluding Liability

A fire in defendant insured's apartment did not arise out of the ownership or maintenance of a motor vehicle (a motorcycle) so that the fire was excluded from coverage under a tenant-homeowner's insurance policy where the fire was caused by the insured's handling of combustible materials in the vicinity of ignition sources. *Nationwide Mut. Fire Ins. Co. v. Allen*, 184.

§ 129. Cancellation of Fire Policies

A fire insurance policy was canceled pursuant to a power of attorney given to the lender which financed the policy premium. *Freeman v. Reliance Ins. Co.; Chamblee v. Reliance Ins. Co.*, 620.

§ 149. Liability Insurance

The trial court properly concluded that a complaint filed by plaintiff's former wife in another action in which she sought to recover damages for personal injury was within the coverage afforded by the defendant's policy, and that the defendant was required to provide a defense for plaintiff in that action. *Stanback v. Westchester Fire Ins. Co.*, 107.

Where an exclusion provision in an insurance policy tended to exclude intentional torts from coverage but the policy defined "personal injury" to include several listed intentional torts, there was an ambiguity in the policy, and given the construction most favorable to the insured, the policy did not exclude intentional infliction of mental anguish and malicious prosecution from its coverage. *Ibid.*

Where recovery is had for breach of an insurance contract and the amount of recovery is ascertained from relevant evidence, such as billing dates for services rendered by lawyers, interest should be, and was properly, added to the recovery from the date of the breach. *Ibid.*

INTOXICATING LIQUOR

§ 2.4. Grounds for Revocation of License

A trial court properly affirmed an order issued by the North Carolina Alcoholic Beverage Control Commission cancelling petitioner's malt beverage and unfortified wine permit where petitioner failed to meet the qualification of G.S. 18B-1000(6) in that its gross receipts from alcoholic beverages were greater than its gross receipts from non-alcoholic beverages and food. *AGL, Inc. v. Alcoholic Beverage Control Comm.*, 604.

Petitioner's off-premise malt beverage and wine permits were properly revoked on the ground that petitioner allowed the consumption of malt beverages upon the licensed premises. *Hunter v. Alcoholic Beverage Control Comm.*, 638.

JOINT VENTURES

§ 1. Generally

In an action to recover for injuries received by minor plaintiffs when they were struck by a car while watching the Anheuser-Busch Clydesdale Horse Show in a shopping center parking lot, any negligence on the part of the shopping center's agents could not be imputed to defendants under a "joint enterprise" theory. *Kilpatrick v. University Mall; Badgett v. University Mall*, 629.

JUDGMENTS

§ 10. Construction and Operation of Consent Judgments

There was competent evidence in the record to support a trial court's ruling that plaintiffs had complied with a consent judgment *as the court interpreted it. Horne v. Flack*, 749.

§ 37.4. Preclusion or Relitigation of Judgments in Particular Proceedings

Plaintiff was estopped to relitigate the issue of whether defendant law firm divulged confidential information about plaintiff to the other defendants. *Lowder v. Lowder*, 505.

KIDNAPPING

§ 1.2. Sufficiency of Evidence

The evidence was sufficient for the jury to find that defendant removed the victim from the trailer where she was residing without her consent so as to support his conviction of kidnapping. *S. v. Lewis*, 575.

LANDLORD AND TENANT

§ 13.3. Notice of Renewal

Where a lease required written notice of an intent to extend and an increased rental for the extended term, plaintiff lessors did not waive the written notice requirement by their acceptance of the original rent for 15 months after expiration of the original term. *Royer v. Honrine*, 664.

LIMITATION OF ACTIONS

§ 8.3. Accrual of Cause of Action in Particular Fraud Actions

The three-year statute of limitations for fraud or mistake does not commence to run "until the discovery by the aggrieved party of the facts constituting the

MECHANICS' LIENS

§ 1. Nature and Extent of Mechanics' Liens

Intervenor had a lien for towing and storage of attached vehicles pursuant to a contract with the sheriff and had a right to intervene in the principal action to assert such lien. *Case v. Miller*, 729.

Intervenor's lien for towing and storage of attached vehicles was not extinguished when the vehicles were sold pursuant to court order and was not barred because notice of the claim was not filed with deceased defendant's executor within six months after the notice to creditors was published. *Ibid.*

MORTGAGES AND DEEDS OF TRUST

§ 19.6. Foreclosure and Sale; Grounds for Injunctive Relief

There was no error in the trial court's denying the substitute trustee the right to proceed with foreclosure after default on a note where the wife's signature on the note was unauthorized, in that the husband directed his secretary to sign his wife's name to the instrument. *In re Foreclosure of Mills*, 694.

MUNICIPAL CORPORATIONS

§ 2.3. Annexation; Compliance with Specific Requirements

A judgment upholding an annexation ordinance was supported by findings that the annexed area directly abuts the city's municipal boundary and that at least one-eighth of the aggregate external boundaries of the annexed area coincide with the city's boundary. *Livingston v. City of Charlotte*, 265.

§ 2.4. Remedies to Attack Annexation

Allegations in a petition for judicial review of an annexation ordinance that city officials improperly attempted to cause the council of a nearby city to deny petitioner a fair hearing on a voluntary annexation petition were irrelevant and properly stricken. *Livingston v. City of Charlotte*, 265.

§ 30. Power of Municipality to Zone Generally

A town could not use a declaratory judgment action to have various deeds to property in the town declared void as being in violation of the town's subdivision ordinance. *Town of Nags Head v. Tillett*, 554.

A town was not authorized by G.S. 160A-375 to have deeds to property in the town declared void because the conveyances violated the town's subdivision ordinance. *Ibid.*

§ 30.10. Zoning; Particular Requirements and Restrictions

The trial court erred in requiring a town to issue a building permit to defendants for a lot which did not meet the requirements of the town's subdivision ordinance. *Town of Nags Head v. Tillett*, 554.

NARCOTICS

§ 5. Verdict

A verdict finding defendant guilty of possession of LSD "with intent to sell or deliver" was uncertain and will be treated as a verdict convicting defendant of the lesser included offense of possession of LSD. *S. v. Creason*, 599.

NEGLIGENCE

OBSTRUCTING JUSTICE

PARENT AND CHILD

§ 1.5. Procedure for Termination of Parental Rights

The trial court erred in terminating respondent mother's parental rights for failure to pay a reasonable portion of the costs of care for her three children where the court failed to make findings as to respondent's ability to pay some portion of the costs of child care. *In re Moore*, 300.

§ 2.2. Child Abuse

An order adjudicating respondent's two minor daughters to be abused and neglected and ordering custody of the children in the County Department of Social Services was supported by the findings of fact and the conclusions of law. *In re Gwaltney*, 686.

§ 7. Parental Duty to Support Child

Defendant father was not liable for the hospital expenses of his minor child where the mother and father were divorced and the mother had legal custody of the child. *Alamance County Hospital v. Neighbors*, 771.

§ 8. Liability of Parent for Torts of Child

Plaintiff's complaint was sufficient to state a claim against defendant parents for an assault committed by their son. *Vinson v. McManus*, 763.

§ 9. Prosecutions for Nonsupport

In an action in which defendant was tried and convicted in district court for failure to support his legitimate child, the superior court did not obtain jurisdiction of a charge of failure to support an illegitmate child since the statement of charges filed in the superior court changed the nature of the offense that the defendant was charged with and convicted of in the district court. *S. v. Caudill*, 268.

§ 10. Uniform Reciprocal Enforcement of Support Act

The Uniform Reciprocal Enforcement of Support Act gave the courts of this State statutory authority for the exercise of personal jurisdiction over a nonresident father upon motion by the mother for garnishment of alleged arrearages under a Georgia child support order which had been registered in Randolph County, and the father had sufficient minimum contacts with this State so that the exercise of personal jurisdiction over him did not violate due process. *Stevens v. Stevens*, 234.

Garnishment was a proper remedy for the enforcement of a Georgia child support order pursuant to the Uniform Reciprocal Enforcement of Support Act, and service of a motion in the cause for garnishment was proper process. *Ibid.*

The registration provisions of the Uniform Reciprocal Enforcement of Support Act apply so as to allow enforcement in North Carolina of foreign support orders entered prior to 1 October 1975. *Ibid.*

PARTITION

§ 3.2. Parties in Proceedings for Judicial Partition

In a special proceeding for the partition of certain land held as a tenancy in common, there was no error and the court did not express an opinion by refusing to join the purchasers at the partition sale which followed as parties. *Ingram v. Craven*, 502.

PROCESS

§ 6. Subpoena Duces Tecum

There was no abuse of discretion in the trial court's quashing a subpoena *duces tecum* which plaintiffs obtained for the production of all movant's time cards and records of all work over an eight year period. *Ward v. Taylor*, 74.

§ 9.1. Personal Service on Nonresidents in Another State; Minimum Contacts Test

The Uniform Reciprocal Enforcement of Support Act gave the courts of this State statutory authority for the exercise of personal jurisdiction over a nonresident father upon motion by the mother for garnishment of alleged arrearages under a Georgia child support order which had been registered in Randolph County, and the father had sufficient minimum contacts with this State so that the exercise of personal jurisdiction over him did not violate due process. *Stevens v. Stevens*, 234.

No grounds existed for the exercise of personal jurisdiction over the nonresident defendant, and the exercise of such jurisdiction would violate due process under the minimum contacts test. *McMahan v. McMahan*, 777.

QUASI CONTRACTS AND RESTITUTION

§ 2.1. Sufficiency of Evidence in Actions to Recover on Implied Contracts

Plaintiff's evidence was sufficient to support his claim of unjust enrichment for his contributions to the purchase and improvement of a house and lot titled in defendant's name while the parties were living together. *Collins v. Davis*, 588.

RAPE AND ALLIED OFFENSES

§ 4.3. Evidence of Unchastity of Prosecutrix

In a prosecution for second-degree rape and second-degree sexual offense, evidence of the complainant's prior consensual intercourse with her former boyfriend earlier in the evening of defendant's alleged offenses did not qualify for admission under the closely resembling pattern exception of G.S. 8-58.6(b)(3). *S. v. Rhinehart*, 615.

§ 6. Instructions

In a prosecution for second-degree rape and second-degree sexual offense, the trial court's instructions on consent were clearly sufficient to convey the substance of defendant's request for a charge that consent is a defense to the crime of rape. *S. v. Rhinehart*, 615.

RECEIVERS

§ 1.2. Remedies against Void and Irregular Orders

Attacks on the validity of receiverships by collateral actions are not permissible under North Carolina law. *Hudson v. All Star Mills*, 447.

An action alleging that receivers, bankruptcy trustees and their attorneys negligently failed to prosecute an action to recover a debt due to the insolvent corporation constituted an improper collateral attack on the receivership court's jurisdiction. *Lowder v. Doby*, 491.

Plaintiffs' attempt to have some court, other than the receivership court, declare that seized property did not fall within the control of the receivership court was an impermissible attempted collateral attack on a receivership action. *Lowder v. Rogers*, 507.

REFORMATION OF INSTRUMENTS

§ 7. Sufficiency of Evidence

There was a mutual mistake of the parties in a deed to the extent that it did not reflect the intent that the deed should convey all interests in a tract of land to plaintiffs subject to a third party's life estate in a ½ acre portion thereof. *Avery v. Haddock*, 452.

RULES OF CIVIL PROCEDURE

§ 4. Process

The misstatement of defendant's name in the captions on the summons and complaint was a harmless misnomer and without jurisdictional significance. *Paramore v. Inter-Regional Financial*, 659.

§ 8.1. Complaint

The defendant in a medical malpractice action did not open the door to the admission of evidence of the original prayer for relief which stated a specific demand for monetary relief exceeding $10,000 in violation of G.S. 1A-1, Rule 8(a)(2). *Carter v. Carr*, 23.

§ 12.1. Defenses and Objections; When and How Presented

In an action in which plaintiff's complaint was sufficient to allege a claim for relief for breach of the implied warranty which accompanied the sale of a newly constructed dwelling, the trial court erred in granting defendant's motion for either judgment on the pleadings or for summary judgment. *Towery v. Anthony*, 216.

§ 15.1. Discretion of Court to Grant Amendment of Pleadings

In an action in which conversion of certificates of deposit was alleged, the trial court did not abuse its discretion in denying defendants' motion to amend their answer. *Myers v. Myers*, 177.

§ 15.2. Amendment of Pleadings to Conform to Evidence

The trial court did not err in permitting defendants to present evidence of abandonment of an easement and to amend their pleadings to conform to such evidence. *Horton v. Goodman*, 655.

§ 19. Necessary Joinder of Parties

In an action on a promissory note by a merged bank, the absence of the surviving bank, the real party in interest, from the action did not warrant a directed verdict, but the trial court should have granted a continuance to permit the real party in interest to be substituted or should have corrected the defect by an *ex mero motu* ruling. *Carolina First Nat'l Bank v. Douglas Gallery of Homes*, 246.

Where defendant failed to show real prejudice in not having had the real party in interest joined at the original trial, the court's directed verdict in favor of plaintiff will be left intact, but the case will be remanded to the trial court to amend the pleadings and substitute the real party in interest in its verdict. *Ibid.*

§ 25. Substitution of Parties upon Transfer of Interest

Rule 25(d) does not authorize a merged bank to continue prosecuting an action. *Carolina First Nat'l Bank v. Douglas Gallery of Homes*, 246.

§ 33. Interrogatories

Defendant failed to meet his burden of showing some actual potential prejudice in the denial of defendants' motion for a protective order after being served with interrogatories. *Lee v. Keck*, 320.

RULES OF CIVIL PROCEDURE — Continued

§ 41.1. Voluntary Dismissal; Dismissal without Prejudice

The filing of notice of dismissal, while it may terminate adversary proceedings in a case, does not terminate the court's authority to enter orders apportioning and taxing costs. *Ward v. Taylor*, 74.

§ 41.2. Dismissal in Particular Cases

It was the trial court's duty, when presented with plaintiff's motion for an involuntary dismissal of defendant's request for attorneys' fees, to examine the quality of defendant's evidence and make a ruling on the merits. *Whedon v. Whedon*, 191.

§ 43. Evidence

The trial court erred in refusing to allow defendant insurer to make an offer of proof for the record of a spontaneous utterance made by plaintiff's wife which may have implicated plaintiff in setting the family automobile afire. *Nix v. Allstate Ins. Co.*, 280.

§ 50. Motions for Directed Verdicts and Judgments n.o.v.

Petitioner's failure to move for a directed verdict at the close of her own evidence or at the close of all the evidence, justified the trial court's denial of her motion for judgment n.o.v. *Wiseman v. Wiseman*, 252.

Defendant waived the right to assign error to the denial of his motion for a directed verdict made at the close of plaintiff's evidence where, after presenting his own evidence, he did not renew his motion at the close of all the evidence. *Citrini v. Goodwin*, 391.

§ 51. Instructions to Jury

The trial court did not err in denying plaintiff's oral request for a special instruction where plaintiff failed to submit a proposed instruction and failed to submit her request in writing. *Hord v. Atkinson*, 346.

§ 55. Default

A clerk of court may properly enter a default when no reply is timely filed in response to a counterclaim. *Beard v. Pembaur*, 52.

The trial court acted under a misapprehension of the law to the extent that it required plaintiff to show excusable neglect or a meritorious defense in order to set aside an entry of default on a counterclaim. Even if the court properly used the standard of good cause, it abused its discretion in refusing to set aside the entry of default. *Ibid.*

The trial court erred in entering default judgment against plaintiff on defendant's counterclaim where plaintiff filed a reply to the counterclaim after entry of default. *Ibid.*

§ 56. Summary Judgment

The trial court had authority under G.S. 1A-1, Rule 56(f) to allow defendant additional time to file affidavits in opposition to plaintiff's motion for summary judgment, and the trial court did not abuse its discretion in so allowing. *Jones v. All American Life Ins. Co.*, 582.

§ 56.4. Summary Judgment; Necessity for and Sufficiency of Supporting Material; Opposing Party

In an action in which plaintiff's complaint was sufficient to allege a claim for relief for breach of the implied warranty which accompanied the sale of a newly

RULES OF CIVIL PROCEDURE — Continued

constructed dwelling, the trial court erred in granting defendant's motion for either judgment on the pleadings or for summary judgment. *Towery v. Anthony*, 216.

Defendant's assertion in an affidavit that he would produce chemical experts at trial to support his contentions was insufficient to show that there was a genuine issue for trial. *Dixie Chemical Corp. v. Edwards*, 714.

§ 59. New Trials

The trial court properly granted plaintiff a new trial for misconduct by the jury where some jurors were observed during a court recess standing by defense counsel's table looking at a drawing which the court had refused to receive into evidence. *Elks v. Hannan*, 757.

§ 60. Relief from Judgment or Order

In an action instituted by plaintiff to set aside a clerk's order setting aside a final order of defendant's adoption, the trial court had jurisdiction to hear plaintiff's motion. *Flinn v. Laughinghouse*, 476.

§ 60.2. Grounds for Relief from Judgment or Order

The trial court in a medical malpractice action did not err in denying plaintiff's Rule 60(b)(3) motion for relief from a judgment on the ground that plaintiff's husband had discussed the facts of her case with the attorney who represented defendant at trial. *Carter v. Carr*, 23.

The filing of notice of dismissal, while it may terminate adversary proceedings in a case, does not terminate the court's authority to enter orders apportioning and taxing costs. *Ward v. Taylor*, 74.

§ 60.4. Relief from Judgment or Order; Appeal

The abuse of discretion test was used as the standard of review of the denial of a Rule 60(b)(3) motion for relief from a judgment. *Carter v. Carr*, 23.

§ 68. Offer of Judgment

Where the jury returned a verdict less favorable than an offer of judgment, the trial court erred in ordering defendant to pay the costs of the action including all expert witness fees. *Huff v. Chrismon*, 525.

SALES

§ 6.4. Warranties in Sale of House by Builder-Vendor

Plaintiff's evidence was sufficient for the jury in an action to recover for breach of an implied warranty of workmanlike quality in the construction of plaintiff's house. *Kenney v. Medlin Construction & Realty*, 339.

§ 19. Measure of Damages for Breach of Warranty

In an action for breach of an implied warranty of workmanlike quality in the construction of plaintiff's house, the trial court did not err in permitting the jury to award plaintiff the costs of repair rather than the diminution in value. *Kenney v. Medlin Construction & Realty*, 339.

SCHOOLS

§ 11. Liability for Torts

In an action arising from an automobile accident involving a driver education vehicle owned by a county board of education, the trial court erred in finding the

SCHOOLS — Continued

driver education vehicle came under the exclusive jurisdiction of the Industrial Commission. *Smith v. McDowell Co. Bd. of Education*, 541.

SEARCHES AND SEIZURES

§ 10. Search and Seizure on Probable Cause

In a prosecution for second degree murder, the trial court erred in failing to suppress evidence of a gun obtained without a warrant where there was neither evidence of exigent circumstances or evidence of consent. *S. v. Jolley*, 33.

§ 24. Application for Warrant; Cases where Evidence of Probable Cause Is Sufficient; Information from Informers

A warrant to search defendant's premises for shotguns used in a robbery was properly issued on the basis of an officer's affidavit stating information received from a confidential informant. *S. v. White*, 671.

STATE

§ 4.3. Actions against State Highway Commission

An agreement concerning an easement and construction of telephone, water and sewer lines across plaintiffs' property to two rest areas on I-85 constituted a highway construction contract pursuant to G.S. 136-28.1(d), and plaintiffs were therefore required to submit their claim to the State Highway Administrator prior to bringing an action against the Department of Transportation for breach of the agreement. *Allan Miles Cos. v. N.C. Dept. of Transportation*, 136.

A "hold harmless" agreement between the general contractor of a highway construction project and a subcontractor's surety did not constitute an assignment of a claim against the State in violation of G.S. 147-62 but was an indemnity agreement, and the indemnitee was the real party in interest with standing to challenge the Department of Transportation's assessment of liquidated damages under the contract. *Ledbetter Brothers v. N.C. Dept. of Transportation*, 97.

STATUTES

§ 3. Vague and Indefinite Statutes

North Carolina's equitable distribution statute is not unconstitutionally vague in that it sets forth reasonably clear guidelines and definitions for courts to interpret and administer it uniformly and in accordance with the legislative intent. *Ellis v. Ellis*, 634.

TAXATION

§ 22. Exemption of Property of Educational Institutions

Pursuant to G.S. 105-282.1(a), the Property Tax Commission properly found that a non-profit corporation's failure to apply for a tax exempt status, after listing its property, prevented the Commission from granting an exemption for the property during the listing period. *In re Wesleyan Education Center*, 742.

§ 25.1. Assessment of Ad Valorem Taxes; Listing

Pursuant to G.S. 105-282.1(a), the Property Tax Commission properly found that a non-profit corporation's failure to apply for a tax exempt status, after listing

TAXATION — Continued

its property, prevented the Commission from granting an exemption for the property during the listing period. *In re Wesleyan Education Center*, 742.

§ 28. Individual Income Tax Generally; Taxable Income

Union strike benefits constituted a gift and not taxable income. *Stone v. Lynch, Sec. of Revenue*, 441.

§ 34. Tax Liens on Realty and Persons Liable

An action brought by plaintiff to foreclose certain tax liens for ad valorem taxes on real estate due the City of New Bern was barred since the action was not instituted within ten years from the date the taxes became due. *Bradbury v. Cummings*, 302.

TORTS

§ 7. Release from Liability

In an action evolving from an automobile accident, appellant's employer's release of all claims against the driver of the automobile involved did not operate to bar appellant's claims against the same driver. *Blauvelt v. Landing*, 779.

TRIAL

§ 5. Course and Conduct of Trial in General

In an action concerning the partition of land, the trial court did not err in allowing appellants' former attorney to remain in the courtroom as a commissioner in partition proceedings even though he had filed a pleading adverse to appellants' interests after appellants terminated his services. *Ingram v. Craven*, 502.

§ 11.3. Order of Jury Argument

Where defendant was called by plaintiff as an adverse witness but offered no evidence of his own, defendant had the right to make the opening and closing jury arguments. *Hord v. Atkinson*, 346.

§ 31. Directed Verdict and Peremptory Instructions

In an action for conversion of certificates of deposit and restitution, the trial court correctly peremptorily instructed on the issue of conversion; however, the trial court erred in peremptorily instructing on the precise sum converted, and thus the amount of plaintiff's damages. *Myers v. Myers*, 177.

§ 38.1. Disposition of Requests for Instructions

The trial court did not err in denying plaintiff's oral request for a special instruction where plaintiff failed to submit a proposed instruction and failed to submit her request in writing. *Hord v. Atkinson*, 346.

§ 42. Form and Sufficiency of Verdict

In a civil action where plaintiff filed suit against defendants seeking to have a deed conveying her property to defendants and reserving a life estate for herself set aside because the defendant failed to supervise her care, maintenance and needs as spelled out in the deed, the trial court properly denied plaintiff's motions for j.n.o.v. and a new trial on the grounds that the jury's verdicts were inconsistent. *Craig v. Calloway*, 143.

TRIAL — Continued

§ 50.1. New Trial for Misconduct of Jury; Particular Acts

The trial court properly granted plaintiff a new trial for misconduct by the jury where some jurors were observed during a court recess standing by defense counsel's table looking at a drawing which the court had refused to receive into evidence. *Elks v. Hannan*, 757.

TRUSTS

§ 13.1. Creation of Resulting Trusts; Express Agreements

Plaintiff's evidence was sufficient to establish a resulting trust in property titled in defendant's name while plaintiff and defendant were living together. *Collins v. Davis*, 588.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

The trial court properly found an unfair or deceptive trade practice pursuant to G.S. 75-1.1 where the evidence tended to show that defendant represented to plaintiff that the tractor plaintiff purchased was a 1975 Peterbilt with a 1975, 400 Cummins engine, and in reality it contained a 1972, 370 Cummins engine. *Bernard v. Central Carolina Truck Sales*, 228.

The evidence on motion for summary judgment was insufficient to support an action for unfair and deceptive trade practices under the law of South Carolina. *Andrew Jackson Sales v. Bi-Lo Stores*, 222.

The trial court properly found the measure of damages to be the value of the truck plaintiff traded in and the total of the monthly payments plaintiff made for his "new" tractor, and the trial court correctly trebled the damages. *Bernard v. Central Carolina Truck Sales*, 228.

The trial court properly failed to grant defendant's motions for directed verdict in an action for unfair and deceptive acts or practices in the attempted sale of a house. *Wilder v. Squires*, 310.

An issue submitted to the jury which stated "did the defendant, J. Ralph Squires, cause $2,460 of the funds held in escrow to be paid to him without consent of the Plaintiff?" adequately supported the theory of coercion which was the theory which plaintiff relied upon to prove unfair acts or practices. *Ibid.*

In an action for unfair or deceptive acts or practices, the issues submitted to the jury supported the trial court's findings of fact and conclusions of law, and the trial court properly documented the matters that led him to conclude and decide as a matter of law that defendant committed an unfair act or practice pursuant to G.S. 75-1.1. *Ibid.*

In an action for an unfair act or practice, the trial court properly awarded attorneys' fees to plaintiff pursuant to G.S. 75-16.1. *Ibid.*

The trial court properly denied defendants' motion for directed verdict at the close of all the evidence in an action for fraud and unfair trade practices. *Lee v. Keck*, 320.

Plaintiffs who recovered treble damages for an unfair trade practice were barred from recovering additional damages for fraud. *Borders v. Newton*, 768.

The trial court did not abuse its discretion in denying attorney fees to plaintiff tenants in an action for unfair trade practices. *Ibid.*

UNIFORM COMMERCIAL CODE

§ 7. The Sales Contract

Evidence was not admissible under the U.C.C. to show a "usage of trade" obligating plaintiff fiber manufacturer to fill all orders by defendant carpet manufacturer during the projected market life of a carpet style utilizing fiber manufactured by plaintiff. *Fiber Industries v. Salem Carpet Mills*, 690.

VENDOR AND PURCHASER

§ 6.1. Liability of Vendor of New Structure; Negligence in Construction

Plaintiff's evidence was sufficient for the jury in an action to recover for breach of an implied warranty of workmanlike quality in the construction of plaintiff's house. *Kenney v. Medlin Construction & Realty*, 339.

§ 8. Purchaser's Right to Damages for Vendor's Breach

In an action for breach of an implied warranty of workmanlike quality in the construction of plaintiff's house, the trial court did not err in permitting the jury to award plaintiff the costs of repair rather than the diminution in value. *Kenney v. Medlin Construction & Realty*, 339.

WATERS AND WATERCOURSES

§ 1. Surface Waters; Drainage and Interference with Natural Flow

The trial court erred in applying the reasonable use test for surface water drainage cases in an action to enforce a restrictive covenant governing drainage easements in a residential subdivision. *Woodward v. Cloer*, 331.

WEAPONS AND FIREARMS

§ 3. Discharging Weapon

The trial court erred in refusing to give defendant's requested instruction that defendant would be justified in discharging a firearm into an occupied motor vehicle if (1) he had probable cause to believe that the person detained had committed a felony in his presence or was attempting to escape from the commission of a felony with the use of a deadly weapon, and (2) he attempted to detain the person in a reasonable manner considering the offense involved and the circumstances of the detention. *S. v. Ataei-Kachuei*, 209.

WILLS

§ 2.3. Contracts to Devise or Bequeath; Enforcement of Agreement

The trial court properly admitted plaintiff's will into evidence even though the will may have been revoked since defendants never sought to prove the validity of the will. *Craig v. Calloway*, 143.

WITNESSES

§ 5.1. Particular Evidence Held Competent for Purpose of Corroboration

Testimony in a medical malpractice action that plaintiff's husband refused to allow plaintiff to be treated at a Medicaid clinic because it was beneath his dignity was admissible to impeach the testimony of plaintiff's husband and to corroborate the witness's later testimony. *Carter v. Carr*, 23.

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina