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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

THOMAS M. SHELTON, III, ALAN CRAIG SHELTON AND GEORGE C. COLLIE, SUCCESSOR TRUSTEE, OF THE TRUST OF THOMAS M. SHELTON, DECEASED, PLAINTIFFS v. FRANCIS H. FAIRLEY, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF THOMAS M. SHELTON, DECEASED; FRANCIS H. FAIRLEY, S. DEAN HAMRICK, JAMES D. MONTEITH AND LAWRENCE A. COBB, INDIVIDUALLY AND AS FAIRLEY, HAMRICK, MONTEITH & COBB, A NORTH CAROLINA PARTNERSHIP, DEFENDANTS, AND LOIS HOLT SHELTON WILSON AND CATHERINE NORELL SHELTON EINHAUS, ADDITIONAL DEFENDANTS

No. 8426SC164

(Filed 18 December 1984)

1. Rules of Civil Procedure § 4— service on attorneys by delivery to one partner at law offices—insufficient as to other partners

Service of process against the partners of a law firm as individuals by delivering summons to one partner at the law offices of the partnership was valid only as to the partner served. The clearly stated provision of G.S. 1A-1, Rule 4(j)(1)a is for personal delivery or delivery at each defendant's residence.

2. Executors and Administrators § 38; Judgments § 35.1— removal of executor—not res judicata to action for damages

A proceeding to remove an executor and to revoke his letters of administration pursuant to G.S. 28-32 is not *res judicata* as to a later civil action for damages between the parties and does not collaterally estop the bringing of such an action. A proceeding to remove an executor and a civil suit for damages are not the same cause of action.

3. Limitation of Actions § 4— statute of limitations—action against executor of estate—notice of claims

In an action for breach of fiduciary duty and damages against the executor of an estate and his attorneys, the statute of limitations did not begin running against plaintiffs' claims at the initial meeting with the executor

because plaintiffs had only a bare knowledge of anticipated losses; when plaintiffs appealed an order granting defendants attorney's fees or when they filed a petition to remove defendant executor because the knowledge which gives rise to those claims is not necessarily sufficient knowledge from which to allege tortious conduct or other claims; or when plaintiffs failed to attack an order reducing commissions and fees because filing a claim for those losses would have been premature before the final accounting. The court should not have dismissed plaintiffs' claims with prejudice based upon the statute of limitations except for one claim against three defendants who were not properly served initially.

Judge PHILLIPS concurring.

APPEAL by plaintiffs from *Griffin, Judge*. Order and judgment entered 3 October 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 October 1984.

Plaintiffs are the successor trustee and the beneficiaries of a testamentary trust established in 1974 and worth, at that time, approximately 4.2 million dollars. Defendants are the executor of the estate, his law firm, and the law firm partners individually.

In 1979 plaintiff-beneficiaries filed a motion pursuant to N.C. Gen. Stat. 28-32 seeking removal of defendant-executor. Defendant-executor thereafter renounced his right to qualify as trustee and, with court approval, subsequently resigned as executor of the estate. In 1980 plaintiffs, again pursuant to N.C. Gen. Stat. 28-32, filed a petition seeking removal of defendant co-trustee. Removal was denied and on plaintiffs' appeal all matters were heard *de novo* in superior court. The court entered an order in August 1981 reducing executor's commissions and attorney's fees from $579,689.99 to $300,000.00. In April 1982 the court signed an order approving a Family Settlement Agreement. Both orders were entered pursuant to N.C. Gen. Stat. Ch. 28, the applicable probate code.[1]

In June 1982 plaintiffs brought the present action for damages, for an accounting and to surcharge the executor for falsifying accounts, breach of fiduciary duty, negligence and legal malpractice. Defendants moved to dismiss as to defendants Fairley, Monteith and Cobb for insufficiency of service of process,

1. The decedent died in 1974, prior to the effective date of current Chapter 28A; former Chapter 28 thus is applicable. *See* Editor's Note to General Statutes Chapter 28A and Session Laws cited therein.

and for summary judgment on the ground that plaintiffs' action was barred by the statute of limitations. Plaintiffs moved for summary judgment as to the defense of res judicata and collateral estoppel. The court denied plaintiffs' motion, granted defendants' motions, and dismissed with prejudice each of plaintiffs' claims. Plaintiffs appeal.

George C. Collie and Charles M. Welling for plaintiff appellants.

Golding, Crews, Meekins, Gordon & Gray, by John G. Golding and Harvey L. Cosper, Jr., for defendant appellees.

WHICHARD, Judge.

I.

[1] The first issue concerns service of process on defendants Fairley, Monteith and Cobb. To exercise personal jurisdiction over a natural person, process must be served in compliance with N.C. Gen. Stat. 1A-1, Rule 4(j)(1). "Where a statute provides for service of summons by designated methods, the specified requirements must be complied with or there is no valid service." *Long v. Board of Education*, 52 N.C. App. 625, 626, 279 S.E. 2d 95, 96 (1981), quoting *Broughton v. DuMont*, 43 N.C. App. 512, 514, 259 S.E. 2d 361, 363 (1979), *disc. rev. denied*, 299 N.C. 120, 262 S.E. 2d 5 (1980). Rule 4(j)(1)a provides for service "[b]y delivering a copy of the summons and of the complaint to [defendant] or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein[.]"

A separate summons issued 30 July 1982 to each of the defendants individually was delivered to defendant Hamrick at the law offices of defendant partnership. This did not accord with the clearly stated provision of Rule 4(j)(1)a requiring personal delivery or delivery at each defendant's residence.

Citing *Wiles v. Construction Co.*, 295 N.C. 81, 243 S.E. 2d 756 (1978), plaintiffs contend that actual notice of the suit cures deficiencies in service of process. In *Hall v. Lassiter*, 44 N.C. App. 23, 25, 260 S.E. 2d 155, 157 (1979), *disc. rev. denied*, 299 N.C. 330, 265 S.E. 2d 395 (1980), this Court held otherwise. It stated, "[W]e do

not believe [the Supreme Court in *Wiles*, 295 N.C. 81, 243 S.E. 2d 756,] intended, by judicial decree, completely to abolish the clearly stated statutory requirements for the service of process in favor of some nebulous concept of actual notice." *Id.* It noted that the defect in *Wiles* was in the form of the summons, not in the manner in which it was served. *Id.*

While *Harris v. Maready*, 311 N.C. 536, 319 S.E. 2d 912 (1984) suggests a movement away from strict compliance with N.C. Gen. Stat. 1A-1, Rule 4(b), we do not believe it changes plaintiffs' obligation in this case to comply with N.C. Gen. Stat. 1A-1, Rule 4(j)(1)a. In *Harris* defendant was personally served with a copy of the summons directed to a co-defendant in the action. The caption of the summons listed defendant's name first among the individual defendants being sued. Because defendant was personally served, the court stated that there was no substantial confusion about the identity of defendant as a party being sued. *Id.* at 544, 319 S.E. 2d at 917. In so doing it specifically did not overrule *Philpott v. Kerns*, 285 N.C. 225, 203 S.E. 2d 778 (1974), which "held that actual notice given in a manner other than that prescribed by statute cannot supply constitutional validity." *Harris*, 311 N.C. at 544, 319 S.E. 2d at 917. It found, rather, that facts which showed personal service on the defendant there were sufficient to meet the requirements of Rule 4. *Id.* at 545, 319 S.E. 2d at 920.

In this case defendants Fairley, Monteith and Cobb were not personally served until they received Alias & Pluries summons issued on 7 June 1983. We conclude that jurisdiction over these defendants was not obtained by delivery of the summons issued 30 July 1982 to their law partner, defendant Hamrick, at the offices of defendant partnership. As to these defendants the action was therefore discontinued until the issuance of Alias and Pluries summons on 7 June 1983, and the statute of limitations was not tolled until that date.

We note that given our disposition of the statute of limitations issue, *infra*, tolling the statute on 7 June 1983 instead of on 30 July 1982 affects only one of plaintiffs' nine claims for relief, barring as to defendants Fairley, Monteith and Cobb the fifth claim which alleges damages in excess of $10,000 for the deterio-

ration of improved real property known as "the Queens Road property."

II.

[2] The second issue concerns the defense of res judicata and collateral estoppel raised by defendants. Defendants contend that this action for damages is barred by the earlier proceeding to remove the executor and revoke his letters of administration pursuant to N.C. Gen. Stat. 28-32. We hold that orders entered in a proceeding under N.C. Gen. Stat. 28-32, in which an executor must show cause why he should not be removed, do not constitute res judicata as to a later civil action for damages between the parties or collaterally estop the bringing of such an action.

Under the doctrine of res judicata a final judgment on the merits by a court of competent jurisdiction is conclusive of rights and facts or issues thereby litigated as to the parties and those in privity with them. *King v. Grindstaff,* 284 N.C. 348, 355, 200 S.E. 2d 799, 804 (1973); *Kabatnik v. Westminster Co.,* 63 N.C. App. 708, 711-12, 306 S.E. 2d 513, 515 (1983). It bars all subsequent actions between the same parties on the same matter. *Id.* It is not a doctrine without limits, however, and its applicability may often be a close question. Commentators have noted that

> [i]n limiting the doctrine, there is support for the rule that judgments relied upon as creating a bar or preclusion are to be construed with strictness (citations omitted) . . . . Hence, the position has been taken that the doctrine of res judicata is to be applied in particular situations as fairness and justice require . . . (citations omitted).

46 Am. Jur. 2d §§ 401, 402, at 568-69.

Reasoning as above, courts have carved out exceptions to the doctrine of res judicata based upon policy reasons. *See, e.g., Spilker v. Hankin,* 188 F. 2d 35 (D.C. App. 1951) (fiduciary relationship between attorney and client supports policy of courts examining closely any transaction between them, which policy should be weighed against that supporting doctrine of res judicata). Our Supreme Court has recognized an exception in instances where a statutory proceeding to remove an executor may be followed by a later civil action. We are instructed by three

cases in particular: *Jones v. Palmer*, 215 N.C. 696, 2 S.E. 2d 850 (1939); *In re Estate of Galloway*, 229 N.C. 547, 50 S.E. 2d 563 (1948); and *In re Estate of Lowther*, 271 N.C. 345, 156 S.E. 2d 693 (1967).

In *Jones v. Palmer*, 215 N.C. 696, 2 S.E. 2d 850, beneficiaries sought to remove administrators by petition pursuant to N.C. Gen. Stat. 28-32. The Court denied removal on the ground that the estate was practically administered. It stated:

> In sustaining the conclusion reached by the court below denying the petition to revoke the letters of administration . . ., this Court does not intend to make the findings of fact and conclusions of the clerk . . . or the judge reviewing them on appeal effective for any other purpose. *They are confined to a consideration of that question alone and do not constitute res judicata in any other proceeding between the parties which the petitioners may be entitled to pursue, and are not to be taken to the prejudice of either party therein.*

Jones v. Palmer, 215 N.C. at 699, 2 S.E. 2d at 853 (emphasis supplied).

Jones thus clearly states that a statutory action to remove administrators or executors is not res judicata in any other proceeding which the parties are entitled to pursue. Defendants have not cited, and we have not found, any case which overrules *Jones* and its progeny or holds to the contrary.

Defendants argue the inapplicability of *Jones* on the ground that the proceedings here were broader than those there. The *Jones* opinion suggests otherwise. The Court there refers to the "voluminous evidence presented to the court in support of [the] contentions." *Id.* at 697, 2 S.E. 2d at 851. The allegations there, moreover, are substantially similar to those here. Plaintiffs in *Jones* alleged payment of excessive commissions, failure to make timely filings, delay in collection of assets, losses due to unnecessary interest charges, sales of property at a loss, unauthorized payment of fees and other losses. These claims are similar to plaintiffs' claims here, *infra*. Nothing in the facts in *Jones* suggests that it should be distinguished from this case. It is true, as defendants note, that its procedural posture is different, but that alone does not persuade us that the legal principles it states are not applicable.

Galloway, 229 N.C. 547, 50 S.E. 2d 563, also concerns a proceeding under N.C. Gen. Stat. 28-32 for revocation of letters of administration. The significant language there is:

> 'This proceeding . . . is neither a civil action nor a special proceeding under the code of civil procedure. Its purpose is not to litigate the alleged rights and liabilities of adverse parties, settle the same, and give judgment against one party in favor of another, but is to require one who is charged by the law with special duties and trusts . . . to show cause . . . why he shall not be removed from his office . . . .'

Galloway, 229 N.C. at 551, 50 S.E. 2d at 566, quoting *Edwards v. Cobb*, 95 N.C. 5 at 9 (1886).

Lowther, 271 N.C. 345, 156 S.E. 2d 693, reaffirms *Galloway* and states, further, that an adjudication of fact by the clerk in a proceeding under N.C. Gen. Stat. 28-32 is not res judicata in any other proceeding between the parties which they may be able to pursue. *Id.* at 356, 156 S.E. 2d at 702.

Thus, under the language of these cases, a proceeding under N.C. Gen. Stat. 28-32 is not res judicata in a civil action for damages. The judgment in the prior proceeding also does not act as an estoppel as to matters litigated and determined therein. The Court makes this point in *Jones* when it states that "the findings of fact and conclusions of the clerk . . . or the judge reviewing them . . . are not to be taken to the prejudice of either party therein." *Jones*, 215 N.C. at 699, 2 S.E. 2d at 853. Prejudice would result if, when beneficiaries sought to remove an executor, they were held to an election of remedies and could not later bring a civil action for damages. Such a policy would either chill exercise of the right to seek statutory removal of an executor or force beneficiaries prematurely to bring civil actions for damages.

Holding that the purpose of N.C. Gen. Stat. 28-32 is "not to litigate the alleged rights and liabilities of adverse parties," *Galloway* at 551, 50 S.E. 2d at 566, is merely a specific application of the broader principle that the doctrine of res judicata does not apply where the second action between the same parties is upon a different claim or demand. *See Hagen v. Hagen*, 205 Va. 791, 794, 139 S.E. 2d 821, 823 (1965); *see also* 46 Am. Jur. 2d § 404 at 572

("[i]f the two actions between the same parties do not involve the same claim, demand, and cause of action, [res judicata] effect will not ordinarily be given to the prior judgment"). Further, finding that a proceeding to remove an executor and a civil suit for damages are not the same cause of action is based upon sound reasoning. The proceeding to remove an executor is purely statutory, with probate jurisdiction vested in the clerk of superior court, N.C. Gen. Stat. 28-1, and reviewable by a superior court judge on appeal. A civil suit for damages involves a full trial with the right to have factual issues resolved by a jury. In this case the relief available to the beneficiaries in the prior proceeding was reduction in executor's commissions and attorney's fees and removal of the executor and the trustee. The present action involves nine claims for relief in the form of money damages for: (1) a loss of $380,000 in the dissolution of decedent's company; (2) a loss in excess of $306,000 in interest penalties and premiums; (3) and (5) losses in excess of $10,000 each from the deterioration and subsequent sale of improved real estate; (4) a loss in excess of $10,000 due to the sale of an oil company and a corporation; (6) reimbursement for $300,000 paid in executor's commissions and attorney's fees; and (7), (8) and (9) respectively, reimbursement for administrative expenses in excess of $10,000, miscellaneous and consequential damages, and punitive damages.

Clearly there is no identity of the matters sued for in the prior proceeding and the present action. Such identity has been declared a prerequisite to the application of the doctrine of res judicata. *Matthews v. Matthews*, 133 So. 2d 91, 94 (Fla. App. 1961). Moreover, "[t]he res judicata doctrine precluding relitigation of the same cause of action has been held inapplicable where the performance of an act was sought in one action and a money judgment in the other." 46 Am. Jur. 2d § 412, at 580.

We are cognizant that relitigation of some issues may result under our holding. That is contemplated by the applicable law, however, which is sound for the policy reasons stated above.

For the foregoing reasons the portion of the Order and Judgment denying plaintiffs' motion for summary judgment as to defendants' Fourth Defense, that the orders in the prior proceeding constitute res judicata and collaterally estop plaintiffs from maintaining this action, is reversed; upon remand, the trial court shall allow the motion.

III.

[3] The third issue concerns the bar of the statute of limitations. In *Tyson v. N.C.N.B.*, 305 N.C. 136, 142, 286 S.E. 2d 561, 565 (1982), our Supreme Court held that a suit to recover damages from an executor for breach of fiduciary duty is essentially grounded in contract and subject to the three-year limitation of N.C. Gen. Stat. 1-52(1). Recently, this Court noted that the cause of action accrues at the date of the alleged breach or, at the latest, on the date it is discovered. *Bruce v. N.C.N.B.*, 62 N.C. App. 724, 727, 303 S.E. 2d 561, 563 (1983).

Plaintiffs contend that the statute of limitations against a defendant in a fiduciary relationship does not begin to run until termination of the relationship. Plaintiffs cite 8 Strong's Index 3d, Limitation of Actions, Sec. 7, p. 383, which in turn cites *Franklin v. Franks*, 205 N.C. 96, 170 S.E. 113 (1933) (fiduciary relationship does not prevent a defendant pleading the statute of limitations as a bar to recovery against him). *Franklin* provides no authority for plaintiffs' theory, however, and we have found none elsewhere.

Defendants contend that as to eight of plaintiffs' nine claims (the ninth being for punitive damages) the breach or the discovery of it occurred more than three years prior to the filing of plaintiffs' suit. The test on their motion for summary judgment is whether on the basis of the materials presented to the court there is any genuine issue as to any material fact. *Snyder v. Freeman*, 40 N.C. App. 348, 353, 253 S.E. 2d 10, 13 (1979). If there is a question of fact as to when the breach or discovery of it occurred, and when the statute of limitations thus began to run, summary judgment on that issue is not appropriate. *Id.*

We deal with each of plaintiffs' claims in turn:

The first claim alleges a loss of approximately $380,000 from the negligent operation and liquidation of the Mellon Company. For federal estate tax purposes, the company was valued at $341,000. Plaintiffs contend they were not aware of the dissipation of cash, cash equivalents, inventory, and tangible assets, until the filing of the sixth annual account, dated 11 December 1980, which showed $2,108.17 cash received on dissolution of the company. Defendants contend that the finding of fact in the order of

August 1981 controls. That finding states: at the initial meeting between plaintiff-beneficiaries and defendant-executor on 7 August 1974 plaintiffs "approved the continuation of the Mellon business in spite of . . . anticipated losses."

On the basis of this finding defendants contend plaintiffs' cause of action arose 7 August 1974. In the alternative defendants contend it arose on 16 November 1979 when the beneficiaries filed their Petition for Removal of defendant-executor.

We agree with plaintiffs. At the time of the "initial meeting" between executor and beneficiaries, the latter had only a bare knowledge of anticipated losses which did not, without more, give rise to an action for negligence and breach of fiduciary duty. At the time they filed the Petition for Removal plaintiffs alleged grounds for removal which were neither identical to grounds for a recovery of civil damages nor sufficient grounds therefor.

We hold that as to the first claim for relief, plaintiffs' cause of action arose on 11 December 1980 with the filing of the sixth annual account. The first claim was thus commenced within the statutory period. As to that claim the court's dismissal with prejudice is reversed.

The second claim alleges a loss in excess of $306,000 for payment of penalties and interest due to defendants' failure to pay estate and inheritance taxes on a timely basis. Defendants contend plaintiffs' cause of action arose on 16 July 1979. At that time defendants, in a petition which included a recital as to the filing of estate and inheritance taxes, sought attorney's fees. Plaintiffs appealed the order granting the fees. In the alternative defendants contend plaintiffs' cause of action arose on 16 November 1979 when plaintiffs filed their Petition for Removal of defendant-executor.

We have determined, *supra*, that an action to remove an executor and a civil suit for negligence and breach of fiduciary duty are not the same cause of action for res judicata purposes. Neither is knowledge which gives rise to a petition to reduce attorney's fees or to remove an executor necessarily sufficient knowledge from which to allege tortious conduct. Plaintiffs' Petition of 16 November 1979, to which defendants refer us, does not allege willful, wanton, or negligent conduct as to the tardy pay-

ment of taxes. It gives no indication plaintiffs knew or suspected that they had a claim for such conduct. Whether that knowledge did not arise until filing of the final account dated 3 March 1981, thus placing plaintiffs' claim within the statutorily permissible period, is a genuine issue of material fact for the jury. As to the second claim the court's dismissal with prejudice is reversed, and the cause is remanded for jury trial on the issue of when plaintiffs' knowledge of the claim arose.

Plaintiffs' third claim alleges losses in excess of $10,000 from the deterioration and subsequent sale of improved real property known as Greystone, a reproduction of a medieval castle owned by decedent. Defendants contend plaintiffs' cause of action arose on 16 November 1979 with the filing of the Petition for Removal. The Petition states that defendant-executor "allowed estate property . . . known as . . . Greystone . . . to become extremely rundown and to decay to such an extent that the fair market value . . . was greatly diminished . . . . [T]he executor failed to fulfill his duty reasonably and properly to make such repairs . . . as would maintain [the property's] value." Plaintiffs contend they had no actual knowledge of the extent of their loss until the filing of the fifth amended annual account on 4 August 1980. We agree with plaintiffs.

We find the following pertinent dates in the record: 11 August 1978, letter from plaintiffs' counsel to defendant-executor indicating the property had not yet been sold; 16 November 1979, Petition for Removal which does not refer to the sale of the property; 4 August 1980, filing of fifth amended annual account which refers to a cash sale of all Greystone property for $300,000. The record is silent as to the date this asset was disposed of.

We find that as to the third claim for relief, plaintiffs' cause of action arose on 4 August 1980 and was thus brought within the statutory period. As to that claim the court's dismissal with prejudice is reversed.

Plaintiffs' fourth claim alleges conspiracy in the transfer of improved and unimproved real estate in Watauga County, North Carolina, including the sale of Pitts Oil Company and Grandfather Corporation, and seeks damages in excess of $10,000. The record discloses that the sale of Pitts Oil Company and Grandfather Corporation took place "on or about July, 1976." The 16 November

1979 Petition for Removal states that the executor has expressed "a division of interest and loyalty between the beneficiaries . . . and certain individuals . . . . [T]he executor has shown great favoritism . . . in the marketing of estate assets and . . . certain properties located in Watauga County . . . ." Neither the sale of property nor the suspicion of favoritism, without more, gives rise to a cause of action for conspiracy. The record is silent as to when plaintiffs learned of the alleged conspiracy. There thus is a genuine issue of material fact concerning the date of the alleged conspiracy or at least the date of plaintiffs' discovery of it. As to plaintiffs' fourth claim for relief the court's dismissal with prejudice is reversed and the cause is remanded for jury trial on the issue of when plaintiffs' claim arose.

Plaintiffs' fifth claim alleges damages in excess of $10,000 for losses sustained by the deterioration of improved real property known as "the Queens Road property." Plaintiffs alleged deterioration, ruin, depreciation, and vandalism of this property. In their Petition for Removal, filed 16 November 1979, plaintiffs alleged that defendant-executor "failed and refused to preserve and protect estate assets . . . allow[ing this property] to sit vacant and idle for such period of time and under such conditions that vandals and marauding persons pilfered said property . . . ." Since the Petition and the complaint present identical allegations based upon knowledge of identical facts, we find that this claim accrued on 16 November 1979, the latest date on which defendants' breach could have been discovered. Plaintiffs' fifth claim is thus time-barred as to defendants Fairley, Monteith and Cobb, and the court's dismissal with prejudice as to that claim as it relates to those defendants is affirmed; except as the dismissal of that claim relates to those defendants, it is reversed.

Plaintiffs' sixth claim is to surcharge the executor for commissions and counsel fees. Defendants contend that plaintiffs' right to attack the award of commissions and attorney's fees expired when they failed to attack the order of August 1981 reducing commissions and fees from $579,689.99 to $300,000.00. Plaintiffs did not have to appeal from that order, however, to preserve their rights against defendants for breach of fiduciary duty. *See Galloway*, 229 N.C. 547, 50 S.E. 2d 563 (rights and liabilities of adverse parties in the estate may not be litigated in a proceeding under N.C. Gen. Stat. 28-32). In addition, the purpose

of surcharge is to reimburse the estate for losses incurred as the result of some act or omission of the representative constituting a breach of trust. 31 Am. Jur. 2d, Executors and Administrators § 522, at 233. Plaintiffs were not aware of the extent of all losses to the estate until the filing of the final account as supplemented on 12 October 1981. It would have been premature to attempt to surcharge for losses either not due to mishandling or that could have been returned to the estate by the time of final accounting. As to this claim plaintiffs' cause of action is based on the breach of fiduciary duty of the executor while administering the estate of the deceased; the claim accrued with the filing of the supplemental final account on 12 October 1981. The sixth claim thus is not time-barred and the court's dismissal with prejudice as to that claim is reversed.

The seventh claim is for administrative expenses due to defendants' delay in closing the estate. Defendants contend plaintiffs had notice of payments for administrative expenses as early as the second annual account, filed 16 September 1976. Plaintiffs contend that not until the final supplemental account filed on 12 October 1981 could they have had knowledge of the extent of expenses incurred due to defendants' delay in closing the estate. Plaintiffs also contend that until that time defendants could have returned sums to the estate, leaving plaintiffs no cause of action for negligently disbursed sums.

We agree with plaintiffs. Their seventh claim accrued on 12 October 1981. The court's dismissal with prejudice as to that claim is thus reversed.

The eighth claim, which defendants do not address, is for consequential and miscellaneous damages due to prolonged administration of the estate. For the reasons enumerated in discussion of the seventh claim we find that this claim also accrued on 12 October 1981 with the filing of the final supplemental account and the termination of the fiduciary relationship between plaintiffs and defendants. The eighth claim is not time-barred and the court's dismissal with prejudice as to that claim is reversed.

Plaintiffs' ninth claim is for punitive damages for willful breach of fiduciary duties as executor, trustees, and attorneys. Since we have held that all of plaintiffs' claims survive except, in part, the fifth, this claim also survives insofar as it relates to all

claims except, in part, the fifth. The court's dismissal with prejudice as to this claim is affirmed insofar as it relates to the fifth claim as applied to defendants Fairley, Monteith and Cobb, but otherwise is reversed.

IV.

In summary, we conclude as follows:

1. Defendant Hamrick was properly served for all purposes on 30 July 1982.

2. Defendants Fairley, Monteith and Cobb were served individually upon receipt of the Alias and Pluries summons issued on 7 June 1983.

3. Defendant partnership was served on 30 July 1982.

4. The court erred in determining that plaintiffs' claims were barred by the principles of res judicata and collateral estoppel.

5. As to all claims except the fifth as applied to defendants Fairley, Monteith and Cobb, and the ninth insofar as it relates to the fifth and as applied to those defendants, the court erred in granting defendants' motion for summary judgment and dismissing with prejudice based upon the statute of limitations.

Affirmed in part, reversed in part, and remanded.

Judge BECTON concurs.

Judge PHILLIPS concurs (except as stated).

Judge PHILLIPS concurring.

I agree with all that is stated in the well-reasoned opinion of the majority except that defendants Fairley, Monteith and Cobb were not served with process until they received copies of the alias and pluries summons issued on June 7, 1983. In my opinion, these defendants were duly served in July, 1982, when the summons for each of them was delivered to and accepted by their partner in the very offices where all of them practiced law together. The only purpose of the rules concerning the modes of serving process is to guarantee that defendants are notified in

some appropriate way of lawsuits filed against them. Since a defendant is duly served when a summons is left with some "discreet" adolescent at his house, it is inconceivable to me that he is not also served when the summons is delivered to his law partner at their place of business. When the purposes of the statute have been accomplished, as certainly was the case with these three defendants, reality, rather than technical wording, should control.

JASON LEE BRIDGES, BY AND THROUGH HIS GUARDIAN, JANE C. BRIDGES, AND JANE C. BRIDGES AND DONALD BRIDGES, INDIVIDUALLY v. SHELBY WOMEN'S CLINIC, P.A. AND HUGH L. FARRIOR, M.D.

No. 8427SC342

(Filed 18 December 1984)

1. **Physicians, Surgeons and Allied Professions § 20.1— negligence—failure to diagnose premature labor—insufficient showing of proximate cause**

In a medical malpractice action to recover damages for the negligent failure to timely diagnose premature labor, the court properly granted defendants' motions for directed verdicts where plaintiffs did not show sufficient causation in that there was insufficient evidence that plaintiff mother would have been given an experimental drug, the only drug then available to suppress labor, had she arrived at Charlotte Memorial Hospital earlier than she did and because there was insufficient evidence that giving the experimental drug would have prevented or lessened the severity of the child's injuries.

2. **Physicians, Surgeons and Allied Professions § 20.1— mental anguish—premature birth—insufficient showing of proximate cause**

The trial court properly entered a directed verdict for defendants on a claim for negligent infliction of mental anguish arising from the premature birth of a child and resulting injuries to the child where plaintiffs failed to show that defendants' negligence was the proximate cause of the child's injuries.

APPEAL by plaintiffs from *Snepp, Judge.* Judgment entered 3 November 1983 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 29 November 1984.

This is a medical malpractice action in which plaintiffs seek to recover damages arising from the defendant doctor's alleged negligence in failing to timely diagnose the plaintiff mother's premature labor and for negligent infliction of mental distress. At

the conclusion of plaintiffs' evidence at trial, the court granted the motions of defendants for directed verdicts pursuant to Rule 50 of the North Carolina Rules of Civil Procedure. From the judgment entered, plaintiffs appealed.

Erwin and Beddow, by Fenton T. Erwin, Jr., for plaintiff appellants.

Kennedy, Covington, Lobdell and Hickman, by Charles V. Tompkins, Jr. and James P. Cooney, III, for defendant appellees.

HILL, Judge.

Plaintiffs assign as error the trial court's entry of directed verdicts in favor of defendants. In determining the correctness of a directed verdict, we must consider the plaintiff's evidence to be true and resolve all contradictions in his favor, giving him the benefit of every inference which can be drawn from the evidence. *Anderson v. Carter*, 272 N.C. 426, 158 S.E. 2d 607 (1968). "A directed verdict is improper unless it appears as a matter of law that plaintiff cannot recover under any view of the facts which the evidence reasonably tends to establish." *Willoughby v. Wilkins*, 65 N.C. App. 626, 631, 310 S.E. 2d 90, 94 (1983), *disc. rev. denied*, 310 N.C. 631, 315 S.E. 2d 697, 698 (1984).

Plaintiffs' evidence tends to show the following facts, in relevant part: Jane Bridges, the plaintiff mother, became pregnant in January, 1980. During her pregnancy, she received prenatal care from various doctors at the Shelby Women's Clinic (hereinafter "the Clinic") including the defendant Dr. Farrior. In the afternoon of 17 July 1980, Jane Bridges, who was then in her 29th week of pregnancy, noticed that she was spotting. She called the Clinic and spoke with a nurse who told her that the spotting could be old blood and for her to lie down and take it easy but to call back if the blood changed color or if she began to have pain. Mrs. Bridges followed these instructions. That night she began having little twinges of pain in the lower part of her stomach and across her back.

The next morning Mrs. Bridges was still spotting and the blood had changed color. In addition, she experienced pelvic pressure. She called the Clinic and spoke to the same nurse she had spoken to the previous afternoon. The nurse told Mrs.

Bridges that she definitely needed to see a doctor, that Dr. Farrior was on call and would be there at 11:30, and for her to come in to see him then. Mrs. Bridges arrived at the Clinic around 11:30 that morning, was weighed, and gave urine and blood samples. She told the nurse she was experiencing a lot of pressure and was having twinges like pains across her stomach and back, and that the bleeding was getting worse. Mrs. Bridges was told that a physician had diagnosed her symptoms as a kidney infection. She was given a prescription for medication to fight the infection and told to return to the Clinic in a few days. She was not examined or questioned about her symptoms by a physician while at the Clinic on that morning of 18 July 1980.

Mrs. Bridges had the prescription filled and went home to bed. About 3:00 that afternoon, she began to urinate frequently and noticed that her spotting had increased in flow and become redder. Her pelvic pressure and pain had also increased. She called the Clinic about 6:15 p.m. and learned that Dr. Farrior was on call and was at Cleveland Memorial Hospital. She called Dr. Farrior and told him who she was and explained her condition and the preceding events of the day. Dr. Farrior told her that she had a kidney infection, that he could not do anything for her, that it took twenty-four hours for the medicine to get in her bloodstream, and that she was not going to feel any better until it did. When Mrs. Bridges persisted in expressing her concern about her condition, Dr. Farrior told her that if she was going to come to the hospital to see him, she had better not "wait around until midnight or he wouldn't be there, he had had a long day."

Mrs. Bridges and her husband, Donald, arrived at Cleveland Memorial Hospital at 7:15 p.m. Dr. Farrior examined her and told her she was three centimeters dilated and in premature labor. Subsequently he informed Mrs. Bridges that he was going to have her transferred to Charlotte Memorial Hospital where there was a neonatal unit. A neonatal unit specializes in caring for premature children.

Mrs. Bridges was transported by ambulance to Charlotte Memorial Hospital and arrived there about 10:00 p.m. Upon her arrival, she was found to be five centimeters dilated and was diagnosed as being in premature labor. Testimony at trial showed that in normal labor the expectant mother's cervix dilates, or

opens, to about ten centimeters whereas with a premature birth the cervix might only open to seven or eight centimeters. In addition, Mrs. Bridges had an elevated white blood count as had been revealed by the urinalysis taken at the Clinic that morning and a slight fever of 100.4°. The physician noted these signs of infection as well as the earlier diagnosis of a urinary tract infection.

In July 1980, there were no approved drugs for the suppression of labor. However, Charlotte Memorial Hospital was in the process of investigating the effectiveness of an experimental labor suppressant drug, Terbutaline. Dr. John Hisley, who was in charge of the Terbutaline experiment at Charlotte Memorial Hospital, testified that in order to qualify for the experiment women in preterm labor had to meet certain guidelines, called a protocol. They had to be between 27 and 34 weeks pregnant, have no unexplained vaginal or uterine bleeding, and could not be suffering from an unexplained infection or chorioamnionitis. Apparently, Mrs. Bridges was considered for the protocol but because of her advanced dilation and her elevated temperature, she did not qualify for it.

Shortly after July 1980, Charlotte Memorial Hospital ended the Terbutaline experiment. The results of the hospital's experiment were never tabulated because an insufficient number of women had qualified for the experiment. Terbutaline has not been approved by the Food and Drug Administration for use in the suppression of labor. Plaintiffs' expert witness, Dr. Harlan Giles, Professor and Associate Chairman of the Department of Obstetrics and Gynecology at the Texas Tech University School of Medicine, testified that in his experience, Terbutaline was effective in suppressing labor 70% to 80% of the time when it was used. Dr. Hisley testified that, in his experience, only 20% of women in preterm labor were even eligible for use of the drug, and that in those women on whom the drug was used, it was effective about half the time. Dr. Hisley further testified that Terbutaline almost always had side effects, that some of these were serious and some even fatal, and that it could not be predicted in advance whether a particular patient would be able to tolerate the side effects.

No attempt to suppress Mrs. Bridges' labor was made. She gave birth to Jason at 1:53 a.m. on 19 July 1980. Jason was born

about ten weeks premature. He was immediately rushed to the neonatal intensive care unit and placed on a respirator. On 21 July 1980, Jason experienced an intercranial hemorrhage, or bleeding in his brain. Subsequently his condition improved somewhat, however, on 28 July, he suffered another and much more severe intercranial hemorrhage. The evidence tended to show that Jason's premature birth precipitated the intercranial hemorrhaging and that the hemorrhaging caused the impairments which Jason has. Jason is profoundly mentally retarded and has cerebral palsy, hydrocephalus, epilepsy, and scoliosis. The evidence further showed that the severity of the intercranial hemorrhaging correlated directly with the severity of Jason's mental retardation and cerebral palsy.

[1] Plaintiffs first contend the trial court erred in directing a verdict in favor of defendants on their claim based upon the negligence of Dr. Farrior. Plaintiffs alleged that Dr. Farrior was negligent in failing to examine Mrs. Bridges at her 11:30 a.m. appointment at the Clinic on 18 July 1980 to see if she was in premature labor, and that Dr. Farrior's negligence was a proximate cause of Jason's impairments. In order to withstand the defendants' motion for a directed verdict on their negligence claim, plaintiffs were required to offer evidence establishing the following: (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 (1981). If plaintiffs failed to present sufficient evidence of any one of these elements, the defendants were entitled to directed verdicts. *Id.*

Defendants concede in their brief that plaintiffs' evidence, when viewed in the light most favorable to plaintiffs, was sufficient to establish the standard of care, breach of the standard of care, and damages. However, defendants contend plaintiffs' evidence was wholly insufficient to establish the requisite causal connection between Dr. Farrior's negligence and Jason's impairments. Plaintiffs, on the other hand, argue that they presented sufficient evidence to establish proximate cause in that the jury could have found from the evidence the following chain of causation: that had Dr. Farrior examined Mrs. Bridges at 11:30 a.m. on 18 July 1980, he would have, or should have in the exercise of reasonable care, diagnosed her as being in premature labor; that given such diagnosis, Mrs. Bridges would have been sent to Char-

lotte Memorial Hospital at an earlier time; that had she arrived at Charlotte Memorial Hospital at an earlier time, she would have been eligible for the Terbutaline experiment; that had she been given Terbutaline, she would have been able to tolerate the drug and would not have suffered side effects which would have required discontinuance of usage of the drug; that the drug would have suppressed Mrs. Bridges' labor thereby delaying Jason's birth; and that a delay in Jason's birth could have altered his condition.

After carefully examining the record, we conclude that the chain of causation relied upon by plaintiffs is not sufficient to support their claim because the evidence is not sufficient to establish at least one of its crucial links—that had Mrs. Bridges arrived at Charlotte Memorial Hospital sooner than she did on 18 July 1980, she would have been given the experimental drug Terbutaline. Dr. Hisley, who testified about Charlotte Memorial Hospital's requirements for the use of Terbutaline, stated that in order for a woman in labor to qualify for use of Terbutaline, she could not have any unexplained vaginal or uterine bleeding, and could not be suffering from any unexplained infection. The evidence presented tended to show that Mrs. Bridges had both an unexplained infection, as indicated by her temperature and elevated white blood count, and unexplained bleeding on 18 July 1980; therefore, she would not have qualified for the use of Terbutaline even if she had arrived at the hospital earlier in the day. Based on such evidence, the jury could not have reasonably concluded that Mrs. Bridges would have been given the drug if she had arrived at the hospital at an earlier time.

Moreover, we do not believe plaintiffs presented sufficient evidence to show that it was reasonably probable that had Mrs. Bridges been given Terbutaline, that it would have prevented or lessened the severity of Jason's injuries. Jason's treating physician, Dr. Docia Hickey, testified that in her opinion the main cause of intercranial hemorrhaging was prematurity, and that the risk of intercranial hemorrhaging continues in infants through the 35th week of gestation. She indicated that it is not until after the 34th or 35th week of gestation that there is no longer the substantial possibility of an intercranial bleed.

The evidence showed that Jason's gestational age at birth was approximately 30 weeks old. Therefore, there would still have been a substantial possibility that Jason would have suffered an intercranial hemorrhage unless his birth was delayed by at least four or five weeks. Dr. Hickey indicated that there was only a slight possibility that if Jason's birth had been delayed by one week that the delay would have reduced the risk that Jason would have an intercranial hemorrhage.

Dr. Hisley, of Charlotte Memorial Hospital, was the only witness to testify about the length of time Terbutaline would suppress labor, if the drug was effective and was tolerated by the patient. He stated that based on the literature available prior to July 1980, his opinion was that the length of time labor was suppressed when Terbutaline was used was anywhere from twenty-four hours to six or seven weeks, and that the average length of time was three weeks. Other studies, however, disputed those figures which was why Charlotte Memorial Hospital was conducting it own investigation of the drug.

Dr. Hisley's testimony as to the duration of Terbutaline's effectiveness was inconclusive and conjectural. At best, the evidence may have been sufficient to permit the jury to conclude that there was a possibility that the drug, if effective, may have suppressed labor for 4 or 5 weeks, the period of time necessary to substantially reduce the risk that Jason would have an intercranial hemorrhage. The evidence did not show that this was reasonably probable, or that it was probable that Mrs. Bridges could have even tolerated the drug as was required. *See Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E. 2d 541 (1964). As stated by our Supreme Court in *Phelps v. Winston-Salem*, 272 N.C. 24, 30, 157 S.E. 2d 719, 723 (1967):

> The law does not charge a person with all the possible consequences of his negligence, nor that which is merely possible. . . . If the connection between negligence and the injury appears unnatural, unreasonable and improbable in the light of common experience, the negligence, if deemed a cause of the injury at all, is to be considered a remote rather than a proximate cause.

We conclude that plaintiffs failed to present sufficient evidence from which the jury could have reasonably found the ex-

istence of the necessary causal connection between Dr. Farrior's delay in examining Mrs. Bridges and Jason's injuries. Accordingly, we hold that the directed verdict against plaintiffs on their negligence claim was proper.

[2] Plaintiffs next contend the trial court erred in directing a verdict in favor of defendants on Mrs. Bridges' claim for negligent infliction of mental anguish. It is clear that the mental anguish for which Mrs. Bridges seeks recovery centers completely on the injuries sustained by her son. Since plaintiffs failed to show that Dr. Farrior's negligence was a proximate cause of Jason's injuries, it follows *a fortiori* that plaintiffs failed to show that Dr. Farrior's negligence was a proximate cause of the mental anguish of Mrs. Bridges resulting from Jason's injuries. We hold the trial court's entry of a directed verdict in favor of defendants on Mrs. Bridges' claim for negligent infliction of mental anguish was proper.

Affirmed.

Judges HEDRICK and WEBB concur.

HENRY C. DOBY, JR., AND JOHN M. BAHNER, JR., AS RECEIVERS FOR ALL STAR INDUSTRIES, INC. v. NORMAN A. LOWDER AND WIFE, LINDA G. LOWDER, GRANT D. LOWDER AND WIFE, LORAINE H. LOWDER, DWIGHT DAVID LOWDER AND WIFE, BETTY F. LOWDER, DOGWOOD FARMS, A PARTNERSHIP, AND NORMAN R. LOWDER, POULTRY FARMS, INC.

No. 8420SC369

(Filed 18 December 1984)

1. Trial § 2.3— denial of continuance—uncertainty concerning plaintiff's counsel—time for discovery

The trial court did not abuse its discretion in denying plaintiff receivers' motion for continuance of a hearing on defendants' motions for summary judgment and to strike a notice of *lis pendens* on the ground that the Court of Appeals had ruled that the law firm representing plaintiffs had been improperly appointed to represent plaintiffs in another case, and plaintiffs were uncertain of the authority of the law firm to represent them in this case, where plaintiffs' counsel elected to remain in this case and to take an active role in it for several months after the decision of the Court of Appeals was filed, and the ac-

tion had been pending for several years before the motion for continuance was made. Nor did the trial court err in denying the motion for continuance on the ground that plaintiffs needed to obtain discovery from a person who was not a party to the action since plaintiffs had ample opportunity to pursue discovery before the hearing was scheduled. G.S. 1A-1, Rule 40(b).

2. Fraudulent Conveyances § 1.2— action based on bulk transfer statutes—statute of limitations

An action by plaintiff receivers based on the bulk transfer statutes of the Uniform Commercial Code is barred by the statute of limitations of G.S. 25-111 where the action was commenced more than six months after the transferees took possession, concealment was neither alleged nor proven, and the evidence negated concealment. G.S. 25-6-101 *et seq.*

3. Rules of Civil Procedure § 56— summary judgment—affidavit not timely filed

An affidavit was not properly before the court in a hearing on a summary judgment motion where it was not served before the day of the hearing as required by G.S. 1A-1, Rule 56(c), and there was no showing that the court's permission to allow later service was requested or granted pursuant to G.S. 1A-1, Rules 6(d) or 56(e).

4. Fraudulent Conveyances § 3.1— fraud in corporation's conveyance—insufficient complaint

In an action by plaintiff receivers to recover amounts due on notes from the corporate defendant to the receivers' insolvent, plaintiffs' complaint was insufficient to state a cause of action for fraud in the transfer of real estate by the corporate defendant to the individual defendants where the complaint made no reference to the fraudulent conveyance statutes, failed to allege with particularity any other circumstances constituting fraud, and failed to allege that amounts paid to the corporate defendant were less than the reasonable value of the assets it transferred.

5. Fraudulent Conveyances § 3.4— conveyance by a corporation—insufficient showing of fraud

The forecast of evidence on a motion for summary judgment was insufficient to support a finding of fraud in the corporate defendant's conveyance of real estate to the individual defendants where the pleadings and affidavits disclosed only that the individual male defendants were the sons of the corporate defendant's president; there was no showing that the corporate defendant was unable to pay its debts after the transfer; and affidavits disclosed that the consideration paid was approximately the same as the appraised value of the property, that there was no concealment of the transaction, and that the corporate defendant did not retain possession of the property.

6. Lis Pendens § 2— notice of lis pendens not authorized

Filing of a notice of *lis pendens* was not authorized where plaintiffs' action was for a money judgment based on fraud in the conveyance of realty from the corporate defendant to the individual defendants and did not seek to set aside the transfer of realty.

Doby v. Lowder

APPEAL by plaintiffs from *Barefoot, Judge.* Order granting defendant appellees' motion for summary judgment entered 3 October 1983 and orders denying plaintiffs' motions for continuance and for leave of their counsel to withdraw and granting defendant appellees' motion to strike notice of *lis pendens* entered 5 October 1983 in Superior Court, STANLY County. Heard in the Court of Appeals 30 November 1984.

Plaintiff-receivers instituted this action to recover amounts due on notes from the corporate defendant to the receivers' insolvent. They appeal the denial of their motions for continuance and for leave of their counsel to withdraw. They also appeal the granting of defendant appellees' motions for summary judgment and to strike notice of *lis pendens.*

Kluttz, Hamlin, Reamer, Blankenship and Kluttz, by William C. Kluttz, Jr., for plaintiff appellants.

Griffin, Caldwell, Helder & Steelman, P.A., by C. Frank Griffin and Sanford L. Steelman, Jr., for defendant appellees.

HILL, Judge.

Plaintiffs contend the court erred in denying their motion to continue the hearing on defendant appellees' motions for summary judgment and to strike plaintiffs' notice of *lis pendens.* We disagree.

A motion to continue is addressed to the court's sound discretion and will not be disturbed on appeal in the absence of abuse of discretion. *Cleeland v. Cleeland,* 249 N.C. 16, 18, 105 S.E. 2d 114, 116 (1958). Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. G.S. 1A-1, Rule 40(b); *Shankle v. Shankle,* 289 N.C. 473, 482, 223 S.E. 2d 380, 386 (1976). The chief consideration is whether granting or denying a continuance will further substantial justice. *Shankle,* 289 N.C. at 483, 223 S.E. 2d at 386.

Plaintiffs instituted this action in 1979, following the appointment of the law firm of Moore & Van Allen as plaintiffs' counsel in another case earlier that year. *See Lowder v. All Star Mills,* 309 N.C. 695, 696, 309 S.E. 2d 193, 195 (1983), *reh. denied,* 310 N.C. 749, 319 S.E. 2d 266 (1984). In January 1983 this Court found er-

ror in that appointment. *Lowder v. Mills, Inc.*, 60 N.C. App. 275, 285, 300 S.E. 2d 230, 236 (1983) (affirmed as to this point, *Lowder*, 309 N.C. at 698, 309 S.E. 2d at 196). In May 1983 our Supreme Court allowed discretionary review of that decision, but did not stay its certification. *Lowder*, 309 N.C. at 697, 309 S.E. 2d at 196.

Plaintiffs, through the same counsel, filed notice of *lis pendens* on the real estate the corporate defendant had earlier transferred to the other defendant appellees. During the next four months they also pursued additional discovery.

[1] On 15 September 1983 the non-corporate defendant appellees filed motions for summary judgment and to strike the notice of *lis pendens*, along with supporting affidavits. On 27 September 1983, plaintiffs' attorneys (then Moore, Van Allen and Allen) moved that they be allowed to withdraw. On 30 September 1983 plaintiffs moved that the 3 October 1983 hearing on the motions of the non-corporate defendant appellees be continued. The reasons stated for their request were the prior withdrawal of their counsel from the other case, the uncertainty of their counsel over their authority to act in this case and plaintiffs' need to obtain discovery from a person who is not a party to this action.

We conclude that the court's denial of a continuance was a proper exercise of its discretion and not a denial of substantial justice. This Court's decision regarding the appointment of plaintiff's counsel was rendered in an action which was separate from this one. Plaintiffs' counsel elected to remain in this case and to take an active role in it for several months after this Court's opinion was filed and certified to the trial court. Moreover, this action had been pending for several years before the motion for continuance was made. Plaintiffs had ample opportunity to pursue discovery before the hearing was scheduled. Plaintiffs offered nothing to show why they had not already sought all of their discovery, to show that any such discovery had been thwarted by defendant appellees, or to show how the discovery which they sought on the eve of the hearing would have affected this case. In short, plaintiffs failed to show good cause for requesting the continuance. G.S. 1A-1, Rule 40(b); *see, e.g., Complex, Inc. v. Furst and Furst v. Camilco, Inc. and Camilco, Inc. v. Furst*, 57 N.C. App. 282, 284-85, 291 S.E. 2d 296, 298, *disc. rev. denied*, 306 N.C. 555, 294 S.E. 2d 369 (1982).

Plaintiffs contend the court erred in denying the motion of their counsel for leave to withdraw. They indicate, however, that the later granting of that motion rendered their contention moot except as it bears upon the denial of their motion for continuance. Having disposed of the continuance issue above, we deem the contention regarding the motion to withdraw to be abandoned. N.C. R. App. P. 28(a) and 28(b)(5).

Plaintiffs contend the court erred in granting summary judgment for defendant appellees. We disagree. Summary judgment should issue if the materials before the court 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. *Bank v. Evans*, 296 N.C. 374, 376, 250 S.E. 2d 231, 233 (1979); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971); G.S. 1A-1, Rule 56(c). There is no genuine issue of fact here, and the non-corporate defendants are entitled to judgment as a matter of law.

The pleadings, answers to interrogatories, affidavits and exhibits show the following:

In 1976 the corporate defendant transferred to defendant Dogwood Farms, a partnership composed of the male individual defendants, certain real and personal property, valued at approximately $645,000.00, in exchange for consideration of the same amount in the form of the partnership's down payment, promissory note, deed of trust on the realty, and assumption of the corporate defendant's existing debt for farm equipment. The transfer of personalty was evidenced by a recorded bill of sale. The deed and deed of trust to the realty were also recorded in Stanly County at the time of the transfer. Defendant partnership has sold the standing crops it bought, paid off the debts it assumed, and is current in its payments on the note.

There is nothing to support plaintiffs' argument that fraud was present in the exchange between the corporate defendant and the non-corporate defendant appellees. The complaint alleged that the transfer violated G.S. 25-6-101 through 111. However, plaintiffs failed to argue those statutes in their brief. We thus deem any reliance by plaintiffs upon G.S. 25-6-101 through 111 to be abandoned. N.C. R. App. P. 28(a) and 28(b)(5).

[2] Even if plaintiffs had argued those statutes, however, any action based upon them would be barred. No action may be brought under those statutes more than six months after the transferee takes possession unless the transfer is concealed. G.S. 25-6-111. Here the parties agree that the transfer occurred on or about 29 October 1976. The complaint was filed on 7 December 1979, more than six months later. Concealment is neither alleged nor proven. The prompt recordation of the bill of sale, deed and deed of trust negates any consideration of concealment. Further, the affidavits of the non-corporate defendant appellees show that they took possession at the time of the transfer. Since the exchange they have paid *ad valorem* taxes on the property and have exercised exclusive dominion over it.

[3] Plaintiffs may not rely upon the tendered affidavit of Malcolm Lowder to show that the corporate defendant retained possession. It was not served before the day of the hearing as required by G.S. 1A-1, Rule 56(c). There is no showing that the court's permission to allow later service was requested or granted pursuant to G.S. 1A-1, Rule 6(d) or 56(e). Since the court did not rule on the admissibility of the affidavit, it was not properly before the court. *See, Rose v. Guilford Co.*, 60 N.C. App. 170, 172, 298 S.E. 2d 200, 202 (1982). Thus, any action based upon G.S. 25-6-101 through 111 is barred by G.S. 25-6-111.

[4] Even if plaintiffs' action was not thus barred their complaint does not state a cause of action for fraud. In all averments of fraud the circumstances constituting fraud must be stated with particularity. G.S. 1A-1, Rule 9(b); *Rosenthal v. Perkins*, 42 N.C. App. 449, 452, 257 S.E. 2d 63, 65-66 (1979). The complaint makes no reference to the fraudulent conveyance statutes, G.S. 39-15 through 22, nor does it allege with particularity, except in connection with G.S. 25-6-101 through 111, discussed above, any other circumstances constituting fraud. There is no allegation that any amounts paid to the corporate defendant were less than the reasonable value of the assets it transferred. *See, e.g., Bank*, 296 N.C. at 377-80, 250 S.E. 2d at 233-35. Thus, plaintiffs' argument of fraud in the transfer is without support in their pleadings.

[5] Further, if the argument was supported by proper pleadings, such pleadings would find no support in the evidence. Plaintiffs refer to the five tests for fraud. *Id.*, at 376-77, 250 S.E. 2d at 233;

Aman v. Walker, 165 N.C. 224, 227-28, 81 S.E. 162, 164 (1914). However, they argue only the fifth. Pursuant to N.C. R. App. P. 28(a) and 28(b)(5), we deem any reliance upon the first four tests to be abandoned. The fifth test includes the knowledge and participation of the transferee. *Id.* Plaintiffs argue that the facts raise an issue as to the fraudulence of the parties' intent. *See, e.g., Nytco Leasing v. Southeastern Motels*, 40 N.C. App. 120, 131, 252 S.E. 2d 826, 833-34 (1979). As evidence of such intent, plaintiffs cite as "badges of fraud" four circumstances, none of which is present here. The first is the relationship of the parties. *See, e.g., Sanford v. Eubanks*, 152 N.C. 697, 701, 68 S.E. 219, 221 (1910). The pleadings and affidavits disclose that defendant appellee partners are the sons of the corporate defendant's president, Norman R. Lowder. For reasons discussed above, plaintiffs may not rely upon the tendered affidavit of Malcolm Lowder to show a more extensive relationship between the corporate defendant and these other defendant appellees. Further, a sale of property for less than its reasonable value and the grantor's subsequent inability to pay its debts are required before such a relationship is considered evidence of fraudulent intent. *Nytco Leasing*, 40 N.C. App. at 130, 252 S.E. 2d at 833, citing *McCanless v. Flinchum*, 89 N.C. 373 (1883). There was no showing that the corporate defendant was unable to pay its debts. Defendants' counterclaim alleges that any debt it owed to plaintiffs has been paid. The corporate defendant had a net worth of approximately one million dollars immediately before and immediately after the exchange. The approximate $100,000.00 reduction in the corporate defendant's net assets after the transfer was not attributable to a deficiency in the consideration paid to it by defendant appellees. The corporate defendant's financial statement immediately after the transfer failed to reflect the full amount of the down payment paid to it by defendant appellees. A sale for less than reasonable value was manifestly not present here. The affidavits disclose that the consideration paid was approximately the same as the appraised value of the property transferred. Another "badge of fraud" argued by plaintiffs, inadequate consideration, thus also was not present. *See, e.g., Jessup v. Johnston*, 48 N.C. 335, 338-39 (1856). In light of our above discussion on the lack of concealment, there was no secrecy surrounding the transaction that would constitute a "badge of fraud." *Vick v. Kegs*, 3 N.C. 126 (1800). Finally, the affidavits of the other defendant appellees show that the corporate

defendant did not retain possession of the property. *See Messick v. Fries*, 128 N.C. 450, 450-51, 39 S.E. 59, 60 (1901). For reasons discussed above, plaintiffs may not rely upon the affidavit they tendered to rebut that showing.

The affidavits of the non-corporate defendant appellees show that the partners' wives have no interest in the partnership. Plaintiffs have failed to plead or to produce evidence showing that they have any such interest, that they participated in the transfer, or that they have any other reason to be parties to this action. The partners' interests in the partnership property are not subject to certain property rights of spouses. G.S. 59-55(b)(5).

We conclude that there was no genuine issue of material fact and that defendant appellees were entitled to judgment as a matter of law. Plaintiffs' assignment of error to the award of summary judgment thus is overruled.

[6] As noted, plaintiffs do not allege a violation of the fraudulent conveyance statutes, nor do they seek to set aside a fraudulent conveyance. Such actions would affect title to real property and would thus support the filing of a notice of *lis pendens*. G.S. 1-116; *Bank*, 296 N.C. at 380, 250 S.E. 2d at 235. The nature of plaintiffs' action, however, must be determined by reference to the facts alleged in the body of the complaint. *Pegram v. Tomrich Corp.*, 4 N.C. App. 413, 415, 166 S.E. 2d 849, 851 (1969). This is an action for a money judgment. It does not seek to set aside a transfer of realty. In such a case the filing of a notice of *lis pendens* is not authorized. *Parker v. White*, 235 N.C. 680, 688, 71 S.E. 2d 122, 128-29 (1952); *Wolfe v. Hewes*, 41 N.C. App. 88, 91, 254 S.E. 2d 204, 206-07, *disc. rev. denied*, 298 N.C. 206 (1979).

Moreover, the court based its order striking the notice of *lis pendens* upon its grant of summary judgment for defendant appellees. We affirm the award of summary judgment, and we therefore affirm the striking of the notice of *lis pendens*.

Affirmed.

Judges WEBB and JOHNSON concur.

STEVE VERNON TONEY v. CYNTHIA JACKSON TONEY

No. 8429DC29

(Filed 18 December 1984)

1. **Divorce and Alimony § 25.3— child custody—finding that court did not interview child because defendant objected—no error**

In an action for divorce and child custody where a court reporter was not available, where the parties stipulated that the court should hear the action and determine all issues presented, and where the court made extensive findings of fact, a finding that the court had not interviewed one of the children because defendant objected merely reported bare facts and did not reflect any interference with defendant's constitutional rights.

2. **Divorce and Alimony § 25.4— custody of child with father—supported by findings**

The court's conclusion that awarding plaintiff husband the custody of one brother would be in the child's best interest was supported by its findings, and the findings are presumed to be supported by the evidence where the testimony at the hearing is not brought forward in the record.

3. **Divorce and Alimony § 24.9— child support—mother to support child in her custody—findings sufficient**

In an action for divorce and child custody, the court's findings were sufficient to support an order that defendant wife be solely responsible for the support and maintenance of the child placed in her custody. While the better practice would have been to make more detailed findings, the result reached was fair and equitable, and defendant will not be heard to complain because she failed to offer monetary support evidence from which more sufficient findings could be made. G.S. 50-13.4(b).

Chief Judge VAUGHN concurring in part and dissenting in part.

Judge EAGLES concurring in part and dissenting in part.

APPEAL by defendant from *Gash, Judge.* Order entered 12 October 1983 *nunc pro tunc* 23 August 1983 in District Court, RUTHERFORD County. Heard in the Court of Appeals 25 October 1984.

Arledge, Callahan & Franklin by J. Christopher Callahan and Hugh J. Franklin for plaintiff appellee.

W. T. Culpepper, III, for defendant appellant.

BRASWELL, Judge.

Defendant-mother appeals from certain portions of an order concerning the custody and support of the parties' minor children,

Bruce and Bryan. Specifically she appeals from the portions of the order which granted custody of Bryan to his father, the plaintiff, and which made her solely responsible for the support and maintenance of Bruce, the minor child placed in her custody. She brings forth and argues three questions on appeal. She contends the court erred by basing its decision in part upon the finding of fact that due to the defendant's objection the court did not interview Bryan; by failing to make adequate and detailed findings of fact to support the award of the custody of Bryan to the plaintiff; and by making inadequate findings of fact to support the conclusion that she be solely responsible for the support of the child in her custody. We disagree and affirm the trial court's judgment.

On 10 June 1973, plaintiff and defendant were married. Two minor children, Bryan and Bruce, were born of the marriage. On 5 February 1983, the parties separated when defendant moved, with the minor children, to her parents' home in Chowan County. On 28 June 1983, plaintiff obtained physical custody of Bryan. On 8 July 1983, plaintiff filed this action seeking custody of both minor children and seeking an order requiring his wife to provide support for the children. On 22 August 1983, defendant answered seeking a divorce from bed and board, custody of the minor children, and an award of attorney's fees.

On 23 August 1983, a hearing was held on the complaint and counterclaim. At the hearing, when informed that a court reporter was not available, the parties stipulated that the court should hear the actions and determine all issues presented. Following the hearing the court made extensive findings of fact. Based upon these findings of fact the court awarded primary custody of Bryan to the plaintiff, and primary custody of Bruce to the defendant. The court further decreed that each party should be solely responsible for the support of the minor child within their custody. From that portion of the order, awarding the custody of Bryan to the plaintiff and making the defendant responsible for the support of Bruce, the defendant has appealed.

[1] First, defendant argues the court erred by making the following finding of fact:

> XXII. That both Plaintiff and Defendant testified that Bryan Toney was mature and intelligent for his age, but in-

asmuch as the defendant objected to this Court interviewing said Bryan Toney, this Court declined to do so.

She argues that she had a constitutional right to prevent the court from privately interviewing Bryan, and that her exercise of this right should not prejudice her right to custody of the minor child. Defendant has failed to show that this finding was a basis for the court's conclusion that it would be in Bryan's best interest to place his custody with his father. We hold the words used by the judge only serve to report the bare facts of what occurred, and do not reflect any interference with defendant's constitutional rights. The record is instead replete with other findings which show that other factors were the basis of the order. For failure to show any prejudicial error, the assignment of error is overruled.

[2] Next, defendant argues that the court's conclusion that awarding the plaintiff Bryan's custody would be in the child's best interest was not supported by adequate and detailed findings of fact. In custody cases, the court's order must contain findings of fact which are sufficient to sustain the court's conclusions that the award will best promote the interest and welfare of the minor child. Such findings must be supported by competent evidence. *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E. 2d 26 (1977). Where the testimony offered at the hearing, as in this case, is not brought forward in the record "it must be presumed that the findings of fact are supported by competent evidence." *Carter v. Carter*, 232 N.C. 614, 616, 61 S.E. 2d 711, 713 (1950). *See also Bethea v. Bethea*, 43 N.C. App. 372, 258 S.E. 2d 796 (1979), *disc. rev. denied*, 299 N.C. 119, 261 S.E. 2d 922 (1980). The following pertinent findings of fact appear in the record.

XVII. That since June 28, 1983, until this date, Bryan Toney has continually resided with the Plaintiff in Rutherford County, North Carolina and Bruce Toney has continually resided with the Defendant in Chowan County, North Carolina.

XVIII. That both Plaintiff and Defendant exercised substantial and important care and responsibility for both minor children since birth; that both Plaintiff and Defendant were active in their church, Bethel Baptist Church, during the course of their marriage.

XIX. That the house where the Plaintiff now resides is the former marital domicile, and is situate on approximately nine acres of land in the country, has three bedrooms, is a modern livable home, has a basketball goal, concrete driveway, color television and that only the Plaintiff and Bryan Toney have resided here since June 25, 1983; that Bryan Toney has his own bedroom in this residence.

XX. That the home where the Defendant has resided since February 5, 1983 is an old home, but recently renovated, is also situate on a large tract of land in Chowan County, North Carolina, has four bedrooms, (however, the two bedrooms located upstairs are currently being used for storage and only the two bedrooms downstairs are being used for sleeping), and that Defendant and Bruce Toney sleep in one downstairs bedroom and Defendant's parents sleep in the other downstairs bedroom.

* * * *

XXIII. That both Plaintiff and Defendant testified that the other party was a fit and proper parent at all times during the course of their marriage, but each parent testified that it was in the best interest of said minor children for custody to be placed with them.

XXIV. . . . That Plaintiff's working hours are from 7:30 a.m. until 8:00 p.m. for three consecutive days followed by four days vacation then the same working hours for four consecutive days followed by three days vacation. That when Plaintiff is at work, Bryan Toney is cared for by Plaintiff's parents, whose land adjoins the land of the former marital domicile. That both Plaintiff and Defendant testified that Plaintiff's parents, Bryan Toney's paternal grandparents, were fit and proper persons to have the care and custody and supervision of either of the minor children.

XXV. That although the Defendant is employed on the first shift at Carter's, Inc., due to the company's extra business, she has actually worked the second shift approximately eighty per cent of the time since becoming employed at Carter's, Inc. in May 1983.

XXVI. That Defendant's parents are both employed on a first shift, and Bruce Toney is placed in a nursery day care center each weekday morning in Edenton, North Carolina.

XXVII. That Bryan Toney was enrolled in the first grade at a Rutherford County elementary school during the 1982-83 school year, when on February 5, 1983, without prior notice, Defendant removed said child to Chowan County and entered said child in a Chowan County elementary school to complete that school year.

* * * *

XXIX. That both Plaintiff and Defendant are fit and proper persons to have the care and custody of said minor children and both Plaintiff and Defendant are fit and proper persons to exercise reasonable visitation privileges with the other minor child in the custody of the other parent, and the Court finds that it is in the best interest of Bruce Toney that his custody be granted to the Defendant, subject to reasonable visitation privileges with the Plaintiff as hereinafter set forth, and the Court finds that it is in the best interest of Bryan Toney that his custody be granted to the Plaintiff, subject to reasonable visitation privileges with the Defendant as hereinafter set forth.

These findings are sufficient to support the court's conclusion that it would be in the best interest of Bryan to be placed in the custody of the plaintiff. The assignments of error are overruled.

[3] Finally, defendant argues that the court erred by ordering her to be solely responsible for the support and maintenance of Bruce, the minor child placed in her custody, without making adequate and detailed findings of fact and conclusions of law on that issue. G.S. 50-13.4(b) in part provides that "[i]n the absence of pleading and proof that the circumstances warrant, the father and mother shall be primarily liable for the support of a minor child." An order apportioning the support to the parties

> 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 conclu-

sions must themselves be based upon factual *findings* specific enough to indicate to the appellate court that the judge below took "due regard" of the particular "estates, earnings, conditions, [and] accustomed standard of living" of both the child and the parents. It is a question of fairness and justice to all concerned. (Citation omitted.)

Coble v. Coble, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980).

In determining the support obligations the trial court made the following pertinent findings of fact.

> XXIV. That both Plaintiff and Defendant are able bodied persons, capable of employment and Plaintiff is employed at Cone Mills in Avondale, North Carolina, earning a substantial income, and Defendant is employed at Carters, Inc. in Edenton, North Carolina, and earning somewhat less than Plaintiff. That Plaintiff presented no evidence of his income and expenses and Defendant testified that she earned approximately $150 a week take-home pay. Both Plaintiff and Defendant testified Plaintiff had substantial and reasonable expenses of paying for the mortgage on the former residence, Ford Thunderbird, color television, and other living expenses, while the Defendant's more modest and reasonable expenses include nursery, payment on a vacuum cleaner, and contribution to her parents for food.
>
> * * * *
>
> XXX. That both Plaintiff and Defendant are primarily liable for the support of the children and at the present time, with each parent being a custodial parent of one child, and with both Plaintiff and Defendant employed on a full time basis, and the Defendant residing with her parents, it is fair and reasonable that each custodial parent be responsible for the health, education and maintenance of the minor child in his/her custody and therefore, should not also be ordered to contribute to the support of the minor child in the custody of the other parent.

Based upon these findings of fact, the court reached the following conclusion of law.

(6) That both the Plaintiff and the Defendant are liable for the support of the minor children and have the ability to provide for the support of said minor children, having due regard to the relative ability of the parties to provide support, and to the circumstances of the parties and the children as required by G.S. 50-13.4(b) and (c).

While the better practice would have been for the court to have made more detailed findings of fact, we believe the findings quoted above are sufficient to show that the court based its findings and conclusions upon the needs of the child and the parents' relative ability to meet those needs. We further believe that the result reached was fair and just to all concerned. Furthermore, defendant will not be heard to complain because she failed to offer, either in her case in chief or upon her cross-examination of the plaintiff, monetary support evidence from which more sufficient findings could be made. The assignments of error are overruled.

The judgment of the trial court is

Affirmed.

Chief Judge VAUGHN concurs in part and dissents in part.

Judge EAGLES concurs in part and dissents in part.

Chief Judge VAUGHN concurring in part and dissenting in part.

I do not believe that the facts found are sufficient to allow meaningful appellate review of the judge's decision to deprive the mother of custody of the eight-year-old son and to separate that child from his brother. I vote to reverse and remand the case on the custody question.

Judge EAGLES concurring in part and dissenting in part.

The trial court's decision is deficient in that it does not determine the husband-father's earnings and ability to pay child support and fails to determine the support properly required for the child remaining in the custody of the mother. These deficiencies

require that the matter be remanded for a new hearing to determine these questions and for a properly supported determination of the amount of child support to be paid by the father. While I vote to reverse and remand the matter on the support issue, I concur as to the trial court's custody determination.

STATE OF NORTH CAROLINA v. RONNIE GALE BEGLEY, TERRY LYNN BEGLEY, AND LORI ANN WAY

No. 8428SC242

(Filed 18 December 1984)

1. **Criminal Law § 9.2— robbery and assault—conviction under concerted action principle**

The State's evidence was sufficient to support conviction of all three defendants for common law robbery and two defendants for assault inflicting serious injury under the concerted action principle where it tended to show that the defendants, acting in concert, struck the victim from behind and rendered him unconscious, put him in a van, and took his wallet containing forty dollars, and that the victim suffered severe head and brain injuries from the assault.

2. **Witnesses § 1.1— mental competency of witness—pretrial motion to disqualify—hearing during trial**

The trial court did not err in the denial of defendants' pretrial motion to disqualify a witness for mental incompetency where the court noted that defendants could raise the competency issue at the appropriate time during trial and afforded them a voir dire hearing at trial to offer evidence of the incompetency of the witness.

3. **Witnesses § 1.1— mental competency of witness—failure to consider or admit medical records**

The trial court did not err in failing to consider certain medical records on voir dire in determining the mental competency of an assault and robbery victim to testify or in excluding the records from evidence where the records were not offered for the purpose of proving mental incompetency but for the purpose of impeaching, or at most clarifying, damaging testimony by defendants' own medical witness that the victim was competent to testify.

4. **Witnesses § 1.1— brain damage to witness from assault—competency to testify**

The trial court did not abuse its discretion in allowing a robbery and assault victim who suffered brain damage from the assault to testify where no factual issues were raised by the evidence on voir dire as to the victim's men-

tal competency, and where defendants' own medical witness testified on voir dire that the victim was mentally competent.

5. **Criminal Law § 66.17— in-court identification—independent origin from pretrial procedures**

A robbery and assault victim's in-court identification of the female defendant was of independent origin and not tainted by any suggestive pretrial procedures where the trial court made findings supported by the evidence that the victim had a good opportunity to observe the female defendant immediately before and during the commission of the crimes, that he paid particular attention to her because of her attractiveness, and that he was extremely certain in his identification of her both in an unplanned pretrial confrontation and in court.

6. **Criminal Law § 104— credibility of witnesses**

The credibility of witnesses is a matter for the jury except where the testimony is inherently incredible and in conflict with the physical conditions established by the State's own evidence.

APPEAL by defendants from *Howell, Judge.* Judgment entered 22 August 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 4 December 1984.

The defendants were each charged in proper bills of indictment with the armed robbery of Frederick Ralph Sprinkle in the amount of $45.00, and the defendants Ronnie Begley and Terry Begley were charged in proper bills of indictment with assault with a deadly weapon with intent to kill inflicting serious injury.

The evidence offered at trial tends to show that Sprinkle visited an Asheville tavern, Roy's Place, during the evening of 26 November 1980. At the tavern he saw Ronnie Begley and Terry Begley, brothers, and Lori Way, Ronnie Begley's girlfriend. Ronnie and Terry Begley came to the tavern together in a van with a Florida license plate driven by Ronnie Begley, where they met Way. Sprinkle played pool with Ronnie Begley and Lori Way. When the defendants started to leave the bar, Sprinkle asked Ronnie Begley for a ride "across the bridge to Burger Bar." As the defendants and Sprinkle were leaving the bar, Sprinkle remembered he had left his coat, and told them, "[y]ou all just go on," and returned to the bar to get his coat. He then walked out of the tavern, around the corner of the building, and towards the van that Ronnie Begley was driving. Someone hit Sprinkle from behind and he was lifted into the van by defendant Way and others. Sprinkle saw Way and Ronnie Begley in the van before he

was struck again from behind and lapsed into unconsciousness. He next remembered crawling up a bank to a road. A passerby later found him unconscious in the road and summoned help.

Sprinkle brought a wallet with $40.00 in it to the tavern. The paramedic who first treated him searched for identification and found no wallet or money. Sprinkle suffered severe head and brain injuries as a result of the assault. Each defendant testified and admitted going to Roy's bar on the evening of 26 November 1980. They denied knowing or seeing Sprinkle at the bar and testified that they left the bar alone in the van and went to a liquor store, a friend's home, and elsewhere.

A jury found defendants Ronnie and Terry Begley guilty of common law robbery and assault inflicting serious injury. Defendant Way was found guilty of common law robbery. The trial court entered judgment sentencing Ronnie Begley to consecutive terms of three years for the robbery offense and two years for the assault offense. Defendant Terry Begley received consecutive sentences of five years on the robbery conviction and two years on the assault conviction. Defendant Way was sentenced to three years on the robbery offense. Defendants appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Guy A. Hamlin, for the State.

Swain & Stevenson, P.A., by Joel B. Stevenson, for defendants, appellants Ronnie Gale Begley and Terry Lynn Begley.

Appellate Defender Adam Stein, by Assistant Appellate Defender James A. Wynn, Jr., for defendant, appellant Lori Ann Way.

HEDRICK, Judge.

[1] Defendant Terry Begley contends the evidence was insufficient to require submission of the case against him to the jury on any charges because no evidence placed him at the scene of the assault. Defendant Way contends the evidence was insufficient to support her conviction for common law robbery because there was no evidence of a taking and carrying away of property that belonged to the victim. We disagree with both contentions.

It is not necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime. *State v. Joyner*, 297 N.C. 349, 357, 255 S.E. 2d 390, 395 (1979).

When the evidence is considered in the light most favorable to the State it will permit the jury to find that Ronnie and Terry Begley went to Roy's bar together in Ronnie Begley's van, and while at the bar they played pool with Sprinkle, and that the defendants left the bar followed immediately by Sprinkle, and that as he was going to the van he was assaulted by one or more of the defendants, acting in concert. The evidence is likewise sufficient to permit the jury to find that the defendants, acting in concert, put Sprinkle in the van and took from him his wallet containing $40.00. These assignments of error have no merit.

Ronnie and Terry Begley's argument based on their assignments of error numbered 3, 4, 5, 6, 11, and 12, and Way's arguments based on her assignments of error numbered 2 and 22, all relate to questions purportedly raised as to the mental competency of witness Sprinkle to testify in these cases. The defendants made a pretrial "motion in limine" praying "that the Court enter an Order forbidding the District Attorney from eliciting testimony from, or tendering, the witness Sprinkle, unless and until the Court has conducted a hearing to determine and rule upon the competency of the State's witness Sprinkle." The motion was signed by defendants' counsel but not verified, and not supported by any affidavit with respect to the matters alleged in the motion. The trial judge denied the motion but stated, "Of course, if there is a question with regard to identification and that is objected to, the Court will have to conduct a voir dire and such matters as may be relevant in this motion will be raised at that time." At trial, when the State began its examination of Sprinkle, defendants objected and requested a voir dire.

At the voir dire, which covers 97 pages in the record, inquiry was made as to whether Sprinkle's identification of the defendants was tainted by impermissibly suggestive out-of-court iden-

tification procedures, and whether the in-court identification of defendants as perpetrators of the crimes was of independent origin and based upon what he observed at the time of the crimes. There was lengthy testimony by Sprinkle on voir dire as to the extensive injuries he suffered. The evidence disclosed that Sprinkle was struck on the head, rendered unconscious, and as a result suffered brain damage. Defendants offered the testimony of Dr. Kelly concerning his examination of Sprinkle at the Veterans' Administration Hospital at Oteen. Dr. Kelly testified that,

> On December 9th, 1982, the patient came to the Outpatient Department, and he requested an exam to certify whether he was competent to testify against alleged assailants. I did what would be called a screening mental status exam, and this exam tests for the intellectual competence of the patient. And according to my exam and in all phases that I tested, he was intellectually competent. There was no indication of any intellectual impairment at that time. I considered this to be adequate for intellectual testing, and I wrote in my chart that he was mentally competent. I did not notice any prior records at that time, and I say that because if I had, I don't think I would have limited my exam to that extent.

Defendants offered "medical records," made during Sprinkle's course of treatment at Oteen, into evidence on voir dire and later at trial. The trial judge did not consider the "medical records" on voir dire and did not admit them at trial. Defendants now contend the trial judge erred in denying their "motion in limine" and in not considering the "medical records" with respect to issues raised on voir dire and in not allowing the "medical records" into evidence at trial.

"The competency of a witness to testify by reason of mental incapacity is raised by a motion requesting the trial judge to pass on the witness' competency. The resolution of this question rests largely within the discretion of the trial judge." *State v. Newman*, 308 N.C. 231, 253, 302 S.E. 2d 174, 187 (1983) (citing *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970); *State v. Robinson*, 283 N.C. 71, 194 S.E. 2d 811 (1973)). A person may be a witness if he "is capable of giving a correct account of the matters which he has seen or heard with respect to the questions at issue." *State v.*

Benton, supra, 276 N.C. at 650, 174 S.E. 2d at 799 (citations omitted). The law does not say that the decision of the trial judge as to the competency of a witness shall be controlled by medical evidence. *Id.*

[2] Assuming arguendo that the "motion in limine" was sufficient to raise the issue of Sprinkle's competency to testify, the trial court did not err in denying the motion before trial and noting that defendants could raise the competency issue again at the appropriate time during trial. G.S. 15A-952(f) provides, "When a motion is made before trial, the court in its discretion may hear the motion before trial . . . or during trial." Further assuming defendants later properly raised the issue when they objected to Sprinkle's identification testimony, the trial judge afforded them a hearing on voir dire to offer evidence in support of any contention as to whether Sprinkle was incapable of giving a correct account of the matters he saw and heard at the scene of the crime.

[3] Defendants contend the trial judge erred in not considering the "medical records" that were made during the time Sprinkle was being treated at the Veterans' Administration Hospital at Oteen. We note the "medical records" in question were not made part of the record on appeal, do not appear in the transcript, and have not been forwarded to this Court as an exhibit. Thus we do not know precisely what the reports contain. We do know, however, that the "medical records" were not offered into evidence for the purpose of proving mental competency, but for the purpose of impeaching, or at most clarifying, the otherwise damaging testimony of defendants' own witness, Dr. Kelly, that the victim of the brutal assault was competent to testify. We hold that the trial judge did not err in not considering the "medical records" in voir dire and in not allowing them into evidence at trial.

[4] At the close of the voir dire, the trial judge made findings of fact with respect to the in-court identification by Sprinkle of defendants as the perpetrators of the crimes in question. The trial judge did not make any specific findings of fact or conclusions of law regarding Sprinkle's mental competency. No factual issues were raised by the evidence adduced on voir dire as to Sprinkle's mental competency, and under the circumstances of this case the trial court did not err in not making specific findings or conclusions with respect to Sprinkle's mental competency. We

hold the trial judge did not abuse his discretion in allowing Sprinkle to testify, and these assignments of error are without merit.

[5] Defendant Way contends the in-court identification of her as one of the perpetrators of the crimes was unconstitutionally tainted by an unfair pretrial identification procedure and was improper because it was inherently unreliable and incredible. The test for constitutionality of in-court identification is "whether, under the totality of the circumstances, the identification of defendant at trial was reliable and of independent origin even though the earlier confrontation procedure was suggestive." *State v. Headen*, 295 N.C. 437, 441, 245 S.E. 2d 706, 710 (1978) (citations omitted). The evidence and findings on voir dire show that Sprinkle had a good opportunity to observe defendant Way immediately before and during commission of the crimes, that he paid particular attention to her because of her attractiveness, and that he was extremely certain in his identification of her both in an unplanned pretrial confrontation and in court. The evidence and findings support the trial judge's conclusions that Sprinkle's in-court identification was based on his observations from the day of the crimes, and that suggestive pretrial procedures did not give rise to substantial likelihood of irreparable misidentification.

[6] Nor did the trial judge err in failing to conclude that Sprinkle's testimony was inherently incredible. The credibility of witnesses is a matter for the jury except where the testimony is inherently incredible and in conflict with the physical conditions established by the State's own evidence. *State v. Wilson*, 293 N.C. 47, 51, 235 S.E. 2d 219, 221 (1977). Sprinkle's testimony did not conflict with any physical evidence so as to render it inherently incredible, and the detail and nature of his testimony was sufficiently reliable to submit to the jury.

We hold that the defendants had a fair trial free from prejudicial error.

No error.

Judges WHICHARD and EAGLES concur.

HALLIE B. LOWE v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, SARAH T. MORROW, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES; JOHN M. SYRIA, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF SOCIAL SERVICES

No. 8423SC128

(Filed 18 December 1984)

Social Security and Public Welfare § 1— denial of Medicaid benefits—insufficient findings and conclusions

A decision by the Department of Human Resources denying plaintiff's claim for Medicaid benefits on the basis of disability was unsupported by findings of fact and affected by error of law where the decision contained no findings as to whether plaintiff is engaged in substantial gainful activity and whether plaintiff suffers from an impairment which significantly limits her ability to engage in basic work activities, where the conclusions are confusing and fail to comply with applicable law, and where plaintiff's claim was not evaluated in the sequential manner mandated by law. 42 U.S.C. §§ 1396(a)(3)(A), 1382(c)(a)(3).

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 21 June 1983 in Superior Court, WILKES County. Heard in the Court of Appeals 25 October 1984.

This is an appeal from a judgment of the Superior Court affirming the Department of Human Resources' denial of plaintiff's claim for medical assistance (Medicaid) benefits. The record discloses the following:

On 6 March 1981 plaintiff applied to the Wilkes County Department of Social Services (DSS) for Medicaid benefits. On 22 April 1981 her application was denied by DSS based on its finding that plaintiff was "not considered disabled." Plaintiff then requested a hearing by a DSS Hearing Officer, which hearing was held on 16 June 1981. When Mrs. Lowe's application was again denied, she appealed the decision to the State Department of Human Resources (DHR). Another hearing was conducted, and on 5 October 1981 a "tentative decision" was issued, affirming the decision of the Wilkes County DSS. This decision was affirmed by final decision of the Chief Hearing Officer on 24 November 1981, which held "the Notice of Decision dated October 5, 1981, becomes the final decision for your case on appeal." Plaintiff sought judicial review of the administrative ruling in Superior Court,

Wilkes County, which affirmed the decision of DHR on 21 June 1983. Plaintiff appealed.

Legal Services of the Blue Ridge, by Charles McBrayer Sasser and Louise Ashmore, for plaintiff, appellant.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Henry T. Rosser, for defendants, appellees.

HEDRICK, Judge.

The appropriate standard of review in this action is set out in N.C. Gen. Stat. Sec. 150A-51, which provides:

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

See Lackey v. Dept. of Human Resources, 306 N.C. 231, 234, 293 S.E. 2d 171, 174 (1982). Accordingly, we consider plaintiff's contentions that defendants' decision is based upon errors of law and is unsupported by substantial evidence in view of the entire record.

A State agency designated by the Legislature as being responsible for determining eligibility for medical assistance must comply with State and federal statutes and regulations in making such determinations. N.C. Gen. Stat. Secs. 108A-54, 108A-56; 42 U.S.C. Sec. 1396a(a). *See also Lackey*, 306 N.C. 231, 293 S.E. 2d 171. In the instant case plaintiff's claim for medical assistance was

based on her contention that she was disabled, and it was DHR's determination to the contrary that resulted in the denial of plaintiff's claim for benefits. An individual is "disabled" under applicable federal law

> if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. . . .

42 U.S.C. Sec. 1382c(a)(3)(A). In 1980, the Secretary of Health and Human Resources promulgated regulations establishing a sequential evaluation process to be used by administrative agencies in evaluating disability claims. Set out in 20 C.F.R. Sec. 416.920, these regulations provide as follows:

> Sec. 416.920 *Evaluation of disability in general.*
>
> (a) *Steps in evaluating disability.* We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.
>
> (b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.
>
> (c) *You must have a severe impairment.* If you do not have any impairment(s) which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

(d) *When your impairment meets or equals a listed impairment in Appendix 1.* If you have an impairment which meets the duration requirement and is listed in Appendix 1 of Subpart P of Part 404 of this chapter, or is equal to a listed impairment, we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment, we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment must prevent you from doing any other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment, we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled. (2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see Sec. 416.962).

In evaluating the evidence at Step 2, i.e., determining whether an impairment is severe, the agency is to make reference to 20 C.F.R. Sec. 416.921, which provides:

Sec. 416.921 *What we mean by an impairment that is not severe.*

(a) *Non-severe impairment.* An impairment is not severe if it does not significantly limit your physical or mental abilities to do basic work activities.

(b) *Basic work activities.* When we talk about basic work activities, we mean the abilities and aptitude necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, co-workers and usual work situations; and

(6) Dealing with changes in a routine work setting.

We think the above-quoted statute and regulations require the agency charged with determination of eligibility for medical assistance to make the following inquiries in determining whether an individual is disabled under 42 U.S.C. Sec. 1382c(a)(3): (1) Is the individual engaged in substantial gainful activity? (2) If not, does the individual suffer from a severe impairment, i.e., an impairment that significantly limits his ability to engage in the basic work activities outlined in 20 C.F.R. Sec. 416.921? (3) Assuming the individual meets this threshold severity requirement, is the impairment so severe as to render the individual disabled without inquiry into vocational factors such as age, education, and work experience, i.e., does the impairment meet or equal those listed in 20 C.F.R. Part 404, Subpart P, Appendix 1? (4) If the severe impairment does not meet or equal those listed in Appendix 1, does it prevent the individual from doing past relevant work in light of his "residual functional capacity?" and, (5) If the severe impairment does prevent the individual from doing past relevant work, can the individual do other work, given his age, education, residual functional capacity, and past work experience?

We now turn our attention to the final agency decision that is the subject of this appeal. That decision contains statements, labeled "Findings of Fact," that are actually summaries of plaintiff's contentions and recitals of the evidence. Finding of Fact No. 3, for example, states:

> Medical evidence shows that you have been treated for a variety of joint complaints, with diagnosis of low back strain, bursitis, and rotator cuff strain. Physical examination shows some decreased range of movement in the back, tenderness, and pain. There are no x-rays available for review.

Other statements in this part of the decision indicate that "medical evidence shows" that plaintiff suffers from varicose veins "with mild chronic venous insufficiency," that plaintiff has been hospitalized for treatment of diverticulosis, and that plaintiff was "successfully treated for a renal calculus in 1976." Finally, Finding of Fact No. 7 states:

> You have a diagnosis of depression, and it is felt that many of your somatic complaints are due to this. However, your depression is considered to be situational in nature, due to severe family problems. It has not caused severe restriction of daily activities, constriction of interests, detrerioration [sic] of personal habits, or inability to relate to other people.

The section of the decision labeled "Conclusions" contains the following pertinent statements:

> 4. Your impairments do not meet or equal the severity described in Appendix 1 of the Social Security regulations.
>
> 5. Although your representative feels that you are restricted to less than a full range of sedentary work, the objective evidence does not document this. None of your impairments objectively meet the requirements for restriction in a publication by the Atlanta Regional Office, entitled Guidelines for Evaluation of Residual Functional Capacity.
>
> 6. Since objective evidence fails to reveal the presence of any impairment or combination of impairments which would cause significant restriction of functional ability, the above cited definition of disability is not met.

Our examination of the decision rendered by defendant agency reveals that the agency has failed to perform its vital function of finding facts, rendering impossible judicial review of its ultimate decision. Furthermore, the "conclusions" made by the agency are confusing and fail to comply with applicable law. For the benefit of the agency on remand, we will briefly discuss the flaws which permeate the decision before us:

While "substantial gainful activity" is defined in the final agency decision, the decision is devoid of any finding of fact as to whether plaintiff is engaged in such activity. All of the evidence in the record shows that plaintiff is in fact not employed, and we

thus assume the agency would have so found, had it made a finding. Consequently, defendants must next consider whether plaintiff suffers from an impairment or impairments that significantly limit[s] her ability to engage in basic work activities. While the conclusions quoted above might conceivably be construed to suggest that defendants resolved this question of fact in the negative, the agency made no findings of fact in support of such a conclusion. Indeed, the findings made by the agency leave unresolved the question whether plaintiff suffers from any impairment at all; furthermore, there is no reference in the decision to the impact her impairment, if any, has on the activities outlined in 20 C.F.R. 916.921. Our uncertainty as to the agency's resolution of the question whether plaintiff suffers from a "severe impairment" is compounded by the remaining conclusions quoted above. Under the sequential evaluation process set out in 20 C.F.R. 916.920, a conclusion by the agency that plaintiff does not suffer from a "severe impairment," if supported by findings of fact which are in turn supported by substantial evidence, ends the agency inquiry and requires a decision denying plaintiff's claim for medical assistance. There is no need for the agency, as it has apparently done in the instant case, to proceed to Step 3, i.e., a consideration of whether plaintiff's impairment meets or equals those listed in Appendix 1. Nor should the agency move to Step 4, which involves an evaluation of plaintiff's residual functional capacity. The fact that the agency addressed these questions in the decision appealed from reveals that the agency did not evaluate plaintiff's claim in the sequential manner mandated by law, and thus demonstrates that the decision is affected by error of law, in addition to being unsupported by findings of fact.

For the reasons set forth herein, the order of the Superior Court affirming the decision of the Department of Human Resources must be vacated and the cause remanded to that court for the entry of an order of remand to the Department of Human Resources to make findings of fact and conclusions of law consistent with this opinion.

Vacated and remanded.

Judges WEBB and HILL concur.

ARCHIE JELLEN v. ERNEST SMITH INSURANCE AGENCY, INC. AND SOUTH CAROLINA INSURANCE COMPANY, AN INSURANCE CORPORATION

No. 8430SC548

(Filed 18 December 1984)

Constitutional Law § 24.7; Process § 14.3— personal jurisdiction over foreign corporation—statutory authority—minimum contacts

The North Carolina courts have authority to exercise personal jurisdiction over defendant Florida insurance agency in an action concerning a homeowner's insurance policy under the statute relating to actions which arise out of promises to deliver things of value to North Carolina, G.S. 1-75.4(5)(c), and under the statute relating to corporations which repeatedly solicit business in North Carolina, G.S. 55-145, where the evidence showed that the defendant promised a North Carolina agency that it would write an insurance policy insuring a residence plaintiff owned in Florida and deliver the same to the agency in North Carolina to be forwarded to plaintiff in North Carolina, the policy was in fact delivered to North Carolina, and such delivery was pursuant to a verbal agreement between the North Carolina and Florida agencies to refer business to each other which had been in effect for over twenty years. Furthermore, such evidence showed that defendant had sufficient minimum contacts with North Carolina so that the exercise of personal jurisdiction over it did not offend due process.

APPEAL by defendant Ernest Smith Insurance Agency, Inc., from *Downs, Judge.* Order entered 27 December 1983 in Superior Court, MACON County. Heard in the Court of Appeals on 24 October 1984.

Van Winkle, Buck, Wall, Starnes and Davis by Russell P. Brannon for defendant appellant.

Mayer & Magie by Roderic G. Magie for plaintiff appellee.

BRASWELL, Judge.

Defendant Ernest Smith Insurance Agency appeals from an order denying its motion to dismiss for lack of personal jurisdiction. It argues that the court erred by failing to dismiss the action in that there is no statutory authority under which the North Carolina courts can exercise jurisdiction. Defendant Smith also contends that it does not have sufficient minimum contacts with North Carolina to satisfy the due process requirements of the United States Constitution. We disagree and affirm the trial court's order.

Plaintiff, Archie Jellen, a North Carolina resident, sued to recover money damages from a loss under vandalism coverage in a homeowner's policy. The policy was issued on plaintiff's Florida residence by South Carolina Insurance Company (hereinafter Insurance Company) and procured by Ernest Smith Insurance Agency (hereinafter Ernest Smith) located in Florida. Following the service of the suit, Ernest Smith moved to dismiss for lack of personal jurisdiction.

In North Carolina plaintiff Jellen requested Tudor Hall & Associates, Inc. (hereinafter Tudor Hall), a North Carolina Corporation, to procure coverage for a Florida residence. Tudor Hall was not licensed to do business in Florida and could not sell the insurance. Because of the frequent nature of these types of requests from the public, Tudor Hall had some twenty years earlier entered into a "verbal agreement" with Ernest Smith whereby Ernest Smith would write the coverage on Tudor Hall's clients' Florida property, and in turn Ernest Smith would refer requests which they received in Florida for insurance on North Carolina properties to Tudor Hall. Under this agreement the commissions for the policies would be split 50-50 and the agency which actually wrote the coverage would do the bulk of the work. The policy and the bill for the insurance would be delivered by mail to the out-of-state agency to be forwarded to the purchaser.

In this case Tudor Hall called Ernest Smith to arrange for the policy. The policy was issued on the Insurance Company and mailed to the plaintiff in care of Tudor Hall. The commission was split between the agencies. After the policy was written, plaintiff Jellen specifically questioned whether vandalism was an insured risk. Tudor Hall called Ernest Smith and was assured that vandalism was covered. Following a loss, coverage was denied and litigation ensued. Following the denial of its motion to dismiss for lack of personal jurisdiction, Ernest Smith appealed.

Defendant Smith first contends the court erred by denying its motion to dismiss in that there was no statutory authority for the exercise of such jurisdiction.

G.S. 1-75.4(5)c. provides that the courts of this State shall have jurisdiction:

(5) . . . In any action which:

* * * *

c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; . . .

G.S. 55-145, which governs jurisdiction over foreign corporations not transacting business in this State, in pertinent part provides:

(a) Every foreign corporation shall be subject to suit in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:

* * * *

(2) Out of any business solicited in this State by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the State; . . .

The defendant meets the test set forth in both the above-quoted statutes. The evidence shows that Ernest Smith promised Tudor Hall that it would write an insurance policy insuring plaintiff's property and deliver the same to Tudor Hall in North Carolina to be forwarded to Mr. Jellen in North Carolina. The promise was kept and the policy was in fact delivered to North Carolina. These actions are sufficient to confer jurisdiction on the North Carolina courts pursuant to G.S. 1-75.4(5)c.

The evidence also shows that for some twenty years Ernest Smith has had an agreement with Tudor Hall to refer the business of writing insurance policies on Florida property to that agency. This agreement and the sales which have resulted therefrom are sufficient to show that Ernest Smith has been repeatedly soliciting business in North Carolina. Ernest Smith is, therefore, subject to the jurisdiction of the North Carolina courts pursuant to G.S. 55-145.

Ernest Smith next argues that the court erred by failing to dismiss the complaint because the agency did not have sufficient minimum contacts with the State of North Carolina to satisfy the due process requirement of the United States Constitution.

"[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102, 66 S.Ct. 154, 158 (1945) (*quoting Millikin v. Meyer*, 311 U.S. 457, 463, 85 L.Ed. 278, 283, 61 S.Ct. 339, 343 (1940)). In explaining this test, the Supreme Court in *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed. 2d 1283, 1298, 78 S.Ct. 1228, 1240 (1958) stated:

> [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.

In the case *sub judice*, the defendant Ernest Smith entered the insurance market in North Carolina over twenty years ago. During this time they have, with the assistance of Tudor Hall, advanced their position and afforded themselves the protection of North Carolina law. Over this twenty-year period their North Carolina contacts and activities have resulted in a large amount of business which has afforded them significant financial gains. We conclude that these activities are sufficient to determine that the defendant Ernest Smith has the "minimum contacts" required to subject it to the jurisdiction of the North Carolina courts.

The defendant's assignments of error are overruled. The order of the trial court is

Affirmed.

Chief Judge VAUGHN and Judge EAGLES concur.

HERMAN BLUMENTHAL, EXECUTOR OF THE ESTATE OF I. D. BLUMENTHAL, DECEASED v. MARK G. LYNCH, SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA

No. 8426SC291

(Filed 18 December 1984)

Taxation §§ 22, 32— intangibles tax—exemption for charitable organization—inapplicability to executor

An executor actively administering an estate is ineligible for the intangibles tax exemption under G.S. 105-212(4) with respect to "property held or controlled by a fiduciary . . . for the benefit of any organization exempt under this section" when the exempt organization is a beneficiary under decedent's will.

Judge WEBB dissenting.

APPEAL by plaintiff from *Snepp, Judge.* Judgment entered 27 December 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 November 1984.

I. D. Blumenthal died leaving a last will and testament which devised $100,000.00 to each of three sisters and the remainder to the Blumenthal Foundation for Charity, Religion, Education and Better Inter-Faith Relations (hereinafter "Foundation"), a foundation exempt from the intangibles tax. Plaintiff executor filed the intangibles tax return on behalf of the estate for the years 1978, 1979, and 1980, totalling $51,631.06, and after assessment, paid the tax under protest as required by G.S. 105-267. He sues for a refund.

Plaintiff found it advantageous to delay distribution to the Foundation until 1981 for tax reasons. At the time of filing suit, he had distributed to the Foundation all the assets, retaining $37,768.78 cash and his claim against the Secretary of Revenue, but had not filed his final account.

The trial court made findings of fact and conclusions of law, ruling that G.S. 105-212 does not provide an exemption from the intangibles tax to plaintiff. Judgment was entered for defendant. Plaintiff appeals.

Attorney General Rufus L. Edmisten by Assistant Attorney General Marilyn R. Rich for defendant appellee.

Parker, Poe, Thompson, Bernstein, Gage and Preston by H. Bryan Ives, III, for plaintiff appellant.

HILL, Judge.

Plaintiff contends that as executor of the estate he is exempt from the intangibles tax after payment of the three $100,000.00 bequests under each of the following paragraphs of G.S. 105-212:

> [1] None of the taxes levied in this Article or schedule shall apply to religious, educational, charitable or benevolent organizations not conducted for profit . . . .
>
> . . .
>
> [4] If any intangible personal property held or controlled by a fiduciary domiciled in this State is so held or controlled for the benefit of a nonresident or nonresidents, or for the benefit of any organization exempt under this section from the tax imposed by this Article, such intangible personal property shall be partially or wholly exempt from taxation and under the provisions of this Article in the ratio which the net income distributed or distributable to such nonresident, nonresidents or organization, derived from such intangible personal property during the calendar year for which the taxes levied by this Article are imposed, bears to the entire net income derived from such intangible personal property during such calendar year.

The parties stipulated to the findings of fact which the trial court adopted as its own. Based on the findings of fact the trial court made the following conclusions of law:

> 1. That the intangible personal property held or controlled by plaintiff, Herman Blumenthal, Executor of the Estate of I. D. Blumenthal, Deceased, is not "intangible personal property held or controlled . . . for the benefit of any organization exempt under this section from the tax imposed by this Article" within the meaning of G.S. 105-212.
>
> 2. That the said property does not qualify for the exemption from intangibles tax provided for in G.S. 105-212.
>
> 3. That plaintiff is not entitled to a refund of intangibles tax paid with respect to said property.

The trial judge's conclusions of law raise the following questions for consideration on appeal: (1) Is the fiduciary exemption con-

tained in the first paragraph of G.S. 105-212 applicable to exempt plaintiff from the intangibles tax? (2) Is the charitable exemption contained in the fourth paragraph of G.S. 105-212 applicable to exempt plaintiff from the intangibles tax?

We treat both questions simultaneously and hold that the trial court properly concluded as a matter of law that the executor of an estate is ineligible for the intangibles tax exemption with respect to "property held or controlled by a fiduciary . . . for the benefit of any organization exempt under this section," when the exempt organization is a beneficiary under decedent's will.

Two cases have arisen under this statute which we believe to be instructive. In *Allen v. Currie, Commissioner of Revenue*, 254 N.C. 636, 119 S.E. 2d 917 (1961), Justice Bobbitt (later Chief Justice) outlines the status of an executor and his duties together with the applicable law.

> While the estate was in process of administration, the executors held and controlled all assets of the estate for disbursement and distribution according to law and the provisions of the will without distinction as to the kind and character of the assets to be distributed to the widow or to the nonresident residuary beneficiaries upon final settlement. In short, the assets were in the hands of the executors in their capacity as the testator's personal representatives.
>
> . . .
>
> The ultimate question is whether the exemption provided in . . . G.S. 105-212 is available to plaintiff. This provision was incorporated in G.S. 105-212 in 1947 . . . . [W]e think the 1947 amendment was intended to apply to an established or continuing trust . . . . [T]he exemption was not intended to apply, and does not apply, to intangibles constituting general assets held and controlled by an executor of an estate during the process of administration.

Id. at 642-43, 119 S.E. 2d at 922-23.

In *Ervin v. Clayton, Comr. of Revenue*, 278 N.C. 219, 179 S.E. 2d 353 (1971), Chief Justice Bobbitt speaks again to the status of the personal representative and his responsibilities:

> The fiduciary obligation of the personal representative of a decedent is distinguishable from that of the trustee (by whatever name called) of an established or continuing trust. An executor, as the resident decedent's personal representative, is obligated to administer the estate in accordance with law and the provisions of the will. As such personal representative, he must ascertain and pay the funeral expenses and debts, including inheritance and estate taxes as well as taxes on income received by the decedent prior to death and on income received by him as personal representative. Until this has been done, the status of intangibles constituting assets of the estate remains unsettled. What intangibles, if any, a particular beneficiary is entitled to receive cannot be determined with exactitude until the estate is ready for final settlement.
>
> . . .
>
> We are of opinion and now hold that the exemption from intangibles tax provided in . . . G.S. 105-212 does not apply to intangibles held and controlled by the personal representative of a resident decedent during the period such personal representative is engaged in the active administration of the estate in accordance with law.

Id. at 226, 179 S.E. 2d at 357.

Although plaintiff contends he has completed the administration of the estate except for cash on hand and his claim against the State, the very presence of these intangibles along with this lawsuit is evidence the estate is being actively administered according to law. The fiduciary exemption contained in G.S. 105-212 does not apply to executors actively administering an estate. If an inequity exists, it should be addressed to the sound judgment of the Legislature.

The arguments presented by plaintiff are misplaced. We conclude the trial judge was correct. His decision is

Affirmed.

Judge HEDRICK concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. I believe that under the plain words of the statute the assets held by the executor were held for the benefit of an exempt organization and were not subject to intangibles tax. The cases relied upon by the majority involve estates which had not been administered to the extent that all the assets were being held for an exempt organization. That is a distinction between them and this case which I believe makes them inapplicable.

STATE OF NORTH CAROLINA v. L. J. HUNT

No. 8316SC1210

(Filed 28 December 1984)

1. **Constitutional Law § 76; Criminal Law § 48— pretrial silence—Miranda warning—admissible**

Where defendant was not given *Miranda* warnings and did not make a statement prior to trial, his silence about that which, if true, any rational person would have spoken was properly used to impeach his testimony at trial.

2. **Criminal Law § 86.4— second degree murder—prior assault warrant—admissible**

In a prosecution for second degree murder where defendant husband had testified that his relationship with his wife was entirely harmonious and he therefore had no motive to kill her, a prior assault warrant sworn out by the wife was competent and admissible, not for the purpose of proving the substantive facts asserted therein, but as an indication of the true relationship between defendant and his wife. An instruction limiting the evidence to impeachment was not required because defendant did not request such an instruction.

Judge WHICHARD dissenting.

APPEAL by defendant from *Clark (Giles R.), Judge.* Judgment entered 29 July 1983 in Superior Court, ROBESON County. Heard in the Court of Appeals 17 September 1984.

Defendant was found guilty of second degree murder in the shooting death of his wife and sentenced to imprisonment for a term of 15 years.

The evidence presented reveals that defendant's wife, Emma Hunt (Mrs. Hunt) was killed on 26 February 1983 in the bedroom of her home by a single shotgun blast to the head. That evening,

the home was occupied only by Mrs. Hunt, defendant, and Curly Jacobs, Jr. (Jacobs). Jacobs, the victim's natural child and stepson to defendant, served as the State's principal witness at trial. He testified that his mother and defendant had been drinking and watching television that evening. Defendant threw a drink to the floor and Mrs. Hunt motioned for her son to go to the rear of the trailer. In leaving, he saw his mother go towards the front door. Still within earshot, Jacobs heard the door close, his mother declare "L.J." and then a shot. As he returned to the living area of the trailer, defendant emotionally confessed that he had just killed his wife. Jacobs testified that he then attempted to reach the police but was physically prevented from doing so by defendant. After a brief struggle, Jacobs forced defendant out the front door and proceeded to speak with the authorities.

As the police arrived at the scene, they saw defendant, barefooted, "dart" from behind the trailer and attempt to hide by "squat[ting]" behind a nearby vehicle. An officer pulled her weapon and ordered defendant to halt and place his hands on top of his head. Upon being identified as L. J. Hunt, defendant was placed under arrest and made no statement before or after his arrest. There is no suggestion in the record or by defendant that he was ever given Miranda warnings.

Other evidence tends to show that the murder weapon belonged to defendant, that defendant and his wife had marital problems, that defendant had a serious drinking problem, was often abusive when he drank, and that he had struck his wife and threatened to kill both her and her children on prior occasions.

Defendant testified that it was Jacobs who had quarreled with Mrs. Hunt that evening and that he, defendant, was outside the trailer when the shot was fired. Defendant stated that he did not immediately enter the trailer because he did not recognize the noise as gunfire. Once having entered the trailer, however, defendant saw that Mrs. Hunt had been shot and immediately exited to "get the car" and "take her to the hospital." He claimed to have enjoyed a good relationship with his wife and denied that he was ever abusive towards her.

Jacobs' testimony at trial corresponded with what he told authorities at the scene on 26 February. Defendant, however, made no accusations against Jacobs that night and failed to make

any explanation to the police or prosecution officials as to how his wife had been killed until he testified in his own defense some five months later. On cross examination the following took place:

> Q. You didn't tell the police officers any of this that you are telling the jury, here, on the night?
>
> Mr. Bullard: Object.
>
> Q. (By Mr. Townsend:) Did you?
>
> The Court: Sustained as to the form of it.
>
> Q. What did you tell the police officers on the night?
>
> A. I didn't tell them anything.
>
> Q. Okay. Fact is, you've not told anyone—
>
> Mr. Bullard: Well, object to that.
>
> The Court: Overruled.
>
> Q. —about what you've told the jury, here, today; is that right?
>
> A. No, I haven't.

The State was also permitted to introduce evidence that Mrs. Hunt had once sworn out an assault warrant against defendant. In response to her actions, defendant fled to Alabama for a period of time but was never convicted or arrested under the warrant. The defense unsuccessfully objected to the evidence but neglected to request that a special instruction be given to the jury as to how such evidence should be weighed. Defendant claims that the trial court committed prejudicial error and appeals.

Attorney General Edmisten, by T. Byron Smith, Associate Attorney General, for the State.

James R. Glover, Appellate Defender Clinic, University of North Carolina School of Law, for defendant appellant.

VAUGHN, Chief Judge.

[1] The initial issue raised on appeal is whether the pre-trial silence of defendant was properly used to impeach his in-court

testimony. Defendant argues that allowing himself to be cross examined violates defendant's due process rights under the 14th Amendment to the United States Constitution as well as his right to remain silent under the 5th Amendment and under art. 1, § 23 of the North Carolina Constitution. *State v. Lane*, 301 N.C. 382, 271 S.E. 2d 273 (1980). We hold that defendant has failed to show a violation under either provision.

In order to establish a violation of due process under the 14th Amendment by an attack on his pre-trial silence, defendant must at least show that he was given Miranda warnings and was thereby implicitly assured that the exercise of his right to remain silent would carry no penalty. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976) (three justices would have allowed the questioning even though Miranda warnings had been given). The record, however, fails to show and defendant does not argue that he was given Miranda warnings at or prior to arrest or during the extended period in which he remained silent and failed to offer any explanation. It was not, therefore, improper under the 14th Amendment due process clause to cross examine defendant regarding his pre-trial silence when he chose to take the stand. *Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed. 2d 490 (1982) (rejecting the Sixth Circuit's decision which held that arrest alone was governmental action which implicitly induces a defendant to remain silent); *State v. McGinnis*, --- N.C. App. ---, 320 S.E. 2d 297 (1984); *State v. Burnett*, 39 N.C. App. 605, 251 S.E. 2d 717, *cert. denied*, 297 N.C. 302, 254 S.E. 2d 924 (1979).

The *Fletcher* court quoted with renewed approval from *Jenkins v. Anderson*, 447 U.S. 231, 239, 100 S.Ct. 2124, 65 L.Ed. 2d 86 (1980), a case dealing with pre-arrest silence:

> Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. 3A J. Wigmore, Evidence § 1042, p 1056 (Chadbourn rev, 1970). Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative.

Fletcher, 455 U.S. at 606.

The *Fletcher* court further held:

> In the absence of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony.

Id. at 607.

The right to remain silent is, of course, protected by both the 5th Amendment to the United States Constitution and article 1, section 23 of the Constitution of North Carolina. Here, however, we are concerned with the long-standing and fundamental right of the State to impeach a defendant who waives his right not to testify with prior declarations or conduct that is inconsistent with his sworn testimony at trial. If the pre-trial statement or conduct is inconsistent, it may be used to impeach defendant. If it is not inconsistent, it does not impeach and may not be used. We are not aware of any decision of the Supreme Court of North Carolina that would place more or heavier burdens on the State's right to cross examine a testifying defendant than those imposed by the Supreme Court of the United States.

In *State v. Lane*, 301 N.C. 382, 271 S.E. 2d 273 (1980), defendant was charged with the sale of heroin. As the indictments were being read, he volunteered the statement that he had once sold heroin but had not sold any to the person named in the indictments. At trial both defendant and his boss testified that defendant was in Darlington, South Carolina at the time the sale was alleged to have been made in High Point. The court first noted that since the statement made by defendant was volunteered, the Miranda warnings were not applicable and thus the due process question discussed in *Doyle* did not arise. The single issue presented, as stated by the court, was "whether defendant's failure to disclose his alibi defense . . . amounts to an inconsistent statement in light of his in-court testimony relative to an alibi." *Lane*, 301 N.C. at 385, 271 S.E. 2d at 275. The court held that "[u]nder the particular circumstances of this case, it is our opinion

that the failure of defendant to state his alibi defense at the time the indictment was being read to him or at any time prior to trial did not amount to a prior inconsistent statement." *Id.* at 386-87, 271 S.E. 2d at 276.

The court reasoned:

> The crux of this case is whether it would have been *natural* for defendant to have mentioned his alibi defense at the time he voluntarily stated that he "did not sell heroin to this person [Lee Walker]." We answer the question in the negative. In our opinion, the alibi defense was not inconsistent with defendant's statement that he did not sell heroin to Officer Lee Walker. At the time the indictment was being read to defendant on 25 April 1979, he was under arrest and was in custody in the Winston-Salem Police Department. At that point, with or without the Miranda warnings, his constitutional rights guaranteed by the fifth amendment were viable. The indictment charged that on 4 April 1979, some twenty-one days prior to the date of the reading of the indictment, defendant sold heroin to police officer Walker. It was *natural* for defendant to know whether he had sold drugs to a named person and spontaneously to deny having done so. In our opinion it would not be *natural* for a person, particularly under the circumstances present in this case, to know where he was on a given date some twenty-one days prior thereto. It is a matter of common knowledge that the average person cannot, *eo instanti*, remember where he was on a given date one, two or three weeks in the past without some investigation and substantiation from sources other than his ability of instant recall.

Lane, 301 N.C. at 386, 271 S.E. 2d at 276 [emphasis added].

The only question in *Lane*, therefore, was whether it would have been natural for defendant to have explained his alibi prior to trial. The court concluded that it would not have been natural and therefore his silence on the alibi defense was not inconsistent with his testimony at trial. That silence was, as a result, constitutionally protected. Under the test of *Lane*, therefore, the question before us is whether, when defendant saw that his wife had been shot by her own son, it would have been natural for him to have said so instead of being led away to jail on the accusations of the

real murderer who, because of defendant's silence, was left to go free. To us the question is easy. Indeed, it is inconceivable that he would not have volunteered the information. We hold that his silence about that which, if true, any rational person would have spoken was properly used to impeach his testimony at trial where, for the first time after his wife was murdered in his presence, he named her son as the murderer. His own brother testified as a witness for him. Yet, according to defendant's testimony as set out in this opinion, he had not even told his brother his version of how his wife was murdered. There is nothing ambiguous about defendant's silence, and we find it to be of considerable probative value in impeaching his testimony at trial.

The patent incredibility of defendant's silence here is even stronger than it was in *State v. McGinnis*, 70 N.C. App. 421, 320 S.E. 2d 297 (1984). In that case, the defendant was convicted of assault with a deadly weapon. The State's evidence revealed that defendant encountered his victim in a parking lot, exchanged words and shot him. Defendant was arrested shortly thereafter but, as in the present case, made no statement to the police until trial, at which time defendant testified that his weapon was fired accidentally. The Court noted that it would clearly have been natural for defendant to have told the arresting officer that the shooting was accidental, if defendant truly believed such to be the case. As a result, the State could use defendant's post-arrest silence in an attempt to impeach his testimony at trial. The court stated, correctly we think, that "[t]he test is whether, under the circumstances at the time of the arrest, it would have been *natural* for defendant to have asserted the same defense asserted at trial." *Id.* at ---, 320 S.E. 2d at 300 [emphasis added].

It does not make any difference whether defendant remains totally silent or makes some statement, as in *Lane*, that does not impeach his trial testimony. The question is whether he remains silent about matters that it would be natural for him to relate. If he does, his failure to speak out when it would have been natural for him to do so can be used to impeach him without encroaching on his constitutional right.

In a later case our Supreme Court took the opportunity to further explain its ruling in *Lane*:

> *Lane* stands for the proposition that comment by a prosecuting attorney at trial upon defendant's *post-arrest* silence, as a general rule, is constitutionally impermissible. *Lane* does, however, recognize an exception to this rule: the prior inconsistent statement. This arises when defendant's silence amounts to a contradiction of his testimony at trial and occurs only when, *at the time of defendant's silence*, it would have been natural for him to speak and give the substance of his trial testimony.

State v. Odom, 303 N.C. 163, 165-166 n2, 277 S.E. 2d 352, 354-354 n2, *cert. denied*, 454 U.S. 1052, 102 S.Ct. 596, 70 L.Ed. 2d 587 (1981), *rehearing denied*, 454 U.S. 1165, 102 S.Ct. 1041, 71 L.Ed. 2d 322 (1982) (footnote included) (*citing* 3A Wigmore, Evidence § 1042 (Chadbourn rev. 1970) (when silence amounts to an inconsistent statement)) [emphasis added].

In *Burnett*, 39 N.C. App. 605, 608, 251 S.E. 2d 717, 719, the prosecutor questioned defendant about his pre-trial silence as follows:

> Q. Have you ever before this day, sitting on that witness stand, ever said anything to any law enforcement man, woman, or whatever, about this person Ike?
>
> A. No.
>
> Q. Have you ever said anything to the District Attorney's Office prior to today sitting on this witness stand here, said anything at all about this man Ike?
>
> MR. HOWARD: Objection.
>
> COURT: Overruled.
>
> A. No.

The court then stated through Mitchell, Judge (now Supreme Court Justice):

> Nothing in the record on appeal before us in these cases indicates that either of the defendants were advised of their Miranda rights. As there is no evidence that these defendants were ever advised of their Miranda rights, advice as to those rights could not have implicitly assured them that their silence would not be used. Therefore, the Court's holding in

Doyle did not prohibit the use of the defendants' silence by the State in the context of the facts of these particular cases.

> When a defendant receives no assurance whatsoever that his silence will not be used against him, we do not believe it would be unreasonable or unfair to expect the accused to tell the authorities the identity of the perpetrator of the crime with which the defendant is charged, if the defendant has reason to believe that the perpetrator is someone other than himself. If the defendant has not been advised of his right to remain silent and waits until he takes the witness stand in his defense to first reveal the identity of the allegedly true perpetrator, the prosecutor may reveal the tardiness of any such statement as it tends to reflect upon the credibility of the statement.

Id. at 609, 251 S.E. 2d at 720.

Defendant's failure to assert these facts, when it would have been natural for him to do so, "amounts in effect to an assertion of the nonexistence of the fact" and thus constitutes an inconsistency which the jury properly considered as impeaching evidence. 3A Wigmore, Evidence, § 1042 (Chadbourn rev. 1970).

[2] Defendant's second argument describes as error the trial court's refusal to exclude evidence of prior assault charges instituted by Mrs. Hunt against defendant. We disagree.

Defendant testified in his own behalf. In so doing, he surrendered his privilege against self-incrimination and was properly subjected to impeachment by questions relating to specific acts of criminal and degrading conduct. *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973); *State v. Ashley*, 54 N.C. App. 386, 283 S.E. 2d 805 (1981), *disc. rev. denied*, 305 N.C. 153, 289 S.E. 2d 381 (1982), *rev'd on other grounds, State v. McGaha*, 306 N.C. 699, 295 S.E. 2d 449 (1982). "Cross-examination for purposes of impeachment is not . . . limited to questions concerning prior convictions, but also extends to questions relating to specific acts of criminal and degrading conduct for which there has been no conviction." *State v. Ross*, 295 N.C. 488, 490-91, 246 S.E. 2d 780, 783 (1978). The proper scope of such cross examination is limited only by the exercise of discretion, in good faith, by the trial judge. *State v. Purcell*, 296 N.C. 728, 252 S.E. 2d 772 (1979); *see, e.g., State v. Wise*, 27

N.C. App. 622, 626, 219 S.E. 2d 820, 822 (1975), *disc. rev. denied*, 289 N.C. 302, 222 S.E. 2d 702 (1976) ("grossly unfair" to preclude cross examination of defendant's "deal" with a police officer regarding another charge).

In the present case, defendant testified that his relationship with his wife was entirely harmonious and that he therefore had no motive to kill her. As a result, the assault charge was competent and admissible, not for the purpose of proving the substantive facts asserted therein, but as indicative of the true relationship between defendant and Mrs. Hunt. However groundless, evidence of the institution of criminal charges by Mrs. Hunt reveals serious marital tensions between the couple. The charges are therefore not unrelated to the present case and were within the knowledge of the defendant. *See State v. Purcell, supra.* We hold that the trial judge did not abuse his discretion in admitting the evidence over defendant's objections.

We note that when evidence is competent for one purpose, but not for another, a defendant is entitled, *upon request*, to have the jury instructed to consider it only for those purposes for which it is competent. *State v. Ray*, 212 N.C. 725, 194 S.E. 482 (1938); *State v. Foster*, 63 N.C. App. 531, 306 S.E. 2d 126 (1983). The record does not show, however, that defendant made any special request that the jury consider the evidence only for impeachment purposes. "Absent a request in apt time to limit and restrict such evidence to impeachment purposes, the trial judge is not required to give such instructions," *State v. Austin*, 4 N.C. App. 481, 482, 167 S.E. 2d 10, 11 (1969) (*citing State v. Goodson*, 273 N.C. 128, 159 S.E. 2d 310 (1968)); *State v. Elkerson*, 304 N.C. 658, 285 S.E. 2d 784 (1982), and a general objection is insufficient to constitute a special request under these circumstances. *See, e.g. Austin*, 4 N.C. App. at 482, 167 S.E. 2d at 11 ("I request special instruction to the jury how they are supposed to consider any evidence . . ." [sic] held to be adequately specific). The trial court's failure to instruct was therefore not improper.

No error.

Judge JOHNSON concurs.

Judge WHICHARD dissents.

Judge WHICHARD dissenting.

The majority opinion phrases the question before the court as "whether, when defendant saw that his wife had been shot by her own son, it would have been natural for him to have said so. . . ." The majority so phrases the question because they read "[t]he only question in *Lane*," 301 N.C. 382, 271 S.E. 2d 273 (1980), to be "whether it would have been natural for defendant to have explained his alibi prior to trial." Having so framed the question, the majority is able to hold that "silence about that which, if true, any rational person would have spoken" may be used to impeach a defendant's testimony at trial. The majority determines the *Lane* court to have concluded that, absent *Miranda* warnings, silence that is not "natural" is not constitutionally protected.

In my view the North Carolina Supreme Court has not passed upon whether evidence of pretrial silence is admissible to impeach a criminal defendant who testifies at trial.[1] In *Lane* the court held that defendant's voluntary statement to police— "Hell, I sold heroin before, but I didn't sell heroin to that person"—did not amount to a prior statement inconsistent with his alibi defense at trial that could be used for impeachment purposes, *Lane*, 301 N.C. at 382, 386-87, 271 S.E. 2d at 274, 276. The question in *Lane* was not whether it would have been natural for defendant to have explained his alibi prior to trial. Rather, the court stated,

> The single question presented by this appeal is whether defendant was prejudicially deprived of his constitutional rights when the court permitted the district attorney to cross-examine him concerning his failure to disclose his alibi *at the time he made a statement to the police officers* or at any time before trial.

Id. at 383, 271 S.E. 2d at 274.

1. I regard the footnote in *State v. Odom*, 303 N.C. 163, 166, 277 S.E. 2d 352, 354 (1981), quoted in the majority opinion, as an incomplete statement regarding *Lane*. In the factual context of *Lane*, the reference is to silence within a statement, not to absolute silence as here. *Odom*, like *Lane*, does not directly pass upon the question presented here; *viz*, impeachment by total silence as opposed to impeachment by a partial statement that omits matter later presented at trial. The pages in *Lane* cited in the footnote in *Odom* at no place refer to impeachment by total silence. Further, the footnote cites *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971), which also dealt with a prior inconsistent statement, not prior silence.

Thus the *Lane* court framed the issue before it as whether a defendant could be impeached concerning his failure to disclose his alibi at the time he made a statement to police officers. *Id.* at 385, 271 S.E. 2d at 275. The court concluded,

> Here it is clear that there was a violation of defendant's constitutional rights. The cross-examination attacked defendant's exercise of his right against self-incrimination in such a manner as to leave a strong inference with the jury that defendant's defense of alibi was an after-the-fact creation. The defense of alibi was crucial to defendant's case, and it seems probable that the cross-examination concerning his failure to relate his defense of alibi prior to trial substantially contributed to his conviction.

Id. at 387, 271 S.E. 2d at 277. The court held that the evidence was sufficiently prejudicial to warrant a new trial.

The majority speaks of the "patent incredibility" of defendant's silence about his alibi until a trial that occurred some eighteen months after arrest. The court in *Lane* found no such incredibility. At trial defendant there testified that on the day of the alleged heroin sale he had accompanied his employer to an automobile auction. *Lane*, 301 N.C. at 383, 271 S.E. 2d at 274. The court emphasized that a person may not know where he was on a given date, *eo instanti*. *Id.* at 386, 271 S.E. 2d at 276. The court did not suggest that defendant had any obligation to recall or furnish this alibi between the instant of arrest and trial. Under the *Lane* analysis the length of a defendant's silence has no bearing on whether it is constitutionally protected or sufficiently probative to be admissible under state evidence law.

Moreover, this case and *Lane* are factually distinguishable. In *Lane*, unlike here, defendant failed to disclose his alibi at the time he made a statement to the police. Thus, *Lane* involved a prior statement by defendant. The defendant here, however, made no statement to the police following his arrest. Rather, defendant testified to the following series of events: Defendant and his wife were planning to go to a movie and spend the night at a motel, as they did occasionally to be alone. Defendant's wife asked Jacobs, her grown son, about his rent which was three weeks overdue. Jacobs said he was not worried about the rent and defendant's wife stated that they had bills to pay. Jacobs threatened to slap

his mother, who then told Jacobs to pack and get out. (Jacobs admitted on cross-examination that he had had conversations with his mother about moving out.) Defendant then left the trailer to tend his hunting dog and was outside when the shot was fired. He was outside as well when the police arrived.

According to police testimony, upon seeing defendant the police immediately pulled their weapons and told him to halt. Defendant raised his hands. The officers handcuffed him and put him in a squad car.

The record shows that defendant remained in custody from the day of his arrest through trial; on sentencing he was given credit for 153 days in confinement. The record is silent as to *Miranda* warnings.

This case thus involves postarrest *silence* absent *Miranda* warnings, while *Lane* involved a postarrest *statement*. The court in *Lane* recognized a single exception to the constitutional right to silence: impeachment by a prior inconsistent statement. Silence plays a part in this exception only insofar as a prior inconsistent statement may be silent as to "a material circumstance presently testified to, *which it would have been natural to mention in the prior statement.*"[2] *Lane*, 301 N.C. at 386, 271 S.E. 2d at 276, *quoting State v. Mack*, 282 N.C. 334, 340, 193 S.E. 2d 71, 75 (1972).

The court in *Lane* explained its position by noting two situations in which a material omission converts a prior statement into a prior inconsistent statement. In the first situation a written statement (a letter) taken as a whole, by what it neglects to say as well as what it says, "affords some presumption that the fact was different from [the witness'] testimony." *Foster v. Worthing*, 146 Mass. 607, 16 N.E. 572 (1888), cited in *Lane*, 301 N.C. at 385, 271 S.E. 2d at 275-76. Thus, to illustrate the exception to the constitutional right to silence, the *Lane* court chose a situation in which a witness in a civil trial, not a criminal defendant, may be impeached by a letter in which he has omitted a material fact. In

2. This is to be distinguished from discrediting a witness—in contrast to a criminal defendant, at issue here—by conduct inconsistent with trial testimony, which carries no constitutional prohibition. *See* 1 Brandis, *North Carolina Evidence* Sec. 46, at 174-75 n. 64, 65, 66.

the second situation a witness (not a criminal defendant), who testified that she had heard the deceased threaten the defendant, was impeached by her failure to state that she had told a police officer that she had also heard defendant threaten the deceased. *Mack*, 282 N.C. 334, 193 S.E. 2d 71, cited in *Lane*, 301 N.C. at 385, 271 S.E. 2d at 276. The statement to police which omitted a material fact testified to at trial was admitted as a prior inconsistent statement.

The *Lane* court, therefore, did not suggest that silence per se is inconsistent with a later alibi defense which may be used to impeach. Further, *Lane* appears to support a result contrary to the majority's holding here. The court in *Lane* states:

> [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 [is] 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.

Lane, 301 N.C. at 384, 271 S.E. 2d at 275. The court made this statement fully cognizant of *Jenkins v. Anderson*, 447 U.S. 231, 65 L.Ed. 2d 86, 100 S.Ct. 2124 (1980), and *Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed. 2d 91, 96 S.Ct. 2240 (1976). It in fact distinguished *Jenkins* as a case in which defendant was not under arrest and thus not within the ambit of fifth amendment protection. *Lane*, 301 at 385, 271 S.E. 2d at 275. In *Jenkins* the United States Supreme Court held that the use of prearrest silence to impeach a defendant's credibility does not violate the United States Constitution. *Jenkins*, 447 U.S. at 238, 65 L.Ed. 2d at 94-95, 100 S.Ct. at 2129. In *Doyle*, the court held that it was fundamentally unfair to use postarrest silence against defendants after they had been impliedly assured via *Miranda* warnings that their silence would carry no penalty. *Doyle*, 426 U.S. at 611, 49 L.Ed. 2d at 94, 96 S.Ct. at 2241. The above quotation from *Lane* tends to indicate that our Supreme Court would not limit *Doyle* to its facts. The reasoning of *Lane* and the pertinent language therein suggest that were the issue of impeachment by prior silence before our Supreme Court, as it was not in *Lane*, the court would hold that the right to remain silent is guaranteed by the North Carolina

Constitution, and that its exercise, with or without *Miranda* warnings, cannot be a basis for subsequent impeachment.[3]

The majority states that while the right to silence is protected by the Fifth Amendment to the United States Constitution and by Art. I, Sec. 23 of the Constitution of North Carolina, we are concerned here not with that fundamental right, but with the right of the state to impeach a defendant who testifies with prior declarations or conduct that is inconsistent with his or her testimony at trial. The majority do not state whether they classify defendant's silence as a "declaration," which it is not, or as conduct. They merely state that "[i]t does not make any difference whether defendant remains totally silent or makes some statement . . . ." I believe it makes a considerable difference and that the court in *Lane* was aware of both the difference and its relationship to state evidence law.

In *Jenkins*, the United States Supreme Court explicitly noted that it did "not force any state court to allow impeachment through the use of prearrest silence." 477 U.S. at 239, 65 L.Ed. 2d at 96, 100 S.Ct. at 2130. "Each jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial." *Id.* In *Fletcher v. Weir*, 455 U.S. 603, 607, 71 L.Ed. 2d 490, 494, 102 S.Ct. 1309, 1312 (1982), the Court further noted that a state "is entitled . . . to leave to the judge and jury under its own rules of evidence . . . the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony."

Thus, the Virginia Supreme Court has distinguished between impeachment by a defendant's silence as opposed to a prior inconsistent statement. *See Squire v. Commonwealth*, 222 Va. 633, 283 S.E. 2d 201 (1981). Under state constitutional law a Florida court has held it impermissible to comment on a defendant's postarrest silence whether or not *Miranda* warnings are given. The court said, "[A] state court is free to place greater restrictions on the

3. Additionally, even if the court holds that silence is impeachable absent *Miranda* warnings, *Fletcher v. Weir*, 455 U.S. 603, 71 L.Ed. 2d 490, 102 S.Ct. 1309 (1982), it is the prosecution's burden to establish that no *Miranda* warnings were given to bring the case within *Fletcher*. The court in *Fletcher* did not presume *Miranda* warnings were given. *See United States v. Cummiskey*, 728 F. 2d 200, 205 (3rd Cir. 1984). Here there is no evidence that the prosecution carried this burden of proof.

use of post-arrest silence than the *Doyle-Jenkins-Fletcher* trilogy requires, since to do so merely expands, but is consistent with, the minimal due process these cases announce." *Lee v. State*, 422 So. 2d 928, 930 (Fla. App. 1982). A Florida judge has also noted that: "The credibility of [a defendant's] testimony, like that of other witnesses, [is] subject to proper attack. A showing of . . . prior silence would not be a proper attack. However, a showing of a prior inconsistent statement is proper." *Crosby v. State*, 353 So. 2d 866 (Fla. App. 1977). An Alaska court has held that under Alaska law prosecutorial comment on defendant's postarrest silence is prohibited. *Bloomstrand v. State*, 656 P. 2d 584 (Alaska App. 1982). The Supreme Court of Colorado has held inadmissible a defendant's failure to make a statement to the arresting officer because of "the many possible explanations for . . . post-arrest silence." *People v. Quintana*, 665 P. 2d 605, 611 (Colo. 1983). It noted, "An arrestee is under no obligation to speak to the police." *Id.* at 610. The Supreme Court of New Jersey has stated, "[A]s a matter of state law the use of a defendant's silence is improper irrespective of [*Miranda*] warnings . . . ." *State v. Lyle*, 375 A. 2d 629, 632 (N.J. 1977).

While the United States Supreme Court has barred the use against a criminal defendant of silence maintained after receipt of governmental assurances, *Doyle*, 426 U.S. 610, 49 L.Ed. 2d 91, 96 S.Ct. 2240, both *Jenkins*, 447 U.S. 231, 65 L.Ed. 2d 86, 100 S.Ct. 2124, and *Fletcher*, 455 U.S. 603, 71 L.Ed. 2d 490, 102 S.Ct. 1309, involve silence not induced by the assurances contained in the *Miranda* warnings. These cases establish that, absent *Miranda* warnings, a state may determine under its own rules of evidence the impeachment value of pretrial silence.

It is also the province of a state to interpret its own constitution; the meaning of the Constitution of North Carolina is a matter of state law upon which the decision of our Supreme Court is final. *State v. Jarrette*, 284 N.C. 625, 655, 202 S.E. 2d 721, 741 (1974). For example, a decision of the United States Supreme Court construing the due process clause of the Fourteenth Amendment to the federal constitution, though persuasive, does not control our Supreme Court's interpretation of the "law of the

land" clause[4] in the Constitution of North Carolina. *Horton v. Gulledge*, 277 N.C. 353, 359, 177 S.E. 2d 885, 889 (1970).

Our Supreme Court thus was free to note, as it did in *Lane*, 301 N.C. at 384, 271 S.E. 2d at 275, that "[w]ith or without [*Miranda*] warnings defendant's exercise of his right to remain silent [is] 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." Whether the defendant has received *Miranda* warnings should be immaterial in this context; there is "no reason for distinguishing between a defendant who has been advised of his right to remain silent and one who knows he has the right without being so advised." 2 Brandis, *North Carolina Evidence* Sec. 179, at 53 n. 21 par. 2.

I find no case placing the issue presented here, whether silence per se may be used to impeach a criminal defendant who chooses to testify in his own behalf at trial, directly before our Supreme Court. Pre-*Lane* cases from this Court dealt with situations in which defendants actually made a prior statement. *See, e.g., State v. Haith*, 48 N.C. App. 319, 269 S.E. 2d 205 (1980) (could impeach defendant by cross-examination about his failure to tell officers, while making an in-custody statement, that he was acting in self-defense); *State v. Pugh*, 48 N.C. App. 175, 268 S.E. 2d 242 (1980) (could impeach defendant by showing inconsistencies between trial testimony and prior statement); *State v. Fisher*, 32 N.C. App. 722, 233 S.E. 2d 634 (1977) (prior statement which failed to mention a material circumstance later testified to admissible for impeachment purposes).

The majority opinion cites *State v. Burnett*, 39 N.C. App. 605, 251 S.E. 2d 717, *cert. denied*, 297 N.C. 302, 254 S.E. 2d 924 (1979), in which the prosecutor was allowed to question defendant concerning his failure to make a statement after arrest. In that case, however, defendant did not properly object to the introduction of the evidence in question and thereby waived any later objection. *Id.* at 609, 251 S.E. 2d at 720. I thus do not consider that case dispositive here. It is not cited in *Lane*, 301 N.C. 282, 271 S.E. 2d 273, upon which the majority relies.

4. "No person shall be taken, imprisoned . . . or in any manner deprived of . . . life, liberty, or property, but by the law of the land." Art. I, Sec. 19, Const. of North Carolina.

The majority opinion also cites *State v. McGinnis*, --- N.C. App. ---, 320 S.E. 2d 297 (1984). In *McGinnis*, as here, the defendant "made no statements to police following his arrest." *Id.* at ---, 320 S.E. 2d at 299. Relying upon *Lane*, 301 N.C. 282, 271 S.E. 2d 273, the *McGinnis* court extended the *Lane* exception to fifth amendment protection for prior inconsistent statements to an exception for pretrial silence, as does the majority here. I believe *Lane* did not require that extension, and that, for the reasons stated here, it should not have been made.

Several months before our Supreme Court decided *State v. Lane*, 301 N.C. 282, 271 S.E. 2d 273, this Court stated:

> We emphasize that we do not reach the determination of whether the North Carolina Constitution would permit questioning as to prearrest silence in the fact situation in *Jenkins* [*v. Anderson*, 447 U.S. 231, 65 L.Ed. 2d 86, 100 S.Ct. 2124 (1980)]. *See e.g. State v. McCall*, 286 N.C. 472, 482-87, 212 S.E. 2d 132, 138-41 (1975) [defendant entitled to a new trial where . . . prosecutor commented directly on defendant's failure to deny an accusatory statement], and *State v. Castor*, 285 N.C. 286, 204 S.E. 2d 848 (1974) [defendant's silence in presence of accusations by state's witness not an admission]. Similarly, for the reasons expressed by the dissents of Mr. Justice Marshall and Mr. Justice Brennan in *Jenkins*, . . . we expressly refuse to hold that the North Carolina Constitution will permit, under all circumstances, that a criminal defendant who testifies in his own behalf may be impeached by some form of his prearrest silence.

State v. Haith, 48 N.C. App. at 328, 269 S.E. 2d at 211.

Postarrest or pretrial silence of a criminal defendant should not be used to impeach that defendant's in-court testimony, offered for the first time at trial, for the following reasons:

First, "in most circumstances silence is so ambiguous that it is of little probative force." *United States v. Hale*, 422 U.S. 171, 176, 45 L.Ed. 2d 99, 104, 95 S.Ct. 2133, 2136 (1975). Our Supreme Court has stated that a "defendant's silence as evidence of his guilt or for the purpose of impeaching him as a witness" is of "insignificant probative value." *State v. Williams*, 288 N.C. 680, 693, 220 S.E. 2d 558, 568 (1975). A defendant's pretrial silence may be

attributable to an awareness that there is no obligation to speak, or to a natural caution, or to a belief that an attempt to exonerate himself or herself would be futile. *People v. Conyers*, 420 N.E. 2d 933, 935 (N.Y. 1981). A defendant's silence may stem from a mistrust or fear of law enforcement authority, a not unreasonable interpretation of defendant's silence here. *Id.* "In short, . . . prior silence . . . may be attributable to a variety of . . . circumstances that are completely unrelated to the truth or falsity of [a defendant's] testimony. Accordingly, evidence of a defendant's pretrial silence must be regarded as having minimal probative significance and . . . a correspondingly low potential for advancing the truth-finding process even when offered solely for purposes of impeachment." *Id. Accord People v. Quintana*, 665 P. 2d at 611 (evidence of defendant's failure to make a statement to arresting officer held inadmissible as ambiguous and lacking in probative value); *People v. Jacobs*, 204 Cal. Rptr. 849 (Cal. App. 2 Dist. 1984); *People v. Fondron*, 204 Cal. Rptr. 457 (Cal. App. 5 Dist. 1984). While a prior inconsistent statement has a material bearing on the credibility of a witness, no such inference can be drawn solely from a defendant's silence. *See* Stansbury's North Carolina Evidence. (Brandis Revision 1973) Sec. 179, at 54 n. 96.

Moreover, the risk of prejudice is substantial when the prosecution attempts to impeach a defendant's testimony by his failure to make pretrial exculpatory statements. "Jurors, who are not necessarily sensitive to the wide variety of alternative explanations for a defendant's pretrial silence, may . . . construe such silence as an admission and . . . draw an unwarranted inference of guilt." *Conyers*, 420 N.E. 2d at 935. Because evidence of pretrial silence may have a disproportionate impact on the minds of the jurors, "the potential for prejudice inherent in such evidence outweighs its marginal probative worth. . . ." *Id. Accord Commonwealth v. Nickerson*, 434 N.E. 2d 992, 997 (Mass. 1982).

Second, drawing adverse inferences from silence impermissibly burdens the exercise of the privilege against self-incrimination and the right to present a defense. *See Griffin v. California*, 380 U.S. 609, 14 L.Ed. 2d 106, 85 S.Ct. 1229. *See also Commonwealth v. Nickerson*, 434 N.E. 2d 992 (Mass. 1982) (to permit use of prearrest silence for impeachment purposes suggests defendant had a duty to provide evidence against himself and burdens his right to testify in his own defense). An accused has

both the privilege not to incriminate himself or herself prior to trial and the right to testify in his or her own defense at trial. Impeaching a defendant by pretrial silence forces the defendant to choose between these two fundamental guarantees and to make that choice at an early stage in the proceedings, usually without the advice of counsel. Such impeachment suggests as well that one who ultimately chooses to testify retroactively waives all right to silence.

Third, impeachment of a criminal defendant by silence may impermissibly shift the burden of proof to the defendant. The threshold focus of a criminal trial is upon the sufficiency of the credibility of the prosecution's witnesses. When the defendant takes the stand the actual focus shifts to the defendant's credibility. If the defendant takes the stand but attempts to draw no significance from his or her pretrial silence, the prosecution should not be permitted to cross examine as to the significance of the silence to improve its own case in chief. *See People v. Bobo*, 390 Mich. 355, 212 N.W. 2d 190 (1973) (fact that witness did not make statement may be shown only to contradict statements that he did; "nonutterances" are not statements). *See generally* Schiller, *On The Jurisprudence of The Fifth Amendment Right To Silence*, 16 Am. Crim. L. Rev. 197, especially at 200-01 (1979).

The following from this Court's opinion in *Lane* is instructive:

> It strikes this Court that the United States Supreme Court may be reluctant to strike down state court convictions, such as in *Doyle*, when the impeachment on cross-examination relates to a defendant's silence *before* he receives his *Miranda* warnings. For analytical purposes, the reading of the warning to an arrestee provides an easily recognizable signpost. It is clear from that point on that the arrestee *knows* he has the right to remain silent. The arrestee may not then be penalized at trial for exercising that right.
>
> Of course, the whole reason for bringing out a defendant's silence on cross-examination is that the silence constitutes a prior "statement," inconsistent with his alibi. The reasoning is that silence in the face of accusation and possible prosecution is inconsistent with innocence, particularly where the arrestee has an alibi which he later reveals at trial.

> This inconsistency, which is ambiguous at best, *see United States v. Hale*, 422 U.S. 171, 45 L.Ed. 2d 99, 95 S.Ct. 2133 (1975), vanishes altogether when a defendant's silence during the custodial interrogation can be taken to indicate reliance on the *right* to remain silent. *Hale*, at p. 177. The right to remain silent does not arise when an arrestee is given his *Miranda* warnings. It is a right which he possesses at all times under the Fifth Amendment of the United States Constitution and under Article I, Sec. 23 of the North Carolina Constitution. Our Supreme Court has repeatedly held that ". . . a defendant's constitutional right to remain silent while in custody precludes the admission of testimony that defendant remained silent in the face of accusations of his guilt." [Citations omitted.]

In summary, while the United States Supreme Court has held that use of pretrial silence to impeach a testifying defendant's credibility does not violate the United States Constitution, it has left to the states the formulation of their own rules defining when evidence of such silence is admissible. The states are also free to interpret their own constitutions; our courts thus can interpret the provision of our Constitution which grants to an accused in a criminal prosecution the right "not [to] be compelled to give self-incriminating evidence." N.C. Const., Art. I, Sec. 23.

Lane dealt with impeachment by a pretrial *statement*, while this case concerns impeachment by pretrial *silence*. The distinction is considerable, and the court here thus should not find *Lane* dispositive.

The question before the court is whether evidence of pretrial silence is admissible to impeach a criminal defendant who chooses to take the stand in his or her own behalf. If the right question is asked, the answer is not easy; nor have other jurisdictions found it so. The court is faced with balancing the inevitable tension between maintaining order in society and preserving hard-earned constitutional rights. I find no precedent from our Supreme Court which I believe to be controlling. Absent such, I would hold that evidence of defendant's pretrial silence is "insolubly ambiguous," *State v. Fisher*, 32 N.C. App. at 725, 233 S.E. 2d at 636, and thus irrelevant and inadmissible for impeachment purposes under general principles of state evidence law. Evidence that is highly prej-

udicial but of low probative value has traditionally been excluded from criminal trials because of its potential to distort the search for truth. The United States Supreme Court has stated, "When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." *Shepard v. United States*, 290 U.S. 96, 104, 78 L.Ed. 196, 202, 54 S.Ct. 22, 25 (1933).

I also would hold such evidence inadmissible as violative of the privilege against self-incrimination provided by Art. I, Sec. 23 of the Constitution of North Carolina. To hold otherwise allows the State to convert exercise of the privilege against self-incrimination into a sword that pierces the credibility of a defendant who also exercises the right to present a defense at trial through his or her own testimony. The privilege against self-incrimination and the right to present a defense through one's own testimony were never intended to be mutually exclusive in their exercise; to make them so, as the majority opinion here in effect does, places a gloss on the one or the other that tends to negate it.

I thus respectfully dissent, and vote to award a new trial at which the impeaching evidence concerning defendant's pretrial silence must, upon objection as here, be excluded.

WASTE MANAGEMENT OF CAROLINAS, INC., T/D/B/A TRASH REMOVAL SERVICE, INC. v. PEERLESS INSURANCE COMPANY AND PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY

No. 845SC97

(Filed 28 December 1984)

1. Insurance § 149— potential liability—duty to defend

In an action to determine whether an insurance company has a duty to defend a claim where the allegations against the insured are broad and uncertain as to specific facts, the insured has a right to a defense whenever the allegations show potential liability within the insurance coverage, and there are no allegations which would *necessarily* exclude coverage.

2. Insurance § 149— liability for groundwater contamination—insurers' duty to defend—ambiguities interpreted in favor of insured

In an action to determine whether two insurance companies are obligated to defend a waste collection and transportation service in an action arising

from groundwater contamination, summary judgment should not have been granted for the insurance companies where there was a potential that liability within the policy language would be established at trial when ambiguities in the complaint and the policies concerning "occurrences," pollution exclusions, and "contributing" to groundwater contamination are resolved in favor of the insured.

3. Insurance § 149— liability for improper waste disposal—duty to defend—summary judgment for insurance company improper

In an action to determine whether insurance companies had a duty to defend a waste disposal company in an action for groundwater contamination, summary judgment for the insurance companies was not proper where the complaint suggested that the insured was careless and negligent in disposing of the chemicals. There was a potential that the insured could be found to have accidentally disposed of toxic chemicals without any intent or expectation that they would contaminate groundwater and would therefore fall within an "occurrence" under the policy.

4. Insurance § 149— groundwater contamination—cleanup costs—covered by general liability insurance

In an action arising from groundwater contamination at a landfill in which the complaint sought a broad injunction preventing further harm, requiring that residents be compensated with alternative supplies, and requiring that the aquifer be cleaned up, the cleanup costs were essentially compensatory damages for injury to common property which would be covered by general liability insurance policies.

5. Insurance § 100.1— groundwater contamination—actions against waste transportation company—defense not required under automobile policies

In an action to determine whether insurance companies must defend an action against a waste collection and transportation company for groundwater contamination at a landfill, the allegations in the complaint against plaintiff did not establish a causal connection sufficient for coverage under automobile insurance policies. Summary judgment was properly granted for defendant insurers.

APPEAL by plaintiff from *Fountain, Judge.* Judgment entered 19 September 1983 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 23 October 1984.

The plaintiff in this case, Trash Removal Service (TRS), operates a waste collection and transportation service for residential, commercial and industrial customers. From August 1973 to June 1979, it trucked solid waste in "Dempsey Dumpsters," or "Dempsters," to the Flemington Landfill, located in New Hanover County.

On 11 January 1980, the Flemington Landfill became the subject of a suit brought by the United States against the owners and operators of the Landfill: *United States v. Waste Industries, Inc., et al.*, 80-4-CIV-7 (E.D.N.C.). The suit was based on Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. 6973. The plaintiff United States requested injunctive relief for and reimbursement of costs arising out of groundwater contamination allegedly caused by the Flemington Landfill. The United States alleged that toxic chemicals, including benzene, tetrachloroethylene, trichloroethylene, vinyl chloride and methylene chloride, migrated from the Landfill into the aquifer and have been detected in residential wells at levels sufficient to endanger human health and the environment.

The owners and operators of the Landfill have in turn filed third party complaints against TRS, seeking indemnity or contribution in the event they are found liable under Section 7003. Their complaints allege that TRS "contributed" to the contamination of groundwater in New Hanover County and was "careless and negligent" in not exercising proper care to prevent the deposit of hazardous chemical wastes when delivering solid wastes.

From 12 August 1974 through 12 August 1979, defendant Peerless Insurance Company (Peerless) insured plaintiff under a Manufacturers' and Contractors' Liability Insurance policy. From 17 June 1979 through 17 June 1980, defendant Pennsylvania National Mutual Casualty Insurance Company (Penn) insured plaintiff under a policy of Comprehensive General Liability Insurance. TRS also obtained automobile liability policies for its trash handling vehicles from the same defendants.

On receiving the third party complaints against it, TRS tendered coverage to Peerless and Penn. Peerless denied that any coverage was due under its policies, and Penn declined to undertake TRS's defense and disclaimed any obligation.

On 7 June 1982, TRS filed a complaint seeking a declaratory judgment against Peerless and Penn, determining its rights pursuant to both the general liability and the automobile liability policies. Peerless and Penn moved for summary judgment against TRS, which was granted. The trial court also denied TRS's motion for summary judgment. The trial judge found no just reason to

delay our review of its decision, and TRS has accordingly appealed.

Burney, Burney, Barefoot, Bain & Crouch, by Auley M. Crouch, III, for plaintiff appellant.

Young, Moore, Henderson & Alvis, by Walter E. Brock, Jr., for defendant appellee Pennsylvania National Mutual Casualty Insurance Company; and Prickett & Corpening, by Carlton S. Prickett, Jr., for defendant appellee Peerless Insurance Company.

ARNOLD, Judge.

The primary question presented by this appeal is whether the insurance policies issued by defendants Peerless Insurance Company (Peerless) and Pennsylvania National Mutual Casualty Insurance Company (Penn) oblige them to defend plaintiff, Trash Removal Service (TRS), against certain third party suits brought against it by the owners and operators of the Flemington Landfill. The owners and operators are presently the defendants in a civil action brought by the United States, based on Section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6973. This action seeks to hold the owners and operators responsible for contamination of the aquifer underlying the landfill and to halt further contamination of the aquifer. In turn, the owners and operators have brought third party suits seeking indemnification and contribution from TRS and other transporters of waste materials to the landfill. Those suits caused TRS to request assistance from its insurers, Peerless and Penn, which they denied, triggering the present declaratory judgment action.

Both insurers, Penn and Peerless, have denied any duty to defend TRS, arising out of the various insurance policies. Penn has asserted an affirmative defense based on the "pollution exclusion" contained in its general liability policy. Both insurers moved for summary judgment, and stipulated for purposes of the motions, that with respect to the policy definition of "occurrence," "the insured neither expected nor intended the resulting claimed damage." TRS also moved for summary judgment. After considering "all pleadings and matters of record, and having heard the arguments of counsel," the trial judge rendered summary judgment for defendants Penn and Peerless.

In reviewing an order of summary judgment, we must determine whether there is no genuine issue of material fact and whether judgment was appropriate as a matter of law. *Vassey v. Burch*, 301 N.C. 68, 72, 269 S.E. 2d 137, 140 (1980). In this case we are concerned with the meaning of language used in the defendants' policies of insurance. This is a question of law, *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E. 2d 518, 522 (1970), and if the policy language as applied to the facts shows without contradiction that defendants have no duty to defend, then summary judgment was properly granted.

[1] In determining whether there is a duty to defend, the trial court is largely restricted to facts as alleged in the third party complaints. An insurance company has a duty to defend its insured against a suit brought by a third party claimant, even though the suit may be groundless, if in such suit the third party claimant alleged facts which, if true, imposed upon the insured a liability to the claimant within the coverage of the insured's policy. *Fireman's Fund Insurance Co. v. North Carolina Farm Bureau Mutual Insurance Co.*, 269 N.C. 358, 361-62, 152 S.E. 2d 513, 517 (1967). The court must then compare the complaint with the policy to see whether the allegations describe facts which appear to fall within the insurance coverage. The trial court generally must avoid going beyond the pleadings to ascertain the facts as they actually are, which determine ultimate liability.

Given the plasticity of modern notice pleading, however, the "comparison test," is often difficult to apply, especially in cases like the present, where the plaintiff has initiated the action apparently without knowledge of significant facts. This problem of inadequate pleadings does not appear to have been addressed in North Carolina law. Yet, the dominant rule in other jurisdictions is that where the allegations in the complaint are broad, and uncertain as to specific facts, "the insured has a right to a defense whenever the allegations show a *potential* that liability will be established within the insurance coverage," *Travelers Indem. Co. v. Dingwell*, 414 A. 2d 220, 226 (Me. 1980) (emphasis added), and the complaint contains "no allegation of facts which would *necessarily* exclude coverage," *Dingwell*, 414 A. 2d at 227 (emphasis added). As Chief Judge Learned Hand wrote in the case *Lee v. Aetna Casualty & Surety Co.*, 178 F. 2d 750 (2d Cir. 1949):

> Whether the insurer ought to defend such an action at least until it appears that the claim is not covered by the policy is not free from doubt; *but it seems to us that we should resolve the doubt in favor of the insured.* . . . When . . . the complaint comprehends an injury which *may* be within the policy, we hold that the promise to defend includes it.

Lee, 178 F. 2d at 752-53 (emphasis added).

We believe that this is the correct rule and that it is consistent with, and, as Chief Judge Hand has implied, is founded upon, a principle of insurance law that runs strong in North Carolina: that doubts or ambiguities should be resolved in favor of the insured, *see Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E. 2d 518, 522 (1970).

A specific application of this rule is that where a complaint contains multiple theories of recovery, some covered by the policy and others excluded by it, the insurer still has a duty to defend. *See Travelers Indem. Co. v. Dingwell*, 414 A. 2d 220 (Me. 1980).

[2] We now turn to the insurance policies issued to TRS by the defendants in the present suit. From 12 August 1974 through 12 August 1979, Peerless insured plaintiff under a Manufacturers' and Contractors' Liability Insurance policy. From 17 June 1979 through 17 June 1980, Penn insured plaintiff under a policy of Comprehensive General Liability Insurance. TRS also obtained automobile liability policies for its trash handling vehicles from the same defendants. From 1973 to 1979, when the Landfill was closed, TRS hauled solid waste materials to the Landfill. The parties apparently have not argued before us the issue of whether the insurance policies were in effect during the time that the critical events allegedly insured against took place. Given the facts as presented in the various complaints, we assume that the policies were in effect, although recognizing that when the merits of the federal action are heard, and after more particular factual determinations are made, the issue of timing may figure in deciding whether the policies in fact covered TRS's conduct and whether the insurance companies are liable to TRS.

We deal first with the Manufacturers' and Contractors' Liability Policy and the Comprehensive General Liability Policy, whose pertinent provisions are identical. Both policies provide:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> Coverage A. bodily injury or
>
> Coverage B. property damage
>
> to which this insurance applies, caused by an occurrence, and the company shall have the right and duty 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, and may make such investigation and settlement of any claim or suit as it deems expedient. . . .

The insurance companies must therefore defend any suit seeking damages on account of bodily injury or property damage caused by an "occurrence." "Occurrence" is defined as:

> An accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

Both policies also contain a "pollution exclusion":

> This insurance does not apply . . . (f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

We deal first with the meaning of "occurrence." The policies say that an "occurrence" is an "accident" and that the term "accident" includes "continuous or repeated exposure to conditions." The word "accident," although not defined in the policies, has generally been held by courts to mean "that which happens by chance or fortuitously, without intention or design, and which is unexpected, unusual, and unforeseen." *City of Wilmington v. Pigott*, 64 N.C. App. 587, 589, 307 S.E. 2d 857, 859 (1983), *citing* 43

Am. Jur. 2d, Insurance, § 559; *Skillman v. Insurance Co.*, 258 N.C. 1, 7, 127 S.E. 2d 789, 793 (1962).

The second half of the policies' definition of "occurrence" very nearly restates the common law definition of "accident." Our understanding of the history of the "occurrence" definition in the Comprehensive General Liability model policies is that the latter half of the definition was added to broaden and clarify the meaning of "accident," which some courts had taken to mean only an event happening suddenly and violently. *See* 7A Appleman, Insurance Law and Practice § 4492 (1979). We construe the latter half of the definition as clarifying the meaning of "accident" by stressing that what determines whether an accident has occurred are intent and expectation of bodily injury and property damage, and by adding the idea that whether the event is unexpected or unintended should be determined "from the standpoint of the insured." *See Edwards v. Akion*, 52 N.C. App. 688, 691-92, 279 S.E. 2d 894, 896 (1981) (intentional acts committed by employees of City covered by policy held by City because City did not expect or intend the acts), *aff'd per curiam*, 304 N.C. 585, 284 S.E. 2d 518 (1981).

Thus, in view of the "comparison test" described above and the definition of "occurrence," the question we must answer on examining the complaints is whether the facts alleged suggest a potential that an accident occurred and do not suggest conclusively that the insured actually foresaw or intended that its activity would result in bodily injury or property damage. We stress that our examination of intent or expectation should be a subjective one, from the standpoint of the insured, and not an objective one asking whether the insured "should have" expected the resulting damage.

We now turn to the pollution exclusion clause. The insurers argue that even if the coverage provisions apply to TRS, coverage was properly denied because of the pollution exclusion clause. The clause says that the insurance does not apply to bodily injury or property damage resulting from discharge of waste materials on land or water *unless* "such discharge, dispersal, release or escape is sudden and accidental." The trial court apparently agreed with the insurers, in particular, Penn, that this exclusion prevents the insurers from having a duty to defend. We disagree.

Construction of the polluters exclusion clause appears to be a question of first impression in this state. Overwhelming authority in other jurisdictions suggests that the clause is ambiguous, and that it should be construed consistently with the definition of "occurrence." *See Buckeye Union Ins. Co. v. Liberty Solvents and Chemicals Co., Inc.*, No. 11598, slip op. (C.A. Ohio July 11, 1984) and *Jackson Township Municipal Utilities Authority v. Hartford Accident & Indemnity Co.*, 186 N.J. Super. 156, 451 A. 2d 990 (1982) and cases cited therein.

The exclusion hinges on the words "sudden and accidental." The policies do not define these words, and some courts have observed that this may be enough to create ambiguity in the exclusion. *See Buckeye Union Ins. Co. v. Liberty Solvents and Chemicals Co., Inc.*, No. 11598, slip op. (C.A. Ohio July 11, 1984). Yet, there is further ambiguity in that the pollution exclusion and the definition of occurrence can conflict. The word "sudden," in the pollution exclusion, means happening without previous notice or on very brief notice; unforeseen; unexpected; unprepared for. Webster's New International Dictionary (2d ed. unabridged 1954); Black's Law Dictionary (4th ed. 1968). "Accidental" means, as noted above, happening unexpectedly or unintentionally, or by chance. Under the coverage provisions, if an event happens over a period of time, causing bodily injury or property damage unexpected or unintended from the standpoint of the insured, then it is an "occurrence," and the insurer should defend the insured in the event of suit based on it. Such an occurrence is clearly accidental, if the damage was not expected or intended from the standpoint of the insured. Yet, if the word "sudden" means *only* "an instantaneous happening," then the occurrence which happens over a period of time is subject to exclusion from coverage under the pollution exclusion.

In North Carolina, exclusions from coverage under insurance policies are strictly construed. *Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 114, 314 S.E. 2d 775, 779 (1984). When a policy defines coverage provisions so as to include a particular activity, but that activity is later excluded by an exclusion, then the policy is ambiguous, and the court is obliged to resolve the apparent conflict between coverage and exclusion in favor of the insured. *See id.* We find that the word "sudden" is reasonably susceptible of differing constructions and we construe it not to

mean just "instantaneous," but also "unforeseen" or "unexpected." This construction renders the pollution exclusion consistent with the definition of "occurrence" in the coverage provisions.

This construction has been widely accepted in other jurisdictions. As the court in *Jackson Township Municipal Utilities Authority v. Hartford Accident & Indemnity Co.*, 186 N.J. Super. 156, 451 A. 2d 990 (1982), noted: "the clause can be interpreted as simply a restatement of the definition of 'occurrence'—that is, that the policy will cover claims where the injury was 'neither expected nor intended.' It is a reaffirmation of the principle that coverage will not be provided for intended results of intentional acts but will be provided for the unintended results of an intentional act." 451 A. 2d at 994. *See also* 3 R. Long, The Law of Liability Insurance, App. 30, App. 58 and App. 68 (1936); *Molton, Allen and Williams, Inc. v. St. Paul F. & M. Ins.*, 347 So. 2d 95 (1977); *CPS Chemical Co., Inc. v. Continental Ins. Co.*, No. L039547-81, slip op. at 10-11 (N.J. Super. Aug. 8, 1984).

Thus, in applying the pollution exclusion to the alleged facts, if we find the contamination of the groundwater was "sudden and accidental," *i.e.*, unexpected and unforeseen from the standpoint of the insured, then the pollution exclusion does not preclude the insurers' duty to defend TRS.

We now examine the complaints at issue in this case to determine whether their allegations show a potential for liability within the insurance coverage and whether their allegations establish no set of facts which *necessarily* excludes coverage. We turn first to the federal Section 7003 complaint, because two of the third party complaints are patterned on it and attempt to pass on liability under it to TRS.

The federal complaint alleges that the owners and operators of the Flemington Landfill "contributed" to the disposal of wastes at the Landfill and to their escape into the groundwater beneath the Landfill. The term "contributed" comes from RCRA Section 7003. The term embraces both intentional and negligent activity resulting in danger to human health and the environment. *See United States v. Price*, 523 F. Supp. 1055, 1072-73 (D.N.J. 1981), *citing* S. Rep. No. 172, 96th Cong. 2d Sess. 5, reprinted in [1980] U.S. Code Cong. & Ad. News 8665, 8669. By using the term "contributing" in its complaint, the United States seeks to make the

owners and operators subject to the injunctive relief available under Section 7003, without having to make specific proof of their intent to contaminate the groundwater or of their negligent activity which caused the contamination of groundwater. The use of the term establishes a potential that the owners and operators were negligent, and does not necessarily mean that they were not negligent.

Before going further, we note that our interpretation of the term "contributing" does not transform this suit into one "arising under" federal law. This remains a suit concerned primarily with the construction of an insurance contract, a matter of state law. Our foray into the realm of RCRA common law is merely to show that for the drafters of the federal complaint the meaning of "contributing" is broad, encompassing both negligent and intentional conduct and excluding neither.

We now turn to the third party complaints which use the "contributing" language in allegations against TRS. Complaints filed by two groups of owners and operators, the New Hanover County Board of Commissioners, et al., and Waste Industries, Inc., and Waste Industries of New Hanover, Inc., allege that TRS hauled solid waste materials to the Flemington Landfill, represented that they were non-hazardous, and "contributed" to contamination of groundwater in the Flemington area and to the "imminent and substantial endangerment to health and to the environment" there. These two complaints seek contribution and indemnification from TRS if injunctive relief is granted against the owners and operators and if TRS is shown also to have "contributed" to the alleged contamination.

We find that these third party plaintiffs merely seek to pass on liability under RCRA Section 7003 to TRS. They use the term "contributing" in the same way as the United States did in the federal complaint. The term thus establishes a potential that at trial facts will be found that TRS's conduct was accidental and does not conclusively show that TRS expected or intended the resulting damage to Flemington groundwater. The fact that TRS intended to carry solid waste materials to the Landfill, which was its business, does not mean that it intended to contaminate the groundwater with toxic chemicals. Thus, construing ambiguities in these complaints and in the policies in favor of TRS, we find

that both create a potential that liability within the policy language will be established at trial. If TRS's waste transport business somehow "contributed" to groundwater contamination, then this is potentially an "occurrence" and the insurers accordingly have a duty under the general liability policies to defend TRS against these third party complaints.

[3] We turn next to the other third party complaint, brought by A. D. Royal et al. This complaint also alleges that TRS hauled solid waste materials to the landfill and represented that they were non-hazardous and non-contaminated, and that TRS "contributed" to the contamination of the groundwater supply. The Royal complaint, however, alleges in addition that TRS and other haulers were careless and negligent in not preventing solid and hazardous waste materials from being deposited at the landfill. The Royal complaint requests that if the groundwater has been contaminated, then the contributions, acts, omission, and negligence of TRS and other "Haulers" have caused the property of A. D. Royal et al. (the Landfill owners) to be permanently injured and damaged, and A. D. Royal et al. are entitled to "just and substantial compensation from 'Haulers' [including TRS] under general principles of law and equity," or in the alternative, an injunction should issue requiring TRS to provide a water supply for the Royal land and to restore the aquifer.

The Royal complaint thus alleges a set of facts that comes within the definition of "occurrence"; it suggests that TRS hauled waste materials to the landfill, but that TRS was careless and negligent in not preventing the disposal of waste materials that would contaminate the landfill and the groundwater. The Royal complaint's use of the theory of negligence and carelessness creates a potential that at trial TRS will be shown to have accidentally disposed toxic chemicals at the landfill, without any intent or expectation that they would contaminate the groundwater and landfill. Again, in determining duty to defend, we have examined the facts alleged to see whether from the standpoint of the insured, TRS, the contamination was unexpected and unintended. We have found no allegation of facts from which it necessarily follows that TRS intended or expected the groundwater contamination. Since our inquiry must be from the standpoint of the insured, we cannot say that because TRS deposited waste materials at the landfill it should have known that toxic

chemicals might be contained in the wastes and might seep into the groundwater. The third complaint thus also describes an "occurrence" which triggers the insurers' duty to defend.

Construing the pollution exclusion consistently with the definition of "occurrence," we find no allegation of facts in the third party complaints which shows that the contamination of the groundwater was not "sudden and accidental," *i.e.*, not expected nor intended from the standpoint of the insured. Indeed, the insurers have stipulated that "the insured [TRS] neither expected nor intended the resulting claimed damage." The pollution exclusion accordingly does not apply to any of the complaints.

We hold that both of the general liability policies as applied to the alleged facts oblige the defendant insurers, Penn and Peerless, to defend TRS in suits commenced by the three third party complaints. As to these policies, the trial judge's order of summary judgment against TRS is in error and should be reversed.

[4] We address one additional issue, which the parties have not raised, but which has arisen in other cases concerning the clean-up of toxic wastes. This is the question of whether the policy language, "the company shall have the right and duty to defend any suit against the insured seeking *damages* on account of . . . bodily injury or property damage," means that the insurer is obliged only to defend when legal, monetary damages are requested, or whether it must also defend when a suit seeks the costs of complying with an injunction. *See* general discussion in K. Rosenbaum, Insurance, Hazardous Waste and the Courts: Unforeseen Injuries, Unforeseen Law, 13 Envtl. L. Rep. 10204, 10205-06 (1983). This is a particularly important issue in the present case, where the initial suit is a RCRA Section 7003 action, requesting broad injunctive relief, and the third party complaints seek to pass on costs incurred if the injunction is issued.

We note initially that the third party complaint filed by Royal et al. seeks not just to pass on clean-up costs by contribution and indemnification, but also seeks common law damages for injury to the Royals' property. It is not affected by this issue, at least so far as the insurer's duty to defend goes, because even if only part of the complaint is covered by the policy, the insurer still has to defend. *See Travelers Indem. Co. v. Dingwell*, 414 A. 2d 220 (Me. 1980).

The other two complaints, which allege only that TRS "contributed" to groundwater contamination and should have to contribute to or indemnify the owners and operators for costs incurred by the injunction, give rise to the damages issue. Since they seek to pass on liability that may arise under the Section 7003 action, we must examine the federal complaint. It seeks a broad injunction, requiring the owners and operators not merely to prevent further harm, but also to clean up the aquifer and to compensate Flemington residents by supplying alternative supplies. This gives the proposed federal injunction a strong remedial aspect, and it means that the owners and operators will have to pay out large sums, for what are essentially compensatory purposes, to comply with the injunction.

At this stage, then, we can say that the owners and operators seek to pass on those costs of remedying the present harm. Although called "equitable relief," these clean-up costs are essentially compensatory damages for injury to common property, the Flemington groundwater. They are thus covered by the general liability policies.

[5] Plaintiff TRS alleges also that the third party complaints allege facts covered by the automobile liability policies issued by defendants Penn and Peerless. The automobile liability policies provide, in pertinent part, that the insurers will defend any suit against the insured seeking damages on account of bodily injury or property damage caused by "an occurrence and arising out of the ownership, maintenance or use, including loading and unloading, for the purposes stated as applicable thereto in the declarations, of an owned automobile or of a temporary substitute automobile." What is determinative in this case is the "arising out of" language. Our review of the facts as alleged convinces us that if TRS is responsible for the discharge of hazardous waste materials at the Flemington Landfill this was due to TRS's business policies and practices concerning materials handled, rather than to any particular feature of, or malfunction or improper operation of, the Dempsey Dumpsters. We do not find the requisite "causal connection" between use of the Dumpsters and the injury. *Casualty Co. v. Insurance Co.*, 16 N.C. App. 194, 198-9, 192 S.E. 2d 113, 118 (1972). We affirm the summary judgment against plaintiff TRS as to the automobile insurance policies.

The trial judge's order of summary judgment is reversed as to the policies of Manufacturers' and Contractors' Liability Insurance and Comprehensive General Liability Insurance, but is affirmed as to the automobile liability insurance policies.

Reversed in part and affirmed in part.

Judges WELLS and BECTON concur.

STATE OF NORTH CAROLINA v. RAY DANIEL UPRIGHT, JEROME HERMAN FINK AND JOHN HENRY RUSSELL

No. 8419SC205

(Filed 28 December 1984)

1. **Criminal Law § 105.1— evidence by defendant—waiver of prior motion to dismiss**

By presenting evidence at trial, defendant waived his right to assert the denial of his motion for dismissal made at the close of the State's evidence as error on appeal. G.S. 15-173.

2. **Homicide § 21.7— second degree murder—sufficiency of evidence**

The State's evidence was sufficient to support conviction of defendant for second degree murder where it tended to show that defendant was one of four people within close proximity to the victim as he fell to the floor, defendant was the only one with a gun in his hand seconds after the victim was shot, and the fatal wound was inflicted by a bullet shot from a weapon pressed directly against the victim's back. Alleged discrepancies between the testimony of the State's principal witness and the physical evidence were for the jury to determine.

3. **Criminal Law § 92.2— consolidation of charges—charges against codefendants not lesser included offenses of charge against defendant**

Charges against defendant for second degree murder and charges against two codefendants for accessory after the fact to second degree murder were properly consolidated for trial even though the charges against the codefendants were not lesser included offenses of the charge of second degree murder. G.S. 15A-926.

4. **Criminal Law § 102.4— passing defendant's statements to jury—absence of prejudice**

Defendant was not prejudiced when the prosecutor passed defendant's statements to the jury where the record shows that the court had denied the prosecutor the right to pass a codefendant's statements to the jury but there

was no evidence that defendant's statements were within this prohibition; defendant's statements were used on cross-examination of defendant; and, upon objection, defendant's statements were immediately withdrawn from the jury.

5. **Homicide § 30.2— second degree murder—instruction on voluntary manslaughter not required**

In a prosecution for second degree murder, evidence of the victim's assault of a third person, unknown to defendant, was not legally sufficient provocation to require the trial court to instruct on voluntary manslaughter.

6. **Criminal Law § 112.1— sufficiency of instructions on reasonable doubt**

When read contextually, the trial court's instructions sufficiently emphasized the State's burden of proving the elements of the offense and defendant's guilt thereof beyond a reasonable doubt and did not fail to inform the jury that if they had a reasonable doubt as to any one or more elements of the offense, they should return a verdict of not guilty.

7. **Criminal Law § 138— sentence exceeding presumptive term—single aggravating factor**

The trial court's imposition of a sentence in excess of the presumptive term for second degree murder was supported by the trial court's finding of the single aggravating factor that defendant had a conviction or convictions punishable by more than sixty days confinement. G.S. 15A-1340.4(b).

8. **Criminal Law § 11— accessory after the fact to murder—sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction of accessory after the fact of second degree murder where it tended to show that defendant saw the shooting of the victim, the person who did it, and the seriousness of the victim's wound before rendering assistance to the perpetrator by disposing of the murder weapon.

9. **Criminal Law § 92.5— defenses of codefendants not antagonistic—severance not required**

A defendant charged with accessory after the fact of murder and a codefendant charged with murder did not present antagonistic defenses which required severance of their trials where defendant contended that the victim was not shot at the alleged crime scene and the codefendant contended that a scuffle occurred and the victim was killed by an unknown person. Nor did the codefendant's decision to testify require severance.

10. **Indictment and Warrant § 8.4— election between offenses not required**

Defendant's due process rights were not violated when the prosecutor proceeded to trial on a charge against him for accessory after the fact of second degree murder without dismissing a murder indictment against him.

11. **Criminal Law § 11— accessory after fact to second degree murder—sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction of accessory after the fact to second degree murder where it tended to show

that, after the victim was shot and killed in a bar partly owned by defendant, defendant grabbed two shotguns, gave one to the man guarding the door and kept one, told everyone to line up against the wall and to tell the police that the victim was already shot when he walked in off the street and fell to the floor, and held a gun on the crowd while the perpetrator took the name and address of each patron of the bar.

12. Criminal Law § 138— drinking by defendant as mitigating factor—insufficient evidence

The trial court did not err in failing to find as a mitigating factor that defendant had been drinking where there was no evidence that he was in such a state of inebriation so as to impair his ability to understand the consequences of his conduct.

APPEAL by defendants from *Rousseau, Judge.* Judgments entered 26 August 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 19 October 1984.

The defendant Ray Daniel Upright was tried and convicted of second degree murder. Defendants Jerome Herman Fink and John Henry Russell were tried and convicted with accessory after the fact to second degree murder. These cases were consolidated for trial.

The State's evidence tended to show the following: In the early morning hours of 27 November 1983, about thirty-five to forty people were drinking and gambling at The Rail in Rowan County. Among those present were the three defendants, the victim, James Brooks, and Morris Mullins, the State's principal witness.

Morris Mullins arrived at The Rail at about 1:30 a.m. and remained in the downstairs area throughout the early morning of 27 November 1983. He drank beer and shot pool. Throughout the morning he noticed that Brooks was playing blackjack and winning continuously. He also noticed that Brooks had between $1,500 to $2,000 on his person. Brooks was flashing the money about and money was even hanging out of his pockets. Later in the morning, Brooks accused the dealer of cheating. At that time, defendant Jerome Fink, one of the owners of The Rail, began dealing the cards. Thereafter, at about 5:30 a.m., a single gunshot was fired. Morris Mullins turned to look in the direction from which the shot was fired. He saw Brooks, who was on his hands and knees, slide forward onto his face and stomach. Morris

Mullins also observed the three defendants and the card dealer standing in close proximity to Brooks. As he looked at them, he saw defendant Upright with a revolver in his right hand. As Morris Mullins watched, defendant Upright moved the revolver from an upward position and brought it down by his right side. He did not see a gun on the other persons in close proximity to Brooks. After Brooks collapsed, defendants Upright and Russell went through his pockets and removed his money. Defendant Upright handed defendant Russell his gun and told him to get rid of it. Defendant Russell took the gun and left The Rail. A few moments later, defendant Russell returned and went behind the bar. After going through the garbage, he picked up a bag of garbage and left. He was not seen at The Rail again.

Meanwhile, defendant Fink had removed two sawed-off shotguns from behind the bar. He handed one of the shotguns to the man guarding the door. Defendant Fink ordered everyone to line up against the wall. He told the patrons that if they told the police anything they and their families would be in danger. Fink then told them that if they were contacted by the police, they should tell the police that Brooks came in off the street already shot. After giving the patrons these instructions, defendant Upright and defendant Fink made a list of the name and address of each patron.

At approximately 7:00 a.m. on that same morning, Deputy Sheriff Fite arrived at The Rail and found the body of James Brooks lying face-up. Defendants Upright and Fink, along with two other persons, were at the scene at this time. Other officers arriving at the scene, picked up Jack Clark as he attempted to leave the area. Clark had been shot and pistol-whipped by Brooks earlier that morning. As a result of the shot and the beating, Clark was knocked out, and he did not regain consciousness until around 6:30 a.m. at which time he saw the body of Brooks lying face-up near the bar.

Evidence for the defense tended to show that Brooks was shot by an unknown person at or about 6:15 or 6:30 a.m. on the morning of 27 November 1983. Other defense witnesses testified that when Brooks grabbed a gun from defendant Upright, and began waving it around, a struggle ensued, three shots were fired, and Brooks fell. The evidence for the defense tended to show also

that defendant Upright was at the bar during the struggle and when the shots were fired. At that time, defendant Upright went over to Brooks and rolled him on his side, pulled up his shirt, and saw that he had been shot in the back. Defendant Upright then picked up a pistol that was near the body and laid it on the bar.

Additionally, defendant Fink presented evidence which tended to show that no shots were fired at The Rail during the early morning hours of 27 November 1983.

At the close of the State's evidence and again at the close of all the evidence, defendants moved for and were denied motions for dismissal.

From a verdict of guilty of second degree murder and a judgment of twenty-five years imprisonment, defendant Upright appealed. From a verdict of guilty of accessory after the fact to second degree murder, and a judgment imposing a term of eight years, defendant Fink appealed. From a verdict of guilty of accessory after the fact to second degree murder, and judgment of six years imprisonment, defendant Russell appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General David W. Broome, Jr., for the State.

Donald L. Weinhold, Jr., for defendant appellant Ray Daniel Upright.

Corriher & Whitley, by James A. Corriher, for defendant appellant Jerome Herman Fink.

Appellate Defender Adam Stein by Assistant Appellate Defender David W. Dorey, for defendant appellant John Henry Russell.

WEBB, Judge.

A. Defendant Upright's Appeal

In his first three assignments of error, defendant Upright contends that the trial court erred in denying his motions for dismissal and judgment notwithstanding the verdict because the evidence was insufficient to find that he committed the crime charged beyond a reasonable doubt. Defendant Upright argues that the evidence was wholly circumstantial and that the State's

principal witness admitted that he did not see him shoot Brooks. It is defendant Upright's position that for these reasons the evidence adduced at trial was insufficient to go to the jury and to support the verdict of guilty of second degree murder.

[1, 2] By presenting evidence at trial Upright waived his right to assert the denial of his motion for dismissal made at the close of the State's evidence as error on appeal. G.S. 15-173, *State v. Mendez*, 42 N.C. App. 141, 146-47, 256 S.E. 2d 405, 408 (1979). However, his motion to dismiss at the close of all the evidence draws into question the sufficiency of all the evidence to go to the jury. *State v. Stewart*, 292 N.C. 219, 223, 232 S.E. 2d 443, 447 (1977). The evidence is considered in the light most favorable to the State, with the State being entitled to every reasonable inference therefrom. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E. 2d 649, 652-53 (1982). *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578, 581-82 (1975). If there is substantial evidence, irrespective of whether it is direct or circumstantial or both, that the crime charged was committed by the defendant, then a motion to dismiss is properly denied. *State v. McKinney, supra.* Turning to the facts in this case, we believe that the evidence adduced at trial was sufficient to render defendant Upright's guilt an issue for the jury. There was evidence that defendant Upright was one of four people within close proximity to Brooks as he fell to the floor. There was eyewitness testimony that defendant Upright was the only one with a gun in his hand seconds after Brooks was shot. There was also expert medical testimony that the fatal wound was inflicted by a bullet shot from a weapon pressed directly against the victim's back. From this evidence a jury could reasonably infer that defendant Upright committed the offense charged. While the finding of defendant Upright's guilt depended solely on circumstantial evidence, it has long been established in this State that "[t]he chain of circumstantial evidence . . ." may be sufficient to establish guilt of a crime beyond a reasonable doubt. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978). *State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661 (1965).

Defendant Upright argues, however, that the discrepancies and inconsistencies between the testimony of the State's principal witness, Morris Mullins, and the physical evidence rendered the evidence insufficient to support the verdict. There was uncontroverted physical evidence that Brooks had received several mi-

nor injuries in a scuffle prior to the shooting but that the fatal bullet wound was made by a gun pressed tightly against his back. Morris Mullins testified that he did not hear or see a scuffle prior to the shooting. He also testified that moments after the fatal shot, he saw Brooks slide forward on his hands and knees and that Brooks did not fall backward or hit his head. At this time, defendant Upright was facing Brooks. This evidence would arguably indicate that Brooks was shot by someone other than defendant Upright. Such variance in the evidence, however, is one which goes to the credibility rather than the sufficiency. It is within the province of the jury to pass upon the credibility of the witnesses and weight to be accorded the evidence. *State v. White*, 298 N.C. 430, 440, 259 S.E. 2d 281, 287 (1979). Furthermore, one of the fundamental responsibilities of a jury is to choose between competing versions of the facts. Simply stated, the resolution of discrepancies in the evidence is within the province of the jury. Here the jury resolved these discrepancies in favor of the State, and this it was entitled to do. Accordingly, we hold that these assignments of error are without merit.

[3] Defendant Upright next contends that the trial court erred in granting the State's motion to consolidate the trials of defendant Upright and co-defendants Jerome Fink and John Russell. Specifically, he contends that joinder was improper because his co-defendants were charged with different offenses which were not lesser included offenses of the charge of second degree murder.

The decision whether to join cases against co-defendants is one within the sound discretion of the trial court. *State v. Barnett*, 307 N.C. 608, 619, 300 S.E. 2d 340, 346 (1983). *State v. Jones*, 57 N.C. App. 460, 462-63, 291 S.E. 2d 869, 871 (1982). Absent a showing that a consolidated trial has deprived a defendant of a fair trial, the exercise of trial court discretion will not be disturbed. *State v. Smith*, 291 N.C. 505, 519, 231 S.E. 2d 663, 672 (1977). *State v. Jones, supra.* Since the co-defendants were charged with an offense different from the offense for which defendant Upright was charged, the propriety of conducting a joint trial is governed by G.S. 15A-926. Under this statute, joinder of defendants for trial is permitted when the crimes charged grew out of the same acts or transactions and much of the same evidence is necessary or applicable to all defendants. G.S.

15A-926(b)(2)(b)(2), (3). Joinder is also proper whether the motion is made orally or in writing. G.S. 15A-951(a). *State v. Slade*, 291 N.C. 275, 282, 229 S.E. 2d 921, 926 (1976). Finding consolidation properly authorized, we conclude that there was no abuse of discretion. This assignment of error is without merit.

[4] Defendant Upright's next assignment of error concerns the misconduct of the prosecutor in passing his statements to the jury. He contends that the submission of these statements to the jury, which were in violation of an order of the court, tended to prejudice and confuse the jury. We do not agree.

The record reveals that the trial court admitted Morris Mullins' statements into evidence, but denied the prosecutor the right to pass these statements to the jury. There is no evidence in the record, however, that defendant Upright's statements were within this prohibition. Furthermore, the record reveals that these statements were used on cross-examination of defendant Upright. Additionally, these statements, upon objection, were immediately withdrawn from the jury. There is no evidence in the record that defendant Upright was prejudiced by the actions of the prosecutor. This assignment of error is, therefore, without merit.

[5] Defendant Upright next contends that the trial court erred in failing to charge the jury on the issue of voluntary manslaughter. He argues that there was sufficient evidence to compel such a charge even though a special request was not made.

A defendant is entitled to instructions on a lesser included offense when there is evidence from which a jury could find that the defendant committed the lesser offense. *State v. Ford*, 297 N.C. 144, 150, 254 S.E. 2d 14, 18 (1979). When there is no such evidence, then the trial court should refuse to charge on the unsupported lesser offense. *State v. Hampton*, 294 N.C. 242, 250, 239 S.E. 2d 835, 841 (1978).

In the case before us, we find that there is simply no evidence to warrant an instruction on voluntary manslaughter. Voluntary manslaughter is defined as unlawful killing of a human being without malice, in the heat of passion as a result of legally sufficient provocation. G.S. 14-18. *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E. 2d 905, 916 (1978). Therefore, to warrant an instruction on voluntary manslaughter, there must be evidence that

the killing occurred while the defendant was in heat of passion caused by legally sufficient provocation.

Here, defendant Upright presented no evidence to show either adequate provocation or an action taken in heat of passion. To the contrary, defendant Upright claimed that he did not do the killing. The only inference of provocation is that Brooks grabbed defendant Upright's gun and used it to beat another patron of The Rail. There is no evidence that Brooks assaulted or threatened to assault defendant Upright. Brooks' assault on another patron, unknown to defendant Upright, is not legally sufficient provocation warranting an instruction on voluntary manslaughter. This assignment of error is without merit.

[6] Defendant Upright assigns error to the failure of the trial court to give full instructions regarding second degree murder. He contends that the court failed to inform the jury that "if they had any reasonable doubt as to any one or more elements of the offense . . ., they should return a verdict of not guilty."

When read contextually, as required, the trial judge's instructions sufficiently emphasized that proof beyond a reasonable doubt, of the existence of the essential elements of second degree murder and that defendant Upright was the perpetrator, was necessary to sustain a finding of defendant Upright's guilt. The phrase "[i]f the killing was unlawful and was done with malice, then the defendant would be guilty of second degree murder" clearly relates to the preceding clause and other portions of the jury charge regarding the standard of proof necessary for a conviction. We note, parenthetically, that defendant Upright failed to properly preserve for appeal error as to the instructions. Rule 10(b)(2), Appellate Rules of Procedure. However, the Court has reviewed the jury charge in its entirety and finds no prejudicial error. Accordingly, we hold that this assignment of error is without merit.

[7] Finally, defendant Upright contends that the trial court erred in sentencing him to a term in excess of the presumptive term. Defendant contends that the trial court's finding of a single factor in aggravation does not justify the substantial increase in the sentencing. We do not agree.

The sentencing guidelines fixed in the Fair Sentencing Act are clear. A presumptive sentence of fifteen years applies to a conviction of second degree murder. G.S. 15A-1340.4(f)(1). A sentence greater than the presumptive term may be imposed when there is a preponderance of the evidence which supports the finding of one or more aggravating factors. G.S. 15A-1340.4(b). Specifically, a finding of a single factor in aggravation supported by a preponderance of evidence is sufficient to support a sentence greater than the presumptive term. *State v. Baucom*, 66 N.C. App. 298, 302, 311 S.E. 2d 73 (1984). The weight attached to a particular aggravating or mitigating circumstance in a case is within the discretion of the trial judge. *State v. Salters*, 65 N.C. App. 31, 37, 308 S.E. 2d 512, 516 (1983). *State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658, 661, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982).

In this case, the trial judge found as an aggravating factor that defendant Upright had a prior conviction or convictions for criminal offenses punishable by more than sixty days confinement at which time he was represented by counsel. Since the sentence imposed was within the statutory maximum, the court judgment in sentencing will not be disturbed on appeal. As there was no abuse of the trial court's discretion, we find no merit to this assignment of error.

B. Defendant Russell's Appeal

Defendant Russell challenges the sufficiency of the evidence to go to the jury. He contends first that the evidence was insufficient to establish that defendant Upright killed Brooks, and therefore he could not have been an accessory after the fact. For the reasons stated in our consideration of defendant Upright's assignments of error challenging the sufficiency of the evidence, which we need not reiterate here, we summarily reject this contention.

[8] Defendant Russell next contends that the evidence was insufficient to show that the murder was complete at the time he allegedly left the scene. In a prosecution for accessory after the fact under G.S. 14-7, the State need only show that the defendant knew: (1) that a felony had been committed; (2) that the principal had committed it; and (3) that the defendant rendered assistance to the principal personally. *State v. Earnhardt, supra* at 68, 296

S.E. 2d at 653. *State v. Squire*, 292 N.C. 494, 505, 234 S.E. 2d 563, 569, *cert. denied*, 434 U.S. 998, 98 S.Ct. 638, 54 L.Ed. 2d 493 (1977).

A review of the evidence in this case tended to show that after the shooting of Brooks, defendant Russell aided defendant Upright by disposing of the murder weapon. The evidence also showed that before defendant Russell left the scene, he knew that Brooks had been shot and killed. Indeed, there was eyewitness testimony that defendant Russell and defendant Upright rolled Brooks over and searched his pockets. Viewed in the light most favorable to the State, the evidence clearly indicated that defendant Russell saw the shooting, the person who did it, and the seriousness of Brooks' wound before rendering assistance to defendant Upright by disposing of the murder weapon. While it is possible that defendant Russell did not know Brooks was dead at the time he left the scene, the totality of the evidence permits an inference that defendant Russell knew a felony had been committed before he rendered assistance to the felon. Accordingly, we find no merit in this assignment of error.

C. Defendant Fink's Appeal

[9] Defendant Fink also assigns error to the failure of the trial court to grant his motion to sever his trial from that of co-defendants Upright and Russell. He contends that separate trials were necessary to promote a fair determination of his guilt or innocence since he and defendant Upright presented antagonistic defenses at trial. We do not agree.

Our review of the record indicates that all defendants pleaded not guilty and the State's evidence as to the offenses charged was consistent and free from material conflicts. The critical question in determining whether antagonistic defenses warrant severance is "whether the conflict in defendants' respective positions at trial is of such a nature that considering all of the other evidence in the case, defendants were denied a fair trial." *State v. Nelson*, 298 N.C. 573, 587, 260 S.E. 2d 629, 640 (1979), *cert. denied*, 446 U.S. 929, 100 S.Ct. 1867, 64 L.Ed. 2d 282 (1980). *State v. Boykin*, 307 N.C. 87, 91, 296 S.E. 2d 258, 260 (1982). Defendant Upright's defense was that a scuffle occurred and Brooks was killed by an unknown person. Defendant Fink's defense was that Brooks was not shot at The Rail. We find no prejudice to defendant Fink in joinder because there was no material conflict in the

defenses which would prevent the jury from reaching a fair determination of his guilt or innocence. Finally, we do not see how defendant Upright's decision to testify placed defendant Fink in an untenable position. Defendant Upright's testimony in no way implicated defendant Fink. We hold that defendant Fink's motion to sever the trials was properly denied. Defendant Fink's assignments of error one and two are, therefore, without merit.

[10] Defendant Fink next contends that he was denied due process by the failure of the prosecutor to dismiss the murder indictment against him while simultaneously proceeding to trial on the charge of accessory after the fact to second degree murder. More specifically, he contends that the failure to dismiss the murder indictment chilled his constitutional right to testify and impeded the preparation of his defense. We summarily reject these contentions. Where a defendant is charged in separate bills of indictment with mutually exclusive offenses growing out of the same transactions or occurrences, the State may proceed to trial on either indictment without dismissing the other.

[11] In his next assignment of error, defendant Fink contends that the trial court erred in denying his motions to dismiss. He contends that there was insufficient evidence that defendant Fink personally assisted the principal in escaping detection, arrest, or punishment.

Viewed in the light most favorable to the State, there was substantial evidence that defendant Fink assisted defendant Upright in avoiding detection and arrest. There was competent evidence that after the killing, defendant Fink grabbed two shotguns from behind the bar. He gave one to the man guarding the door, and he kept one. Defendant Fink then told everyone to line up against the wall, and he told them that if they were contacted by the police, they should tell the police "that [Brooks] walked in off the street and fell in the floor shot." There was also eyewitness testimony that defendant Fink held a gun on the crowd while defendant Upright took the name and address of each patron. In light of all of this, we are of the opinion that the court correctly denied defendant Fink's motions to dismiss. This assignment of error is without merit.

[12] By assignment of errors six and seven, defendant Fink contends that the court erred in imposing a sentence in excess of the

presumptive term since the aggravating factors did not outweigh the mitigating factors. He contends that the trial court should have found as a mitigating factor that "[he] was suffering from a mental or physical condition insufficient to constitute a defense but significantly reduced his culpability for the offense." G.S. 15A-1340.4(a)(2)(d). He argues that the evidence that he had been drinking on the morning of the shooting should have been considered in mitigation. We do not agree.

The trial court found as a factor in aggravation that defendant Fink had a prior conviction for criminal offenses punishable by more than sixty days confinement. The trial court found no factors in mitigation. A defendant has the burden of establishing such factors by a preponderance of the evidence. G.S. 15A-1340.4 (b). *State v. Jones*, 309 N.C. 214, 219, 306 S.E. 2d 451, 455 (1983). *State v. Hinnant*, 65 N.C. App. 130, 133, 308 S.E. 2d 732, 734 (1983). Evidence that defendant Fink had been drinking, without more, does not show that he was in such a state of inebriation so as to impair his ability to understand the consequences of his conduct. Accordingly, we hold that the trial judge acted properly in refusing to find as factor in mitigation that defendant Fink had been drinking. Defendant Fink's contentions are, therefore, without merit.

For the reasons stated in the consolidated trials of defendants, we find

No error.

Judges BRASWELL and EAGLES concur.

JOHN C. STOKES, JR. v. WILSON AND REDDING LAW FIRM (ALICE E. PATTERSON)

No. 8317SC1220

(Filed 28 December 1984)

1. **Rules of Civil Procedure § 4— first proper service of summons more than five days from filing of complaint—no prior motion to dismiss—action revived**

Where the original complaint was filed on 1 April 1983, there was no service of a properly issued summons until a second summons was issued and served on 2 May 1983, and the defendant did not move to dismiss prior to being served with the second summons, the second summons revived and commenced a new action. G.S. 1A-1, Rule 4(a) (1983).

2. **Limitation of Actions § 12.1— refiling diversity complaint—attorney's malpractice—applicable statute of limitations unclear—Rule 12(b)(6) dismissal improper**

Plaintiff's complaint stated a potential cause of action and should not have been dismissed under Rule 12(b)(6) where he alleged that defendant attorney had negligently advised him that he could refile his malpractice complaint against a Florida doctor within one year of a voluntary dismissal in a North Carolina Federal Court. A federal court sitting in a diversity case would apply North Carolina choice of law rules, but it could not be determined from the pleadings whether the three-year statute of limitation of G.S. 1-15(c) (1983) or the two-year Florida statute under G.S. 1-21, the North Carolina "borrowing statute," would apply.

3. **Attorneys at Law § 5.1; Rules of Civil Procedure §§ 8.1, 41.2— Rule 41(b) dismissal for Rule 8(a)(2) violation—improper**

The trial court erred by dismissing plaintiff's attorney malpractice complaint under Rule 41(b) where the *pro se* plaintiff did not consistently and doggedly ignore the court's order by refusing to delete *ad damnum* clauses which violated Rule 8(a)(2) and plaintiff was not allowed an opportunity to cure his violation.

APPEAL by plaintiff from *James M. Long, Judge.* Judgment entered 14 July 1983 in Superior Court, STOKES County.[1] Heard in the Court of Appeals 31 August 1984.

Ramsey and Grace, by Richard D. Ramsey, for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by William C. Raper and Michael E. Ray, for defendant appellee.

1. Actually heard in Surry County.

BECTON, Judge.

From an order dismissing, with prejudice, plaintiff's claim that his North Carolina attorney negligently represented him on an underlying medical negligence claim against a Florida doctor, plaintiff appeals. We reverse.

I

Facts and Procedural History

On 11 September 1979, plaintiff, John C. Stokes, Jr., suffered a massive stroke while under the care of a Florida doctor. Plaintiff alleges that, as a result of the stroke caused by the doctor's gross negligence, he suffered "permanent loss or physical impairment, incurred extensive medical and psychological expenses, and was required to undergo surgery for a heart replacement valve."

Between 24 November 1980 and 6 April 1981, the defendant, Attorney Alice Patterson (Attorney Patterson), was retained to represent plaintiff, and she filed, on his behalf, a medical negligence action in the United States District Court for the Middle District of North Carolina on the basis of diversity of citizenship. A voluntary dismissal was taken in that case, and, according to plaintiff, Attorney Patterson told plaintiff "verbally" [orally] that he had one year from the date of dismissal to refile his claim against the doctor, and, further, told him he could do so without a lawyer. On 6 April 1982, plaintiff filed a *pro se* Complaint against the doctor in federal court as he had been advised to do. On 20 July 1982, however, the United States District Court for the Middle District of North Carolina dismissed plaintiff's Complaint as being barred by Florida's two-year statute of limitations, which ran on 11 September 1981.

In his initial, *pro se* Complaint in this, his legal malpractice case, plaintiff alleges, generally, that he relied on Attorney Patterson's knowledge of the law and that she negligently advised him of his rights in prosecuting his medical negligence case. Plaintiff sought "compensatory damages in an amount exceeding $10,000" as well as other relief. Attorney Patterson filed a motion to dismiss on 23 May 1983, setting forth nine alleged deficiencies in plaintiff's *pro se* action, including a lack of personal jurisdiction over her. Seeking to overcome the "alleged deficiencies," plaintiff, on 27 June 1983, filed a motion to amend the Complaint and a

more detailed and extensive proposed Amended Complaint. In the *ad damnum* clause of the proposed Amended Complaint, plaintiff included a demand for relief in the amount of three million dollars. On 30 June 1983, Attorney Patterson filed a second motion to dismiss in which she re-alleged "each and every basis for the motion to dismiss dated May 23, 1983 and further move[d] pursuant to Rule 41(b) that this action be dismissed with prejudice on the grounds that plaintiff has violated Rule 8(a)(2) in the amended complaint. . . ." by stating an improper demand for relief in the amount of three million dollars.

The motions were heard before Judge Long on 5 July 1983. Judge Long's order is set forth in its entirety below:

> This cause coming on to be heard and being heard by the Undersigned Judge Presiding at the July 5, 1983 Special Civil Session of Surry Superior Court, with the consent of plaintiff and of defendant Patterson that this matter might be ruled upon out of county and out of term, upon plaintiff's Motion To Amend The Complaint and upon defendant Patterson's two Motions to dismiss pursuant to Rule 8(a)(2), 12(b)(2), (4), (5) and (6), and 41(b), and after having heard argument of Plaintiff and of counsel for defendant Patterson, and after having reviewed the file (including the Affidavit filed July 6, 1983), the Court is of the opinion that plaintiff's Complaint, the amendment thereto already having been filed, be deemed amended as set forth in the heretofore filed Amended Complaint; and the Court is further of the opinion that defendant Patterson's Motions should be granted.
>
> Now, therefore, it is ordered adjudged and decreed that defendant Patterson's Motions to dismiss be and the same hereby are granted, and the plaintiff's amended complaint is hereby dismissed with prejudice, with plaintiff to bear his own costs.

II

Contentions of the Parties (First Series of Arguments)

A. In his brief on appeal, plaintiff's counsel ingeniously concedes and stipulates the existence of insufficiency of process, insufficiency of service of process, and "lack of personal jurisdiction over [Attorney Patterson] . . . and, further stipulates and con-

cedes that the trial court correctly decided that it did not have personal jurisdiction over her." Seeking, thus, to pare his case down to narrower and more defensible issues, plaintiff first argues that: (1) the trial court had no jurisdiction or authority to enter any order except a dismissal for lack of personal jurisdiction over Attorney Patterson; and (2) that, therefore, the trial court's action (a) in allowing plaintiff's motion to amend, (b) in granting Attorney Patterson's motion to dismiss under Rules 8 and 12(b)(6) of our Rules of Civil Procedure, and (c) in entering judgment of dismissal with prejudice under Rule 41(b) of our Rules of Civil Procedure, should be vacated because those portions of the Orders are void.

B. Contending that neither the record facts nor law supports plaintiff's first series of arguments, defendant counters by contending that: (1) the trial court's Order does not state that dismissal is for lack of jurisdiction over Attorney Patterson, but, rather, merely states that "Patterson's motions to dismiss be, and the same hereby are granted, . . ."; (2) "when there are multiple grounds asserted for the dismissal of an action and it does not appear from the record which of the grounds constitutes the foundation for the order of dismissal, the reviewing court will presume that the order is based upon the grounds that are sufficient to support it"; and (3) the trial court had personal jurisdiction over Attorney Patterson since "a proper summons was issued, directed to and served upon Patterson [on 2 May 1983] . . . [and revived and commenced] a new action on the date of its issuance."

Analysis

A. *Service of Process and Personal Jurisdiction*

Although the trial court specifically listed six of the nine bases upon which Attorney Patterson sought to have plaintiff's Amended Complaint dismissed, the trial court simply ordered, without specifying the basis or bases upon which it relied, that "the plaintiff's Amended Complaint is hereby dismissed with prejudice. . . ." Generally speaking, a trial court's failure to set forth a basis for its decision hampers the appellate review process and sometimes requires appellate courts to rely on certain presumptions. Indeed, Attorney Patterson, as appellee, has cited *London v. London*, 271 N.C. 568, 157 S.E. 2d 90 (1967), for the proposition that when there are multiple grounds asserted for the dismissal

of an action and it does not appear from the record which of the grounds constitutes the foundation for the order of dismissal, the reviewing court will presume that the order is based upon the grounds that are sufficient to support it. Reliance on the *London* Court's general statement regarding the presumption in favor of the correctness of the trial court's order, only provides Attorney Patterson with a hollow victory in this case, as we first find *London* factually distinguishable, and as we further find no sufficient grounds to support the order *dismissing plaintiff's claim with prejudice* in this case.

[1] The original Complaint was filed on 1 April 1983, and no properly issued summons was served on Attorney Patterson until 2 May 1983. Although N.C. Gen. Stat. § 1A-1, Rule 4(a) (1983) is clear and unambiguous in its requirement that "upon the filing of the complaint, summons shall be issued forthwith, and in any event, within five days," our Court has recognized that a properly issued and served second summons can revive and commence a new action on the date of its issuance. For example, in *Roshelli v. Sperry*, 57 N.C. App. 305, 291 S.E. 2d 355 (1982), plaintiff filed a Complaint on 27 March 1981 against the owner of a car, based on the negligent acts of the owner's daughter, who was driving the car. The summons was issued that same day in the name of the owner's daughter, rather than the owner. On 7 April 1983, a second summons was issued in the owner's name and was served on him on 13 April 1983. In affirming the trial court's order denying defendant's motion to dismiss on grounds of lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process, this Court said:

> When proper summons was not issued within five days of the filing of the complaint on 27 March 1981, the action was subject to dismissal upon motion by the defendant before the issuance of the second summons for service on the defendant. The motion to dismiss was made after the issuance and service of the second summons. The action abated upon failure to issue proper summons within five days of filing the complaint, but the action revived upon the issuance and service of summons on defendant. Therefore, the effect of the second summons, issued on 7 April 1981 for service on the named defendant and served on 13 April 1981, was to revive and commence a new action on the date of issue.

Roshelli, 57 N.C. App. at 308, 291 S.E. 2d at 357. In this case, as in *Roshelli*, Attorney Patterson made no motion to dismiss prior to being served with the second summons. Therefore, the second summons issued and served on her on 2 May 1983 revived and commenced a new action on the date of issue.

[2] B. *Propriety of the Rule 41(b) Dismissal With Prejudice*

Having disposed of plaintiff's arguments under Rule 12(b)(2), (4), and (5) relating to sufficiency of process, service of process, and personal jurisdiction, we now address plaintiff's arguments concerning the dismissal of his Complaint for failure to state a claim under Rule 12(b)(6).

Plaintiff's claim that he refiled his action in federal court against the Florida doctor on 6 April 1981 as Attorney Patterson had advised him to do, and that his suit was thereafter dismissed as being barred by the applicable Florida statute of limitations which ran on 11 September 1981, is not frivolous. Although his *pro se* complaints may have been inartfully drawn, and although they may contain defective statements of valid causes of action, they, nevertheless, state a claim upon which relief can be granted.

We summarily reject Attorney Patterson's contentions (in both her first and second series of arguments) that the relationship of attorney and client did not exist at the time she gave plaintiff the allegedly negligent advice, that the plaintiff did not rely on the advice to his detriment, and that the plaintiff's loss was not a proximate result of the advice she gave him. We address fully, however, Attorney Patterson's argument that the advice she gave plaintiff was not negligent "because, according to the facts alleged in the Amended Complaint, the North Carolina Statute of Limitations for medical malpractice—rather than the Florida Statute of Limitations—applies as a matter of law."

Federal courts sitting in diversity cases in North Carolina are to apply the North Carolina choice of law rules, the same rules our state courts would have applied if the action had been brought in state court. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 85 L.Ed. 1477, 61 S.Ct. 1020 (1941); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938); *see generally* S. Wurfel, *Choice of Law Rules in North Carolina*, 48 N.C. L. Rev. 243 (1970). Under North Carolina choice of law rules,

we apply the substantive law of the state where the cause of action accrued and the procedural rules of North Carolina. *Howle v. Twin States Express, Inc.*, 237 N.C. 667, 75 S.E. 2d 732 (1953). Under Florida law the Florida statute of limitations is a procedural rule. *Colhoun v. Greyhound Lines, Inc.*, 265 So. 2d 18 (Fla. 1972). Therefore, a North Carolina state court hearing the plaintiff's Florida medical negligence action would apply its own statute of limitations, either the three-year malpractice statute, N.C. Gen. Stat. § 1-15(c) (1983), or, under certain circumstances, the North Carolina "borrowing statute," N.C. Gen. Stat. § 1-21 (1983). G.S. § 1-21 (1983), if applicable, requires the use of the Florida statute of limitations, in this case, the two-year Florida malpractice statute, Fla. Stat. Ann. § 95.11(4)(b) (West 1982), to bar the plaintiff's cause of action. *See* Note, 45 N.C. L. Rev. 845 (1967) (the North Carolina "borrowing statute"); S. Wurfel, *Statutes of Limitations in the Conflict of Law*, 52 N.C. L. Rev. 489, 519-45 (1974).

Based on the pleadings, we cannot say which North Carolina statute of limitations applied to plaintiff's Florida medical negligence action—the three-year malpractice statute, G.S. § 1-15(c) (1983), or the "borrowing statute," G.S. § 1-21 (1983). The answer hinges on the following factors—(1) whether the Florida doctor defendant was subject to "long-arm" jurisdiction pursuant to N.C. Gen. Stat. § 1-75.4 (1983) at the time the action was brought and decided in federal district court, and (2) whether the plaintiff was a resident of North Carolina at the time his alleged Florida medical negligence cause of action accrued. *See* G.S. § 1-21 (1983). First, we note that the "borrowing statute" is not applicable if a defendant is subject to long-arm jurisdiction under G.S. § 1-75.4 (1983). G.S. § 1-21 (1983); *see* Note, 12 Wake Forest L. Rev. 1041 (1976) (tolled statute of limitations v. long-arm statute amenability). Second, after the cause of action has been barred in the jurisdiction where it arose, only a plaintiff, who was a resident of this State at the time the cause of action originally accrued, has the right to maintain an action in the courts of this State. G.S. § 1-21 (1983).

Therefore, as framed, the plaintiff's Complaint states a potential cause of action. The trial court erred in dismissing his Complaint under Rule 12(b)(6). Further, given the factual issues to

resolve in a malpractice action, a disposition on the pleadings is generally inappropriate.

III

Contentions of the Parties (Second Series of Arguments)

Plaintiff styles his second, and alternative, argument thusly:

> Even if it is determined that the trial court could rule on Alice Patterson's Motion to Dismiss Plaintiff's Complaint for an alleged violation of Rule 8(a)(2) when the court had no jurisdiction, the trial court erred and abused its discretion in imposing the extreme sanction of a Rule 41(b) dismissal, as the record clearly shows that the alleged violation by the partially paralyzed *pro se* plaintiff was not in any respect a flagrant violation, but rather was an error invited by and caused by the appellant.

Attorney Patterson counters with a two-pronged elaborate response which we set forth in outline form below:

I. The trial court correctly dismissed the action with prejudice for plaintiff's failure to state a claim upon which relief could be granted because

   A. The allegations of the amended complaint affirmatively show that Attorney Patterson's advice to plaintiff occurred after the termination of the attorney-client relationship.

   B. The alleged advice was not negligent since North Carolina's three-year medical malpractice statute of limitations rather than Florida's two-year statute of limitations applies as a matter of law.

   C. Plaintiff did not rely to his detriment upon Patterson's advice.

   D. Plaintiff's loss, if any, was not a proximate cause of his reliance upon Patterson's allegedly negligent advice but rather resulted from plaintiff's own failure adequately to represent himself and to appeal from the order of dismissal entered by the Federal Court on 28 July 1982.

E. Plaintiff has alleged no facts that would support his claim for punitive damages.

II. The trial court correctly exercised its discretion in dismissing plaintiff's action with prejudice since

A. Plaintiff did not carry his burden of convincing the court that dismissal should be without prejudice and did not even make a motion to this effect.

B. The doctrine of "invited error" raised by the plaintiff has no application to the record facts in this case.

C. Plaintiff's amended complaint, praying for relief against Attorney Patterson totalling three million dollars was deemed amended as of the time of the filing of the amended complaint and before the motion hearing by the trial judge.

D. Two newspapers contained articles about the three million dollar demand.

Analysis

[3] Having summarily rejected most of Attorney Patterson's contentions in our "Analysis" at p. 5, *supra*, we now address plaintiff's three million dollar prayer for relief.

The Rule 8(a)(2) Violation

With regard to professional malpractice actions, the pertinent portion of Rule 8(a)(2) provides that when

> the matter in controversy exceeds the sum or value of ten thousand dollars ($10,000), the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is for damages incurred or to be incurred in excess of ten thousand dollars ($10,000). . . .

The original Complaint filed by plaintiff did not violate Rule 8(a)(2). However, after Attorney Patterson filed a motion to dismiss the Complaint, plaintiff filed an Amended Complaint in which he prayed for damages exceeding three million dollars. Although neither the fact that plaintiff filed his Complaints *pro se* nor the suggestion that Attorney Patterson, by filing her motion to dismiss, "invited" the Rule 8(a)(2) violation are dispositive of

the narrow issue raised, they, nevertheless, suggest that the Rule 8(a)(2) violation in this case was not so egregious as to warrant a dismissal with prejudice.

In support of her position that the Rule 8(a)(2) violation justified the dismissal with prejudice in this case, Attorney Patterson relied on three cases decided by our Court during 1983: *Jones v. Boyce*, 60 N.C. App. 585, 299 S.E. 2d 298 (1983); *Harris v. Maready*, 64 N.C. App. 1, 306 S.E. 2d 799 (1983); and *Schell v. Coleman*, 65 N.C. App. 91, 308 S.E. 2d 662 (1983). *Schell v. Coleman* is clearly distinguishable from the case at bar, and our Supreme Court has recently rejected the relevant rationale of the *Jones* decision and overruled this Court in *Harris v. Maready*.

It is true that our Supreme Court recently denied discretionary review in *Schell*, however, the facts in *Schell* justified the Rule 41(b) dismissal. In *Schell*, we said:

> The Rule 41(b) power of dismissal is only a permissible sanction, not a mandatory one.
>
> The present case illustrates the type of violation which is flagrant and justifies the extreme sanction of a Rule 41(b) dismissal. Like the plaintiff in *Harris*, the plaintiff here was allowed the opportunity to cure his violation by amending the Complaint yet he failed to do so. Furthermore, plaintiff aggravated the violation by having Coleman served in open court, by informing the North Carolina Department of Insurance that a lawsuit existed against attorneys James C. Coleman and Don Garren in the amount of two million dollars ($2,000,000) for misappropriations, and by causing adverse radio and newspaper publicity.
>
> * * *
>
> Given the flagrant and aggravated nature of plaintiff's violation of the Rule, we are compelled to hold the trial court abused its discretion in denying defendant's motion to dismiss.

65 N.C. App. at 94, 308 S.E. 2d at 664-65. In this case, the *pro se* plaintiff did not consistently and doggedly ignore the Court order by refusing to delete the *ad damnum* clauses which violated Rule 8(a)(2). The plaintiff in this case was not allowed an opportunity to

cure his violation. None of the flagrant or aggravated facts that appear in *Schell* are apparent in this case.

More important, our Supreme Court, in *Harris v. Maready*, 311 N.C. 536, --- S.E. 2d --- (filed 28 August 1984), another professional malpractice case, reversed a decision of this Court. In *Harris*, the plaintiff's original Complaint prayed for damages in excess of ten million dollars. Plaintiff filed an Amended Complaint, but did not cure the Rule 8(a)(2) violation. This Court held that the violation remained in the Amended Complaint, that it was flagrant, and that it was an abuse of discretion for the trial judge not to enter a dismissal. Concerned that less drastic measures were not considered, our Supreme Court reversed and stated:

> Although this Court has never decided what sanctions are appropriate for parties who violate Rule 8(a)(2), we note that decisions in other jurisdictions favor penalties less harsh than dismissal. In *Pissingrilli v. Von Kessel*, 100 Misc. 2d 1062, 420 N.Y.S. 2d 540 (1979), a New York court held that Section 3017(c) which, like our Rule 8(a)(2), prohibits the statement of an amount of money demanded, does not authorize '[s]o drastic a remedy as dismissal.' That court ordered the violating clause stricken from the pleading.

Harris, 311 N.C. at 550, --- S.E. 2d at --- (filed opinion at 20-21). After discussing some other sanctions including a reprimand or the imposition of monetary penalties similar to those awarded for failure to make discovery, our Supreme Court stated:

> After a review of sanctions available in other states, we cannot agree with the statement of the Court of Appeals in *Jones v. Boyce*, 60 N.C. App. 585, 299 S.E. 2d 298 (1983) that absent the strong sanction of dismissal for violation of Rule 8(a)(2) litigants may ignore the rule's proscriptions with impunity. We agree with the view expressed in other jurisdictions that dismissal for a violation of Rule 8(a)(2) is not always the best sanction available to the trial court and is certainly not the only sanction available. Although an action may be dismissed under Rule 41(b) for a plaintiff's failure to comply with Rule 8(a)(2), this extreme sanction is to be applied only when the trial court determines that less drastic sanctions will not suffice.

> The trial court in this case refused to dismiss this action on Rule 8(a)(2) grounds. We hold under the facts of this case that the trial court did not err in denying the motion and reverse the holding of the Court of Appeals to the contrary.

311 N.C. at 551-52, --- S.E. 2d at --- (filed opinion at 22).

Considering the fact that the Rule 8(a)(2) violation in this case was not as egregious even as the violation in *Harris v. Maready*, and considering further how distinguishable *Schell v. Coleman* is from this case, we hold that the Rule 41(b) dismissal with prejudice on the basis of a Rule 8(a)(2) violation was unwarranted, unjustified, and reversible error.

Having discussed all the possible bases the trial court could have had for dismissing plaintiff's complaints with prejudice, we conclude that it was error to dismiss plaintiff's complaints with prejudice in this case. Plaintiff's complaints state claims under Rule 12(b)(6), and because the Rule 8(a)(2) violation did not warrant a Rule 41(b) dismissal, the trial court should consider less drastic measures on remand.

Reversed and remanded.

Judges HILL and BRASWELL concur.

IN THE MATTER OF: TOD WAYNE CLARK, D/O/B 09-25-80

No. 8425DC245

(Filed 28 December 1984)

1. **Parent and Child § 1.6— termination of parental rights—judicial review**

   Termination of parental rights may be upheld if the trial court properly has found one of the grounds enumerated in the statute. G.S. 7A-289.32.

2. **Parent and Child § 1.5— termination of parental rights—neglected child—citation of incorrect statute**

   In terminating respondent's parental rights for neglect of the child, respondent was not prejudiced by the trial court's reference to former G.S. 7A-278(4) rather than to G.S. 7A-517(21) since the definitions of neglected child in the two statutes are nearly identical.

3. Parent and Child § 1.6— termination of parental rights—standard of judicial review

The standard for review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law.

4. Parent and Child § 1.6— termination of parental rights—neglect of child—sufficiency of evidence

The evidence supported the termination of respondent father's parental rights for neglect of the child where it tended to show that when the child was six weeks old, respondent, while drunk, directed a third person to shoot the mother while she held the child in her arms; respondent is an alcoholic with five DUI convictions; respondent has assaulted the mother; and respondent has contributed nothing to the child's support from February 1982 until the termination petition was filed in January 1983. G.S. 7A-289.32(2).

5. Parent and Child § 1.6— termination of parental rights—finding as to absence of evidence—no shift of burden of proof

The trial court's finding in an order terminating parental rights that respondent did not present evidence contradicting the allegations set forth in the petition did not in effect place the burden on respondent to produce evidence of the absence of any basis for terminating his parental rights.

6. Parent and Child § 1.6— termination of parental rights—evidence not excludable on ground of remoteness

In a proceeding to terminate parental rights of a child who was thirty-four months old at the time of the hearing, evidence that respondent, while drunk, had directed a third person to shoot the mother while she held the child in her arms when the child was six weeks old was not required to be excluded on the ground of remoteness.

APPEAL by respondent from *Crotty, Judge.* Judgment entered 25 July 1983 in District Court, BURKE County. Heard in the Court of Appeals 23 October 1984.

This appeal arises from a petition filed on 6 January 1983 by the Burke County Department of Social Services pursuant to G.S. 7A-289.32(2) and (4) to terminate the parental rights of Larry Wayne Clark, the appellant, and Patricia Whisnant Clark, parents of the minor child Tod Wayne Clark. (The petition was apparently one of three filed simultaneously against Ms. Clark to terminate her parental rights as to her three children. Larry Clark is the father of Tod, but not of the other two children.) Ms. Clark did not answer, but Mr. Clark filed an answer essentially denying the allegations contained in the petition.

The evidence presented at the 11 April 1983 hearing and subsequent sessions which became necessary tended to show that: Tod Wayne Clark was born on 25 September 1980 to respondent parents, who subsequently married. Respondents have not lived together since April 1982.

On or about 6 November 1980, while Tod was being held in his mother's arms, she was shot and wounded by Richard Barrier. Both appellant and Barrier were in Patricia Clark's trailer at the time. Larry Clark told Barrier to shoot Ms. Clark while she held Tod. After this incident Tod was placed in the custody of the Burke County Department of Social Services (hereinafter "DSS"), and was adjudicated a neglected child on 24 November 1980. Although there is some conflict in the testimony, it appears that Tod was removed from the custody of his parents on three separate occasions, the last time being in February 1982. Since then Tod has been in the custody of the DSS.

The evidence also tended to show that both parents were alcoholics, although more than one witness testified that appellant downplayed or denied his alcohol problem. Appellant has five convictions for driving under the influence. He was incarcerated for the last of these convictions in late 1982. Appellant has been intermittently employed in the shrubbery business for many years. He testified that when he is working full time he is capable of earning up to $200 per week.

From the final time the DSS removed Tod in February 1982 until it filed the petition to terminate parental rights, appellant contributed no money towards Tod's support although appellant was directed by court order of March 1982 to pay $30 per week for his child's support. After the petition was filed, he did pay the arrearage of $485 for Tod's support to the DSS. He stated he had borrowed the money from his mother. Both parents signed agreements with the DSS. In appellant's agreement, signed on 22 September 1982, he agreed to maintain employment, to maintain a savings account, or alternatively, to look for less seasonal work. He also agreed not to drink. There was evidence that appellant visited his son whenever he had the opportunity to do so. He stated that he loves his son.

When he was removed from respondents' custody in February 1982, at 17 months of age, Tod had no communication skills

and his intellectual development was significantly behind children of his own age. Tod is of normal intelligence. Since being removed from the custody of his natural parents, he has shown dramatic improvement in his intellectual development.

On 25 July 1983 Judge Edward Crotty signed the adjudication and disposition orders terminating respondents' parental rights. The orders were filed the following day. Respondent father then gave timely notice of appeal. Respondent father is the sole appellant; Ms. Clark does not appeal.

On 13 December 1983, appellant Clark filed a motion with the trial court for a new hearing on the petition to terminate his parental rights, on the ground that *In re Montgomery*, 62 N.C. App. 343, 303 S.E. 2d 324 (1983), *rev'd*, 311 N.C. 101, 316 S.E. 2d 246 (1984) filed in this Court on 7 June 1983, and published in the advance sheets on 14 September 1983, had enlarged the standard of proof in these cases. In an attempt to comply with *In re Montgomery*, on 28 December 1983 Judge Crotty signed an "Order Amending Judgment and Juvenile Disposition Order," which contained additional findings of fact. Appellant also excepted to the amended order.

Powell, Triggs, Clontz & Alexander, by Douglas F. Powell, for petitioner-appellee Department of Social Services.

Hugh F. Williams, Jr., for respondent-appellant Larry Wayne Clark.

Richard Beyer, guardian ad litem for minor child, Tod Wayne Clark.

EAGLES, Judge.

I

Appellant's principal assignment of error is that the trial court erred in concluding as a matter of law that he neglected his minor child within the meaning of G.S. 7A-289.32(2) and G.S. 7A-278(4), and G.S. 7A-289.32(4).

In its petition, petitioner DSS sought to terminate appellant's parental rights under G.S. 7A-289.32(2) and G.S. 7A-289.32(4). The following conclusions of law appear in the adjudication order:

[Conclusion No. 2] That Larry Wayne Clark and Patricia Whisnant Clark, the Respondents herein, have neglected the minor child within the meaning of North Carolina General Statutes § 7A-289.32(2) and § 7A-278(4).

[Conclusion No. 3] That the parents have wilfully left the child in the care of the Burke County Department of Social Services, Petitioner herein, for more than six (6) consecutive months without showing positive response or any interest in establishing a parental relationship to the said child or to provide for the future of said child.

These conclusions were duly incorporated by reference into the disposition order and the amended order.

A

[1] We are uncertain upon which statutory subsection of G.S. 7A-289.32 the trial court was relying in Conclusion No. 3, as it refers to none, and contains the grounds from G.S. 7A-289.32(3) but the time period from G.S. 7A-289.32(4). However, termination of parental rights may be upheld if the trial court properly has found one of the grounds enumerated in the statute. *In re Pierce*, 67 N.C. App. 257, 312 S.E. 2d 900 (1984). Since we find that the trial court properly terminated appellant's parental rights under G.S. 7A-289.32(2) on grounds of neglect, we need not determine whether Conclusion No. 3 supported a termination of appellant's rights under either G.S. 7A-289.32(3) or G.S. 7A-289.32(4).

B

[2] In Conclusion of Law No. 2, the trial court concluded that appellant had neglected his child pursuant to G.S. 7A-289.32(2) and G.S. 7A-278(4). G.S. 7A-289.32(2) (1983 Supp.) allows parental rights to be terminated for neglect upon a finding that the child is "a neglected child within the meaning of G.S. 7A-517(21)." Prior to a 1983 amendment, G.S. 7A-289.32 cited G.S. 7A-278(4) for the definition of a neglected child. G.S. 7A-278(4) has been repealed and replaced by G.S. 7A-517(21). By its reference to G.S. 7A-278(4) instead of G.S. 7A-517(21), the trial court inadvertently relied on the former version of G.S. 7A-289.32(2). *See* G.S. 7A-289.32(2) (1981). However, we find that the inadvertence did not prejudice appellant. The definitions of neglected child contained in the two

statutes are nearly identical. *See In re Smith*, 56 N.C. App. 142, 147, 287 S.E. 2d 440, 443, *cert. denied*, 306 N.C. 385, 294 S.E. 2d 212 (1982). (G.S. 7A-517(21) "tracks the language appearing in former N.C.G.S. 7A-278(4)".) The adoption of G.S. 7A-517(21) was primarily a recodification, rather than a change in the substantive law. The standard by which a child may be found neglected is unchanged.

C

Since no prejudice resulted from the mistaken citation, the remaining issue is whether the record supports the findings of fact which in turn support the conclusions of law pertaining to the neglect of Tod by the appellant.

Almost simultaneously with the filing of the adjudication and disposition orders in this case, *In re Montgomery*, 62 N.C. App. 343, 303 S.E. 2d 324 (1983), *rev'd*, 311 N.C. 101, 316 S.E. 2d 246 (1984), was handed down by this Court. In reversing a decision of the trial court terminating parental rights for neglect, this Court stated that in light of *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed. 2d 599 (1982), "it is incumbent upon the court to determine whether love, affection, and the other intangible qualities to be found in a family relationship actually exist, along with the findings otherwise required." 62 N.C. App. at 353, 303 S.E. 2d at 329-30. Our Supreme Court has since reversed this decision and reinstated the judgment of the trial court on the grounds that by engrafting these non-physical or non-economic indicia onto the statutory requirements for neglect, the Court of Appeals had erroneously elevated the burden of proof in termination of parental rights cases.

Respondent argues that the fact that the petitioner moved to have the original orders amended in light of the Court of Appeals decision in *In re Montgomery* is the equivalent of an admission by petitioner that the original orders were inadequate. Since *Montgomery* has been reversed by the Supreme Court, there is no need for us to consider this point. Instead, we return our attention to the adjudication and disposition orders to determine whether they properly support a termination of appellant's parental rights on grounds of neglect.

D

[3] The standard for review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law. *See, e.g., In re Ballard,* 63 N.C. App. 580, 306 S.E. 2d 150 (1983); *modified on other grounds,* 311 N.C. 708, 319 S.E. 2d 227 (1984). Aside from his argument that the court failed to comply with the now-discarded standard of *Montgomery,* the appellant principally relies on *In re Phifer,* 67 N.C. App. 16, 312 S.E. 2d 684 (1984). We held in *Phifer* that the risk of future harm to a child is not, standing alone, sufficient grounds upon which to base a termination for neglect:

> At the very most, these findings present a threat that at some time in the future respondent might not be able to provide adequate care and supervision, if she fails to change her habits and lifestyle. . . . A finding of fact that a parent abuses alcohol, without proof of adverse impact upon the child, is not a sufficient basis for an adjudication of termination of parental rights for neglect.

Id. at 25, 312 S.E. 2d at 689 (noting that G.S. 7A-544 allows DSS to obtain *temporary* custody based on a *risk* of neglect).

[4] Respondent's reliance on that case is misplaced. Unlike the mother in *Phifer,* respondent's alcoholism was not the sole grounds upon which the termination was based; furthermore, the findings, as supported by the evidence, demonstrate that Tod Clark *had been* neglected by his father, and exposed to more than mere risk of potential harm in the future. There was evidence that the respondent, while drunk, had directed a third person to shoot at six-week-old Tod's mother while she held him in her arms. Further, there was evidence that respondent was an alcoholic, that he had five DUI convictions (one of which resulted in his incarceration in late 1982), that he assaulted respondent mother, and that he contributed nothing towards Tod's support from February 1982 until the filing of this petition by the DSS. This evidence is more than sufficient to support the termination of respondent's parental rights for neglect under G.S. 7A-289.32 (2). *See, e.g., In re Pierce, supra.* ("Respondents' situation is characterized by instability, movement, unemployment, infrequent visitation, criminal history and inability to provide the

basic resources for their child"); *In re Moore*, 306 N.C. 394, 293 S.E. 2d 127 (1982), *appeal dismissed sub nom. Moore v. Guilford County Dept. of Social Services*, 459 U.S. 1139, 103 S.Ct. 776, 74 L.Ed. 2d 987 (1983) (trial court properly found neglect, although "[i]t is true that after the termination petition was filed, she began visiting the children and gave them gifts").

II

[5] The respondent assigns error to the following finding of fact contained in the disposition order:

> That evidence has not been presented to refute the essential allegations contained in the Petition, or to show that the best interest of the minor child require[s] that the parental rights should not be terminated.

Respondent argues that by this finding, the trial court impermissibly placed the burden of proof upon the respondent to produce evidence of the absence of any conduct which would constitute a basis for terminating his parental rights. Although it is true that in order to terminate parental rights the burden of proof is on the petitioner to produce clear, cogent and convincing evidence to support one or more of the grounds enumerated in G.S. 7A-289.32, we do not believe that the quoted finding of fact shifts this burden of proof. The finding is nothing more than an accurate statement of the procedural stance of the case. The finding recites only that the respondents did not produce evidence that contradicted the allegations set forth in the petition. We have reviewed the evidence and find that in fact respondent had produced no evidence tending to refute these allegations. Although we do not approve of the somewhat inartful wording of this finding, it was not error.

III

The respondent also assigns error to several findings of fact made by the trial court on the grounds they were not sufficiently supported by the evidence. We overrule these assignments of error on the grounds that the findings were in fact supported by the evidence, or that any discrepancies between proof and findings of fact were minor and non-prejudicial.

Respondent first assigns error to the finding that he admitted to assaulting his wife on 15 December 1982, when he had been drinking and they got into "a little scuffle." During his testimony respondent admitted to assaulting his wife. Although the record indicates some confusion as to the date of the incident, the exact date is not critical here.

Respondent also assigns error to a lengthy finding of fact summarizing the evidence upon which the conclusion of neglect is based. Respondent argues that this finding is erroneous because it incorrectly states that the child had been in the custody of the Burke County DSS since November 1980, when the record reveals that the final time Tod was removed from his parents' custody was February 1982. The respondent is correct that Tod was removed from his parents' custody for the last time in February (or possibly March) 1982. The contested finding is arguably free from error as it does not state that Tod has been in the *continuous* custody of the DSS since November 1980. But in any event, any ambiguity or even error in the dates is not prejudicial to respondent, as all the pertinent substantive matters in this finding of fact are correct and supported by competent evidence.

The respondent next assigns error to the finding concerning the shooting incident, namely, that respondent father and Richard Barrier were at respondent mother's trailer, that they were drunk at the time, that respondent father told Barrier to shoot at respondent mother while she held Tod in her arms, and that respondent father and Barrier were arrested in connection with the shooting. The evidence supports all aspects of this finding except whether appellant was actually arrested in connection with the shooting. This discrepancy does not rise to the level of prejudicial error.

[6] Furthermore, though appellant suggests that evidence of the incident should have been excluded on the grounds of remoteness, we disagree, based in part on the gravity of respondent father's conduct. Evidence pertaining to neglect will not be automatically excluded during a hearing to terminate parental rights on remoteness grounds if the relevance of the evidence outweighs any possible prejudice to the parent, particularly where there is other, more recent evidence as to neglect. *See In re Tate*, 67 N.C. App. 89, 312 S.E. 2d 535 (1984); *In re Moore, supra.*

Finally, it was not reversible error for the court to find that the respondent did not buy his son clothes and other items after the child was found neglected by the court.

IV

Finally, respondent makes two arguments based on alleged errors in the December 1983 amended order: first, that the trial court erred in its conclusion of law that respondent's lack of concern for his son was illustrated by his "egging" Richard Barrier to shoot respondent mother, and second, that the trial court erred in signing the December 1983 order because there was neither clear, cogent and convincing evidence nor any findings of fact that would show the reasonable economic needs of the minor child. The trial court issued the amended order in an express effort to comply with the now-reversed case of *In re Montgomery, supra.* The findings and conclusions in the amended order are thus superfluous and any questions raised as to its contents are moot.

However, as to the first argument, we note that the record conclusively supports the finding that the father was the person who told Barrier to shoot. As to the second argument, we here affirm the trial court's order on grounds of neglect under G.S. 7A-289.32(2). Whether it was necessary for the trial court to make findings pertaining to the child's reasonable economic needs is not at issue here, since child support is relevant only to G.S. 7A-289.32(4).

Affirmed.

Chief Judge VAUGHN and Judge BRASWELL concur.

PET, INC. v. THE UNIVERSITY OF NORTH CAROLINA, CARL L. MANUEL AND LYNGLAS ENTERPRISES, LTD.

No. 8318SC1092

(Filed 28 December 1984)

1. **Sales § 1.1; Principal and Agent § 4— federal regulations—alleged principal to be financially responsible—not applicable to subcontractor**

Summary judgment was properly granted for defendant in an action by a subcontractor for monies due under a contract to supply milk to defendant's contractor from a federally funded Summer Food Service Program for Children for which defendant served as a local sponsor. Federal regulations delineating defendant's complete financial responsibility for program operations governed only the relationship between defendant and the state agency responsible for reimbursing defendant, and did not expand defendant's common law contractual liability to encompass liability to contractors with whom defendant had no privity.

2. **Sales § 1.1; Principal and Agent § 4— detailed contract provisions—no grant of authority—no agency**

Summary judgment was properly granted for defendant in an action by a subcontractor to recover monies due under a contract to supply milk to defendant's contractor under a federally funded summer lunch program. There was no evidence of an express or implied grant of authority and detailed provisions of the contract between the defendant and the contractor regarding the manner of performance were guidelines to insure results which did not transform the contractor into an agent of the defendant.

3. **Principal and Agent § 4.2— out of court statements of alleged agent—inadmissible**

In an action by a subcontractor against the local sponsor of a summer lunch program, statements by the contractor that it had agreed as an agent of the defendant to pay for delivery of milk did not create a genuine issue of fact as to agency. Evidence of an alleged agent's out of court declarations is inadmissible to establish agency without other evidence to establish the fact of agency.

APPEAL by plaintiff from *Hamilton H. Hobgood, Judge.* Judgment entered 6 June 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 22 August 1984.

Boone, Higgins, Chastain & Cone, by Robert C. Cone, for plaintiff appellant.

Attorney General Edmisten, by Associate Attorney General Thomas J. Ziko, for defendant appellee.

BECTON, Judge.

This case deals with the liability of the defendant, the University of North Carolina (UNC), for milk supplied by the plaintiff, Pet, Inc. (Pet), to the federally-funded Summer Food Service Program for Children (SFSPC), sponsored in Greensboro by UNC's constituent institution, North Carolina Agricultural and Technical State University (A&T).

In 1976, the federal government funded a Summer Food Service Program for Children, 42 U.S.C. Sec. 1761 (Supp. 1984), as established by the National School Lunch Act, 42 U.S.C. Secs. 1751-1763 (1973 & Supp. 1984). The program is administered by the U.S. Department of Agriculture (USDA) for the purpose of providing nutritional help, based on need, to school-aged children during the summer months. The USDA distributes the operating funds to state agencies, which in turn reimburse the local sponsors for the meals served. The regulations, promulgated by the USDA to govern the administration of the entire program and in effect at the time these events occurred, are codified at 7 C.F.R. Secs. 225.1 - .18 (1978).

In June 1977, A&T signed an agreement with the North Carolina Department of Public Instruction (DPI) (the state agency in charge of reimbursement) to participate in the SFSPC as a sponsor. As a sponsor, A&T had the option to contract with a "'food service management company' . . . to manage, or to prepare, or to deliver, or to serve, or any combination, thereof, unitized meals, with or without milk." 7 C.F.R. Secs. 225.2(m) and -.11 (1978). A&T contracted with Lynglas Enterprises, Ltd. through Carl L. Manuel, Treasurer, to prepare and deliver meals including milk to the designated locations from 13 June 1977 to 19 August 1977. Manuel contracted with Pet to supply the required milk.

Pet instituted this action against UNC, Lynglas and Manuel after Manuel/Lynglas failed to pay the $18,557.76 due for the milk supplied. Pet obtained a default judgment against Lynglas and took a voluntary dismissal without prejudice against Manuel, pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure.

The action comes before this Court on the remaining two parties' cross-motions for summary judgment. From the order granting UNC's motion and denying Pet's motion, Pet appeals.

I

Summary judgment is appropriate once a party establishes that (1) there is no genuine issue of fact, and (2) it is entitled to judgment as a matter of law. N.C. Gen. Stat. Sec. 1A-1, Rule 56(c) (1983); *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). On appeal, Pet contends that the trial court erred in granting summary judgment in favor of UNC, because UNC failed to establish that it was entitled to judgment as a matter of law. Pet relies on three alternate legal theories to establish UNC's liability: (1) A&T's non-delegable administrative and financial responsibility for the entire program, as provided by the federal statutory and regulatory scheme; (2) Manuel's express or implied authority to act as A&T's agent in negotiations with Pet; and (3) Manuel's apparent authority to act as A&T's agent. We are not persuaded by Pet's arguments. After reviewing the pleadings, answers to interrogatories, and other discovery materials, we conclude that the trial court did not err in granting summary judgment in favor of UNC.

II

[1] By signing the agreement to participate as a sponsor in the SFSPC, A&T agreed to comply with the regulations promulgated by the USDA, as codified at 7 C.F.R. Sec. 225.1 - .18 (1978), as well as with any USDA handbooks issued under the above regulations. 7 C.F.R. Sec. 225.9(1) (1978). Pet mistakenly relies on the federal regulations to establish A&T's liability, as the sponsor, to Pet, a subcontractor. In fact, the regulations only govern the relationship between the sponsor and the state agency.

The regulations, included in the plaintiff's brief, and the 1977 edition of the USDA SFSPC Sponsor Handbook, Defendant's Exhibit 1, delineate A&T's complete financial responsibility for program operations. A sponsor is not eligible to participate in the program unless it:

> Demonstrates financial and administrative capability for Program operations and accepts final financial and adminis-

> trative responsibility for total Program operations at all sites at which it proposes to conduct a food service; . . .

7 C.F.R. Sec. 225.9(a)(1) (1978). The non-delegable nature of A&T's financial responsibility is demonstrated unambiguously in the procurement provisions of the regulations, as codified at 7 C.F.R. Sec. 225.15 (1978). Although A&T has the authority to procure goods and services for use in the Program by contracting with "responsible contractors" who may subcontract with other contractors, 7 C.F.R. Sec. 225.15(a)(3)(v) and (a)(4) (1978), A&T remains

> the responsible authority without recourse to the State agency regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into under the Program. This includes disputes, claims, protests of award, source evaluation or other matters of contractual nature.

7 C.F.R. Sec. 225.15(a)(6) (1978).

However, A&T as the sponsor, only bears the "contractual responsibilities arising under *its* contracts." *Id.* (Emphasis added.) The sponsor's acceptance of "final financial and administrative responsibility for total Program operations," 7 C.F.R. Sec. 225.9(a)(1) (1978), and the non-delegable nature of that financial responsibility, as described in the USDA Handbook, *supra*, at 3, refer only to the sponsor's potential reimbursement for operation costs by the State agency. In other words, if A&T commits itself contractually to costs which are not properly reimbursable by the state agency under the federal regulations, and is, nevertheless, reimbursed and pays its contractors, it still remains liable to the state agency for the improperly reimbursed costs.

Thus, the federal regulations do not expand A&T's common-law contractual liability to encompass liability to subcontractors. The bidding provisions in the USDA Handbook, *supra*, reflect this clearly. Although sponsors may accept bids from vendors who will have "to secure certain food items [including milk] from commodity distributors," they cannot accept a vendor who will in turn subcontract the "meal assembly functions." *Id.* at 39. The rationale given is: "[s]ubcontracting places the company immediately responsible for the quality and supply of meals beyond the direct contractual control of the sponsoring organization." *Id.* Pet, as a

subcontractor in privity of contract only with Lynglas, has no remedy against UNC under the federal regulations cited.

III

[2] Based on the "magnitude of detail specified in the contract" between A&T and Lynglas and the degree of control A&T thereby exercised in its relationship with Lynglas, Pet contends that Lynglas acted as A&T's agent in its dealings with Pet, rendering UNC liable on Pet's claim. We find that Lynglas had no express or implied authority to serve as A&T's agent.

Pursuant to 7 C.F.R. Sec. 225.5(d) (1978), each state agency, in this case, the DPI, must develop a "standard form of contract for use by sponsors and food service management companies." The USDA further requires that the sponsor/food service management company contract include, at minimum, the following provisions:

> (1) The sponsor shall provide the food service management company with a list of approved food service sites and shall update the list as needed;
>
> (2) The food service management company shall maintain such records (supported by invoices, receipts, or other evidence) as the sponsor will need to meet its responsibilities under this part, and shall report thereon to the sponsor promptly at the end of each month, at a minimum;
>
> (3) The food service management company shall have State or local health certification for the facility in which it proposes to prepare meals for use in the Program and it shall ensure that all health and sanitation requirements are met at all times;
>
> (4) The books and records of the food service management company pertaining to the sponsor's food service operation shall be available for a period of 3 years from the date of receipt of final payment under their contract with the sponsor for inspection and audit by representatives of the State agency, of the Department, and of the United States General Accounting Office at any reasonable time and place;
>
> (5) Unitized meals shall be delivered in accordance with a delivery schedule prescribed in the contract;

(6) Increases and decreases in the number of meal orders may be made by the sponsor, as needed, within a period of prior notice mutually agreed upon;

(7) No payment shall be made for meals that do not meet nutritional requirements, are spoiled or unwholesome at time of delivery, or do not otherwise meet the requirements of the contract;

(8) All meals shall meet the requirements of Sec. 225.10; [portion, size, meal composition]

(9) Nonperformance shall subject the food service management company to specified sanctions.

7 C.F.R. Sec. 225.11(b) (1978).

The solicitation/contract into which A&T and Lynglas entered, defendant's Exhibit 4, incorporated the above provisions as well as provisions specifying the individual meal packaging, the meal preparation time prior to delivery, the food quality, the menu cycle, and A&T's "right to suggest menu changes within [Lynglas'] stipulated food cost periodically throughout the contract period." Further, the contract provided that A&T had the right to delete sites on twenty-four hour notice to Lynglas. *Id.* at 7. If Lynglas failed "to comply with any of the requirements in this contract or schedule," A&T had the right to cancel the contract after giving Lynglas written notice of "specific instances of non-compliance." *Id.* at 9. These additional provisions were either part of the standard contract developed by the DPI pursuant to 7 C.F.R. Sec. 225.5(d) (1978) or added by A&T and approved by the DPI under 7 C.F.R. Sec. 225.11(c) (1978).

In its brief Pet states: "The detail of the contract (i.e., the fact that the manner as well as the result of the work was under A&T's control) and the termination provisions point inescapably to an agency relationship even under State law." We disagree.

Relying on case law distinguishing between an employer-employee relationship and an employer-independent contractor relationship, Pet attempts to establish an agency relationship between A&T and Lynglas. *Askew v. Leonard Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965); *Cooper v. Asheville Citizen-Times Publishing Co., Inc.*, 258 N.C. 578, 129 S.E. 2d 107 (1963); *Hayes v.*

Bd. of Trustees of Elon College, 224 N.C. 11, 29 S.E. 2d 137 (1944). Pet focuses on one of the factors considered in *Hayes*: Whether the person employed (d) "is not subject to discharge because he adopts one method of doing the work rather than another." 224 N.C. at 16, 29 S.E. 2d at 140. Admittedly the A&T/Lynglas contract included basic provisions on the manner of performance, for example: container size, time of preparation and delivery and the icing of the milk. However, these provisions directly related to the result. In a letter, dated 26 June 1977 to Manuel from the director of the Summer Lunch Program, Defendant's Exhibit 8A, it is clear that Lynglas' failure to comply with the container and time requirements had resulted in delays and spoiled food. The provisions were guidelines to insure uniform results—edible meals. Given the perishable nature of the commodity, the Summer Lunch Program operated, as a matter of course, under severe time constraints and health standards, which infused the contract. The degree of specificity in the contract resembles the detailed building specifications in construction contracts. We are unwilling to find that these necessary guidelines transformed Lynglas into an employee/agent of A&T.

We now alternatively analyze the evidence before us in light of the principal elements of an agency relationship, the grant of authority to the agent to act for the principal. *Branch Banking and Trust Co. v. Creasy*, 301 N.C. 44, 269 S.E. 2d 117 (1980). A detailed contract with arguably harsh termination provisions does not, in and of itself, dictate an agency relationship. The element of control is not the crucial issue here. Rather, we are concerned with evidence of Lynglas' express or implied authority to represent and act for A&T in negotiations with third parties. *Lancaster's Stock Yards, Inc. v. Williams*, 37 N.C. App. 698, 246 S.E. 2d 823, *disc. rev. denied*, 295 N.C. 738, 248 S.E. 2d 863 (1978).

There is no evidence before us to support a grant of express or implied authority. In the A&T/Lynglas contract, Lynglas, as a "contractor," simply agreed to supply A&T with complete meals including milk. The contract provided: "The Vendor [Lynglas] is responsible for the performance of any subcontractor with whom he may arrange for the fulfillment of this contract." Defendant's Exhibit 4 at 6. Although Lynglas had the leeway to purchase milk from a "commodity distributor," it had no express or implied authority to act as A&T's agent in that purchase.

IV

[3] Alternatively, Pet asserts that the language in an agreement between Pet and Manuel, a Lynglas officer, to provide Manuel with two refrigerated milk trucks, Plaintiff's Exhibit 8, establishes Manuel's apparent authority to act as A&T's agent. Apparent authority "is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses. . . ." *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 31, 209 S.E. 2d 795, 799 (1974).

Plaintiff's Exhibit 8 reads, in pertinent part, as follows:

> Whereas, the Party of the First Part has already agreed to supply milk to the Party of the Second Part *as its agent* pursuant to the North Carolina A&T State University and the Summer Lunch Program. . . .
>
> Whereas, the Party of the Second Part has already agreed, as *agent of the sponsor* of said program to pay for the delivery of said milk. [Emphasis added.]

Pet is attempting to prove Lynglas' apparent authority solely through Manuel's out-of-court declarations. As a general rule, evidence of an alleged agent's out-of-court declarations is inadmissible to establish the agency relationship,

> unless (1) the fact of agency appears from other evidence, and also unless it be made to appear by other evidence that the making of such statement or declaration was (2) within the authority of the agent or, (3) as to persons dealing with the agent, within the apparent authority of the agent.

Hanover Co. v. Twisdale, 42 N.C. App. 472, 476, 256 S.E. 2d 840, 843 (1979) (quoting *Commercial Solvents, Inc. v. Johnson*, 235 N.C. 237, 241, 69 S.E. 2d 716, 719 (1952)). Pet has provided no other evidence to establish "the fact of agency." We, therefore, cannot permit Pet to establish the agency relationship based on the alleged agent's statements.

V

In summary, the trial court did not err in granting summary judgment in favor of UNC. None of Pet's theories discussed above create a genuine issue of fact.

Affirmed.

Judges HILL and BRASWELL concur.

EMILY R. LANCASTER v. BLACK MOUNTAIN CENTER AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 8328SC1218

(Filed 28 December 1984)

Master and Servant § 108.1— unemployment compensation—insufficient evidence and findings of misconduct

Findings by the Employment Security Commission did not support the conclusion that claimant was discharged as a health care technician in an institution for the mentally retarded for misconduct connected with her work so as to disqualify her from receiving unemployment compensation benefits where the evidence supported findings that claimant attached a piece of paper to a resident's head, drew a circle on one resident's nose, and placed a resident's eyeglasses on over a headband, but there was no evidence or findings that claimant's actions constituted physical or emotional abuse as those terms are defined in the employer's manual or that claimant willfully or deliberately, with evil intent, disregarded her employer's interests.

APPEAL by employer Black Mountain Center and Employment Security Commission of North Carolina from *Howell, Judge.* Order and judgment entered 11 August 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 19 September 1984.

Employer Black Mountain Center and the Employment Security Commission of North Carolina ("Commission") appeal from a decision reversing an order of the Commission which disqualified claimant Emily Lancaster from receiving unemployment benefits on the ground of misconduct associated with her work.

Bob Warren, for claimant appellee.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Robert E. Cansler, for appellant Black Mountain Center.

Donald R. Teeter, for appellant Employment Security Commission of North Carolina.

JOHNSON, Judge.

Claimant was discharged from her employment as a health care technician with appellant Black Mountain Center (employer), an institution for severely mentally retarded individuals, on 17 December 1982 for alleged "gross personal misconduct." In the letter of termination, the employer charged that claimant committed six incidents which were the cause of her discharge: (1) engaging in inappropriate verbalization to residents by saying to a resident: "Why are you living?" and "You should not have been born"; (2) attaching a paper with tape over the face of a resident; (3) drawing a circle in ink on a resident's nose and placing a dot inside the circle; (4) pulling a headband over a resident's face and placing the resident's glasses over the headband; (5) spraying a resident in the face with water; and (6) handling residents roughly by jerking their limbs, shaking them, or slapping their faces.

Claimant applied for unemployment compensation. From the denial of her application on the ground that she was disqualified from receiving benefits due to work-related misconduct, she appealed to the appeals referee, who allowed her to recover. The employer appealed to the Commission, which reversed the appeals referee and denied her benefits. The Commission made the following pertinent findings of fact:

> 3. As to the six (6) alleged incidents [for which claimant was terminated]:
>
> (i) The claimant admits saying "Why are you living?" but denies saying "You should not have been born." It is found as fact that she did say "Why are you living?" to a resident or residents.
>
> (ii) The claimant admits attaching a piece of paper with tape over the face of a resident, and it is found as fact she did.
>
> (iii) The claimant admits drawing a circle in ink on a resident's nose and placing a dot within the circle, and it is found as fact she did.
>
> (iv) The claimant admits pulling a headband over a resident's face and then putting the resident's glasses over the headband, and it is found as fact she did.

(v) The claimant admits spraying water in the face of a resident, while bathing the resident, and it is found as fact she did.

(vi) The claimant denies handling residents in a rough manner, no evidence was introduced to support that she did, and it is found as fact she did not.

4. As to incident (v) *supra*, the claimant's action was, apparently, accidental while she was bathing a resident. As to incidents (i), (ii), (iii) and (iv), she gives as reasons that she was acting in jest, in play, or otherwise attempting to evoke responses from these residents, who have IQ's of no more than six-month old children. She, however, admits to knowing, and it is found as fact, that each resident had a written treatment plan showing his specified needs and that none of her actions in incidents (i), (ii), (iii) or (iv) were contained as treatments in the treatment plans. Her actions were things she decided to do wilfully on her own.

5. The employer's written policies and G.S. 122-55.1, *et seq.* are intended to ensure to the residents the right to dignity, privacy and humane care, and they prohibit physical and emotional abuse. Emotional abuse is defined in the policies as associated with acts of harrassment, teasing or other behaviors which belittle or "attack" the ego of the person and may cause or causes emotional harm. Emotional abuse also is defined in the policies as verbal abuse. The claimant knew or should have known of these policies, because she had been given training for her job.

6. The claimant did not have good cause for her admitted actions in incidents (i), (ii), (iii) and (iv).

Based upon these findings, the Commission concluded that claimant's actions constituted misconduct disqualifying her from receiving unemployment benefits.

Claimant appealed to the Superior Court of Buncombe County which entered the following Order:

This matter was heard by the undersigned at the July 25, 1983 civil session of Superior Court for the county of Buncombe and reviewed as provided in G.S. § 96-15. The Court

having examined the record on appeal and reviewed the evidence finds and concludes:

1. That Commission finding 3 (i) is not supported by the evidence. Claimant was asked if she made such a statement to a specific patient. She denied this specifically, and the only testimony is that she does not deny because she cannot recall this statement. The employer failed to offer evidence to show where or when or under what circumstances such statement was made.

EXCEPTION NO. 1 of the Employer and the Employment Security Commission.

2. Commission finding 3 (ii). This finding is not supported by evidence. The claimant only admitted that she attached a piece of paper across the head of a patient to draw attention to her finding (sic); that she attached a paper "over the face" implies that she blinded the patient. This was not what the claimant admitted.

EXCEPTION NO. 2 of the Employer and the Employment Security Commission.

3. Commission finding 3 (iii). This finding is supported by the evidence.

4. Commission finding 3 (iv). This is totally unsupported by the evidence. Claimant admitted putting a headband over the forehead of a patient where it was supposed to be and putting prescribed glasses on her nose where they were supposed to be. She specifically denies switching the headband with the glasses as implied in this finding. (See page 54 of the transcript.)

EXCEPTION NO. 3 of the Employer and the Employment Security Commission.

5. Commission finding 3 (v). This finding is supported by the evidence.

The Court concludes that the findings of fact which are supported by the evidence are insufficient to constitute "misconduct" because there was a total failure on the part of the employer to show the effect, if any, of the claimant's actions,

and the evidence is insufficient to show that the employee wilfully disregarded the employer's interest. Therefore, the employer did not meet its burden to show circumstances which disqualify this claimant from unemployment benefits.

EXCEPTION NO. 4 of the Employer and the Employment Security Commission.

Now, therefore, it is ordered, adjudged and decreed that the decision of the Employment Security Commission under docket 83(G)1423 is hereby reversed, and it is further ordered that the claimant is entitled to unemployment benefits as provided by law.

Appellants contend the Superior Court erred by making findings of fact in contradiction of the findings of fact made by the Commission. The law is settled that the jurisdiction of the Superior Court in reviewing a decision of the Commission is limited to determining whether there is evidence to support the Commission's findings of fact and whether these findings so supported sustain the legal conclusions and the award. G.S. 96-15(i); *In re Enoch*, 36 N.C. App. 255, 243 S.E. 2d 388 (1978). The Superior Court in the present case did not make additional findings of fact, but was properly carrying out its review function by explaining how the findings were not supported by the evidence. This contention is overruled.

We next review the evidence to determine whether the Superior Court was correct in "finding" that several of the Commission's findings were not supported by the evidence. As to whether plaintiff allegedly made certain statements to residents, the employer, who had the burden of showing the claimant to be disqualified from receiving benefits, *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 289 S.E. 2d 357 (1982), presented no evidence that claimant made these statements. The only evidence with respect to these alleged statements consisted of claimant's testimony at the hearing. Claimant testified that she could not remember making either of the statements, "Why are you living?" or "You should not have been born." She denied making the statements to a specific resident. The Commission apparently based its finding of fact that she made the statement, "Why are you living?" from the following exchange:

Q. Do you deny making the first statement, why are you living?

A. I don't deny it, no.

Q. You don't deny it.

A. But I cannot recall.

In the absence of other evidence to indicate she made the statement, we do not believe the Commission could validly find as a fact that claimant made the statement from her refusal to deny it because she could not recall whether or not she made the statement. We agree with the Superior Court that the Commission's finding was not supported by evidence.

As for the allegation that claimant attached a piece of paper over a resident's face, the record shows claimant testified that she attached a piece of paper on a resident's head, "not over the face." No evidence was presented to contradict this testimony. Thus, as the Superior Court properly concluded, the Commission's finding was not supported by the evidence.

As for the finding with respect to the placement of the headband and glasses, the evidence is conflicting. At the hearing, claimant testified that she placed the headband and glasses at their proper places. However, employer presented a written document in claimant's handwriting and signed by claimant in which she admitted placing the glasses on over the headband. Since there was evidence to support the Commission's finding, the Superior Court erred in concluding the Commission's finding was not supported by evidence.

We next consider whether the Commission's findings of fact sustain its conclusions of law. Since the policy of the Employment Security Act is to alleviate the burdens upon one unemployed through no fault of his own, sections in the Act disqualifying one from receiving benefits should be strictly construed in favor of the claimant. *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968). G.S. 96-14(2) provides that an individual "shall be disqualified" from receiving unemployment benefits if the Commission determines that the individual was discharged for misconduct connected with his work. Such misconduct disqualifying one from receiving benefits has been defined by this Court and the Supreme Court as

"conduct which shows a wanton or wilful disregard for the employer's interest, a deliberate violation of the employer's rules, or a wrongful intent." *Intercraft Industries Corp. v. Morrison, supra,* at 375, 289 S.E. 2d at 359; *In re Collingsworth,* 17 N.C. App. 340, 194 S.E. 2d 210 (1973).

The ground asserted by the Commission and the employer for disqualifying claimant from receiving benefits is that claimant disregarded or violated her employer's written policies prohibiting physical and emotional abuse. These policies are outlined in an administrative policy manual issued to each employee. Physical abuse is defined in the manual as "any action which may cause or causes physical or emotional harm or injury." Emotional abuse is defined as "abuse which takes on a non-physical form [such as] acts of harrassment, teasing or other behavior which belittle or 'attack' the ego of the person and may cause or causes emotional harm." Attached to the appendix of the manual are examples of physical and emotional abuse, which include "unnecessary teasing, making fun of a resident, or unduly criticizing a resident, causing embarrassment, ridicule or belittlement." Claimant characterized her actions as "harmless teasing."

A violation of a work rule does not constitute misconduct if the evidence shows an employee's actions were reasonable and taken with good cause. *Intercraft Industries Corp. v. Morrison, supra.* Claimant testified that she did take the questioned actions to attract attention to residents who craved attention or to distract or calm a resident in an agitated state; that these actions achieved their purpose and received positive reactions from other staff personnel; that she had never been warned that her behavior would not be tolerated; and that even though her actions were not included in the treatment plans for the residents, she was encouraged to add to the treatment plans as she saw fit.

As indicated *supra,* the employer has the burden of proving a claimant disqualified from receiving benefits. Here, the Commission's findings supported by evidence show that claimant attached a piece of paper to a resident's head, drew a circle on one's nose, and placed eyeglasses on over a headband and that employer had policies prohibiting abuse of residents. There were no findings, nor evidence to support findings, that claimant's actions constituted physical or emotional abuse as those terms are defined in

the employer's manual, or that claimant wilfully or deliberately, with evil intent, disregarded her employer's interests. The employer has failed to carry its burden. We agree with the Superior Court that the Commission's findings do not sustain a conclusion that claimant's actions constituted misconduct. We, therefore, except as modified herein, affirm the Superior Court's order declaring claimant to be entitled to receive unemployment benefits.

Modified and affirmed.

Chief Judge VAUGHN and Judge WHICHARD concur.

HERBERT L. CLARK AND WIFE, BOBBIE C. CLARK v. ASHEVILLE CONTRACTING COMPANY, INC., A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

WALTER RULE AND WIFE, NANCY RULE v. ASHEVILLE CONTRACTING COMPANY, INC., A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

WILLIAM E. PFEIFFER AND WIFE, LEIGH PFEIFFER v. ASHEVILLE CONTRACTING COMPANY, INC., A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

HERBERT F. MOORE AND WIFE, LORETTA MOORE v. ASHEVILLE CONTRACTING COMPANY, INC., A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

ANGELO G. DOTSIKAS AND WIFE, CATHERINE M. DOTSIKAS v. ASHEVILLE CONTRACTING COMPANY, INC., A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

ALLEN WALTON YOUNG AND WIFE, BIRGIT YOUNG v. ASHEVILLE CONTRACTING COMPANY, INC., A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

WINSTON C. LITTLE AND WIFE, LINDA B. LITTLE v. ASHEVILLE CONTRACTING COMPANY, INC., A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

EDSEL RITTER AND WIFE, NORMA RITTER v. ASHEVILLE CONTRACTING COMPANY, INC., A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

HARRY GOLDEN AND WIFE, RUTH GOLDEN v. ASHEVILLE CONTRACTING COMPANY, INC., A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

TANIA ROLLMAN v. ASHEVILLE CONTRACTING COMPANY, INC., A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

ARTHUR E. JACOBSON, SENIOR WARDEN, ST. LUKE'S EPISCOPAL CHURCH, DAN WALL, JUNIOR WARDEN, ST. LUKE'S EPISCOPAL CHURCH v. ASHEVILLE CONTRACTING COMPANY, INC., A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

CHARLES CROCKER AND WIFE, MAE CROCKER v. ASHEVILLE CONTRACTING COMPANY, INC., A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

EUGENE C. SANFORD AND WIFE, PATRICIA G. SANFORD v. ASHEVILLE CONTRACTING COMPANY, INC., A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

J. ROBERT HUFSTADER AND WIFE, JEAN HUFSTADER v. ASHEVILLE CONTRACTING COMPANY, INC., A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

WILLIAM L. SUTTON AND WIFE, BETTY A. SUTTON v. ASHEVILLE CONTRACTING COMPANY, INC., A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

Clark v. Asheville Contracting Co., Inc.

KENNETH W. BROWNELL, JR. AND WIFE, MARGARET SLACK BROWNELL v. ASHEVILLE CONTRACTING COMPANY, INC., A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 8328SC900

(Filed 28 December 1984)

1. **Appeal and Error § 6.2— mandatory injunction—final judgment—immediately appealable**

In actions arising from the placing of rock waste from a highway project near and in a subdivision, a mandatory injunction requiring that defendant remove the waste was a final judgment from which there was the right to an immediate appeal, even though the judgment did not award the plaintiffs any damages.

2. **Highways and Cartways § 7.2— highway construction—disposal of rock waste—contractor not liable except for negligence**

In actions arising from the placing of rock waste from a highway project near and in a subdivision, the court should have dismissed all claims against the contractor except those alleging that agents of the contractor had entered the property, cut trees, and dumped rock without permission of the owners. A contractor with the Department of Transportation which performs work incidental to the construction of a public highway with proper care and skill cannot be held liable to a property owner for damages resulting to the property from the performance of the work.

3. **Highways and Cartways § 7.2— highway construction—property damage from disposal of rock waste—motion to dismiss properly denied—restrictive covenants and zoning ordinance violated**

A motion to dismiss was properly denied as to the president of a contractor which placed rock waste from a highway project near a subdivision and on two lots the contractor's president had purchased in the subdivision. Plaintiffs' forecast of evidence showed violations of restrictive covenants and a zoning ordinance which would entitle plaintiffs to relief if proven.

4. **Highways and Cartways § 7.2— highway construction—disposal of rock waste—issues of fact present as to whether public nuisance created**

Summary judgment should not have been granted for plaintiffs in an action arising from the disposal of rock waste from a highway construction project because there were issues of fact as to whether the Department of Transportation created a public nuisance which diminished the value of plaintiffs' property.

5. **Injunctions § 3— mandatory injunction—findings as to convenience-inconvenience and comparative injuries should be made**

Where there was evidence that performance of a mandatory injunction to remove rock waste would take nine years and cost $13,500,000.00, there should have been findings regarding convenience-inconvenience and comparative injuries to the parties.

Clark v. Asheville Contracting Co., Inc.

APPEAL by defendants from *Lewis, Judge.* Judgment entered 1 January 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 10 May 1984.

This is an appeal in 16 cases brought by property owners in the City of Asheville as a result of land and rock disposal growing out of the Beaucatcher Mountain Highway Project. The plaintiffs brought actions in 16 cases alleging that they own real property in the Mountainbrook Subdivision in Asheville which property was damaged by the action of defendants in placing rock waste materials near their homes. Each of the plaintiffs alleged at least four claims which are: (1) the defendants have created a nuisance; (2) the defendant Taylor violated a restrictive covenant on two lots he owned in Mountainbrook Subdivision; (3) that it was a violation of a zoning ordinance to place the rock waste materials where they were placed; and (4) the defendant Department of Transportation had authorized Asheville Contracting Company, Inc. to perform acts that resulted in the taking of a compensable interest. In four of the actions, the plaintiffs alleged a fifth cause of action, that rock placed on the property of Asheville Contracting and Taylor caused water to flow on the plaintiffs' property to their damage. In three of the cases the plaintiffs alleged a sixth cause of action that the defendants had entered their property and cut trees and dumped rock to their damage. Defendants cross-claimed against each other.

All parties made motions for summary judgment. The court took testimony which showed that when the State constructed a roadway through Beaucatcher Mountain near Asheville, a cut was made through the mountain. The defendant Asheville Contracting Company, Inc. was awarded a contract to remove more than 2,000,000 cubic yards of excess material, mostly granite, and dispose of it off the project site. The contract required that Asheville Contracting Company, Inc. would furnish the off-site waste area. The location of the off-site waste area and the manner in which the waste was to be placed on it was subject to approval by the Department of Transportation. Asheville Contracting Company, Inc. bought land and acquired an easement adjoining the Mountainbrook Subdivision and defendant Taylor, who is the president of Asheville Contracting, bought two lots in Mountainbrook Subdivision. The waste material from the project was put on the property adjoining the subdivision and the two lots owned

by Taylor in the subdivision. The location of the waste disposal site and the manner in which the waste was placed on it was approved by the Department of Transportation. There was evidence from the plaintiffs that the placing of the waste material "considerably raised the level of the land immediately adjoining their properties, blocking view, creating water drainage problems and in general, totalling [sic] changing the character of the neighborhood from a quiet residential area to that of a commercial waste site." There was evidence that 2,400,000 cubic yards of material would have to be removed which would take nine years and cost $13,500,000.00.

The court denied the motions for summary judgment by the defendants. As to the plaintiffs' claims, the court found that there was not a genuine issue as to any material fact, that the acts of the defendants were not for a proper public purpose, and that the plaintiffs are entitled to judgment against the defendants. It found further that the plaintiffs would suffer irreparable harm for which they had no adequate remedy at law unless the nonconforming use of the property is eliminated. It ordered the defendants to remove the waste from the property. It found that a final judgment had been entered as to fewer than all the claims and determined there is no just reason for delay. The defendants appealed.

Attorney General Edmisten, by Assistant Attorney General Alfred N. Salley, for the North Carolina Department of Transportation.

Long, Parker, Payne and Matney, by Robert B. Long, Jr. and David E. Matney, III, for plaintiff appellees.

Adams, Hendon, Carson and Crow, P.A., by George Ward Hendon, for defendant appellants Asheville Contracting Company, Inc. and Baxter H. Taylor.

WEBB, Judge.

[1] We note first that when the court entered a mandatory injunction requiring the defendants to remove the waste, this concluded the lawsuit. Although the judgment did not award the plaintiffs any damages in accordance with some of their claims, it was a final judgment for which there is the right to an immediate

appeal regardless of whether the superior court made a determination that there is no just reason for delay.

[2] We hold it was error not to dismiss all claims against Asheville Contracting Company, Inc. except the claims in three of the complaints that agents of Asheville Contracting entered their property and cut trees and dumped rock without permission of the owners. The complaints allege Asheville Contracting did certain work pursuant to a contract with the North Carolina Department of Transportation in the construction of a public highway. There is no allegation or proof other than the cutting of trees and dumping of rock on the property of some of the plaintiffs that Asheville Contracting performed its work negligently or not in accord with the contract. When a contractor with the Department of Transportation for work incidental to the construction of a public highway performs such work with the proper care and skill, he cannot be held liable to an owner for damages resulting to property from the performance of the work. *Highway Commission v. Reynolds Co.*, 272 N.C. 618, 159 S.E. 2d 198 (1968); *Moore v. Clark*, 235 N.C. 364, 70 S.E. 2d 182 (1952). The plaintiffs contend this principle does not apply in this case because Asheville Contracting violated a zoning ordinance and restrictive covenants by placing the rock waste as it did. If this is so, the plaintiffs are trying to protect private rights given them by the ordinance and covenants. Whatever claim they may have is against the Department of Transportation for the diminution of their property values.

We believe the three claims that Asheville Contracting cut trees and deposited rocks on the property of the plaintiffs states a claim under which the plaintiffs may prove the company acted outside the contract or was negligent. For that reason, we hold it was not error to deny the motion to dismiss them.

[3] We hold it was not error to deny the motion to dismiss by Baxter H. Taylor. He is not a party to the contract between Asheville Contracting and the Department of Transportation. The plaintiffs have alleged and offered a forecast of evidence which shows he violated restrictive covenants in his deed and a zoning ordinance. If they can prove this, they are entitled to relief.

[4] We hold it was error to allow the motions for summary judgment. The complaints allege claims for inverse condemnation by

the Department of Transportation. Whether the Department of Transportation has by violation of a zoning law, restrictive covenants, or otherwise created a public nuisance which diminishes the value of the plaintiffs' property presents questions of fact about which there is dispute. We believe the evidence as to these facts are in conflict so that the allowance of the motion for summary judgment as to them was error.

[5] Although we reverse and remand as to the Department of Transportation and Baxter H. Taylor on the issue of the propriety of allowing the motion for summary judgment, we will comment on the mandatory injunction by which the defendants were ordered to remove the materials. There was evidence that it would take nine years and cost $13,500,000.00 to remove this material. The court made no findings of fact on this evidence. In determining whether to grant an injunction, the court must consider the relative convenience-inconvenience and the comparative injuries to the parties. *See* 42 Am. Jur. 2d *Injunctions* § 56 (19--). In this case some findings of fact should be made in this regard before ordering the removal of the material.

Reversed and remanded.

Judges HILL and WHICHARD concur.

IN THE MATTER OF THE ARBITRATION BETWEEN THE STATE OF NORTH CAROLINA AND DAVIDSON & JONES CONSTRUCTION COMPANY AND GIFFORD-HILL & COMPANY, INC. AND HAKEN/CORLEY & ASSOCIATES, INC.

No. 8310SC1109

(Filed 28 December 1984)

1. Arbitration and Award § 9— order vacating arbitration award—motion to confirm rendered moot—no right of appeal

The granting of a motion to vacate an arbitration award renders moot a motion to confirm the award. Thus, the trial court's original order vacating an arbitration award and granting a rehearing rendered moot an amended order including a specific denial of a motion to confirm so that the amended order did not give the parties a right to appeal. G.S. 1-567.12, .13(d), .14(b)(c), and .18(5).

2. Arbitration and Award § 9— articles by a witness furnished to arbitrators—no misconduct

Arbitrators were not guilty of misconduct and their decision was not based upon *ex parte* evidence where one party furnished to the arbitrators copies of articles written by such party's witness pursuant to a request made by one arbitrator at a hearing attended by all the parties.

APPEAL by the State of North Carolina, Davidson & Jones Construction Company, and Gifford-Hill Company, Inc. from *Bailey, Judge.* Order entered 15 April 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 19 September 1984.

Young, Moore, Henderson & Alvis, P.A., by Joseph C. Moore, Jr. and Joseph C. Moore, III, for appellee.

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

Griffin, Cochrane & Marshall, A Professional Corporation, by Luther P. Cochrane and Jennifer L. Wheatley, for appellant.

Perry, Patrick, Farmer & Michaux, P.A., by Roy H. Michaux, Jr., for the appellant.

JOHNSON, Judge.

This appeal arises out of an arbitration proceeding entered into by all the parties concerning the extent of, and responsibility for, certain remedial construction work on a parking deck on the campus of the University of North Carolina at Chapel Hill. On 30 April 1973, the State of North Carolina entered into an agreement with Hakan/Corley & Associates, Inc. (hereinafter Hakan/Corley) whereby Hakan/Corley agreed to design, prepare plans and specifications and to provide construction service for a 500-car parking facility at a proposal budget cost of $1,250,000.00. On 24 May 1974, a contract for construction of the parking facility was awarded to Davidson & Jones Construction Company (hereinafter Davidson & Jones). By an agreement entered into on 8 August 1974, Davidson & Jones entered into a subcontract with Gifford-Hill & Company, Inc. (hereinafter Gifford-Hill).

Construction of the project was started during the summer of 1974. Shortly thereafter, structural problems were encountered during the erection process, which caused Hakan/Corley to employ Mr. Charles Raths of the firm of Raths, Raths & Johnson,

Inc., of Chicago, Illinois to inspect the deck. Mr. Raths, a nationally known expert in the area of pre-stressed concrete, made certain general recommendations which he felt were necessary to correct the problems being encountered. On 27 November 1974, Hakan/Corley submitted to Davidson & Jones and Gifford-Hill drawings for modifications, whereupon Davidson & Jones submitted a change order requesting an increase of $9,448.49. The change order was thereafter approved by Hakan/Corley and the State. The deck was substantially completed in June 1975. Hakan/Corley, during a routine inspection of the deck, noted cracks in various columns which supported the deck. Again in May or June 1979, Raths was hired to investigate the problem. On 12 August 1980, at a meeting between the State, Hakan/Corley and Davidson & Jones, a decision was made to instruct Raths to proceed with the actual design details for the deck repairs. Raths, in an agreement with the State, was required to supervise the repair to be performed by Kimley-Horn, a subcontractor hired by Raths.

On 31 March 1981, the parties entered into an Agreement to Arbitrate to determine the issues of liability and apportionment of costs for repairs. The parties agreed to arbitrate in accordance with the Rules of the American Arbitration Association entitled, "Construction Industry Arbitration Rules" and to the extent that the issues submitted were not covered therein, the Uniform Arbitration Act as codified in G.S. 1-567.1, *et seq.* would govern. The issues were submitted to three neutral arbitrators, approved by the parties, and extensive hearings were held. During the hearings, one of the arbitrators requested the State to furnish certain articles written and published by the State's principal witness, Charles Raths. These articles were furnished by the State to the arbitrators before the next scheduled hearing as requested by the arbitrators before all the parties, so they would have an opportunity to review them. Prior to an award being rendered, one of the three arbitrators resigned, leaving the remaining two arbitrators as empowered under sec. 20 of the Rules of Arbitration to render an award unless objected to by the parties. No objection was filed by any party.

The award by the remaining two arbitrators was rendered on 3 November 1982, accompanied by a letter explaining their reasons for the award. The letter was stated to be unofficial and not

a part of the award. The State filed a motion to confirm the award. Shortly thereafter, Hakan/Corley filed a motion to vacate the award and to deny the State's motion for confirmation, citing the arbitrators' reliance on the Raths' article as the reason. The trial judge vacated the award on the basis that the arbitrators' consideration of the Raths' article constituted *ex parte* evidence which was prejudicial to Hakan/Corley.

[1] The first question posed by this appeal is whether it should be dismissed as premature. G.S. 1-567.18 delineates the specific instances in which an appeal may be taken from an arbitration order. It is clear that G.S. 1-567.18(5) allows an appeal where "an order vacating an award without directing a rehearing" is rendered. It is clear from this language that the legislature did not intend for an appeal to lie from an arbitration order which vacates an award, but directs a rehearing. The trial court, in its original order, vacated the arbitration award and granted a rehearing before new arbitrators. The court further stated in its original order that the granting of the motion to vacate rendered the motion to confirm moot and the court would not reach consideration of it. After a motion to reconsider, the trial court amended its order to include a specific denial of the motion to confirm, which the appellants assert gives them the right of appeal. The appellee asserts that the trial court's original ruling (vacating the arbitration award and granting a rehearing) renders the amended order moot, thus not providing an avenue for an appeal at this stage of the proceeding.

The determination of this issue lies in the language of construction of the following statutes: G.S. 1-567.12 and G.S. 1-567.13, which speak to the question of confirming and vacating an arbitration award. G.S. 1-567.12, confirmation of an award, provides:

> Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in G.S. 1-567.13 and 1-567.14.

Upon referring to G.S. 1-567.13, the statute gives the grounds for vacating an arbitration award and only in subsection (d) can one find a reference to confirmation of an award. Subsection (d) states, "[i]f the application to vacate is denied and no motion to

modify or correct the award is pending, the court shall confirm the award." From this language and our reasoning, we conclude that if a motion to vacate is granted, the determination of a motion to confirm an award is rendered moot. Additional support for this conclusion can be found in G.S. 1-567.14(b) and (c), the only remaining statute that makes reference to the affirmation of an arbitration award. In subsection (b), the legislature gave the trial court the authority to modify and correct an award, then confirm the award; or in the alternative to only confirm the award. In subsection (c), authority was given the trial court to join an application to modify or correct an award with an application to vacate an award. There is no mention in the statutes of joining an application to vacate with an application to confirm. The vacating of an arbitration award does not deny a motion to confirm, but renders the consideration of an application to confirm moot. Therefore, the trial court's original order to vacate the award and not reach the determination of the motion to confirm was correct.

This appeal should be dismissed. Nevertheless, in our discretion we shall review the holding of the trial court, pursuant to Rule 21 of the Rules of Appellate Procedure.

[2] The primary issue confronting this Court is whether the arbitrators were guilty of misconduct and of exceeding their power by receiving and considering evidence that influenced their decision, which was not properly before them. It has been established in this jurisdiction that *ex parte* acts by arbitrators constitute misconduct. *Fashion Exhibitors v. Gunter*, 291 N.C. 208, 230 S.E. 2d 380 (1976). The question thus becomes whether the evidence received by the arbitrators was *ex parte* evidence. The Court in *Gunter* espoused the view now accepted in this jurisdiction, "[t]he obligation of arbitrators . . . is to act fairly and impartially and to determine the cause upon the evidence adduced before them at the hearing. They have no right to consider facts excepting as submitted in the evidence at the hearings and it is misconduct for them to seek outside evidence by independent investigation. An arbitrator acts in a quasi-judicial capacity and must render a faithful, honest and disinterested opinion upon the testimony submitted to him." (Citation omitted.) *Id.* An act of an arbitrator in gathering evidence outside the scheduled hearing and without notice to the parties would be a violation of the Act [North

Carolina Uniform Arbitration Act] and hence of the arbitration agreement.

The trial court, in its findings of fact, found that the arbitrators at a hearing attended by all the parties requested the State to provide them with copies of several articles written by Charles Raths in 1971, one of the witnesses who had been called by the State to testify. It further found that some or all of the articles so requested by the arbitrators were thereafter furnished to them by the State. From these findings of fact, the trial court concluded that the arbitrators' acts constituted misconduct. The trial court's findings of fact supported by competent evidence are conclusive on appeal, the trial court's conclusions drawn from the findings are subject to review. 1 Strong's N.C. Index 3d, Appeal and Error, sec. 57.3, p. 345.

The request for the articles written by Raths was made before all the parties, thus giving them notice of the arbitrators' desire to receive this evidence. The arbitrators did not receive this evidence as a result of their own independent investigation. Based upon the previous cited principles, we conclude that the trial court's conclusion that the arbitrators' acts constituted misconduct was error. We hold that the trial court's findings of fact, which are based upon competent evidence, reveal that the evidence relied upon by the arbitrators was not *ex parte* evidence, therefore they were not guilty of misconduct.

Even though we have found the evidence received by the arbitrators was not *ex parte* evidence, there still must be a determination of whether the evidence was improperly received. It has been a long standing rule that arbitrators are not bound by strict rules of evidence. In *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E. 2d 793 (1982), our Supreme Court reiterated this point.

> Intertwined with this [disadvantage of limited appellate review] is the disadvantage that the arbitrator is bound by neither substantive law nor rules of evidence . . . A mistake committed by an arbitrator is not of itself sufficient ground to set aside the award. If an arbitrator makes a mistake, either as to law or fact, it is the misfortune of the party, and there is no help for it. There is no right of appeal, and the Court has no power to revise the decisions of "judges who are of the parties' own choosing." An award is intended to

> settle the matter in controversy and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens a door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus the object of references would be defeated and arbitration instead of ending would tend to increase litigation. (Citation omitted.)

The arbitrator requested the article by Charles Raths at the hearing attended by all parties and also at that hearing requested that the material be produced before the next meeting. Although we do not believe that this is the best or preferred manner for an arbitrator to receive evidence, we hold that it is not enough to vacate the arbitration award. It is a truism that an arbitration award will not be vacated for a mistaken interpretation of law. *In re Cohoon*, 60 N.C. App. 226, 298 S.E. 2d 729, *disc. rev. denied*, 307 N.C. 697, 301 S.E. 2d 388 (1983).

In light of our decision that the evidence was properly received, we find it unnecessary to decide whether Hakan/Corley & Associates, Inc. waived its right to object to the decision of the arbitrators to review the articles of Charles Raths.

For the foregoing reasons, the judgment of the trial court is reversed and the cause is remanded with instructions to reinstate the award.

Reversed and remanded.

Chief Judge VAUGHN and Judge WHICHARD concur.

COUNTY OF WAYNE EX REL. RUBY MAE WILLIAMS v. MICHAEL ANTHONY WHITLEY

No. 848DC454

(Filed 28 December 1984)

1. Rules of Civil Procedure § 4.1— service by publication—no alias or pluries summons

In personam jurisdiction may be obtained over a defendant through service of process by publication within 90 days of the issuance of the original

summons, but before the issuance of an alias or pluries summons, if some action is taken by the plaintiff within five days of the filing of the complaint to commence the action and to insure that some method of service of process is begun, if some further action is taken within 90 days of the issuance of the original summons to prevent the action from abating, and if the circumstances warrant service by publication. G.S. 1A-1, Rule 60(b)(4).

2. Rules of Civil Procedure § 4.1— service by publication insufficient

In personam jurisdiction was not obtained by service of process by publication under G.S. 1A-1, Rule 4(j1) where the affidavit did not allege facts showing that defendant with due diligence could not have been personally served and where the notice of service of process was published in a Goldsboro paper even though defendant's last address was in Kansas. G.S. 1A-1, Rule 60(b)(4).

APPEAL by defendant from *Exum, Judge.* Order entered 5 March 1984 *nunc pro tunc* 24 February 1984, in District Court, WAYNE County. Heard in the Court of Appeals on 7 December 1984.

Baddour, Lancaster, Parker & Hine by E. B. Borden Parker for plaintiff appellee.

Duke and Brown by John E. Duke for defendant appellant.

BRASWELL, Judge.

This case presents the question: Can *in personam* jurisdiction be obtained over a defendant through service of process by publication within ninety days of the issuance of the original summons, but before any issuance of an alias or pluries summons? We hold that it can. However, because the service of process by publication under G.S. 1A-1, Rule 4(j1) was insufficient in this case, jurisdiction over the defendant was not obtained and the judgment entered against him is void.

This civil action was commenced by the filing of a verified complaint and the issuance of a summons on 12 January 1979. The plaintiff sued the defendant to have him declared the father of a minor child, Pamela Williams, and to have him ordered to pay reasonable support for the child.

The summons was issued to the defendant at his address in Fort Leavenworth, Kansas, but was returned unserved. Thereafter, on 21, 28 March 1979 and 4 April 1979, without first having

the original summons endorsed or an alias or pluries summons issued, the plaintiff ran a "Notice of Service of Process by Publication" in the *Goldsboro News-Argus.* The plaintiff filed an affidavit dated 18 May 1979 stating that the defendant had been served by publication according to G.S. 1-597. One year and one month later, on 18 June 1980, District Court Judge Kenneth Ellis entered an order against the defendant finding that the defendant had been properly served by publication, adjudging the defendant the father of Pamela Williams, and ordering him to pay $150 a month for her support.

The defendant on 19 October 1983 specially appeared and filed a G.S. 1A-1, Rule 60(b)(4) motion seeking to have the order declared void and vacated for lack of *in personam* jurisdiction due to insufficient service of process. On 24 February 1984 District Court Judge Patrick Exum, on the basis of *McCoy v. McCoy,* 29 N.C. App. 109, 223 S.E. 2d 513 (1976), cited in his order, denied the defendant's motion to vacate. From that order, the defendant has appealed.

A G.S. 1A-1, Rule 60(b)(4) motion seeks relief from a final judgment or order which is void. This motion is addressed to the sound discretion of the court. The scope of our review on appeal is limited to determining whether the court abused its discretion when it denied the defendant's motion. *Sink v. Easter,* 288 N.C. 183, 217 S.E. 2d 532 (1975). *But see Carter v. Carr,* 68 N.C. App. 23, 314 S.E. 2d 281, *disc. rev. allowed,* 311 N.C. 751 (1984). If a judgment or an order is rendered without an essential element such as jurisdiction or proper service of process, it is void. *Wynne v. Conrad,* 220 N.C. 355, 17 S.E. 2d 514 (1941).

[1] To determine whether *in personam* jurisdiction was obtained over the defendant through the method of service of process used in this case, we must analyze our facts in relation to the rules having to do with the issuance of a summons and service by publication that have already been established. Under G.S. 1A-1, Rule 4(a), summons must be issued within five days of the filing of the complaint. Where a complaint has been filed and a proper summons does not issue within the five days allowed under the rule, the action is deemed never to have commenced. *Everhart v. Sowers,* 63 N.C. App. 747, 306 S.E. 2d 472 (1983).

The summons must be served within thirty days after the date of the issuance of the summons. G.S. 1A-1, Rule 4(c). How-

ever, the failure to make service within the time allowed does not invalidate the summons. The action may continue to exist as to the unserved defendant by two methods. First, within ninety days after the issuance of the summons or the date of the last prior endorsement, the plaintiff may secure an endorsement upon the original summons for an extension of time within which to complete service of process. Secondly, the plaintiff may sue out an alias or pluries summons at any time within ninety days after the date of issue of the last preceding summons in the chain of summonses or within ninety days of the last prior endorsement. G.S. 1A-1, Rule 4(d)(1) and (2). Thus, a summons that is not served within the thirty-day period becomes dormant and cannot effect service over the defendant, but may be revived by either of these two methods. If the ninety-day period expires without the summons being served within the first thirty days or revived within the remaining sixty days, the action is discontinued. If a new summons is issued, it begins a new action. G.S. 1A-1, Rule 4(e).

In *McCoy v. McCoy, supra,* this Court held that the issuance of a summons is not essential to the validity of service of process by publication as to a defendant whose usual place of abode is unknown and cannot be ascertained with due diligence. In that case the plaintiff-wife had filed her verified complaint on 13 June 1975 and began service of process by publication on 16 June 1975. *Id.* at 109-10, 223 S.E. 2d at 514.

However, this Court in *Byrd v. Watts Hospital,* 29 N.C. App. 564, 225 S.E. 2d 329 (1976) and again in *Brown v. Overby,* 61 N.C. App. 329, 300 S.E. 2d 565 (1983), held that service by publication, begun more than ninety days after the last alias and pluries summons, did not revive an otherwise discontinued action. Judge Hedrick in *Brown* quoted the following explanatory text from *Byrd*:

> ". . . here, the action had abated at the time plaintiff attempted service by publication. Before plaintiff here could obtain service by publication he first had to revive the action, and that revival could be accomplished only by the issuance of alias or pluries summons or endorsement of the last valid summons.
>
> . . . We think Rule 4(e) mandates that something be done in the clerk's office to *revive* a discontinued action—obtain an

alias or pluries summons or an endorsement to the original summons. (Emphasis in original)."

Id. at 331, 300 S.E. 2d at 566-67, *quoting Byrd, supra,* at 569, 225 S.E. 2d at 331-32.

Our facts show that the plaintiff had a summons issued within five days of the filing of the complaint. Thus, the action did in fact commence. When this summons was not served within thirty days of its issuance, it became dormant or unservable, but nevertheless was not invalidated according to G.S. 1A-1, Rule 4(c) and was subject to being revived under the two methods under Rule 4(d). However, rather than have the original summons endorsed or sue out an alias or pluries summons, the plaintiff approximately sixty-eight days from the issuance of the summons began service of process by publication. Thus, like *McCoy* and contrary to *Byrd* and *Brown,* at the time the service by publication was begun, the action had not abated nor had it been discontinued.

Furthermore, although Rule 4 does not specifically answer the question presented in this case, it does clearly provide that a summons not served within the thirty-day period is not "invalidated" and that an action is not deemed "discontinued" until after ninety days from the date of the issuance of the original summons, its endorsement, or from the issuance of an alias or pluries summons. Since it is clear that the plaintiff's cause of action had not yet abated, we hold that service by publication could be had by the plaintiff without first having an alias or pluries summons issued.

We agree with the holdings of *Byrd* and *Brown* that something must be done by the plaintiff to keep his cause of action alive within the ninety-day period until some type of service can be had over the defendant. If the ninety-day period passes without any action on the part of the plaintiff and the cause of action is discontinued, then no endorsement, issuance of an alias or pluries summons, or service of process by publication can revive the action. However, if the circumstances are such to justify service of process by publication (in other words, even with due diligence the defendant cannot be personally served) and the plaintiff's cause of action has not yet abated, then as this Court indicated in *McCoy,* we see no reason to require the "useless for-

mality" of having an alias or pluries summons issued. *McCoy, supra,* at 111, 223 S.E. 2d at 515.

In order to counter arguments that the holding in this case will foster an abuse of Rule 4, we reiterate that: (1) some action must be taken by the plaintiff within five days of the filing of the complaint to commence the action and to insure some method of service of process is begun; (2) some further action must be taken by the plaintiff within ninety days of the issuance of the original summons to prevent his action from abating; and (3) if the plaintiff does choose to serve the defendant at some time by publication the circumstances must warrant this step as provided under the traditional rules governing the use of service of process by publication.

[2] With this in mind, we now must determine whether the circumstances of this case did in fact warrant the use of service by publication and whether the service of process by publication attempted was properly carried out pursuant to G.S. 1A-1, Rule 4(j1). This section of Rule 4 states that

> A party that cannot with due diligence be served by personal delivery or registered or certified mail may be served by publication. Service of process by publication shall consist of publishing a notice of service of process by publication once a week for three successive weeks in a newspaper that is qualified for legal advertising . . . and *circulated in the area where the party to be served is believed by the serving party to be located,* or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending. . . . Upon completion of such service there shall be filed with the court an affidavit *showing . . . the circumstances warranting the use of service by publication.* . . . (Emphasis added).

G.S. 1A-1, Rule 4(j1). In the first place, the plaintiff's affidavit clearly states that the defendant's last address was in Kansas. Even though that was where the defendant was thought to be, the notice of service of process was published only in a Goldsboro paper. Thus, the place where the notice was published and circulated was insufficient under the requirements of Rule 4(j1).

Secondly, the affidavit does not state the circumstances warranting the use of service by publication as required by Rule 4.

The affidavit does not allege any facts showing that the defendant with due diligence could not be personally served. Because service of process by publication is in derogation of the common law, statutes authorizing it must be strictly construed both as grants of authority and in determining whether service has been made in conformity with the statute. *Emanuel v. Fellows*, 47 N.C. App. 340, 267 S.E. 2d 368, *disc. rev. denied*, 301 N.C. 87 (1980). Thus, strictly construing the plaintiff's attempt of service by publication, we hold that it did not sufficiently conform to the requirements of G.S. 1A-1, Rule 4(j1) so as to confer jurisdiction over the defendant to any North Carolina Court. We further hold that because *in personam* jurisdiction was not obtained over the defendant, the paternity and custody order was void. Judge Exum therefore abused his discretion by denying the defendant's Rule 60(b)(4) motion. We reverse the 24 February 1984 order which denied the Rule 60(b)(4) motion and vacate the 18 June 1980 paternity and custody order.

Reversed and vacated.

Judges BECTON and JOHNSON concur.

NANCY JONES KENNON v. GEORGE MARION KENNON, JR.

No. 8418DC196

(Filed 28 December 1984)

1. Venue § 8— modification of child support and custody—change of venue

The trial court did not abuse its discretion in allowing plaintiff mother's motion for a change of venue of a motion to modify child support and custody for the convenience of the witnesses and the ends of justice where both parties had moved to the county to which venue was changed.

2. Divorce and Alimony § 24.7— increase in child support—change of circumstances

The evidence and findings showed a substantial change in circumstances which supported the trial court's order increasing the father's child support obligation from $10 per week per child to $125 per month per child.

3. **Judgments § 50; Limitation of Actions § 4.3— loan repayment obligation—action on judgment—statute of limitations**

Where a consent judgment required the former husband to indemnify and hold harmless the former wife from all claims and debts incurred by or on behalf of the husband, the wife was required to make payments on the husband's note when he defaulted, and the husband promised to pay the wife $1,000 as repayment for damages she had suffered thereby, the ten-year statute of limitations for judgments, G.S. 1-47, applied to the wife's action on the husband's loan repayment obligation, not the three-year contract statute of limitations of G.S. 1-52.

4. **Divorce and Alimony § 27— modification of child support and custody—error in award of attorney fees**

The trial court erred in awarding attorney fees of $450 to the wife in an action to modify child support and custody where the wife had income in excess of $32,000 per year, the husband was in compliance with the prior support and custody order, and the trial court failed to make findings as to the skill of the wife's attorney, his hourly rate, and the reasonableness thereof.

5. **Divorce and Alimony § 25.9— modification of custody order—mother's summer vacation**

The trial court did not abuse its discretion in modifying a previous custody order by allowing one additional week of custody with the mother during the summer months due to her summer vacation.

APPEAL by defendant from *Lowe, Judge*. Order entered 13 October 1983 in District Court, GUILFORD County. Heard in the Court of Appeals 13 November 1984.

Hatfield & Hatfield, by Kathryn K. Hatfield, for plaintiff appellee.

Bethea, Robinson, Moore & Sands, by Alexander P. Sands, III, for defendant appellant.

BECTON, Judge.

In this child support and custody action, we must determine if the trial court erred by (a) allowing the wife's motion for change of venue; (b) denying the husband's motion to stay proceedings pending the appeal of the order changing venue; and (c) denying the husband's motion to dismiss for insufficiency of the evidence.

I

Seeking full custody of, and child support for, the two minor children of the marriage, the wife initiated this action in Rockingham County in 1977. Shortly thereafter, on 2 August 1977, a

consent judgment was entered which stated, in essence, that the wife would be responsible for the care, custody, support and maintenance of the two children during the school year and that the husband would be responsible for the same during the summer. Although the wife was then, and is now, making more money than the husband, as part of the consent judgment, the husband was required to pay to the wife Ten Dollars ($10.00) per week per child as child support.

On 23 April 1978, after an absolute divorce had been granted the parties in the Rockingham County District Court, the wife filed a motion in the cause, seeking a modification of the consent judgment entered on 2 August 1977. Her motion was denied by a Rockingham County district court judge who ordered that the consent order remain in full force and effect. Sometime thereafter all the parties moved to Guilford County. On 3 May 1983 the wife filed a motion for change of venue from Rockingham County to Guilford County and, contemporaneously therewith, filed a motion (a) to increase child support; (b) to decrease the summer custody of the husband with the minor children; (c) to require the husband to repay a $1,000 loan made by the wife to the husband; and (d) for reasonable attorney fees.

On 20 May 1983, an order was entered transferring the case to Guilford County pursuant to the wife's motion for change of venue. The husband gave notice of appeal, but a Guilford County district court judge ruled that the appeal was premature and then denied the husband's motion for a stay of the proceedings. The matters contained in the wife's other motion were then calendared for hearing. On 22 September 1983, a hearing was held, with both sides presenting evidence. From an order requiring him to pay child support of $125.00 per month per child, to repay the wife $1,000 that she had loaned him, to pay her attorney's fees in the amount of $450, and increasing the wife's period of child custody, the husband appeals. The husband also appeals the earlier court order allowing the wife's motion to change venue and denying his motion to stay the proceedings pending the appeal of the order changing venue.

II

A. *Venue*

[1] We address first the change of venue issue. The husband contends that there is no statutory authority for the order chang-

ing venue, and, even if there were, the trial court abused its discretion by transferring this action to Guilford County. We do not agree.

Neither party contends that the wife could, as a matter of right, have had this matter removed to Guilford County. The applicable statutes on discretionary venue will therefore be discussed.

Although N.C. Gen. Stat. Sec. 1-82 (1983), controlling venue in cases that are not specifically covered by other statutes, provides that: "In all other cases, the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement, . . ." it must be remembered that this matter comes before us based on a motion filed in the cause. More important, N.C. Gen. Stat. Sec. 1-83(2) (1983) provides that a matter may be transferred for the convenience of witnesses and the ends of justice. In her motion for a change of venue, the wife specifically alleged that both parties had become Guilford County residents and further alleged that the convenience of parties and witnesses would be best served by the matter being removed to Guilford County. In its order changing venue, the court specifically found that both parties had become Guilford County residents and that "[t]he matter in large part involve[d] economic issues such as the cost of supporting the children [and that] these issues are relative to the geographic location of the children and parties." We find no abuse of discretion in allowing the motion to change venue.

With regard to the denial of the husband's motion to stay proceedings pending an appeal of the order allowing a change in venue, we note that an order denying a motion for a change of venue, pursuant to G.S. Sec. 1-83(2) (1983), based upon the convenience of witnesses and the ends of justice, is an interlocutory order and not immediately appealable. *Furches v. Moore*, 48 N.C. App. 430, 269 S.E. 2d 635 (1980); N.C. Gen. Stat. Sec. 7A-27(c) (1983). Following the same rationale, an order granting a motion for a change of venue is interlocutory and not immediately appealable. In this case, the trial court made that ruling and thereafter denied the husband's motion to stay the proceedings. Procedurally, it is true that this Court, and not the trial court, should have decided whether the order granting a change in venue was interlocutory and not immediately appealable, *see Estrada*

v. Jaques, --- N.C. App. ---, 321 S.E. 2d 240 (1984), but the question is moot, since we have now determined that the change in venue was proper.

B. *Child Support*

[2] On the basis of detailed findings of fact in the trial court's 13 October 1983 order, we reject the husband's argument that the evidence was insufficient to support the award of $125.00 per month per child as child support. One of the twenty enumerated findings of fact follows:

> 4. Since the last hearing in this matter, the expenses of the children have increased as set out herein. Rent or house payment has increased from $175 to $628 per month. The Plaintiff previously had no household maintenance expenses and now averages $25 per month. Plaintiff's electric bill has increased from approximately $30 to $80 per month. Plaintiff previously had no homeowner insurance premium and no cablevision and now pays $20 per month homeowners insurance and Cablevision fee. The food expenses for the children have increased from $100 per month to $200 per month. Both children are now in school and hence buy their lunches at school. The cost of school lunch has increased by approximately $.25 per day. The present expense is $32 per month. The clothing expense for the children has increased from $50 to $100 per month. The child care expense has decreased. The children previously had no educational expenses and now have such expense of $10 per month. The plaintiff has paid in excess of $1,100 in orthodontic fees for the children. The children take two music lessons, one of $20 per month and the other of $26 per month. They took neither lesson at the last hearing. One child now plays soccer and did not at the last hearing. This averages $4 per month.

Although there were no findings of fact regarding the needs of the children or the income of the parties in the 1977 consent judgment, and although the parties agreed that $10 per week per child was sufficient, the findings of fact in this case show that there has been a substantial change in circumstances. We uphold the award, subject, however, to the following modification. The record suggests that the trial court only intended to award a total of $250 per month for the time that the children were in the

custody of the wife, not for the entire calendar year. At the hearing, the court used the figures of ten and one-half months and two and one-half months which totals thirteen months, not twelve. We find that the order finally entered is contrary to the order discussed in open court.

C. *Loan*

[3] We also summarily reject the husband's argument that the evidence was insufficient for the trial court to enter judgment against him in favor of the wife on the $1,000 loan repayment obligation. In the 1977 consent order, the husband agreed to "indemnify and hold harmless the [wife] from any and all claims, demands, obligations, liabilities, damages and debts of the [husband] or incurred by or on behalf of the [husband]." The husband has not denied that the wife was required to make payments on his note when he defaulted, injuring the wife in an amount in excess of $869.80 plus interest. The trial court found as a fact that the husband promised to pay the wife $1,000 as repayment for the damages she had suffered thereby, and we find no error. The husband asserts the three-year contract statute of limitations, N.C. Gen. Stat. Sec. 1-52 (1983), as a bar, but we find the ten-year statute of limitations for judgments, N.C. Gen. Stat. Sec. 1-47 (1983), the applicable statute of limitations.

D. *Attorney's Fees*

[4] We do agree with the husband that the trial court erred in awarding attorney's fees of $450.00 to the wife. We find little evidence that the wife, with income in excess of $32,000 per year, does not have sufficient means to defray the expenses of the suit. More important, the husband was in lawful compliance with the orders of the courts of Rockingham County, both with regard to custody and support of his minor children prior to the modification thereof by the courts of Guilford County. Consequently, we cannot say that the husband refused to provide support which was adequate under the circumstances existing at the time of the institution of the action.

As the husband suggests in his brief, we "cannot require any party, at the risk of being ordered to pay attorney's fees, to anticipate that an order of court, such as this, would be modified. . . ." Equally important in our decision to deny attorney's fees in

this case is the trial court's failure to make findings on the wife's lawyer's skill, hourly rate, its reasonableness in comparison with that of other lawyers, as we required in *Falls v. Falls*, 52 N.C. App. 203, 278 S.E. 2d 546, *disc. rev. denied*, 304 N.C. 390, 285 S.E. 2d 831 (1981).

E. *Visitation*

[5] Finally, we summarily reject the husband's argument that the trial court erred in modifying the previous order of custody by allowing one additional week of custody with the mother during the summer months due to her summer vacation. The court heard the evidence and we find no abuse of discretion.

Modified, affirmed in part and reversed in part.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. AMY RIGGSBEE

No. 8415SC81

(Filed 28 December 1984)

1. Parent and Child § 2.2— abuse by day care operator—evidence sufficient

In a prosecution for felonious child abuse, defendant's motion to dismiss was properly denied when the State introduced evidence that a child was placed in the *sole* care of defendant; that the child had no bone disease or nutritional deficiency and was in good physical condition when left with the defendant; that the child suffered a spiral fracture of his left arm while in the defendant's care; that defendant attempted to explain the injury first by stating that the child had sprained his arm while attempting to push himself up, then that she had not seen the child fall but had simply found him in his crib with his arm twisted behind his back; and that the fracture could not have been caused by the child falling on his arm but had been caused by a twisting force being applied to the arm. G.S. 14-318.4(a)(2).

2. Parent and Child § 2.2— abuse by day care operator—evidence of other incidents admissible on cross-examination of defendant

In a prosecution for felonious child abuse, there was no error in the denial of defendant's motion in limine to prohibit the State from cross-examining her about injuries to two other children in her care where defendant's testimony on *voir dire* tended to show acts of misconduct and there was no allegation that the State did not ask the questions in good faith.

3. Parent and Child § 2.2— abuse by day care operator—defense of accidental injury—evidence of another incident admissible

In a prosecution for felonious child abuse, there was no error in admitting evidence of a prior striking of another infant by defendant where defendant was charged with a violation of G.S. 14-318.4, which requires that the State prove intentional injury to the child, and defendant's defense was that the injury was accidental. When the issue is whether the act is done intentionally or by accident, evidence of previous acts of child abuse is relevant and competent.

APPEAL by defendant from *Collier, Judge.* Judgment entered 13 October 1983 in Superior Court, ORANGE County. Heard in the Court of Appeals 26 September 1984.

Defendant was convicted upon an indictment proper in form charging her with felonious child abuse. From a judgment imposing a two year suspended sentence, defendant appeals.

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

Appellate Defender Adam Stein, by Assistant Appellate Defender James A. Wynn, Jr., for defendant appellant.

JOHNSON, Judge.

The State introduced evidence which tended to show the following: On 6 May 1983, defendant operated and maintained a day care facility in her home for children ranging from infant to five years of age. Andrew Huang, the four month old son of David and Christi Huang, was one of the children in defendant's care. Andrew was a healthy child and appeared to have no physical abnormalities when his mother left him with defendant the morning of 6 May 1983. At approximately 2:00 p.m., Bill Hawks arrived to pick up his daughter who was also in defendant's care. While there, Mr. Hawks observed Andrew crying while lying in his crib on his stomach with his arm caught behind his back like an "armlock." No one was holding Andrew's arm. At 5:00 p.m., Mrs. Huang arrived to pick Andrew up. Defendant informed Mrs. Huang that she had just attempted to call her at work to alert her that Andrew appeared to have sprained his arm when he tried to push himself up and fell while in his playpen. Mrs. Huang examined Andrew's left arm which appeared paralyzed. She immediately took him to Dr. Charles Sheaffer, Andrew's pediatrician since birth.

Dr. Sheaffer, an expert in pediatrics, testified that upon examining Andrew on the date in question, he diagnosed a fracture in the mid-shaft of Andrew's left arm; that Andrew had no history of bone disease or nutritional deficiency, either of which would render the occurrence of a fracture more likely. Dr. Sheaffer further testified that although Andrew could push himself up, he was unable to crawl or pull himself up, and in his opinion Andrew could not have caused the injury by pushing himself up on his hands and falling over in his crib.

Dr. Daniel Murphey, an expert in the field of orthopedic surgery, examined Andrew upon referral of Dr. Sheaffer. X-rays revealed a spiral fracture of the humerus of Andrew's left arm. It was Dr. Murphey's opinion that the injury was caused by "a type of force that is not seen from a pull but more of a twisting or torsional injury on the bone."

Dr. Walter Greene, an expert in the field of pediatric orthopedics, and Dr. Godfrey Gaisie, an expert in the field of pediatric radiology, also testified that the x-rays revealed a spiral fracture which Dr. Greene described as a fracture caused by twisting force.

Dr. William Drobnes, an expert in the field of radiology, performed a skeletal survey of Andrew and diagnosed the spiral fracture, which in his opinion could not have been caused by Andrew pushing himself up and falling over his hands.

Bobbi Littlefield, a Protective Services Social Worker at Orange County Department of Social Services, testified that she investigated Andrew's injury; that defendant told her Andrew was "fussing" while she was changing some other children around 5:00 p.m. on May 6, 1983, and that she (defendant) went over to Andrew's crib and saw that "his arm was twisted in a funny way behind him"; that defendant also told her that she had not seen Andrew fall, but that she assumed that he had been rocking and rolled over and twisted his arm. Marty Hawks testified that on 9 May 1983, defendant told her that Andrew was in his playpen on "all fours, and he was rocking back and forth, and he lost his balance and fell, and his arm got stuck underneath him." Over defendant's objection, another State witness was allowed to testify regarding a prior act of child abuse.

Defendant did not testify in her own behalf but presented several character witnesses.

Defendant contends the trial court erred in its denial of defendant's motion to dismiss; in its denial of defendant's motion in limine and in the admission of evidence of a prior act of child abuse.

Defendant was indicted and convicted of child abuse under G.S. 14-318.4(a)(2) which states in pertinent parts that:

> Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child who intentionally inflicts any serious physical injury which results in [b]one fracture is guilty of a . . . felony.

The essential elements of the crime of which defendant was convicted are as follows:

(1) That defendant was providing care of Andrew Huang.

(2) That Andrew Huang was less than 16 years of age.

(3) That defendant intentionally twisted Andrew's arm.

(4) That the twisting of Andrew's arm by defendant proximately caused a serious injury to Andrew.

(5) That the injury resulted in the fracture of a bone in Andrew's arm.

In ruling on a motion to dismiss, the trial court is required to consider the evidence in the light most favorable to the State and give to the State the benefit of every reasonable inference to be drawn therefrom. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). When the motion raises the question of the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is guilty. *State v. Mapp*, 45 N.C. App. 574, 264 S.E. 2d 348 (1980).

[1] Defendant contends that the court should have allowed her motion to dismiss in that the State failed to present sufficient evidence that defendant intentionally twisted Andrew's arm; or if

so, that such twisting was a proximate cause of the bone fracture Andrew suffered. We disagree.

Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. In determining the presence or absence of intent, the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974); *State v. Norman*, 14 N.C. App. 394, 188 S.E. 2d 667 (1972).

Based upon all the facts before the court in the case *sub judice* there is sufficient evidence reasonably to infer defendant's guilt. The State introduced evidence which showed that on 6 May 1983, Andrew, four months of age, was placed in the *sole* care of defendant. Andrew had no bone disease or nutritional deficiency and was in good physical condition when left with defendant. While Andrew was in defendant's *sole* care, he suffered a spiral fracture of his left arm. Defendant attempted to explain Andrew's injury by first stating that Andrew sprained his arm when he fell on it while attempting to push himself up. Several days later, defendant stated that she did not see Andrew fall on his arm, but simply found him in his crib with his arm twisted behind his back. Doctors Sheaffer, Murphey and Drobnes testified that the fracture could not have been caused by Andrew falling on his arm while attempting to push or pull himself up. Doctors Murphey and Greene testified that the fracture was caused by a twisting force being applied to Andrew's arm. We find that from this evidence the jury could reasonably infer that Andrew's injury was non-accidental and that defendant, who had *sole* care of Andrew at the time of injury, intentionally twisted Andrew's arm, thereby proximately causing the fracture. When taken in the light most favorable to the State, the evidence is sufficient to withstand the motion to dismiss. (Compare *State v. Mapp, supra.*)

[2] Defendant contends the court erred in denying defendant's motion in limine to prohibit the State from cross-examining her about injuries two other children sustained while in defendant's care. The trial judge denied defendant's motion and thus defendant elected to testify only on *voir dire* to preserve her testimony for appellate review.

On *voir dire* cross-examination, the State asked defendant if she had inflicted any bruises on Andrew Martin, a four month old child, left in her care and whether she failed to obtain medical care for Aspen Reams who had fallen from a crib while in defendant's care and who was later diagnosed as having a concussion and bruises to the back of her neck. Defendant argues that the evidence was inadmissible because it does not show acts of misconduct or that defendant was ever charged or prosecuted for any crime concerning the injuries to Andrew Martin or Aspen Reams.

It is well established 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 provided the questions are based on information and are asked in good faith. Such cross-examination for the purpose of impeachment, however, is not limited to convictions of crimes but may also include any act of the defendant which tends to impeach his character. *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972); 1 Brandis on N.C. Evidence, sec. 111, p. 406. In the case *sub judice*, there is no allegation or showing that the State did not ask the questions in good faith. Also, the evidence does tend to show acts of misconduct. Consequently, the examination of defendant about these acts was within the scope of permissible impeachment and the trial judge properly denied defendant's motion in limine.

[3] By her final assignment of error, defendant contends the court erred in failing to exclude evidence of a prior striking of another infant by defendant.

Over defendant's objection, a State's witness was allowed to testify as follows: that on 8 February 1983, when she carried her child to defendant's day care, she heard defendant scream at another child, "Matthew, I can't stand this today; I'm not in the mood for this. If you don't stop screaming, I'm going to beat the shit out of you." The witness also testified that defendant then commenced to repeatedly spank Matthew who was seven months old. The witness testified further that when she confronted defendant, defendant denied striking Matthew, but later stated that she had no choice because he tried to bite her.

Defendant was charged with felonious child abuse in violation of G.S. 14-318.4, which requires that the State prove an intentional injury to the child. Defendant's defense was that the injury

was accidental. This Court has held that when the issue is whether an act was done intentionally or by accident, evidence of previous acts of child abuse is relevant and competent to show that the injuries complained of were the result of an intentional act and not of an accidental fall. *State v. Smith,* 61 N.C. App. 52, 300 S.E. 2d 403 (1983). Therefore, the evidence was properly admitted. In the trial of defendant's case we find

No error.

Chief Judge VAUGHN and Judge WHICHARD concur.

CITY OF WINSTON-SALEM v. NORMAN L. COOPER AND WIFE, RUTH S. COOPER; GEORGE F. PHILLIPS, TRUSTEE; NORTHWEST PRODUCTION CREDIT ASSOCIATION

No. 8421SC414

(Filed 28 December 1984)

1. **Eminent Domain § 6.9— expert witness—cross-examination as to knowledge of general property values**

In a condemnation trial at which the amount of damages was the only issue, the court erred by not permitting the City to ask defendants' expert witnesses on cross-examination whether they could point to any vacant acreage on an aerial photograph of the area that had ever sold for more than $3,000. An attempt to determine whether the witnesses were knowledgeable about the general values of other properties near the subject property was proper.

2. **Eminent Domain § 6.5— condemnation—misunderstanding of expert witness as to zoning ordinance—affected credibility only**

In a trial to determine damages for land condemnation, the court did not err by refusing to strike the testimony of an expert witness regarding the value of the property because the testimony was based on an erroneous understanding of the controlling zoning ordinance. The witness's misunderstanding of the zoning ordinance went to the credibility and weight of his testimony rather than its competency.

3. **Eminent Domain § 6.2— admissibility of sales price of one property as evidence of value of another**

In a land condemnation proceeding, whether two properties are sufficiently similar to admit evidence of the sales price of one as evidence of the value of the other is a matter within the sound discretion of the trial court.

APPEAL by plaintiff from *Hairston, Judge.* Judgment entered 9 December 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 5 December 1984.

City Attorney Ronald G. Seeber, Assistant City Attorney Ralph D. Karpinos; and Womble, Carlyle, Sandridge & Rice by Roddey M. Ligon, Jr., for the plaintiff appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready by F. Joseph Treacy, Jr., and Sapp & Mast by David P. Mast, Jr., for the defendant appellees.

BRASWELL, Judge.

The City of Winston-Salem (hereinafter the City) has appealed from a judgment awarding the defendants, Norman L. Cooper and Ruth S. Cooper, $278,500.00 as compensation for property acquired by condemnation. The City alleges as error three rulings of the trial court relating to evidentiary matters. Because the trial court erred by denying the City an opportunity to adequately cross-examine defendants' experts, we reverse and remand for a new trial.

This condemnation proceeding was instituted by the City to acquire approximately 51 acres of land owned by the defendants. On 21 August 1981, the City took possession of the property by depositing $144,200.00 with the court. In August 1982, the defendants filed an answer. Following the entry of a 7 July 1983 order which settled all issues other than damages, a Commissioners' hearing was conducted. The Commissioners awarded the defendants $144,840.00 compensation. Defendants excepted and demanded a jury trial. The trial was conducted at the 28 November 1983 term of Forsyth County Superior Court. During the trial each party offered extensive testimony from various experts, much of which was objected to, regarding the value of the taken property. Based upon this evidence, the jury awarded the defendants $278,500.00. From the judgment entered upon the verdict, the City appealed.

The City brings forth and argues three questions relating to the admission or the exclusion of certain testimony of the parties' expert witnesses. We believe that question two relating to the refusal of the court to allow cross-examinations of two of Mr.

Cooper's experts regarding their knowledge of property values in the subject area is dispositive of the City's appeal.

[1] Defendants offered and the court accepted Mr. Shavitz and Mr. Peters as expert witnesses in the field of real estate appraisals. After testifying that they had examined the sale values of other properties in the area, each witness testified as to his opinion regarding the fair market value of the subject property. Mr. Shavitz placed the value at $4,600.00 per acre and Mr. Peters estimated the value to be $4,850.00 per acre. On cross-examination the City asked the following question of Mr. Shavitz.

> Q. Mr. Shavitz, could you, to begin with, would you please step over to the aerial photo [Defendants' Exhibit 5] and point out to the jury any vacant acreage tract on the entire aerial photo that has ever sold in any time in history for $3,000 or more?

The City posed essentially the same question to Mr. Peters. Each time the defendants objected and each time the court sustained their objection. On *voir dire* examination, each witness admitted that they knew of no property shown on Defendants' Exhibit 5, an aerial photograph of the 600-800 acres around the subject property, which had ever sold for as much as $3,000 per acre.

The City contends that the court's ruling denied them the opportunity to sift the witnesses with regards to their knowledge of property values in the subject area. They argue that they are not attempting to put before the jury prices of non-comparable real estate, but were merely attempting to show that the experts' opinions were not based upon a knowledge of prices in the area.

The defendants respond that the trial court properly sustained the objections based upon the law established by our Supreme Court in *Power Company v. Winebarger*, 300 N.C. 57, 265 S.E. 2d 227 (1980). Justice Exum writing for the Court stated:

> The impeachment purpose of the cross-examination is satisfied when the witness responds to a question probing the scope of his knowledge. Any further inquiry which states or seeks to elicit the specific values of property dissimilar to the parcel subject to the suit is at best mere surplusage. At worst it represents an attempt by the cross-examiner to con-

vey to the jury information which should be excluded from their consideration. When wilful and persistent, such an attempt undercuts the applicable rule of evidence and tends to confuse the jury. It was undoubtedly for these reasons that the rule was explained by Justice (later Chief Justice) Sharp in *Carver v. Lykes*, 262 N.C. 345, 356-57, 137 S.E. 2d 139, 148 (1964), as follows:

> "The 'utmost freedom of cross-examination' to test a witness' knowledge of values . . . does not mean that counsel may ask a witness if he doesn't know that a certain individual sold his property for a stated sum with no proof of the actual sales price other than the implication in his question. . . . Where such information is material it is easy enough to establish by the witness himself, whether a certain property has been sold to his knowledge and, if so, whether he knows the price. If he says he does not know, his lack of knowledge is thus established by his own testimony and doubt is cast on the value of his opinion. . . . If he asserts his knowledge of the sale and, in response to the cross-examiner's question, states a totally erroneous sales price, is the adverse party bound by the answer or may he call witnesses to establish the true purchase price? Unless per chance the purchase price of the particular property was competent as substantive evidence of the value of the property involved in the action, it would seem that the party asking the question should be bound by the answer. To hold otherwise would open a Pandora's box of collateral issues." (Citations omitted).

For clarity we here restate the following controlling principles:

(1) Where the value of a particular parcel of realty is directly in issue, the price paid at voluntary sales of land similar in nature, location, and condition to the land involved in the suit is admissible as independent evidence of the value of the land in question, if the sales are not too remote in time. Whether two properties are sufficiently similar to admit the sales price of one as circumstantial evidence of the value of the other is a question to be determined by the trial

judge, usually upon *voir dire*. *State v. Johnson, supra; Redevelopment Commission v. Panel Co.*, 273 N.C. 368, 159 S.E. 2d 861 (1968).

(2) Conversely, where a particular property is markedly dissimilar to the property at issue, the sales price of the former may not be introduced or alluded to in any manner which suggests to the jury that it has a bearing on the estimation of the value of the latter.

(3) Where a witness has been offered to testify to the value of the property directly in issue, the scope of that witness' *knowledge* of the values and sales prices of dissimilar properties in the area may be cross-examined for the limited purposes of impeachment to test his credibility and expertise. *Templeton v. Highway Commission, supra.*

(4) Under these limited impeachment circumstances, however, it is improper for the cross-examiner to refer to specific values or prices of noncomparable properties in his questions to the witness. *Carver v. Lykes, supra.* Moreover, if the witness responds that he does not know or remember the value or price of the property asked about, the impeachment purpose of the cross-examination is satisfied and the inquiry as to that property is exhausted. *Highway Commission v. Privett, supra.* If, on the other hand, the witness asserts his knowledge on cross-examination of a particular value or sales price of noncomparable property, he may be asked to state that value or price only when the trial judge determines in his discretion that the impeachment value of a specific answer outweighs the possibility of confusing the jury with collateral issues. In such a rare case, however, the cross-examiner must be prepared to take the witness' answer as given. *Carver v. Lykes, supra.*

Id. at 64-66, 265 S.E. 2d at 232-33.

Defendants argue that *Winebarger* should be read to prevent a party from asking any question which contains a monetary value. We disagree. The rules stated in *Winebarger* were designed to prevent a party from putting before the jury on cross-examination the prices of other pieces of noncomparable property. The rules were not designed to prevent parties from sifting the

witnesses to determine whether they are knowledgeable about the selling price of properties within the area. We believe that the questions put to Mr. Shavitz and Mr. Peters were proper questions. The City did not ask about specific tracts of property nor did it ask whether there was any property worth as much as the witnesses had testified that the Cooper property was worth. We believe that an attempt to determine whether the witness was knowledgeable about the general values of other property near the subject property was proper, and the court's refusal to allow them that opportunity was prejudicial error necessitating a new trial. Even so, since the other assignments of error raised by the City on appeal may arise on retrial, we will discuss them.

[2] The City also contends the court erred by refusing to strike Mr. Shavitz's testimony regarding the value of the Cooper property because it was based upon an erroneous understanding of the zoning ordinance which controlled the use of the property. Mr. Shavitz testified that the property was zoned to allow multi-family dwellings to be built thereon, and that this was one of the considerations he used in determining its value. The City offered evidence that the property was zoned for single family dwellings. This evidence was supported by the City's zoning ordinance which the City introduced. The City, therefore, argues that Mr. Shavitz's testimony was incompetent and should have been stricken. We disagree. The fact that Mr. Shavitz based his opinion regarding the value of the property upon a misunderstanding of the zoning ordinances goes to the credibility and weight which the jury should accord the testimony, rather than to the competency of the evidence. The assignment of error is overruled.

[3] Finally, the City argues that the court erred in refusing to allow the City to offer evidence regarding the sale prices of the Loflin-Homlin property and the Wake Forest property because it found them to be non-comparable sales. Whether two properties are sufficiently similar to admit evidence of the sale prices of one as evidence of the value of the other is a matter within the sound discretion of the trial court. *City of Winston-Salem v. Davis*, 59 N.C. App. 172, 296 S.E. 2d 21, *disc. review denied*, 307 N.C. 269, 299 S.E. 2d 214 (1982). We do not need to determine whether the court abused its discretion in this instance because at the subsequent trial the evidence which the parties offer may be different,

and that court must determine based upon the evidence introduced at that trial whether the properties are comparable.

Reversed and remanded for a new trial.

Judges BECTON and JOHNSON concur.

WINDHAM DISTRIBUTING COMPANY, INC. v. STEVE DAVIS, T/A/D/B/A PIEDMONT CAROLINA TRUCKING AND RONALD PERRY; AND MARINE TRANSPORT, INC.

No. 845DC231

(Filed 28 December 1984)

1. **Rules of Civil Procedure § 60.2— motion to declare a judgment void for error of law—properly denied**

Defendant's motion under G.S. 1A-1, Rule 60(b)(4) to have a judgment against him declared void for errors of law was properly denied where the trial court had the authority and jurisdiction to enter the judgment. Defendant should have appealed directly from the judgment to have obtained relief from alleged errors of law in the judgment.

2. **Execution § 17— execution against person—findings required for arrest order**

The court should have granted defendant's motion to dismiss an order of arrest issued as part of the execution of a judgment against defendant's person where the order did not contain a finding that the defendant was about to flee the jurisdiction to avoid paying his creditors, had concealed or diverted assets in fraud of his creditors, or would do so unless immediately detained. G.S. 1-311, G.S. 1-410.

APPEAL by defendant, Steve Davis, from *Rice, Judge*. Order entered 3 October 1983 in District Court, NEW HANOVER County. Heard in the Court of Appeals 14 November 1984.

Yow, Yow, Culbreth & Fox by Lionel L. Yow for plaintiff appellee.

Boyan, Nix and Boyan by Clarence C. Boyan for defendant appellant.

BRASWELL, Judge.

The major questions presented by the only appealing defendant, Steve Davis, are that the trial court erred in denying (1) his

G.S. 1A-1, Rule 60(b)(4) motion to set aside the judgment as void and (2) his motion to dismiss the order of arrest on the grounds that this order for execution against his person was in violation of G.S. 1-311. We hold that the trial court properly denied the Rule 60(b)(4) motion, but because the order of arrest was insufficient under G.S. 1-311 the trial court improperly denied the defendant's motion to dismiss this order. The facts follow.

Piedmont Carolina Trucking through its agent, Ronald Perry, hijacked a shipment of Stroh's Beer that was to be delivered by Marine Transport, Inc. to the plaintiff. Piedmont's president and owner, Steve Davis, revealed that the beer could be ransomed by the plaintiff if Marine Transport or the plaintiff paid a debt owed by Marine Transport to Piedmont. The plaintiff sued Piedmont Carolina Trucking and its agents, and Marine Transport, Inc. for damages it sustained due to the nondelivery of the beer.

The plaintiff was awarded actual damages of $27,471.76 against Marine Transport. The trial court trebled this figure and awarded the plaintiff "treble damages in the amount of $82,-415.28" against Davis and Perry. The trial court further assessed against Davis and Perry punitive damages in the amount of $100,000, "subject to a credit for the treble damages" previously awarded for "a total punitive damage award of $17,584.72." The plaintiff was also awarded attorney's fees of $4,000 against Davis and Perry. The defendant Steve Davis filed no responsive pleading in this action and did not appeal from this judgment entered on 24 May 1982. We are now concerned with the process of the collection of the judgment.

The plaintiff first attempted to collect the punitive damages and attorney's fees awarded out of the defendant Steve Davis's personal property. When the Sheriff was unable to locate any property upon which to levy, the plaintiff applied for an execution against the person or body arrest of Steve Davis. On 6 September 1983, District Court Judge Charles Rice issued an order of arrest against the defendant "to show cause, if any, why he should not be kept in incarceration for failure to pay punitive damages in the amount of $17,584.74 and attorney's fees in the amount of $4,000.00." Steve Davis was arrested on 14 September 1983 and was released upon the posting of a cash bond in the amount of $21,584.72. On 23 September 1983, the defendant filed a Rule

60(b)(4) motion, seeking to have the 24 May 1982 judgment declared void, and a motion to dismiss the Order of Arrest.

On 3 October 1983 the defendant was ordered to appear before Judge Rice to show cause "why he should not be kept incarcerated for failure to pay punitive damages . . . and attorney's fees." At this hearing, the trial court considered, then denied, the defendant's motions, and ordered the defendant "to be immediately incarcerated . . . until such time as the Defendant pays unto the Plaintiff the sum" of $21,584.72. The defendant appealed in open court. The defendant was released from jail pending resolution of the issues pursuant to a petition to the Court of Appeals for a Writ of Supersedeas.

[1] The first matter for our consideration is the denial of the defendant's G.S. 1A-1, Rule 60(b)(4) motion. The defendant contends that the 24 May 1982 judgment is void because (1) the trial court improperly awarded the plaintiff treble damages against him based on the amount of actual damages assessed against another defendant and (2) the trial court erroneously awarded the plaintiff punitive damages in addition to treble damages against him. However, because the defendant did not appeal from the 24 May 1982 judgment, it is final and we do not reach the underlying questions of whether the defendant's actions constituted a Chapter 75 violation or whether the trebled award or the award of punitive damages was improper. A motion for relief under section (b) of Rule 60 is addressed to the sound discretion of the trial court, so our review on appeal is limited to determining whether the court abused its discretion when it denied the defendant's motion. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975). *But see Carter v. Carr*, 68 N.C. App. 23, 314 S.E. 2d 281, *disc. rev. allowed*, 311 N.C. 751 (1984).

Is the judgment of 24 May 1982 void? "A judgment may be valid, irregular, erroneous, or void." *Wynne v. Conrad*, 220 N.C. 355, 359, 17 S.E. 2d 514, 518 (1941). An erroneous judgment is one rendered according to the course and practice of the court but contrary to the law or upon a mistaken view of the law. A void judgment has semblance of a valid judgment, but lacks some essential element such as jurisdiction or service of process. *Id.* at 360, 17 S.E. 2d at 518. Thus, a judgment is not void if "the court had jurisdiction over the parties and the subject matter and had

authority to render the judgment entered." *In re Brown*, 23 N.C. App. 109, 110, 208 S.E. 2d 282, 283 (1974).

In the present case, the defendant does not contend that the trial court was without jurisdiction or the authority to enter the 24 May 1982 judgment. His contentions, instead, relate to alleged errors of law committed by the trial court in the judgment. He has therefore confused what constitutes an erroneous judgment with a void one. *See generally Howell v. Tunstall*, 64 N.C. App. 703, 308 S.E. 2d 454 (1983). To have obtained relief from these alleged errors of law, the defendant should have appealed directly from the 24 May 1982 judgment. *Wynne, supra.* However, the defendant did not do so. Even if errors of law could be found in the judgment, the judgment is not void because the trial court had jurisdiction and the authority to enter it. We hold, therefore, that the trial court did not abuse his discretion in denying the defendant's Rule 60(b)(4) motion.

[2] The second major contention asserted by the defendant is whether the trial court improperly denied his motion to dismiss the order of arrest issued as part of the execution against his person. G.S. 1-311 states in pertinent part:

> If the action is one in which the defendant might have been arrested, an execution against the person of the judgment debtor may be issued to any county within the State, after the return of an execution against his property wholly or partly unsatisfied.

The record clearly reveals that this action was one in which the defendant could have been arrested under the Arrest and Bail statute, G.S. 1-410. Section (1) of G.S. 1-410 provides that the defendant may be arrested

> [i]n an action for the recovery of damages on a cause of action not arising out of contract where the action is for . . . willfully, wantonly, or maliciously injuring, taking, detaining, or converting . . . personal property.

As the facts show, the plaintiff did not have any contractual agreement with this defendant for the delivery of the beer. The defendant willfully took and detained the beer and was sued by the plaintiff for damages. The record also shows that the execu-

tion against the defendant's property was returned unsatisfied. Thus the circumstances of this case are in accordance with the first portion of G.S. 1-311.

This statute further requires that "no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as provided in the Article Arrest and Bail, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by law." G.S. 1-311. Here, the complaint does in fact contain a statement of facts showing the G.S. 1-410(1) ground for arrest.

However, G.S. 1-311 also provides that when a jury trial is waived and the court finds the facts, "the court *shall* find facts establishing the right to execution against the person." (Emphasis added.) The court must find that

> the defendant either (i) is about to flee the jurisdiction to avoid paying his creditors, (ii) has concealed or diverted assets in fraud of his creditors, or (iii) will do so unless immediately detained.

Id. Neither the 24 May 1982 judgment nor the order of arrest contain any one of the above findings. To us the plaintiff's assertion that the finding in the order of arrest that the defendant sought to have the judgment dismissed in a bankruptcy proceeding satisfies the required findings portion of the statute is not controlling. Procedural due process requires "not only findings with respect to the wrong of the debtor upon his creditor but in addition a finding of probable cause to believe that he has committed or will commit further wrongs in order to cheat his creditors." *Grimes v. Miller*, 429 F. Supp. 1350, 1356 (M.D.N.C. 1977), *aff'd*, 434 U.S. 978, 98 S.Ct. 600, 54 L.Ed. 2d 473 (1977). Without a finding in accordance with G.S. 1-311(i), (ii), or (iii), the order of arrest was insufficient and should not have been issued. We hold that because the order was in violation of the mandate of G.S. 1-311, the court improperly denied the defendant's motion to dismiss the order of arrest. The order is hereby vacated. We consider it important to note that if the necessary circumstances once again arise, upon proper findings a new order of arrest may be issued for an execution against the person of the defendant.

As his final assignment of error, the defendant contends that his second incarceration after the show cause and motion hearing

was not pursuant to a proper civil contempt order. More specifically, the defendant argues that the Temporary Commitment Order for Civil Contempt was insufficient because it lacked a finding that he possessed the means to comply with the 24 May 1982 judgment. Because we have held that the order of arrest was insufficient and that the first incarceration of the defendant pursuant to that order was improper, we must also hold, without considering the actual merits of this assignment, that any further incarceration of the defendant stemming from that order was improper.

The results are: (1) the denial of the defendant's Rule 60(b)(4) motion is affirmed; and (2) the denial of his motion to dismiss the order of arrest is reversed and that order is vacated.

Affirmed in part; reversed in part.

Chief Judge VAUGHN and Judge EAGLES concur.

LUCY BLOUNT WILLIAMS v. ALFRED WILLIAMS, III

No. 8410SC455

(Filed 28 December 1984)

1. **Trusts § 19— constructive trust in marital property—directed verdict proper**

The court correctly directed a verdict against plaintiff wife on her claim for a constructive trust in real property purchased by her former husband in both names because there was no evidence of fraud, breach of duty, or other wrongdoing by the husband.

2. **Quasi Contracts and Restitution § 5; Mortgages and Deeds of Trust § 1.1— marital property—unjust enrichment, equitable lien—directed verdict proper**

The trial court properly directed a verdict against plaintiff wife on her claims against her former husband for unjust enrichment and an equitable lien in real property titled in both names where there was no promise, agreement, or representation by the husband that the house would be titled in the wife's name and a loan by the wife's father for construction of a house was to both parties.

3. **Husband and Wife § 17.1— separation—property interest in marital home—not abandoned**

Plaintiff's former husband did not abandon his property interest in the marital home simply by leaving where there was no statement by the husband

or other evidence that he intended to abandon his property interest, and where he made payments for the mortgage, insurance, and taxes until plaintiff remarried.

4. Divorce and Alimony § 21.9— equitable distribution—no application to divorce three years before Act

Common law equitable distribution of marital property has been expressly rejected, and a wife may not claim equitable distribution where the divorce was nearly three years prior to the effective date of the marital property act. G.S. 50-20 (1983).

APPEAL by plaintiff from *Farmer, Judge.* Judgment entered 15 December 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 7 December 1984.

Haywood, Denny, Miller, Johnson, Sessoms & Haywood, by George W. Miller, Jr. and Michael W. Patrick, for plaintiff appellant.

Hunter, Wharton & Howell, by John V. Hunter, III, for defendant appellee.

BECTON, Judge.

In this action against her former husband, plaintiff, Lucy Blount Williams, sought (1) to impress her husband's one-half undivided interest in certain realty with a resulting or constructive trust; (2) to impress an equitable lien on her husband's business interests; (3) to establish that her husband had abandoned any interest he had in the realty, or in personalty, located on the property in question; and (4) a non-statutory equitable distribution of the property her husband acquired during his marriage to her.

The case was tried before a jury, but, at the close of plaintiff's evidence, the trial court granted the husband's motion for a directed verdict. Plaintiff appeals.

I

Plaintiff, Lucy Williams, and defendant, Alfred Williams, III, were married on 15 November 1947. In 1958, the husband purchased a lot, placing title in both parties' names. In 1962 a house was constructed on the lot, and thereafter a mortgage was placed on the property, signed by both parties. Sixty thousand dollars loaned to the parties by the wife's father went into the construction of the house. In 1976, the husband moved out of the house

but continued to make all mortgage, insurance and tax payments as he had done since 1964. In May 1978, an alimony judgment was entered awarding the wife possession of the house and directing the husband to continue making mortgage, insurance and tax payments. The parties were divorced in November 1978. On 24 May 1982, one day before she remarried, the wife filed this lawsuit alleging alternatively that she owned the entire house by virtue of the doctrines of resulting trust and constructive trust, or that she had an equitable lien on her husband's interest in his business because she had signed guarantees for loans to his business or that he had abandoned his interests in the property.

We have examined all of the wife's contentions, including her contention that she is entitled to a non-statutory equitable distribution of marital property, and find them to be without merit.

II

The trial court correctly directed a verdict against the wife on her claims of resulting trust, constructive trust, and equitable lien. This result is compelled not only by the law but also by the following factors listed by the husband in his brief:

> (1) Title to the lot was taken in the name of husband and wife, the husband paying the purchase price with no contribution from the wife;
>
> (2) There was never any agreement between the husband and wife as to the title to the lot or the house or their respective interests in them;
>
> (3) The husband never made any false representations to the wife as to the title to the property or any other aspect of it;
>
> (4) The husband made virtually all of the mortgage payments, and the bulk of the other contributions to the building of the house came from a loan or gift made to both of them; and
>
> (5) The wife's notion that she owned the entire property was not based on anything her husband told her, but was based on a mere assumption which she never communicated to anyone.

It is not necessary to address plaintiff's resulting trust claim since she has not pursued it on appeal.

[1] With regard to the constructive trust claim the law is clear. Courts will impose a constructive trust on property to prevent the legal titleholder, who has acquired it through a breach of duty, fraud, or other inequitable circumstances, from being unjustly enriched. *See Cline v. Cline*, 297 N.C. 336, 255 S.E. 2d 399 (1979) and *Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965). We find no evidence in the record of any fraud, breach of duty, or other wrongdoing by the husband, an essential prerequisite to imposing a constructive trust. *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E. 2d 873 (1970).

[2] Similarly, we find no evidence in the record sufficient to invoke the doctrine of unjust enrichment or to raise a jury question concerning an equitable lien in the wife's favor. The mere fact that one party was enriched, even at the expense of the other, does not bring the doctrine of unjust enrichment into play. "There must be some added ingredients to invoke the unjust enrichment doctrine." *Wright v. Wright*, 305 N.C. 345, 351, 289 S.E. 2d 347, 351 (1982). In this case we find no promise, agreement, or representation by the husband that the house would be titled in the wife's name. Moreover, regardless of the source of the sixty thousand dollars put into the house, the wife has no special claim to reimbursement for it. The record reflects that the sixty thousand dollars was advanced to *both parties*, but even if it were not, the law is clear: neither party owning property as a tenant by the entirety prior to divorce is entitled to any reimbursement for payments on the mortgage or for other benefits to the property during the marriage. *Branstetter v. Branstetter*, 36 N.C. App. 532, 245 S.E. 2d 87 (1978).

III

[3] We summarily reject the wife's contention that the husband abandoned his interest in the realty. The record contains neither a statement by the husband that he intended to abandon his interest in the realty nor any other evidence sufficient to show an abandonment. "To constitute an abandonment or renunciation of [his fee simple interest] there must be acts and conduct positive, unequivocal, and inconsistent with his claim of title. Nor will mere

lapse of time or other delay in asserting his claim, unaccompanied by acts clearly inconsistent with his right, amount to a waiver or abandonment." *Banks v. Banks*, 77 N.C. 186, 187 (1877). *See also* 1 C.J.S. *Abandonment* Sec. 5(c) (1936). And this makes sense, since, when married parties separate, usually one of them leaves the home. Leaving the marital home, without more, simply does not constitute an abandonment of the property interest in the marital home. And, if facts were necessary to show no abandonment, the evidence would still weigh heavily in the husband's favor. Up until the alimony order, the husband voluntarily continued to make payments for mortgage, insurance, and taxes. He also made those payments while the alimony order was in effect from May 1978 until July 1982, two months after the lawsuit in this case was filed and his wife remarried.

IV

[4] We summarily reject plaintiff's claim to a distribution of marital property. The Equitable Distribution of Marital Property Act, as codified at N.C. Gen. Stat. Sec. 50-20 (Supp. 1983), was effective on 1 October 1981, and applies only to actions for absolute divorce filed on or after that date. *Burmann v. Burmann*, 64 N.C. App. 729, 308 S.E. 2d 101 (1983). The parties in the instant case were divorced nearly three years prior to the effective date of the marital property act. Moreover, our Supreme Court implicitly rejected common law equitable distribution in *Leatherman v. Leatherman*, 297 N.C. 618, 256 S.E. 2d 793 (1979).

Finally, even if some common law equitable distribution were recognized in North Carolina, we fail to see how it could be applied three and one-half years after the divorce of the parties.

For the above reasons, the judgment of the trial court is

Affirmed.

Judges JOHNSON and BRASWELL concur.

FOUR SEASONS HOMEOWNERS ASSOCIATION, INC. v. W. K. SELLERS, THOMAS G. SIMPSON, SAMUEL W. JORDAN, JOHN DIAL AND DIANA DIAL

No. 8426DC297

(Filed 28 December 1984)

1. **Appeal and Error § 42.2— portions of record stricken—included in record on prior appeal—judicial notice**

There was no error in striking from defendant appellants' proposed record ninety-six pages of pleadings and transcripts in earlier actions between the parties because all the material necessary for a determination of the appeal had been filed in prior appeals. Appellate courts may take judicial notice of their own records.

2. **Attorneys at Law § 7.4— attorneys' fees—collection of homeowners association maintenance fees**

Where a prior appeal had affirmed the payment of attorneys' fees for the collection of maintenance fees by a homeowners association and defendant had not raised on appeal the applicability of G.S. 6-21.1, the prior appeal was *res judicata* even as to those awards in excess of the statutory maximum of fifteen percent of the outstanding balance. Subsequent awards in excess of that amount were reversed.

APPEAL by defendants from *Lanning, Judge.* Order entered 16 December 1983 in District Court, MECKLENBURG County. Heard in the Court of Appeals 27 November 1984.

The defendants were initially before this Court after judgments in plaintiff's favor were rendered on 10 March 1982. The trial court concluded in these judgments that the defendants owed the plaintiff Homeowners Association unpaid maintenance assessments plus attorneys' fees. The Declaration of Covenants, Conditions and Restrictions for Four Seasons subdivision obligated defendants to pay the assessments and attorneys' fees in the event that collection of unpaid assessments was referred to an attorney. We affirmed these judgments in *Homeowners Assoc. v. Sellers*, 62 N.C. App. 205, 302 S.E. 2d 848 (1983); and in *Homeowners Assoc. v. Jordan*, 62 N.C. App. 328, 302 S.E. 2d 504 (1983) (unpublished opinion). Defendants' subsequent petition for rehearing was denied. Their petitions for writs of certiorari were also denied. 309 N.C. 461, 307 S.E. 2d 364 (1983); 309 N.C. 460, 307 S.E. 2d 363 (1983).

The parties are again before this Court regarding an order allowing plaintiff's motions for additional attorneys' fees incurred

since the 10 March 1982 judgments. We hold that this order is unsupported by law and must be reversed.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by Christian R. Troy, for plaintiff appellee.

William D. McNaull, Jr. for defendant appellants.

ARNOLD, Judge.

In the order awarding additional attorneys' fees, the trial court found that plaintiff's attorney had expended 63.9 hours since 11 March 1982 in connection with the four actions against defendants; that these services included conferences, preparation of the record on appeal and brief, preparation for and appearance at oral argument in the Court of Appeals, review of appellate decisions, preparation of motion for attorneys' fees and responding to defendants' petitions. The trial court concluded that the reasonable value of these services is not less than $4,480; and that this amount should be divided equally among the four actions. Each defendant was therefore ordered to pay additional attorneys' fees of $1,120.

[1] Defendants first argue that the trial court committed error in striking from their proposed record on appeal ninety-six pages of pleadings and transcripts in the earlier actions between the parties. All material necessary for a determination of this appeal has been filed in prior appeals before this Court. Since our appellate courts may take judicial notice of their own records and review the chronology of litigation, *see Appeal of McLean Trucking Co., Winston-Salem*, 285 N.C. 552, 557, 206 S.E. 2d 172, 176 (1974); *In re Williamson*, 67 N.C. App. 184, 185, 312 S.E. 2d 239, 240 (1984), the trial court did not commit reversible error in striking portions of the prior litigation from the present record on appeal.

[2] Defendants next argue that the award of additional attorneys' fees was error, since the award was in excess of that allowed by G.S. 6-21.2 and since there was no evidence that plaintiff complied with the notice provisions of this statute. Plaintiff responds that this Court previously determined that G.S. 6-21.2 was inapplicable; and that defendants were obligated to pay *reasonable* attorneys' fees pursuant to covenants running with defendants' land.

In our earlier opinion we affirmed the allowance of attorneys' fees to plaintiff, indicating that the following covenant clearly provided for collection of attorneys' fees and was enforceable against defendants since it ran with their land:

> In order to secure payment of the annual and special assessments hereinabove provided, such charges as may be levied by the Association against the Lot(s), together with interest, costs of collection and reasonable attorneys fees, shall be a charge on the land and shall be a continuing lien upon the property against which each such assessment or charge is made. Each such assessment, together with interest, costs of collection and reasonable attorneys fees shall also be the personal obligation of the person who is the Owner of such Lot at the time when the assessment fell due.

Homeowners Assoc., 62 N.C. App. at 211-212, 302 S.E. 2d at 853. In reaching our decision, we noted that defendants had failed to except to the findings of fact and conclusions of law in the judgments awarding plaintiff attorneys' fees. On appeal, defendants had merely argued that attorneys' fees were not recoverable, because defendants were not parties to the declaration of covenants. They did not raise the applicability of G.S. 6-21.2. Since our courts, however, have consistently refused to sustain an award of attorneys' fees except when expressly authorized by statute, our earlier decision to uphold the award of attorneys' fees implies that the covenant providing for the collection of attorneys' fees was authorized by statute. *See Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 266 S.E. 2d 812 (1980).

G.S. 6-21.2 provides in pertinent part:

> Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:
>
> . . . .
>
> (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of

> reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

Our Supreme Court has examined G.S. 6-21.2 and the legislative history of the statute and concluded:

> [W]e hold that the term "evidence of indebtedness" as used in G.S. 6-21.2 has reference to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money. Such a definition, we believe, does no violence to any of the statute's specific provisions and accords well with its general purpose to validate a debt collection remedy expressly agreed upon by contracting parties.

Enterprises, Inc., 300 N.C. at 294, 266 S.E. 2d at 817-18 (1980). *See also Coastal Production Credit v. Goodson Farms*, 70 N.C. App. 221, 319 S.E. 2d 650 (1984).

In the matter before us the "evidence of indebtedness" is the Declaration of Covenants, Conditions and Restrictions for Four Seasons subdivision. Therein defendants, as owners of lots in the subdivision, personally obligated themselves to pay maintenance fees in return for a nonexclusive right and easement of enjoyment in the common areas of the subdivision. Defendants agreed to secure payment with a lien upon their lots in the amount of the due assessments. Defendants further agreed to pay reasonable attorneys' fees if the due assessments were collected through an attorney. Pursuant to G.S. 6-21.2(2), defendants were therefore liable for attorneys' fees in the amount of 15% of the "outstanding balance" owing on the evidence of indebtedness.

The record on appeal in our prior decision shows that defendant Sellers was ordered to pay assessments of $675.88 and attorneys' fees of $250.00. Defendant Simpson was ordered to pay assessments of $798.76 plus attorneys' fees of $250. Defendants Dial and wife were ordered to pay assessments of $164.45 and attorneys' fees of $24.66. Defendant Jordan was ordered to pay assessments of $239.59 and $35.95 in attorneys' fees. The fees assessed against defendants Dial and Jordan amounted to 15% of

their outstanding balances. The other two defendants were ordered to pay fees in excess of 15%. As we earlier noted, however, defendants assigned error to these awards solely on the basis that they were not parties to the covenant providing for collection of attorneys' fees. They did not raise any issue regarding the applicability of G.S. 6-21.2, and our affirmation of these prior awards is *res judicata*. The order directing each defendant to pay additional attorneys' fees of $1,120, however, is prohibited by statute and must be

Reversed.

Judges WELLS and BECTON concur.

JEAN WRIGHT BLOUNT v. MARVIN K. BLOUNT, JR.

No. 8426DC23

(Filed 28 December 1984)

Divorce and Alimony § 21.9— equitable distribution precluded by separation agreement

A 1976 separation agreement settled the property rights of the parties and barred plaintiff's claim for equitable distribution where the agreement contained language in which each party relinquished any interest in property owned by the other, notwithstanding the agreement did not enumerate in detail the property owned by defendant husband.

APPEALS by plaintiff and defendant from *Lanning, Judge.* Judgment entered 10 November 1983, District Court, MECKLENBURG County. Heard in the Court of Appeals 17 October 1984.

Plaintiff filed this action 19 November 1982 seeking equitable distribution of marital property pursuant to G.S. 50-20, subsequent to an action for divorce filed by defendant. Defendant answered asserting that plaintiff's application for equitable distribution was barred by the parties' 1962 ante-nuptial agreement and their 1976 separation agreement, and that the equitable distribution statute, G.S. 50-20, violates both North Carolina and United States Constitutions. Both plaintiff and defendant moved for summary judgment.

On 10 November 1983, after a hearing on the motions, the trial court entered an order and judgment providing that: (1) the 1962 ante-nuptial agreement was not a bar to equitable distribution and therefore plaintiff's motion for summary judgment on this issue was granted; (2) the 1976 separation agreement was a bar to equitable distribution and therefore defendant's motion for summary judgment as to that claim was granted and plaintiff's complaint for equitable distribution was dismissed with prejudice; and (3) G.S. 50-20 is not unconstitutional and plaintiff's motion for summary judgment on this issue was granted. From this order both plaintiff and defendant appealed.

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

Hunter, Wharton and Howell, by John V. Hunter, III, and Kennedy, Covington, Lobdell and Hickman, by Richard D. Stephens, for defendant.

EAGLES, Judge.

At the outset we note that plaintiff's brief violates Rule 28(b)(5) of the Rules of Appellate Procedure by omitting reference to assignments of error and exceptions pertinent to the questions presented in the argument as required. Despite the procedural defects of plaintiff's brief, we choose to exercise our discretion under Rule 2, in order to consider the case on its merits.

The dispositive issue in this appeal is whether the trial court properly entered summary judgment in support of defendant's claim that the 1976 separation agreement settled all the property rights of the parties and was therefore a bar to equitable distribution. We hold that under the facts of this case the trial court was correct.

Plaintiff does not challenge the validity of the 1976 separation agreement but claims that the agreement was a support agreement and was never intended to settle all the property rights which arose out of the marriage. In support of her argument plaintiff points out that even though defendant held assets valued in excess of a million dollars, the only property mentioned in the agreement was the tenancy by the entirety homeplace, the home furnishings and plaintiff's car. Defendant counters that the

validity of the separation agreement is not in dispute and even though specific items of property were not enumerated, the agreement contained language providing for a mutual relinquishment of all rights in property acquired through the marriage. Defendant asserts that because the 1976 separation agreement settled all property rights which grew out of the marriage, no marital property remained to be equitably distributed at the time of the divorce.

G.S. 52-10 allows husband and wife to enter a separation agreement which "release[s] and quitclaim[s]" any property rights acquired by marriage, and that a release will bar any later claim on the released property. Such a valid separation agreement is an enforceable contract between husband and wife. *Sedberry v. Johnson*, 62 N.C. App. 425, 302 S.E. 2d 924, *rev. denied*, 309 N.C. 322, 307 S.E. 2d 167 (1983). The same rules which govern the interpretation of contracts generally apply to separation agreements. *Lane v. Scarborough*, 284 N.C. 407, 200 S.E. 2d 622 (1973). Where the terms of a separation agreement are plain and explicit, the court will determine the legal effect and enforce it as written by the parties. *Church v. Hancock*, 261 N.C. 764, 136 S.E. 2d 81 (1964). *Goodyear v. Goodyear*, 257 N.C. 374, 126 S.E. 2d 113 (1962). When a prior separation agreement fully disposes of the spouses' property rights arising out of the marriage, it acts as a bar to equitable distribution. *Dean v. Dean*, 68 N.C. App. 290, 314 S.E. 2d 305 (1984); *McArthur v. McArthur*, 68 N.C. App. 484, 315 S.E. 2d 344 (1984).

When we apply these principles to the facts of the present case, we conclude that plaintiff relinquished all her property rights which arose out of the marriage. Accordingly, at the time of divorce in 1983 no marital property remained for equitable distribution. The language of the separation agreement is plain and unambiguous.

> The wife . . . hereby releases and relinquishes unto the husband . . . any and all property or interest in property real, personal, and mixed, now owned or hereafter acquired by husband . . . just the same as if she had never been married to him . . . .

The defendant similarly relinquished all his rights in any property owned by plaintiff. While the contract did not enumer-

ate in detail the property of the defendant, we have held that the fact that specific property owned by either party was not described in the agreement cannot serve, without more, to avoid the unmistakably clear general provisions of the contract. *McArthur v. McArthur*, 68 N.C. App. 484, 315 S.E. 2d 344 (1984).

Plaintiff made no claim that the separation agreement was void as against public policy, or that her consent to the agreement was the product of overreaching or coercion. Rather plaintiff has conceded that the agreement was valid and enforceable but maintained that she never intended it to be a final settlement of all property rights. The clear and unambiguous terms of the agreement prevent that interpretation. The court cannot fabricate issues of fairness not raised by the parties. *See* Sharp, Divorce and the Third Party: Spousal Support, Private Agreements and the State, 59 N.C.L. Rev. 819 (1981).

In defendant's appeal he asserts that the trial court improperly granted summary judgment to the plaintiff on the issue of whether the ante-nuptial agreement entered by the parties prior to their 1962 marriage was a bar to equitable distribution. While a careful reading of the ante-nuptial agreement makes it clear that not all the marital property rights of the parties were disposed of in that agreement and that the trial court was correct that it could not act as a bar to later equitable distribution, our holding as to the effect of the 1976 separation agreement on equitable distribution disposes of the controversy.

Defendant also claims that G.S. 50-20, dealing with equitable distribution, violates the North Carolina and United States Constitutions. Because the matter has been determined by our resolution of the 1976 separation agreement issue, we do not reach the constitutional challenge. It is well established that we need not pass upon constitutional questions if another issue is determinative of the matter before us. *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980).

We hold that summary judgment was properly entered and the trial court is affirmed.

Affirmed.

Judges WEBB and BRASWELL concur.

ANNIE PENN MEMORIAL HOSPITAL, INC. v. CASWELL COUNTY

No. 8417DC459

(Filed 28 December 1984)

1. **Counties § 6.2; Sheriffs and Constables § 2— authority of deputy to obligate county for wounded prisoner**

A deputy sheriff had the authority to bind the county where a person who had just been wounded by a deputy was handcuffed and transported to plaintiff hospital, hospital personnel were told that the county would be responsible for the man, and emergency medical treatment was administered.

2. **Sheriffs and Constables § 2; Criminal Law § 75.7— patient in custody when treated at hospital—deputy authorized to obligate county**

A wounded man was in lawful custody when he was admitted to plaintiff hospital, so that a deputy sheriff had authority to obligate the county, where the man had been wounded after pointing a shotgun at a deputy, the deputy had handcuffed the man and transported him to the hospital for emergency treatment, and the sheriff's department had requested hospital personnel to notify them of the man's discharge so that they could pick him up.

APPEAL by plaintiff from *McHugh, Judge.* Judgment entered 15 December 1983 *nunc pro tunc* 26 October 1983 in District Court, ROCKINGHAM County. Heard in the Court of Appeals 7 December 1984.

This is an action to collect on an open account.

Gwyn, Gwyn & Farver, by H. Craig Farver, for plaintiff-appellant.

Farmer & Watlington, by R. Lee Farmer, for defendant-appellee.

JOHNSON, Judge.

The issue in this case concerns whether a county is liable for medical services rendered to a person wounded by a deputy sheriff, handcuffed and taken immediately to a hospital where the injured person underwent emergency treatment. The trial court found and concluded that the county was not liable. For the reasons that follow, we reverse the trial court and remand for the entry of a judgment in accordance with this opinion.

The plaintiff's evidence tends to show that an apparently intoxicated Douglas Lee Dunn was shot in the abdomen by a deputy

sheriff of Caswell County when Dunn pointed a shotgun at the deputy. Dunn was handcuffed and immediately transported to plaintiff hospital where he underwent emergency medical treatment. Dunn was accompanied in the emergency room by several deputy sheriffs, all of whom were in uniform. One of the deputies told hospital personnel that the County would be responsible for Dunn.

George Chandler, a patient accounts manager for plaintiff hospital, called the Caswell County Sheriff's Department the next day to determine whether the County would be responsible for the bill. Although the sheriff was out, Chandler was assured that the County would be responsible for Dunn. In the past, deputies had brought patients to plaintiff hospital for treatment, told the hospital that the County would be responsible for the bill, and the County would pay. When Chandler called the sheriff's department, he was requested to notify the sheriff's department of Dunn's discharge so they could come and get him at the hospital. When Dunn was discharged three weeks later, a deputy came and picked him up. The deputy was going to handcuff Dunn inside the hospital but deferred to Chandler's request to handcuff Dunn outside the hospital. Chandler saw the deputy hand some papers to Dunn while outside.

Neal Emory, the Caswell County manager, testified that a deputy sheriff did not have the authority or right to incur debts for the County. He conceded that deputies had obligated the County to pay for hospital bills in the past.

[1] The County contends that the deputy sheriff did not have the authority to bind it and that Dunn had not been arrested nor taken into lawful custody when he was admitted to the hospital. We find the present case to be controlled by *Spicer v. Williamson*, 191 N.C. 487, 132 S.E. 291 (1926), in which one Peter Camel was wounded at the time of his arrest by a deputy sheriff, and immediately taken for medical treatment by the sheriff. Holding the Board of County Commissioners of Duplin County liable for Camel's medical bills, the Court stated:

> It is clearly the duty of the board of commissioners of a county, in this State, as prescribed by statute, to provide for necessary medical attention to a prisoner confined in the county jail, whether such prisoner has been committed to jail

as the result of a preliminary trial, or upon a final judgment on his conviction of a violation of law. The board of commissioners owes no less duty to a person, lawfully in the custody of the sheriff, awaiting a preliminary trial, and confined in jail, because he is unable to give bond for his appearance at such trial. *A reasonable construction of these statutes extends this duty of the board to a person in the lawful custody of the sheriff, who is unable, because of the condition of the prisoner, to take him at once to the jail.* The suggestion in the brief for the board of commissioners filed in this Court, that the board owes no duty to provide for necessary medical attention to a prisoner until he has actually been placed in jail, does not commend itself to us as within a reasonable or necessary construction of the statutes applicable. . . .

The fact that the board of county commissioners of Duplin County had not authorized the sheriff to request plaintiff to render professional services to his prisoner, prior to the performance of such services, upon the facts as shown by the evidence in this case, does not relieve the board of liability for the reasonable value of such services. Upon these facts, it was the duty of the board of commissioners to provide necessary medical services for Peter Camel, after he was arrested and taken into custody by the sheriff. In the emergency confronting the sheriff, it was his duty, as sheriff, to procure proper medical attention for his prisoner. *Ordinarily, the sheriff or other officer, having in his custody a prisoner whose condition requires medical attention, should report such condition to the board of commissioners before calling in a physician. In an emergency, however, he may without previous authority from the board, procure necessary attention for his prisoner, and the board of commissioners will be liable for the reasonable charge for such services as may be rendered to the prisoner at the request of the sheriff. The authority of the sheriff to act in an emergency such as existed in this case must be sustained.* . . . (Citations omitted.) (Emphasis added.)

191 N.C. at 492, 132 S.E. at 294-95. Given the emergency situation in the present case, defendant's contention that the deputy did not have authority to bind the County has no merit.

[2] We also find no merit to defendant's contention that Dunn was not in lawful custody at the time he was admitted to the hos-

pital. In this State, a law enforcement officer may arrest a person without a warrant when he has probable cause to believe the person has committed a criminal offense in the officer's presence. G.S. 15A-401(b)(1). Here, Dunn pointed a shotgun at the deputy. The deputy thus had probable cause to believe Dunn had committed a criminal offense, an assault, in his presence, and thus could arrest Dunn without a warrant. The deputy handcuffed Dunn and transported him to the hospital for emergency treatment. The sheriff's department also requested hospital personnel to notify them of Dunn's discharge so they could pick him up.

Here, the evidence compels findings and conclusions that the deputy had the emergency authority to bind the County and that Dunn was in lawful custody. The trial court's findings and conclusions to the contrary were, therefore, erroneous. This cause must, therefore, be remanded for an entry of a judgment in favor of plaintiff.

Reversed and remanded.

Judges BECTON and BRASWELL concur.

PATTY H. MARLEY v. WILLIAM GANTT

No. 845DC171

(Filed 28 December 1984)

Damages § 10; Rules of Civil Procedure § 61— sick leave benefits during disability —improper questions—harmless error

While it was error for the trial court to permit defendant's attorney to question plaintiff as to the salary she received as sick leave benefits while she was unable to work because of the accident in question, the admission of such evidence did not amount to the denial of a substantial right within the meaning of G.S. 1A-1, Rule 61 which would allow the trial court to set aside the verdict. G.S. 1A-1, Rule 59.

APPEAL by plaintiff from *Rice, Judge.* Judgment entered 27 October 1983 in District Court, NEW HANOVER County. Heard in the Court of Appeals 13 November 1984.

This is an action for personal injury incurred by the plaintiff in an automobile accident. The plaintiff testified that among other

injuries she missed 84 hours of work and she was paid approximately $10.00 per hour. On cross-examination the following colloquy occurred:

Q. Mrs. Marley, you were a salaried person I believe you said, is that correct?

A. I am weekly salaried; yes, sir.

Q. So you actually lost no pay or income for any of the time—

MR. SMITH: Objection.

The Court: May I see you, Gentlemen?

. . .

Q. Mrs. Marley, at the time of this accident and since that time, you were a salaried employee, is that correct?

A. Yes, sir.

Q. That is why you did not know what you made per hour?

A. I am on a weekly salary, that is correct.

Q. In fact, you were paid your regular weekly salary throughout that time even when you missed some time because of the accident, is that correct?

MR. SMITH: Objection.

COURT: Overruled.

A. That's correct.

The Court did not charge the jury that the plaintiff was entitled to lost wages. The jury awarded her $2,000.00 for her injury. The plaintiff made a motion for a new trial under G.S. 1A-1, Rule 59 and the defendant moved for an additur to increase the verdict by $840.00 to $2,840.00. The motion for a new trial was denied and the motion for an additur was allowed. The plaintiff appealed.

Smith and Jackson by W. G. Smith and Bruce H. Jackson, Jr. for plaintiff appellant.

Crossley and Johnson by Robert W. Johnson for defendant appellee.

WEBB, Judge.

It was error for the Court to allow the defendant's attorney to question the plaintiff as to the salary she received while she was not able to work. See *Fisher v. Thompson*, 50 N.C. App. 724, 275 S.E. 2d 507 (1981). Neither party contends it was not proper for the Court to order an additur to the verdict. See *Caudle v. Swanson*, 248 N.C. 249, 103 S.E. 2d 357 (1958). The plaintiff argues that it was error not to allow her motion pursuant to G.S. 1A-1, Rule 59 to set the verdict aside for the error committed in the trial in allowing the improper cross-examination. She contends that by allowing this line of questioning her credibility and that of her other witnesses was so impeached that she was materially prejudiced.

G.S. 1A-1, Rule 61 provides that an error in the admission of evidence is not a ground for setting aside a verdict unless the refusal to do so "amounts to the denial of a substantial right." The plaintiff in this case argues that a substantial right was affected. There was testimony by an orthopedic surgeon that she had suffered a severe cervical sprain resulting in 17% disability. She argues that when the trial court repeatedly overruled counsel's objection to testimony of sick leave benefits it was done in the presence of the jury and affected their perception of the plaintiff as well as her witnesses. We do not believe we can hold that the credibility of the plaintiff's witnesses including the medical doctor who testified for her was affected by this line of questions. The questions asked of the plaintiff did not require her to contradict any of her direct testimony. We do not believe we can hold she was so impeached that she was denied a substantial right when the verdict was not set aside.

No error.

Judges HEDRICK and HILL concur.

SELENA E. BRYANT, ADMINISTRATOR OF THE ESTATE OF NETTIE GAVIN BRYANT v. SAMPSON MEMORIAL HOSPITAL

No. 844SC289

(Filed 28 December 1984)

1. **Physicians, Surgeons and Allied Professions § 15.2— pathologist's testimony about appropriate medical treatment—admissible**

The court erred by not allowing a pathologist to testify as an expert on the proper treatment in Sampson County of decubitus ulcers. A medical doctor of whatever specialty is better able to form an opinion as to medical treatment than the laymen who ordinarily comprise juries.

2. **Physicians, Surgeons and Allied Professions § 16.1— malpractice—decubitus ulcers—patient not turned with sufficient frequency—evidence sufficient**

The court should not have granted defendant's motion to dismiss where plaintiff's doctor would have testified that the proper treatment for the deceased's ulcers would include turning her at regular intervals, which was not done, and that the ulcers became worse and contributed to her death.

APPEAL by plaintiff from *Llewellyn, Judge*. Judgment entered 2 November 1983 in Superior Court, SAMPSON County. Heard in the Court of Appeals 27 November 1984.

This is an action in which the plaintiff claims damages for pain and suffering of her intestate prior to death and the wrongful death of her intestate caused by the negligence of the defendant's agents.

Dr. H. J. Carr testified that he admitted the plaintiff's intestate to the hospital on 7 April 1981 at which time she was suffering from decubitus ulcers. He described the treatment of decubitus ulcers which includes turning the patient every two hours. He testified further that the hospital records did not show that the plaintiff's intestate was turned as often as had been prescribed for her.

Dr. L. S. Harris testified and was tendered by the plaintiff as an expert in "pathology and general medicine." The Court found he was an expert in pathology but not in "general medicine." The Court allowed Dr. Harris to testify that one of the causes of the death of the plaintiff's intestate was decubitus ulcers. He was not allowed to testify as to the standard of care in the area for the treatment of decubitus ulcers. If his testimony had been allowed

he would have testified that a patient should be turned frequently. He would also have testified if he had been allowed to do so that from his review of the hospital records the proper standard of care was not followed in treating the ulcers of the plaintiff's intestate.

At the conclusion of the plaintiff's evidence the Court allowed the defendant's motion to dismiss. The plaintiff appealed.

Bruce H. Robinson, Jr. for plaintiff appellant.

Ward and Smith, P.A. by Dale P. Johnson and Thomas E. Harris for defendant appellee.

WEBB, Judge.

[1] We hold it was error to exclude the testimony of Dr. Harris and it was error to allow the defendant's motion to dismiss. The Court would not allow Dr. Harris to testify as an expert on the proper treatment in Sampson County of the decubitus ulcers of plaintiff's intestate because it felt a pathologist is not an expert in the general practice of medicine. This was error. An expert witness is one who through study or experience or both is better qualified than the jury to form an opinion on a particular subject. See Brandis on N.C. Evidence, 2nd Rev. Ed., § 133. We believe that a medical doctor of whatever specialty is better able to form an opinion as to medical treatment than the laymen who ordinarily comprise juries. Dr. Harris' testimony should have been admitted.

[2] If Dr. Harris' testimony had been admitted there would have been evidence that the proper treatment for the deceased's ulcers would include turning her at regular intervals which was not done and that the ulcers became worse and contributed to her death. This would have been evidence from which a jury could find that the negligence of the defendant's agents was a proximate cause of injury and death to plaintiff's intestate.

Reversed and remanded.

Judges HEDRICK and HILL concur.

BEN F. LOEB, JR. v. ANNE N. LOEB

No. 8315DC1177

(Filed 2 January 1985)

1. **Divorce and Alimony § 21.9— equitable distribution—presumption of marital property—standard of proof to rebut presumption**

The Equitable Distribution Act creates a presumption that all property acquired by the parties during the course of the marriage is "marital property," and the standard of proof required to rebut that presumption is the clear, cogent, and convincing evidence standard required to rebut the presumption of gift between spouses in cases involving title to real property before the Act. G.S. 50-20 (Supp. 1983).

2. **Divorce and Alimony § 21.9— equitable distribution—jointly held property—presumption of gift to marital estate not rebutted**

In an action for divorce and equitable distribution, the wife did not meet her burden of proof in contending that jointly held tracts conveyed to the parties as tenants by the entirety as a gift by the wife's mother were intended to be a gift to the wife alone rather than to the marital estate. G.S. 50-20(b)(1), G.S. 50-20(b)(2).

3. **Divorce and Alimony § 21.9— equitable distribution—cash gifts from wife's mother—marital property**

In an action for divorce and equitable distribution, the court did not err by finding that cash gifts from the wife's mother were deposited in joint savings and checking accounts and combined with the other income of the family where the wife was unable to state the value of the gifts and the gifts could not be traced in the joint accounts. The wife did not provide the necessary proof to rebut the marital property assumption. G.S. 50-20(b)(2) (Supp. 1981).

4. **Divorce and Alimony § 21.9— equitable distribution—purchases from joint accounts—findings sufficient**

In an action for divorce and equitable distribution, the court did not err in finding that a condominium, certificates of deposit, and money market certificates were purchased with funds from joint bank accounts. A finding concerning the source of funds was not needed since the joint bank accounts were marital property.

5. **Divorce and Alimony § 21.9— equitable distribution—condominium in wife's name—purchased with marital property**

In an action for divorce and equitable distribution, the court did not err in finding that a condominium purchased in the wife's name had been purchased with marital property where it was purchased with funds from joint savings, stocks and bonds in the wife's name only purchased with funds from joint accounts, and $2,000 from a gift to the wife by her mother after the parties separated. The wife did not meet her burden of rebutting the presumption that all property acquired by either spouse during the marriage is marital property. G.S. 50-20(b)(2) (Supp. 1981).

6. Divorce and Alimony § 21.9— equitable distribution—equal division of property—no error

In an action for divorce and equitable distribution, the court did not err by dividing the marital property equally according to value even though the parties' income was significantly disproportionate where a condominium had been purchased as a new home for the children, there was no evidence that the wife needed to occupy or own the marital residence, the wife had separate property in the form of stocks, real estate, and a *vested* interest in a large family trust, and the husband's only separate property was his retirement benefit. G.S. 50-20(c) (Supp. 1981).

7. Divorce and Alimony § 21.9— equitable distribution of property—findings required

In an action for divorce and equitable distribution, the court did not err by not specifically finding the *marital property* of the parties where its finding as to the property acquired and owned by the parties tracked the language of the statutory definition of marital property. Findings and conclusions as to the statutory and non-statutory factors for determining the division of marital property are necessary only to justify an unequal equitable distribution. G.S. 50-20(b)(1) (Supp. 1981).

8. Appeal and Error § 42.2— supporting evidence not in record—assignments of error deemed abandoned

In an action for divorce and equitable distribution, assignments of error concerning the admission of the husband's real estate appraiser's report and the husband's summaries of checks were deemed abandoned where neither exhibit was included in the record on appeal.

9. Rules of Civil Procedure § 59— motion for new trial—properly denied

In an action for divorce and equitable distribution, defendant's Rule 59 motion for a new trial based on allegations that plaintiff had falsely answered an interrogatory about whether he had consulted an expert and had reneged on an oral stipulation concerning the admission of the wife's property appraisal, was properly denied where defendant did not object, claim surprise, or seek a continuance when the husband's expert was tendered to the court, where plaintiff's attorney filed an affidavit denying the existence of the stipulation, and where there was no evidence that the wife's appraisal was offered into evidence. G.S. 1A-1, Rule 59.

APPEAL by defendant from *Hunt, Judge.* Orders entered 3 June 1983 and 27 July 1983 in District Court, ORANGE County. Heard in the Court of Appeals 29 August 1984.

Susan H. Lewis and George W. Miller, Jr., for plaintiff appellee.

Hunter, Wharton & Howell, by John V. Hunter, III, for defendant appellant.

BECTON, Judge.

This case deals with the inclusion of property acquired by gift from a third party in an equitable distribution of marital property.

The parties were married in 1961 and lived together until their separation in March 1981. During the course of their marriage, the plaintiff husband, Ben F. Loeb, Jr., worked as an attorney, first with a private law firm in Tennessee, then with the State of North Carolina. From 1964 until 1981, the defendant wife, Anne N. Loeb, generally did not work outside the home. The parties have two children.

The husband contributed his entire income to the support of the family and the accumulation of the parties' savings and assets. The parties handled their finances exclusively through *joint* savings and *joint* checking accounts. Over the years the wife's mother, Mrs. Nelson, gave the parties joint title to several tracts of real property in Tennessee as tenants by the entirety, and cash gifts individually that were deposited in their joint savings and joint checking accounts.

During their marriage, the parties acquired the following: (1) joint title to a 196-acre farm in Tennessee (by deed from Mrs. Nelson); (2) joint title to a 36-acre farm in Tennessee (by deed from Mrs. Nelson); (3) joint title to an interest in a lot and building in Paris, Tennessee (by deed from Mrs. Nelson); (4) joint title to a residential lot in Chapel Hill (purchased with funds from their joint checking and savings accounts); (5) title in the wife's name alone to a condominium in Chapel Hill (purchased for cash, consisting of the proceeds from (a) a signature note in the wife's name, (b) a money market certificate in the wife's name, which was purchased with funds from a joint account, (c) stocks and bonds in the wife's name (purchased with the proceeds from stock originally held jointly or in the husband's name); (6) AT&T stock held in the wife's name (purchased with funds from the parties' joint checking account); (7) Commercial Bank Stock held in the wife's name (purchased with funds from the parties' joint checking account); (8) certificates of deposit at Orange Savings and Loan in both parties' names (purchased with funds from the parties' joint savings and checking accounts); (9) a certificate of deposit at Home Federal Savings and Loan in both parties' names

(purchased with funds from the parties' joint savings and checking accounts); (10) a money market certificate at NCNB in the husband's name (purchased with funds from the parties' joint savings and checking accounts); (11) a house and lot in Chapel Hill (purchased with proceeds from the sale of the parties' first marital home in Chapel Hill, which, in turn, had been purchased with funds from joint savings and checking accounts); (12) a voluntary retirement account in the husband's name alone; (13) title in the wife's name alone to a 96-acre farm in Tennessee (by deed from her parents); (14) the husband's North Carolina State Employees' Retirement Account. The trial court made specific findings on the monetary value of each item listed above; these are included in the record on appeal.

On 30 September 1982 the husband instituted an action for absolute divorce from the wife and asked for an equitable distribution of the marital property. The Equitable Distribution Act (the Act), as codified at N.C. Gen. Stat. Sec. 50-20, applies to all actions for absolute divorce instituted on or after 1 October 1981. G.S. Sec. 50-20 (Supp. 1983). The absolute divorce was granted on 13 December 1982. The equitable distribution issue was tried in April 1983; the Order dividing the parties' marital property was entered on 3 June 1983. The trial court found that (1) items 1-12 were marital property; (2) item 13 was the wife's separate property; and (3) item 14 was the husband's separate property. It then distributed the marital property equally between the parties according to value, awarding the wife items 1-3 and 5-7, and awarding the husband items 4 and 8-12. Because of a slight discrepancy in the value of their respective property, the trial court ordered the husband to make a distributive award to the wife in the amount of $4,577 "to render an equal and equitable distribution."

After the trial, but before the entry of the Order, the wife filed a motion for a new trial or for leave to reopen the evidence. The motion was denied on 14 July 1983. The wife appeals from the 3 June 1983 Order and the 14 July 1983 denial of her motion.

I

Under the Act, the trial judge, before equitably dividing the parties' property, must distinguish between "marital property," as defined in G.S. Sec. 50-20(b)(1) and "separate property," as

defined in G.S. Sec. 50-20(b)(2). *See Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E. 2d 772 (1984). "Separate property" is not subject to equitable distribution. G.S. Sec. 50-20(c); S. Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C.L. Rev. 247, 249 (1983). The wife assigns error to the trial court's classification of the Tennessee tracts of land given to the parties jointly by the wife's mother during the course of the marriage as "marital property." We find no error.

Under the original version of G.S. Sec. 50-20(b)(1), which was in effect at the time the husband filed for absolute divorce, "marital property" was defined as "all real and personal property acquired by either spouse during the course of the marriage and presently owned, except property determined to be separate property in accordance with subdivision (2) of this section." G.S. Sec. 50-20(b)(1) (Supp. 1981). "Separate property," in pertinent part, included "all real and personal property acquired by a spouse . . . by bequest, devise, descent, or gift during the course of the marriage." G.S. Sec. 50-20(b)(2) (Supp. 1981).

In construing the provisions of a statute, we find the legislative intent controlling. *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980). The language of the statute itself and the purpose behind the legislation supply the strongest indicia of the legislative intent. *State ex rel. Utilities Comm'n v. Public Staff*, 309 N.C. 195, 306 S.E. 2d 435 (1983); *In re Kirkman*, 302 N.C. 164, 273 S.E. 2d 712 (1981). The introductory provision of the Act reveals its equitable purpose: "Upon application of a party, the court shall determine what is the marital property and shall provide for an equitable distribution of the marital property between the parties . . . ." G.S. Sec. 50-20(a) (Supp. 1981). The Act reflects a trend nationwide towards recognizing marriage as "a partnership, a shared enterprise to which both spouses make valuable contributions, albeit often in different ways." Sharp, *supra*, at 247.

[1] Guided by the legislative intent, we hold that the language of the Act, both in the original version and as amended, *see* G.S. Sec. 50-20 (Supp. 1983), creates a presumption that all property acquired by the parties during the course of the marriage is "marital property." *Accord Painter v. Painter*, 65 N.J. 196, 320 A. 2d 484 (1974) (similar statutory language); *see* Sharp, *supra*, at 250

& n. 16-17. Absent a statutorily-mandated standard of proof, we adopt the standard of proof required to rebut a presumption of gift between spouses in cases involving title to real property arising prior to the effective date of the Act. *See Mims v. Mims*, 305 N.C. 41, 286 S.E. 2d 779 (1982). The "marital property" presumption may, therefore, be rebutted by clear, cogent, and convincing evidence that the property comes within the "separate property" definition. *See id.* The burden of proof necessarily falls on the party claiming the "separate property."

[2] In the case before us, the wife contends that the jointly held Tennessee tracts are her "separate property." The first question is whether jointly held property qualifies as "marital property." The 1981 version of the "marital property" definition reads, in pertinent part, "all real and personal property acquired by either spouse. . . ." G.S. 50-20(b)(1). We find that jointly held property should be read into the 1981 "marital property" definition, especially in light of G.S. Sec. 50-20(b)(2) (Supp. 1981), which specifies that "separate property" remains separate "regardless of whether the title is in the name of the husband or wife *or both*." (Emphasis added.) *Accord Grant v. Grant*, 424 A. 2d 139 (Me. 1981) (interpreting similarly worded "marital property" definition); *see* Sharp, *supra*, at 252 & n. 30 (majority rule among common-law states). The General Assembly has subsequently clarified its legislative intent by amending the "marital property" definition to include "all real and personal property acquired by either spouse or *both spouses*. . . ." G.S. Sec. 50-20(b)(1) (Supp. 1983). (Emphasis added.) Thus, the parties' jointly held Tennessee tracts were presumed to be "marital property."

To rebut the presumption, the wife had the burden of proving by clear, cogent, and convincing evidence that the tracts came within the "separate property" definition. "Separate property" is defined, in significant part, as "all real and personal property . . . acquired by *a* spouse by . . . gift during the course of the marriage." G.S. Sec. 50-20(b)(2) (Supp. 1981). (Emphasis added.) The General Assembly's choice of the singular term, "a," is crucial. We discern that the legislature intended to exclude from the definition of "separate property" a gift of property to both parties from a third party during the course of the marriage. *Accord Ackley v. Ackley*, 100 A.D. 2d 153, 472 N.Y.S. 2d 804 (N.Y. App. Div. 1984) (same outcome—"gift from a party other than *the*

spouse"); *In re Marriage of Wendt*, 339 N.W. 2d 615 (Iowa Ct. App. 1983) (same outcome—"gifts received by either party"). Our holding reflects the partnership concept of marriage inherent in the equitable distribution statute, as discussed by the *Ackley* Court:

> In construing the language of the equitable distribution statute, we must consider its basic premise that marriage is an economic partnership (see *Forcucci v. Forcucci*, 83 A.D. 2d 169, 171, 443 N.Y.S. 2d 1013). '[T]he partnership concept of marriage is enhanced by a recognition that property acquired jointly by the spouses during marriage by gift, bequest, devise or descent is a part of the marital estate' (*Grant v. Grant*, [Me.], 424 A. 2d 139, 144). A gift of property to both spouses comes to them by reason of the marital relation (*Forsythe v. Forsythe*, [Mo. App.], 558 S.W. 2d 675, 678) and should be considered as property belonging to the marital partnership. Thus, wedding gifts as well as other gifts made to both spouses have been held to be marital property. [Citations omitted.]

100 A.D. 2d at 155-6, 472 N.Y.S. 2d at 806.

Under common-law, a deed conveying real estate to a husband and wife creates an estate by the entireties. *Freeze v. Congleton*, 276 N.C. 178, 171 S.E. 2d 424 (1970). However, title is not absolutely controlling under the Act, as is clear from the "separate property" definition, G.S. Sec. 50-20(b)(2) (1981). Joint title merely creates the rebuttable presumption of "marital property," which may be overcome by clear, cogent, and convincing evidence of the third party donor's contrary intent. *Forsythe v. Forsythe*, 558 S.W. 2d 675 (Mo. Ct. App. 1977); *Ackley v. Ackley; Grant v. Grant* (concurring opinion); *see* Sharp, *supra*, at 263 & n. 100. Thus, evidence that the gift of property was intended for only one spouse could conceivably rebut the presumption. Admittedly, the likelihood of overcoming the presumption is small. *See* Sharp, *supra*.

However, in this case, the wife has totally failed to meet her burden of proof. Only the wife testified; and her testimony tends to buttress her mother's intent to make a gift to the marital estate. While discussing one tract of land the wife stated: "Mother had given us her share of the lot at that time." There is

no evidence in the record of her mother's intent to make a gift to her daughter alone. The wife's mother conveyed the Tennessee tracts to the parties as tenants by the entirety. Without evidence of the donor's differing intent to rebut the "marital property" presumption, we conclude that the trial court did not err in classifying the jointly held land as "marital property."

II

[3] The wife argues that the trial court's finding that "gifts from the wife's mother were placed in joint [savings and checking] accounts and *combined* with other income of the family including the [husband's] salary . . . is not supported by competent, material and relevant evidence." (Emphasis added.) We disagree. The trial court's finding reflects the wife's failure to meet her burden of proof.

The wife relies on G.S. Sec. 50-20(b)(2) (Supp. 1981), which reads, in pertinent part, as follows: "Property acquired in exchange for separate property shall be considered separate property regardless of whether the title is in the name of the husband or wife or both." There is no doubt that the wife's cash gifts from her mother might have qualified initially as "separate property" under G.S. Sec. 50-20(b)(2) (Supp. 1981), given sufficient evidence. Moreover, it is true that the wife's mere act of depositing her cash gifts from her mother in the parties' joint bank account would not have deprived them of their "separate property" status under G.S. Sec. 50-20(b)(2) (Supp. 1981), if she had been able to trace the proceeds. The General Assembly clearly intended "separate property" to remain so, no matter the title. *See id.* However, the wife had the burden of proving not only the act of giving, but also the monetary value of the gift. Absent proof of the value, a cash gift from a third party can not initially qualify as "separate property" and be traced into a joint bank account.

Here the wife was unable to state the value of her alleged "separate property": "As to approximately how much money my mother gave me and Mr. Loeb during the marriage, that was something I didn't total up in any specific manner . . . . I just don't have that figure." There is no evidence of the amount of the wife's cash gifts deposited in the parties' joint bank accounts. The wife has, therefore, failed to rebut the "marital property"

presumption. In essence, the wife's cash gifts were combined with the family's other income in the joint accounts.

In terms of the proof required the Act is consistent with prior North Carolina law. In *Smith v. Smith*, 255 N.C. 152, 120 S.E. 2d 575 (1961), the Court established a rebuttable presumption that the funds in a joint bank account to the credit of a husband and wife were held jointly, with each party entitled to one-half of the proceeds. The husband rebutted the simple presumption of a joint tenancy with proof that he was the sole source of all the funds in the joint account. Under those circumstances, the wife was held to be the husband's agent rather than the co-owner of the funds. Here the wife has not provided the necessary proof to rebut the "marital property" presumption.

We find no error in the trial court's finding.

III

[4] The trial court found that (1) the condominium in Chapel Hill, (2) the certificates of deposit at Orange Savings & Loan, (3) the certificate of deposit at Home Federal Savings & Loan, and (4) the money market certificate at North Carolina National Bank were purchased with funds from the parties' joint bank accounts. The wife contends that there is no competent evidence to support the trial court's finding. After reviewing the record, we summarily affirm. The wife also contends that the trial court "impermissibly failed to find the source and nature of the funds." The trial court found that items 1-4 listed above were "marital property," to the extent they were purchased with funds from the parties' joint bank accounts. Since the funds in the joint bank account were "marital property," for the reasons discussed in II, *supra*, the trial court's findings were adequate.

IV

[5] The trial court classified the Chapel Hill condominium as "marital property," after finding that it had been

> purchased by the [wife] in her name with funds of the joint savings of the parties . . .; stocks and bonds purchased by the parties from funds of savings and checking accounts held by the parties jointly . . . and $2,000 from a gift to the [wife] from her mother after separation of the parties.

The wife argues that there is "no competent, relevant and material evidence that it was purchased with marital property." We disagree.

In addition to restating the argument addressed in II, *supra*, the wife emphasizes that the stocks and bonds liquidated were in her name alone. She concedes that "to some extent, they were in her name because the husband insisted that they be." The wife does not contest the fact that the stocks and bonds were purchased with funds from the joint accounts.

Having concluded in II, *supra*, that funds from the joint accounts were "marital property," we must determine whether the subsequent issuance of the stocks and bonds in the wife's name alone changes the character of the asset. Considering that the funds in the accounts were marital property, a purchase of stock in a single spouse's name with funds from the account could be classified as a gift from the other spouse. However, G.S. Sec. 50-20(b)(2) (Supp. 1981) specifies that "property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance." There is no evidence in the record of such an intention.

At this point, we reiterate that there is a rebuttable presumption that all property acquired by either spouse during the course of the marriage is marital property. G.S. Sec. 50-20(b)(1) (Supp. 1981). The party claiming the separate property exception carries the burden of rebutting the presumption. *See* Sharp, *supra*, at 250. The wife has failed to carry her burden. We conclude that the trial court did not err in classifying the condominium as "marital property."

V

[6] In distributing the parties' marital property, the trial court awarded the husband the family residence and the residential lot in Chapel Hill, his voluntary retirement account, the certificates of deposit at Orange Savings & Loan and Home Federal Savings and the money market certificate at NCNB. The wife was awarded the condominium in Chapel Hill, the three jointly-held tracts of Tennessee land, and various stocks. The husband was also ordered to pay the wife a $4,577 distributive award. The wife

argues that the trial court erred in making the award, since "the husband, the party with real earning power and substantial retirement assets, has been decreed the owner of virtually everything worthwhile which was acquired by the *joint* efforts of the parties during the nineteen years they lived together, and the owner of a large part of the wife's family's gifts." The trial court found that an equitable division of the marital properties was equitable and fair. Each party was awarded marital property with approximately the same monetary value. We are persuaded that the trial court did not err.

G.S. Sec. 50-20(c) (Supp. 1981) provides, in pertinent part: "There shall be an equal division by using net value of marital property unless the [trial] court determines that an equal division is not equitable." Recently, this Court stated that the above language "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." *Alexander v. Alexander*, 68 N.C. App. at 552, 315 S.E. 2d at 775. In this case, the trial court decided that the wife's parents' gifts to the parties constituted marital property. Once that determination had been made, it was not inequitable for the trial court to divide the marital property equally according to value absent "some reason(s) compelling a contrary result." *Id.* There is no requirement that the trial judge consider the geographical location of the property as well as its monetary value, in making the distribution.

The wife contends that "some reason(s) compelling a contrary result" exist. *Id.* She asserts that a consideration of the statutory factors and the non-statutory factor listed in G.S. Sec. 50-20(c) (Supp. 1981) dictates a distribution weighted in her favor instead of an equal division. We disagree. The wife emphasizes: (1) the extremely disparate incomes of the parties, G.S. Sec. 50-20(c)(1); (2) her custody of the two children and need for shelter, G.S. Sec. 50-20(c)(4); (3) the husband's "substantial" pension and retirement rights, G.S. Sec. 50-20(c)(5); (4) the "award of virtually all the liquid marital assets to the husband," G.S. Sec. 50-20(c)(9); and (5) the fact that "[m]ore than half of the combined net worth of the parties has been made possible by the generosity of the wife's family," G.S. Sec. 50-20(c)(12).

We summarily dispose of (2), (4) and (5). There is no evidence that the wife has a "need . . . to occupy or own the marital residence. . . ." G.S. Sec. 50-20(c)(4). According to her testimony, the condominium had been purchased as a new home for the children. The trial court did not award the husband "virtually all the liquid marital assets"; the division was approximately equal. We need not address (5) in light of our discussions in I and II, *supra.*

Turning to (1), under G.S. Sec. 50-20(c)(1), the trial court may consider "[t]he income, property, and liabilities of each party . . ." in deciding whether to make an equitable distribution. Clearly, "property" in this instance refers to the parties' "separate property." Although the parties' "separate property" is not itself subject to equitable distribution under G.S. Sec. 50-20, its value may be considered as a balancing factor in the trial court's distribution of the marital property. 1 *Valuation & Distribution of Marital Property* Sec. 19.09 [1] (J. McCahey ed. 1984). It is true that the parties' earned income is significantly disproportionate. The husband earns approximately $50,000; the wife earns $7,000 part-time, while looking for full-time employment as a CPA. However, the trial court found that the wife had "separate property" in the form of stocks, real estate and a *vested* remainder interest in the corpus of a large family trust fund, which is to be distributed upon her mother's death. The dividend-paying stocks and real estate were valued at approximately $37,000. We emphasize that the non-speculative quality of the wife's rights to the trust fund distinguishes this from the vast majority of cases. The principal is to remain untouched until its distribution at the wife's mother's death. Moreover, the wife's interest is *vested. Compare Krause v. Krause,* 174 Conn. 361, 387 A. 2d 548 (1978) (evidence of the "potential inheritance" of a spouse is inadmissible, when the expectancy is, at most, speculative). Therefore, the trial court could properly consider the trust fund as "separate property."

The husband's retirement benefits were his only separate property. Under G.S. Sec. 50-20(c)(5) (Supp. 1981) the trial court may consider "[v]ested pension or retirement rights and the expectation of nonvested pension or retirement rights, which are separate property." The husband alone had such "retirement rights," presently valued at $32,000.

After reviewing the evidence in the context of the factors listed above, we are persuaded that the trial court correctly ordered an equal division of the marital property.

VI

[7] As stated in I, *supra*, the trial court, in an equitable distribution case, must first decide and make findings of fact on what "property acquired by either spouse during the course of their marriage and presently owned . . ." constitutes "marital property." G.S. Sec. 50-20(b)(1) (Supp. 1981); *Alexander v. Alexander.* The wife assigns error to the trial court's failure to find the *marital property* of the parties. This assignment of error is without merit.

In Finding of Fact No. 11 the trial court stated: "The following properties were acquired by the parties and are presently owned by them. . . ." It then listed twelve assets acquired by the parties during their marriage. Finding of Fact No. 12 begins: "The following is a list of separate property owned by the parties at the present time. . . ." Although Finding of Fact No. 11 does not include the words "marital property," it tracks the language of G.S. Sec. 50-20(b)(1) (Supp. 1981), the definition of "marital property." We conclude that the trial court's finding on the parties' marital property is adequate.

VII

The trial court simply found: "An equal distribution of marital property will be equitable and fair," before distributing the parties' marital property. The wife contends that the trial court erred "in failing to make appropriate findings and conclusions as to the statutory factors for determining the division of marital property." We hold that the trial court need only make findings of fact on the statutory and nonstatutory factors to support its conclusion that an equal division is inequitable. *See Alexander v. Alexander* (dicta). G.S. Sec. 50-20(c) (Supp. 1981) establishes a presumption that an equal division is equitable. Only when the presumption is rebutted by "reason(s) compelling a contrary result" are findings of fact on the statutory and nonstatutory factors necessary to justify the unequal equitable distribution. *Alexander v. Alexander,* --- N.C. App. at ---, 315 S.E. 2d at 775.

VIII

[8] The wife assigns error to the admission of the husband's real estate appraiser's report and the husband's summaries of checks. Neither exhibit has been included in the record on appeal. Without the exhibits before us, we are unable to determine whether the wife has been prejudiced by their admission. *Medford v. Davis*, 62 N.C. App. 308, 302 S.E. 2d 838, *disc. rev. denied*, 309 N.C. 461, 307 S.E. 2d 365 (1983); *Hasty v. Turner*, 53 N.C. App. 746, 281 S.E. 2d 728 (1981). We emphasize that the appellant has the responsibility of properly preparing the record on appeal. *Tucker v. Gen'l Tel. Co.*, 50 N.C. App. 112, 272 S.E. 2d 911 (1980). These assignments of error are deemed abandoned.

IX

[9] After the trial the wife made a motion for a new trial or the opportunity to present additional evidence under Rule 59 of the North Carolina Rules of Civil Procedure. In her motion, she did not specify the particular grounds under Rule 59. She assigns error to the trial court's denial of her motion, arguing that the husband's allegedly false interrogatory answer to a question on expert witnesses and his allegedly false testimony on financial records severely prejudiced her. A trial court's ruling on a motion for a new trial is not reviewable on appeal absent a manifest abuse of discretion. *Mumford v. Hutton & Bourbonnais Co.*, 47 N.C. App. 440, 267 S.E. 2d 511 (1980). We do not discern an abuse of discretion.

When the husband's expert was tendered to the court, the wife's attorney made no objection, claimed no surprise, and sought no continuance. Whether the husband had already consulted an expert witness at the time he denied doing so in his interrogatory answer is immaterial under these circumstances, since the wife has failed to show any resulting prejudice. When a party claims prejudice on appeal, she must demonstrate how she was prejudiced. *Medford v. Davis; Hasty v. Turner.*

From the wife's motion, we determine that the true issue before the trial court on the motion was not the husband's false interrogatory answer, but rather, the wife's inability to admit her own appraisal of the Tennessee property in evidence, pursuant to an alleged oral stipulation. In her motion the wife states that the

husband's attorney reneged on the oral agreement at trial. The husband's attorney, in an affidavit submitted on the motion, denied the existence of an oral stipulation. Given the opposing counsel's denial, the oral stipulation cannot be proved. *Lindsey v. Supreme Lodge of Knights of Honor*, 172 N.C. 818, 90 S.E. 1013 (1916). It is advised that counsel evidence their stipulations by a signed writing to avoid this result. *Amick v. Shipley*, 43 N.C. App. 507, 259 S.E. 2d 329 (1979).

To determine whether evidence has been improperly excluded, the record must show the evidence was offered, an objection was sustained, and the purport of the evidence excluded. 1 H. Brandis, *North Carolina Evidence* Sec. 26 (2d rev. ed. 1982). Here, there is no evidence in the record that the wife's appraisal was even offered in evidence. The wife has failed to show any prejudice entitling her to relief under Rule 59. *Medford v. Davis.*

The wife's second grounds for her motion, the husband's allegedly false testimony on financial records, is not supported by the record.

We find that the trial court did not abuse its discretion in denying the wife's Rule 59 motion.

X

In summary, the trial court did not err in classifying jointly-held real property received from a third party and assets purchased with funds from joint bank accounts as "marital property." Further, the trial court did not err in applying the equal division presumption to award each party one-half of the marital property. Finally, the trial court did not abuse its discretion in denying the wife's motion for a new trial or to present additional evidence.

Affirmed.

Judges HILL and BRASWELL concur.

IN RE: WILLIAM EDWARD WILKINSON, JAMY LEE WILKINSON, AND JONATHAN WAYNE WILKINSON, MINOR CHILDREN AND ALAMANCE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER v. CHERYL RIFFEL, GUARDIAN AD LITEM

No. 8315DC1296

(Filed 2 January 1985)

Infants § 9.1— Department of Social Services ordered to furnish guardian ad litem adoption information—no error

The court did not err by ordering the Department of Social Services to furnish the guardian ad litem for two children with information as to the home in which the children had been placed for adoption. G.S. 7A-586 specifically gives the court the power to order that the guardian ad litem have confidential information which in the opinion of the guardian ad litem is relevant to the case, and the placement of juveniles for adoption is relevant to a determination by the guardian ad litem as to whether the needs of the juveniles are being met. G.S. 48-25(b).

APPEAL by petitioner Alamance County Department of Social Services from order of *Washburn, Judge*. Order entered 29 August 1983 in District Court of ALAMANCE County. Heard in the Court of Appeals 26 September 1984.

The Alamance County Department of Social Services appeals from an order requiring it to give information to Cheryl Riffel as guardian ad litem for two minors. Cheryl Riffel was appointed guardian ad litem for the three Wilkinson minors in a proceeding to terminate parental rights. On 23 August 1982 the parental rights to the three children were terminated and the custody and control of the children were given to the Department together with the right to give and withhold consent to adoption. A review of the matter was heard on 15 August 1983. At that time a social worker for the Department reported that two of the children had been placed in an adoptive home and were doing well. On 24 August 1983 the guardian ad litem made a motion that the Department be required to reveal to her information pertaining to the placement of the two children. The Court granted the motion and defendant appealed.

G. Keith Whited for appellant Alamance County Department of Social Services.

Messick, Messick and Messick, by Steven H. Messick for appellee Cheryl Riffel, Guardian ad Litem.

WEBB, Judge.

The Court has ordered the Department of Social Services to furnish the guardian ad litem for two minor children with information as to the home in which the minors have been placed for adoption. The resolution of this appeal depends on whether the Court had the power under the statutes to enter this order. The guardian ad litem was appointed pursuant to G.S. 7A-586 which provides in part:

> When in a petition a juvenile is alleged to be abused or neglected, the judge shall appoint a guardian ad litem to represent the juvenile. The appointment shall be made pursuant to the program established by Article 39 of this chapter unless representation is otherwise provided pursuant to G.S. 7A-491 or G.S. 7A-492. In every case where a nonattorney is appointed as guardian ad litem, an attorney shall be appointed in the case in order to assure protection of the child's legal rights within the proceeding. The duties of the guardian ad litem shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues; to explore options with the judge at the dispositional hearing; and to protect and promote the best interest of the juvenile until formally relieved of the responsibility by the judge.
>
> . . . .
>
> The judge may order the Department of Social Services or the guardian ad litem to conduct follow-up investigations to insure that the orders of the court are being properly executed and to report to the court when the needs of the juvenile are not being met. The judge may also authorize the guardian ad litem to accompany the juvenile to court in any criminal action wherein he may be called to testify in a matter relating to abuse.
>
> The judge may grant the guardian ad litem the authority to demand any information or reports whether or not confidential, that may in the guardian ad litem's opinion be relevant to the case. Neither the physician-patient privilege nor

the husband-wife privilege may be invoked to prevent the guardian ad litem and the court from obtaining such information. The confidentiality of the information or reports shall be respected by the guardian ad litem and no disclosure of any information or reports shall be made to anyone except by order of the judge.

This section gives the guardian ad litem many more responsibilities and duties than a guardian ad litem ordinarily has. The guardian ad litem has the continuing duty to conduct follow-up investigations and to report to the court when the needs of the juveniles are not being met. The section specifically gives the Court the power to order that the guardian ad litem have confidential information which in the opinion of the guardian ad litem is relevant to the case. We believe the placement of juveniles for adoption is relevant to a determination by the guardian ad litem as to whether the needs of the juveniles are being met. G.S. 48-25(b) provides that information gathered by the Department as to adoptive parents shall be confidential. G.S. 7A-586 provides that the guardian ad litem is entitled to confidential information. We hold that the Court did not commit error in ordering pursuant to G.S. 7A-586 that the guardian ad litem have this information. We express no opinion as to what our holding would be if the adoption proceeding had been filed.

The appellant also contends the Court committed error in ordering the release of the information without considering the rights of the adoptive parents. As we read G.S. 7A-586 the Court may order the release of confidential information to a guardian ad litem if the guardian ad litem needs the information to determine whether the needs of the juveniles are being met. We hold that the Court made sufficient findings of fact so that the requirements of this statute were met. The appellants rely on *In re: Spinks*, 32 N.C. App. 422, 232 S.E. 2d 479 (1977); *Peoples v. Peoples*, 10 N.C. App. 402, 179 S.E. 2d 138 (1971) and *Davidson v. Dept. of Social Services*, 56 N.C. App. 806, 290 S.E. 2d 399 (1982). The cases do not deal with the release of information under G.S. 7A-586 and have no application to this case.

Affirmed.

Judges BRASWELL and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 28 DECEMBER 1984

COMMERCIAL CREDIT v. BEECH MOUNTAIN PROPERTY OWNERS ASSOC. No. 8424DC24	Watauga (82CVD422)	Affirmed
JAMES v. CHAMPION INDUSTRIES No. 8410IC603	Industrial Commission (I-4977)	Affirmed
MILLER v. BOWEN No. 842SC345	Washington (79SP36)	Affirmed
PITTMAN v. THOMAS No. 847SC90	Wilson (83CVS907)	Reversed & Remanded
STATE v. KEATON No. 8418SC244	Guilford (81CRS44578)	Affirmed
STATE v. McCORD & CAMPBELL No. 8428SC301	Buncombe (83CRS12486) (83CRS12488)	No Error as to Campbell; No Error as to Guilt of McCord but Remand for New Sentencing
STATE v. McLEAN No. 8412SC259	Cumberland (82CRS50309)	New Trial
STATE v. SUMMERS & SHOFFNER No. 8418SC304	Guilford (82CRS15597) (82CRS15596)	New Trial

CAROLINA BUILDERS CORPORATION v. HOWARD-VEASEY HOMES, INC., FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF RALEIGH, DAN C. AUSTIN, AND V. WATSON PUGH, D/B/A TAP COMPANY, A NORTH CAROLINA GENERAL PARTNERSHIP, HERMAN WOLFF, JR., ATTORNEY IN FACT FOR V. WATSON PUGH, AND RURAL PLUMBING AND HEATING, INC.

CAROLINA BUILDERS CORPORATION v. HOWARD-VEASEY HOMES, INC., FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF RALEIGH, DAN C. AUSTIN, AND V. WATSON PUGH, D/B/A TAP COMPANY, A NORTH CAROLINA GENERAL PARTNERSHIP, HERMAN WOLFF, JR., ATTORNEY IN FACT FOR V. WATSON PUGH, AND RURAL PLUMBING AND HEATING, INC. AND CHEROKEE BRICK OF NORTH CAROLINA

No. 8410SC323

(Filed 15 January 1985)

1. **Laborers' and Materialmen's Liens § 3— building supplies—sufficiency of evidence of contract to purchase**

Evidence of an oral agreement between plaintiff seller of building supplies and defendant builder that defendant would buy everything that plaintiff supplied so long as plaintiff would sell to him and his company, and the delivery and acceptance of materials over a five-month period, coupled with invoicing and payment, was sufficient to show a contract necessary for the perfecting of a statutory lien on real property pursuant to G.S. 44A-8.

2. **Laborers' and Materialmen's Liens § 3— deed signed but not delivered or recorded—ownership requirement of lien statute met**

Where defendant land development partnership signed a deed conveying two lots to defendant builder for valuable consideration on 12 June 1981, plaintiff first furnished building materials to the lots on 19 June 1981, and on 14 July 1981 the deed was executed, recorded and delivered and defendant became the legal owner of the property, defendant builder's equitable interest at the time materials were first furnished by plaintiff followed by his subsequent legal interest satisfied the ownership requirement of G.S. 44A-8, the materialmen's lien statute.

3. **Laborers' and Materialmen's Liens § 9— intervening construction loan deed of trust—priority of materialmen's lien over purchase money deed of trust**

Defendant savings and loan association's intervening construction loan deed of trust defeated the priority that defendant's purchase money deed of trust ordinarily would have had over plaintiff's materialmen's lien under the doctrine of instantaneous seisin since defendant authorized the recording of the savings and loan association's construction loan deed of trust one minute prior to the recording of its own purchase money deed of trust, and the savings and loan could have required defendant builder to obtain lien waivers but failed to do so.

Carolina Builders Corp. v. Howard-Veasey Homes, Inc.

APPEAL by defendant TAP Company from *Brannon, Judge.* Judgment entered 14 November 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 28 November 1984.

Defendant TAP Company (defendant) appeals from a judgment awarding plaintiff's liens priority status on claims against lots owned by Howard-Veasey Homes, Inc. over defendant's purchase money deeds of trust.

Russell & Brewer, P.A., by Harold E. Russell, Jr., and Joyce A. Hamilton, and Joslin, Culbertson & Sedberry, by William Joslin, for plaintiff appellee.

Boyce, Mitchell, Burns & Smith, P.A., by G. Eugene Boyce and Susan K. Burkhart, for defendant TAP Company, appellant.

WHICHARD, Judge.

Defendant is a land development partnership. Plaintiff sells building supplies. In April or May, 1981, defendant orally agreed to sell and Veasey Homes, Inc. (Veasey) agreed to buy two lots owned by defendant. On 12 June 1981 defendant signed a deed conveying the lots to Veasey. On 14 June 1981 Veasey applied for building permits and on 15 June 1981 Veasey began clearing the lots. On 19 June 1981 plaintiff first supplied building materials to lot 51; on 8 July 1981 plaintiff first supplied such materials to lot 50.

On 13 July 1981 Veasey executed construction loan deeds of trust to First Federal Savings & Loan Association of Raleigh (First Federal) and deeds of trust for the balance of the purchase price to defendant. The closing attorney recorded the deeds to both lots on 14 July 1981 at 3:55 p.m. He also recorded the construction loan deeds of trust on 14 July 1981 at 3:55 p.m. He recorded defendant's purchase money deeds of trust on the same day at 3:56 p.m. The attorney testified that "[c]ustomarily, the attorney records any construction loan deed of trust prior to any purchase money deed of trust. This procedure is aimed at giving the construction lender the first priority, as required by title insurance companies."

Plaintiff last furnished materials to lot 50 on 28 October 1981. It last furnished materials to lot 51 on 9 November 1981. On 19

February 1982, pursuant to G.S. Ch. 44A, plaintiff filed liens against the two lots in the amounts of $9,540.72 and $7,542.13, respectively, for materials furnished.

Plaintiff then commenced this action requesting priority as to proceeds of foreclosure proceedings on the lots. On 31 August 1982 plaintiff voluntarily dismissed the action against First Federal. The court assigned plaintiff priority status over the purchase money security interest of defendant and enforced plaintiff's liens against the property.

Defendant appeals; we affirm.

I.

To perfect a statutory lien on real property plaintiff must meet the requirements of G.S. Ch. 44A, Art. 2. The following provision is pertinent:

> Any person who . . . furnishes materials pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a lien on such real property to secure payment of all debts owing for . . . material furnished pursuant to such contract.

G.S. 44A-8. An owner under the statute is defined as "a person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made." G.S. 44A-7(3). " 'Owner' includes successors in interest of the owner and agents of the owner acting within their authority." *Id.*

Defendant raises three questions which we answer affirmatively: (1) Did plaintiff supply materials to Veasey pursuant to a contract as required by G.S. 44A-8? (2) Does Veasey meet the statutory definition of an owner as defined in G.S. 44A-7(3)? (3) Does First Federal's intervening construction loan deed of trust defeat the priority that defendant's purchase money deed of trust ordinarily would take over plaintiff's lien?

II.

[1] As to the first issue, the court made the following findings of fact:

5. That Howard-Veasey Homes, Inc., by and through its duly authorized corporate officer, Bob Veasey, entered into a contract with plaintiff . . . for the furnishing of building materials to Lot 50 . . ., and on July 8, 1981, said materials were first furnished to said lot and, pursuant to its contract with . . . Veasey . . ., plaintiff continued to furnish building materials until October 28, 1981.

. . . .

7. That Howard-Veasey Homes, Inc., by and through its duly authorized corporate officer, Bob Veasey, entered into a contract with plaintiff . . . for the furnishing of building materials to Lot 51 . . ., and on June 19, 1981, said materials were first furnished to said lot, and pursuant to its contract with . . . Veasey . . ., plaintiff continued to furnish building materials until November 9, 1981.

The court's findings of fact are conclusive if supported by any competent evidence. *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).

In support of its contention that plaintiff and Veasey had not entered into a contract, defendant cites the following testimony by Veasey: "I made it clear that . . . I would buy everything that [plaintiff] supplied so long as they would sell it to me and my company. . . . That is the only supplier for building materials that I have . . . ."

Defendant also cites testimony by Veasey that there was no agreement concerning the price of the material delivered to the lots; plaintiff could raise the price of brick, nails, or lumber. This testimony, rather than supporting defendant's position, is sufficient competent evidence to support the court's findings.

The contract between plaintiff and Veasey is a contract for the sale of goods, governed by the Uniform Commercial Code (UCC), G.S. Ch. 25, Art. 2. Under the Code a contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract. G.S. 25-2-204(1). The delivery and ac-

ceptance of materials from 19 June 1981 through 9 November 1981, coupled with invoicing and payment, is conduct by the parties which recognizes the existence of a contract.

Even though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for awarding an appropriate remedy. G.S. 25-2-204(3). If parties so intend, they can conclude a contract for sale even though the price is not settled; in such a case the price is a reasonable price at the time for delivery. G.S. 25-2-305(1). A price to be fixed by the seller means a price to be fixed in good faith. G.S. 25-2-305(2). Thus the open price term is no impediment to the court's finding.

Further, the Code provides for contract terms which measure quantity by the output of the seller or the requirements of the buyer. G.S. 25-2-306(1). The Official Comment to this provision states the following:

> Under this Article, a contract for output or requirements is not too indefinite since it is held to mean the actual good faith output or requirements of the particular party. Nor does such a contract lack mutuality of obligation since . . . the party who will determine quantity is required to . . . conduct his business in good faith and according to commercial standards of fair dealing in the trade. . . . Reasonable elasticity in the requirements is expressly envisaged . . . .

G.S. 25-2-306, Official Comment 2. (See White and Summers, *Uniform Commercial Code* 12-14 (1980), for the weight to which Official Comments are entitled.) Veasey's testimony that he would buy everything plaintiff supplied so long as plaintiff would sell to him and his company is evidence of an output and requirements contract.

Defendant's contention that plaintiff and Veasey had "at most, a non-binding agreement to buy and sell materials on open account, lacking all essential terms" is without merit. We hold that the agreement between plaintiff and Veasey satisfies the contract requirement under G.S. 44A-8 and that the evidence was sufficient for the court so to find.

III.

[2] For a materialman's lien to arise, G.S. 44A-8, *supra*, there must be a contract between a materialman and the owner of the improved premises. To qualify as an owner one must have "an interest in the real property improved" and be a person "for whom the improvement [was] made and who ordered the improvement to be made." G.S. 44A-7(3).

The purpose of the materialman's lien statute is to protect the interest of the supplier in the materials it supplies; the materialman, rather than the mortgagee, should have the benefit of materials that go into the property and give it value. *See* 1 L. Jones, *A Treatise on the Law of Mortgages of Real Property* Sec. 603 at 833-34 (8th ed. 1928). *See also* Douglass, *Materialmen's Liens in North Carolina: The Problem of the Overeager Purchaser*, 61 N.C. L. Rev. 926, 928 n. 12 (1983). To implement this purpose, courts should construe the statute so as to further the legislature's intent. *Greene v. Town of Valdese*, 306 N.C. 79, 85, 291 S.E. 2d 630, 634 (1982). They should construe a remedial statute to advance the remedy intended. *Shipyard, Inc. v. Highway Comm.*, 6 N.C. App. 649, 651-52, 171 S.E. 2d 222, 224 (1969). We believe our materialman's lien act, G.S. Ch. 44A, Art. 2, Pt. 1, is remedial in nature and should be construed to advance the legislative intent in enacting it. We construe G.S. 44A-7, which defines "owner," on that basis.

The precise question of whether a vendee who orders commencement of work before acquiring legal title is an owner within the meaning of the statute appears to be one of first impression in this jurisdiction. Most jurisdictions agree that an enforceable executory contract for the sale of land provides sufficient equitable interest to give the vendee ownership status for the purpose of statutory materialmen's liens. Douglass, *supra* at 927 n. 9, 929-30 n. 21, 933 n. 43 citing, *e.g.*, *Sontag v. Abbott*, 344 P. 2d 961 (Colo. 1959); *Service Lumber & Supply Co. v. Cox*, 123 So. 820 (Fla. 1929); *Northwestern Nat'l Bank v. Metro Center*, 303 N.W. 2d 395 (Iowa 1981); *Noll v. Graham*, 27 P. 2d 277 (Kan. 1933); *Chicago Lumber Co. v. Fretz*, 32 P. 908 (Kan. 1893); *Sullivan v. Thomas Org., P.C.*, 276 N.W. 2d 522 (Mich. 1979); *Summer & Co. v. DCR Corp.*, 47 Ohio St. 2d 254, 351 N.E. 2d 485 (1976); *Lemire*

v. McCollum, 425 P. 2d 755 (Or. 1967); *Westfair Corp. v. Kuelz*, 280 N.W. 2d 364 (Wis. Ct. App. 1979).

In two cases decided under the former materialman's lien statute, G.S. Ch. 44, Art. 1 (repealed 1969), our appellate courts assumed, without deciding, that a purchaser with only an equitable interest had the power to cause a lien to attach to the property. *See Supply Co. v. Rivenbark*, 231 N.C. 213, 56 S.E. 2d 431 (1949) (purchase money deed of trust, executed in same transaction with deed, superior to lien for material furnished while purchaser was lessee with option to purchase; implicit that lien would have had priority but for purchase money deed of trust); *Pegram-West, Inc. v. Homes, Inc.*, 12 N.C. App. 519, 184 S.E. 2d 65 (1971) (lien for materials furnished before owner's deed recorded superior to deed of trust not recorded as part of same transaction with deed). In *Supply Co.* and *Pegram-West* the Courts thus impliedly assumed that a prospective purchaser with an equitable interest was an owner under the prior statute.

Here the court reached the following conclusion of law:

> 10. That North Carolina General Statute 44A, Article 2, allows materialmen to [acquire] valid enforceable lien rights relating back in time to the first furnishing [of materials] under circumstances where the person or entity with whom he contracted did not at that time have legal title but later did acquire legal title.

This conclusion appears tantamount to stating that any subsequently acquired interest will support a materialman's lien even if no enforceable interest existed when the contract was made or the work commenced. While that may be an appropriate rule, *see* Douglass, *supra* at 934, it goes beyond the facts here and encompasses factual situations[1] which are not before this Court.

Here the court found as a fact "[t]hat [Veasey] agreed to purchase, and [defendant] agreed to sell in April or May of 1981, Lots

1. *E.g.*, where a party with mere open, undisputed possession, without provable oral or written contract to purchase, later acquires legal title, *see Chicago Lumber Co. v. Fretz*, 32 P. 908 (Kan. 1893); or where a potential purchaser with an unenforceable oral contract later acquires legal title, *see Lemire v. McCollum*, 425 P. 2d 755 (Or. 1967). *Contra Service Lumber & Supply Co. v. Cox*, 123 So. 820 (Fla. 1929) (test for interest sufficient to constitute ownership is transferability).

50 and 51 . . . ." Defendant has not excepted to this finding. If supported by any competent evidence, as this is, the court's findings of fact are conclusive on appeal. *Spivey v. Porter*, 65 N.C. App. at 819, 310 S.E. 2d at 370. Both parties agree that defendant and Veasey entered into an oral agreement under which defendant would convey lots 50 and 51 to Veasey.

As an executory contract for the sale of land, this agreement is subject to the statute of frauds and shall be void unless some memorandum or note sufficient to satisfy the statute be put in writing and signed by the party to be charged therewith. G.S. 22-2. Defendant here signed a deed conveying lots 50 and 51 to Veasey for valuable consideration on 12 June 1981. The deed is sufficiently definite as to the terms of the contract, the names of the vendor and vendee, and a description of the land to be conveyed to satisfy G.S. 22-2. *See Smith v. Joyce*, 214 N.C. 602, 604, 200 S.E. 431, 433 (1939). With the deed as a sufficient memorandum signed by defendant, the oral agreement between defendant and Veasey constitutes an enforceable contract within the provisions of G.S. 22-2. *Id.* As an enforceable contract for the sale of land it is subject to specific performance in equity. *See* 71 Am. Jur. 2d *Specific Performance* Sec. 112 at 143-45 (1973).

Thus, as of 12 June 1981 Veasey had an equitable interest in the property. Plaintiff first furnished materials to the lots on 19 June 1981, after Veasey had acquired his equitable interest. On 14 July 1981 the deed was executed,[2] recorded, and delivered and Veasey became the legal owner of the property. We hold that Veasey's equitable interest at the time materials were first furnished by plaintiff followed by his subsequent legal interest satisfies the ownership requirement under G.S. 44A-8. To the extent that conclusion of law number ten exceeds this holding, based upon the discrete facts presented, it is disavowed. Otherwise, we find it correct.

IV.

[3] A materialman's lien relates back and takes effect from the time of the first furnishing of materials at the site of the improve-

2. *See, e.g., Barnes v. Aycock*, 219 N.C. 360, 362, 13 S.E. 2d 611, 612 (1941) ("The delivery of a deed, a transmutation of the possession, is an essential ceremony to the complete execution of it.").

ment by the person claiming the lien. G.S. 44A-10. While the statutory language does not indicate the precise moment of attachment, it does indicate an order of priority between competing lien claimants. That priority can be defeated by the application of the doctrine of instantaneous seisin, which defendant urges us to apply. The doctrine provides that when a deed and a purchase money deed of trust are executed, delivered, and recorded as part of the same transaction, the deed of trust attaches at the instant the vendee acquires title and constitutes a lien superior to all others. *E.g., Supply Co.*, 231 N.C. 213, 56 S.E. 2d 431. It would thus subordinate a previously existing materialman's lien. The policy supporting the doctrine is that a vendor who parts with property and supplies the purchase price does so on the basis of having a first priority security interest in the property. The vendor who advances purchase money relies on the assurance that he or she will be able to foreclose on the land if the purchase price is not repaid. It is thus equitable and just that the vendor have a first priority security interest and be protected from the possibility of losing both the land and the money in the transaction. *See* Urban and Miles, *Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement, and Priority*, 12 Wake Forest L. Rev. 283, 329-30 (1976); Douglass, *supra*, at 938. Here, however, the vendor (defendant) has not so relied.

Defendant contends that the deed and the purchase money deed of trust were executed, delivered, and recorded as part of a continuous transaction, beginning on 10 July 1981 at the offices of First Federal and ending on 14 July 1981 when the deed and deeds of trust were recorded. The evidence and custom and usage in the trade, however, indicate a contrary intent.

Defendant authorized the recording of First Federal's construction loan deeds of trust one minute prior to the recording of its own purchase money deed of trust. As the closing attorney testified, *supra*, defendant followed a convention "aimed at giving the construction lender the first priority as required by title insurance companies." We find no merit in defendant's argument that the intervening construction loan does not defeat application of the doctrine of instantaneous seisin and that under the doctrine defendant's purchase money deed of trust displaces First Federal's deed of trust along with plaintiff's liens. Here, unlike in

Supply Co., 231 N.C. 213, 56 S.E. 2d 431, or in any other case that defendant has cited or that we have found, defendant has deliberately accepted a secondary position behind First Federal's construction loan deed of trust.

As an indication of the parties' intent the lapse in recording time destroys the fiction of the same transaction necessary to sustain the doctrine of instantaneous seisin. It does so because it is a convention expressly designed for that purpose, to give the construction lender priority over the purchase money deed of trust. Defendant thus cannot claim that by virtue of instantaneous seisin it has subordinated plaintiff's previously accruing materialman's liens.

The court reached the following conclusions of law:

> 7. That in neither . . . *Pegram-West, Inc. vs. Hanes*, 12 NC App. 519, 184 SE 2nd 65 (1971) nor *Supply Co. vs. Riverbark*, 231 NC 213, 56 SE 2nd 431 (1949), both well-recognized authorities in North Carolina on the principle of "instantaneous seisin", did the facts include the intervention of a construction loan which was not purchase money in nature. The doctrine of "[i]nstantaneous seisin" has been applied only to purchase money transactions. In neither case was there consent by a purchase money mortgage holder to the intervention of a construction loan.
>
> . . . .
>
> 9. Both First Federal and [defendant] had every means available to them to cut-off the lien rights of the lien claimants in that both, with actual or constructive knowledge of the commencement of construction, could have required lien waivers at closing as opposed to the non-commencement affidavits which First Federal secured and knew or should have known to be false.

We agree, and we thus hold that First Federal's intervening construction loan deed of trust defeats the priority that defendant's purchase money deed of trust ordinarily would have over plaintiff's lien under the doctrine of instantaneous seisin.

This holding follows the trend in the law to protect the materialman's interest. "[Lien] statutes are designed to protect

laborers and materialmen who expend their labor and materials upon the buildings of others. Insofar as these statutes afford new remedies, they are liberally construed to effect the legislative purpose . . . ." *Lemire*, 425 P. 2d at 759. As the trial court concluded, the vendor and the construction lender have the resources and the bargaining power to require the vendee to obtain lien waivers from material suppliers or to obtain title insurance as here. *See* R. Kratovil, Modern Mortgage Law and Practice, Sec. 214 at 138, 141 (1972). We thus perceive no reason to extend the doctrine of instantaneous seisin to protect, at the expense of the materialman, the holder of a purchase money security interest who, by consenting to give a construction lender's security an intervening priority over his or her own, has indicated an intent not to be so protected.

V.

In summary, we find that plaintiff had a contract with the owner of the property within the meaning and intent of those terms as used in G.S. 44A-8. Materials furnished pursuant to that contract gave rise to a statutory materialman's lien which takes precedence over a purchase money deed of trust when there is an intervening construction loan deed of trust.

Affirmed.

Judges JOHNSON and EAGLES concur.

IN THE MATTER OF: ROBIN ELAINE McDONALD, STACIE RAY OXENDINE, SHARON MICHELLE McDONALD: MINOR CHILDREN

No. 8426DC233

(Filed 15 January 1985)

1. **Parent and Child § 1.5— termination of parental rights—evidence of breathalyzer test results not objectionable**

In a proceeding to terminate parental rights, respondents could not object to evidence with regard to results of a breathalyzer test administered to the father on the ground that a proper foundation was not laid for the testimony where respondents subsequently elicited testimony from the same witness with regard to breathalyzer test results of the mother; furthermore, any error

in the admission of the evidence was rendered harmless by the father's own testimony, during which without objection he admitted *inter alia* that he was an alcoholic and that he had been drinking heavily only days before the test.

2. Evidence § 29.2— what business records do not show—admissibility of evidence

According to the business records exception to the hearsay rule, testimony as to what business records do not show is admissible when relevant.

3. Parent and Child § 1.5— termination of parental rights—expert testimony as to respondents' parenting abilities—evidence admissible

In a proceeding to terminate parental rights the trial court did not err in admitting testimony of a clinical psychologist that respondents could not function effectively as the custodians to their own children or even to children who did not exhibit the problems which their children exhibited, that if the court should find that respondents had abused alcohol in the months before the trial, this fact would reinforce his opinion, and that even if respondents ceased consuming alcohol, this factor would not change his opinion. Such testimony was properly admitted because the witness was an expert in clinical psychology who had personally conducted psychological examinations of the children and also reviewed the reports concerning prior examinations of the children by another psychologist, and by virtue of his expertise and the information before him, the witness was better qualified than the trial court to form an opinion as to respondents' parenting abilities.

4. Parent and Child § 1.6— termination of parental rights—neglect—sufficiency of evidence

The trial court did not err in basing its termination of the mother's parental rights on neglect where the court based its finding upon a prior adjudication of neglect and upon evidence that the mother had an alcohol problem which subjected her children to specific dangerous incidents and an injurious environment and that the mother's alcohol problem resulted in psychological problems for the children; furthermore, the fact that incidents of neglect by the mother occurred two years and more before the termination proceeding went to the weight of the evidence, not to its admissibility.

5. Parent and Child § 1.6— termination of parental rights—children in foster care—no self-improvement by mother—sufficiency of evidence

Evidence was sufficient to support the trial court's order terminating the mother's parental rights on the ground that she had willfully left her children in foster care for more than two years without a showing that substantial progress had been made in correcting conditions which led to the removal of the children from her care where the evidence showed only minimal efforts on the mother's part to seek treatment for her alcoholism and virtually complete lack of success in overcoming her problem. G.S. 7A-289.32(3).

6. Parent and Child § 1.6— termination of parental rights—failure to support children—sufficiency of evidence

Evidence was sufficient to support the trial court's termination of parental rights on the ground of failure to provide support pursuant to G.S.

7A-289.32(4) where such evidence tended to show that respondent father had full time employment paying $5.50 per hour for the six months next preceding the filing of the termination petition; the mother had not been employed for the past five years, and her only efforts at finding a job had been to make two job applications; and in the two years preceding the filing of the termination petition the parents paid $8.50 toward the support of their children.

APPEAL by respondents from *Matus, Judge.* Judgments entered 24 October 1983 in District Court, MECKLENBURG County. Heard in the Court of Appeals 14 November 1984.

This case presents an appeal from three orders terminating the parental rights of respondent mother Vashtie Oxendine McDonald as to her three minor children, and terminating the parental rights of respondent father Eugene Dayton McDonald as to two of the children, Robin Elaine McDonald (Robin) and Sharon Michelle McDonald (Sharon). In the same proceeding, the trial court also terminated the parental rights of Curtis Carlight, father of Stacie Ray Oxendine (Stacie). Mr. Carlight never answered nor did he participate in these proceedings; he does not appeal.

The Mecklenburg County Department of Social Services (DSS) filed the petitions in this case on 5 May 1983. The hearing was held on 11 July 1983, and orders were entered terminating respondents' parental rights. As to Stacie, the trial court terminated Mrs. McDonald's parental rights under G.S. 7A-289.32(2) and (3). As to both Robin and Sharon, the trial court terminated Mr. McDonald's parental rights under G.S. 7A-289.32(3) and (4), and Mrs. McDonald's parental rights under G.S. 7A-289.32(2), (3) and (4). From the orders terminating their parental rights, respondents appeal.

Ruff, Bond, Cobb, Wade & McNair, by Moses Luski and William H. McNair, for petitioner-appellee.

Ellis M. Bragg, for respondent-appellants.

EAGLES, Judge.

[1] Respondents first assign error to the admission of the testimony of Betty Dibrell as to the results of Mr. McDonald's breathalyzer reading on 28 March 1983. The basis of their objection is that petitioner failed to lay a proper foundation for the in-

troduction of these results into evidence. *Robinson v. Insurance Co.*, 255 N.C. 669, 122 S.E. 2d 801 (1961) (describing requisite foundation for admissibility of blood alcohol test). Ms. Dibrell, an employee of the Randolph Clinic, an outpatient alcoholism treatment facility, testified that she is the custodian of clinic business records. She testified on direct examination that Mr. McDonald's records showed that on 28 March 1983 he was administered a breathalyzer test at the clinic which revealed a blood alcohol content of .08. She stated that she did not administer the test.

We need not consider whether a proper foundation was laid for Ms. Dibrell's testimony, nor whether it falls within the business records exception to the hearsay rule, as respondents waived their right to object to the admission of this evidence. On cross-examination, counsel for appellants also questioned Ms. Dibrell concerning the breathalyzer results for Mrs. McDonald contained in clinic records. Respondents elicited the response that the results of two tests administered at the clinic on separate occasions showed blood alcohol readings of .00. They cannot now complain of the lack of a proper foundation for evidence elicited for their benefit which was obtained from the same source. Furthermore, any error in the admission of the evidence was rendered harmless by Mr. McDonald's own testimony, during which without objection he admitted *inter alia* that he was an alcoholic and that he had been drinking heavily only days before the test. We note the "well-recognized rule in this jurisdiction that the admission of testimony over objection is ordinarily harmless error when testimony of the same import had previously been admitted without objection or is thereafter introduced without objection." *State v. Jones*, 287 N.C. 84, 99, 214 S.E. 2d 24, 35 (1975).

[2] Appellants also allege that the trial court should have refused to admit the testimony of Ms. Dibrell that the clinic records did not indicate that Mr. and Mrs. McDonald were ever refused treatment for nonpayment of their bills, because the testimony was an impermissible expression of opinion. We disagree. According to the business records exception to the hearsay rule, *see generally* 1 Stansbury's N.C. Evidence § 155 (2d rev. ed. 1982), when relevant, testimony as to what business records do not show is admissible. *See State v. Rogers*, 30 N.C. App. 298, 226 S.E. 2d 829, *review denied*, 290 N.C. 781, 229 S.E. 2d 35 (1976). Furthermore, other evidence demonstrates that respondents con-

tinued to receive treatment at the clinic despite a failure to pay fees, or that in some instances, treatment was terminated for other reasons. This assignment of error is overruled.

[3] Appellants next argue that the trial court erred in admitting the testimony of Dr. J. Thomas Stack that the appellants could not function effectively as parents-custodians of their children. Dr. Stack was stipulated to be an expert in clinical psychology. The gist of his testimony was that, in his opinion, the appellants could not function effectively as the custodians to their own children, or even to children who did not exhibit the problems that their children exhibited, that if the court should find that appellants had abused alcohol in the months before the trial, this fact would reinforce his opinion, and that even if appellants ceased consuming alcohol, this factor would not change his opinion. The basis for appellants' objection is that Dr. Stack's opinion testimony embraced the very issues to be decided by the trier of fact: whether the children were neglected, whether appellants were capable of improving the parent-child relationship, and whether it was in the best interests of the children that appellants' parental rights be terminated.

We observe that Dr. Stack's testimony did not invade the province of the finder of fact. He expressed no opinion as to whether the children were neglected, and specifically denied opining whether it was in the children's best interests that the respondents' parental rights be terminated. Whether appellants were capable of improving the parent-child relationship is not an ultimate issue in termination of parental rights cases as respondents suggest. Dr. Stack's testimony only contained an opinion as to one of the factors a trial judge must consider in determining the child's best interest in a termination case, that is, parenting ability.

Furthermore, the prohibition against opinion testimony as to ultimate issues has been significantly eroded, particularly in regard to expert opinion testimony. Whether the expert testimony invaded the province of the finder of fact has been rejected as the proper inquiry. Rather, the test is "whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of

fact." *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E. 2d 905, 911 (1978). *See generally*, 1 Stansbury's N.C. Evidence § 126 (2d rev. ed. 1982) (noting that G.S. 8C-1, Rule 704, effective 1 July 1984, abolishes the rule that opinion testimony, lay or expert, is not admissible because it invades the province of the trier of fact). Applying the proper test to the facts before us, it is clear Dr. Stack's testimony was properly admitted. Dr. Stack was an expert in clinical psychology who had personally conducted psychological examinations of the children and also reviewed the reports concerning prior examinations of the children by another child psychologist. By virtue of his expertise and the information before him, Dr. Stack was better qualified than the trial court to form an opinion as to the respondents' parenting abilities. This assignment of error is overruled.

[4] By their fourth assignment of error, appellants contend that it was reversible error for the trial court to find that Mrs. McDonald had neglected each of her three minor children pursuant to G.S. 7A-289.32(2). (Mr. McDonald's parental rights were terminated on grounds other than neglect.) The basis for appellants' contention is that in finding neglect the trial court relied exclusively on the 9 June 1981 order of Judge William G. Jones that each of the minor children was a neglected child.

The recent case of *In re Ballard*, 311 N.C. 708, 319 S.E. 2d 227 (1984), modifying an earlier decision of this Court, governs the issue of the effect of a prior order determining neglect on a subsequent proceeding to terminate parental rights for neglect. The Supreme Court framed the controlling rule thus: "[E]vidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights." *Id.* at 715, 319 S.E. 2d at 232. Clearly, it was not improper for the trial court to consider Judge Jones' order, and incorporate that prior order into the orders terminating respondents' parental rights.

The appellants' assignment of error is not only that Judge Matus relied on the prior order, but that he relied *exclusively* upon that prior order in concluding that Mrs. McDonald had neglected her children. Again, the controlling law is found in *Ballard*. Since the "determinative factors" in termination proceedings are "the best interests of the child and the fitness of the

parent to care for the child *at the time of the termination proceeding*," *id.* at 715, 319 S.E. 2d at 232 (emphasis in original), the trial court must consider any evidence of changed conditions after the child was removed from parental custody in light of evidence of prior neglect and the probability of a repetition of neglect. *Id.*

The trial court did consider other evidence. The trial court stated in its orders that it was basing its finding of neglect not only upon the prior order but also upon other evidence received in the termination hearing, and our examination of the record satisfies us that the trial court did not confine its consideration to the evidence of neglect contained in the 9 June 1981 order. In each of the three orders terminating parental rights, there is a finding incorporating Judge Jones' prior order, specifically tracking the language in the prior order that "on April 28, 1981, Mrs. McDonald was under the influence of alcoholic beverages to such an extent that she was staggering, that she had a gasoline can which contained gasoline and a lawn mower in her home, and she was smoking a cigarette in close proximity to these materials." The orders contain additional findings that before the removal of the children from her custody on 28 April 1981, respondent mother had been consuming alcoholic beverages to the extent that she failed to provide adequate care and support for her children, and that she permitted them to live in an environment injurious to their health and welfare, and that she has continued to consume alcoholic beverages on a regular basis since the children were removed from her home. Further, the orders included a finding that on some occasions the consumption of alcoholic beverages has led to disruptive and combative behavior on the part of the respondent mother.

The foregoing evidence supports a finding of neglect pursuant to G.S. 7A-289.32(2). The findings comport with the directive to *Ballard* that "termination of parental rights for neglect may not be based solely on conditions which existed in the distant past but no longer exist." *Id.* at 714, 319 S.E. 2d at 231-2. We note that the proscription in *In re Phifer*, 67 N.C. App. 16, 312 S.E. 2d 684 (1984), that a finding that a parent abuses alcohol, without proof of adverse impact upon the child, will not support a termination of parental rights for neglect, has not been violated. The evidence of the gasoline can incident and extensive evidence concerning the children's psychological problems show the adverse

effect of their mother's alcoholism on the minor children. This evidence, reflected in the trial court's findings, far surpasses a bare finding that a parent has an alcohol problem. The foregoing discussion makes it unnecessary to address respondents' contention that proof of a single act of neglect is insufficient to establish the neglect ground for termination set forth in G.S. 7A-289.32(2). The trial court did not base its conclusion on a single incident of neglect but on a long-standing pattern of neglect of which Mrs. McDonald's alcoholism was a principal contributing cause.

Appellants also suggest that the incidents of neglect by Mrs. McDonald, occurring two years and more before the termination proceeding, were too remote to be considered by the trial court. We disagree. Evidence of events even more removed in time from the hearing than the evidence at bar has been utilized to support a termination for neglect. *See, e.g., In re Moore*, 306 N.C. 394, 293 S.E. 2d 127 (1982), *appeal dismissed sub nom. Moore v. Guilford County Dept. of Social Services*, 459 U.S. 1139, 103 S.Ct. 776, 74 L.Ed. 2d 987 (1983) (six years). The remoteness of evidence goes to its weight, not to its admissibility.

The key to a valid termination of parental rights on neglect grounds where a prior adjudication of neglect is considered is that the court must make an *independent* determination of whether neglect authorizing the termination of parental rights existed at the time of the hearing. *Ballard, supra.* The trial court here made its determination independently of the prior order. We find no error in the trial court's basing the termination of Mrs. McDonald's parental rights on grounds of neglect.

Appellants next contend that the trial court erred in terminating parental rights under G.S. 7A-289.32(3), which allows the trial court to terminate parental rights upon a finding that:

> (3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child or without showing positive response within two years to the diligent efforts of a county Department of Social Services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make

and follow through with constructive planning for the future of the child.

First, appellants contend that the statutory "two consecutive years" requirement was not met as to Mr. McDonald. The record shows that the children were removed from parental custody on 28 April 1981. The DSS filed its petition to terminate parental rights on 5 May 1983, and the case was heard on 11 July 1983. Mr. McDonald was in prison from 11 May 1978 until 11 June 1981. Respondents argue that the clock did not begin running as to Mr. McDonald until 11 June 1981, the date of his release from prison, and that the petition was filed less than two years from that date. We need not reach the issue of whether the two year period of G.S. 7A-289.32(3) is to be calculated from the date of the filing of the petition, or from the date of the termination hearing. We find that the trial court properly terminated Mr. McDonald's parental rights pursuant to G.S. 7A-289.32(4), *infra*, and affirm on that ground. *See In re Pierce*, 67 N.C. App. 257, 312 S.E. 2d 900 (1984) (finding of at least one ground enumerated in statute will support valid termination).

[5] As to Mrs. McDonald, however, we find that the unexcepted-to findings of fact in the termination orders fully support the conclusions terminating her parental rights under that subsection. *See In re Smith*, 56 N.C. App. 142, 287 S.E. 2d 440, *cert. denied*, 306 N.C. 385, 294 S.E. 2d 212 (1982) (findings of fact not excepted to are deemed supported by competent evidence and are conclusive on appeal). These findings depict only minimal efforts on Mrs. McDonald's part to seek treatment for her alcoholism and the virtually complete lack of success in overcoming her problem. As stated by the trial court, respondent mother's sporadic attendance at the Randolph Clinic resulted in "little participation on her part in discussions concerning alcohol abuse and the professional staff saw little if any improvement in her understanding of alcohol abuse and its effects on her." Mrs. McDonald's failure to gain control of her alcohol abuse is illustrated by the finding that she was consuming alcoholic beverages on a daily basis as recently as June 1983. Significantly, despite intermittent efforts at overcoming the chronic alcoholism that was the root cause of respondent mother's inability to properly care for her children, the record discloses these efforts never resulted in actual improvement. As we observed in a recent discussion of G.S. 7A-289.32(3):

> Implicit in the term "positive response" is that not only must positive efforts be made toward improving the situation, but that these efforts are obtaining or have obtained positive *results*. Otherwise, a parent could forestall proceedings indefinitely by making sporadic efforts for that purpose.

In re Tate, 67 N.C. App. 89, 94, 312 S.E. 2d 535, 539 (1984).

We also overrule respondents' related assignment of error that the trial court erred in finding that respondents had at all times the means and ability to attend the Randolph Clinic for treatment. Again, we do not address this assignment of error as to Mr. McDonald. As to Mrs. McDonald, our review of the record satisfies us that the findings of the trial court with respect to respondent mother's ability to attend the Randolph Clinic are supported by the evidence.

Appellants' final argument is that the trial court erred in denying its motions to dismiss at the conclusion of appellee's case, and at the conclusion of all the evidence. By this assignment of error, appellants are actually making three separate arguments: that the trial court erred in terminating the parental rights of respondents as to Robin and Sharon pursuant to G.S. 7A-289.32(4), that the trial court failed to comply with the standard of proof required to terminate parental rights as set forth in *In re Montgomery*, 62 N.C. App. 343, 303 S.E. 2d 324 (1983), and that the trial court abused its discretion in concluding that it was in the best interest of the minor children that respondents' parental rights be terminated.

[6] G.S. 7A-289.32(4) provides that the court may terminate parental rights upon a finding that for the six months next preceding the filing of the petition, while the child is in custody of the department of social services, the parent "has failed to pay a reasonable portion of the cost of care for the child." The parents' ability to pay controls what amount is a "reasonable portion" of the cost of care, *In re Clark*, 303 N.C. 592, 281 S.E. 2d 47 (1981), and nonpayment will be deemed a failure to pay a reasonable portion if and only if the respondent could pay some amount greater than zero. *In re Bradley*, 57 N.C. App. 475, 291 S.E. 2d 800 (1982). *See also In re Biggers*, 50 N.C. App. 332, 274 S.E. 2d 236 (1981) (determination of "reasonable portion" based on interplay of amount necessary to meet reasonable needs of child, and ability of

parties to provide that amount). Where a trial court fails to make any findings as to the parents' ability to pay, the order will not support termination of parental rights under G.S. 7A-289.32(4). *See, e.g., In re Johnson*, 70 N.C. App. 383, 320 S.E. 2d 301 (1984); *In re Phifer, supra* (although order contained findings concerning parents' resources).

The trial court found that since April 1981, respondent parents paid the DSS $4.25 per child towards the support of their two daughters, a total of $8.50. (Although a 20 July 1981 order had suspended the requirement that the parents pay any child support, this obligation was specifically reinstated by a subsequent order in effect the six months next preceding the filing of the petition.) The unchallenged finding of fact relating to payment of support establishes that since 16 July 1982, the date of the order reinstating the requirement that respondents pay child support, Mr. McDonald has had full-time employment paying at least $5.00 per hour for extended periods of time; specifically, in the three months prior to 5 May 1983, he was continuously employed by a construction company earning $5.50 per hour. With respect to Mrs. McDonald, the court found that she has not been employed during the past five years, and her only efforts at finding a job have been to make two job applications. *See In re Bradley, supra* (when a parent has forfeited opportunity to provide some portion of the cost of the child's care by her misconduct, she will not be heard to assert that she has no ability or means to contribute to the child's care and is therefore excused from contributing any amount). *Accord, In re Tate*, 67 N.C. App. 89, 312 S.E. 2d 535 (1984).

As to appellants' argument concerning *In re Montgomery*, the opinion of the Court of Appeals has been reversed by the Supreme Court since the case at bar was tried. *In re Montgomery*, 62 N.C. App. 343, 303 S.E. 2d 324 (1982), *rev'd*, 311 N.C. 101, 316 S.E. 2d 246 (1984). Therefore, we need not examine whether the standard of proof as articulated by this Court in *Montgomery* was complied with by the trial court. *See In re Clark*, 72 N.C. App. 118, 323 S.E. 2d 754 (1984).

Finally, upon a finding that one or more grounds exist under G.S. 7A-289.32 to terminate parental rights, the trial court is never required to terminate parental rights, but is given the dis-

cretion to do so. *See, e.g., In re Pierce, supra.* Our examination of the record before us discloses no evidence that the trial court abused its discretion in concluding that it was in the best interests of the minor children that the parental rights of respondents be terminated.

We summarize our holding: As to respondent mother, we affirm the trial court in all respects; namely, we affirm the termination of her parental rights as to Stacie pursuant to G.S. 7A-289.32(2) and (3), and as to Robin and Sharon, we affirm pursuant to G.S. 7A-289.32(2), (3) and (4). As to respondent father, we affirm the termination of his parental rights as to Robin and Sharon pursuant to G.S. 7A-289.32(4).

Affirmed.

Chief Judge VAUGHN and Judge BRASWELL concur.

Former Chief Judge VAUGHN concurred in the result reached in this case prior to 31 December 1984.

Judge BRASWELL concurred in the result reached in this case prior to 31 December 1984.

NATIONAL MEDICAL ENTERPRISES, INC. AND CUMBERLAND COUNTY v. KATIE LEE SANDROCK, JANE H. SANDROCK, JACK CARROL SANDROCK, TOMMY LEE SANDROCK, TERRY LYNN SANDROCK DAVIS, JOHN OLIVER SANDROCK, KATHY LEIGH SANDROCK CRABB, AND ANY UNKNOWN OR UNBORN HEIRS OF JOHN SANDROCK, DECEASED

No. 8412SC284

(Filed 15 January 1985)

1. Hospitals § 1— lease to for-profit entity—lease illegal

In enacting G.S. 131-126.20(c) the Legislature intended to authorize a county to lease its hospital facilities to a nonprofit entity but not to a for-profit entity; therefore, a proposed lease between plaintiff county and plaintiff for-profit corporation which proposed to operate the hospital was illegal and void.

2. Hospitals § 1; Deeds § 15— definition of public hospital—proposed lease to for-profit entity—termination of determinable fee

As used in a deed from defendant's decedent-grantor to plaintiff county, the term "public hospital" was intended to mean a hospital owned and operated by the county under the Municipal Hospital Facilities Act, revenues from which would inure to the county, and which could be leased to a nonprofit association but not a for-profit corporation; therefore, operation of the hospital under the proposed lease to plaintiff for-profit corporation would be contrary to the grantor's intent and would terminate the county's determinable fee in favor of defendant's reversion.

3. Attorneys at Law § 7— action involving effect of lease—award of fees properly denied

Where the principal controversy involved the legal effect of a proposed lease, not construction of decedent-grantor's will to determine ownership of any reverter interest the lease might trigger, the trial court did not err in denying the claim of defendant, owner of the possibility of reverter reserved by the grantor, for attorney's fees under G.S. 6-21(2), nor did the court abuse its discretion in denying fees pursuant to G.S. 1-263.

APPEAL by plaintiffs from *Bowen, Judge*. Judgment entered 15 December 1983 in Superior Court, CUMBERLAND County. Appeal by defendant Jane H. Sandrock (defendant) from *Bowen, Judge*. Order entered 6 January 1984 in Superior Court, HARNETT County. Heard in the Court of Appeals 16 November 1984.

Plaintiffs are Cumberland County (County), the owner of premises operated as a public hospital, and National Medical Enterprises, Inc. (NME), a for-profit corporation which proposes to lease and operate the Hospital. Defendant's decedent-grantor deeded the property in question to the County in fee simple determinable, "for so long as the same is used as the site for a public hospital, health center, clinic or similar establishment or related use and no longer." Plaintiffs and defendant agree that defendant is the owner of the possibility of reverter reserved by the grantor. The other initial defendants (possible heirs and assignees of the grantor) have not appealed and any question as to the ownership of the reversion is deemed waived.

Plaintiffs brought this action for a declaratory judgment to quiet title. They sought a determination that the proposed lease would not terminate the determinable fee of the County. Defendant answered that the estate conveyed by deed to the County would be destroyed by the Lease Agreement and by the operation of the Hospital by NME as lessee. In defendant's counter-

claim she requested that the court determine the validity of the Lease Agreement and Addendum. Both parties moved for summary judgment.

The court granted summary judgment for defendant and declared the following:

1. Defendant is the owner of the possibility of reverter reserved by the grantor, now deceased, in his deed to County.

2. The Lease Agreement between County as lessor and NME as lessee is unlawful, invalid, and legally unenforceable.

3. The Addendum (extending the effective date of the lease) between County as lessor and NME as lessee is unlawful, invalid, and legally unenforceable.

4. Commencement of the lease under the Agreement will terminate the fee simple determinable estate conveyed to County by decedent.

From this order plaintiffs appeal.

On 6 January 1984 the court denied defendant's motion for counsel fees. From that order defendant appeals.

Hollowell & Silverstein, P.A., by Edward R. Hollowell and Robert L. Wilson, Jr.; Brown, Fox & Deaver, P.A., by Bobby G. Deaver; Garris Neil Yarborough; and Womble, Carlyle, Sandridge & Rice, by Roddey M. Ligon, Jr., for plaintiffs.

McCoy, Weaver, Wiggins, Cleveland and Raper, by John E. Raper, Jr., for defendant Jane H. Sandrock.

WHICHARD, Judge.

I.

The first issue concerns the validity of the lease and the addendum between County and NME. We hold that the lease and, by extension, the addendum to the lease are unlawful, invalid, and legally unenforceable.

Plaintiffs argue that the County has authority to lease the Hospital to a for-profit corporation pursuant to G.S. 160A-272. They cite the following provision:

> Any property owned by a [county] may be leased or rented for such terms and upon such conditions as the [commissioners] may determine, but not for longer than 10 years . . . and only if the [commissioners determine] that the property will not be needed by the [county] for the term of the lease.

G.S. 160A-272.[1]

[1] Defendant argues that the County has authority to operate and lease hospital facilities pursuant to G.S. 131-126.20 and not pursuant to 160A-272. She cites the following provision:

> (c) Any [county] may enter into a contract or other arrangement with any other [county] or other public agency of this or any other state . . . or with any individual, private organization or nonprofit association for the provision of hospital, clinic or similar services . . . . A [county] may lease any hospital facilities to any nonprofit association on such terms and subject to such conditions as will carry out the purposes of this Article.

G.S. 131-126.20(c).[2] We agree with defendant.

The County is authorized to provide hospital services under G.S. 153A-249, which reads: "A county may provide and support hospital services pursuant to Chapter 131." As stipulated by the parties, pursuant to Chapter 131 the County organized and operates the Hospital under the Municipal Hospital Facilities Act, G.S. 131-126.18 *et seq.* The County has no authority to act absent enabling legislation. *O'Neal v. Wake County*, 196 N.C. 184, 186, 145 S.E. 28, 29 (1928). The legislation quoted above, G.S. 131-126.20(c), authorizes the leasing of hospital facilities only to a non-

1. G.S. 153A-176 makes the provisions of Ch. 160A, Art. 12, relating to disposition of property by cities, applicable to counties. It also authorizes the above alterations in terminology to make the references to cities and their officials appropriate for counties and their officials.

2. As indicated *infra*, G.S. 153A-249 authorizes counties to provide and support hospital services pursuant to Ch. 131. For the convenience of the reader, "county" has thus been substituted for "municipality" in the foregoing statute.

profit association. Plaintiffs have stipulated that NME is a for-profit, investor-owned corporation; it therefore is not a nonprofit association as that term is defined by the Municipal Hospital Facilities Act at G.S. 131-126.18(5) and used in G.S. 131-126.20(c).

Plaintiffs argue that because G.S. 131-126.20(c) does not mention leasing hospital facilities to for-profit corporations it does not govern and G.S. 160A-272 does. We find this argument without merit. G.S. 160A-272 is a general statute covering the lease or rental of surplus property by a municipality or a county for less than ten years. G.S. 131-126.20(c) provides specifically for the leasing of hospital facilities.

It is a rule of statutory construction that

> "[w]here one statute deals with the subject matter in detail with reference to a particular situation and another statute deals with the same subject matter in general and comprehensive terms, the particular statute will be construed as controlling the particular situation unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto . . . ."

Utilities Comm. v. Electric Membership Corp., 3 N.C. App. 309, 314, 164 S.E. 2d 889, 892 (1968) (quoting 7 Strong, N.C. Index 2d, Statutes, Sec. 5, p. 73). Further,

> [our] Supreme Court has spoken many times on the question of interpretation of statutes. "Where there are two provisions in a statute, one of which is special or particular and the other general, which, if standing alone, would conflict with the particular provision, the special will be taken as intended to constitute an exception to the general provisions, as the General Assembly is not to be presumed to have intended a conflict."

Id., citing *Davis v. Granite Corp.*, 259 N.C. 672, 676, 131 S.E. 2d 335, 338 (1963).

The absence of specific language in Chapter 131 either authorizing or prohibiting the lease of a hospital to a for-profit corporation should not be interpreted as authority for such a lease. The inclusion of statutory authority to lease to nonprofit associations in G.S. 131-126.20(c) operates to exclude authority to lease to

for-profit corporations. *In re Taxi Co.*, 237 N.C. 373, 376, 75 S.E. 2d 156, 159 (1953) (citing the "sound rule of statutory construction [that] . . . the expression of one thing is the exclusion of another"). Thus, it must be assumed that in enacting G.S. 131-126.20(c) the legislature intended to authorize a county to lease its hospital facilities to a nonprofit entity but not to a for-profit entity. Passage of the later, general provision in G.S. 160A-272 did not expressly or by implication repeal G.S. 131-126.20(c). *See Person v. Garrett, Comr. of Motor Vehicles*, 280 N.C. 163, 165-66, 184 S.E. 2d 873, 874 (1971).

As an agreement contrary to the applicable statutory provision, which we find to be G.S. 131-126.20(c), the proposed lease between the County and NME is illegal and void. *See Cauble v. Trexler*, 227 N.C. 307, 311, 42 S.E. 2d 77, 80 (1947) (agreements against public policy illegal and void; when legislature enacts statute, purpose of statute becomes public policy).

In light of our disposition of this issue, we find it unnecessary to reach the question of whether the Lease Agreement violates G.S. 159-39.

II.

[2] The second issue concerns the legal significance of the term "public hospital" as used in the deed to the County, and whether operation of the Hospital as envisioned by the proposed Lease Agreement would trigger the reversionary interest retained in the conveyance. We hold that operation of the hospital under the proposed lease would be contrary to the grantor's intent and would terminate the County's determinable fee in favor of defendant's reversion.

We are aware that a "public hospital" is defined as "any hospital . . . [o]n whose behalf a county or city has issued and has outstanding general obligation or revenue bonds . . . ." G.S. 159-39(a)(3). Moreover, the parties have stipulated that "[t]here are outstanding Cumberland County general obligation bonds issued on behalf of the Hospital, and thus the Hospital is [presently] a public hospital as defined in . . . G.S. . . . 159-39." Since the County bonds will not be paid by the expiration of the term of the proposed lease, the Hospital will continue to be a public hospital under the lease as that term is statutorily defined.

The issue, however, does not require applying a statutory definition enacted after the grant to the limitation created by the grantor's deed. It requires a determination of the legal significance of the term public hospital as used by the grantor. *See Reynolds v. Sand Co.*, 263 N.C. 609, 613, 139 S.E. 2d 888, 891 (1965).

We are persuaded that by the term "public hospital" the grantor intended to create a hospital owned and operated by the County, the revenues from which would inure to the County. Among other evidence, the following uncontroverted statements accompanied defendant's motion for summary judgment:

> 2. As Chairman of the Board, I led the Board in its considerations to build and finance the construction of the Cape Fear Valley Hospital (the "Hospital"). As spokesman and agent for the Building Committee, I represented the Building Committee and the Board in the selection of a site for the Hospital, in the negotiations with John Sandrock for the gift of the land for the Hospital, in the negotiation with the John Owen heirs for a right-of-way from the Raeford Road to the Sandrock property, in the selection of an architect for the project, in the application for Hill-Burton funds and in the supervision of the construction and equipment of the Hospital.
>
> . . . .
>
> 16. I approached John Sandrock and asked him to give the County 30 acres of his Airport property. In my negotiations with John Sandrock for the gift and conveyance of this property, I represented to him that the property would be used for the construction and operation of a public hospital which the County would own, manage and operate and receive the revenues from its operation.
>
> . . . .
>
> 22. Based on my negotiations with him, I am of the opinion that John Sandrock intended by the Deed to convey this property to the County as a "public hospital" to be owned and operated by the County with the County and its citizens to receive the benefit of the revenues earned.
>
> . . . .

28. In accepting the gift of the 30 acres from John Sandrock, the Board acting on behalf of the County acquired the real property described in the Deed from John Sandrock under the authority of and for the purposes set out in the Municipal Hospital Facilities Act.

Affidavit of Lector E. Ray (filed 1 December 1983).

2. As County Attorney, I advised the Board in its considerations to build and finance the construction of the Cape Fear Valley Hospital (the "Hospital"). As legal advisor to the Building Committee, I was responsible for recording the minutes of the meetings of and handling all the correspondence for the Building Committee and the Board in the selection of a site for the Hospital, in the negotiations with John Sandrock for the gift of the land for the Hospital, in the negotiation with the John Owen heirs for a right-of-way from the Raeford Road to the Sandrock property, in the selection of an architect for the project, in the application for Hill-Burton funds and in the supervision of the construction and equipment of the Hospital.

. . . .

29. Based on my discussions and negotiations with James MacRae as attorney for John Sandrock, it is my opinion that Attorney MacRae understood that the County was proceeding to establish the Cumberland County Hospital under the Municipal Hospital Facilities Act and was familiar with said Municipal Hospital Facilities Act.

30. Under the terms and conditions of the granting and habendum clauses of the Deed the County was conveyed the real property described in the Deed "for so long as the same is used as a site for a public hospital, health center, clinic or similar establishment or related use and no longer." It is my opinion that "public hospital" as used in the Deed refers to Chapter 131, entitled "Public Hospitals," of the North Carolina General Statutes and in particular to the Municipal Hospital Facilities Act contained therein under which the County was proceeding in its efforts to establish the Cumberland County Hospital.

> 31. It is my opinion that John Sandrock intended by the Deed to convey to the County the real property described therein for use as a "public hospital, health center, clinic or similar establishment or related use" and that ownership remain in the County. He refused to execute the Deed or authorize recordation until the Hospital was approved by the North Carolina Medical Care Commission.

Affidavit of Lester G. Carter, Jr. (filed 1 December 1983).

At the time the Hospital was organized, the Municipal Hospital Facilities Act allowed the County to contract for services with any government, individual, or corporation (nonprofit or for-profit), but to lease a hospital only to a nonprofit association. G.S. 131-126.20(c). At the time of the grant, leases to for-profit corporations such as NME were not authorized. Thus, as used in the deed, the term "public hospital" appears intended to mean a hospital owned and operated by the County under the Municipal Hospital Facilities Act, revenues from which would inure to the County, and which could be leased to a nonprofit association but not a for-profit corporation.

III.

[3] Defendant contends the court should have allowed her motion for an attorney's fee under the following provision:

> Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:
>
> (2) . . . [A]ny action or proceeding which may require the construction of any will . . ., or fix the rights . . . of parties thereunder.

G.S. 6-21(2). Defendant also cites G.S. 1-263, which states that "the court may make such award of costs as may seem equitable and just" in any action brought under the Declaratory Judgment Act.

The court considered arguments of counsel and ruled that defendant's motion "should be denied." It thus appears to have acted in its discretion. The principal controversy involved the legal effect of the proposed lease, not construction of the decedent-grantor's will to determine ownership of any reverter inter-

est the lease might trigger. In light of the altogether peripheral nature of the reverter issue, assuming without deciding that the court had authority to award an attorney's fee, it clearly did not abuse its discretion in declining to do so.

Affirmed.

Judges JOHNSON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. DAVID ALLEN BROOKS

No. 8427SC299

(Filed 15 January 1985)

1. **Criminal Law § 66.9— photographic identification—procedure not suggestive**

A pretrial photographic identification of defendant was not impermissibly suggestive where the sheriff's department had a photograph of defendant which was taken ten weeks following the alleged offenses; the photograph was included with three other photographs, all of white males with similar characteristics, but with sufficient differences to permit an identification with a high degree of certainty; the sheriff did not point out any particular aspects of the photographs when they were viewed by the witness; and the witness picked defendant out of the photographic array within five minutes after being shown the photographs.

2. **Criminal Law § 66.2— identification at preliminary hearing—no impermissibly suggestive procedure**

An identification of defendant at his preliminary hearing was not impermissibly suggestive where no indication was made to the witness as to which individual was defendant, and the witness identified defendant as one of the perpetrators of the crime.

3. **Criminal Law § 86.5— impeachment of defendant—questions improper**

The trial court erred in permitting the prosecutor to cross-examine defendant for impeachment purposes regarding previous attempts by him and his look-alike brother to fool or confuse their victims and other witnesses at trial by dressing and sitting alike in the courtroom, since the questions failed to identify a specific instance of criminal or degrading conduct on the part of defendant; however, such error was not prejudicial, especially in light of the fact that this case was not strictly one of credibility between defendant and the victim.

4. Robbery § 4.7— common law robbery—insufficiency of evidence—fear induced after property taken

Evidence was insufficient to be submitted to the jury on a charge of common law robbery, since the fear necessary to sustain a conviction occurred in this case only after the taking of the victim's personal property.

APPEAL by defendant from *Grist, Judge.* Judgment entered 1 April 1983 in Superior Court, LINCOLN County. Heard in the Court of Appeals 7 December 1984.

On 8 November 1982, the Lincoln County grand jury returned proper bills of indictments charging defendant, David Allen Brooks, with armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant's trial began before the jury on 22 March 1983. On 23 March 1983, the trial judge, upon a motion by the defendant declared a mistrial. A new jury was empaneled on 28 March 1983 and found defendant guilty of common law robbery and assault with a deadly weapon inflicting serious injury. Defendant was sentenced to five years on the common law robbery and ten years for the assault charge, with both sentences to run consecutively. From the verdict and sentences, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

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

JOHNSON, Judge.

In his first assignment of error, defendant asserts that the trial court failed to make adequate findings of fact to resolve conflicts in the evidence which would determine the admissibility of the identification testimony of Marshall Goodson, the victim. Defendant specifically challenges the in-court identification on two grounds: (1) that the pretrial identification from the photographic array was impermissibly suggestive; and (2) that Mr. Goodson's pretrial identification of him at the preliminary hearing on 3 November 1983 was impermissibly suggestive and tainted the victim's in-court identification of the defendant.

[1] As to defendant's contentions, the trial court ruled that the manner in which the photographic array was displayed and the

conduct on the part of the police officers or the district attorney at the probable cause hearing was not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification.

> The five factors set forth in *Biggers*, . . . for the assessment of the reliability of identification testimony were intended to apply to those cases where there has been a showing that a pretrial identification procedure, conducted by State officials, is in some manner impermissibly suggestive. *Biggers* mandates that, if there is a showing of an impermissibly suggestive pretrial identification procedure, there must be a determination, in accordance with the factors listed therein, whether the witness's identification of the defendant at trial will be reliable and of an origin independent of the suggestive pretrial procedure. (Citations omitted.) If, however, there is a finding that the pretrial identification procedure was not impermissibly suggestive, then the court's inquiry is at an end, . . . and the credibility of the identification evidence is for the jury to weigh.

State v. Green, 296 N.C. 183, 250 S.E. 2d 197 (1978). *See Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972); *State v. Clark*, 301 N.C. 176, 270 S.E. 2d 425 (1980) (five standards to be used to determine reliability of an out-of-court identification).

The trial court in the case *sub judice* held a *voir dire* hearing outside the presence of the jury. The court found, *inter alia*, that the sheriff's department of Catawba County had a photograph of the defendant which was taken on 19 May 1977, ten weeks following the alleged offenses; that this photograph was included with three other photographs, all the photographs being of white males with long hair, some with chin hair and others with lesser degree of chin hair, including two photographs with minimal chin hair; that the photographs appeared to be reasonably similar in characteristics, but had sufficient differences that an identification could be made of either one of the individuals with a high degree of probability of certainty; that the sheriff of Lincoln County did not point out any particular aspect of the photograph; and that Mr. Goodson picked the defendant out of the photographic array within five minutes after being shown the photographs.

[2] The court further found that there was no suggestiveness made to Mr. Goodson at the probable cause hearing as to which individual was David Allen Brooks, the defendant, even though there was present at the hearing a brother of David Allen Brooks who looks considerably like David Allen Brooks even though a year or two older; that the brother was seated beside Brooks primarily for the purpose of attempting to mislead the State's witness into making a misidentification, but the district attorney, sensing that such was the purpose, removed the brother from the table where he was seated by the defendant so the identification process could be carried out without interference of a look alike; and that during the course of the probable cause hearing Mr. Goodson again identified David Allen Brooks as one of the perpetrators of the crime. These findings are supported by competent evidence, thus are binding on appeal. From these findings, the trial court concluded that the identification of the defendant from the photographic array and at the preliminary hearing was not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification and that the credibility of the identification was for the jury to weigh. Upon concluding that the pretrial identification was not impermissibly suggestive the trial court's inquiry was at an end and the identification was properly admitted into evidence. We agree with the trial court and find that defendant's first assignment of error is without merit.

[3] By his second assignment of error, defendant contends that the trial court erred in permitting the prosecutor to cross-examine defendant regarding previous attempts by him and his brother to fool or confuse their victims and other witnesses at trial. The prosecutor asked the following questions of the defendant:

> Q. And you and your brothers try to dress just as near alike as you can all the time, don't you?
>
> A. No, sir.
>
> Q. You try to fool victims all the time in court, don't you?
>
> Mr. Black: OBJECTION.
>
> The Court: OVERRULED.

Q. Isn't that the object of your dressing alike and trying to get your hair to look alike and sitting alike in the courtroom and sitting right beside each other?

A. No, sir. We was (sic) sitting beside each other, because both of us was incarcerated.

Q. You wasn't there to try to fool up Mr. Goodson at all?

A. No, sir.

Q. That wasn't the plan of your lawyer and the other lawyer?

A. No, sir.

Q. Why did you object to coming up there beside your lawyer then?

A. Why did I object?

Q. Yes, sir.

A. I didn't. I got up and sat down beside of him.

Defendant contends that this line of questioning was improper impeachment and highly prejudicial. The State contends that this line of questioning was proper impeachment and emphatically contends that the defendant lost the benefit of this objection where the same evidence was admitted later without objection. The State argues that defendant made only one objection throughout this line of questioning, thus not preserving the record for appeal. The State cites *State v. Zimmerman*, 23 N.C. App. 396, 209 S.E. 2d 350, *cert. denied*, 286 N.C. 420, 211 S.E. 2d 800 (1975) as dispositive of this contention. We disagree. We find G.S. 15A-1446 (d)(10) is dispositive of this contention not *Zimmerman*. In *Zimmerman*, the court deemed the objection was lost when the same evidence was admitted on a *number of occasions* throughout the trial, which differs with the case *sub judice* where the sole objection was to a single line of questioning at one instance in the trial. G.S. 15A-1446(d)(10) states: Errors based on any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.

(10) Subsequent admission of evidence involving a specified line of questioning where there has been an improperly over-

ruled objection to the admission of evidence involving that line of questioning.

The question thus becomes whether this line of questioning was improper impeachment. It is well settled that when a defendant takes the stand he may be cross-examined for purposes of impeachment concerning any prior specific acts of criminal and degrading conduct on his part. *See, State v. Dawson*, 302 N.C. 581, 276 S.E. 2d 348 (1981).

> [A] criminal defendant who takes the stand may be cross-examined for purposes of impeachment concerning any prior *specific acts* of criminal and degrading conduct on his part. Such acts need not have resulted in a criminal conviction in order to be appropriate subjects for inquiry. The scope of inquiry about particular acts is, however, within the discretion of the trial judge, and questions concerning them must be asked in good faith. It is not permissible to inquire for purposes of impeachment as to whether a defendant has previously been arrested or indicted for or accused of some unrelated criminal or degrading act.

State v. Sparks, 307 N.C. 71, 296 S.E. 2d 451 (1982) (quoting *State v. Purcell*, 296 N.C. 728, 732, 252 S.E. 2d 772, 775 (1979)). Thus, the first test of the permissibility of a question asked on cross-examination for impeachment purposes is whether it identifies a *specific instance* of criminal or degrading conduct *on the part of the defendant*. This Court has repeatedly held questions that fail to pinpoint a specific act of misconduct by the defendant to be improper. *Id.* The questions, in the case *sub judice*, propounded by the prosecutor did not identify a specific act, but were oblique. The questions fail to state the specific time, place or victim of any alleged misconduct and were improperly admitted.

Even if improper impeachment has occurred, an appellate court must find the impeachment to be sufficiently prejudicial so that "had the error in admitting these statements not occurred a different result might have been reached at trial." *See State v. Peplinski*, 290 N.C. 236, 225 S.E. 2d 568, *cert. denied*, 429 U.S. 932, 50 L.Ed. 2d 301, 97 S.Ct. 339 (1976). It is well settled that the scope of cross-examination rests largely in the discretion of the trial court, and his ruling will not be held error unless there is a showing that the jury's verdict was improperly influenced. *State*

v. Daye, 281 N.C. 592, 189 S.E. 2d 481 (1972). Taking this evidence with all the evidence properly admitted, we fail to find any prejudice. This case is not strictly a case of credibility between the defendant and the victim. The State introduced evidence from Bobby Ray Smith which linked the defendant to the crime. Mr. Smith testified, *inter alia*, that after his release from federal custody, he engaged in a conversation with the defendant and defendant's brother. Mr. Smith stated,

> The conversation came up, and he (defendant) said, "We robbed a guy one time and he bucked on us, and I had to shoot him in the face." He didn't state who his name was at the time. He said, "I don't think you know him, but he runs the gin in Maiden," and I knew Mr. Goodson—just about all my life, you know, and I knew who it was after that because I'd heard about it before—about him getting shot in the face.

In light of this evidence before the jury and looking at the totality of the circumstances, we hold that the evidence improperly admitted was not prejudicial.

[4] In his final assignment of error, defendant contends that the State failed to present sufficient evidence to sustain a conviction for common law robbery. The defendant was originally charged with armed robbery of a wallet containing $876.00 and checks totaling $1,623.80. At the close of the State's evidence, the trial court properly ruled the evidence insufficient as to the armed robbery offense charged and the case would be submitted to the jury on the question of defendant's guilt of common law robbery.

Common law robbery is the felonious, non-consensual taking and carrying away money or personal property from the person or presence of another by means of violence or fear. *See State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622, 103 S.Ct. 474 (1982). Defendant challenges the sufficiency of the evidence, presented by the State, to sustain a conviction for common law robbery. In considering a motion to dismiss for insufficiency of the evidence, the evidence is to be taken in the light most favorable to the State and the State is entitled to the benefit of every reasonable inference to be drawn therefrom. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). The State must present substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included

therein, and (b) of defendant's being the perpetrator of the offense. *Id.*

The State presented evidence, *inter alia*, that the defendant and his accomplice entered the victim's home twice on the night of the alleged offense. Upon entering the victim's home the second time, defendant's accomplice grabbed the victim's overalls from a chair near the bed. The defendant was standing near the kitchen door, behind the victim and his accomplice. The evidence further revealed that the accomplice and the victim struggled with the overalls and the wallet fell to the floor. The accomplice proceeded to run from the house with the overalls, but without the wallet. The victim then turned in the direction of the defendant, whereupon he first saw the gun. The victim testified that he froze upon seeing the gun pointed in his face. Defendant then shot the victim and exited the house without the wallet. Taking this evidence in the light most favorable to the State, we fail to find sufficient evidence of the essential element of a taking by force or violence which places the victim in a state of fear or apprehension.

> "Generally, the element of force in the offense of robbery may be actual or constructive. Actual force implies physical force. Under constructive force are included 'all demonstrations of force, menaces, and other means by which the person robbed is put in fear sufficient to suspend the free exercise of his will or prevent resistance to the taking . . . No matter how slight the cause creating the fear may be or by what other circumstances the taking may be accomplished, if the transaction is attended with such circumstances of terror, such threatening by word or gesture, as in common experience are likely to create an apprehension of danger and induce a man to part with his property for the sake of his person, the victim is put in fear.'" (Citations omitted.)

State v. Hammonds, 28 N.C. App. 583, 222 S.E. 2d 4 (1976) (quoting *State v. Norris*, 264 N.C. 470, 141 S.E. 2d 869 (1965)).

The evidence the State relies upon to show fear occurred after the "taking." The evidence tends to show that the accomplice grabbed the overalls containing the wallet. It was this action that constituted the taking. The State went on to show that the victim and accomplice then struggled with the overalls

and the wallet fell to the floor where it remained. Only then, after the victim lost in the yanking of the overalls, did he turn in the direction of the defendant and see the gun. The victim, who froze upon seeing the gun, was then shot by the defendant. After shooting the victim, the defendant exited the house without the wallet. This evidence reveals that the "taking" occurred before the victim was placed in fear or an apprehension of fear through the defendant's actions. For these reasons, the defendant's conviction for common law robbery must be reversed.

Affirmed in part; reversed in part.

Judges BECTON and BRASWELL concur.

(Judge BRASWELL concurred in the result reached in this case prior to his retirement on 31 December 1984.)

PATRICIA McLEAN DRUMMOND v. EARL CORDELL, D/B/A CORDELL'S BODY SHOP; AND MELODY M. CORDELL

No. 8430SC598

(Filed 15 January 1985)

1. **Judgments § 16— judgment valid on its face—collateral attack improper**

The trial court erred in directing verdict in favor of plaintiff nullifying a judgment entered pursuant to a small claims action, since the magistrate's judgment recited that due and timely notice of the nature of the action and the time and place of trial were given to defendant; this statement was conclusive and not subject to collateral attack if it was consistent with the record in the case; the return of service on the magistrate's summons no longer existed, having been destroyed pursuant to an order of the Administrative Office of the Courts; the record, or lack thereof, therefore did not affirmatively show lack of legal service; and extrinsic evidence not contained in the record of the small claims action which tended to show lack of service or defective service was not sufficient to rebut the conclusiveness of the face of the judgment.

2. **Rules of Civil Procedure § 15— evidence outside pleadings—defendant's admissions—issues properly before court**

An issue of whether the penalty and attorney fees provisions of G.S. 44A-4(g) were applicable in this case was properly before the trial court, though plaintiff in her complaint did not elect to proceed under G.S. 44A-1 et seq. as a basis for recovery in her action for conversion of her vehicle, since

defendant admitted that G.S. 44A-4(e) and (f) were not substantially complied with in that there was improper notice of the judicial sale.

APPEAL by defendants from *Downs, Judge.* Judgment entered 13 January 1984 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 24 October 1984.

This is a civil action filed by plaintiff, Patricia McLean Drummond, in Superior Court, Haywood County, in which she seeks to set aside a judgment entered pursuant to a small claims action in District Court, Buncombe County. (*Earl Cordell v. Patricia McLean Drummond*, 81CVM2548, entered 24 September 1981.) Plaintiff also seeks damages for conversion of a 1979 Fiat automobile and to enjoin defendants, Earl Cordell, d/b/a Cordell's Body Shop and Melody M. Cordell, from using or disposing of the automobile.

The essential facts are:

Plaintiff purchased a 1979 Fiat automobile, V.I.N. 128AS-10110675, from Swann Motors (Swann) in Candler on 5 July 1979.

Plaintiff experienced mechanical difficulty with the Fiat on several occasions. Swann attempted to remedy the problems, apparently without success.

In February 1980, plaintiff filed suit against Swann for breach of warranty (*Drummond v. Swann Motors*, 80CVS77). That suit was settled in 1982. During the pendency of that action the events occurred which gave rise to this case.

Defendant Earl Cordell owns a body shop and operates a tow truck in conjunction with the body shop business. Evidence at trial tended to show that Earl Cordell did towing for Swann without a written contract.

Swann went out of business. Plaintiff's Fiat, having been left with Swann by plaintiff from October 1979 until November 1980, was damaged by vandals. Swann had Cordell tow the Fiat to Cordell's body shop and store it. Cordell charged Swann $20.00 for the tow, but did not charge Swann for the storage of the Fiat. The Fiat remained at Cordell's Body Shop from November 1980 until July of 1981.

In June of 1981, plaintiff received a "Notice of Intent to Sell a Vehicle to Satisfy Storage Liens." On 3 July 1981, plaintiff received from the Division of Motor Vehicles a letter advising her that Earl Cordell had filed the notice and that plaintiff had 10 days within which to file a "Request for Judicial Hearing." Plaintiff's request was sent by certified mail to the Division of Motor Vehicles and delivered on 16 July 1981.

Plaintiff's evidence tended to show that she did not thereafter receive notice of the judicial hearing allowing enforcement of the storage lien, notice of the judgment rendered at that hearing, or notice of the actual public sale of her Fiat pursuant to G.S. 44A-4(e).

In the spring of 1982, plaintiff went to Cordell's Body Shop and discovered that her Fiat had been sold to defendant Melody M. Cordell pursuant to a public sale authorized by the small claims judgment in 81CVM2548. Melody M. Cordell is the daughter of defendant Earl Cordell.

The record of the small claims action introduced in the trial of this action consisted of papers captioned "complaint to enforce possessory lien on motor vehicle," "magistrate's summons" with no sheriff's return and "judgment in action on possessory lien on motor vehicle." The judgment was signed by Magistrate Jack Puckridge and dated 24 September 1981. The judgment is a pre-printed form-judgment with blanks in which information concerning the vehicle at issue and amount of money owing can be inserted. The pre-printed judgment's language states that "Due and timely notice of the nature of the action and the time and place of trial were given the defendant(s) as is shown in the record." The record, however, does not show personal service or constructive service of process upon the plaintiff in the magistrate's court action. However, the record also fails to disclose that service was not obtained.

The Honorable J. Roy Elingburg, Clerk of Superior Court, Buncombe County, testified that he could not locate the file in 81CVM2548. He also testified that pursuant to a directive from the Administrative Office of the Courts, files older than 90 days were microfilmed and then destroyed. He further testified that he was only required to microfilm the magistrate's judgment itself and not the remainder of the documents in the file.

Evidence of defendant Earl Cordell and plaintiff tended to show that service of process, if any, was by publication pursuant to G.S. 1A-1, Rule 4(j1) and G.S. 7A-211.1. However, both defendants admitted in response to plaintiff's request for admissions, that no affidavit stating that Patricia McLean Drummond's whereabouts or address was unknown and could not with due diligence be ascertained was ever submitted to the Clerk of Superior Court, Buncombe County.

At the close of plaintiff's evidence, the trial court allowed plaintiff's motion for directed verdict on the collateral attack of the small claims judgment in 81CVM2548 on the grounds that the record did not, on its face, show service of process upon the plaintiff as required by the Rules of Civil Procedure and G.S. 7A-217. The trial court also granted defendant Melody M. Cordell's motion for directed verdict on the issue of damages.

At the close of all the evidence, defendant Earl Cordell moved for directed verdict and was denied.

The jury rendered its verdict as follows:

(1) Did the Defendant, Earl Cordell, convert the 1979 Fiat automobile from the plaintiff?

ANSWER: "Yes."

(2) What amount of damages, if any, is the Plaintiff entitled to recover from Defendant, Earl Cordell?

ANSWER: "$1,250.00."

(3) What amount of damages, if any, is the defendant, Earl Cordell, entitled to recover from the plaintiff for storage of the 1979 Fiat automobile?

ANSWER: "None."

Defendants made motions for judgment notwithstanding the verdict and for a new trial, which were denied by the trial court.

Defendants appeal and plaintiff cross appeals from the trial court's refusal to award her attorney's fees.

McLean and Dickson, by Russell L. McLean, III, and Robert L. Ward, for plaintiff-appellee.

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

EAGLES, Judge.

I

[1] Defendant first assigns as error the trial court's directed verdict in favor of plaintiff nullifying the small claims judgment in 81CVM2548. We agree that there was error.

> Where a court of competent jurisdiction of the subject matter recites in its judgment or decree that service of process by summons or in the nature of summons has been had upon the defendant who is subject to the jurisdiction of the court, and the judgment is regular on its face, nothing else appearing, such judgment or decree is conclusive until set aside by direct proceedings. [Citations omitted.]

Powell v. Turpin, 224 N.C. 67, 29 S.E. 2d 26 (1944). Here, the magistrate's judgment recited: "Due and timely notice of the nature of the action and the time and place of trial were given the defendant(s) as is shown in the record." This statement is conclusive and not subject to collateral attack if it is consistent with the record in the case. *Id.* at 69, 29 S.E. 2d at 28.

The evidence at trial tends to show that the return of service on the magistrate's summons no longer exists, having been destroyed pursuant to an order of the Administrative Office of the Courts. Other documents that may have been in the record at the time the magistrate's judgment was entered have been destroyed as well. The recital in the judgment *must* prevail unless there is some evidence *in the record* showing affirmatively that there was no legal service of process. *Id.* at 70, 29 S.E. 2d at 28. Since the record, or the lack thereof, does not affirmatively show lack of legal service, the judgment does withstand collateral attack. Extrinsic evidence not contained in the record of the small claims action that tends to show lack of service or defective service is not sufficient to rebut the conclusiveness of the face of the judgment under our well-settled law on the collateral attack issue.

> A contrary doctrine would be fatal to judicial sales and the values of title derived under them, as no one would buy at or approximating the true value of property if he supposed that his title might at some distant date be declared void because of some irregularity in the proceeding altogether unsuspected by him and of which he had no opportunity to inform himself.

224 N.C. at 70, 29 S.E. 2d at 28. For these reasons, collateral attack upon the magistrate's judgment and the directed verdict in plaintiff's favor on that issue were error.

The magistrate's judgment remains valid and is subject only to a direct attack. It remains a final judgment rendered on the merits by a court of competent jurisdiction and is conclusive as to those issues raised therein with respect to parties and those in privity with them. The magistrate's judgment constitutes a bar to all subsequent actions involving the same issues and parties. *Kabatnick v. Westminster Co.*, 63 N.C. App. 708, 306 S.E. 2d 513 (1983). Since the magistrate's judgment empowered defendant Earl Cordell to sell plaintiff's automobile pursuant to G.S. 44A-4(e), the jury verdict for conversion and damages cannot stand.

II

[2] We note that the trial court's judgment in directing a verdict on the attorney fee claim states "[t]hat the defendant failed to substantially comply with the requirements of N.C.G.S. 44A [Statutory Lien on Motor Vehicles]."

G.S. 44A-4(g) states:

> If the lienor fails to comply substantially with any of the provisions of this section, the lienor shall be liable to the person having legal title to the property or any other party injured by such noncompliance in the sum of one hundred dollars ($100.00), together with a reasonable attorney's fee as awarded by the Court. Damages provided by this section shall be in addition to actual damages to which any party is otherwise entitled.

Our examination of the record indicates that plaintiff in her complaint did not elect to proceed under G.S. 44A-1, et seq. as a

basis for recovery in this action for conversion. However, an admission by defendant, Earl Cordell, tended to show that G.S. 44A-4(e) and (f) were not substantially complied with in that there was improper notice of the judicial sale. Where no objection is made to evidence on the ground that it is outside the issues raised by the pleadings, the issue raised by the evidence is nevertheless before the trial court for determination. The pleadings are regarded as amended to conform to the proof even though the defaulting pleader made no formal motion to amend. Failure to make the amendment will not jeopardize a verdict or judgment based on competent evidence. If an amendment to conform the pleadings to the proof should have been made to support the judgment, the appellate court will presume it to have been made. *Mangum v. Surles*, 281 N.C. 91, 187 S.E. 2d 697 (1972). Therefore, the issue of whether the penalty and attorney fees provisions of G.S. 44A-4(g) are applicable in this case was properly before the trial court. See, *Caesar v. Kiser*, 387 F. Supp. 645 (1975). This was also properly an issue for directed verdict where the non-movant, Earl Cordell, established plaintiff's case on non-compliance with G.S. 44A-4(e) and (f) by admissions in a document before the trial court. *North Carolina Nat. Bank v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979). As a result, that portion of the judgment on directed verdict finding that "[d]efendant failed to substantially comply with the requirements of N.C.G.S. 44A [Statutory Lien on Motor Vehicles]" remains valid. We note that defendants do not assign as error the trial court's finding on this issue.

III

For the reasons herein stated, the verdict of the jury must be set aside and the judgments of the trial court reversed except so much of the judgment on directed verdict that finds that "[d]efendant failed to substantially comply with the requirements of N.C.G.S. 44A [Statutory Lien on Motor Vehicles]" which is affirmed.

This case is remanded to Superior Court, Haywood County, for award of the $100.00 penalty and attorney's fees pursuant to G.S. 44A-4(g).

Our determination of preceding issues makes it unnecessary to consider the remaining assignments of error.

Affirmed in part, reversed in part, and remanded.

Chief Judge VAUGHN and Judge BRASWELL concur.

Former Chief Judge VAUGHN concurred in the result reached in this case prior to 31 December 1984.

Judge BRASWELL concurred in the result reached in this case prior to 31 December 1984.

STATE OF NORTH CAROLINA v. CHAMUAL LARRY GREENLEE

No. 8428SC220

(Filed 15 January 1985)

Criminal Law § 90— witness's prior inconsistent statement—use by state to impeach own witness improper

The trial court erred in permitting the State to introduce its witness's prior inconsistent statement into evidence and the jury to view it, since the court did not limit admission of the written statement to those parts corroborating the witness's testimony; the prosecuting attorney could not legitimately claim surprise or entrapment because the witness's testimony the day before had not conformed to her prior statement to police; and identification of the perpetrator of the crime was the crucial issue in the case, but introduction of the witness's written statement was clearly designed for the prohibited purpose of discrediting her previous testimony which would have tended to exonerate defendant.

APPEAL by defendant from *Cornelius, Judge.* Judgment entered 13 October 1983 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 4 December 1984.

Defendant was tried and found guilty of first degree burglary and felonious larceny. The state proffered evidence which tended to show that during the evening of 7 January 1983 defendant, Richard Simmons, Regina Moseley, and Artie Vernon met socially at the House of Soul in Asheville, North Carolina. During the morning hours of 8 January 1983, they went to the Interstate Motel. Simmons rented a room; the females went to the room first; and the men entered later. Upon entering, Simmons handed defendant a jacket. A pair of boots, billfold, some pants, and a

bottle of whiskey were in the room. Moseley heard Simmons say that he had obtained these items from another room occupied by whites. Moseley requested to be taken home, and she left with the defendant, who did not take any items from the room.

Defendant voluntarily surrendered himself to investigating officers on 10 January 1983. On the following day investigating officers searched defendant's home and found a brown Wrangler jacket, with the name "Stoker" written in the sleeve, that had been reported stolen from the motel.

Four occupants of room 117 of the Interstate Motel testified that they had returned to their room at approximately 3:30 a.m. on 8 January 1983, locked the door, went to sleep, and awoke at approximately 8:00 a.m. They discovered various personal items missing, including a brown Wrangler jacket, billfold, knife, whiskey, and a down vest. Scott Stoker, one of the occupants, identified the brown jacket found in defendant's home as his.

Officer Victor Sloan testified that several days after defendant's arrest, the latter voluntarily came into the police department. He told officers that he had purchased the jacket confiscated and had a receipt for it. Defendant did not produce the receipt.

Defendant offered evidence which tended to show that he arrived home at approximately 1:30 a.m. on 8 January 1983 and remained there throughout the night. Richard Simmons came to his house later in the day with a coat and he left it with the defendant. The defendant placed the coat in the closet from which the police removed it during their search.

Attorney General Rufus L. Edmisten, by Elisha H. Bunting, Jr., for the State.

Assistant Public Defender Lawrence C. Stoker for defendant.

WELLS, Judge.

Defendant brings forward three assignments of error: (1) the state was permitted to improperly impeach its own witness by a prior inconsistent statement; (2) the state was permitted to improperly introduce the prior inconsistent statement into evidence; and (3) the trial court erred in denying defendant's motions for ap-

propriate relief. We agree that the state improperly impeached its own witness and order a new trial.

At the time of defendant's trial, the general rule in criminal trials was that the state may not impeach its own witness by prior inconsistent statements or any evidence of the witness's bad character. *E.g., State v. Cope*, 309 N.C. 47, 305 S.E. 2d 676 (1983); *State v. Taylor*, 88 N.C. 694 (1883); *State v. Gilliam*, 71 N.C. App. 83, 321 S.E. 2d 553 (1984); 1 H. Brandis, N.C. Evidence § 40 (2d rev. ed. 1982) (but forcefully criticizing the anti-impeachment rule); *but cf. Chambers v. Mississippi*, 410 U.S. 284 (1973) (questioning the rule in context of defendant's due process rights); *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death sentence vacated, Carter v. North Carolina*, 429 U.S. 809 (1976). The anti-impeachment rule has never been held applicable in situations where use of the prior inconsistent statement or bad character evidence was offered for purposes other than impeachment of the witness. *E.g., State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981), *cert. denied*, 456 U.S. 932 (1982) (clarification of witnesses' testimony); *State v. Oxendine*, 303 N.C. 235, 278 S.E. 2d 200 (1981) (corroboration); *State v. Berry*, 295 N.C. 534, 246 S.E. 2d 758 (1978) (clarification of statement by witness); *State v. Tinsley*, 283 N.C. 564, 196 S.E. 2d 746 (1973) (corroboration even though minor differences with in-court testimony); *State v. Charles*, 53 N.C. App. 567, 281 S.E. 2d 438 (1981) (corroboration).

Several exceptions soften the often harsh impact of the anti-impeachment rule. First, the trial court, in its discretion, may permit the state to:

> cross-examine either a hostile or an unwilling witness for the purpose of refreshing his recollection and enabling him to testify correctly. 'In so doing, the trial judge may permit the party to call the attention of the witness directly to statements made by the witness on other occasions. . . . But the trial judge offends the rule . . . if he allows a party to cross-examine his own witness solely for the purpose of proving him to be unworthy of belief.'

State v. Anderson, 283 N.C. 218, 195 S.E. 2d 561 (1973) (citations omitted); *see also State v. Moore*, 300 N.C. 694, 268 S.E. 2d 196 (1980).

Second, a party may impeach his own witness when that party is surprised or entrapped by the witness. In such situations the exception is not automatically invoked. The procedure and criteria for invoking the exception were outlined in *State v. Cope*, *supra* (relying on *State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975)):

> (1) the state, by motion to the trial court, moves to impeach its witness as soon as the state is surprised or entrapped;
>
> (2) trial court conducts a *voir dire* to determine if the state has been surprised as a material fact contrary to what the state had a reasonable expectation to believe. There can be no surprise, entrapment, or reasonable expectation that the witness will conform his testimony to any prior statement if the state's attorney knows that the witness has retracted or repudiated his written statement or if the state's attorney has reason to believe the witness will do so. The prosecuting attorney is not required to have interviewed the witness prior to trial, even though better practice dictates this procedure.
>
> The surprised party must prove the prior inconsistent statement and that it was communicated to the state's attorney by the witness or his agent or investigating officers furnished the state's attorney with the witness's signed or acknowledged statement.
>
> The determination to permit impeachment is in the discretion of the trial court. The trial court must also determine to what extent the prior inconsistent statement may be proffered.
>
> (3) Even though the trial court may permit impeachment, the prior inconsistent statement is admitted for the sole purpose to explain why the witness was called. The prior inconsistent statement is not substantive evidence for any purpose.

Even if improper impeachment has occurred, an appellate court must find the impeachment to be sufficiently prejudicial so that "had the error in admitting these statements not occurred a dif-

ferent result might have been reached at trial." *State v. Cope, supra; see also State v. Peplinski*, 290 N.C. 236, 225 S.E. 2d 568, *cert. denied*, 429 U.S. 932 (1976); *State v. Moses*, 52 N.C. App. 412, 279 S.E. 2d 59, *disc. rev. denied*, 303 N.C. 318, 281 S.E. 2d 390 (1981); *compare State v. Gilliam, supra* (harmless error); *with State v. Woods*, 33 N.C. App. 252, 234 S.E. 2d 754 (1977) (prejudicial error); N.C. Gen. Stat. § 15A-1443(a) (1978).

The testimony of Regina Moseley is the focal point of this appeal. Prior to trial, she gave investigating officers a signed, handwritten, statement. The pertinent parts of the statement are:

> First of all, me and Teresa Vernon and Greenlee and we left the House of Soul. And at the time we was at the Interstate Motel. And while the 4 of us were on our way to the room and Greenlee had some pants in his hand, and he came in the room with the three of us. And Greenlee was in and out of the room about twice. . . . And I then told Greenlee to take me home, so . . . Greenlee took me home . . . Greenlee had some boots in his hand and a bottle of whiskey. . . . Billfold had $13.00 dollars in it. Greenlee had it, also two jackets. Greenlee said that the room was open and he went in.

At trial, the state called Moseley during its case-in-chief. The relevant parts of her testimony are:

> Q. . . . When he came in, what if anything did Greenlee have in his hands?
>
> A. Well, I seen the guy [Richard Simmons] hand him a jacket. He put it on the table.
>
> . . .
>
> Q. And before the other guy handed Mr. Greenlee the jacket, did Mr. Greenlee have anything in his hands, ma'am?
>
> A. No, not as I can remember.
>
> Q. I believe you talked to the officers about this on a later occasion, didn't you, ma'am?
>
> A. Yes, I had to go up there.
>
> Q. And at that time you made a statement?

A. The statement I made, I was telling what all I had seen on the table.

Q. Well, the statement you made then to the officer was true, wasn't it, ma'am?

A. Yes.

MR. STOKER: Objection.

COURT: Sustained.

Q. Ma'am, I'll ask you to look at this statement and see if it refreshes your memory.

MR. STOKER: Objection.

COURT: Overruled. What is the exhibit number?

Q. Do you remember now if Greenlee had anything in his hands when he came in?

MR. STOKER: If the Court please, we object. He's trying to impeach his own witness. We object.

COURT: Overruled.

A. I remember him having a jacket in his hand, and all I remember is what I put here that was on the table in the room at the motel.

Q. Well, you put that sentence in there, too. Do you remember that now, ma'am?

A. Not as I can remember.

. . .

Q. Did Mr. Greenlee say anything at that time, ma'am?

MR. STOKER: Objection.

COURT: Overruled.

Q. . . . I'm referring to your statement again.

A. The other guy [Richard Simmons] did. I told you his name was Richard. I heard him say something about the room, the door was open.

. . .

On redirect examination, the state continued the same line of questioning:

> Q. Did you overhear a conversation between Mr. Greenlee and this Richard fellow?
>
> MR. STOKER: Objection.
>
> COURT: Overruled.
>
> A. Yes, I heard Richard say that he got the stuff out of some white people's room, the door was open.
>
> MR. STOKER: Move to strike.
>
> COURT: Overruled. Denied. Answer.
>
> Q. What did Mr. Greenlee say in response to that, ma'am?
>
> A. That's all I heard. . . .

Defendant's argument that the foregoing testimony demonstrates improper impeachment is not well taken. The prosecuting attorney, realizing that the witness's in-court testimony was contradictory to her written statement, was attempting to refresh her memory. Refreshing the witness's memory by calling that person's attention to a previous statement is permitted. *State v. Anderson, supra.* Furthermore, the record reveals that the trial court sustained defense objections to those questions that appeared to be for the purpose of impeachment only.

During the second day of trial, the state recalled Moseley. Overruling repeated objections, the trial court permitted the state to introduce Moseley's prior inconsistent statement into evidence and the jury to view it. Defendant's arguments that introduction of the written statement into evidence and passing the statement to the jury improperly impeached Moseley are well taken.

First, a fair reading of the transcript and Moseley's written statement unmistakably demonstrates that the prior written statement impeached Moseley's in-court testimony in several respects, the most important being that Richard Simmons, not defendant Greenlee, implicated himself by stating that he had "got the stuff" from another room occupied by whites. We agree

with the state's contention that parts of Moseley's written statement corroborated some of her in-court testimony and would have been admissible even though there were slight variations in the two versions. *State v. Oxendine, supra; State v. Moore, supra.* The trial court did not, however, limit admission of the written statement to those parts corroborating her testimony.

Second, the prosecuting attorney could not legitimately claim surprise or entrapment on the second day of the trial for Moseley's testimony of the previous day. In *State v. Pope, supra,* the court emphatically stated that "[w]here the prosecuting attorney knows at the time the witness is called that he has retracted or disavowed his statement, or has reason to believe that he will do so if called . . . he will not be permitted to impeach the witness." The facts in *Anderson* are analogous to the facts before us in this case. In *Anderson* the state's attorney learned on *voir dire* that its witness had either forgotten certain material facts or had consciously altered testimony. On the same day, the witness was called at trial and asked the same questions as propounded on *voir dire.* The court held that the prosecuting attorney was not surprised or entrapped. *State v. Anderson, supra; see also State v. Thomas,* 62 N.C. App. 304, 302 S.E. 2d 816 (1983) (state's attorney learned witness lost memory before lunch recess).

Third, Moseley's written statement impeaching her in-court testimony was prejudicial because identification of the perpetrator of the crime was the crucial issue in the case. Introduction of Moseley's written statement was clearly designed to discredit her previous testimony which would have tended to exonerate defendant and to implicate defendant instead. The introduction of the statement is clearly prohibited for this purpose. *State v. Moore, supra; State v. Smith,* 289 N.C. 143, 221 S.E. 2d 247 (1976), *appeal after remand,* 291 N.C. 505, 231 S.E. 2d 663 (1977). There were no witnesses to the burglary and larceny. The most significant evidence linking defendant to the crime, other than Moseley's written statement and defendant's presence at the crime scene, was the discovery of the stolen jacket in his home. Defendant's wife testified, however, that defendant was at home when the crime was committed and that Richard Simmons brought the jacket to defendant's home. We hold that had the error in admitting Moseley's written statement not occurred the jury might have reached a different result.

It is unnecessary to discuss defendant's other assignments of error. For the reasons stated, there must be a

New trial.

Judges ARNOLD and PHILLIPS concur.

IN THE MATTER OF: YAVONKA BYRD, A MINOR CHILD

No. 8425DC593

(Filed 15 January 1985)

1. **Parent and Child § 1.5; Evidence § 28— termination of parental rights—court file on minor child—admissibility**

In a proceeding to terminate parental rights the trial court did not err in admitting into evidence the court file on the minor child, since a court may take judicial notice of earlier proceedings in the same cause, and, during the hearing, respondents consented to admission of the file.

2. **Parent and Child § 1.6— termination of parental rights—consideration of prior order of neglect—prior order not determinative**

Although a prior order of child neglect is admissible in subsequent proceedings to terminate parental rights, the prior order alone is not determinative on the issue of neglect, and the trial court must make an independent determination of whether neglect authorizing the termination of parental rights existed at the time of the hearing, which determination was made by the court in this case.

3. **Parent and Child § 1.5— termination of parental rights—prior adjudication of neglect—parents' representation by counsel**

The admissibility of prior orders of child neglect in hearings for termination of parental rights is not conditioned on whether the parents were represented by counsel.

4. **Parent and Child § 1.5— termination of parental rights—admissibility of expert testimony**

The trial court did not err in admitting the testimony of certain expert witnesses to the effect that respondents' parental rights should be terminated, since one witness was tendered as an expert in the field of juvenile protective services and in permanency placing of children, and the other testified as an expert in infant development and permanency planning for children; the substance of the testimony was that the child was in need of permanent placement and a stable home environment; the witnesses were unquestionably in a better position than the trial court to have an opinion on the subject; and the testimony undoubtedly aided the court in making its determination.

5. **Parent and Child § 1.6— termination of parental rights—failure to pay costs of child care—parents incarcerated—subsequent exoneration—no intentional misconduct**

The trial court erred in terminating respondents' parental rights pursuant to G.S. 7A-289.32(4) upon a finding that, while the child was in Department of Social Services custody, the parents had failed to pay a reasonable portion of the cost of the care of the child for a continuous period of six months next preceding the filing of the petition, since both respondents were convicted of manslaughter and were incarcerated for the six months next preceding the filing of the petition; the parents' own misconduct which results in forfeiture of the opportunity to provide for child care ordinarily does not excuse the parents from contributing, but in this case respondents' manslaughter conviction was ultimately reversed; and it therefore could not be said as a matter of law that respondents by their intentional misconduct forfeited the opportunity to contribute toward their child's care.

6. **Parent and Child § 1.6; Attorneys at Law § 5— termination of parental rights —one attorney for both parents—sufficiency of evidence against both parents**

Respondents in an action to terminate parental rights could not complain that the trial court erred in failing to appoint separate attorneys for each respondent and that the court was predisposed to decide the case for or against respondents as a couple, since respondents failed to make any objection at the time of appointment of counsel; the record contained sufficient competent evidence to terminate the parental rights of both respondents; and there was no indication that the trial court treated respondents as a couple rather than as individuals.

APPEAL by respondents from *Tate, Judge*. Judgment entered 24 August 1983 in District Court, CALDWELL County. Heard in the Court of Appeals 25 October 1984.

This appeal arises from a petition filed on 8 March 1983 by the Caldwell County Department of Social Services (DSS) to terminate the parental rights of respondents Joseph A. Byrd and Sheree S. Byrd in their minor child, Yavonka Byrd. Yavonka was born on 4 November 1978 and first came into the custody of the DSS in December 1978, following unexplained physical injuries which required her hospitalization. On 15 December 1978 the DSS filed a juvenile petition seeking to have Yavonka adjudicated a neglected child, which was allowed on 7 February 1979. Yavonka has remained in DSS custody since December 1978, although she was placed with respondents during the periods from 4 April 1979 to 6 June 1979, and from 13 June 1979 to 27 June 1979, when she was again removed from her parents and hospitalized.

On 21 January 1982, respondents were convicted of manslaughter in connection with the death of their son, JoVon Byrd. The conviction was ultimately reversed, *State v. Byrd*, 60 N.C. App. 624, 300 S.E. 2d 49, *rev'd*, 309 N.C. 132, 305 S.E. 2d 724 (1983), but respondents were incarcerated from the time of their conviction until after the hearing in this matter.

Respondents were, however, present at the hearing, which was held at successive sessions of district court on 6 July, 13 July, 27 July, and 3 August 1983. Based upon evidence offered by the parties at the hearing and upon its review of the court records of Yavonka Byrd, the trial court entered its order terminating respondents' parental rights on 24 August 1983. From this order, respondents appeal.

Whisnant, Simmons, and Groome, by H. Houston Groome, Jr., and Fred D. Pike, for petitioner appellee.

Carroll D. Tuttle for respondent appellants.

No brief for guardian ad litem, Beverly T. Beal.

EAGLES, Judge.

The trial court terminated the parental rights of respondents pursuant to G.S. 7A-289.32(2) and (4). We find that although parental rights were validly terminated pursuant to G.S. 7A-289.32(2), the evidence and findings did not support a termination under G.S. 7A-289.32(4). A valid finding of one of the statutorily enumerated grounds is sufficient to support an order terminating parental rights. *In re Pierce*, 67 N.C. App. 257, 312 S.E. 2d 900 (1984). Accordingly, we affirm.

[1] Respondents first assign error to the admission into evidence of the court file on Yavonka Byrd, particularly of Judge Edward Crotty's 7 February 1979 order adjudicating Yavonka to be a neglected child. As to the court file generally, a court may take judicial notice of earlier proceedings in the same cause. *In re Stokes*, 29 N.C. App. 283, 224 S.E. 2d 300 (1976). *See generally* 1 Stansbury's N.C. Evidence § 13, § 153 (2d rev. ed. 1982) (court records exception to hearsay rule). The court file was properly admitted into evidence. Furthermore, although respondents insist they were somehow prejudiced by its admission, we discern no

prejudice. Finally, it appears from the record that during the hearing, respondents consented to the admission of the file. Counsel for respondents stated in open court that although he objected to any previous orders being considered or adopted by the court, "the Court may certainly take judicial notice of the file."

[2] As to the 7 February 1979 order, a prior adjudication of neglect is admissible in subsequent proceedings to terminate parental rights for neglect. *In re Ballard*, 311 N.C. 708, 319 S.E. 2d 227 (1984). However, respondents contend the trial court failed to consider any evidence of neglect other than that contained in the prior order. Although a prior order of neglect is admissible in subsequent proceedings, the prior order alone is not determinative on the issue of neglect, and the trial court must make an independent determination of whether neglect authorizing the termination of parental rights existed at the time of the hearing. *Ballard, supra.* Contrary to respondents' contention, however, we find that the trial court in fact made an independent determination. The record indicates that Judge Tate expressly recognized the termination hearing to be a "new and separate and independent proceeding," and that he heard evidence, including evidence pertaining to neglect, from both parties. The resulting order reflects that parental rights were terminated for neglect based on both the prior order and on additional evidence adduced at the hearing.

[3] Respondents also argue that the prior order of neglect is not admissible because the parents were not represented by counsel at that time, and cite *In re Norris*, 65 N.C. App. 269, 310 S.E. 2d 25 (1983), *cert. denied*, 310 N.C. 744, 315 S.E. 2d 703 (1984). This issue was not reached in *Norris.* Rather, the fact that respondents were not represented by counsel at the neglect hearings does not preclude the admission of the prior order into evidence. The admissibility of prior orders is not conditioned on whether the parents were represented by counsel. *Ballard, supra. See also In re Clark*, 303 N.C. 592, 281 S.E. 2d 47 (1981) (in termination proceeding brought prior to 9 August 1981, indigent parent not entitled to counsel as a matter of law).

[4] Respondents next argue that the court erred in admitting the testimony of certain expert witnesses to the effect that the respondents' parental rights should be terminated. They argue

that this testimony invaded the province of the finder of fact. In considering the admissibility of expert opinion testimony, the determinative test is not whether that testimony concerned the ultimate issues and thereby invaded the province of the finder of fact, but rather "whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the finder of fact." *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E. 2d 905, 911 (1978).

The testimony of the two witnesses to which respondents attribute error is as follows: Doris Conn, a former DSS employee, was tendered as an expert in the field of juvenile protective services and in permanency placing of children. She testified that she had worked with Yavonka Byrd from December 1978 to March 1980, and that in her opinion "parental rights should be terminated in order that permanency placement for Yavonka could be completed." Francille Sexton, testifying as an expert in infant development and permanency planning for children, stated that "the parental rights should be terminated and she should be placed in a secure and stable environment," and "that if she could be placed in a permanent environment so that she would feel secure that it would facilitate her development since that was a deterrent in working with her."

The quoted testimony satisfies the test for expert opinion testimony. The substance of the testimony, based on the expertise and knowledge of the witnesses, was that Yavonka Byrd was in need of permanent placement and a stable home environment. The witnesses were unquestionably in a better position than the trial court to have an opinion on this subject, and their testimony undoubtedly aided the court in making its determination in this case. Although the better practice would be to have expert witnesses refrain from expressly testifying whether parental rights should be terminated, it was not error for the trial court to admit this testimony. We overrule this assignment of error.

Respondents also contend that it was prejudicial error for the trial court to have admitted the testimony of Ms. Sexton because her testimony was based in part on reports and records concerning an evaluation of Yavonka by a multi-disciplinary team at the Western Carolina Center in Morganton. They further ar-

gue that it was error to admit the records and reports into evidence. Francille Sexton was the team coordinator for Yavonka's evaluation; she also personally conducted diagnostic evaluations of Yavonka. She testified that she is the custodian of the reports made by the team evaluating Yavonka, and also that she relied on those reports and records in her testimony. There was no error in allowing Ms. Sexton to rely upon the reports in reaching her conclusions. An expert "has wide latitude in gathering information and may base [an] opinion on evidence not otherwise admissible." *State v. DeGregory*, 285 N.C. 122, 203 S.E. 2d 794 (1974).

Nor was it error to admit these documents into evidence on the basis that their contents were inadmissible hearsay. The trial court specifically denied that it was receiving the reports into evidence for proof of what they contained, but was admitting them for the limited purpose "of showing only the general extent of the efforts made to reach and rehabilitate each of the parents of Yavonka and the responses [if] any which were made by Mr. and Mrs. Byrd to those reports." In a similar vein, counsel for petitioner explained that he wished to introduce the reports into evidence only for the purpose of establishing what are essentially the grounds of G.S. 7A-289.32(3). Respondents' parental rights were not terminated pursuant to G.S. 7A-289.32(3), but pursuant to G.S. 7A-289.32(2) and (4). We therefore fail to see how respondents were in any manner prejudiced by the admission of the reports and records.

[5] The trial court also terminated respondents' parental rights pursuant to G.S. 7A-289.32(4), upon a finding that while the child was in DSS custody the parents had failed to pay a reasonable portion of the cost of care of the child for a continuous period of six months next preceding the filing of the petition. Respondents contend their parental rights were improperly terminated under this subsection, and here we agree with respondents.

The record indicates that between 27 June 1979 and 8 March 1983, the date on which the petition was filed, respondents paid a total of $90.00 to the DSS towards the support of their child. The record also contains evidence of Mr. Byrd's employment history between 18 April 1979 and 8 May 1981, and of Mrs. Byrd's employment history between 11 September 1979 and 17 August 1981. On 21 January 1982, however, both respondents were con-

victed of manslaughter, and were incarcerated for the six months next preceding the filing of the petition. The Supreme Court later held that the respondents' motions for dismissal in that case should have been granted, and reversed the Court of Appeals decision affirming the conviction. *State v. Byrd*, 309 N.C. 132, 305 S.E. 2d 724 (1983).

In re Bradley, 57 N.C. App. 475, 291 S.E. 2d 800 (1982), also involved a situation in which the respondent parent was incarcerated during the six months next preceding the filing of the petition. This Court held that where the respondent had been removed from the prison work-release program due to his violation of prison regulations, the trial court did not err in finding he was able to pay an amount greater than zero toward the support of his child:

> Where . . . the parent had an opportunity to provide for some portion of the cost of care of the child, and forfeits that opportunity by his or her own misconduct, such parent will not be heard to assert that he or she has no ability or means to contribute to the child's care and is therefore excused from contributing any amount.

Id. at 479, 291 S.E. 2d at 802-3. What distinguishes the case before us and *Bradley* is that here respondents' conviction was ultimately reversed. Because of this reversal, we cannot say as a matter of law that respondents by their intentional misconduct forfeited the opportunity to contribute towards their child's care.

The respondents next argue that it was error to admit testimony concerning a child other than Yavonka Byrd, in that the testimony erroneously tended to demonstrate respondents' conduct toward Yavonka. Counsel for petitioner asked Joseph Byrd whether his voluntary manslaughter conviction was in connection with the death of his son, JoVon Byrd. Respondent counsel's objection to this question was sustained. Petitioner's counsel continued to question Joseph Byrd concerning JoVon's death. The trial court overruled objections to these further questions. The information elicited from Joseph Byrd during this line of questioning was that it was his belief that JoVon died from natural causes, that the pathologists who conducted the autopsy had conflicting opinions as to cause of death, and that he did not know how his daughter was injured because she was not in his care

when she was injured. Judge Tate then sustained an objection when counsel for petitioner asked Mr. Byrd whether the injuries he observed on Yavonka's body were similar to those of JoVon shortly before his death. Whether or not this line of questioning was proper, no testimony prejudicial to respondents was elicited. The trial court was careful to sustain objections to questions that might have elicited prejudicial information. Additionally, none of the findings of fact contained in the order terminating parental rights indicate that Judge Tate relied on any of the information elicited from this line of questioning. *See State v. Davis*, 290 N.C. 511, 227 S.E. 2d 97 (1976) (findings of fact will be reversed where it affirmatively appears that they are based in whole or in part upon incompetent evidence).

[6] Respondents also contend that the court erred in not appointing a separate attorney for each respondent, suggesting that the trial court was predisposed to decide the case for or against respondents as a couple. Prior to trial, upon a finding of indigency, respondents were appointed counsel by Judge Tate. Respondents failed to make any objection to Judge Tate's action in appointing counsel, which is necessary to preserve the right to appeal. N.C. Rules App. Proc., Rule 10. In any event, respondents' argument is completely unsupported by the record. Respondents were ably represented by their appointed counsel both at trial and on this appeal. The record contains sufficient competent evidence to terminate the parental rights of both respondents. There is no indication the trial court treated Joseph and Sheree Byrd as a couple rather than as individuals. Although some of the factual findings in Judge Tate's order apply to both respondents, others are specifically directed to one or the other respondent.

Finally, respondents make a group of arguments attacking the order in a broadside fashion, contending that the factual findings are not supported by clear, cogent, and convincing evidence, that these findings do not support the conclusions of law, which findings and conclusions do not, in turn, support the judgment. Although respondents have correctly stated the evidentiary standard required to support a judgment terminating parental rights, *see, e.g., In re Montgomery*, 311 N.C. 101, 316 S.E. 2d 246 (1984), we find that as to G.S. 7A-289.32(2) the findings were supported by clear, cogent, and convincing evidence, which findings

supported the trial court's conclusions and judgment. Once a petitioner has met its burden of proof at the adjudication stage, the court moves on to the disposition stage where the decision to terminate parental rights is always discretionary. *Montgomery, supra.* No abuse of discretion occurred here and the judgment appealed from is accordingly

Affirmed.

Chief Judge VAUGHN and Judge BRASWELL concur.

Former Chief Judge VAUGHN concurred in the result reached in this case prior to 31 December 1984.

Judge BRASWELL concurred in the result reached in this case prior to 31 December 1984.

MCLEAN TRUCKING COMPANY v. OCCIDENTAL FIRE & CASUALTY COMPANY OF NORTH CAROLINA AND GARLAND L. WRIGHT

No. 8410SC188

(Filed 15 January 1985)

Insurance § 90— leased truck—driver not in the business of lessor at time of accident.

Defendant lessor of a truck was not "in the business of" plaintiff lessee at the time he was involved in an automobile accident, and plaintiff lessee's insurance policy written by defendant insurance company therefore provided coverage for the accident where defendant made freight deliveries assigned through plaintiff's central dispatch in Winston-Salem; following his deliveries in Florida he contacted central dispatch to determine if other assignments in Florida were available; there were none, so he returned to plaintiff's Laurinburg freight terminal hoping to secure an assignment; there he was informed that no loads were available but might be after the weekend; he was told to call the Laurinburg office on Monday morning to see if potential assignments had materialized; defendant then left plaintiff's terminal and headed for his home in Virginia; and the accident occurred along the way.

APPEAL by defendant from *Smith, Donald L., Judge.* Judgment entered 18 November 1983 in WAKE County Superior Court. Heard in the Court of Appeals 13 November 1984.

Plaintiff McLean Trucking Company [hereinafter McLean], lessee of a tractor trailer truck of defendant-lessor Garland Wright, brought this action for a declaratory judgment under the Uniform Declaratory Judgment Act to establish whether an automobile liability insurance policy issued by defendant Occidental Fire & Casualty Company of North Carolina [hereinafter Occidental] naming defendant Wright as insured afforded coverage for claims arising from an accident involving Wright's truck. Both parties moved for summary judgment. The trial court granted summary judgment to plaintiff, finding defendant Occidental's policy afforded coverage, and denied defendant Occidental's motion for summary judgment.

Defendant Occidental appealed.

Tharrington, Smith & Hargrove, by John R. Edwards and J. Anthony Penry, for plaintiff.

Moore, Ragsdale, Liggett, Ray & Foley, P.A., by Peter M. Foley and Robert H. Merritt, Jr., for defendant.

WELLS, Judge.

The sole issue in this appeal is whether, as a matter of law, defendant Wright was using his tractor trailer "in the business of any person or organization to whom the automobile is rented" when he collided with another vehicle after leaving plaintiff's terminal in Laurinburg, North Carolina en route to his home in Broadnax, Virginia. If defendant Wright was "in the business of" plaintiff, defendant Occidental's automobile liability insurance policy excluded coverage; if he was not "in the business of" plaintiff, defendant Occidental's insurance policy afforded coverage. Defendant contends that (1) the plain language of the insurance policy and facts surrounding the accident place defendant Wright "in the business of" plaintiff, (2) the Truckmen's Endorsement to the insurance policy required the insured's completed return to the point of origination before coverage was applicable, and (3) that Interstate Commerce Commission regulations required a finding that defendant Wright was "in the business of" plaintiff at the time of the accident. We disagree and affirm the trial court's entry of summary judgment.

Entry of summary judgment is appropriate only when the pleadings, evidence produced through discovery, and affidavits, if any, demonstrate that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Whitten v. AMC/Jeep, Inc.*, 292 N.C. 84, 231 S.E. 2d 891 (1977). The material facts of this case, as summarized below, are undisputed, therefore, the only issue is whether plaintiff is entitled to judgment as a matter of law.

The forecast of evidence in this case is that plaintiff leased a truck operated by defendant Wright for one year, beginning 7 August 1980, with continuation of the contract until termination by notice. The contract required Wright, as the lessor, to provide and maintain the tractor trailer and to furnish a qualified driver subject to the approval of the lessee. Item seven of the contract stated that the rented vehicle "shall be and remain under the complete and exclusive control of the Lessee for the duration of this lease and the driver of said equipment shall be considered the employee of the Lessee for the duration of this lease." Item eight of the lease provided that:

> 8. Lessee shall maintain Public Liability and Property Damage Insurance as well as Workmen's Compensation Insurance and agrees to hold Lessor harmless from any such claim while said equipment is in the actual service of the Lessee; however, Lessor shall maintain at his own expense Public Liability and Property Damage Insurance which shall be effective while the equipment is parked, deadheading, bobtailing or otherwise being operated in any manner other than under or pursuant to specific dispatch instructions from the Lessee; and the Lessor will save Lessee harmless from any loss, claim or liability while the equipment . . . is so used or employed. This shall be construed to mean that the Lessee will not be responsible . . . when the equipment is being used other than in connection with the transportation of freight under its authority and with the authorization of the Lessee, or when the same is being used in any manner except under and pursuant to dispatch instructions of the Lessee.

The terms of the contract required plaintiff to procure the insurance coverage required of defendant Wright and charge its cost to the latter.

In accordance with the lease agreement, plaintiff acquired automobile liability insurance for defendant Wright, as a named insured, under plaintiff's existing fleet insurance policy with defendant Occidental. A policy endorsement, denominated Truckmen—Insurance For Non-Trucking Use, was made a part of the basic policy. The endorsement provided:

> It is agreed that the insurance with respect to any automobile described herein or designated in the policy as subject to this endorsement applies, subject to the following additional provisions:
>
> 1. The insurance does not cover as an Insured any person or organization, or any agent, or employee or contractor thereof, other than the named Insured, while engaged in the business of transporting property by automobile for others, or while en route for such purpose at the request of any person or organization in such business. . . .
>
> 2. The insurance does not apply:
>
> (a) while the automobile is used to carry property in any business;
>
> (b) while the automobile is being used in the business of any person or organization to whom the automobile is rented.

The parties concede that the policy was in force at the time of defendant Wright's accident.

Defendant Wright had been dispatched from his home to plaintiff's terminal in Wilson, North Carolina, to deliver freight in New Jersey. From New Jersey, he was dispatched to Miami and Jacksonville, Florida. Having unloaded in Jacksonville, defendant Wright telephoned plaintiff's central dispatcher in Winston-Salem as required by company operating procedure to await further dispatch. There being no freight available for transport, he proceeded to Laurinburg, North Carolina pulling an empty trailer (in industry parlance "deadheading") at his own volition and without instruction from plaintiff to do so. Defendant Wright arrived on Thursday, January 29, 1981, but failed to obtain another assignment on the following day. Plaintiff's Laurinburg dispatcher advised defendant Wright that an assignment might be forthcoming

from Wilson on Monday and paid him a $100 advancement against services already rendered. Defendant Wright, at his election and without plaintiff's instruction, proceeded to his home in Broadnax, Virginia. En route, defendant Wright collided with a Greyhound bus in Nash County, resulting in multiple civil actions against defendant Wright and plaintiff.

Defendant Occidental appears to argue, *citing e.g. Rodriguez v. Ager*, 705 F. 2d 1229 (10th Cir. 1983); *Simmons v. King*, 478 F. 2d 857 (5th Cir. 1973), that Interstate Commerce Commission [hereinafter I.C.C.] regulations requiring the plaintiff lessee to contractually assume exclusive possession and control of defendant Wright throughout the contract mandates our finding that he was in the business of plaintiff at the time of the accident. We disagree. The decisions cited by defendant Occidental are inapposite to the question before this court.

The I.C.C. has broad regulatory authority to regulate the type of lease agreement entered into between plaintiff and defendant Wright to require "that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof . . . as if they are the owners of such vehicles. . . ." 49 U.S.C. § 304(e)(2) (1963). By regulation the I.C.C. requires that the lease:

> shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility thereto, by the lessee for the duration of said contract, lease or other arrangement. . . .
>
> . . .
>
> The authorized carrier operating equipment under this part shall remove any legend, showing it as the operating carrier, displayed on such equipment, and shall remove any removeable device showing it as the operating carrier, before relinquishing possession of the equipment.

49 C.F.R. § 1057.4(a)(4) and (d)(2) (1978). The I.C.C. regulations modify the common law doctrine of *respondeat superior* applicable to independent contractors as public policy imposes strict liability on the lessee motor carrier. *American Trucking Assos. v.*

U.S., 344 U.S. 298 (1953) (discussion of policy reasons for imposing strict liability).

The decision in *Rodriguez* merely held that so long as a lessor operated under a motor carrier's I.C.C. authority and bearing the freight carrier's legends that liability is imposed on the carrier-lessee. The *Rodriguez* court was responding to several decisions, *e.g. Wilcox v. Transamerican Freight Lines, Inc.*, 371 F. 2d 403 (6th Cir. 1967) (per curiam), *cert. denied*, 387 U.S. 931 (1967), in which it was held that strict liability to third parties would be imposed on the carrier-lessee only when the lessor was operating in business of the carrier-lessee. Plaintiff McLean's liability for the acts of defendant Wright is not the issue before this court.

The issue we must decide is whether defendant Occidental's insurance policy provided coverage if liability is ultimately imposed on plaintiff. While plaintiff may be held strictly liable to third parties, the I.C.C. regulations do not prevent plaintiff from allocating its risk through insurance or indemnification agreements with a lessor. *Transamerican Freight v. Brada Miller*, 423 U.S. 28 (1975) (indemnity); *American Interinsurance v. Commercial U. Assur.*, 605 F. 2d 731 (4th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980) (in context of South Carolina Public Service Commission regulations).

Defendant next argues that based on the facts, plain meaning of the policy provisions, and uniform interpretation of the insurance contract no coverage is provided. We disagree. Because defendant insurer did not specifically or by reference incorporate the applicable I.C.C. regulations into its policy to define the phrase "in the business of" to the same extent as strict liability may be applied, we must apply time honored principles of insurance contract construction consistently with the context in which the phrase is used and its meaning accorded it in its ordinary use. *Maddox v. Insurance Co.*, 303 N.C. 648, 280 S.E. 2d 907 (1981); *Woods v. Insurance Co.*, 295 N.C. 500, 246 S.E. 2d 773 (1978); *see also St. Paul Fire & Marine Ins. Co. v. Frankart*, 69 Ill. 2d 209, 370 N.E. 2d 1058 (1977); *Simpkins v. Protective Ins. Co.*, 94 Ill. App. 3d 951, 419 N.E. 2d 557 (1981).

The contract language at issue has been interpreted differently in several jurisdictions. *E.g. St. Paul Fire & Marine Ins. Co. v. Frankart, supra* ("in business of" until lessor returns to

origin of haul, terminal where haul assigned, or lessor's home terminal); *Brun v. George W. Brown, Inc.*, 289 N.Y.S. 2d 722 (App. Div. 1968) (coverage under policy only when tractor is being delivered to or returned from lessee and unattached to trailer carrying freight). We find that the language of the insurance contract in question is ambiguous. In reaching our decision therefore:

> [T]he goal of construction is to arrive at the intent of the parties when the policy was issued. . . . The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder.

Woods v. Insurance Co., supra.

Applying the principles above, we find that the phrase "in the business of" is best defined in the common law doctrine of *respondeat superior.* It is axiomatic that in order to predicate liability under this doctrine the employee would have to be within the scope of employment, furthering the business of the employer at the time of the accident, therefore, "in the business of" the lessee. *Passmore v. Smith*, 266 N.C. 717, 147 S.E. 2d 238 (1966). The law in this state is equally clear that an employee is not engaged in the business of the employer while driving home from his place of employment. *Ellis v. Service Co., Inc.*, 240 N.C. 453, 82 S.E. 2d 419 (1954). Defendant Wright, following his deliveries in Florida, followed normal procedure and contacted plaintiff's central dispatch to determine if other assignments in Florida were available. With no assignments available, he returned to plaintiff's Laurinburg freight terminal hoping to secure an assignment. There, he was informed that no loads were available but loads might be available in Atlanta, Charlotte and Wilson on Monday. Defendant Wright was not assigned to any of these potential assignments and was told to call the Laurinburg terminal Monday morning to confirm if the potential assignment in Wilson had materialized as the Wilson terminal is in the Laurinburg operating district. Defendant Wright secured, under plaintiff's procedures, a $100 advance against freight already transported by defendant but not yet paid. Defendant left and the accident oc-

curred as defendant Wright returned home. Under these undisputed facts, we hold, that for the purpose of defendant Occidental's insurance policy, defendant Wright was not in the business of plaintiff at the time of the accident.

Defendant Occidental argued that defendant Wright was in the business of plaintiff until such time as he returned to his home in Virginia *citing St. Paul Fire & Marine Ins. Co. v. Frankart, supra.* The *Frankart* court held that for the purpose of insurance coverage the driver-lessor is "in the business of" the motor-carrier lessee "at least until the owner-driver returns to the point where the haul originated . . ., to the terminal from which the haul was assigned . . ., or to the owner-driver's home terminal from which he customarily obtained his next assignment. . . ." *Id.* Under the facts before us, defendant Wright's deposition reflects that the Laurinburg terminal and plaintiff's central dispatch in Winston-Salem were responsible for making assignments out of the Wilson terminal. Even though defendant had received his original assignment out of the Wilson terminal from central dispatch in Winston-Salem, when defendant Wright returned to Laurinburg he had essentially returned to the terminal from which the freight was assigned.

The grant of summary judgment by the trial court is hereby

Affirmed.

Judges ARNOLD and BECTON concur.

COLE FREEMAN v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY

No. 8422SC300

(Filed 15 January 1985)

1. Evidence § 12— husband's threats—wife's testimony not excluded under husband-wife privilege

In an action to recover on a fire insurance policy where defendant alleged that plaintiff burned his house for the fraudulent purpose of collecting insurance benefits, the trial court did not err in refusing to exclude, on the ground that it was protected by the husband-wife privilege, plaintiff's wife's

testimony that plaintiff threatened her and threatened to burn down their house.

2. **Appeal and Error § 48— objectionable evidence—similar evidence not objected to—no prejudice**

Plaintiff was not prejudiced by testimony that he had beaten his wife in the past, testimony as to why plaintiff's wife asked him if he had burned their house, and testimony by a former neighbor about statements made by plaintiff's wife, since there was other similar evidence to which plaintiff did not object.

3. **Insurance § 121— fire insurance—intentional burning—sufficiency of evidence**

In an action to recover on a fire insurance policy evidence was sufficient to submit the issue of intentional burning to the jury, though defendant could not show that plaintiff was at the scene of the fire when it occurred, where there was evidence of plaintiff's lack of income, prior threats by plaintiff to burn his property, a prior attempt by plaintiff to procure someone to burn his house, previous fires where plaintiff collected insurance benefits, one unsuccessful attempt to collect benefits for smoke damage, incendiary origin, and plaintiff's access to his house.

APPEAL by plaintiff from *Lewis* [*J. B., Jr.*], *Judge*. Judgment entered 27 October 1983 in Superior Court, DAVIE County. Heard in the Court of Appeals 27 November 1984.

On 22 July 1980 defendant insurer issued a policy to plaintiff and his wife insuring their dwelling located in Mocksville, North Carolina. The house was destroyed by fire on 30 April 1981, and defendant denied liability. Plaintiff thereafter sued defendant for judgment of $23,881.50. In its answer defendant alleged as a defense that plaintiff intentionally caused or acquiesced in the fire for the fraudulent purpose of collecting insurance benefits. Defendant also filed a counterclaim against plaintiff for recovery of the benefits paid to plaintiff's wife. Plaintiff appeals from the judgment ordering that plaintiff recover nothing and that defendant recover on its counterclaim.

Hall and Vogler, by William E. Hall, for plaintiff appellant.

Yates, Fleishman, McLamb & Weyher, by Joseph W. Yates, III, and Barbara B. Weyher, for defendant appellee.

ARNOLD, Judge.

Plaintiff has assigned errors to the admission of evidence and to the denial of his motions for directed verdict and judgment not-

withstanding the verdict. We have carefully reviewed each assignment of error and find no prejudicial error.

[1] Plaintiff first assigns error to the admission of the following testimony elicited from his wife by the defendant:

Q. State whether or not he ever made threats to you?

MR. MORGAN: OBJECTION, husband and wife privilege, Your Honor.

COURT: OVERRULED.

A. Yes.

Q. State whether or not he's ever threatened to burn the house down.

MR. HALL: OBJECT.

COURT: OVERRULED.

A. Yes, sir.

Q. On more than one occasion?

MR. HALL: OBJECT.

A. Yes, sir.

I have left him on other occasions.

Q. Did he threaten to burn the house down on any other occasion when you left?

MR. HALL: OBJECT.

COURT: OVERRULED.

A. I don't remember if it was the times I had left or not, but it was just a thing when he got drunk, he would say it.

. . . .

Q. State whether or not you ever heard Mr. Freeman make any remarks about causing damage to that trailer if it was not moved.

MR. HALL: OBJECT.

COURT: If you heard that.

MR. YATES: Yes.

COURT: OVERRULED.

A. Yes.

Q. What did he say on those occasions?

A. He would just say I'm going to burn the whole place up, or something like that.

Plaintiff argues that the foregoing testimony should have been excluded because of the husband-wife privilege. We disagree.

G.S. 8-56 provides that in any civil action, except as herein specified, the husband or wife of any party in the action or of any person in whose behalf the action is brought, prosecuted, opposed or defended, is competent and compellable to be a witness on behalf of any party to such action. The statute then provides that the privilege applies to actions in consequence of adultery or criminal conversation. The statute emphasizes that "[n]o husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage." Plaintiff argues that his wife's testimony involved confidential communications and was therefore erroneously admitted.

Our Supreme Court recently defined "confidential communication" as one that is "induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship." *State v. Freeman*, 302 N.C. 591, 598, 276 S.E. 2d 450, 454 (1981). Although the Court in *Freeman* was confronted with the application of the husband-wife privilege in a criminal case, the court formed its definition of "confidential communication" by applying the guidelines set out in decisions interpreting the term under G.S. 8-56. *See id.; see also Wright v. Wright*, 281 N.C. 159, 188 S.E. 2d 317 (1972); *Hicks v. Hicks*, 271 N.C. 204, 155 S.E. 2d 799 (1967); *McCoy v. Justice*, 199 N.C. 602, 155 S.E. 452 (1930). *Cf. State v. Freeman*, 197 N.C. 376, 148 S.E. 450 (1929) (conversation between defendant and wife in the presence of an arresting officer not confidential).

In the case before us it would be absurd to label testimony of threats made by plaintiff to his wife a confidential communication. Clearly such communication was not induced by any affection,

confidence or loyalty between plaintiff and his wife. We further find that his wife's testimony, that plaintiff would threaten to burn down the house and her mother's trailer whenever he was drunk, was not a confidential communication. Former neighbors of plaintiff and his wife testified that they had also heard plaintiff threaten to burn down "the hill" whenever he was drunk. Plaintiff's house, the trailer and the former neighbors' house were located on this hill.

[2] Plaintiff next argues that the trial court erred in allowing his wife to testify that plaintiff had beaten her in the past. He contends that this evidence was irrelevant and clearly prejudicial. We agree that this testimony was irrelevant; however, we do not find that plaintiff was prejudiced by its admission. Furthermore, plaintiff waived his objection to this testimony when he failed to object to testimony of a former neighbor that she had observed plaintiff assault his wife. "Exception to the admission of testimony is waived when testimony of the same import is thereafter admitted without objection. (Citation omitted.)" *McNeil v. Williams*, 16 N.C. App. 322, 324, 191 S.E. 2d 916, 918 (1972).

We also find no error to the question posed to plaintiff's wife regarding why she asked plaintiff if he had burned their house. She answered, "Because I thought he might have." Plaintiff's wife had already testified that plaintiff had threatened to burn their house on more than one occasion. There was also testimony of other witnesses, admitted without objection, that plaintiff's wife had told them she knew plaintiff was going to burn the house.

Plaintiff next argues that the trial court erroneously allowed a former neighbor, Lois Broadway, to testify about statements made by plaintiff's wife. He contends that Ms. Broadway's testimony was inadmissible because it did not corroborate the testimony of plaintiff's wife.

We first note that portions of Ms. Broadway's testimony were not objected to and are therefore not preserved for review by this Court. App. R. 10(a). Objection was taken solely to the following testimony:

> Q. What, if any conversation do you recall at Evelina Taylor's house between you and Opal [plaintiff's wife]—by Opal in your presence?

A. Well, Opal was real distraught, she was real emotional. She was pacing the floor and everything. She said, like, well he finally did it. Or, you know, comments like that.

MR. HALL: OBJECTION, Your Honor, not corroborative to anything said by Opal.

COURT: OVERRULED.

The record on appeal shows that plaintiff's wife had earlier testified that she found out about the fire while she was staying at the Taylor house; that she was "real upset" and that she told the law enforcement officers who came to the Taylor house that plaintiff had threatened to burn the house before. Although there are some variances in the corroborative testimony, they are not sufficient to render the testimony inadmissible. *See State v. Mayhand*, 298 N.C. 418, 425, 259 S.E. 2d 231, 236-37 (1979). Also, other witnesses to the statements made at the Taylor house testified that plaintiff's wife made these statements. Since no objections were made to the witnesses' testimony, plaintiff has not been prejudiced.

[3] Plaintiff's remaining assignment of error goes to the denial of his motions for directed verdict and for judgment notwithstanding the verdict. Plaintiff contends that even when the evidence is viewed in the light most favorable to the defendant the defendant failed to prove that plaintiff caused a fire at his home. Plaintiff specifically contends that the North Carolina courts should require an insurer to show proof of opportunity to set the fire before relying on the defense of intentional burning and that defendant failed to show such opportunity because there was no testimony that plaintiff or someone he procured was at the scene of the fire at the time of its inception. We find such a requirement to be too stringent.

In North Carolina, circumstantial evidence can be sufficient to prove an intentional burning. In *Fowler-Barham Ford v. Insurance Co. and Fowler v. Insurance Co.*, 45 N.C. App. 625, 263 S.E. 2d 825, *disc. rev. denied*, 300 N.C. 372, 267 S.E. 2d 675 (1980), we emphasized that:

> Ordinarily, there is no direct evidence of the cause of a fire, and therefore, causation must be established by cir-

> cumstantial evidence. *See Stone v. Texas Co.*, 180 N.C. 546, 105 S.E. 425 (1920). It is true that there must be a causal connection between the fire and its supposed origin, but this may be shown by reasonable inference from the admitted or known facts. *Simmons v. Lumber Co.*, 174 N.C. 221, 93 S.E. 736 (1917). The evidence must show that the more reasonable probability is that the fire was caused by the plaintiffs or an instrumentality solely within their control. *See Simmons v. Lumber Co., supra; Collins v. Furniture Co.*, 16 N.C. App. 690, 193 S.E. 2d 284 (1972).

Id. at 628, 263 S.E. 2d at 827-828. In *Fowler-Barham Ford* we found that the trial court properly denied the plaintiffs' motion for directed verdict because plaintiffs had the opportunity to have acquiesced in or to have controlled the fire since plaintiff Fowler was present and alone at his dealership when the fire occurred; plaintiffs had a motive for the fire because they were in financial straits; and testimony showed the fire was incendiary. When these circumstances were viewed together, we found them sufficient to submit the issue to the jury.

Defendant here presented an expert in the field of fire investigation who testified that in his opinion the fire was incendiary. Moreover, plaintiff conceded incendiary origin in his brief. Defendant presented further evidence that plaintiff had no income in the year preceding the fire, that his wife was the sole source of income having earned approximately $5,000 the preceding year, and that she left plaintiff three days before the fire. The evidence showed that plaintiff had access to his dwelling and was the last person to have been there prior to the fire. There was evidence that plaintiff had previously threatened to burn his property, that he had previously submitted a claim for smoke damage to his house and was denied insurance benefits and that he had recovered benefits in the past when two of his cars burned. Finally, defendant presented the testimony of Ernest Cranford, an acquaintance of plaintiff. Cranford testified that approximately 10 months before the fire, plaintiff offered him $3,000 to burn his house, and that plaintiff had told Cranford he burned one of his cars in order to collect insurance.

The plaintiff denied making any threats to burn his property or attempting to procure Cranford or anyone else to burn his

house. He further testified that he left his house around 8:00 p.m. on the night of the fire and returned at 1:00 a.m. Firemen had been alerted to the fire at 10:00 p.m., and were still at the scene when plaintiff returned home.

To establish the defense of an intentional burning by an insured, the defendant must prove that the property was intentionally burned and that the insured participated either directly or indirectly in its burning. Plaintiff's motive and opportunity are merely circumstances to be considered in determining whether there has been an intentional burning by the insured or someone procured by him. They are not essential elements of the defense. Here defendant showed motive by presenting evidence of plaintiff's lack of income. Other circumstances for the jury to consider were prior threats by plaintiff to burn his property, a prior attempt by plaintiff to procure someone to burn his house, previous fires where plaintiff collected insurance benefits, one unsuccessful attempt to collect benefits for smoke damage, and incendiary origin. The fact that defendant could not show that plaintiff was at the scene of the fire when it occurred, merely goes to the weight of defendant's evidence. In light of the other circumstances shown by defendant and the fact that plaintiff had access to his house and was the last person to have been there prior to the fire, the jury could reasonably infer that plaintiff caused the fire.

The foregoing evidence presented by defendant was sufficient to submit the issue of intentional burning to the jury, and it was the duty of the jury to weigh this evidence and to determine the credibility of the witnesses. The trial court, therefore, properly denied plaintiff's motions for directed verdict and judgment notwithstanding the verdict.

No error.

Judges WELLS and BECTON concur.

STATE OF NORTH CAROLINA v. BOBBY ALLEN RAINES

No. 8428SC194

(Filed 15 January 1985)

1. **Rape § 1— physical force—more required than sexual act itself**

Physical force as that phrase is generally understood in sexual offense and kindred cases requires more than the physical touching which constitutes the sexual act itself.

2. **Rape § 5— patient allegedly raped by nurse—insufficient evidence of physical or constructive force**

In a prosecution of defendant nurse for second degree rape and second degree sexual offense of one of the patients under his care, the trial court erred in denying defendant's motion to dismiss where there was no evidence of physical force or constructive force which could reasonably and understandably generate fear in the prosecuting witness, nor was she physically helpless.

APPEAL by defendant from *Lewis, Judge.* Judgment entered 31 October 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 18 October 1984.

Attorney General Rufus Edmisten, by Assistant Attorney General Alfred N. Salley, for the State.

Elmore & Powell, P.A., by Bruce A. Elmore, Sr. and Ronald W. Mack, for defendant appellant.

BECTON, Judge.

The defendant, Bobby Allen Raines, a charge nurse at Memorial Mission Hospital in Asheville, North Carolina, was charged with second-degree rape and second-degree sexual offense of one of the patients under his care. The trial court submitted the case to the jury on alternative theories that the defendant raped and committed a second-degree sexual offense on the victim: (1) "by force and against her will" or (2) who was "physically helpless." The defendant was found not guilty of rape; however, the jury convicted the defendant of the second-degree sexual offense "by force and against her will" and found that the victim was not "physically helpless." From a judgment imposing the presumptive sentence of twelve years for the Class D felony, defendant appeals.

I

The prosecuting witness was admitted to the emergency room of Memorial Mission Hospital on 13 July 1983 at approximately 10:00 a.m. with migraine headaches. Later, she was transferred to the intensive care unit because she was extremely nauseated and having seizures. At all relevant times, she was "hooked up" to an I.V. and to heart monitoring equipment.

When the defendant first saw the prosecuting witness at approximately 7:15 p.m., she was vomiting, and, according to the defendant, he gave her an injection of torecan, an anti-nausea drug, although he did not note this on the patient's chart nor report it to his head nurse the following morning.

The prosecuting witness suggested that twice during the night the defendant put something in her I.V. which caused a burning sensation, and testified that defendant thereafter twice placed his hand in her vagina and attempted to rape her, succeeding the second time. The prosecuting witness admitted that she never saw the defendant give her an injection and that she merely saw him stand over her with his hands "in a position on the I.V." She did not allege any physical force, nor did she resist his advances in any way. Between the first and second incidents, the prosecuting witness' doctor checked on her, but she did not report the incident to him although she spoke with him. The prosecuting witness denied seeing any nurse other than the defendant in her room.

The defendant admitted that he, as well as two other nurses, purged and adjusted the prosecuting witness' I.V. numerous times and that he took her temperature rectally during the night. Defendant denies injecting her with anything other than an anti-nausea drug and, further, denies making any sexual advances. Two nurses testified, corroborating defendant's testimony concerning purging and adjusting the I.V.

An examination of the prosecuting witness' gown and the bedsheet revealed the presence of sperm. An analysis of the semen on the bedsheet and on her gown showed no A.B.O. reaction and showed a P.G.M. reaction of one. An analysis of the vaginal swabs revealed no A.B.O. or P.G.M. reaction. The prosecutrix's A.B.O. blood type was determined to be O secretor with a P.G.M.

group one. Her husband's A.B.O. type was determined to be O non-secretor, P.G.M. group two-one. The defendant's A.B.O. type was determined to be A non-secretor, P.G.M. one. However, the forensic serologist who testified for the State could draw "no conclusion . . . as to the A.B.O. or P.G.M. blood group of the donor of the semen." The serologist further testified:

> A. I cannot say that this individual contributed. I cannot say that this person did contribute the semen that was found.
>
> Q. In fact, sir, wouldn't there be hundreds of millions of men that could have contributed this as far as their body fluids are concerned?
>
> A. Given the results on the bed sheet, as well as on the hospital gown, taking into consideration the population frequency of members of the population that are P.G.M. Group 1, approximately 58 percent of the male population are P.G.M. Group 1.
>
> Q. Thank you. I believe the world population is about four billion right now. Now, the P.G.M. reactions can come from vaginal fluids as well as the male fluid, isn't that right?
>
> A. That is correct.
>
> Q. So it is. And I'll ask you if the P.G.M. reaction that you got on the bed sheet were consistent with her vaginal fluids?
>
> A. The P.G.M. blood group, Type 1 reaction, which was obtained from the bed sheet and the hospital gown is consistent with both Sarah Grindstaff and Bobby Raines.

II

On appeal, defendant contends that the trial court erred: (1) in failing to grant his motion to dismiss because there is no evidence of physical or constructive force; (2) in failing to instruct the jury that before fear, fright, or duress could replace physical force in satisfying the elements of a forcible sexual offense, such fear, fright or duress must have been *reasonably* induced; (3) by instructing the jury that the scientific examination of the semen excluded every male except the defendant; and (4) in failing to instruct the jury that defense counsel's stipulation was merely a chain of custody stipulation and was in no way intended as an ad-

mission to the conclusiveness or effectiveness of the scientific tests.

For the reasons that follow, we reverse.

III

N.C. Gen. Stat. Sec. 14-27.5 (1981), in pertinent part, provides:

> (a) A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally defective, mentally incapacitated, or physically helpless.

[1] *Physical force*, as that phrase is generally understood in sexual offense and kindred cases, was absent in this case. And, we decline to accept the State's invitation to expand the "physical force" doctrine and bring within its ambit the conduct—the physical touching—that constitutes the "sexual act" itself in this case. In other words, we reject the argument set forth in the State's brief that "[a]s to the second-degree sexual offense, the assailant had used the necessary force to complete the act before his victim had an opportunity to resist or even to become frightened . . . [and] should not be heard to say that because he deliberately surprised his victim and attacked her completely without warning" that he is not guilty.

Whether *constructive force*, as the phrase has been judicially interpreted, was present in this case is a more difficult question. The "by force and against the will" language in G.S. Sec. 14-27.5 (1981) comes from the common law definition of rape. "This phrase as used in all these [sexual offense] statutes means the same as it did at common law when it was used to describe some of the elements of rape." *State v. Locklear*, 304 N.C. 534, 539, 284 S.E. 2d 500, 503 (1981). At common law, fear, fright, or coercion could take the place of actual physical force, or, as stated by our Supreme Court: "A threat of serious bodily harm, which reasonably induces fear thereof, constitutes the requisite force and

negates consent." *State v. Burns*, 287 N.C. 102, 116, 214 S.E. 2d 56, 65, *cert. denied*, 423 U.S. 933, 46 L.Ed. 2d 264, 96 S.Ct. 288 (1975).

> Likewise under our sexual offense statutes, actual physical force is not required to satisfy the statutory requirement that the sexual act be committed 'by force and against the will' of the victim. *Fear of serious bodily harm reasonably engendered by threats* or other actions of a defendant *and which causes the victim to consent* to the sexual act takes the place of force and negates the consent. (Emphasis added.)

State v. Locklear, 304 N.C. at 540, 284 S.E. 2d at 503.

This long-revered definition of constructive force may explain why the State, in its brief, sought to characterize this case as one involving "physical force" and to summarily respond to, or sidestep, defendant's argument that the evidence of "constructive force" was insufficient to take the case to the jury. Dealing with defendant's argument in one sentence, the State, in its brief, states: "Although the State disagrees with appellant as to whether the victim was reasonably put in fear and as to the effect of the exclusion of the suggested qualifying phrase from the court's charge, it suggests that the question of 'constructive' force does not arise." The State obviously realized that fear, fright, or coercion must be reasonably induced before it can replace actual physical force. Indeed, in every constructive force case cited by the district attorney at trial, there was, at least, a threat of physical force, and, in most of the cases, there was actual physical force which preceded or constituted the threat that further force would follow if the victim would not succumb. *State v. Hines*, 286 N.C. 377, 211 S.E. 2d 201 (1975); *State v. Primes*, 275 N.C. 61, 165 S.E. 2d 225 (1969); *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44 (1967); *State v. Carter*, 265 N.C. 626, 144 S.E. 2d 826 (1965); *State v. Thompson*, 227 N.C. 19, 40 S.E. 2d 620 (1946).

In the case before us, there was neither the threat of physical force nor any actual force preceding or constituting a threat. The sexual acts, which the jury found that the defendant committed, were reprehensible and criminal. And, arguably, the legislature intended to include defendant's conduct within the statutory perimeters, but the facts of this case do not neatly fit the "by

fear and against the will" language of G.S. Sec. 14-27.5 (1981). Significantly, the jury, in its special verdict, specifically found that defendant did *not* commit a sexual act on a person who was *physically helpless*. Equally important is the recognition that a genuine threat of force with resulting physical and psychological stress can sometimes be more traumatic than the degrading act it precedes. For example, some would be more traumatized and unnerved by a genuine threat of serious bodily injury to them or their children than by a reprehensible touching of the genitals as on a crowded elevator or in a swimming pool. And the legislature has, in sexual offense cases as well as in other areas of the law, made distinctions and, indeed, gradations, depending on the use or threatened use of force. Most important, however, is N.C. Gen. Stat. Sec. 14-27.7 (1981), which covers felonious sexual activity with a person over whom defendant or his employer had assumed custody. Consent is no defense to a charge under this statute, which, in relevant part, provides that

> if a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a class G felony.

Id.

[2] On the peculiar facts of this case in which the jury found defendant not guilty of rape and not guilty of second-degree sexual offense on a person who was "physically helpless," and in which there is no evidence of actual physical force or of constructive force which could reasonably and understandably generate fear in the prosecuting witness, we have determined that the trial court erred in denying the defendant's motion for nonsuit.

IV

It is not necessary to address defendant's remaining assignments of error since they are not likely to arise even if the State elects to proceed against defendant under G.S. Sec. 14-27.7 (1981).

For the reasons stated above, we

Reverse.

Judges HEDRICK and PHILLIPS concur.

GRADY B. BEAVER AND WIFE, RUBY MARLOWE BEAVER v. RICHARD P. HANCOCK, M.D.

No. 8422SC308

(Filed 15 January 1985)

Physicians, Surgeons and Allied Professions § 14— malpractice—failure of plaintiff to offer any medical expert testimony—summary judgment proper

The trial court in a medical malpractice case properly granted summary judgment for defendant where plaintiff alleged that defendant was negligent in using wire sutures to close plaintiff's incision, leaving a loose piece of wire suture in plaintiff's body, and failing to discover, diagnose, or remove loose sutures from plaintiff's body; to establish any of these elements of negligence, plaintiff would have to rely in part on the testimony of other physicians who either diagnosed or treated plaintiff subsequent to the operation performed by defendant; to establish the standard of care owed to plaintiff and that defendant violated that standard, plaintiff would have to offer expert testimony; and plaintiff did not furnish the affidavits of any medical witnesses and indicated that he did not intend to rely on their testimony at trial.

APPEAL by plaintiffs from *Collier, Judge*. Judgment entered 19 October 1983 in IREDELL County Superior Court. Heard in the Court of Appeals 27 November 1984.

This is an action for medical malpractice brought by plaintiff Grady Beaver, and for loss of consortium by plaintiff Ruby Beaver (since Ruby Beaver's claim is entirely dependent, for convenience all further references to "plaintiff" herein are to Grady Beaver). Plaintiff experienced gall bladder problems beginning in 1977. Defendant operated on him in February 1978, removing his gall bladder. Defendant used wire sutures to close the peritoneal membrane, *i.e.*, the interior wall of plaintiff's abdomen.

Following the operation, plaintiff reported severe pain and soreness in the area around the incision, returning to the hospital in May 1978. Defendant talked to plaintiff during this stay; x-rays were taken, which faintly showed a loose piece of wire suture below the site of plaintiff's incision. Apparently, defendant did not

see these x-rays. Plaintiff was discharged without further treatment and he continued to experience severe pain. Plaintiff returned to defendant in late June 1978, and was x-rayed again. The x-rays again disclosed the free-floating wire. Defendant operated the next day and removed the loose wire; during the operation, he felt the original incision from inside and did not feel any broken sutures.

Plaintiff still continued to experience severe pain around the site of the original incision, but defendant advised him that the original sutures would not be harmful. Plaintiff consulted other doctors, who conducted tests and concluded that the wire sutures were the cause of plaintiff's pain. A third operation, in February 1979, resulted in the removal of 23 fragments of wire from plaintiff's abdomen. The pain ceased thereafter. Because of his debilitating pain, plaintiff's farm income declined, and he lost a separate position as sales and service agent for a farm equipment company. He also incurred substantial medical expenses.

Plaintiff's allegations of negligence, found in paragraph numbered XIII of the complaint were as follows:

> XIII. That defendant was careless and negligent and failed to meet the reasonable and prudent standard of care that doctor of his training and learning would have exercised in the performance of his care of a patient in that he dropped a 5-centimeter wire in the peritoneum cavity of Grady Beaver and allowed the same to remain free-floating within the peritoneum cavity, and he failed and refused to remove the wire sutures from Grady Beaver which had become symptomatic immediately after the February 1978 operation and remained symptomatic until they were removed from Grady Beaver's body on February 27, 1979; that defendant should have counseled Grady Beaver with respect to removing said wire sutures during the June 1978 operation at the time defendant removed the one free-floating wire suture, and should not have dismissed Grady Beaver as a patient in August of 1978, while he knew, or reasonably should have known, that Grady Beaver was still in great pain and suffering due to the wire sutures breaking loose and becoming symptomatic; that due to his callous attitude and due to his negligent failure to continue treating and working with

Grady Beaver at such time that he knew, or reasonably should have known, that the broken wire sutures around the gall bladder incision site of February of 1978 had broken loose and had become symptomatic, he forced Grady Beaver to go to other physicians and undergo an operation by another physician in February of 1979, incurring medical bills in excess of $3,800.00, and causing him to experience an additional operation at that time for removal of the wire sutures and causing him great pain and suffering until that operation in February of 1979; that defendant should have counselled with Grady Beaver as to the type of sutures that he would close the gall bladder area with during the operation, and given him a choice of the type of sutures and should have warned him of the dangers of using steel sutures.

Plaintiff and his wife filed suit in November 1981, but later took a voluntary dismissal. Plaintiff reinstituted the action in August 1982. Defendant answered, and discovery ensued. Defendant submitted interrogatories, identical to interrogatories submitted in the first action, requesting the names of plaintiff's expert witness(es). Plaintiff did not answer. Upon order of the court, plaintiff answered, in August 1983, that he did not have an expert witness at the time but was actively seeking one. In September 1983 defendant moved for summary judgment supported by the affidavit of Dr. James Fahl.

Defendant's affidavit described his medical education, training, experience, and credentials, and further described defendant's treatment of plaintiff. Defendant stated, in summary, that as a surgeon practicing in Hickory, North Carolina, he removed plaintiff's gall bladder on 21 February 1978. During the course of the operation, defendant closed plaintiff's incision with interrupted wire sutures, a type of suture particularly appropriate for a man of plaintiff's physical characteristics. Defendant's postoperative course was uneventful and defendant was discharged from the hospital on 2 March 1978. Defendant saw plaintiff on 8 March and 19 April 1978. On 12 May 1978, defendant saw plaintiff in the hospital, where plaintiff had been admitted (by Dr. Kurad) for abdominal pain. Defendant examined plaintiff's incision and felt no broken wire sutures. Defendant next saw plaintiff at the hospital on 26 June 1978, when plaintiff advised defendant that plaintiff had a wire suture "somewhere down in his pelvis."

Defendant had an x-ray made, which disclosed a wire suture fragment "lying posterior in the pelvis." Defendant recommended that the suture be removed, which was accomplished in an operation on 27 June 1978. During this operation, defendant reached inside the abdominal cavity up under the peritoneum to the site of the incision, felt the underside of the incision and did not feel any broken sutures from that side. Defendant next saw plaintiff on 26 July 1978. The second incision was well-healed. Plaintiff had multiple complaints, principally of rectal pain. Defendant last saw plaintiff on 6 September 1978, when plaintiff complained of pain at the site of the second incision. Defendant discussed with plaintiff an operation to remove the wire sutures; defendant did not hear further from plaintiff. Defendant concluded his affidavit by stating his opinion that defendant's care and treatment of plaintiff was in accordance with the standards of practice among general surgeons with similar training and experience in Hickory and similar communities.

In his affidavit, Dr. Fahl a Hickory surgeon since 1972, stated that he had reviewed defendant's affidavit with respect to defendant's care and treatment of plaintiff; that he knew the standards of practice among general surgeons practicing in Hickory and similar communities, and that defendant's care and treatment of plaintiff was in accordance with those standards.

Plaintiff filed no opposing affidavit; but indicated that he planned to rely at trial on the history of his care and treatment by defendant to establish defendant's negligence. More particularly, based on demands made by defendant for plaintiff to disclose the names of expert witnesses to be used at trial, plaintiff indicated that he had no expert witnesses and did not plan to call any at trial.

Harris & Pressly, by J. Pressly Mattox, for plaintiffs.

Kennedy, Covington, Lobdell & Hickman, by Charles V. Tompkins, Jr. and Kiran H. Mehta, for defendant.

WELLS, Judge.

Plaintiff failed to place any exceptions or assignments of error in the record. The appeal nonetheless constitutes an exception to the judgment, and presents the question of whether the judg-

ment is supported by the conclusions of law. Rule 10(a) of the Rules of Appellate Procedure. A motion for summary judgment requires the court to rule on the legal sufficiency of the pleadings and evidence to raise issues of fact. *See Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The court finds issues of fact; it does not determine them. *See Hotel Corp. v. Taylor*, 301 N.C. 200, 271 S.E. 2d 54 (1980); 73 Am. Jur. 2d *Summary Judgment* § 1 (1974). In addition, summary judgment is a drastic measure, to be used with caution, particularly in negligence cases. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980); *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1979). Accordingly, we hold that under Rule 10(a) plaintiff's appeal adequately presents the propriety of the grant of summary judgment.

On a motion for summary judgment, the evidence must be considered in the light most favorable to the non-moving party, with all favorable inferences therefrom. *Rose v. Guilford Co.*, 60 N.C. App. 170, 298 S.E. 2d 200 (1982). The moving party's papers are scrutinized carefully, while the non-movant's are treated indulgently. *Vassey v. Burch, supra.* Under these standards, the movant must forecast evidence which would entitle it to judgment as a matter of law. The opposing party has no duty to come forward until the movant has met its burden; if internal inconsistencies in the movant's evidence reveal a genuine issue of material fact, summary judgment should be denied. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). Once the movant has presented a sufficient showing, however, the non-movant cannot rest on conclusory allegations. *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982). Rather, it must come forward with specific facts showing a genuine issue for trial. *Id.*

Reluctant as we should be to allow the drastic remedy of summary judgment in negligence cases, *see Williams v. Power & Light Co., supra*, especially medical malpractice cases, *Vassey v. Burch, supra; Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E. 2d 287 (1978), we nevertheless conclude that under the unusual circumstances presented to the trial court in this case, summary judgment for defendant was appropriately granted. One of the recognized purposes of summary judgment is to allow the moving party, by discovery or affidavits, to "pierce the pleadings," to show that the opposing party cannot produce an essential element of his claim. *Lowe v. Bradford, supra.*

Plaintiff's complaint asserts three principal aspects of defendant's negligence: (1) the use of wire sutures to close plaintiff's incision; (2) leaving a loose piece of wire suture in plaintiff's body; and (3) the failure to discover, diagnose, or remove loose sutures from plaintiff's body. It is clear that in order to establish any of these elements of negligence, plaintiff would have to rely in part on the testimony of other physicians who either diagnosed or treated plaintiff subsequent to his gall bladder operation.

Plaintiff's burden was to show that defendant was negligent in his care of plaintiff and that such negligence was the proximate cause of plaintiff's injuries and damage. *Ballenger v. Crowell, supra.* The defendant physician's negligence must be established by showing the standard of care owed to plaintiff and that defendant violated that standard of care. The standard owed is that standard which is in accordance with accepted standards of care in the community in which plaintiff was treated, or in similar communities. N.C. Gen. Stat. § 90-21.12 (1981), *Ballenger v. Crowell, supra.* Usually, but not in all cases, the accepted standard of care and its violation must be established by expert testimony. *Powell v. Shull,* 58 N.C. App. 68, 293 S.E. 2d 259, *cert. denied,* 306 N.C. 743, 295 S.E. 2d 479 (1982).

Based on the materials before the trial court at the summary judgment level, we cannot place this case in any exception to the general rule. Defendant having shown in his forecast of evidence that he did not violate the standard of care he owed plaintiff, it was then incumbent upon plaintiff to show by the affidavits of those other physicians who had treated plaintiff, or at least one of them, that defendant had violated the standard of care he owed plaintiff. In the process of discovery plaintiff furnished the names of fifteen medical people (radiologist, pathologist, physicians, and surgeons) who either diagnosed or treated plaintiff's problems following his gall bladder surgery, yet plaintiff not only did not furnish the affidavits of any of these persons, but clearly indicated he did not intend to rely on their testimony at trial. Given the nature of the medical problems set out in plaintiff's complaint, plaintiff's mere allegations as to his symptoms, pain, suffering, and treatment by others and conclusory allegations as to defendant's negligence was not sufficient to meet his burden on defendant's motion.

In approving the granting of summary judgment for defendant in this case, we deem it appropriate to emphasize the importance of paragraph (f) of Rule 56 of the Rules of Civil Procedure in this case and all similar cases. The Rule provides:

> (f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Before allowing summary judgment for a defendant in a medical malpractice case, the trial court should be satisfied that the plaintiff has had ample opportunity to obtain affidavits required to rebut a defendant's affidavits on the issues of standard of care and violation of the standard, it being clear that defending health care providers have an advantageous position with respect to developing affidavits in support of their position. In this case, plaintiff's own representation to the trial court made it clear that plaintiff was not seeking the aid of the Rule 56(f) provisions.

For the reasons stated, the judgment below is

Affirmed.

Judges ARNOLD and BECTON concur.

ROYCE LEE GOOD, EXECUTOR OF THE ESTATE OF ALBERT LEE GOOD v. ROY LEE GOOD, MILTON GOOD, AND LAR-MILL KNITTING MILLS, INC.

No. 8425SC107

(Filed 15 January 1985)

1. Uniform Commercial Code § 31— note not in plaintiff's possession—plaintiff entitled to bring action

While plaintiff did not qualify as holder of a promissory note because he did not have possession, he could nevertheless maintain an action if the note's ownership and terms could be proven and its absence could be accounted for. Plaintiff in this case met those requirements where the ownership and terms

of the $30,000 note were largely undisputed, the note itself being before the court, and where plaintiff's evidence accounting for the absence of the note tended to show that the note was executed by the corporate defendant and endorsed by the individual defendants who alleged that they paid the note in full with cash whereupon the original holder then cancelled the note and delivered it and a security agreement to one defendant; the alleged signature on the note was a forgery; on the day of his death, the holder's house was ransacked and certain items were taken; defendant had possession of and presented the note; defendant failed to produce any record of payment other than the note with the holder's alleged signature; plaintiffs testified that the holder's bank records did not show a deposit of $30,000; and there was testimony that previous payments on the note had been by check. G.S. 25-3-804.

2. **Evidence § 28— existence of federal tax lien—evidence admissible to show motive for theft of documents and forgery**

In an action to collect on a promissory note where there were allegations of theft of documents, forgery and prior payment of the note, the trial court did not err in permitting rebuttal testimony that there existed an uncancelled and unsatisfied federal tax lien against the corporate defendant, though defendants asserted that admission of the rebuttal testimony was error because it constituted impermissible impeachment through use of a collateral matter, since the evidence that defendants' company was heavily in debt and failing financially tended to show a motive for theft and forgery of the corporation's note.

APPEAL by defendants from *Ferrell, Judge*. Judgment entered 2 September 1983 in Superior Court, CATAWBA County. Heard in the Court of Appeals 25 October 1984.

On 25 May 1982 plaintiff Royce Lee Good instituted this action in his representative capacity as executor of the estate of his father, A. L. Good, to collect principal and accumulated interest due on a promissory note to A. L. Good from Lar-Mill Knitting Mills, Inc. (referred to as Lar-Mill hereafter) endorsed by Milton Good and Roy Good. Roy Good was A. L. Good's brother and Milton Good's father. The promissory note executed on 20 May 1980 had been given in renewal of an earlier May 1979 note, secured by a security agreement upon collateral pledged by Lar-Mill. Interest payments by check were made for June through September 1980 in two payments, 25 June 1980 and 15 September 1980.

On 17 November 1980 A. L. Good died. Shortly thereafter plaintiff qualified as his executor and brought this action.

In his amended complaint, plaintiff alleged that in May 1980 defendant Lar-Mill executed a note to A. L. Good for $30,000 plus

interest at twelve (12) percent, that defendants Milton Good and Roy Good endorsed the note and are "jointly and individually liable" on the note.

In their joint answer defendants admitted execution of a promissory note to A. L. Good in the principal amount of $30,000, that the note was to draw interest at 12 percent per annum payable in 12 monthly installments of $360 each beginning 15 June 1980 and that the principal was to be payable or renegotiated at the end of the 12 month period. The note was executed by Lar-Mill, by and through its president, Milton Good. Defendants further admitted that Milton and Roy Good endorsed the note but denied their liability on the note. The answer alleged that on 1 October 1980 Roy Good as endorser and in response to A. L. Good's demand for immediate payment paid in full the sums due under the note and that A. L. Good cancelled the note and delivered the note and security agreement to Roy Good.

At trial evidence was offered tending to show that the note was executed and endorsed substantially as alleged in the amended pleadings. Plaintiff offered opinion evidence of an expert handwriting examiner, James Durham, that the handwriting on the note, "Paid in full October 1, 1980. A. L. Good" alleged by defendants to be the handwriting and signature of A. L. Good, was not his signature but was a forgery. Plaintiff testified that Roy Good, when questioned by plaintiff's attorney about payment of the note, stated that he paid the note in full in cash. Defendants' evidence was that the only people present when payment was made were Roy Good and the decedent A. L. Good, that the note had been surrendered to Roy Good upon payment after being marked paid in full by A. L. Good and that the note had been in Roy Good's possession or his attorney's possession since that time. Defendants' witnesses, family members, testified that the handwriting on the note was that of A. L. Good.

At the close of plaintiff's evidence and again at the close of all the evidence, defendants moved for directed verdict which was denied.

The jury returned a verdict in favor of plaintiff in the amount of $30,720.00. Defendants' motion for judgment notwithstanding the verdict was denied.

From judgment entered in favor of plaintiff, defendants appeal.

Rudisill & Brackett by Keith Bridges for the plaintiff-appellee.

Corne, Pitts, Corne & Grant by Robert M. Grant, Jr., for the defendant-appellants.

EAGLES, Judge.

I

Defendants contend that plaintiff, A. L. Good's executor, cannot maintain the action on the note because he is not a holder and further contend that there is not sufficient evidence of nonpayment to withstand defendants' motions for directed verdict and judgment notwithstanding the verdict. We disagree.

[1] Defendants contend that plaintiff executor did not qualify as a "holder" as contemplated by G.S. 25-3-301. As defendants contend, the holder, i.e. one "who is in possession of . . . an instrument . . . issued or endorsed to him or to his order or to bearer or in blank," has authority to enforce the note. G.S. 25-1-201(20). Contrary to defendants' contentions the mere absence of the note from the owner's possession does not defeat his right to bring the action to enforce the terms of the note. G.S. 25-1-201(20).

The Uniform Commercial Code on which defendants rely, also deals with the missing document situation by providing as follows:

> The owner of an instrument which is lost, whether by destruction, theft, or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms. The court may require security indemnifying the defendant against loss by reason of further claims on the instrument.

G.S. 25-3-804.

While plaintiff does not qualify as holder because he did not have possession, the official commentary to G.S. 25-3-804 makes it clear that he may maintain the action if the note's ownership and terms can be proven and its absence can be accounted for.

> The plaintiff who claims to be the owner of such an instrument is not a holder as that term is defined in this act since he is not in possession of the paper, and he does not have the holder's prima facie right to recover under the section on the burden of establishing signatures. He must establish the terms of the instrument and his ownership and must account for its absence.

Official Comment, G.S. 25-3-804.

We hold that plaintiff has met the requirements of G.S. 25-3-804.

The ownership and terms of the note are largely undisputed; the note itself was before the court.

By way of accounting for the note not being in plaintiff's possession, there was evidence in the form of

(1) expert testimony that the alleged signature on the promissory note was a forgery;

(2) testimony that on 17 November 1980 (the day A. L. Good died), plaintiff discovered that his father's house had been ransacked and certain items were missing;

(3) defendant's possession of and presentation of the promissory note;

(4) defendant Roy Good's testimony that he used his personal savings of $25,000 plus $5,000 in borrowed funds to pay A. L. Good $30,000.00 in cash on October 1, 1980;

(5) defendant Roy Good's failure to produce any record of payment other than the note with A. L. Good's alleged signature;

(6) defendant Roy Good's testimony that his bank records for the end of September 1980 showed his balance was not over $5,000;

(7) defendant Roy Good's testimony that he kept $25,000 in savings in his house;

(8) plaintiff's testimony that A. L. Good's bank records did not show a deposit of $30,000.00; and

(9) testimony that previous payments on the note had been by check.

For the reasons stated we hold that the trial court was correct in denying defendants' motions for directed verdict and judgment notwithstanding the verdict.

II

[2] Defendants next assign as error admission of rebuttal testimony from Grace Killian that in the Catawba County Clerk of Superior Court's office an uncancelled and unsatisfied federal tax lien against Lar-Mill existed on the clerk's Book of Judgments. This testimony contradicted the prior testimony of defendants Roy Good and Milton Good that in the past there had been a federal tax lien but that it was now paid in full.

Defendants assert that admission of the rebuttal testimony was error because it constituted impermissible impeachment through use of the collateral matter of nonpayment of the federal tax lien. "The proper test for determining what is material and what is collateral is whether the evidence offered in contradiction would be admissible if tendered for some purpose other than mere contradiction." *State v. Long*, 280 N.C. 633, 639, 187 S.E. 2d 47, 51 (1972).

It is clear that this evidence was admissible for a purpose other than mere contradiction, to show the motive of the individual defendants. Evidence of financial status such as unpaid liens and similar obligations is recognized as a proper technique for showing motive. *State v. Pate*, 40 N.C. App. 580, 253 S.E. 2d 266, *cert. denied*, 297 N.C. 616, 257 S.E. 2d 222 (1979); *McCorkle v. Beatty*, 226 N.C. 338, 38 S.E. 2d 102 (1946).

Further it is clear that evidence of motive is admissible where allegations of theft of documents, forgery and prior payment of a note are involved. Dean Brandis notes: "The existence of a motive is . . . a circumstance tending to make it more probable that the person in question did the act, hence evidence of a motive is always admissible where the doing of the act is in dispute." 1 Brandis, *North Carolina Evidence*, Section 83 (2d ed. 1982).

The disputed evidence was material, relevant and admissible. That defendants' company was heavily in debt and failing financially tended to show a motive for theft and forgery of the corporation's note.

Defendants argue as an additional basis for reversal that Ms. Killian's testimony about the federal tax lien records was impermissible as incompetent and irrelevant character evidence about specific acts. We disagree, noting that if the specific acts are "relevant and competent as evidence of something other than character, they are not inadmissible because they incidentally reflect upon character." 1 Brandis, *North Carolina Evidence*, Section 111 (2d ed. 1982).

Having carefully reviewed all defendants' assignments of error, we find in the trial

No error.

Chief Judge VAUGHN and Judge BRASWELL concur.

Former Chief Judge VAUGHN concurred in the result reached in this case prior to 31 December 1984.

Judge BRASWELL concurred in the result reached in this case prior to 31 December 1984.

PHIL MECHANIC CONSTRUCTION COMPANY, INC., AND DAVID HILLIER, SUBSTITUTE TRUSTEE v. CONRAD HAYWOOD AND GENEVA HAYWOOD

No. 8429DC172

(Filed 15 January 1985)

1. Mortgages and Deeds of Trust § 25— sale under deed of trust—special proceeding

A procedure for sale under a deed of trust pursuant to G.S. 45-21.1 is commenced by serving a notice of hearing and not a summons, and is therefore a "special proceeding."

2. Mortgages and Deeds of Trust § 25— foreclosure under power of sale—validity of debt—trustee's right to foreclose—res judicata

When a mortgagee or trustee elects to pursue foreclosure under a power of sale pursuant to G.S. 45-21.1 et seq., issues decided thereunder as to the validity of the debt and the trustee's right to foreclose are *res judicata* and cannot be relitigated in an action for strict judicial foreclosure.

3. Uniform Commercial Code § 33— signature on promissory note—issue not determined in prior proceeding

The trial court erred in dismissing plaintiff's action on a promissory note as to the female defendant, since the order in a prior special proceeding addressed the issue of whether she signed a deed of trust but did not address the issue of whether she signed the promissory note.

APPEAL by plaintiffs from *Hix, Judge*. Judgment entered 15 September 1983 in District Court, RUTHERFORD County. Heard in the Court of Appeals 25 October 1984.

This is a civil action in which plaintiffs, Phil Mechanic Construction Company, Inc. and David Hillier, substitute trustee, seek to recover money owed on a debt secured by a deed of trust and to foreclose on the deed of trust.

The essential facts are:

This action is based upon a promissory note and deed of trust which was also the basis for relief sought in an earlier special proceeding pursuant to G.S. 45-21.1 et seq. (*Phil Mechanic Construction Company, Inc. and John E. Shackelford, Substitute Trustee v. Conrad Haywood and Geneva Haywood*, 80SP54, judgment entered 3 April 1980 by the Clerk of Superior Court, Rutherford County.) The issue in the prior special proceeding before the Clerk of Superior Court was to determine the validity of the debt secured by the alleged deed of trust and the trustee's right to foreclose. The Clerk of Superior Court found that "respondent Geneva Haywood had no prior knowledge of the deed of trust she is alleged to have signed and that the signature appearing on said deed of trust is not that of respondent Geneva Haywood." The Clerk of Superior Court denied the request to proceed to foreclosure under the power of sale contained in the deed of trust.

No appeal from the decision of the Clerk of Superior Court in 80SP54 was perfected and the order entered by the clerk became final as to the issues and parties.

Plaintiffs here filed this action to foreclose upon the deed of trust in question on 27 April 1982 and defendants answered, pleading the order of the Clerk of Superior Court, entered 3 April 1980 in bar of foreclosure.

The trial court made findings of fact and conclusions of law and ordered plaintiff's case dismissed finding that the 3 April 1980 order of the Clerk of Superior Court was *res judicata.*

Plaintiffs appeal.

Riddle, Shackelford and Hyler, by John E. Shackelford for plaintiff-appellant.

J. H. Burwell, Jr. and George R. Morrow, for defendant-appellee.

EAGLES, Judge.

I

Plaintiffs first assign as error the trial court's dismissal of this action on the deed of trust as to defendant Geneva Haywood, as *res judicata.*

[1] The basis of plaintiffs' argument is that the former proceeding before the Clerk of Superior Court was brought under G.S. 45-21.1 et seq. and is neither a civil action or a special proceeding. Plaintiff further argues that G.S. 45-21.2 clearly states that the "right to foreclose by action in court" is not affected by a proceeding under this article. We disagree.

G.S. 1-1 provides that "[r]emedies in the courts of justice are divided into (1) Actions" and "(2) Special Proceedings." G.S. 1-2 states "[a]n action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense," while G.S. 1-3 notes that "[e]very other remedy is a special proceeding." *But see In re Cook,* 218 N.C. 384, 11 S.E. 2d 142 (1940) (proceeding under former G.S. 122-36 et seq. in strictness, seems to be neither a civil action nor a special proceeding).

We note that:

> Actions include those proceedings which are instituted and prosecuted according to the ordinary rules and provisions relative to actions at law or suits in equity . . . special proceedings include those proceedings which are not ordinary in this sense, but are instituted and prosecuted according to some special mode, as in the case of proceedings commenced without a summons, and prosecuted without regular pleadings, which are characteristics of ordinary actions.

1 C.J.S., Actions, Section 42 (1936—Supp. 1984). The procedure for sale pursuant to G.S. 45-21.1 et seq. is commenced by serving a notice of hearing and not a summons. G.S. 45-21.16. As such, proceedings under G.S. 45-21.1 fall within the description of "special proceedings." We also note that this court, in ruling that plaintiffs failed to perfect their appeal from the order of the Clerk of Superior Court, specifically denominated that case a "special proceeding." *Mechanic Construction Co. v. Haywood*, 56 N.C. App. 464, 289 S.E. 2d 134 (1982). Since rights sought to be enforced under G.S. 45-21.1 et seq. are instituted by filing notice instead of a complaint and summons and are prosecuted without regular pleadings, they are properly characterized as "special proceedings."

[2] Plaintiffs also argue that the clear intention of the legislature was not to bar other actions in court since G.S. 45-21.2 states "[t]his Article does not affect any right to foreclosure by action in court, and is not applicable to such actions." While we agree that the intention of the legislature was not to bar other actions in court, we do not agree that an order entered by the Clerk of Superior Court construing the validity of the debt and the trustee's right to foreclose, pursuant to G.S. 45-21.1 et seq., cannot be *res judicata* as to a subsequent action based on the issues decided in the clerk's order.

There are two methods of foreclosure possible in North Carolina: foreclosure by action and foreclosure by power of sale. 9 North Carolina Index 3d, Mortgages and Deeds of Trust, Sections 24, 25 (1977). Foreclosure by action requires formal judicial proceedings initiated by summons and complaint in the county where the property is located and culminating in a judicial sale of the foreclosed property if the mortgagee prevails. *Id.*

A foreclosure pursuant to a power of sale, however, is strictly regulated by G.S. 45-21.1 et seq. which requires a hearing before the Clerk of Superior Court to determine four issues:

1. the existence of a valid debt;

2. the existence of a default;

3. the trustee's right to foreclose;

and,

4. sufficiency of notice.

G.S. 45-21.16(d); *In Re Foreclosure of Burgess*, 47 N.C. App. 599, 267 S.E. 2d 915 (1980).

If the Clerk determines the existence of each item, the Clerk then authorizes the trustee to proceed with the sale pursuant to the power of sale contained in the mortgage instrument itself. This procedure enables the trustee or mortgagee to conduct the foreclosure sale with a level of judicial involvement somewhat less than that required in a foreclosure by action. If the mortgage contains a power of sale, the mortgagee or trustee may elect to proceed under G.S. 45-21.1 et seq. or may choose to proceed under foreclosure by action. G.S. 45-21.1 et seq. does not apply to or prevent the bringing of a foreclosure by action. G.S. 45-21.2.

However, when a mortgagee or trustee elects to proceed under G.S. 45-21.1, et seq., issues decided thereunder as to the validity of the debt and the trustee's right to foreclose are *res judicata* and cannot be relitigated in an action for strict judicial foreclosure.

We note that decisions of the Clerk of Superior Court pursuant to G.S. 45-21.1 et seq. are appealable to the judge of superior court within ten days. An appeal requires a hearing *de novo* before the judge as to the issues decided by the Clerk of Superior Court pursuant to G.S. 45-21.16(d). *In Re Foreclosure of Watts*, 38 N.C. App. 90, 247 S.E. 2d 427 (1978). Since plaintiffs did not perfect an appeal of the order of the Clerk of Superior Court, the clerk's order is binding and plaintiffs are estopped from arguing those same issues in this case. For these reasons, the trial court did not err in dismissing this action on the deed of trust as barred by *res judicata*.

II

[3] Plaintiffs next assign as error the trial court's dismissal of the action on the note as to defendant Geneva Haywood. We agree that there was error.

The order in the special proceeding pursuant to G.S. 45-21.1 et seq. found that "Geneva Haywood had no prior knowledge of the Deed of Trust" and "that the signature appearing on said Deed of Trust is not that of Respondent, Geneva Haywood." The order of the Clerk of Superior Court did not address the issue of whether defendant, Geneva Haywood, signed the promissory note.

The complaint filed by plaintiffs in this action also seeks the amount of money due and owing to plaintiffs, $4,720.00 plus interest. Since there is no order that is *res judicata* as to this issue, it was error for the trial court to dismiss Geneva Haywood from the action on the note.

Judgment of the trial court denying foreclosure of the deed of trust is affirmed. The portion of the trial court's judgment that purports to dismiss the action on the promissory note is reversed and a new trial is ordered on the issue of Geneva Haywood's liability upon the promissory note.

Affirmed in part, reversed in part, new trial ordered.

Chief Judge VAUGHN and Judge BRASWELL concur.

Former Chief Judge VAUGHN concurred in the result reached in this case prior to 31 December 1984.

Judge BRASWELL concurred in the result reached in this case prior to 31 December 1984.

Carrigan v. Shenandoah Transplants, Inc.

WILLIAM H. CARRIGAN; JAMES G. GALLOWAY AND ALEXANDER H. GALLOWAY, JR., CO-EXECUTORS OF THE ESTATE OF ALEX H. GALLOWAY, DECEASED; EVELYN M. HORTON; JULIUS A. HOWELL; ANNE S. HOWELL; DONALD F. MACKINTOSH; GEORGE C. MOUNTCASTLE; BRANT R. SNAVELY, SR.; AND BRANT R. SNAVELY, JR., PLAINTIFFS v. SHENANDOAH TRANSPLANTS OF NORTH CAROLINA, INC., AND BLAIR M. GRAHAM, INDIVIDUALLY, DEFENDANTS, AND ROBERT G. BLAIR, EXECUTOR OF THE ESTATE OF TULLY D. BLAIR, GARNISHEE

No. 8421SC341

(Filed 15 January 1985)

Rules of Civil Procedure § 37— failure to produce corporate documents—sanctions improperly imposed

The trial court erred in ordering sanctions against defendants for failure to produce corporate documents at a deposition where plaintiffs requested the corporate minute book of defendant corporation and records pertaining to animals owned by plaintiffs and defendants, but the court in fact imposed sanctions for failure to produce documents of a Virginia corporation which were not encompassed within the court's order for production of documents; moreover, even if the minute book of the Virginia corporation were included in the production order, the individual defendant testified at the time of his deposition that all records of the corporation were destroyed in a flood in 1977.

APPEAL by defendants from *Wood and Washington, Judges.* Judgment entered 7 November 1983; order entered 22 August 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 29 November 1984.

The plaintiffs brought this action 21 October 1981 for fraud and unfair and deceptive trade practices by the defendants in the sale of cattle to plaintiffs beginning in 1978. The defendants filed an answer in which they denied the material allegations of the complaint and counterclaimed for defamation and breach of contract.

The plaintiffs served interrogatories on the defendants with the complaint. The plaintiffs served a second set of interrogatories and a request for the production of documents on 22 March 1982. Among the documents requested were: "The entire corporate minute book of defendant, Shenandoah Transplants of North Carolina, Inc." and records pertaining to animals owned by plaintiffs and defendants. The defendants filed a motion for a protective order on 8 April 1982. On 4 May 1982 the Court denied

the defendants' motion for a protective order and ordered the defendants to answer the interrogatories and produce the documents within 30 days. On 23 June 1982 the deposition of the defendant Blair Graham was scheduled. He was served with a subpoena duces tecum to bring the business and livestock records of the corporation. He did not bring any records and the taking of the deposition was cancelled. On 21 July 1982 the plaintiff made a motion for sanctions on the ground that defendant had failed to answer the interrogatories and had failed to produce documents as ordered by the Court. On 27 July 1982 the defendants filed answers to interrogatories and stated they were unable to comply with the order to produce the corporate minute book because it had been destroyed in a flood in Virginia.

A second deposition of the defendant Graham was taken on 11 October 1982. Mr. Graham testified that he and two other people had organized Shenandoah Transplants of Virginia, Inc. in 1972 or 1973 and various investors bought cattle which were placed on the farm for breeding purposes. This corporation stayed in existence until 1975 or 1976. He testified that there were some records available as to who owned the cattle but he did not bring them to the taking of the deposition. In 1977 he changed the name of a North Carolina Corporation he owned to Shenandoah Transplants of North Carolina, Inc., and moved his business to Wayne County, North Carolina. He testified that he had some records in Goldsboro of animals purchased by Shenandoah Transplants of North Carolina, Inc., for clients which had not been furnished to the plaintiffs. He also testified there were other records of the operations in North Carolina which had not been furnished to the plaintiffs. He did not bring any of these records to the taking of the deposition. The taking of this deposition was suspended.

On 7 April 1983 the plaintiff moved a second time for sanctions on the ground that the defendants had refused to produce documents as they had been ordered to do. The plaintiffs asked that the defendants' answer and counterclaim be stricken and that a default judgment be entered against the defendants. On 24 May 1983 the Court entered an order in which it found that the defendants had refused to furnish documents as they had been ordered to do. It found that the taking of the deposition on 11 October 1982 had to be suspended because the defendant Graham did not have documents present at the taking of the deposition

which documents he should have had with him. The Court recited that defendants' counsel stated that he had three boxes of documents which the plaintiffs could examine and copy if they so desired. The Court ordered as sanctions that the defendants pay the plaintiffs' counsel fees and costs for taking the deposition. The Court ordered further that the defendants comply with the order to produce documents within ten days. On 7 June 1983 the defendants filed a response to the plaintiffs' request for interrogatories. The defendants did not pay the attorney fees and court costs as ordered by the Court until after the plaintiffs made a third motion for sanctions on 12 August 1983.

On 20 August 1983 the plaintiffs again took the deposition of the defendant Graham. At this time he testified that all records of Shenandoah Transplants of Virginia, Inc., including the corporate minute book, were destroyed in a flood in October 1977. He testified that all cattle in Virginia had been sold in December 1977, and the corporation disbanded. He also testified that a bookkeeper in Roanoke still had records of the Virginia Corporation. He also testified that the records might be in a packhouse in Goldsboro but he had not made an effort to find them because he did not think he was required to do so under the court order. He stated that he would be willing to furnish a copy of his tax return for 1975.

Following the taking of this deposition the plaintiffs made their fourth motion for sanctions. The Court found facts including a finding that the records of Shenandoah Transplants of Virginia were among the documents which were ordered produced and that the defendants were in willful and deliberate disobedience of the orders of the Court. The Court ordered that the defendants' answer, counterclaim and further defense be stricken and a default judgment be entered against the defendants. The Court also ordered the defendants to pay $1,000.00 to the plaintiffs' attorneys within thirty days. The defendants appealed.

Hutchins, Tyndall, Doughton and Moore by Richard Tyndall and H. Lee Davis for plaintiffs appellees.

Hunter, Hodgman, Greene, Goodman and Donaldson by Richard M. Greene for defendants appellants.

WEBB, Judge.

The judgment entered by Judge Wood did not dispose of the entire case and is interlocutory. It is appealable. See *Adair v. Adair*, 62 N.C. App. 493, 303 S.E. 2d 190 (1983).

In its order imposing sanctions the Court found facts as to the matters on which the three previous motions for sanctions had been based. These matters might be considered in determining what sanctions are to be imposed if there is cause to impose sanctions based on the plaintiffs' fourth motion for sanctions. The first three motions for sanctions have been determined and unless there has been action by the defendants which would authorize the imposition of sanctions since those rulings were made it was error for the Court to impose sanctions.

As we read the order the action of the defendant Blair M. Graham in not producing documents at the deposition of 20 August 1983 was the only matter considered by the Court which had not been the subject of a previous motion for sanctions. Mr. Graham did not produce and testified that he had not searched for certain records of Shenandoah Transplants of Virginia, Inc. The Court held that the records were encompassed within the order for the production of documents. If this is the case there was sufficient evidence for the Court to find that the defendants had failed to produce documents as ordered by the Court and the defendants would be subject to sanctions under G.S. 1A-1, Rule 37(b)(2)(c).

We do not believe the plaintiffs requested these documents in their request for the production of documents filed 22 March 1982. The request was for the corporate minute book of Shenandoah Transplants of North Carolina, Inc. and documents pertaining to cattle transactions occurring in 1978 and afterwards. This would not include transactions occurring while the defendants were operating Shenandoah Transplants of Virginia, Inc. Judge Martin, in overruling the defendants' motion for a protective order, ordered the defendants to produce the documents requested and the corporate minute book of Shenandoah Transplants of North Carolina, Inc., from 1 January 1975. If we assume this included the corporate minute book of Shenandoah Transplants of Virginia, Inc., this was not one of the documents which

the defendants failed to produce at the deposition taken 20 August 1983.

We do not believe the defendants failed to produce requested documents or violated Judge Martin's order after the third motion for sanctions. It was error to strike the defendants' pleadings and to enter a default judgment. Because it was error to enter this judgment it was also error to order the defendants to pay attorney fees.

The defendants also appeal from the denial of a motion to dissolve an order of attachment. The Clerk of Superior Court on 3 February 1982 ordered the attachment of the property of the defendant Blair M. Graham. Pursuant to this order the sheriff levied on the interest Blair M. Graham had in the estate of Tully D. Blair. On 13 May 1982 Mr. Graham made a motion to dissolve the attachment. On 9 July 1982 the Clerk of Superior Court denied this motion. On 20 July 1983 Mr. Graham made a motion in Superior Court to dissolve the order of attachment. He asked that the Court treat the motion in the alternative as an appeal from the order of the Clerk of Superior Court. Judge Washington ruled that the same matters were presented in the motion one year previously to the Clerk of Superior Court. He held that an appeal had not been timely made from the order of the Clerk and denied the motion. In this we find no error.

Affirmed in part; reversed and remanded in part.

Judges HEDRICK and HILL concur.

Judge HILL concurred in the result reached in this case prior to 31 December 1984.

Gunter v. Dayco Corp.

LEE H. GUNTER, EMPLOYEE, PLAINTIFF v. DAYCO CORPORATION (DAYCO-WAYNESVILLE), EMPLOYER, AND NATIONAL UNION FIRE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8410IC1

(Filed 15 January 1985)

Master and Servant § 55.3— workers' compensation—new duties given employee—injury sustained during twisting and jerking—accident

The Industrial Commission properly concluded as a matter of law that plaintiff sustained an injury by accident where plaintiff was transferred by his employer to new duties which required more strenuous physical activity, different from the activity in his original position; plaintiff spent two days working with a training crew learning his new duties before he was injured the next morning; the new duties involved unfamiliar turning and jerking movements; and the Commission could thus find that the injury occurred as a result of the interruption of plaintiff's normal work routine.

Judge WEBB dissenting.

APPEAL by defendants from North Carolina Industrial Commission Opinion and Award of 2 September 1983. Heard in the Court of Appeals 28 September 1984.

The defendants appeal from compensation awarded to the plaintiff. The plaintiff testified before Deputy Commissioner Lisa Shepherd that as a result of economic conditions at Dayco Corporation he was told he would be laid off. Because of his seniority he was entitled under his union contract to displace a worker with less seniority, which he chose to do. In his former job he operated a mechanical chainlift to do any heavy lifting as he fed raw materials into a calendar. He did no manual labor or heavy pushing or pulling. He spent two days observing and two days on a training crew learning how to do his new job and then began doing it. His new assignment entailed putting hose on a mandrel which was then rolled into an oven for curing and then removing the hose after it had been "cured." The putting on and taking off of the hose required strenuous twisting and jerking of the hose. Plaintiff testified: "As to the details of what happened at the time I was injured, well, it's just putting them on and taking them off, it's learning how and it's a whole lot of knowing how to do it." He testified further, "[a]s to what happened, I was taking one off and was trying to get it off, and I jerked it and twisted it, and it pulled my arm, my left arm."

Deputy Commissioner Lisa Shepherd found that "at the time plaintiff was injured his normal work routine had not been interrupted by any unusual condition or occurrence" and denied the plaintiff's claim. On appeal the full Commission stated that *Adams v. Burlington Industries*, 61 N.C. App. 258, 300 S.E. 2d 455 (1983) governs. The full Commission modified a finding of fact in part as follows:

> 3. Plaintiff's new job involved greater exertion and twisting movements not involved in his previous job and these circumstances constituted an interruption of his normal work routine. He therefore sustained an injury by accident arising out of and in the course of his employment on December 18, 1981.

Based on this finding, the full Commission, with Chairman Stephenson dissenting, awarded compensation to the plaintiff.

The defendants appeal.

Smith, Patterson, Follin, Curtis, James and Harkavy by Donnell Van Noppen, III, for plaintiff-appellee.

Russell and Greene, by J. William Russell for defendant-appellants.

EAGLES, Judge.

The plaintiff in this case was transferred by his employer to new duties that required more strenuous physical activity, different from the activity in his original position. He spent two days working with a training crew learning the new duties before he was injured the next morning. The resolution of this appeal depends on whether the Industrial Commission may find from these facts that the plaintiff was injured in an accident. We hold that the Industrial Commission may.

The term "accident" as used in the Workers' Compensation Act has been defined as "an unlooked for and untoward event which is not expected or designed by the person who suffers the injury"; its elements are "the interruption of the routine work and the introduction thereby of unusual conditions likely to result in unexpected consequences." See *Adams v. Burlington In-*

dustries, supra; Porter v. Shelby Knit, Inc., 46 N.C. App. 22, 264 S.E. 2d 360 (1980).

On its facts and in terms of the applicable rule, the instant case is strikingly similar to *Adams v. Burlington Industries, supra.* There an employee in new duties accidentally injured himself while engaged in unfamiliar twisting and turning movements not necessary in his other position. Here the employee was moved to new duties which involved unfamiliar and strenuous twisting, turning and jerking movements which he had not been required to do in his former position. In both cases the injury occurred early in the familiarization process of the newly assigned duties. In *Adams* the assignment was temporary and the injury occurred on the first day; here the injury occurred on the first day plaintiff worked after the two-day training period.

We find that plaintiff's testimony constituted competent evidence from which the full Commission could have found that the injury occurred "as a result of the interruption of the plaintiff's normal work routine." It clearly involved the introduction of new circumstances not a part of his normal routine. The findings of fact of the Industrial Commission are conclusive on appeal if there was any competent evidence to support them. *Jackson v. Highway Commission*, 272 N.C. 697, 700, 158 S.E. 2d 865, 867 (1968); *Locklear v. Robeson County*, 55 N.C. App. 96, 284 S.E. 2d 540 (1981). The findings are binding on us even if the evidence presented could have supported findings to the contrary. *Searcy v. Branson*, 253 N.C. 64, 116 S.E. 2d 175 (1960).

The facts found by the full Commission support the conclusion that plaintiff's injury resulted from an "accident."

In the instant case, just as in *Adams, supra*, "the combined extra exertion and twisting movements required by the . . . job do support the conclusion that plaintiff's injury resulted from an unexpected and unforeseen event not anticipated or designed by the employee." *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 124 S.E. 2d 109 (1962). The plaintiff's work routine using mechanical chainlift equipment to do any required lifting was interrupted by the addition of jerking, turning and twisting movements required by the new duties. We hold that the Commission properly concluded as a matter of law that plaintiff sustained an injury by "accident." *Gladson v. Piedmont Stores*, 57 N.C. App. 579, 292

S.E. 2d 18, *rev. denied*, 306 N.C. 556, 294 S.E. 2d 370 (1982); *Locklear v. Robeson County, supra; Porter v. Shelby Knit, Inc., supra.*

The opinion and award of the Industrial Commission is

Affirmed.

Judge WHICHARD concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. The undisputed facts are that the plaintiff was carrying out the duties of his job when he was injured. There is nothing to show the normal work routine of his job was interrupted. I do not believe that from these facts the Commission could conclude there was an accident. The fact that the plaintiff had only recently been assigned to the job should not make a difference. I would distinguish *Adams v. Burlington Industries*, 61 N.C. App. 258, 300 S.E. 2d 455 (1983) on the ground that in that case the plaintiff was on a one-day assignment. Whether or not we like it, the law governing this case requires that the plaintiff be injured in an accident in order for him to receive compensation. I believe that by holding he was so injured we have usurped the function of the legislature.

THOMAS H. BROWN v. MARY L. BROWN

No. 8415DC407

(Filed 15 January 1985)

1. Divorce and Alimony § 30— lump sum pension payment not marital property

Pursuant to the provisions of G.S. 50-20(b)(2) in effect at the time this action for absolute divorce was instituted, a lump sum pension payment made to plaintiff by his employer and deposited in the parties' joint savings account was plaintiff's separate property and not marital property as determined by the trial court; moreover, the portion of the interest earned on the savings account attributable to plaintiff's pension fund should also have been excluded from distribution as marital property.

2. Divorce and Alimony § 30— unequal division of marital property—findings of fact insufficient

The trial court's findings of fact were insufficient to support an unequal division of marital property, and the court erred in dividing the property according to its fair market value rather than according to its net value. G.S. 50-20(c).

APPEAL by plaintiff from *Washburn, Judge.* Judgment entered 23 November 1983 in District Court, ALAMANCE County. Heard in the Court of Appeals 5 December 1984.

This is an appeal from a judgment distributing marital property pursuant to the Equitable Distribution Act, G.S. 50-20 and 50-21.

Vernon, Vernon, Wooten, Brown & Andrews, P.A., by Wiley P. Wooten and T. Randall Sandifer, for plaintiff appellant.

Lee W. Settle, C. C. Cates and Robert F. Steele, for defendant appellee.

JOHNSON, Judge.

The issues presented by this appeal are (1) whether the court's findings of fact were adequate to support an unequal division of property and (2) whether the court erred in finding certain savings account funds to be marital property. For the following reasons, we find error in the court's findings of fact and remand the cause for further findings of fact and a redistribution of the property.

The parties were married on 23 October 1954 and separated on 11 October 1981 when defendant left the marital home. On 13 October 1981, plaintiff filed an action seeking a divorce from bed and board. Defendant filed an answer in which she sought alimony *pendente lite*. Plaintiff subsequently obtained a divorce from bed and board, but defendant's claim for alimony *pendente lite* was denied. The parties subsequently obtained an absolute divorce on 17 March 1983. Defendant's claim for permanent alimony was also denied on 14 July 1983. Defendant did not perfect an appeal from the denial of her request for alimony. Following a hearing upon defendant's request for an equitable distribution of the parties' property, the court found that an equal distribution of

the property would not be equitable and awarded more than half (approximately 55%) of the marital property to defendant.

The findings of fact indicate that the parties had three children, two of which died in infancy. The third child was 21 years old at the time of the hearing and a college student. Shortly after their marriage, the parties purchased a small tract of land and constructed a residence thereon in 1957. Later, in 1964, the parties purchased a 74.3 acre farm which was placed in their joint names. The parties lived a traditional lifestyle in which the plaintiff worked in public work and farmed while defendant was a mother and housewife. Plaintiff worked for Associated Transport from 1956 until 1976, when the company closed, at which time he received a $4,000.00 lump sum pension payment. At the time of the hearing, plaintiff was 57 years old and receiving a pension of $273.00 per month from Associated Transport in addition to income from his full time job at Cone Mills, where he earned $5.46 per hour, and from farming. Plaintiff was in good physical and mental condition. Defendant, at the time of the hearing, was 54 years old, unemployed, and recovering from a partial hysterectomy. She was in fairly good physical condition, except for hypertension and thyroid problems. She owed $1,590.64 in medical bills incurred after leaving the marital dwelling.

[1] At the time of the separation, the parties had two bank accounts: an account in the amount of $12,027.67 at First Federal Savings & Loan Association in both names and an account at North Carolina National Bank in the amount of $2,664.28 in plaintiff's name only. The court found as a fact that the funds in these accounts were "mostly, if not all, marital property." Plaintiff has excepted to the foregoing finding. He contends that the court erred by failing to find that the $4,000.00 lump sum pension payment, which was deposited into the savings account with First Federal, was plaintiff's separate property. We agree.

The Equitable Distribution Act ("the Act") was enacted in 1981 and subsequently amended in 1983. 1981 Sess. Laws, c. 815; 1983 Sess. Laws, c. 758; 1983 Sess. Laws, c. 640. The amendments in chapter 758, which primarily concern pension rights, were made effective only to actions for absolute divorce filed on or after 1 August 1983. 1983 Sess. Laws, c. 811, s. 1. The amendments in chapter 640 became effective 1 August 1983 to actions

pending in District Court on that date and those filed thereafter. 1983 Sess. Laws, c. 811, s. 1.

The Act requires the court, upon application of a party, to determine what property is marital property and distribute it equitably between the parties. G.S. 50-20(a) (Cum. Supp. 1981). Before making this distribution, the court must classify the parties' property as being marital property or separate property, as those terms are defined in G.S. 50-20(b) (Cum. Supp. 1981). At the time the action for absolute divorce was instituted, G.S. 50-20(b)(2) (Cum. Supp. 1981) provided that vested pension rights were to be considered separate property for purposes of equitable distribution.[1] Here, the evidence is uncontradicted that Mr. Brown received a lump sum pension payment of $4,000.00 which was deposited into a joint savings account, together with other funds. Mr. Brown's lump sum pension payment was, thus, his separate property. By being deposited into the joint bank account, the pension money did not lose its character as Mr. Brown's separate property. As the version of the Act which applies to the present case expressly provides:

> Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property.[2]

1. The General Assembly amended G.S. 50-20 in 1983 to provide that vested pension rights were marital property. 1983 Sess. Laws, c. 758, s. 1. The amendments contained in Chapter 758 were made effective only to actions for absolute divorce instituted on or after 1 August 1983. 1983 Sess. Laws, c. 811, s. 1.

2. Since the action for equitable distribution was still pending as of 1 August 1983, the equitable distribution hearing not having been held until the 17 November 1983 Civil Session of Alamance County District Court, the amended version of G.S. 50-20(b)(2) (Cum. Supp. 1983) applies in the present case. 1983 Sess. Laws, c. 640, s. 3. Before amended, G.S. 50-20(b)(2) provided in pertinent part:

> Property acquired in exchange for separate property shall be considered separate property regardless of whether the title is in the name of the husband or wife or both. The increase in value of separate property and the income derived from separate property shall be considered separate property.

G.S. 50-20(b)(2) (Cum. Supp. 1981).

G.S. 50-20(b)(2) (Cum. Supp. 1983). There is no evidence of such a contrary intention. Neither did the depositing of the pension fund into the joint savings account, standing alone, constitute a gift. *Smith v. Smith*, 255 N.C. 152, 120 S.E. 2d 575 (1961). Since the balance of the savings account never fell below $4,000.00, no withdrawals reducing the account's balance having been made from the account before the parties' separation, Mr. Brown is entitled to the pension fund as his separate property. *See Allen v. Allen*, 584 S.W. 2d 599 (Ky. Ct. App. 1979). The trial court, therefore, erred in including the pension funds as marital property. The portion of the interest earned on the savings account attributable to Mr. Brown's pension fund should have also been excluded from distribution as marital property. G.S. 50-20(b)(2) (Cum. Supp. 1983).

[2] The remaining issue is whether the court's findings of fact were sufficient to support an unequal division of property. In its findings of fact, the court stated that it had considered all of the factors listed in G.S. 50-20(c) and that after weighing all these factors, it found that "an equal distribution would not be equitable in this case, and that factors favoring division in favor of the defendant outweigh factors favoring division in favor of the plaintiff." The court, however, did not articulate its reasons for finding that an equal division would not be equitable as we held in *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E. 2d 772 (1984), that the court should do. The court's findings of fact are deficient also in that the court did not value the parties' property according to its net value as required by G.S. 50-20(c), but erroneously divided the property according to its fair market value. *Alexander, supra.* We also note the court failed to distribute the parties' Mercury automobile, which was classified as marital property.

For the foregoing errors, the judgment must be vacated and the cause remanded for the entry of a judgment consistent with this opinion.

Vacated and remanded.

Judges BECTON and BRASWELL concur.

(Judge BRASWELL concurred in the result reached in this case prior to his retirement on 31 December 1984.)

DELBERT RAY JACKSON v. THE LUNDY PACKING COMPANY

No. 834SC1285

(Filed 15 January 1985)

1. **Appeal and Error § 6.9— request for jury trial—denial of motion to dismiss interlocutory**

Defendant's appeal from denial of its motion to dismiss plaintiff's request for trial by jury was from an interlocutory order and was clearly premature.

2. **Master and Servant § 10.2; Rules of Civil Procedure § 39— retaliatory discharge from job—action to be tried by jury**

In designating an employee's action to recover damages for discharge from his job in retaliation for filing a workers' compensation claim as a civil action and in requiring it to be processed in the General Court of Justice without specifying the mode of trial, the General Assembly intended for such actions to be tried in the usual way by juries upon the timely request of any party thereto. G.S. 97-6.1.

APPEAL by defendant from *Walker, Russell G., Judge.* Order entered 24 October 1983 in Superior Court, SAMPSON County. Heard in the Court of Appeals 25 September 1984.

Alleging that defendant discharged him from his job in retaliation for filing a claim for workers' compensation, plaintiff sued defendant for damages as authorized by G.S. 97-6.1 and demand for a jury trial was made in the complaint. After filing answer defendant moved to dismiss plaintiff's request for trial by jury. When the motion was denied defendant appealed and in the alternative petitioned for certiorari.

John R. Parker for plaintiff appellee.

Haynsworth, Baldwin, Miles, Johnson, Greaves and Edwards, by James M. Miles and Charles P. Roberts III, for defendant appellant.

PHILLIPS, Judge.

[1] This appeal is clearly premature and subject to dismissal. It is from an interlocutory order that disposed of no part of the case and left the entire litigation completely unadjudicated. *See* Rule 54, N.C. Rules of Civil Procedure; *Bailey v. Gooding*, 301 N.C. 205, 270 S.E. 2d 431 (1980). Nor is the appeal authorized by the provisions of G.S. 1-277 or G.S. 7A-27(d), because no substantial right of

the defendant's would have been lost if the appeal had been delayed until the case is litigated. The only possible harm that defendant could have suffered by delaying its appeal was having to try the case twice, which by itself, contrary to defendant's contention, does not justify an interlocutory appeal. *Davis v. Mitchell*, 46 N.C. App. 272, 265 S.E. 2d 248 (1980). But there is no reason to suppose that two trials would have been necessary, even if defendant's position was right and the judge's wrong. The case could have easily been tried to both judge and jury and no doubt would have been before now if defendant had so requested. If that simple, expedient course had been followed, the delay and expense caused by this appeal certainly would not have been incurred and the case could have been ended before now with no appeal at all. Nevertheless, since defendant's contention is so clearly without merit we choose to dispose of it now, so that neither the plaintiff, the trial court, nor this Court will be troubled with it further.

The statute plaintiff sues under, G.S. 97-6.1 provides in pertinent part: "Any employer who violates any provision of this section shall be liable in a civil action . . ." Article IV, Section 13(1) of the North Carolina Constitution plainly states that:

> There shall be . . . but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated *a civil action, and in which there shall be a right to have issues of fact tried before a jury.* (Emphasis supplied.)

And under the provisions of Rule 39(a)(2) of the N.C. Rules of Civil Procedure, plaintiff having demanded a jury trial, he is entitled to such a trial unless "[t]he court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes."

Defendant's position, in short, is that: Plaintiff has no right to a jury trial in this case since no cause of action for retaliatory discharge existed before our state Constitution was adopted in 1868. Article I, Section 25 of the North Carolina Constitution, adopted at that time, provides that "[i]n all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." And it is true, as defendant contends, that

our Supreme Court has held many times that this is the only provision of our state Constitution that *guarantees* trial by jury in civil cases and that this Article applies only where a right to a jury trial existed when the Constitution was adopted. But that plaintiff was not *guaranteed* a jury trial by the Constitution does not necessarily mean, as defendant jumps to conclude, that plaintiff has no legal right to a jury trial in this case or that defendant has a legal or constitutional right *not* to have it tried by jury. In support of its position defendant points to several cases involving civil rights and remedies that did not exist in this state before our Constitution was adopted in 1868 in which our Supreme Court ruled that the movant was not entitled to a jury trial. None of those decisions have any bearing whatever on this case, however, for the simple reason that the statutes involved in those cases expressly directed that the new civil rights and remedies created by them be adjudicated in some way other than by a jury; whereas, the statutes which created plaintiff's cause of action for retaliatory discharge made no such provision. The decisions erroneously relied upon by defendant include: *In re Huyck Corp. v. C. C. Mangum, Inc.*, 309 N.C. 788, 309 S.E. 2d 183 (1983) [contract claim against the State]; *North Carolina State Bar v. DuMont*, 304 N.C. 627, 286 S.E. 2d 89 (1982) [a disciplinary proceeding]; *In re Clark*, 303 N.C. 592, 281 S.E. 2d 47 (1981) [a parental rights termination proceeding]; *State v. Carlisle*, 285 N.C. 229, 204 S.E. 2d 15 (1974) [a driver's license revocation proceeding]; *Huffman v. Douglass Aircraft Co. Inc.*, 260 N.C. 308, 132 S.E. 2d 614 (1963), *cert. denied*, 379 U.S. 850, 13 L.Ed. 2d 53, 85 S.Ct. 93, *reh. denied*, 379 U.S. 925, 13 L.Ed. 2d 338, 85 S.Ct. 279 (1964) [a workers' compensation proceeding]; *In re Annexation Ordinance Nos. 866-870*, 253 N.C. 637, 117 S.E. 2d 795 (1961) [an annexation proceeding]; *In re Ferguson*, 50 N.C. App. 681, 274 S.E. 2d 879 (1981) [a parental rights termination proceeding]; and *In re Taylor*, 25 N.C. App. 642, 215 S.E. 2d 789 (1975) [an involuntary commitment proceeding].

[2] Defendant nevertheless argues that since the General Assembly did not expressly provide for trying this newly created action to a jury, but merely said it was enforceable by a civil action, that it must be tried to a judge. Why this should be, defendant's brief does not explain, and we cannot imagine. Certainly, it is not because non-jury trials are the favorites of either our people or our jurisprudence, because they are not, as every citizen

knows. Nor can it be because the usual or traditional procedure is to try civil cases for money damages to judges, rather than jurors, for it is not, as every lawyer and judge knows. That our Constitution does not *guarantee* a jury trial for this new civil remedy is really beside the point; because the question presented is whether under the circumstances defendant has a right not to have its case tried to a jury. We hold that it does not. In designating retaliatory discharge claims as civil actions, and in requiring them to be processed in the General Court of Justice without specifying the mode of trial indicates to us, and we so hold, that the General Assembly intended for these actions to be tried in the usual way by juries upon the timely request of any party thereto. The practice of trying civil money damages cases to juries is too customary and well regarded by the people and profession alike for us to presume, as defendant would have us do, that the General Assembly intended to forbid jury trials in these cases. Thus, we affirm the order appealed from.

Affirmed.

Judges HEDRICK and BECTON concur.

SANDRA BURGESS SMITH v. JEAN BURGESS AND EUGENE BURGESS

No. 8328DC1200

(Filed 15 January 1985)

Parent and Child § 6.3— child custody—insufficiency of evidence to support charge

Evidence was insufficient to support the trial court's conclusion that a child's best interests required that her custody be changed from defendant grandparents to plaintiff mother where the court found that plaintiff had married, had found employment, and had a "suitable residence" for the child to live in, but no findings were made as to plaintiff's earnings and her ability to care for and support the child, or as to why the best interests of the child would be served by removing her from the home which she had loved and thrived in since her birth eight and one-half years earlier.

APPEAL by defendants from *Harrell, Robert L., Judge.* Order entered 18 August 1983 in District Court, BUNCOMBE County. Heard in the Court of Appeals 30 August 1984.

Plaintiff sued her parents, the defendants, for custody of her own daughter, Paula Burgess, who was eight and a half years old when suit was filed. When the case was heard the court awarded custody of the child to plaintiff and defendants appealed.

The evidence at trial, largely undisputed, tended to show that: When plaintiff was about fourteen years old she became unstable and unmanageable; she was caught shoplifting and ran away from home several different times, taking up with first one young man, then another. While living with Joey English in 1974 the child involved was conceived, but after it was born in March 1975 plaintiff returned to defendants' home, where she and the child lived for about two years at defendants' expense. Plaintiff then moved out, leaving the child with defendants, who have supported and cared for her ever since. In December 1977 plaintiff agreed in writing for defendants to have custody of the child. Since then plaintiff has visited the child regularly, but its day to day care and support have been furnished by defendants. In early 1983 plaintiff asked for the child back and when defendants refused suit was filed. Plaintiff testified that when she left the child with defendants they agreed she could have it back when she married, which she did in August 1981 to George Smith. Defendant Jean Burgess testified that there was no such agreement and that plaintiff only stated that if she married within a couple of years "or had a home within the next two to three years" she would want her back. Defendants own their two bedroom home in Swannanoa, where they and the child have lived all along. Jean Burgess has been employed by a nearby factory for twenty years and now earns $235 a week. Eugene Burgess, temporarily disabled as the result of an automobile accident, draws $88.20 a week in workers' compensation. Jean Burgess leaves her factory job each day Paula is in school so as to be at home when Paula gets there, and Eugene Burgess is there when his wife is at work.

After living with him for one year, plaintiff married George Smith, a 40 year old disabled veteran, in August, 1981 and they have a seventeen month old son, who was conceived before the marriage. Plaintiff has just obtained a job at Old Fort Finishing on the 3 p.m. to midnight shift, but has not yet started to work. Plaintiff's husband, George Smith, is attending school on the G. I. Bill of Rights, has medical coverage for the family, and receives disability payments of $825 a month. He, plaintiff, and their baby

live in Black Mountain in a rented house that has three bedrooms, one of which is for Paula. Plaintiff testified that her husband would care for Paula after school hours and while plaintiff is working; but her husband, though present in court, did not testify. Defendants testified that Paula did not wish to leave the school in Swannanoa and becomes very upset when in the Smith home and George Smith yells at plaintiff. In chambers the judge asked the child who she would like to live with and she said she did not like her mother and wanted to live with defendants.

Ronald E. Sneed for plaintiff appellee.

Bennett, Kelly & Cagle, by Harold K. Bennett, for defendant appellants.

PHILLIPS, Judge.

In child custody cases it is fundamental that if the trial court's findings of fact do not support its conclusions of law the order resting thereon must be vacated and the cause remanded for a new hearing. *Green v. Green*, 54 N.C. App. 571, 284 S.E. 2d 171 (1981). The trial court's pertinent findings of fact in this case were as follows:

> 3. On 9 March 1975, Paula Michelle Burgess was born to the plaintiff.
>
> 4. In December of 1977 the plaintiff signed a custody agreement whereby the custody of Paula Burgess was given to the defendants.
>
> 5. When Paula Burgess was born in March of 1975 and in December of 1977, the plaintiff was unmarried and unemployed and unable to provide a home for the minor child.
>
> 6. That the plaintiff married George David Smith on August 22, 1981, and now has a home which is a suitable residence for the minor child.
>
> 7. The plaintiff is a suitable and fit person to have custody of Paula Burgess.
>
> 8. That it is in the best interest of the minor child that she reside with her natural mother, the plaintiff.

9. That there has been a change of circumstances since the custody agreement of December 15, 1977, was entered into by the plaintiff and the defendants, to wit: the Plaintiff is now married, employed, and has a suitable home for the child.

Clearly, these findings are insufficient to support the court's conclusions that the child's best interests require that her custody be changed to the plaintiff. No finding was made as to either plaintiff's earnings or ability to care for and support the child, or as to why the best interests of the child will be served by removing her from the home that she has loved and done well in for eight and a half years. That plaintiff is now married and has both a job and a "suitable residence" for the child to live in does not dispense with the necessity of such or similar findings, which, of course, could not have properly been made from the evidence recorded. Though plaintiff testified that her husband receives $825 a month in G.I. benefits and thus might be in position to contribute to the child's support, no evidence that he was willing to do so is recorded. Plaintiff's testimony that her husband would look after the child when she returns home from school was not buttressed by testimony that he is either able, willing, or qualified to do so; and nothing is recorded concerning his absences from the home while attending school or who will be there to supervise and care for the child during the days of school vacation when plaintiff will be mostly asleep following her work at the factory. And no evidence was presented that the atmosphere or quality of life in the Smith household was such as likely to promote the security, stability and emotional well being of this child, who, according to the record, has been well and lovingly cared for by defendants ever since she was born. Indeed, the only testimony relating to all thereto, about the child being upset whenever she had been in the Smith house and he had yelled at plaintiff, tended to show otherwise.

While trial judges in child custody cases have great latitude in determining what the best interests of such children require, it is a latitude limited by the evidence in each case. And in this case the evidence presented so far, in our opinion, simply does not justify removing the child involved from the home in which she has been living so satisfactorily for so long.

Vacated and remanded.

Judges WEBB and JOHNSON concur.

SQUIRES TIMBER COMPANY v. THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

No. 8413SC17

(Filed 15 January 1985)

Insurance § 6— damage to machinery—machinery leased or sold on installment basis—genuine issue of fact

In an action to recover on an insurance policy for fire damage to a piece of logging machinery, the trial court erred in entering summary judgment for defendant insurer where there was a genuine issue of material fact as to whether plaintiff leased the machinery or sold it on an installment basis to the person in whose possession it sustained damage; the insurance policy specifically excluded leases but not installment sales; and there was no evidence of fraud or misrepresentation.

APPEAL by plaintiff from *Brannon, Judge.* Judgment entered 28 September 1983 in Superior Court, BLADEN County. Heard in the Court of Appeals 16 October 1984.

Hester, Johnson and Johnson, by W. Leslie Johnson, Jr., for plaintiff appellant.

Marshall, Williams, Gorham & Brawley, by William Robert Cherry, Jr., for defendant appellee.

BECTON, Judge.

I

In its Complaint, the plaintiff, Squires Timber Company (Squires), alleges that in May 1981, the defendant, The Insurance Company of the State of Pennsylvania "issued a policy of insurance . . . upon certain personal property *owned* by [Squires], to wit a 1979 Franklin feller buncher, . . . serial no. 9269 . . ." (*emphasis added*); that approximately one year later the feller buncher was damaged and destroyed by fire, causing a loss and damage to Squires in the amount of $51,000; and that Squires

notified defendant of the loss and damage, but the defendant denied liability. The defendant, in its Answer, admitted that the property was insured, but pled, as a specific defense, that the property was "leased or rented" to Harry Lee McKoy and, therefore, excluded from coverage.

It is true that the nature of the agreement between McKoy and Squires is in dispute. Squires contends that it sold the feller buncher to McKoy, a logger, on 15 August 1980 and that it often sells, but never leases, equipment to loggers. McKoy testified that he was either leasing the machine, buying it pursuant to a lease purchase, or buying it pursuant to an installment sales purchase.

The following facts are not in dispute, however, McKoy was an independent logger and not an employee of Squires. On 15 August 1980, McKoy was given exclusive possession and control of the feller buncher pursuant to either the lease, lease purchase sale, or conditional sale agreement of the parties; the agreement between McKoy and Squires was oral; at the time McKoy was given possession of the equipment, an account ledger of the transaction was set up between Squires and McKoy; during May of 1981, after the feller buncher had been in McKoy's exclusive possession and control for approximately nine months, Squires sought insurance on the equipment with defendant; at no time during the negotiations or during the policy period did Squires or McKoy ever put defendant or any of its agents on notice as to the agreement between Squires and McKoy; and during the time that McKoy had possession of the feller buncher, he performed all the repairs and maintenance and purchased two tires for the feller buncher costing a total of $4,400.00.

II

Based on the above disputed and undisputed facts, Squires styles its sole question presented for review as follows:

> Did the trial court commit reversible error in granting defendant's motion for summary judgment where there was no lease or rental on the personal property which would exclude coverage and where there was no concealment or misrepresentation of any material fact or circumstances concerning the policy?

After outlining the "insurance philosophy" of risk management, pursuant to which policies are applied for in the name of the insured so that premiums can be charged and collected based upon the previous loss record of that insured, its business pursuits, its protection of property, its use of property, its integrity and numerous other underwriting decisions, defendant contends that it makes no difference, as a practical matter, whether the arrangement between Squires and McKoy was a sale, conditional sale, lease purchase, or lease. According to defendant, the "arrangement" violated the general conditions of the policy as stated in Article I as well as a specific exclusion contained in Section 4. More specifically, in Article 1, "Misrepresentation and Fraud," the policy provided:

> This entire policy shall be void if, whether before or after a loss, the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Under Section 4 dealing with exclusions, the policy provided:

> This policy does not insure against loss: . . . (i) to property while leased and/or rented to others.

Relying heavily on a Texas Court of Appeals case, *Bucher v. Employers Casualty Co.*, 409 S.W. 2d 583 (Tex. Civ. App., 1966), which held that an installment sale transferred equitable title, thereby constituting a violation of the "change in ownership" provision of the controverted policy and voiding coverage, defendant argues that the lease or installment sale passed equitable title to McKoy and voided Squires' insurance coverage.

Even if we were to accept fully defendant's philosophy of risk management, defendant still would not win at the summary judgment stage on the facts of this case. There is no "change in ownership" provision in Squires' policy. Therefore, there are genuine issues of material fact regarding the nature of the agreement between McKoy and Squires. The insurance policy specifically excludes leases but not installment sales. In addition to McKoy's inconsistent statements that he was leasing the equipment and that he was buying the equipment, Squires presented substantial evi-

dence suggesting an installment sale. McKoy approached Squires and asked if he could buy the machine; a ledger sheet was set up concerning the transaction with the first relevant entry being a balance of $101,000 due; the ledger sheet shows payments by McKoy to Squires beginning 15 August 1980 and ending 23 April 1982 at which time a balance of $60,034.55 was due; McKoy purchased two tires for the feller buncher costing a total of $4,400; McKoy did not sign a proof of loss with regard to the feller buncher because "it was Squires Timber Company's machine until I paid for it"; and both McKoy and a Squires Timber Company official testified that the transaction was a sale.

Further, we find no evidence of fraud or misrepresentation in this case. Pursuant to an agreement, McKoy had obtained possession and control of the feller buncher a full nine months before Squires insured the equipment. Significantly, no interest of Squires changed after the policy was executed.

Considering the facts set forth above, the further facts that all insurance premiums due were paid, and the well-known principle that policies of insurance prepared by the insurer will be liberally construed in favor of the insured, and strictly against the insurer, we hold that summary judgment in favor of the defendant was improperly granted.

Reversed.

Judges HEDRICK and PHILLIPS concur.

Thompson v. Lenoir Transfer Co.

MARY THOMPSON, WIDOW AND GUARDIAN AD LITEM OF TORI ANN THOMPSON AND TRACY THOMPSON, MINOR CHILDREN; A. W. HUFFMAN, JR., ADMINISTRATOR OF THE ESTATE OF JOHN H. THOMPSON, DECEASED, EMPLOYEE, PLAINTIFFS v. LENOIR TRANSFER COMPANY, EMPLOYER, AND AETNA INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8410IC400

(Filed 15 January 1985)

Master and Servant § 93.2— workers' compensation—Commission's consideration of transcript in earlier hearing—no error

Defendants in a workers' compensation proceeding failed to show prejudicial error in the Commission's consideration of the transcript of an earlier hearing on plaintiff's claim, since the Court of Appeals, by ordering a ruling on an evidentiary matter unresolved at the first hearing, contemplated that the transcript would provide the basis for rehearing and did not order a *de novo* hearing; nor were defendants prejudiced by the Commission's ruling that an expert witness's answer to a hypothetical question was admissible but defendants could not offer additional testimony, since defendants had adequate opportunity to cross-examine and attempt to impeach the witness at the first hearing but failed to do so.

APPEAL by defendants from the order of the North Carolina Industrial Commission entered 18 August 1983. Heard in the Court of Appeals 4 December 1984.

Wilson and Palmer, P.A., by Hugh M. Wilson, for plaintiffs.

Harrell and Leake, by Larry Leake, for defendants.

WELLS, Judge.

John Thompson accidentally injured his leg in January 1976, while in the course of his employment. He died in December 1976 as a result of an overdose of pain medicine prescribed for his injuries. Plaintiffs initiated this proceeding seeking death benefits, both for Thompson's death and for his widow's disability at the time. In the initial hearing, plaintiffs attempted unsuccessfully to introduce lay testimony regarding Thompson's state of mind before his death; in addition, the Commission conditionally admitted, but did not finally rule on, causation testimony in the form of a hypothetical question to Dr. Brown, Thompson's physician. From an order denying all benefits, plaintiffs appealed. This court vacated the Commission's order as based on a misapprehension of law.

Upon remand, plaintiffs introduced the transcript of the first hearing and presented some additional evidence. The hearing officer ruled that Dr. Brown's answer was admissible, denied defendants' motion to introduce new evidence from Dr. Brown, and entered an order allowing benefits. On appeal the Full Commission adopted the hearing officer's award.

In their principal assignments of error, defendants contend that the Commission erred in allowing plaintiff to "introduce into evidence" the transcript of the first hearing and in denying their motion to further depose Dr. Brown.

In our previous opinion, *Thompson v. Transfer Co.*, 48 N.C. App. 47, 268 S.E. 2d 534, *disc. rev. denied*, 301 N.C. 405, 273 S.E. 2d 450 (1980), the mandate of this court was as follows:

> The opinion and award of the Commission is vacated and the cause is remanded to the Industrial Commission for a rehearing to: (1) determine the admissibility of Dr. Brown's answer to the hypothetical question propounded by counsel for plaintiff, and, if the answer is admissible, to properly consider such testimony; (2) to consider testimony of lay witnesses concerning decedent's pain and depression which tend to establish a direct causal relation between the accident and the suicide; and (3) to make appropriate additional findings of fact and awards as may be consistent with this opinion and the facts found upon remand.

Id.

This court, by ordering a ruling on an evidentiary matter unresolved at the first hearing, contemplated that the transcript would provide the basis for rehearing and did not order a *de novo* hearing, *see Bailey v. Dept. of Mental Health*, 2 N.C. App. 645, 163 S.E. 2d 652 (1968), and that the Commission would base its ultimate order on the record made including the evidence wrongfully excluded at the first hearing. The offer of the transcript "into evidence" was an act without legal significance. Our courts have long recognized the need for Industrial Commission procedures to be adaptable to its mission and role, and that the Commission itself considers cases before it in the record made before Hearing Commissioners, without a *de novo* hearing. *See, e.g., Maley v. Furniture Co.*, 214 N.C. 589, 200 S.E. 2d 438 (1939).

Defendants contend that the admission of the transcript prejudicially allowed the testimony of Al Huffman and A. W. Huffman, Jr., who had not been cross-examined at the first hearing. Both witnesses testified at the second hearing, however, and were available for cross-examination on their prior testimony.

Defendants claim especial prejudice from the testimony of Jerry Barlow, who provided the only evidence that Thompson actually told Dr. Brown of his state of mind which caused his suicide. Dr. Brown testified as an expert in giving his opinion regarding the causal contribution of Thompson's state of mind to his death, however. His personal knowledge of Thompson's statements was therefore irrelevant. An expert need not testify from personal knowledge, as long as the basis for his or her opinion is available in the record or available upon demand. *See State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979); N.C. Gen. Stat. § 8-58.14 (1981); *see also* N.C. Gen. Stat. § 8C-1 Rules of Evidence 703, 705 (Cum. Supp. 1983). Barlow's testimony was simply repetitive of other testimony in the record on which Dr. Brown could have equally and properly based his opinion. No prejudice appears from any of this testimony.

The key controversy involved Dr. Brown's causation testimony: the Commission ruled that his answer to the hypothetical question was admissible, but denied defendants' motion to allow additional testimony. Defendants now claim that their right to cross-examine Dr. Brown was unfairly usurped. Defendants did in fact cross-examine Dr. Brown briefly, however. Nothing in the record suggests that they were forced to cut short their cross-examination. Moreover, the original ruling was that the evidence would be admitted (albeit conditionally). It is well established that a party may attack the probative value of opinion testimony without waiving the original objection thereto. *State v. Wells*, 52 N.C. App. 311, 278 S.E. 2d 527 (1981). Indeed, any other rule would be manifestly unfair. *See* 1 H. Brandis, N.C. Evidence § 30 (2d rev. ed. 1982). Defendants did not attempt to impeach Dr. Brown and have not justified their failure to do so. Nor have they suggested, assuming they intended to elicit some substantive testimony from Dr. Brown, what the import of that testimony might be. *See State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980) (no offer of proof; exclusion unreviewable). Accordingly, we hold that defendants have had adequate opportunity to cross-examine Dr. Brown

and have failed to show prejudicial error. Their assertion of a general right to *further* cross-examination, on this record, must fail.

We have examined defendants' remaining assignments of error, find them to be without merit and overrule them. The award of the Industrial Commission is untainted by prejudicial error, and is therefore

Affirmed.

Judges ARNOLD and BECTON concur.

HARVEY J. JONES, EMPLOYEE, PLAINTIFF v. BEAUNIT CORPORATION, EMPLOYER, COMMERCIAL UNION ASSURANCE COMPANY AND/OR LIBERTY MUTUAL INSURANCE COMPANY, CARRIERS, DEFENDANTS

No. 8310IC765

(Filed 15 January 1985)

1. **Master and Servant § 68— workers' compensation—claimant not clearly informed of occupational disease—claim not time barred**

Evidence in a workers' compensation proceeding was insufficient to show that claimant was informed clearly, simply and directly by competent medical authority that he had an occupational disease and that his illness was work related so that his claim was time barred under G.S. 97-58(c).

2. **Master and Servant § 82— workers' compensation—occupational disease—determination of which of two carriers was liable**

The Industrial Commission erred in holding defendant insurance carriers jointly liable for compensating an employee disabled by an occupational disease, since one company was the carrier on the risk until 31 March 1968; the other company was the carrier on the risk from 1 April 1968 until the termination of plaintiff's employment with defendant employer; and the employer in whose employment the employee was last injuriously exposed to the hazards of the occupational disease and the carrier on the risk when the employee was so last exposed are the parties liable for payment of compensation. G.S. 97-57.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission filed 14 January 1983. Heard in the Court of Appeals 1 May 1984.

Hassell & Hudson, by Charles R. Hassell, Jr., and Robin E. Hudson, for plaintiff appellee.

Young, Moore, Henderson & Alvis, P.A., by B. T. Henderson, II, and Joseph W. Williford, for defendant appellants Beaunit Corporation and Commercial Union Assurance Company.

Mason, Williamson, Etheridge and Moser, P.A., by James W. Mason, for defendant appellants Beaunit Corporation and Liberty Mutual Insurance Company.

WHICHARD, Judge.

[1] On 19 June 1984 this Court filed an unpublished opinion remanding this case to the Industrial Commission for express determination of defendants' oral motion which pled the provisions of G.S. 97-58 in bar of this claim. We noted that the motion raised a jurisdictional question, the two-year time limit for filing claims under G.S. 97-58(c) being a condition precedent to jurisdiction of the Industrial Commission to hear the claim. *Poythress v. J. P. Stevens*, 54 N.C. App. 376, 382, 283 S.E. 2d 573, 577 (1981), *disc. rev. denied*, 305 N.C. 153, 289 S.E. 2d 380 (1982). We further noted that the record appeared incomplete at the point containing portions of the evidence determinative of this issue; for that reason, the Commission was authorized to receive additional evidence upon remand to enable it to pass upon the motion.

The addendum to the record on appeal contains no additional evidence offered on remand. The Commission unanimously found upon remand "that there is insufficient competent evidence of record to show the claimant was informed clearly, simply, and directly by competent medical authority that he has an occupational disease and that his illness is work-related." *See Lawson v. Cone Mills Corp.*, 68 N.C. App. 402, 410, 315 S.E. 2d 103, 107 (1984) (articulating standard for informing claimant). We sustain the finding. We could not ascertain from the original record that claimant had been informed of his disease so as to raise the jurisdictional bar of G.S. 97-58(c), and the addendum to the record provides no additional evidence for our consideration.

We thus find no merit to defendants' arguments that the claim is time-barred under G.S. 97-58(c). We further find defend-

ants' remaining arguments without merit, and we uphold the award.

[2] Defendant Liberty Mutual cross assigns error to the assessment of liability against it, contending that plaintiff was last injuriously exposed while defendant Commercial Union was the carrier responsible for the risk. We agree. The Commission found, without exception, that plaintiff worked for defendant-employer from 23 September 1963 to 3 May 1971. The parties stipulated that defendant Liberty Mutual was the carrier on the risk until 31 March 1968 and that defendant Commercial Union was the carrier on the risk from 1 April 1968 until the termination of plaintiff's employment with defendant-employer. The employer in whose employment the employee was last injuriously exposed to the hazards of the occupational disease and the carrier on the risk when the employee was so last exposed are the parties liable for payment of compensation. G.S. 97-57. Defendant Commercial Union was the insurance carrier on the risk when plaintiff was last injuriously exposed to the hazards of chronic obstructive pulmonary disease and byssinosis.

The Commission concluded that plaintiff "was last injuriously exposed . . . in his employment with defendant-employer while defendant-insurers were on the risk." On the basis of this conclusion it held defendant carriers jointly liable. Our Supreme Court has stated, however, that "the law makes no provision for a partnership in responsibility . . . ." *Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 170, 22 S.E. 2d 275, 279 (1942).

Haynes presented the question whether, while in the employment of defendant company, plaintiff was injuriously exposed to conditions augmenting the occupational disease he had already contracted. *Id.* at 168, 22 S.E. 2d at 278. The court found that because the same causes which originally gave rise to the disease were present in defendant's company, "last injuriously exposed" as used in G.S. 97-57 "meant an exposure which proximately augmented the disease to any extent, however slight." *Id.* at 166, 22 S.E. 2d at 277. The court wrote:

> Perhaps on a comparative basis, the chief responsibility for plaintiff's condition morally rests upon his [employer of longer duration and the one in whose employ he contracted the disease]; but not the legal liability. It must have been

> fully understood by those who wrote the law fixing the responsibility on the employer in whose service the last injurious exposure took place, that situations like this must inevitably arise, but the law makes no provision for a partnership in responsibility, has nothing to say as to the length of the later employment or the degree of injury which the deleterious exposure must inflict to merit compensation. It takes the breakdown practically where it occurs—with the last injurious exposure.

Id. at 170, 22 S.E. 2d at 279 (cited as the correct legal standard in *Rutledge v. Tultex Corp.*, 308 N.C. 85, 90, 301 S.E. 2d 359, 363 (1983)).

We find *Haynes* to be controlling. Whether there are two companies and, presumably, two insurance carriers as in *Haynes*, or one company and two insurance carriers as here, the carrier on the risk when the employee is last injuriously exposed is the liable party. G.S. 97-57.

Under a *Haynes* analysis, 222 N.C. at 169-70, 22 S.E. 2d at 278-79, defendant Liberty Mutual would be the liable carrier only if plaintiff's occupational disease had reached the point of saturation at the time defendant Commercial Union assumed the risk. The evidence indicates this was not the case. The Commission found as a fact that plaintiff was employed by defendant employer until he was no longer able to work due to his breathing problem. The Commission further found that plaintiff was exposed to dust and fumes from the machine he operated and from the adjacent room. Plaintiff thus worked at the same company under the same deleterious conditions for the duration of his employment. On the basis of this evidence we conclude that plaintiff's last injurious exposure to the hazards which augmented his occupational disease was after responsibility for the risk shifted from defendant Liberty Mutual to defendant Commercial Union. Defendant Commercial Union is thus liable for payment of compensation.

Affirmed in part, reversed in part.

Judges WEBB and HILL[1] concur.

1. Judge Hill concurred in this opinion prior to his retirement on 31 December 1984.

NATIONWIDE LIFE INSURANCE COMPANY v. KANTI C. OJHA

No. 8411SC363

(Filed 15 January 1985)

Insurance §§ 12, 21— incontestability clause—policy date controlled

Defendant beneficiary of two life insurance policies could not invoke the incontestability clause of the policies, since the clause prohibited plaintiff from contesting the policies after "two years from the policy date"; the policies in question were dated 5 December 1980; insured died 2 December 1982; and the date of a conditional receipt issued upon completion of the application and payment of the first premium was thus not the date from which the period of contestability began.

APPEAL by defendant from *Bailey, Judge*. Summary judgment entered 8 November 1983 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 29 November 1984.

Spence & Spence, by Robert A. Spence, Jr., for plaintiff appellee.

Albert A. Corbett, Jr., for defendant appellant.

BECTON, Judge.

In this action by Nationwide Life Insurance Company (Nationwide) to have two of its life insurance policies declared null and void based upon the admitted misrepresentation by the insured of his health status, we conclude that the trial court properly determined that the policies were "contestable" and properly entered summary judgment for Nationwide.

Facts

On 19 November 1980, after Dr. Brij Ojha, the insured, signed an application for life insurance with Nationwide in the amount of one hundred thousand dollars, a conditional receipt was detached from the application and given to Dr. Ojha. The conditional receipt stated that "the insurance . . . becomes effective on the date of application or medical examination, if required, whichever is later, provided" the five conditions, which we summarize below, are met:

(1) Receipt of the first full premium;

(2) Receipt of the fully completed application;

(3) Receipt of all fully completed medical examinations and tests;

(4) Completion of all investigation by the company; and

(5) The company's approval of the policy and the risk.

Immediately following these conditions, the receipt states that "unless all required conditions are met, no insurance shall take effect until the policy is manually received and accepted."

That conditions 1 through 3 above were met is not disputed. Kanti Ojha, the wife of Dr. Ojha and beneficiary under the policy, contends that conditions 4 and 5 were also met. In her brief, she asserts that "[e]vidently, Nationwide Life Insurance Company made such investigation as it deemed proper, and was satisfied Dr. Ojha was insurable and subsequently issued the policy to him." Nationwide, on the other hand, contends that it conducted routine investigations between 24 November and 5 December 1980, and did not approve the application until 5 December 1980. It is undisputed that the policy is dated 5 December 1980.

Because Dr. Ojha died on December 2, 1982, defendant Kanti Ojha wants us to focus on the effective date of the policy. That is, if the effective date is prior to 2 December 1980, she is entitled to recover; if the effective date is after 2 December 1980, then she is not entitled to recover because the two-year incontestability clause in the policy would control. Nationwide, on the other hand, wants us to look at the actual date the policy was issued—the date the policy was approved, the date the risk was incurred, and the anniversary date of the policy.

Analysis

Historically, to protect against an applicant's arbitrary withdrawal of his or her offer while the insurance company extensively investigated the applicant's insurability, insurance companies began issuing conditional binding receipts to the applicant upon the payment of the first premium. These conditional binding receipts usually contained a provision that the insurance shall be considered as in force from the date of the receipt or the date of

the medical examination, provided the application is approved by the company. *See generally* Annot., 2 A.L.R. 2d 943, 946 (1948). With this historical backdrop, we must consider the effect of the conditional binding receipt on the period of time during which Nationwide may contest the validity of the policy under the policy's "incontestability clause." *See id.* at 1014.

"[T]he general rule seems to be that, *in the absence of a specific contrary provision*, the period of contestability begins, according to the provision in the receipt, at the date of the issuance of the binding receipt or the date of the medical examination." *Id.* (Emphasis added.) From this general rule comes the persuasive argument that a life insurance policy should become effective on the date risk commences, and not necessarily on the date which it bears, or the date of its execution, or the date of delivery, or even the date when the first premium is paid. *See Schwartz v. Northern Life Ins. Co.*, 25 F. 2d 555 (9th Cir. 1928), *cert. denied*, 278 U.S. 628, 73 L.Ed. 547, 49 S.Ct. 29 (1928).

In the case at bar, the contest period does not begin to run from the date of conditional receipt. Rather, the incontestability clause contains a "specific contrary provision" prohibiting Nationwide from contesting the policy after "two years from the policy date." Further, annual premiums were due on the anniversary of the policy date. Thus, in order to invoke the incontestability clause, defendant Kanti Ojha had to show that Dr. Ojha had lived for two years after the policy date. This she could not do since the policy was dated 5 December 1980 and Dr. Ojha died 2 December 1982.

Emphasizing that we are not addressing the issue whether, on other facts, Dr. Ojha should have been covered by the policy of insurance beginning with the initial premium paid, but are, rather, addressing whether the incontestability clause is governed by the conditional receipt, we find no triable issue of fact with regard to the effective date of the $100,000 policy issued by Nationwide. We, therefore, conclude that summary judgment for Nationwide was proper, as a matter of law, since the incontestability clause is governed by the policy date, 5 December 1980.

Defendant Kanti Ojha also challenges the trial court's failure to rule on her motions under Rules 59 and 60 of the North Carolina Rules of Civil Procedure. The record does not reflect that

defendant Kanti Ojha ever requested a hearing on her motions. More importantly, our holding that summary judgment was properly granted to Nationwide as a matter of law renders defendant's second argument moot.

Affirmed.

Judges ARNOLD and WELLS concur.

PATRICIA JOHNSON DENISE AND FORMER HUSBAND, FRANK DENISE v. SANDRA JOHNSON CORNELL AND HUSBAND, JAMES F. CORNELL, JR.

No. 844SC417

(Filed 15 January 1985)

Appeal and Error § 57.3— no specific exceptions to findings of fact—scope of review

In a declaratory judgment action to construe several devises in a will where there were no specific exceptions to the findings of fact, the court's scope of review was limited to determining whether the findings of fact supported the conclusions of law.

APPEAL by respondents from *Cowper, Judge.* Declaratory judgment for petitioners entered 1 December 1983 in Superior Court, DUPLIN County. Heard in the Court of Appeals 5 December 1984.

Baddour, Lancaster, Parker & Hine, P.A., by John C. Hine, and Dees, Smith, Powell, Jarrett, Dees & Jones, by William W. Smith, for petitioner-appellees.

Jeff D. Johnson, III, for respondent-appellants.

BECTON, Judge.

In a declaratory judgment action to construe several devises in a will of Virginia Pigford Johnson, the adoptive mother of plaintiff, Patricia Johnson Denise, and the natural mother of defendant, Sandra Johnson Cornell, the trial court concluded on 1 December 1983 that the testatrix intended to divide the 211.75 acre tract of land lying on the north side of rural paved road No.

1311 in the following proportions: Patricia was to receive Tract No. 1, containing 169.26 acres; Sandra, the contiguous Tract No. 2, containing 42.39 acres.

The trial court denied the Cornells' motion for a new trial. In addition, on 31 December 1983, in two separate orders, the trial court ordered (1) the Cornells' attorney, Jeff D. Johnson, to account for receipts and disbursements and to deposit the rental money collected from the estate in a joint account with the Denises' attorney; and (2) that the parties divide the costs of an expert witness land surveyor equally.

From the trial court's 1 December 1983 judgment, its 31 December 1983 orders, and its denial of the Cornells' motion for a new trial, the Cornells appeal. Patricia's former husband, Frank Denise, and Sandra's husband, James F. Cornell, Jr., are parties in this action.

I

Nine of the twelve assignments of error brought forward by the Cornells are based on the trial court's evidentiary rulings. Significantly, the Cornells have not made specific exceptions to the findings of fact. Rather, they have made a general exception to the "final judgment and the entry thereof." Absent specific exceptions to the findings of fact, we are unable to review the Cornells' evidentiary exceptions. *Merrell v. Jenkins*, 242 N.C. 636, 89 S.E. 2d 242 (1955); *Salem v. Flowers*, 26 N.C. App. 504, 216 S.E. 2d 392 (1975). Instead, our scope of review is limited to determining whether the findings of fact support the conclusions of law. *Id.* We find that they do.

In its judgment, the trial court found that (1) the testatrix died seized of 309.2 acres of farmland, thereafter described by metes and bounds; (2) she intended to devise 169.26 acres to Patricia and 42.39 acres to Sandra by the terms of her will, thereafter describing each tract by metes and bounds; and (3) the description in Paragraph IX of the will, cited in full, was sufficient to describe the 169.26 acre tract. It then concluded that the testatrix devised the subject property, again described by metes and bounds, to Patricia and Sandra, by the terms of her will.

Were we to base our decision instead on the evidentiary issues posed, we would still find no error. The declaratory judg-

ment action was tried before a judge without a jury. We note that the evidentiary standards are somewhat more relaxed in a trial without a jury. 1 H. Brandis, *North Carolina Evidence* Sec. 4a (2d rev. ed. 1982). As long as the trial judge has not relied on the incompetent evidence in making his findings, the admission of incompetent evidence is not reversible error if there is sufficient competent evidence to support the findings. *Id.* In the findings of fact before us, there is no proof of the trial judge's reliance on incompetent evidence. Moreover, in reviewing the record, we find competent evidence to support the trial judge's findings. Finally, none of the evidence excluded at trial, but included for review, was competent and material. *See id.*

The Cornells' remaining two assignments of error, dealing with the denial of the Cornells' motion for a new trial, and the entry of the two orders dated 31 December 1983, are without merit.

Affirmed.

Judges JOHNSON and BRASWELL concur.

STATE OF NORTH CAROLINA v. CHARLIE WILLIS ODEN

No. 842SC223

(Filed 15 January 1985)

1. Criminal Law § 43— use of diagram proper

The trial court in a second degree murder case did not err in allowing a witness to testify with the aid of a diagram depicting the scene of the crime, since the diagram was identified by the witness as a fair representation of the location of the scene of a fight between defendant and deceased.

2. Criminal Law § 74.1— confession—State's attack on exculpatory portions

The trial court in a second degree murder case did not err in allowing the State to attack certain exculpatory portions of the defendant's confession which the State had introduced as evidence.

3. Homicide § 21.9— voluntary manslaughter—sufficiency of evidence of excessive force

Evidence in a homicide prosecution was sufficient for the jury to conclude that defendant used excessive force and he could therefore properly be convicted of voluntary manslaughter where the evidence tended to show that

deceased's face was caved in by successive blows with a metal bar; defendant testified that deceased verbally threatened him, gestured with a knife, and threw part of a brick at him; no knife was found; and a witness testified that defendant first knocked deceased down and then struck him three times on the face while he was flat on his back.

APPEAL by defendant from *Bruce, Judge.* Judgment entered 12 October 1983. Heard in the Court of Appeals 4 December 1984.

The defendant, Charlie Willis Oden, was tried on a bill of indictment charging that on 4 August 1983 he did unlawfully, willfully, and feloniously and with malice aforethought kill and murder William Earl Mack. The State proceeded against defendant on the charge of second degree murder. The jury found defendant guilty of voluntary manslaughter. The defendant appeals this judgment.

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

John A. Wilkinson for defendant appellant.

ARNOLD, Judge.

[1] The defendant contends that the trial court committed reversible error in allowing a witness, David Lawrence, to testify with the aid of a diagram depicting the scene of the crime. The witness testified that the diagram was a fair representation of the buildings around the intersection where the crime occurred. As he described what he saw and did on 4 August, he recognized and pointed to specific landmarks on the diagram. Although Mr. Lawrence seemed at one point confused, when he was asked to identify a position he moved to after running from the scene of the crime, which was not depicted on diagram, the rest of his testimony indicates that the diagram accurately depicted the area where Mr. Lawrence said he observed the deceased throw a brick at the defendant. *See* Brandis on North Carolina Evidence § 34 (1982). Our review of the record indicates that the diagram was identified by Mr. Lawrence as a fair representation of the location of the scene of a fight between the defendant and the deceased. Its admission was proper and did not prejudice defendant.

[2] The defendant contends further that the trial court erred in allowing the State to attack certain exculpatory portions of the

defendant's confession, which the State introduced as evidence. The defendant confessed to police that he killed the deceased. Yet, in certain parts of his confession he said that he acted in self defense. The State produced expert forensic evidence and witness testimony that the deceased was not killed in self defense. This was proper under the rule of *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, --- U.S. ---, 104 S.Ct. 202, 78 L.Ed. 2d 177 (1983):

> The introduction by the State of a confession of the defendant which includes such exculpatory statements, however, does not prevent the State from showing facts which contradict the exculpatory statements. The State is not bound by the exculpatory portions of a confession which it introduces if it introduces other evidence tending to contradict or rebut the exculpatory statements of the defendant contained in the confession.

Williams, 308 N.C. at 66, 301 S.E. 2d at 347 (1983).

The trial court properly ruled that the State could attack portions of the defendant's confession.

[3] Defendant contends finally that there was not sufficient competent evidence to convict the defendant of voluntary manslaughter. Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Fleming*, 296 N.C. 559, 562, 251 S.E. 2d 430, 432 (1979). Self defense will excuse a killing if the defendant reasonably believed it necessary to kill the deceased in order to save himself from death or great bodily harm; defendant was not the aggressor; *and* defendant did not use excessive force. *State v. Norris*, 303 N.C. 526, 530, 279 S.E. 2d 570, 572-73 (1981) (emphasis added). "Excessive force" is "more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm." *Id.*

The evidence in the present case was sufficient for the jury to conclude that excessive force was used. The deceased's face was effectively caved in by successive blows with a metal bar. Defendant testified that the deceased verbally threatened him, gestured with a knife, and threw part of a brick at him. No knife

was found. A witness testified that defendant first knocked the deceased down and then struck him three times on the face while flat on his back. The jury had sufficient evidence to conclude that the defendant used more force than was necessary under the circumstances to protect him from death or great bodily harm.

No error.

Judges WELLS and BECTON concur.

JOSEPHINE GILLIS JENKINS v. AVA LINEBERRY WHEELER, ADMINISTRATRIX OF THE ESTATE OF LOUELLA S. WHEELER, AND AVA LINEBERRY WHEELER, INDIVIDUALLY, AVA LINEBERRY WHEELER, EXECUTRIX OF THE ESTATE OF AUSTIN BEDFORD WHEELER, NATIONWIDE MUTUAL INSURANCE COMPANY, AND JAMES L. WILSON

No. 8319SC1199

(Filed 15 January 1985)

Appeal and Error § 16— appeal by one defendant—jurisdiction of trial court to rule on second defendant's motion to dismiss

Where one defendant's motion to dismiss for failure to state a cause of action was granted and plaintiff appealed from the order of dismissal, the trial court had jurisdiction to hear and rule upon a second defendant's motion to dismiss while plaintiff's appeal was pending, since the original order of dismissal against the first defendant in no way touched upon or affected the subject matter of the order of dismissal in favor of the second defendant. G.S. 1-294.

APPEAL by plaintiff from *Mills, Judge*. Order entered 17 August 1983 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 30 August 1984.

Ottway Burton, P.A., for plaintiff appellant.

Gavin and Pugh, by W. Ed Gavin, for defendant appellee.

JOHNSON, Judge.

Plaintiff Jenkins is the sole heir of her natural mother, Louella Wheeler. Louella Wheeler was a passenger in a truck driven by her husband, Austin Wheeler, which was involved in a

one vehicle accident on 19 May 1980. Louella Wheeler died 20 August 1980. Austin Wheeler, Louella Wheeler's second husband and no blood relation to Jenkins, renounced the administration in favor of his sister, Ava Wheeler, who qualified as administratrix of Louella Wheeler's estate. Austin Wheeler committed suicide at some point thereafter, and Ava Wheeler qualified to administer his estate as well. At the time of the accident, Austin Wheeler had an automobile liability insurance policy with Nationwide Mutual Insurance Company with a policy limit of $25,000.

On 7 September 1982, Jenkins filed this action against Ava Wheeler, Ava Wheeler's attorney, James Wilson, and Nationwide. In essence, the complaint alleged that defendants had breached various fiduciary duties and conspired to deprive Jenkins of any recovery on the Nationwide policy.

As to Ava Wheeler, the complaint alleged that upon qualifying as administratrix of the Estate of Louella Wheeler, she negligently or through fraud and conspiracy with Austin Wheeler failed and refused to list or pursue the wrongful death action as an asset of Louella's estate, thus breaching the fiduciary relationship existing between herself as administratrix of the Estate of Louella Wheeler and the plaintiff, as an heir of the estate.

As to Nationwide, the complaint alleged that Nationwide was aware of the conspiracy between Ava Wheeler and Austin Wheeler and conspired with the two of them in denying the estate the proceeds of the automobile liability policy.

As to attorney Wilson, the complaint in essence alleged that he failed to advise Ava Wheeler to list the wrongful death action as an asset of Louella's estate, that he improperly continued representation of conflicting interests, and that he wilfully refused to proceed with the wrongful death action despite Jenkins' insistence and offers to pay all costs, thus breaching the applicable standards of professional skill and ethics.

Defendants Wilson and Nationwide filed motions to dismiss. Wilson's motion to dismiss was granted 8 February 1983, from that order Jenkins appealed. While the matter was pending on appeal (*Jenkins v. Wheeler*, 69 N.C. App. 140, 316 S.E. 2d 354 (1984)), the trial court, on 17 August 1983, heard and granted

defendant Nationwide's motion to dismiss. From that order, Jenkins has instituted this appeal.

Plaintiff does not challenge the substantive correctness of the order granting Nationwide's motion to dismiss. Plaintiff's sole contention advanced in this appeal is that the trial court was without jurisdiction to hear and decide Nationwide's motion to dismiss pending the appeal of the 8 February 1983 order.

G.S. 1-294 provides in pertinent part:

> When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment [order] appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

The language of the statute is clear. An appeal stays further proceedings in the lower court upon the *judgment appealed and matters embraced within that judgment. See, Manufacturing Co. v. Arnold*, 228 N.C. 375, 45 S.E. 2d 577 (1947); *Herring v. Pugh*, 126 N.C. 852, 36 S.E. 287 (1900). The subject matter of the 8 February 1983 order was whether the complaint stated a cause of action against defendant Wilson. The order of 8 February did not touch upon or affect the subject matter of the order of 17 August 1983, which granted Nationwide's motion to dismiss on the ground that the complaint did not state a cause of action against Nationwide. Neither defendant is a necessary party to plaintiff's action against the other. Clearly then, the trial court did have jurisdiction to hear and rule upon Nationwide's motion to dismiss. We therefore

Affirm.

Judges WEBB and PHILLIPS concur.

RICKY ERVIN v. DAVID SPEECE

No. 8422SC34

(Filed 15 January 1985)

Interest § 2; Judgments § 55; Insurance § 110.1— prejudgment interest—distinction between insured and uninsured judgment debtors—statute not unconstitutional

G.S. 24-5, allowing interest on compensatory damages, does not violate the due process and equal protection clauses of the Constitution because it distinguishes between insured and uninsured judgment debtors.

Judge HEDRICK concurs in the result.

APPEAL by defendant from *Morgan, Judge*. Order entered 16 December 1983 in Superior Court, IREDELL County. Heard in the Court of Appeals 18 October 1984.

Plaintiff sued defendant for personal injuries allegedly sustained because of defendant's negligent operation of a pickup truck on 21 November 1982, and requested the recovery of both compensatory and punitive damages. Following a trial presided over by Judge DeRamus the jury found for the plaintiff and awarded plaintiff $7,515 in compensatory damages and $2,000 in punitive damages. Both parties' post-verdict motions were denied, and Judge DeRamus entered judgment on the verdict as follows:

> IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that plaintiff have and recover judgment against the defendant in the amount of $7,515.00 compensatory damages and $2,000.00 in punitive damages and that plaintiff recover interest on the above amount at the rate of 8 percent from December 21, 1982, the date of the filing of the Complaint in this matter.

Pursuant to the provisions of Rule 60 of the N.C. Rules of Civil Procedure, defendant then moved to set aside or modify that portion of the judgment allowing for the recovery of interest while the case was pending. This motion was heard by Judge Morgan, who denied it by order filed on 16 December 1983. Defendant's appeal is from that order.

No brief filed for plaintiff appellee.

George C. Collie for defendant appellant.

Sumrell, Sugg & Carmichael, by Rudolph A. Ashton, III, for The North Carolina Academy of Trial Lawyers, amicus curiae.

PHILLIPS, Judge.

The court's judgment allowing plaintiff interest from the filing of the complaint, rather than the date of the judgment, was entered pursuant to the provisions of G.S. 24-5. This statute, in pertinent part, is as follows:

> The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract shall bear interest from the time the action is instituted until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly. The preceding sentence shall apply only to claims covered by liability insurance. The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract which are not covered by liability insurance shall bear interest from the time of the verdict until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly.

Because the statute distinguishes between insured judgment debtors and uninsured judgment debtors, defendant contends that it violates the due process and equal protection clauses contained in the Fifth and Fourteenth Amendments to the United States Constitution, and the equal protection and law of the land clauses contained in Article I, Section 19 of the North Carolina Constitution. These same contentions were rejected by our Supreme Court in two recent cases similar to this one. *Powe v. Odell*, 312 N.C. 410, 322 S.E. 2d 762 (1984) and *Lowe v. Tarble*, 312 N.C. 467, 323 S.E. 2d 19 (1984). On the authority of those cases we hold that defendant's appeal is without merit. But the judgment is not as clear as it might be as to the amount that pre-judgment interest has accrued on, and we construe it to require interest only on the amount of compensatory damages awarded. Which, no doubt, is what His Honor intended to state, since the statute by its terms authorizes pre-judgment interest on compensatory damages only.

Pre-judgment interest on punitive damages has not been authorized. So construed the judgment was not erroneous and defendant's motion to modify or set it aside was properly denied by Judge Morgan.

The order appealed from is therefore

Affirmed.

Judge BECTON concurs.

Judge HEDRICK concurs in the result.

STATE OF NORTH CAROLINA v. WILLIAM ROGER LANGLEY

No. 8425SC84

(Filed 15 January 1985)

Rape § 4— evidence of semen stains—exclusion under rape victim shield statute proper

In a prosecution for second degree rape and second degree sexual offense, the trial court did not err in excluding on the basis of the rape victim shield statute, G.S. 8-58.6, evidence of semen stains found on the jeans worn by the prosecutrix on the date of the assault, even though the stains were inconsistent with the blood grouping type of the defendant.

APPEAL by defendant from *DeRamus, Judge*. Judgments entered 9 September 1983 in Superior Court, CALDWELL County. Heard in the Court of Appeals 26 September 1984.

Defendant was tried on indictments charging him with second degree rape and second degree sexual offense, convicted, and sentenced to two twelve year terms of imprisonment, to run consecutively.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General T. Buie Costen, for the State.

Robert A. Bell, for defendant appellant.

JOHNSON, Judge.

The issue presented by this appeal is whether the court erred in excluding evidence of semen stains found on the jeans worn by the prosecutrix on the date of the assault which were inconsistent with the blood grouping type of the defendant. For the following reasons, we hold the court properly excluded evidence of the semen stains.

The State's evidence tends to show that the prosecutrix approached defendant and another man in the parking lot of a nightclub after it had closed seeking a ride home. Instead of taking her home, however, defendant drove to a remote wildlife access area where he beat and choked the prosecutrix and forced her to engage in sexual intercourse and fellatio with him.

Defendant admitted engaging in the sexual acts with the prosecutrix but claimed the prosecutrix initiated the sexual activity.

The trial court excluded evidence of the semen stains on the basis of the rape victim shield statute, G.S. 8-58.6, which makes evidence of the victim's sexual behavior irrelevant in a rape prosecution except in certain circumstances. Defendant contends that the evidence was admissible under G.S. 8-58.6(b)(2) to show that the act or acts charged were not committed by the defendant. We disagree.

In *State v. Fortney*, 301 N.C. 31, 269 S.E. 2d 110 (1980), the Court upheld the exclusion of evidence, on the basis of the rape victim shield statute, of semen stains, some of which were inconsistent with the blood grouping type of the defendant, found on the prosecutrix's clothing. The Court noted that evidence of three different semen stains found on the victim's clothing, without more, was not probative of the victim's consent to the sexual acts, but only raised an inference that the victim had had sex with two other individuals other than the defendant some time prior to the night of the rape, which was precisely the type of evidence the rape shield statute was intended to exclude.

A remarkably similar situtation is presented in the present case. The evidence presented at the *in camera* hearing required by G.S. 8-58.6(c) to determine the admissibility of the evidence showed that although a large amount of semen was present on

the vaginal swab taken from the prosecutrix following the alleged rape, none of the semen matched the blood grouping type of the semen found on the jeans. The evidence, at best, merely raises an inference that the prosecutrix had had sex with someone other than the defendant sometime prior to the date of the assault. Such an inference was of the type the statute was designed to avoid. *Fortney, supra.* The evidence of the semen stains found on the jeans was, therefore, properly excluded.

In the trial and judgment of defendant, we find

No error.

Chief Judge VAUGHN and Judge WHICHARD concur.

(Former Chief Judge VAUGHN concurred in the result reached in this case prior to 31 December 1984.)

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 JANUARY 1985

BALL v. FEAGAN No. 8430SC68	Macon (81CVS48)	New Trial
DALEY v. HIGH POINT MEM. HOSPITAL No. 8421SC358	Forsyth (83CVS4744)	Affirmed
IN RE TAYLOR No. 8410DC144	Wake (80J-287)	Affirmed
JEFFERSON-PILOT v. WESTBROOK No. 8410SC25	Wake (81CVS8108)	Reversed & Remanded
RUPPERT v. ALLSTATE INS. CO. No. 8424SC238	Watauga (83CVS175)	Affirmed
S.A.R v. NU-WAY UNIFORM RENTAL No. 8429DC175	Henderson (83CVD730)	Appeal Dismissed
SEAWELL GALLERY OF HOMES v. JOSEPH SUTTON MASONRY CONTRACTOR No. 8418DC395	Guilford (83CVD3419)	Affirmed
SHERIDAN, INC. v. BRANK & DUNN, INC. No. 8429SC333	Buncombe (82CVS1170)	No Error
STATE v. McCLENNY No. 844SC243	Sampson (83CRS8115) (83CRS8119)	No Error as to Defendant's Appeal; State's Appeal—Reverse & remand for sentencing on possession of firearm
TRIAD COMMERCIAL LEASING v. JACKSON No. 8421DC359	Forsyth (83CVD5012)	Affirmed

BILLY CLIFTON WADE v. CAROLYN DODSON WADE

No. 8415DC52

(Filed 5 February 1985)

1. **Appeal and Error § 16— failure to provide security for cost of appeal—motion to dismiss—no jurisdiction of trial court**

Motions to dismiss an appeal for failure of an appellant to provide appropriate security for cost on appeal must be directed to the appellate court where the appeal is docketed; therefore, the trial court in this action was without jurisdiction to enter an order dismissing the appeal for plaintiff's failure to post an undertaking on appeal or a cash bond.

2. **Divorce and Alimony § 30— equitable distribution of marital property—marital property not sufficiently identified**

The trial court's order of equitable distribution of marital property must be vacated where the court did not identify with sufficient detail the property which it determined was marital property; moreover, the court's ruling that plaintiff's misconduct made a detailed listing of the marital property difficult and that plaintiff bore responsibility for the lack of specificity in the judgment did not excuse the court from identifying the property with sufficient detail to enable an appellate court to review the decision and test the correctness of the judgment.

3. **Divorce and Alimony § 30— equitable distribution of marital property—use of fair market value error**

In determining the equitable distribution of marital property, the trial court erred in using the fair market value rather than the net value of the property.

4. **Divorce and Alimony § 30— misconduct during litigation—consideration by court in determining distribution of property improper**

In making its determination as to the equitable distribution of marital property, the court must consider the factors listed in G.S. 5-20(c), and the court may not punish a party by considering his misconduct during litigation as a factor under G.S. 50-20(c)(12).

5. **Divorce and Alimony § 30— increase in value of separate property—only passive appreciation considered in distribution**

The provision of G.S. 50-20(b)(2) that the "increase in value of separate property . . . shall be considered separate property" refers only to passive appreciation of separate property, such as that due to inflation, and not to active appreciation resulting from the contributions, monetary or otherwise, by one or both of the spouses.

6. **Divorce and Alimony § 30— real estate as separate property—house as marital property—method of distribution**

Where plaintiff acquired real property before the parties' marriage, and they built a house thereon during the marriage with defendant making

substantial contributions toward its construction, the property originally held by plaintiff should be considered separate in character and the house constructed during marriage should be considered marital in character. To the extent that it was marital in character, the property should be equitably divided between the parties along with other marital property, and if it was necessary in order to achieve an equitable distribution of the marital property that the court award that part of the asset which was separate in character to defendant, then the court had it within its power in equity to do so to the extent necessary so long as plaintiff was reimbursed or given credit for the value of his separate property contribution.

7. Divorce and Alimony § 30— separate property—transmutation through commingling—theory rejected

The theory of transmutation through commingling, which is that affirmative acts of augmenting separate property by commingling it with marital resources are viewed as indicative of an intent to transmute, or transform, the separate property to marital property, is specifically rejected by the Court of Appeals, since nothing in G.S. 50-20 supports its adoption or indicates a legislative preference for the classification of property as marital, but the statute instead indicates an intent that separate property brought into the marriage or acquired by a spouse during the marriage be returned to that spouse, if possible, upon dissolution of the marriage.

8. Divorce and Alimony § 30— equitable distribution of marital property—award of costs improper

In making a determination as to equitable distribution of marital property, the trial court erred in awarding defendant $625 reimbursement for appraisal fees as costs, since the award was for appraisal costs of witnesses voluntarily selected by defendant, and the court did not have the authority pursuant to G.S. 6-1 to make such an award.

9. Divorce and Alimony § 30— distribution of marital property—consideration of marital misconduct or fault improper

A proceeding for the equitable distribution of marital property should be confined to the issues of the make-up and value of the marital estate and the respective needs of the parties for marital property, and marital misconduct or fault should not be a factor in determining distribution of marital property.

10. Divorce and Alimony § 30— marital property hidden from spouse—appraisals based on photographs—evidence admissible

In a proceeding for the equitable distribution of marital property where the evidence tended to show that plaintiff possessed many vehicles and pieces of heavy machinery during the marriage but he refused to allow defendant to examine them for valuation purposes, the trial court did not err in allowing defendant's witness, who was qualified as an expert in the appraisal of heavy equipment and personal property, to examine photographs of plaintiff's property which defendant had obtained and to give an appraisal, based on his identification of the photographed equipment and upon his experience and expertise in appraising or selling similar equipment.

APPEAL by plaintiff from *Allen, Judge.* Judgment entered 21 September 1983 in ALAMANCE County District Court. Heard in the Court of Appeals 18 October 1984.

This is an equitable distribution action. Plaintiff Billy Wade filed for divorce based on one year's separation in 1982. Defendant Carolyn Wade answered, asking that the divorce be granted and that the court order an equitable distribution of the marital property. Plaintiff had evicted defendant from the family home in 1981 after eight years of marriage, and he thereafter exercised physical control over virtually all the marital property. Judgment of absolute divorce was entered in November 1982. The equitable distribution issues were deferred for hearing.

Following discovery and hearing, the trial court entered a judgment of equitable distribution on 21 September 1983. Plaintiff gave notice of appeal, and the trial court set an appeal bond of $250. Upon motion by defendant, the trial court dismissed the appeal for plaintiff's failure to post an undertaking on appeal or a cash bond. Plaintiff gave notice of appeal from that order, posted bond as ordered by the court, and timely filed his record on appeal with this court.

Vernon, Vernon, Wooten, Brown, Andrews, Garrett and Sandifer, by Wiley P. Wooten and T. Randall Sandifer, for plaintiff.

Hemric, Hemric & Elder, P.A., by H. Clay Hemric, Jr. and Nancy G. Hemric, for defendant.

WELLS, Judge.

[1] Plaintiff first contends the trial court erred in dismissing his appeal. We agree. Under the provisions of Rule 6 of the Rules of Appellate Procedure, motions to dismiss an appeal for failure of an appellant to provide appropriate security for cost on appeal must be directed to the appellate court where the appeal is docketed. The trial court was without jurisdiction to enter its order of dismissal; therefore, that order is vacated. The appeal from the judgment of 21 September 1983 is properly before this court.

We turn now to the merits of the appeal. In its judgment of equitable distribution, the trial court found that plaintiff had in

his possession marital property with a value in excess of $200,000 including the parties' house and the land under and surrounding the house, "rural land with a value of not less than $10,000, and substantial amounts of personal property including numerous trucks, numerous bulldozers, earth movers, tractors, boats, cars, motorcycles, vans, and large sums of money." The court found that defendant had in her possession a 1977 automobile with a value of $4,000 which was marital property, and that defendant was entitled as a matter of law to an equitable distribution of the marital property. The court also made numerous findings regarding plaintiff's failure to comply with discovery orders, his falsification of documents, and his untruthful testimony. The court concluded from the latter findings that plaintiff's actions constituted fault and that it was within the court's authority to consider such fault in determining an equitable distribution of the marital property.

The court awarded defendant the 1977 automobile, the house and the land underlying it, and awarded the remaining marital property to plaintiff. The approximate total value of the property awarded defendant was $76,400. Since the land on which the house was built was titled solely in plaintiff's name, the court ordered plaintiff to deed to defendant the house and all of the land underlying or contiguous to the house, excluding that part of the land on which plaintiff's business was built, but not to exceed three acres. The court further ordered that plaintiff, in lieu of deeding such property to defendant, could elect to pay defendant the sum of $80,000 in cash or certified funds.

Plaintiff argues the judgment of equitable distribution must be vacated because (1) it is not supported by the evidence and (2) the court did not have authority to order the transfer of his land which he claims was his separate property. Of the five assignments of error upon which these arguments are predicated, however, none address any specific finding of fact and none mention any lack of authority regarding the transfer of separate property. It is fundamental that appellate review depends on specific exceptions and proper assignments of error presented in the record on appeal. Rule 10 of the Rules of Appellate Procedure; *Glace v. Throwing Co.*, 239 N.C. 668, 80 S.E. 2d 759 (1954). The assignment of error must clearly disclose the question presented. *Lewis v. Parker*, 268 N.C. 436, 150 S.E. 2d 729 (1966). A single assignment

generally challenging the sufficiency of the evidence to support numerous findings of fact, as here, is broadside and ineffective. *Lancaster v. Smith*, 13 N.C. App. 129, 185 S.E. 2d 319 (1971). The sufficiency of the evidence is accordingly not before us. Moreover, plaintiff's assignments do not clearly present the question of the authority of the court to award separate property. However, the appeal itself constitutes an exception to the judgment and brings forward any error of law apparent on its face.

[2] After carefully examining the judgment, we conclude that it does not comply with the standards for orders of equitable distribution we established in *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E. 2d 772 (1984); therefore, it must be vacated and the cause remanded for entry of a proper judgment. The court did not identify with sufficient detail the property which it determined was marital property. The court specifically identified the 1977 automobile and the house as marital property, however, the remaining marital property was referred to in very general terms. The court ruled that plaintiff's misconduct made a detailed listing of the marital property difficult and that plaintiff bore responsibility for the lack of specificity in the judgment. Despite the difficulty of the task, the court was required to identify the marital property with sufficient detail to enable an appellate court to review the decision and test the correctness of the judgment. *See Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982). The fact that there is evidence in the record from which sufficient findings *could* be made does not excuse the error. *Id.*

[3] In determining what distribution of the property is equitable, the court must use the *net* value of the property rather than its fair market value as used by the court here. *See* N.C. Gen. Stat. § 50-20(c) (Cum. Supp. 1983); *Alexander v. Alexander, supra.* G.S. § 50-20(c) sets forth a presumption of equal division which requires that the marital property be equally divided between the parties in the absence of some reason(s) compelling a contrary result. *Id.* In the present case, the trial court distributed the property unequally giving defendant less than an equal share but failed to state in the judgment the reasons justifying the unequal division. Furthermore, based on the record before us, it is not clear that an unequal division in favor of plaintiff was warranted. On remand, if the court concludes that an equal division is not

equitable, it must clearly set forth findings of fact based on the evidence which support its conclusion. *Id.*

[4] In making its determination, the court must consider the factors listed in G.S. § 50-20(c) and set forth findings of fact in its judgment reflecting its consideration of the relevant factors. The court may not, as it attempted to, punish plaintiff by considering his misconduct during litigation as a factor under G.S. § 50-20 (c)(12). *See Hinton v. Hinton*, 70 N.C. App. 665, 321 S.E. 2d 161 (1984).[1]

We next address whether the court's award of the house and subjacent land to defendant constitutes error of law. The court determined that the house was marital property and was a separate asset from the realty on which it was built and not just an improvement to realty. The evidence clearly shows that plaintiff owned the underlying land prior to the marriage and that it is titled solely in his name. Nevertheless, the court found that plaintiff had in his possession as marital property, subject to equitable distribution, the house and the land under and surrounding the house.

We first consider whether the court was correct in finding that the house was a separate asset from the land on which it was built. Property law generally recognizes two classes of property, real and personal property. *See* N.C. Gen. Stat. § 12-3 (1976); Black's Law Dictionary 1095 (5th ed. 1979). A house, once affixed to the land underneath it, typically becomes part of the realty to which it is affixed. *Ingold v. Assurance Co.*, 230 N.C. 142, 52 S.E. 2d 366 (1949). Though this rule is subject to the exception that the parties may provide to the contrary by contract, express or implied, the burden of proof is on the party claiming the house is personal property to show that it retained that character. *Id.* There is no evidence of any such agreement in this case. Therefore, we must view the house and the land as one asset, that asset being real property.

Next we must determine whether this asset is marital or separate property as defined in G.S. § 50-20(b). That statute defines marital and separate property as follows, in relevant part:

1. There are adequate statutory provisions for punishing such misconduct. N.C. Gen. Stat. § 1A-1, Rule 37(b) of the Rules of Civil Procedure (1983) (discovery sanctions); N.C. Gen. Stat. § 5A-11 *et seq.* (1981) (contempt).

(1) "Marital property" means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property in accordance with subdivision (2) of this section . . .

(2) "Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property . . .

Under the statute, only that property which is marital in character is subject to distribution. *See* G.S. § 50-20(c).

Plaintiff attempted to show at trial that the house and land were his separate property because he acquired the unimproved land prior to the marriage and he contributed some $40,000 of his separate property to the cost of the house whereas defendant contributed only about $5,000. Though it is clear plaintiff acquired the unimproved land prior to the marriage, the trial court found plaintiff's testimony regarding his contributions to the cost of the house untruthful and tainted by forgery. The court found that defendant contributed substantial amounts of money to the construction and maintenance of the house, and indicated that the only credible evidence showed that construction on the house began after the parties were married. Therefore, it appears from the court's findings that the credible evidence showed that the house was constructed during the marriage with marital funds.

[5] Since the unimproved real property was acquired by plaintiff prior to the marriage, it would ordinarily be considered separate in character. Assuming that it is separate in character, it could

then be argued that the improvements to the real property, *i.e.*, the house, merely constitute an increase in the value of the property, and as such, must also be considered separate in character as mandated by that part of G.S. § 50-20(b)(2) which provides "[t]he increase in value of separate property . . . shall be considered separate property." We find that argument unpersuasive.

G.S. § 50-20 is a remedial statute enacted to ensure a fairer distribution of marital assets than under common law rules. The type of unfair results possible under those older rules is well demonstrated by *Leatherman v. Leatherman*, 297 N.C. 618, 256 S.E. 2d 793 (1979) (even assuming husband unjustly enriched by wife's efforts over several decades on behalf of his corporation, wife had no right to share in corporate assets). A remedial statute must be construed broadly, in light of the evils sought to be remedied and the objectives to be attained. *Puckett v. Sellars*, 235 N.C. 264, 69 S.E. 2d 497 (1952). In light of the remedial nature of the statute and the policies on which it is based, we interpret its provision concerning the classification of the increase in value of separate property as referring only to passive appreciation of separate property, such as that due to inflation, and not to active appreciation resulting from the contributions, monetary or otherwise, by one or both of the spouses. This interpretation of the statute is consistent with the approach taken by the overwhelming majority of jurisdictions considering the issue. *See* 1 Valuation and Distribution of Marital Property § 18.06 (J. McCahey ed. 1984); S. Sharp, Equitable Distribution of Property of North Carolina: A Preliminary Analysis, 61 N.C. L. Rev. 247, 260-261 (1983). The appreciation of the real property in the present case was clearly the active type as it resulted from the parties' contributions during the marriage. Therefore this provision in G.S. § 50-20(b) does not apply and we are not required to classify the improved real property as entirely separate in character.

Moreover, given the court's findings, we believe it would be totally inequitable and inconsistent with the policy and purpose of the statute to classify the improved real property as entirely separate property belonging to plaintiff. As this court has previously recognized, G.S. § 50-20 was enacted in recognition of marriage as a partnership and is based at least in part on a policy of repayment of contribution. *Hinton v. Hinton, supra; see also White v. White*, 64 N.C. App. 432, 308 S.E. 2d 68 (1983), *disc. rev.*

allowed, 311 N.C. 309, 317 S.E. 2d 908 (1984). Courts in other states have recognized that the theory of marriage as a partnership

> [R]equires that the marital estate be entitled to a proportionate share in the value of property where its equity interest was partially acquired by marital funds. Where the marital estate chooses to invest its funds in certain property together with non-marital funds, the marital estate is entitled to a proportionate return on its investment. . . . The marital and non-marital estates have each made investments from which they are entitled to the full benefit and return.

Tibbetts v. Tibbetts, 406 A. 2d 70 (Maine 1979) (citations omitted); *see also Harper v. Harper*, 294 Md. 54, 448 A. 2d 916 (1982). To hold otherwise would create incentive for a sophisticated spouse to divert marital funds into improving his or her separate property thereby depriving the other spouse of any possible return of the marital investment upon the dissolution of the marriage. *See Hall v. Hall*, 462 A. 2d 1179 (Maine 1983).

[6] In this case it is clear the marital estate invested substantial sums in improving the real property by constructing a house on it; therefore, the marital estate is entitled to a proportionate return of its investment. *Accord, Turner v. Turner*, 64 N.C. App. 342, 307 S.E. 2d 407 (1983) (where an equity developed in a house purchased by the husband before marriage because of improvements or payments contributed to by the wife during the marriage, that equity could be marital property). Defendant contributed substantially towards construction of the house and it would be contrary to the intent of the statute to deprive her of any possible return of her contributions to the marital estate.

In so concluding, we recognize that a dynamic rather than static interpretation of the term "acquired" as used in G.S. § 50-20(b)(1) will best serve to prevent inequity. *See* Sharp, *supra*; Equitable Distribution of Property § 5.07 (L. Golden, ed. 1983); *Tibbetts v. Tibbetts, supra; Harper v. Harper, supra.* We agree that acquisition must be recognized as the ongoing process of making payment for property or contributing to the marital estate rather than being fixed on the date that legal title to property is obtained. *Tibbetts v. Tibbetts, supra.*

[7] Defendant suggests that we adopt the theory of "transmutation through commingling" and find that the improved real property is entirely marital property. Under that theory, affirmative acts of augmenting separate property by commingling it with marital resources is viewed as indicative of an intent to transmute, or transform, the separate property to marital property. *In re Marriage of Smith*, 86 Ill. 2d 518, 427 N.E. 2d 1239 (1981); *In re Marriage of Lee*, 88 Ill. App. 3d 1044, 410 N.E. 2d 1183 (1980), *aff'd*, 87 Ill. 2d 64, 430 N.E. 2d 1030 (1981). This theory is particularly well developed in Illinois where it was first adopted by judicial decision and later by legislative amendment. *See In re Marriage of Smith, supra*, and Ill. Stat. Ann. Ch. 40, § 503 (Supp. 1984). It has been accepted, however, in other jurisdictions as well. *See, e.g., Darling v. Darling*, 444 A. 2d 20 (D.C. 1982). Adoption of the theory of transmutation has been based on the preconceived legislative preference for the classification of property as marital. *See In re Marriage of Smith, supra.*

We refuse to adopt the theory of transmutation because we find nothing in G.S. § 50-20 which supports its adoption or which indicates a legislative preference for the classification of property as marital. North Carolina has not legislatively adopted a presumption that property acquired during the marriage is marital, as has Illinois, and in fact has adopted a more expansive definition of separate property than most states. *See* Sharp, *supra.* To the contrary, we discern from the statute a clear legislative intent that separate property brought into the marriage or acquired by a spouse during the marriage be returned to that spouse, if possible, upon dissolution of the marriage. This is particularly well demonstrated by that part of G.S. § 50-20(b)(2) which states: "Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance."

We conclude that in order to be consistent with the language and purpose of G.S. § 50-20 the real property concerned herein must be characterized as part separate and part marital. Other states have recognized the dual nature of property that has been acquired with both marital and separate assets. *Frank G.W. v. Carol M.W.*, 457 A. 2d 715 (Del. 1983); *Tibbetts v. Tibbetts, supra;*

Harper v. Harper, supra; Sementilli v. Sementilli, 102 A.D. 2d 78, 477 N.Y.S. 2d 626 (1984). This approach has generally been referred to as the source of funds theory. *See, e.g., Harper v. Harper, supra.* Under this theory, when both the marital and separate estates contribute assets towards the acquisition of property, each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the property. *Id.* Thus, both the separate and marital estates receive a proportionate and fair return on its investment.

[6] When this theory is applied in the present case, the result is not very different from the result reached by the trial court viewing the land and house as two separate assets. That part of the real property consisting of the unimproved land owned by plaintiff prior to the marriage should be considered separate in character and that part of the property consisting of the house which was constructed during the marriage with marital funds should be considered marital in character. Because of his contribution of separate property, plaintiff is entitled to a return of, or reimbursement or credit for, that contribution.

To the extent the property is marital in character, it is to be equitably divided between the parties along with the other marital property. Unfortunately, plaintiff had possession of most of the remaining marital property and had either hidden, sold, or otherwise disposed of it, or in some way made it difficult for the court to award it to defendant. The only asset the court could award defendant as her share of the marital property which would be of any significant and practical value to her was the house. In order to award her the house, the court necessarily had to award her part of the land underlying the house. The question we must resolve then is whether the court could award part of the land which was separate in character to defendant. We conclude that it could.

Since the house and the land are one asset, and that asset is at least partially marital in character, the court had it within its authority to include that asset in its distribution. If it is necessary in order to achieve an equitable distribution of the marital property that the court award that part of the asset which is separate in character to defendant, then we believe the court has it within its power in equity to do so to the extent

necessary so long as plaintiff is reimbursed or given credit for the value of his separate property contribution. That part of the asset which is separate in character should be returned in kind to the person contributing it so far as it is practical, but if it is not practical or equitable to do so, then the court must be permitted to take whatever measures are necessary in distributing the property to achieve equity between the parties. *See Tibbetts v. Tibbetts, supra.* It has long been recognized that courts have within their powers in equity the authority to compel one person to convey title to property to another person when justice requires it as is best demonstrated by courts' use of the equitable remedy of constructive trust. *See* 27 Am. Jur. 2d *Equity* § 105 (1966); *Wilson v. Development Co.*, 276 N.C. 198, 171 S.E. 2d 873 (1970). As is indicated by G.S. § 50-20(g), our legislature recognized this power of the courts to order the transfer of real property under appropriate circumstances.

The trial court only awarded so much of the subjacent land to defendant as was reasonably necessary for use and enjoyment of the house, and allowed plaintiff the option of paying defendant a certain sum of money in lieu of deeding her the property. Given that the court allowed plaintiff that option and so limited its award of the land, we conclude that it was not error as a matter of law for the court to award to defendant the house and subjacent land. We note, however, that the court was not sufficiently specific in its identification of the part of the land to be deeded to defendant. It is essential to a transfer of land that the land be described with sufficient definiteness and certainty to be located and distinguished from other land. *Hodges v. Stewart*, 218 N.C. 290, 10 S.E. 2d 723 (1940). On remand, the trial court should by appropriate order, precisely determine that part of the land which is necessary for use and enjoyment of the house to be deeded to defendant in accordance with the court's directions and to determine the value of that land. The trial court should also clearly indicate in its judgment that it has taken into account plaintiff's right to reimbursement or credit for the value of that part of his separate property contribution not returned to him in determining an equitable distribution of the marital property.

We now briefly discuss plaintiff's other assignments of error. Plaintiff assigns error to the denial of his motion to dismiss, made at the close of defendant's evidence. Plaintiff's motion presented

to the trial court, sitting without a jury, the question of whether defendant's evidence would support findings of fact upon which the trial court could properly enter a judgment in defendant's favor. *See Dealers Specialties, Inc. v. Housing Services*, 305 N.C. 633, 291 S.E. 2d 137 (1982); *see also Bryant v. Kelly*, 10 N.C. App. 208, 178 S.E. 2d 113 (1970), *rev'd on other grounds*, 279 N.C. 123, 181 S.E. 2d 438 (1971). Our review of the record indicates that defendant's evidence establishes *prima facie* her entitlement to an equitable distribution of a substantial amount of marital property. Plaintiff's motion was correctly denied and this assignment is overruled.

The trial court allowed defendant to reopen evidence two weeks after the original hearing and denied plaintiff's motion for a continuance. Plaintiff assigns error. Both motions lay within the court's discretion. *Miller v. Greenwood*, 218 N.C. 146, 10 S.E. 2d 708 (1940) (reopen evidence); *Shankle v. Shankle*, 289 N.C. 473, 223 S.E. 2d 380 (1976) (continuance). No abuse appears, particularly in light of the fact that no new substantive evidence came in following reopening.

[8] Plaintiff assigns error to the trial court's awarding defendant $625 reimbursement for appraisal fees as cost. We agree this was error. Costs are awarded only pursuant to statutory authority. N.C. Gen. Stat. § 6-1 (1981); *City of Charlotte v. McNeely*, 281 N.C. 684, 190 S.E. 2d 179 (1972). While the trial court has broad discretion to allow costs, N.C. Gen. Stat. § 6-20 (1981), it may exercise that discretion only within the bounds of its statutory authority. We are aware that we have approved an award of deposition fees not expressly allowed by statute, following the general definition of "costs" in other jurisdictions. *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 296 S.E. 2d 512 (1982) (citing 20 Am. Jur. 2d *Costs* § 56 (1965)). Unless an expert witness is subpoenaed, however, the witness' fees are not generally recognized as costs. *State v. Johnson*, 282 N.C. 1, 191 S.E. 2d 641 (1972) (interpreting N.C. Gen. Stat. § 7A-314 (1981)); 20 Am. Jur. 2d *Costs* § 65 (1965). The award in this case was for "appraisal" costs of witnesses voluntarily selected by defendant. The portion of the trial court's order awarding costs was therefore error and must be vacated.

Plaintiff also brings forward several evidentiary questions. The standards of evidence are somewhat relaxed in trials before

the court sitting as finder of fact. 1 H. Brandis, N.C. Evidence § 4a (1982). To obtain reversal, plaintiff must show (1) not only that evidence was improperly admitted but also that the trial court relied on it in making its findings, *State v. Davis*, 290 N.C. 511, 227 S.E. 2d 97 (1976), or (2) not only that the evidence was improperly excluded but also that a different result would likely have ensued if it had been admitted. *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 302 S.E. 2d 204 (1983). These assignments are overruled.

[9] Plaintiff assigns error to the exclusion of evidence of defendant's marital misconduct prior to the dissolution of the parties' marriage. At trial, plaintiff was not allowed to cross-examine defendant as to defendant's misconduct. We hold that this evidence was properly excluded. In *Hinton v. Hinton, supra*, a divided panel of this court held that marital misconduct, or fault, should not be a factor in determining an equitable distribution of marital property. While we may not agree with or adopt all the reasoning relied on by the majority in *Hinton*, we do agree with the *Hinton* majority that under our overall statutory scheme, an alimony proceeding is the appropriate means for addressing the economic implications of marital misconduct. It is our position that an equitable distribution proceeding should be confined to the issues of the make-up and value of the marital estate and the respective needs of the parties for marital property. This assignment is overruled.

[10] Plaintiff next assigns error to the trial court's allowing opinion testimony as to the value of certain property later found by the court to be marital property. At trial, defendant's evidence showed that during the course of the parties' marriage, plaintiff possessed a number of items of personal property which included cars, trucks, earth moving and hauling equipment, boats, and trailers. Plaintiff kept much of this property secreted and refused to allow defendant to examine it for valuation purposes, but defendant was able to photograph much of this property. Defendant's witness, Kenneth Teague, was qualified as an expert in the appraisal of heavy equipment and personal property. Teague was shown the photographs of the secreted items of property and was then allowed to give an appraisal, based on his identification of the photographed equipment and upon his experience and expertise in appraising or selling similar equipment. Plaintiff contends

this was error, arguing that there was no showing that Teague was familiar enough with the property to put a value on it. We disagree. The probative value of Teague's opinion testimony was thoroughly explored on cross-examination and by questions from the trial judge. We hold that Teague's testimony was competent; its weight was for the trial court to determine. This assignment is overruled.

Plaintiff also assigns error to the refusal of the trial court to allow into evidence certain exhibits offered by plaintiff in corroboration of testimony offered by his witnesses. Plaintiff has not properly identified the testimony involved, nor has he otherwise presented any basis sufficient for this court to address or evaluate this assignment of error. This assignment is therefore overruled.

Plaintiff also assigns error to the trial court's refusal to allow him to testify that defendant had stated during settlement negotiations that she had no interest in the parties' marital home. The relevance of such an ambiguous statement is dubious, particularly since it accurately reflected the state of legal title at the time. It certainly was not judicially binding, and no prejudicial error resulted from its exclusion. This assignment is overruled.

Plaintiff also assigns error to the trial court's allowing plaintiff's son to testify as to the amount of cash the son saw in his father's possession. The son testified that during the parties' marriage he saw large sums of cash in his father's safe, that the safe was at least a foot wide and about two and one-half to three feet tall, that the cash was kept on a shelf inside the safe which was six to eight inches in depth and which extended for the width of the safe, and that the money occupied the entire shelf. He stated that on many occasions his father had taken out stacks of the money and shuffled it through his fingers, and that he only saw hundred dollar bills in the stacks. The son testified that he had an opinion satisfactory to himself as to how much money was in his father's safe based on his personal observation of the money, and that it was his opinion that the money in the safe totaled $40,000 to $50,000. We hold that this evidence was properly admitted and its weight was for the trial court to determine. This assignment is overruled.

Plaintiff also challenges the sufficiency of the evidence generally and attempts to show that the burden of proof was misplaced. Only the one assignment noted previously appears in the record, however, and we have already held it ineffective. These questions are accordingly not before us.

Substantial judicial resources have already been exhausted by this litigation, and a voluminous record free of evidentiary error has been compiled. A new trial would be unnecessarily wasteful. Accordingly, the trial court may rely on the existing record on remand. *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 65 N.C. App. 242, 310 S.E. 2d 33 (1983), *disc. rev. denied*, 310 N.C. 624, 315 S.E. 2d 689 (1984), *cert. denied*, --- U.S. ---, 105 S.Ct. 128 (1984).

The case is remanded for further proceedings not inconsistent with this opinion.

Affirmed in part; vacated and remanded in part.

Judges ARNOLD and HILL concur.

Former Judge HILL concurred in this opinion before 31 December 1984.

STATE OF NORTH CAROLINA v. ALFRED ALLAN PIPPIN, IV

No. 8410SC215

(Filed 5 February 1985)

1. **Constitutional Law § 50— 14 months between arrest and trial—delay prima facie unreasonable**

Where the offense for which defendant was indicted occurred on 12 July 1982 and defendant voluntarily surrendered himself to the authorities on the same day, admitting his act, a delay of fourteen months in bringing him to trial was prima facie unreasonable and required the district attorney to fully justify the delay.

2. **Constitutional Law § 51— speedy trial—time engaged in plea bargaining not excluded—no error**

By entering into plea bargaining with the assistant district attorney, defendant did not acquiesce in the full 273 days between his arrest and indict-

ment, thereby waving his right to assert a denial of a speedy trial, but instead acquiesced only in those time periods actually attributable to defense counsel's requested plea negotiations. The State failed to meet its burden of establishing any periods relating to plea bargaining and therefore could not complain that the trial court failed to exclude that time.

3. Criminal Law § 91— 140 days between first and final indictment—violation of Speedy Trial Act

A 140-day delay between defendant's first indictment and his final indictment constituted a violation of the N. C. Speedy Trial Act where, except for a seven-day continuance granted on defendant's motion to enable him to take high school exams, the delay was attributable to the district attorney's failure to secure a proper indictment and prosecute the case and, to a much lesser extent, to the assistant district attorney's illness.

4. Constitutional Law § 50— motion under N. C. Speedy Trial Act—no assertion of constitutional right to speedy trial

Defendant's speedy trial motion under the N. C. Speedy Trial Act was not as assertion of his constitutional right to a speedy trial.

5. Constitutional Law § 50— 14 months between arrest and trial—defendant prejudiced

Defendant was prejudiced by a 14-month delay in the proceedings against him where he was incarcerated twice for only brief periods and was released on bond for the balance of the time; at the time of the alleged offense, defendant was a 16-year-old attempting to complete his high school education, and the undue negligent delay by the State certainly interfered with the associational interests of defendant; and defendant's defense was significantly impaired in that he was twice forced to prepare for trials which were not conducted thereby draining his and his family's financial resources.

6. Constitutional Law § 50— speedy trial motion—defendant's financial resources exhausted—basis of trial court's finding

Though the better practice would have been for the trial court to rely on affidavits and other evidence in determining that trial preparations had exhausted defendant's and his family's financial resources, the State nevertheless could not complain that the trial court relied on oral arguments of counsel, since the assistant district attorney expressed no objection to the trial court on hearing counsel's arguments and, more importantly, the trial court relied on several representations made by the assistant district attorney, even though his representations were matters within his personal knowledge.

7. Courts § 9— speedy trial motions—no review of one superior court's judgment by another

There was no merit to the State's argument that the trial court erred in dismissing the charges against defendant with prejudice, thereby violating the rule that ordinarily one superior court may not modify, overrule or change the judgment of another superior court made in the same action, since defendant's first motion for dismissal was for violation of his right to a speedy trial pur-

suant to the N. C. Speedy Trial Act, and his second motion alleged a violation of his constitutional right to a speedy trial.

APPEAL by the State from *Preston, Judge.* Judgment entered 22 September 1983 in WAKE County Superior Court. Heard in the Court of Appeals 3 December 1984.

Defendant was arrested on 12 July 1982 for the murder of Allan Pippin, his father. On 25 March 1983, the Wake County Grand Jury declined indictment of defendant for first degree murder. The district attorney submitted, and the Grand Jury returned, an indictment for second degree murder on 11 April 1983. The solicitor sought to supersede the 11 April 1983 indictment because of deficiencies in properly naming defendant and victim, and the Grand Jury issued another second degree murder indictment on 6 June 1983, the scheduled trial date. Defendant sought and was granted a continuance of the trial on 6 June 1983 until 13 June 1983 in order that he might complete high school examinations.

Defendant moved to quash the indictment on 13 June 1983 as it did not allege "malice," an element of the crime of second degree murder. The trial court, Judge Bowen presiding, ordered the indictment quashed and granted the assistant district attorney's motion to send a new indictment to the Grand Jury. The Grand Jury reindicted defendant for second degree murder on 20 June 1983.

Trial was rescheduled on 22 August 1983. Defendant moved, prior to trial, for dismissal of the charges with prejudice, alleging a violation of the North Carolina Speedy Trial Act. The trial court, Judge Brewer presiding, dismissed the charges against defendant without prejudice on 18 August 1983.

The Grand Jury again indicted defendant for second degree murder on 29 August 1983. Defendant moved for dismissal of the charges with prejudice for lack of a speedy trial as required by the Constitution of the United States and the Constitution of North Carolina. Pending arguments on that motion, defendant petitioned the Court of Appeals for a writ of certiorari alleging that the trial court erred on 18 August 1983 in not dismissing the indictment with prejudice and that the trial court failed to make proper findings of fact as required by law. The petition for cer-

tiorari was denied by this court on 15 September 1983. The trial court, Judge Preston presiding, heard oral arguments on defendant's constitutional speedy trial motion and entered an order on 22 September 1983 dismissing the charges against defendant with prejudice.

The State has appealed.

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

Harrell, Titus & Hassell, by Robert A. Hassell, for defendant.

WELLS, Judge.

The State contends that the trial court erred in dismissing charges with prejudice against defendant because (1) it made findings of fact totally unsubstantiated by any evidence in the record as no evidence was presented at the hearing, and (2) it erred in concluding that defendant's constitutional right to a speedy trial had been violated. We affirm the trial court's order.

The fundamental law of this state provides every individual charged with a crime has the right to a speedy trial, *e.g., State v. Webb*, 155 N.C. 426, 70 S.E. 1064 (1911). This right is also protected by the Sixth Amendment to the Constitution of the United States as applied to the states through the Fourteenth Amendment, *Klopfer v. North Carolina*, 386 U.S. 213 (1967). This right, perhaps the most amorphous of constitutional protections afforded criminal defendants, protects an accused from undue and oppressive pretrial incarceration, prolonged anxiety attendant to criminal accusation, and the potential that undue delays will impair an accused's defense. *United States v. Ewell*, 383 U.S. 116 (1966). Recognizing the obvious interests that society has in the prompt punishment of criminal activity and given the reality that undue delay may hinder the prosecution of an accused, as well as prejudice a defendant, the right to a speedy trial also protects a "societal interest . . . which exists separate from, and at times in opposition to, the interests of the accused." *Barker v. Wingo*, 407 U.S. 514 (1972). The balancing of these interests has been aptly described as not affording the defendant a "sword for defendant's escape, but rather . . . a shield for his protection." Note, 57 Colum. L. Rev. 846 (1957).

The determination of whether the right to a speedy trial has been abridged requires a case by case balancing of four interrelated factors: (1) length of delay; (2) reason for delay; (3) defendant's assertion of the right to a speedy trial; and (4) prejudice to defendant resulting from the delay. Yet, "none of the four factors . . . [are] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. . . . In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." *Barker v. Wingo, supra; see also e.g., State v. McKoy*, 294 N.C. 134, 240 S.E. 2d 383 (1978); *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969). Defendant has the initial burden of showing, *prima facie*, that the delay was caused by the wilful acts or neglect of the prosecuting authority, and, if this burden is met, the State must "offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* showing or risk dismissal." *State v. McKoy, supra* (emphasis in original); *see also State v. Marlow*, 310 N.C. 507, 313 S.E. 2d 532 (1984); *State v. Jones*, 310 N.C. 716, 314 S.E. 2d 529 (1984); *State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976), *cert. denied*, 429 U.S. 1049 (1977).

We first address the length of the delay in this case of some fourteen months (437 days) from arrest until defendant's speedy trial motion was granted. It is well established that a defendant's right to a speedy trial attaches upon being formally accused of criminal activity, by arrest or indictment. *Dillingham v. United States*, 423 U.S. 64 (1975) (per curiam); *State v. McCoy*, 303 N.C. 1, 277 S.E. 2d 515 (1981). This factor:

> [I]s to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.

Barker v. Wingo, supra; see also State v. McKoy, supra; State v. Wright, supra (Exum, J., dissenting). We recognize that some delay is inherent and must be tolerated in any criminal trial,

State v. McKoy, supra; for example, the state is entitled to an adequate period in which to prepare its case for trial, *Pollard v. United States*, 352 U.S. 354 (1957); *see also e.g., State v. Johnson, supra; State v. Norman*, 8 N.C. App. 239, 174 S.E. 2d 41 (1970). What length of time is appropriate in each case is initially within the sound discretion of the trial court. *State v. Hollars*, 266 N.C. 45, 145 S.E. 2d 309 (1965); *State v. Lowry and State v. Mallory*, 263 N.C. 536, 139 S.E. 2d 870, *cert. denied* (1965); *State v. Watson*, 13 N.C. App. 54, 185 S.E. 2d 252 (1971), *cert. denied*, 409 U.S. 1043 (1972).

[1] The offense for which defendant was indicted occurred on 12 July 1982. Defendant voluntarily surrendered himself to the authorities on the same day, admitting his act. Under these facts, and allowing for a reasonable period in which the district attorney needed to prepare for trial, we agree with the implicit finding of the trial court that a delay of fourteen months in bringing defendant to trial was *prima facie* unreasonable and required the district attorney to fully justify the delay. *Compare State v. McKoy, supra* (defendant indicted for first degree murder, found guilty of voluntary manslaughter; approximately twenty-two month delay "unusual"); *State v. Eugene Brown*, 282 N.C. 117, 191 S.E. 2d 659 (1972) (defendant charged with first degree murder, found guilty of manslaughter; seventeen month delay "could contravene the right to a speedy trial under some circumstances, and such delay should be avoided if possible"); *with State v. McCoy, supra* ("We doubt that for a murder case such as this one this delay [eleven months] . . . is enough to be 'presumptively prejudicial,' so as to require us to inquire 'into the other factors that go into the balance.' "); *State v. Sidney Brown*, 287 N.C. 523, 215 S.E. 2d 150 (1975) (three and one-half month delay held not showing any denial of right to speedy trial). The period of delay "in absolute terms is never *per se* determinative," *see also State v. Eugene Brown, supra; State v. Wright, supra*, and as a "triggering" mechanism, "its significance in the balance is not great." *State v. Hill*, 287 N.C. 207, 214 S.E. 2d 67 (1975).

We next review the reasons for the delay. This factor is closely associated with length of delay as the right to a speedy trial protects wilful, oppressive, or neglectful delays by the State. *E.g., United States v. Ewell, supra; Barker v. Wingo, supra; State v. Hill, supra; State v. Crowe*, 25 N.C. App. 420, 213 S.E. 2d 360,

cert. denied, 287 N.C. 665, 216 S.E. 2d 908 (1975). In balancing the reasons for delay in bringing an accused to trial:

> [D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.

Barker v. Wingo, supra. It is axiomatic that the state will not, under most circumstances, be held responsible for delays requested or caused by defendant. *E.g.. State v. McKoy, supra.*

[2] Between defendant's arrest on 12 July 1982 and the first unsuccessful attempt at indictment for first degree murder on 25 March 1983 and the initial indictment for second degree murder on 11 April 1983, there was a lapse of some 273 days. The assistant district attorney, at the motion hearing before the trial court, represented that he had not sought an indictment prior to March 1983 because defendant's counsel had requested that no indictment be brought against defendant while plea negotiations were held with the assistant district attorney. The assistant district attorney stated that plea bargaining involved extensive discussions with defense counsel and some correspondence between the parties. Defendant's attorney agreed that he had requested the district attorney not to indict defendant for first degree murder. In its order, the trial court found as facts:

> . . . .
>
> 5. . . . no indictment was issued, although there were negotiations between the State and counsel for the defendant. . . .
>
> 6. . . . this Court has heard the argument of counsel for the State as to the cause of the delay and cannot find that this lengthy delay [437 days] was justified by any reasonable necessity. . . .

The State, in its brief, appears to argue that by entering into plea bargaining with the assistant district attorney defendant ac-

quiesced in the full 273 days delay between arrest and indictment thereby waiving his right to assert a denial of a speedy trial. We disagree with the state's argument that the entire period is excludable.

We hold that any time periods actually attributable to defense counsel's requested plea negotiations is a waiver by defendant of predicating a speedy trial claim on that period. Plea bargaining is a universal and necessary practice in the courts of this state. The practice is mutually beneficial to the State and defendants. Permitting defendants to avail themselves of this beneficial process and then to subsequently base speedy trial claims on delays expended in plea negotiations would be grossly prejudicial to the state. The trial court's order failed to determine this period of time, and we have been unable to determine this period from the motion transcript. The burden of proof for establishing any periods relating to plea bargaining was on the State. *State v. McKoy, supra.* The state, having failed to adequately present the trial court with evidence as to the period expended in plea negotiations, cannot now complain as to the trial court's failure to exclude that time.

[3] From 11 April 1983 until 29 August 1983, some 140 days, defendant requested one seven day continuance, from 6 June 1983 to 13 June 1983, in order that he might complete high school examinations. The balance of this period, some 133 days, was spent by the district attorney in repeated attempts to secure an indictment under which the state could proceed to trial. The district attorney attempted to supersede the indictment of 11 April 1983 with an indictment on 6 June 1983 because it improperly named the defendant and victim. The superseding indictment was quashed on 13 June 1983 because of the district attorney's failure to properly allege "malice," a necessary element of the charge against defendant. Defendant was indicted for a third time on 10 June 1983 and a trial date was set for 18 July 1983. A continuance was granted until 22 August 1983 because the assistant district attorney in charge of the case was ill. The indictment was dismissed without prejudice on 18 August 1983, the trial court finding a violation of the North Carolina Speedy Trial Act. Each of these indictments arose from the same act by defendant and the intervals between indictments must be considered in evaluating

defendant's speedy trial claim. *Dickey v. Florida*, 398 U.S. 30 (1970) (Brennan, J., concurring).

The state argues that the delay in prosecuting defendant was not intentionally designed to prejudice the defendant, oppressive or arbitrary. While the delay may not have been intentionally pursued in order to prejudice defendant's defense, defendant's constitutional right to a speedy trial encompasses neglectful or negligent delays even though such delays are weighed more neutrally in the *Barker* balancing process than purposeful delays. Unquestionably, the delay between 11 April 1983 and 18 August 1983, except for the seven day continuance granted on defendant's motion, is attributable, for the most part, to the district attorney's negligent failure to secure a proper indictment and prosecute the case prior to a violation of the North Carolina Speedy Trial Act, and, to a much lesser extent, the result of illness of the assistant district attorney.

The district attorney had the defendant indicted a fourth time on 29 August 1983, the next session of the Grand Jury. Defendant petitioned for a writ of certiorari to this court on 1 September 1983, defendant's petition was denied on 15 September 1983 and this court's order was filed on 19 September 1983. On 22 September 1983, the trial court dismissed the charge against defendant which is the subject of this appeal. Any delay occasioned by defendant's motion would not be attributable to the state, but based on the record before us, this delay, if any, was minimal.

[4] The next factor to be considered is defendant's assertion of his right to a speedy trial. Defendant is not required to demand that the state prosecute him. Our supreme court has held that after beginning a prosecution the state has the duty to see that defendants are speedily brought to trial. *State v. Johnson, supra.* The

> [R]ule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right.
>
> . . . .
>
> We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

Barker v. Wingo, supra; see also State v. Jones, supra; State v. Hill, supra.

Defendant contends that his speedy trial motion under the North Carolina Speedy Trial Act was an assertion of his constitutional right to a speedy trial. We disagree. In *State v. Jones, supra,* the court held that the defendant had not asserted his right to a speedy trial even though he had filed a motion to dismiss under the North Carolina Speedy Trial Act. *See also State v. Moore,* 51 N.C. App. 26, 275 S.E. 2d 257 (1981).

The final factor we must consider is prejudice to defendant. Prejudice:

> [S]hould be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker v. Wingo, supra (citation omitted); *see also State v. Johnson, supra.* The United States Supreme Court has also recognized that:

> Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

United States v. Marion, 404 U.S. 307 (1971); *see also United States v. MacDonald,* 456 U.S. 1 (1982); *see also e.g., State v. McCoy, supra* (liberty interest). Defendant does not, therefore, carry the burden to affirmatively demonstrate prejudice, *Dickey v. Florida, supra; Moore v. Arizona,* 414 U.S. 25 (1973), even though demonstration of actual prejudice to the defense of criminal charges carries the greatest weight in balancing the factors in defendant's claim of denial of a speedy trial.

[5] In analyzing prejudice to the defendant, we review the facts before us in light of *Barker* and *Marion.* First, defendant was in-

carcerated twice for only brief periods and was released on bond for the balance of the proceedings against him. Second, at the time of the alleged offense defendant was a sixteen year old high school student, attempting to complete his high school education. The undue, negligent delay by the state in resolving the criminal charges against defendant certainly interfered with the associational interests recognized in and protected by *Marion*. Third, defendant argued that his defense has been significantly impaired as he was twice forced to prepare for trials that were not conducted thereby draining his and his family's financial resources. The *Marion* court specifically recognized this factor as prejudicial. The trial court in the case before us found as a fact that "defendant and his family have exhausted their financial resources to the extent that further appellate proceedings may well require that defendant proceed in forma pauperis." Defendant did not contend that he had sustained any actual prejudice in mounting his defense as recognized in the third *Barker* criteria.

[6] The state contends that the trial court erred in finding as fact that trial preparation had exhausted defendant and his family's financial resources. The state's position is simply that the trial court could not make these findings based on oral arguments of counsel. We disagree.

The Official Commentary to N.C. Gen. Stat. § 15A-952 (1983) provides that "pretrial motions . . . can be disposed of on affidavit or representations of counsel." Furthermore, in *State v. Hollars, supra,* our supreme court decided defendant's constitutional speedy trial claim on its merits while specifically noting that all evidence presented to the trial court was based on oral representations of counsel. *See also* 60 C.J.S. *Motions & Orders* § 37(5) (1969) ("Mere oral statements of counsel should not be received as evidence although objection to their reception may be waived"). Appellate courts in this state have, in the context of speedy trial claims, criticized the failure of counsel to properly develop evidentiary records, *e.g., State v. Wright, supra,* and have clearly expressed that the better practice is to use affidavits and other evidence, *Cf, State v. Branch*, 306 N.C. 101, 291 S.E. 2d 653 (1982). We also note that while the state alleges that the trial court erred in receiving defense counsel's oral statements as evidence, the assistant district attorney expressed no objection to the trial court on hearing counsel's arguments and, more impor-

tantly, the trial court relied on several representations made by the assistant district attorney, even though his representations were matters within his personal knowledge as compared to defense counsel's representations of defendant's financial status.

In balancing the four *Barker* factors, we find that defendant had presented a *prima facie* case that the district attorney's delay in bringing him to trial for approximately fourteen months was caused, in significant part, by the negligence of the district attorney in securing an indictment under which defendant could be properly tried. Except for the one continuance requested by defendant and his petition for a writ of certiorari to this court, the resulting delays must be weighed against the state, albeit more neutrally than if the delay had been purposefully designed. Once the defendant presented a *prima facie* case that substantial delay was the result of the district attorney's negligence, the burden of proof shifted to the state to fully explain and justify the reasons for the delay. The state failed to carry its burden of proof, as the trial court properly found. Two factors counterbalance the length of delay and the district attorney's negligence, however; the defendant's failure to assert his right to a speedy trial and the degree of prejudice resulting from the delay. We conclude that while the degree of prejudice to this defendant is not as severe as in those cases in which defendant's ability to present a defense has been actually impaired, the defendant here demonstrated more than minimal prejudice. Taking all of the facts found by the trial court, and affording the trial court's discretionary judgment the weight it deserves, we affirm the dismissal of charges against defendant.

[7] Finally, the state argued that the trial court erred in dismissing the charges against defendant with prejudice violating the rule that ordinarily one superior court may not modify, overrule or change the judgment of another superior court made in the same action. We find that the authority cited by the State is inapposite to the facts before us.

Our research reveals only one case in the context of speedy trials addressing this issue, *State v. Neas*, 278 N.C. 506, 180 S.E. 2d 12 (1971). In *Neas*, defendant's motion for dismissal of charges against him based on a violation of his constitutional right to a speedy trial was denied by the trial court prior to trial. Defend-

ant plead not guilty, but withdrew his plea prior to jury selection and attempted to enter a plea of guilty. The trial court, for reasons not material to the issue before us, refused to accept the guilty plea and continued the case to the next term of court. Defendant again raised his motion for dismissal for want of a speedy trial based on constitutional law and on the same facts presented to the first trial court. The trial court refused to entertain the motion because of the previous court's order. Our supreme court held that the second trial court correctly refused to entertain defendant's motion as the second motion for dismissal was predicated on the same law and facts as defendant's first motion. *Id.* The facts before us, as distinguished from *Neas*, reveal that defendant's first motion for dismissal was for violation of his right to a speedy trial pursuant to the North Carolina Speedy Trial Act. Defendant's second motion alleged a violation of his constitutional right to a speedy trial. The North Carolina Speedy Trial Act specifically provides that "[n]o provision of this Article shall be interpreted as a bar to any claim of denial of a speedy trial as required by the Sixth Amendment to the Constitution of the United States," N.C. Gen. Stat. § 15A-704 (1983), and this court has held that the protection of the Speedy Trial Act are new rights that are supplemental to the constitutional rights to a speedy trial, *State v. Reekes*, 59 N.C. App. 672, 297 S.E. 2d 763, *disc. rev. denied*, 307 N.C. 472, 298 S.E. 2d 693 (1982). We must, therefore, reject the state's argument.

For the reasons previously discussed, the order of the trial court dismissing charges against defendant with prejudice must be

Affirmed.

Judges ARNOLD and PHILLIPS concur.

ROSE MARIE LEDFORD SMITH, RITA CARDEN AND FRANCES W. LEDFORD v. NATIONWIDE MUTUAL INSURANCE COMPANY AND SOUTH CAROLINA INSURANCE COMPANY

No. 8315SC1102

(Filed 5 February 1985)

Insurance § 95.1— automobile liability insurance—insufficient notice of cancellation for nonpayment of premium

The "Premium Notice" and "Expiration Notice" mailed by defendant insurer to plaintiff insured were not manifestations of a willingness to renew an automobile liability insurance policy which were refused by the insured, nor were they effective notice of refusal to renew by the insurer for nonpayment of premium as required by G.S. 20-310(f), since the "Expiration Notice" purported to grant insured 16 days from the date of expiration of the policy, rather than from the date of mailing or delivery, to pay his premium for semi-annual renewal; the notice did not advise insured of his right to request in writing a hearing and review from the Commissioner of Insurance; nor did the notice advise insured that he might be eligible for insurance through the N. C. Automobile Insurance Plan or that operation of a motor vehicle without having liability insurance is a misdemeanor.

APPEAL by defendant Nationwide Mutual Insurance Company from *McLelland, Judge.* Judgment entered 22 August 1983 in Superior Court, ORANGE County. Heard in the Court of Appeals 23 August 1984. Heard on rehearing in the Court of Appeals 8 January 1985.

The facts of this case are set out in *Smith v. Nationwide*, 71 N.C. App. 69, 321 S.E. 2d 498 (1984). In apt time, defendant Nationwide Mutual Insurance (Nationwide) filed a petition to rehear pursuant to Rule 31, Rules of Appellate Procedure. This court granted the petition to rehear in pertinent part, as follows:

> On rehearing, this Court will consider the question whether the trial court properly allowed summary judgment for the defendant South Carolina Insurance Company.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill and Hargrave, by Douglas Hargrave, for plaintiff-appellees.

Moore, Ragsdale, Liggett, Ray and Foley, by Peter M. Foley and Kurt E. Lindquist, II, for Nationwide Mutual Insurance Company, defendant-appellant.

Holt, Spencer, Longest and Wall, by James C. Spencer, Jr., for South Carolina Insurance Company, defendant-appellee.

EAGLES, Judge.

In the decision of this court reported in *Smith v. Nationwide, supra,* the summary judgment for defendant South Carolina Insurance Company (South Carolina) entered by the trial court was affirmed because defendant Nationwide failed to substantially comply with the clear terms of G.S. 20-310(f) when it failed to renew the automobile policy of its insured, Paul Allen Smith.

In our resolution of the case on appeal we noted that:

> For the purposes of the summary judgment motion, Nationwide stipulated that its insured, Paul Allen Smith, tendered partial payment of the premium on 6 July 1979 and a check for the full amount of the premium on 11 July 1979, both of which were refused by Nationwide.

Nationwide argues correctly in its petition for rehearing that these stipulations applied *only* to defendant Nationwide's motion for summary judgment and *not* to the motion for summary judgment of defendant South Carolina. Stipulations are encouraged and their effects are restricted to the extent manifested by the parties in their agreement. *Rickert v. Rickert,* 282 N.C. 373, 193 S.E. 2d 79 (1972).

We further agree that there was no "cancellation" of the insured's policy since there was no unilateral termination of a policy before the end of the stated term. *Scott v. Allstate Insurance Company,* 57 N.C. App. 357, 291 S.E. 2d 277 (1982).

However, we do not agree with Nationwide's contention that there was no "refusal to renew for non-payment of premium."

The question here involved is therefore, whether, notwithstanding the language of G.S. 20-310(g), Nationwide must comply with the mandate of G.S. 20-310(f) when it declines to renew an automobile liability insurance policy for non-payment of premium after mailing to its insured a "Premium Notice" and an "Expiration Notice." The plaintiffs contend that on 5 July 1979, the date of the accident referred to in our original opinion, the insurance policy issued by Nationwide was still in full force and effect as a matter of law because Nationwide had failed to comply with the requirements of G.S. 20-310(f) relating to cancellation or

refusal to renew for non-payment of premium. We agree and hold that summary judgment was proper in this case.

Summary judgment is a 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 a party is entitled to judgment as a matter of law. *Johnson v. Phoenix Mutual Life Insurance Company*, 300 N.C. 247, 266 S.E. 2d 610 (1980). The goal of this procedural device is to allow disposition before trial of an unfounded claim or defense. *Asheville Contracting Company v. City of Wilson*, 62 N.C. App. 329, 303 S.E. 2d 365 (1983).

The undisputed facts are that: On 27 February 1979, defendant Nationwide issued to Paul Allen Smith its policy of automobile liability insurance numbered 61E686567 with a policy period from 22 February 1979 to 22 June 1979. On 1 June 1979 Nationwide mailed a document entitled "Premium Notice" through the United States mail, first class postage, to Paul Allen Smith at his home address. On 27 June 1979, Nationwide mailed a document entitled "Expiration Notice" through the United States mail, first class postage, to Paul Allen Smith at his home address. Neither of the two documents so mailed were returned to Nationwide as undelivered. On 5 July 1979, the Smith vehicle described in the Nationwide policy of insurance was involved in a collision in Orange County, North Carolina.

The trial court, in its summary judgment order filed 6 September 1983, found that there was no genuine issue as to any material fact with respect to the insurance coverage for the Paul Allen Smith vehicle, a 1969 Chrysler, and that the coverage afforded by Nationwide was in full force and effect on the date of the collision, 5 July 1979.

The deposition of Ann Amos, supervisor of Nationwide's data entry department in Raleigh, tends to show and Nationwide's brief states, that the policy in question was terminated by Nationwide for failure to pay the premium.

It is clear from the "Premium Notice" mailed 1 June 1979 and the "Expiration Notice" mailed 27 June 1979, that the policy in question would have been renewed by Nationwide if the premi-

um had been paid in full by the deadline set in the "Expiration Notice."

The original policy listed an expiration date of 22 June 1979 and the "Expiration Notice," mailed on 27 June 1979, purported to grant Paul Allen Smith an additional 16 day period beyond 22 June 1979 in which he could pay his premium without an interruption in coverage. When full payment was not received during this additional 16 day period, Nationwide terminated the policy. The basis for Nationwide's failure to renew was nonpayment of premium.

Before an insurer may cancel or refuse to renew a policy of automobile liability insurance for failure to pay a premium due, the insurer must follow the provisions of G.S. 20-310 and G.S. 20-309(e). *Nationwide Mutual Ins. Co. v. Davis*, 7 N.C. App. 152, 171 S.E. 2d 601 (1970).

The pertinent part of G.S. 20-310 is found in subsection (f) which provides:

> (f) No cancellation or refusal to renew by an insurer of a policy of automobile insurance shall be effective unless the insurer shall have given the policyholder notice at his last known post-office address by certificate of mailing a written notice of the cancellation or refusal to renew. Such notice shall:
>
> (1) Be approved as to form by the Commissioner of Insurance prior to use;
>
> (2) State the date, not less than 60 days after mailing to the insured of notice of cancellation or notice of intention not to renew, on which such cancellation or refusal to renew shall become effective, except that such effective date may be 15 days from the date of mailing or delivery when it is being canceled or not renewed for the reasons set forth in subdivision (1) of subsection (d) and in subdivision (4) of subsection (e) of this section;
>
> (3) State the specific reason or reasons of the insurer for cancellation or refusal to renew;
>
> (4) Advise the insured of his right to request in writing, within 10 days of the receipt of the notice, that the Commis-

sioner of Insurance review the action of the insurer; and the insured's right to request in writing, within 10 days of receipt of the notice, a hearing before the Commissioner of Insurance;

(5) Either in the notice or in an accompanying statement advise the insured of his possible eligibility for insurance through the North Carolina Automobile Insurance Plan; and that operation of a motor vehicle without complying with the provisions of this Article is a misdemeanor and specifying the penalties for such violation.

G.S. 20-310(f)(2) refers to subdivision (e)(4) of this same statute which states:

(e) No insurer shall refuse to renew a policy of automobile insurance except for one or more of the following reasons . . . (4) The named insured fails to discharge when due any of his obligations in connection with the payment of premiums for the policy or any installment thereof.

Thus, all of the provisions of G.S. 20-310(f) must be complied with before an insurer may refuse to renew an insurance policy pursuant to G.S. 20-310(e)(4). Compliance means substantial compliance with G.S. 20-310 in order for an insurer to effectively cancel [or fail to renew] an automobile liability policy for nonpayment of premium. In the instant case, Nationwide failed to substantially comply with the statute's requirements.

Here, Nationwide by the terms of its "Expiration Notice" mailed 27 June 1979 purports to grant its insured 16 days from the date of expiration, 22 June 1979, within which to pay his premium for semi-annual renewal. The clear implication of the "Expiration Notice" is that if payment is not received, Nationwide will not renew. The "Expiration Notice" falls short of substantial compliance with G.S. 20-310(f) in several respects.

G.S. 20-310(f)(2) requires at least 15 days notice *from the date of mailing or delivery* when insurance is being cancelled or not renewed for failure to pay a premium due. Here, the date of mailing is stipulated by the parties as 27 June 1979. The minimum notice required by G.S. 20-310(f)(2) was not met. If the requirements of G.S. 20-310(f)(2) had been met by the "Expiration

Notice," the insured would have had until 21 July 1979 to pay his premium and have his policy renewed well beyond the accident date of 5 July 1979.

In addition, the "Expiration Notice" did not comply with G.S. 20-310(f)(4) and (5). These provisions require the insurer to advise the insured of his right to request in writing a hearing and review from the Commissioner of Insurance, that the insured may be eligible for insurance through the North Carolina Automobile Insurance Plan, and that operation of a motor vehicle without having liability insurance is a misdemeanor. For these reasons, the trial court was correct in concluding that the policy of insurance issued by Nationwide to Paul Allen Smith was in full force and effect on 5 July 1979.

Nationwide argues again in its petition for rehearing that it did not have to comply with G.S. 20-310(f) because of the language contained in G.S. 20-310(g). For strong public policy reasons, we disagree.

G.S. 20-310(g) states:

> Nothing in this section will apply:
>
> (1) If the insurer has manifested its willingness to renew by issuing or offering to issue a renewal policy, certificate or other evidence of renewal, or has manifested such intention by any other means;
>
> (2) If the named insured has notified in writing the insurer or its agent that he wishes the policy to be cancelled or that he does not wish the policy to be renewed;
>
> (3) To any policy of automobile insurance which has been in effect less than 60 days, unless it is a renewal policy, or to any policy which has been written or written and renewed for a consecutive period of 48 months or longer.

Defendant Nationwide urges that G.S. 20-310(g) looks solely to the actions of the insurer in determining whether it must meet the requirements of G.S. 20-310(f). We do not believe the legislature intended a result that would render meaningless the protection now offered to the motoring public by G.S. 20-310(f).

Even if we were to accept Nationwide's interpretation of G.S. 20-310(g) as valid, if an insurer "manifests its willingness to renew" an insurance policy, it is axiomatic that the actions of the insured must be examined to determine whether there is a rejection of the insurer's offer to renew.

We also note that the "Premium Notice" here is very similar to the "Premium Notice" in *Insurance Company v. Davis, supra,* where this court held that the "Premium Notice" was not an offer to renew a policy. Rather:

> Such a notice, standing alone, is simply a statement of an account that will be due on the date indicated. If payment is not made, the insurer has the option of renewing the policy and treating the unpaid premium as an account receivable or of refusing to renew the policy. If the insure(r) [sic] refuses to renew, termination of coverage results from *its* action and notice to insured and the Motor Vehicles Department must be given as provided [in G.S. 20-310(f)]. The Court's findings that such notice was not given in this case supports its conclusion that the insurance coverage was still in effect at the time of the collision. 7 N.C. App. at 160, 171 S.E. 2d at 605. [Emphasis in original.]

In the *Davis* case, the notice relied on by Nationwide there as its offer to renew was entitled, as here, "Premium Notice." It stated, in pertinent part, "The semi-annual premium on your auto policy . . . is due on June 21, 1967." The premium to be paid by that date was $30.60 and in small print in the lower left-hand corner the following appears: "Your auto insurance is important security you can't afford to be without. Prompt payment of the premium shown above will assure you the continued protection of this policy." 7 N.C. App. at 159, 171 S.E. 2d at 605.

The *Davis* court, in holding that the "Premium Notice" was not an offer to renew the policy, found that the "Premium Notice" made no reference to the expiration date of the policy and *no warning of the consequences of a failure to pay the premium.* 7 N.C. App. 159, 171 S.E. 2d at 605. [Emphasis added.] We note that in the instant case, Nationwide's "Premium Notice" does have a reference to the expiration date, 22 June 1979, *but contains no warning of the consequences of a failure to pay the premium.* In fact, small print on the lower left-hand side of the "Premium

Notice" here states: "This auto premium notice renews our pledge to provide you the best in protection and service for your insurance dollar. Your payment now lets us keep our pledge to you." This language indicates that payment renews the policy but does not state the consequences of failure to pay the premium when due.

We hold that *Insurance Co. v. Davis, supra,* controls here and that the "Premium Notice" mailed to the insured in this case does not constitute an offer to renew a policy of insurance such as that appearing in *Faizan v. Insurance Co.*, 254 N.C. 47, 118 S.E. 2d 303 (1961) and relied on by Nationwide. Nationwide urges that where an insured fails to pay the premium by the due date, here 22 June 1979, the insurer has no duty to send an additional notice to the insured pursuant to G.S. 20-310. While it is true that our Supreme Court in *Faizan* held that the non-renewal was not by the insurer, but rather was the unilateral act of the insured, an examination of the reasoning of the *Faizan* court shows that the decision was based on more than mere failure to pay the premium when due.

> [The insured] did not pay the renewal premium on the date specified and did not tender the premium at any later date. He applied through the Assigned Risk Plan for insurance. 254 N.C. at 57, 118 S.E. 2d at 312.

In the *Faizan* case, the rejection by the insured was unequivocal not merely because he failed to pay the premium when due, but because he obtained another insurance policy from a different insurance company. Here, there is no evidence of an unequivocal rejection of Nationwide's purported offer to renew by Paul Allen Smith.

Nationwide urges that G.S. 20-310(g) applies where an insurer manifests "any willingness to renew" and that to hold otherwise would demand that the requirements of G.S. 20-310(f) be met in all cases where non-payment of premium results. Nationwide also argues that insurers could never have proper *termination* without compliance with the requirements of G.S. 20-310(f) making G.S. 20-310(g) superfluous. It appears to us that the legislature did in fact intend for insurers to meet the requirements of G.S. 20-310(f) in all cases of termination by the insurer, including those situations in which the insured fails to pay the premium when due. G.S. 20-310(g) is not rendered superfluous by this interpretation.

Rather, G.S. 20-310(g) retains its purpose to allow an insurer to avoid the requirements of G.S. 20-310(f) where the insurer has manifested its willingness to renew and the insured unequivocally rejects the renewal by acts such as obtaining an insurance policy from another company or by notifying the insurer or its agent in writing that he does not wish the policy to be renewed.

We also note that the "Expiration Notice" sent by Nationwide is not a document which would allow Nationwide to avoid the G.S. 20-310(f) notice requirements. The document was mailed to the insured 27 June 1979, five days after Nationwide says its cancellation was effective. This "Expiration Notice" cannot provide prospective notice of a past event and does not, itself, meet the notice requirements of G.S. 20-310(f). Advance notice must be given before termination is possible. *Faizan v. Insurance Co., supra.*

We hold that Nationwide renewed the policy in question and treated the unpaid premium as an account receivable. This is further evidenced by the "Expiration Notice" which requested the insured to "pay $166.60" and to "please return this notice with your payment." Having been renewed, the policy was in effect; the subsequent termination for non-payment of premium, after the policy's renewal by Nationwide, was an act by the insurer requiring the full notice requirements of G.S. 20-310(f).

Because of our misapplication of Nationwide's stipulation as to tendered payments in our original opinion, we withdraw our opinion previously filed in *Smith v. Nationwide*, 71 N.C. App. 69, 321 S.E. 2d 498 (1984), and declare that it is no longer the law of this case having been superseded by our decision here. We note that the issue of whether or not the insured actually tendered the premium is not determinative of the outcome of the case on appeal.

We hold that in this case the "Premium Notice" and "Expiration Notice" were not "manifestations of a willingness to renew" which were refused by the insured. Neither were they effective notice of refusal to renew by the insurer for non-payment of premium as required by G.S. 20-310(f).

Nationwide's assigned error on the issue of punitive damages is not properly before us, there being no final order of the trial court from which to appeal.

Affirmed.

Judges ARNOLD and WHICHARD concur.

BARBARA G. WEAVER v. ROBERT E. WEAVER

No. 8410DC99

(Filed 5 February 1985)

1. **Divorce and Alimony § 30— spouse's interest in partnership—marital property subject to distribution**

A spouse's interest in a professional partnership is a marital asset subject to equitable distribution.

2. **Divorce and Alimony § 30— spouse's interest in accounting partnership—method of calculating value**

In determining the equitable distribution of marital property the trial court properly calculated the present value of defendant's interest in an accounting partnership where the court used the partnership agreement's payment plan for a withdrawing partner, and then discounted future payments provided for under the plan; however, the interest rate of 4½% used to discount the payments to defendant of his partnership interest was far below the market rate, and its use produced a present value thousands of dollars in excess of the actual or market value of the money.

3. **Divorce and Alimony § 30— interest in partnership—consideration of goodwill in equitable distribution**

Goodwill is an asset which must be valued in equitable distribution of an interest in a going concern.

4. **Divorce and Alimony § 30— actual value of partnership interest—amount discounted—interest rate used improper—appropriate rates**

The interest rate used under G.S. 8-47 to calculate the present worth of annuities payable annually to a person during his life was not the appropriate rate to use where the trial judge applied a discount in order to find the actual or true net value of defendant's partnership interest for the purpose of making an equitable distribution of marital property; rather, reasonable rates which the court might have considered included the rate used by the IRS in determining assessments and refunds, Treasury bill rates, and the prime rate charged by banks.

5. **Divorce and Alimony § 30— distribution of marital property—interest in accounting partnership—determination of value**

In a proceeding for equitable distribution of marital property where the trial court was required to determine the value of defendant's interest in an accounting partnership, there was no merit to defendant's contention that a

number of contingencies affected payment under the partnership agreement and that they should be considered in valuing defendant's partnership interest, since the contingencies defendant invoked were purely speculative; furthermore, the trial court did not err in failing to consider taxes which defendant might have to pay on the interest in his partnership if he were to withdraw or to consider the lower taxes his wife would pay on the house the trial judge awarded her, since the trial court is not required to consider possible taxes when determining the value of property in the absence of proof that a taxable event has occurred during the marriage or will occur with the division of the marital property.

6. **Divorce and Alimony § 30— equal division of marital property ordered—failure to make specific findings—no error**

Where the trial judge ordered an equal division of the net value of all marital property except for certain personal property, and nothing in the record indicated that he did not consider all the statutory factors in ordering this equal division, the trial judge's failure to make specific findings on all the factors set out in G.S. 50-20(c) was not error.

7. **Divorce and Alimony § 30— court's reliance on oral agreement to divide furnishings—failure to make findings explaining equitable distribution**

The trial court's reliance on the parties' oral agreement for division of their household furnishings at the time of separation and his failure to make specific findings under G.S. 50-20(c) explaining the equitable distribution of furnishings was error.

8. **Divorce and Alimony § 30— piano not marital property—findings proper**

The trial court did not err in finding that a piano, purchased by the wife for $3,800 with marital funds, was a gift to the children of the marriage and was not marital property of the parties subject to equitable distribution.

APPEAL by defendant from *Creech, Judge*. Order entered 5 October 1983 in District Court, WAKE County. Heard in the Court of Appeals 23 October 1984.

The parties were married in 1960. The husband is an accountant and the wife is a real estate broker. On 4 September 1981 they separated.

When the parties separated, their two principal assets were the equity in their home and the equity in the husband's accounting partnership. At the time of separation, the husband left the marital home and took certain personal property with him. The wife testified that she and her husband agreed orally to the division of personal property when he left.

The parties owned a piano, purchased for $3,800 with the earnings of the wife during the marriage. The wife testified that this was given to and belonged to the children of the parties.

On 7 September 1983, the wife filed a complaint asking for alimony pendente lite, permanent alimony, custody of the children, child support payable by defendant, equitable distribution of the marital property and absolute divorce. The plaintiff voluntarily dismissed her claim of alimony, with prejudice. Child custody and the defendant's obligation to pay child support were not contested. The parties say they were granted a divorce. The record in this appeal contains no copy of the divorce decree. The case was tried solely on the issues of equitable distribution and the amount of child support.

On 5 October 1983, the trial judge entered an order of equitable distribution. The order concluded that the defendant's interest in the partnership was marital property of value $100,896 and should be divided equally between the parties. The order also approved the oral agreement at the time of separation as to the parties' personal property, and concluded that each party should retain the property he or she presently possesses by virtue of that agreement. The order also concluded that the piano was a gift by the parties to the children and that it is the property of the children.

The defendant appeals the judgment.

Jack P. Gulley for plaintiff appellee.

Hunter, Wharton & Howell, by John V. Hunter III, for defendant appellant.

ARNOLD, Judge.

I

The defendant first contends that the trial court failed to calculate correctly the present value of defendant's interest in his accounting partnership.

[1] A spouse's interest in a professional partnership is a marital asset subject to equitable distribution. *See Stern v. Stern*, 66 N.J. 340, 331 A. 2d 257 (1975); *In re Marriage of Fonstein*, 17 Cal. 3d 738, 131 Cal. Rptr. 873, 552 P. 2d 1169 (1976). Placing a precise or

even approximately accurate value on such a partnership interest, especially when the partner whose interest is in question continues as a member of the firm, is not easy. There is no real market value for this asset. Yet, partnership interests can and have been successfully valued, with the aid of expert testimony and using various appraisal methods. *See Stern v. Stern*, 66 N.J. 340, 331 A. 2d 257 (1975); *Johnson v. Johnson*, 277 N.W. 2d 208, 213 (Minn. 1979) (joint venturer's interest valued under same principles as partnership interest); *In re Marriage of Fonstein*, 17 Cal. 3d 738, 131 Cal. Rptr. 873, 552 P. 2d 1169 (1976); Ytreberg, Evaluation of Interest in Law Firm or Medical Partnership for Purposes of Division of Property in Divorce Proceedings, 74 A.L.R. 3d 621, 624; *cf.* L. Schwechter & R. Quintero, Valuing the Professional Service Corporation, 3 Equitable Distribution Rep. 142 (1983).

Partnership agreements often furnish a useful method for calculating the partnership interest's value, *see Stern v. Stern, supra; In re Marriage of Fonstein, supra*, particularly when they do not penalize, or place a premium on the holdings, of a particular partner, *see In re Marriage of Morris*, 588 S.W. 2d 39, 43-44 (Mo. App. 1979) (redemption agreement terms for death of stockholder not appropriate in equitable distribution because they placed a premium value on stocks). When the terms of a partnership agreement are used, however, the value of the interest calculated is only a *presumptive* value, which can be attacked by either plaintiff or defendant as not reflective of the true value. *Stern*, 331 A. 2d at 261.

There is no single best approach to valuing a partnership interest. Our task on appeal, therefore, is to determine whether the approach used by the trial judge reasonably approximated the "net value" of the partnership interest.

[2] In the present case, the trial judge, in his Judgment of Equitable Distribution, made a finding of fact that the marital assets of the parties included "[d]efendant's interest in the Partnership which had a present value on December 31, 1982 of One Hundred Thousand, Eight Hundred and Ninety-Six Dollars ($100,896.00)." The trial court apparently based this finding of ultimate fact on the testimony of Mr. Jack Wilson, Chairman of the Management Committee of defendant's accounting partnership. Mr. Wilson testified as to how defendant's interest in the

capital account and share of the profits would be distributed to him under the terms of the partnership agreement in the event of defendant's withdrawal from the firm. The trial court summarized the pertinent parts of this testimony in another finding of fact:

> [T]hat Mr. Wilson testified that computing the Defendant's capital account as of April 1, 1982, at the close of the preceding fiscal year was Forty-Three Thousand, One Hundred and Ten Dollars ($43,110.00); that Mr. Wilson further testified that as of December 31, 1982, it was at Thirty-Two Thousand Dollars ($32,000.00); that the capital account was generally lower in December than at the end of March, and that he would anticipate that it would increase back by March 31, 1983; Mr. Wilson testified that if on February 4, 1983, the Defendant had left the firm as of that date based upon the capital account of Thirty-Two Thousand Dollars ($32,000.00) on December 31, 1982, he would have received the capital account of Thirty-Two Thousand Dollars plus Eighty Thousand, Nine Hundred and Eighty-Six Dollars ($80,986.00) for a total of One Hundred and Twelve Thousand, Nine Hundred and Eighty-Six Dollars (112,986.00); that the capital account would be paid for a five (5) year period in quarterly installments with no interest and the balance of Eighty Thousand, Nine Hundred and Eighty-Six Dollars ($80,986.00) would be paid over a five (5) year period at no interest, the latter sum representing one-half (1/2) of Defendant's partnership interest in the firm for a period of five (5) years.

The trial court thus calculated the present value of defendant's interest in the partnership as the Management Committee would have done had defendant withdrawn in February, 1983 (the trial court backdating to 31 December 1982). The trial court added the value of the defendant's capital account, $32,000, to the remainder of his partnership interest, which was valued at $80,986. The total of these two amounts was $112,986.00. Under the terms of the partnership agreement, this sum would not be paid on the date of withdrawal, but would be paid out over five years, with no interest, in quarterly installments. Thus, the real value of defendant's entire interest in the partnership in early 1983 would be somewhat less than the sum of the payments he would receive over the five year period. The trial court correctly recognized

that he must find the present value of the partnership interest, by discounting future payments at an appropriate rate of interest. The trial court found that the $112,986 spread out over five years would be worth $100,896 in early 1983. Our calculations show that the trial court used a discount rate of 4½%.

[3] While we believe the discount rate somewhat unrealistic (as will be discussed below), we find that the trial court's method of calculating the present value of defendant's partnership interest was basically sound. The trial court used the partnership agreement's payment plan for a withdrawing partner. The plan first separates out the partner's capital account, which is the partner's equity in the firm, *i.e.*, it is his share of the retained earnings, or undrawn profits, including cash accounts, receivables and equipment. The plan then derives a percentage, based on the partner's prior contribution to fees, and applies it to the profits earned over a five year span dating from the withdrawal date. Half of that amount is paid out to the partner in installments over the five years. This latter amount reflects the net value of defendant's interest in a going concern, that is, his share of the goodwill of the firm, as well as his share of the net value of work in progress. We agree with courts in other jurisdictions that goodwill is an asset that must be valued in equitable distribution of an interest in a going concern. *See Stern v. Stern*, 331 A. 2d at 261; *In re Marriage of Nichols*, 43 Col. App. 383, 606 P. 2d 1314 (1979); *In re Marriage of Fleege*, 588 P. 2d 1136 (Wash. 1979).

Since the firm operates on a cash basis, the formula for distribution of profits and the capital account over the successive five year period is a reasonable method of paying out the net value of the withdrawing partner's interest. Discounting these projected payments to find a present value was proper since the valuation for equitable distribution must be a fixed amount made as of a particular statutory valuation date.

The defendant has presented no proof that the figures for defendant's capital account and share of projected profits are inaccurate, or that the partnership agreement's formula incorrectly represents his share of the firm's true monetary worth. In general, the method used by the trial court to value the partnership interest was fair and reasonable, involving no "clear abuse of

discretion," *see White v. White*, No. 559PA83, slip op. at 10 (N.C. January 30, 1985).

[4] While the method used was not unreasonable, the interest rate used to discount the payments to defendant of his interest in the partnership was relatively low. The trial judge did not explain why he used that particular rate. The plaintiff notes in her brief that this is the rate used under G.S. 8-47 to calculate the present worth of annuities payable annually to a person during his life. We do not believe that the purpose of that statute was to cover cases such as the present, where the trial judge sought to find the actual or true net value of the partnership interest to defendant in 1983. We take notice that the rate of 4½% was far below the going or market rate in 1983, and that the use of it produced a present value thousands of dollars in excess of the actual or market value of the money. We therefore remand for a recalculation of the partnership interest, using a rate reasonably in keeping with the fair market value of the money. Reasonable rates of comparison, for example, might include the rate used by the Internal Revenue Service in determining assessments and refunds, Treasury bill rates, or the prime rate charged by banks.

The defendant claims that the trial judge erred in not valuing the partnership interest as of the date of separation of the parties, 4 September 1981. Section 50-21(b) of the North Carolina General Statutes was added by legislation effective 1 August 1983. It provided that if divorce is granted on the ground of one-year separation that the marital property shall be valued as of the date of separation. Session Laws 1983, c. 671, s. 2, makes the act applicable to all civil actions brought under G.S. 50-20, including actions pending in district court on the effective date of the act. This case was filed on 7 September 1982, and was tried in May 1983. The judgment of equitable distribution was signed 30 September 1983 and entered 5 October 1983. This case was pending at the time the amendment to G.S. 50-21 was enacted. The trial judge thus should have valued the partnership interest pursuant to the present G.S. 50-21(b).

The defendant has not, however, placed in the record a copy of the divorce decree, and we do not know the grounds for divorce. On remand, the trial judge should make a finding as to the ground for divorce and value the partnership interest as of the date required under G.S. 50-21(b).

II

[5] The defendant contends that a number of contingencies affect payment under the partnership agreement and must be considered in valuing defendant's partnership interest. All the contingencies defendant invokes, such as whether he will take partnership clients with him if he were to withdraw, are purely speculative. The defendant has produced no evidence that they are likely to or will occur (*e.g.*, he has not said he will have to withdraw from the partnership and take clients with him in order to pay the distributive award) and therefore the trial judge properly ignored them. *See In re Marriage of Fonstein*, 131 Cal. Rptr. 873, 552 P. 2d 1169 (1976); *In re Marriage of Goldstein*, 120 Ariz. 23, 583 P. 2d 1343 (1978); *Crooker v. Crooker*, 432 A. 2d 1293 (Me. 1981).

The defendant argues similarly that the trial court failed to consider taxes that defendant might have to pay on the interest in his partnership if he were to withdraw, or to consider the lower taxes his wife will pay on the house the trial judge awarded her. Again, the defendant asks the court to engage in mere speculation. The trial court is not required to consider possible taxes when determining the *value* of property in the absence of proof that a taxable event has occurred during the marriage or *will* occur with the division of the marital property. *In re Marriage of Fonstein*, 131 Cal. Rptr. 873, 552 P. 2d 1169 (1976); *accord Stern v. Stern*, 66 N.J. 340, 331 A. 2d 257 (1975). We construe Section 50-20(c)(11) of the General Statutes as requiring the court to consider tax consequences that will result from the distribution of property that the court actually orders.

III

[6] The defendant contends further that the trial court erred by failing to consider all the factors for equitable distribution set out in G.S. 50-20(c). The defendant states in his brief that the "trial court failed to consider at all, or make findings on, factors (9), (10), and (11)."

In the case *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E. 2d 772 (1984), this Court addressed the problem of how the trial court must consider the factors in Section 50-20(c) and what findings it must make:

> 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.

Alexander, 68 N.C. App. at 552, 315 S.E. 2d at 775-76.

The North Carolina Supreme Court recently held that the trial court's findings in support of an equitable but unequal division will not be disturbed on appeal unless there was a clear abuse of discretion. *White v. White*, slip op. at 10.

Further, in *White* the court held that an equal division of marital property is favored by the public policy behind the Equitable Distribution Act. We believe this holding is consistent with that in our recent opinion *Loeb v. Loeb*, No. 8315DC1177, slip op. (January 2, 1985), that the trial court need only make findings of fact on the statutory and nonstatutory factors when it has concluded that an equal division is inequitable. *Id.* at 16-17.

In the present case, the trial judge ordered an equal division of the net value of all marital property except for certain personal property, discussed below. We find nothing in the record to indicate he did not consider all the statutory factors in ordering this equal division. Under *Loeb*, the trial court did not have to make specific findings in its judgment as to the factors in Section 50-20(c), because it did not order an unequal but equitable division. Indeed, the trial court left intact the partnership interest and the house, ordering that the partnership remain with the husband and that the house be conveyed to the wife, and determined that the defendant should pay a distributive award to the plaintiff so that each party would receive an equal value. We cannot say that in this case an equal division of the property was a clear abuse of discretion. The strong public policy favoring an equal division has not been overcome by either of the parties, and the trial judge's failure to make specific findings on all the Section

50-20(c) factors was not error, at least with regard to all marital property except for the personal property.

IV

[7] The defendant objects to the trial judge's treatment of the parties' household furnishings. When the parties separated, the husband left the marital home, and took with him a part of the household furnishings. The wife testified that she and her husband agreed orally to the division at that time, and that the husband was satisfied with the division.

The trial judge rejected defendant's valuation of the furnishings, approved the division on separation, and adopted it as an equitable one in his judgment. The court concluded "that the division between the parties was fair and equitable and satisfactory to the parties at the time of the division and the division is approved by the Court. . . ." In making this unequal division of property, the trial court's primary finding was that the parties had orally agreed to the division on separation and that this was satisfactory to them then. The trial court thus left the division of furnishings as it was on separation, and did not add the value of the furnishings to the total value of the marital property.

The trial court's reliance on the parties' oral agreement and his failure to make specific findings under Section 50-20(c), explaining the equitable distribution of the furnishings was error. Under the statute, the trial court may rely on a *written* agreement providing for distribution of marital property. G.S. 50-20(d). On remand, the trial court must value the furnishings and make specific findings explaining the division he orders, if it is not an equal one.

V

[8] The defendant objects to the trial court's finding that a piano, purchased by the wife for $3,800, with marital funds, was a gift to the children of the marriage and was not marital property of the parties. The statute says that "marital property" "means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, *and presently owned*, except property determined to be separate property in accordance with subdivision (2) of this section." G.S. 50-20(b)(1) (emphasis added).

Persons in the parties' family who live in the marital home can have property there which does not belong to the parties. Minor children can own property. Evidence was presented at trial that the parties made a gift of the piano to the children and that it was presently owned by them. The trial court's finding that a gift had been made and that the piano was not part of the marital property was not in error.

VI

Defendant's contention that the trial court failed to find facts as to the partnership interest of the husband lacks merit. The trial court found as an ultimate fact that the present value of the partnership interest was $100,896, and that is all that it is required to do. *See Watts v. Supt. of Building Inspection*, 1 N.C. App. 292, 295, 161 S.E. 2d 210, 213 (1968).

The trial court's order is affirmed in part and reversed and remanded in part, with instructions that the trial court adjust its order in accordance with this opinion.

Affirmed in part, reversed and remanded in part.

Judges WELLS and BECTON concur.

J. M. THOMPSON COMPANY v. DORAL MANUFACTURING CO., INC. AND LMT STEEL PRODUCTS, INC.

No. 8410SC143

(Filed 5 February 1985)

Constitutional Law § 24.7; Process § 14.3— foreign corporation—liabilities assumed by another foreign corporation—insufficiency of evidence—no showing of minimum contacts with North Carolina

The evidence did not show minimum contacts between defendant LMT and North Carolina sufficient to meet constitutional due process standards and satisfy any of the grounds for *in personam* jurisdiction over foreign corporations of G.S. 1-75.4 or G.S. 55-145 where the evidence tended to show that plaintiff ordered hollow metal doors from defendant Doral which proved to be defective; plaintiff brought an action for damages due to breach of contract and due to unfair and deceptive trade practices; plaintiff alleged that the necessary minimum contacts existed because defendant LMT expressly con-

tracted to assume the liabilities of defendant Doral and because, by operation of the alter ego doctrine, all of defendant Doral's activities were imputed to defendant LMT; the only evidence of an agreement by LMT to assume Doral's liabilities was a contract to that effect which was not signed by defendant Doral's owner/president, and he testified that he had no independent recollection of that document or any negotiations or agreements which occurred at that time; and evidence that LMT purchased Doral's loan, took a security interest in Doral's assets, sent one of its employees to Doral as a consultant, supplied Doral with raw materials, occasionally shipped some of Doral's manufactured products to buyers at its own expense, took possession of Doral's equipment just before the company failed, and attempted to collect outstanding accounts did not demonstrate that Doral's finances, policies and practices were so dominated by LMT that Doral ceased to function as a separate corporate entity and that the alter ego doctrine should apply.

APPEAL by defendant from *Bailey, Judge.* Order entered 21 December 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 25 October 1984.

Casey, Haythe & Krugman, by Robert A. Ponton, Jr., and Samuel T. Wyrick, III, for plaintiff appellee.

Kimzey, Smith, McMillan & Roten, by Russell W. Roten, for defendant appellant.

BECTON, Judge.

I

Plaintiff, J. M. Thompson Company (Thompson), a North Carolina corporation, brought this action against two New Jersey corporations, Doral Manufacturing Company, Inc. (Doral) and LMT Steel Products, Inc. (LMT), for damages due to breach of contract and due to unfair and deceptive trade practices. Both defendants answered separately; LMT's Answer contained an N.C. Gen. Stat. Sec. 1A-1, Rule 12(b)(2) (1983) motion to dismiss for lack of personal jurisdiction. After discovery, the Rule 12(b)(2) motion came on for hearing. The trial court denied LMT's motion to dismiss, and LMT appeals.

We conclude that the evidence did not show minimum contacts between LMT and North Carolina sufficient to satisfy due process standards and allow North Carolina to assert *in personam* jurisdiction against LMT. We, therefore, reverse the trial court's order.

II

Factual Background

LMT Steel Products was founded in 1950. Its shareholders and board of directors are Harry Teitelbaum, president, his brother, Joseph Teitelbaum, secretary-treasurer, and Joseph Makara, vice-president. LMT manufactures moveable steel office partitions, steel doors, and frames. Doral, like LMT, is a New Jersey corporation, and was founded in 1972 by Morton Mickenburg and Edwin Janka. Doral was engaged in manufacturing steel doors and frames.

No relationship existed between LMT and Doral, or between any of their shareholders, until 1977, when Harry Teitelbaum was introduced to Mickenburg. At that time, Harry Teitelbaum and Joseph Teitelbaum purchased a loan that Doral owed to the First National State Bank of New Jersey, taking a security interest in Doral's assets and equipment. Makara did not participate in this transaction. Mickenburg testified that sometime after the loan purchase and before 1979, all of Janka's shares of stock and half of the shares owned by Mickenburg were purchased by either LMT, or by Harry Teitelbaum, Joseph Teitelbaum, and Joseph Makara. Mickenburg testified that the remainder of his stock was sold to LMT in July 1981, and that at that time LMT also agreed to accept all of Doral's liabilities and obligations. Although no documentary evidence directly supports this testimony, a copy of a document dated 28 July 1981 was introduced into evidence. The document purports to terminate Mickenburg's relationship with Doral. An introductory paragraph recites that "prior hereto . . . [LMT] purchased the assets and assumed the liabilities of Doral." The signatures of Harry Teitelbaum and Joseph Makara appear on the document; however, the spaces above the names of Morton Mickenburg and Florence Mickenburg, his wife, are left blank. Harry Teitelbaum testified that neither LMT nor any of its three shareholders ever purchased any of Doral's stock, or otherwise acquired any ownership interest in Doral.

On 3 February 1981, Doral accepted a purchase order for hollow metal doors from the plaintiff, J. M. Thompson Company. Thompson was the contractor for the construction of the Veterinary School at North Carolina State University. Doral delivered the doors to the construction site in May 1981, July

1981, and December 1981. Thompson paid Doral part of the full price, but subsequently withheld the balance because of alleged defects in the doors and nonconformities with the purchase order.

Doral had been in financial trouble even before the loan purchase. Indeed, Doral was in default on the loan at the time of purchase. At some point after the loan purchase, LMT began to purchase the majority of steel used by Doral. Harry Teitelbaum estimates that LMT ultimately purchased several hundred thousand dollars worth of steel on behalf of Doral. Teitelbaum testified that he believed it was in his self-interest for LMT to supply Doral steel in this fashion. Presumably, Teitelbaum meant that only if Doral were kept financially afloat, would Doral ever again realize profits and thus be in a position to pay back the Teitelbaum brothers on the loan.

Beginning in about mid-1981, until Doral closed its doors in June 1982, Harry Teitelbaum sent Joseph Makara to Doral on a part-time daily basis. According to Harry Teitelbaum, Makara was sent to Doral to protect Teitelbaum's investment, specifically as an observer and to make recommendations concerning Doral's business operations. Makara agreed that he was sent to Doral to protect the economic interest of the Teitelbaums. Makara described his duties at Doral in terms of reviewing the financial state of that company; he testified that as long as Mickenburg was there, Mickenburg basically "ran the show." Makara also testified that at all relevant times his salary was paid by LMT. Mickenburg testified that Makara told him he was there to improve the operation of the factory, and that Makara was involved in "getting the factory's operation going properly." Harry Teitelbaum and Makara both testified that during the time Makara was at Doral, Makara reported to Teitelbaum at LMT on a bi-weekly basis to discuss Doral's business.

Although the parties disagree as to whether Morton Mickenburg unilaterally abandoned the business or left it after selling the remainder of his stock to LMT, the parties agree that he left Doral in late 1981. After Mickenburg's departure, Makara apparently supervised Doral's operations until it closed down in June 1982, although it is unclear exactly what his duties were. Because Harry Teitelbaum and his brother had a security interest in Doral's assets, after Doral closed down, they arranged to have Doral's equipment moved to LMT.

Plaintiff Thompson first wrote to Doral concerning defects in the shipment of doors in January 1982, and it continued attempts to solve this problem after Doral closed, by corresponding with Makara at LMT. No action was ever taken by either Doral or LMT to remedy the problem. Considering Doral's outstanding accounts among Doral's assets, LMT invoiced Thompson for the balance due on their account in December 1982 and again in June 1983. Thompson filed this action against both Doral and LMT on 4 March 1983.

III

LMT's sole argument is that North Carolina lacks personal jurisdiction over it because none of the grounds in either of North Carolina's statutes conferring personal jurisdiction over a foreign corporation are satisfied. N.C. Gen. Stat. Sec. 1-75.4 (1983) is North Carolina's long-arm statute, and N.C. Gen. Stat. Sec. 55-145 (1982) provides an alternative basis for jurisdiction over foreign corporations not transacting business within this State. *Fiber Industries, Inc. v. Coronet Industries, Inc.*, 59 N.C. App. 677, 298 S.E. 2d 76 (1982) (G.S. Sec. 55-145 alternative to G.S. Sec. 1-75.4). Plaintiff, however, contends that any of the following grounds justify North Carolina's exercise of *in personam* jurisdiction over LMT: that LMT is engaged in substantial activity within North Carolina, G.S. Sec. 1-75.4(1)(d) (1983), that the action arose out of a promise made to plaintiff by defendant to deliver goods within the State, G.S. Sec. 1-75.4(5)(c) (1983), and that the action relates to goods received by plaintiff from defendant in North Carolina, G.S. Sec. 1-75.4(5)(e) (1983). Plaintiff further cites G.S. Sec. 55-145(a)(1) (1982), which subjects a foreign corporation to suit when the action arises out of a contract made or to be performed in North Carolina, and G.S. Sec. 55-145(a)(3) (1982), which subjects a foreign corporation to suit when it produces, manufactures, or distributes goods with the reasonable expectation that they will be consumed in North Carolina and they are so consumed.

We first review the standards by which *in personam* jurisdiction is measured. The burden of proof is on the plaintiff to show by a preponderance of the evidence that LMT's acts placed it within the reach of North Carolina's long-arm statutes. *See Marshall Exports, Inc. v. Phillips*, 507 F. 2d 47 (4th Cir. 1974) (similar motion treated as tendering issue of fact). Absent a request by

the parties, the trial judge is not required to find the facts upon which the ruling on a motion is based; instead, it will be presumed that the judge, upon proper evidence, found facts sufficient to support the judgment. *City of Salisbury v. Kirk Realty Co.*, 48 N.C. App. 427, 268 S.E. 2d 873 (1980); N.C. Gen. Stat. Sec. 1A-1, Rule 52(a)(2) (1983). LMT did not request the trial court to make findings of fact and conclusions of law. Thus, the issue before us is one of sufficiency of the evidence, *see Gro-Mar Public Relations, Inc. v. Billy Jack Enterprises, Inc.*, 36 N.C. App. 673, 245 S.E. 2d 782 (1978), and if the presumed findings of fact are supported by competent evidence, they are conclusive on appeal despite evidence to the contrary. *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) (Court of Appeals articulated what trial court's findings of fact must have been).

The resolution of a question of *in personam* jurisdiction over a foreign corporation, as with any determination of personal jurisdiction, involves a two-part determination: (1) Does a statutory basis for personal jurisdiction exist, and (2) If so, does the exercise of this jurisdiction violate constitutional due process? *E.g., Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977); *HBD, Inc. v. Steri-Tex Corp.*, 63 N.C. App. 761, 306 S.E. 2d 516 (1983). However, it has been held that long-arm legislation was intended to make available to North Carolina courts the full jurisdictional powers permissible under due process. *See Dillon v. Numismatic Funding Corp.*; R. Robinson, *North Carolina Corporation Law and Practice* Sec. 32-1 at 475-78, 478 n. 18 (3d ed. 1983). Therefore, since the "statutory authorization for personal jurisdiction is coextensive with federal due process, the critical inquiry in determining whether North Carolina may assert *in personam* jurisdiction over a defendant is whether the assertion . . . comports with due process." *Rose's Stores, Inc. v. Padgett*, 62 N.C. 404, 410, 303 S.E. 2d 344, 348 (1983) (quoting *Kaplan School Supply Corp. v. Henry Wurst, Inc.*, 56 N.C. App. 567, 570, 289 S.E. 2d 607, 609, *disc. rev. denied*, 306 N.C. 385, 294 S.E. 2d 209 (1982)).

The modern federal due process test was first promulgated in *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945). This test requires a nonresident defendant to have had "minimum contacts" with the forum state before that state may

exercise personal jurisdiction over the defendant. The frequently quoted refinement of this rule appears in *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S.Ct. 1228 (1958):

> The application of [the minimum contacts] rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

357 U.S. at 253, 2 L.Ed. 2d at 1298, 78 S.Ct. at 1240 (quoted in *Rose's Stores, Inc. v. Padgett; Gro-Mar Public Relations, Inc. v. Billy Jack Enterprises, Inc.*). What contacts with the forum state constitute minimum contacts for jurisdictional purposes is ultimately a fairness determination: the defendant's conduct and connection with the forum state must be such that it "reasonably anticipate[s] being haled into court there." *Bush v. BASF Wyandotte Corp.*, 64 N.C. App. 41, 46, 306 S.E. 2d 562, 566 (1983) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L.Ed. 2d 490, 501, 100 S.Ct. 559, 567 (1980)); *see Int'l Shoe Co. v. Washington* (maintenance of suit not to offend "traditional notions of fair play and substantial justice"). *See also Byham v. Nat'l Cibo House Corp.*, 265 N.C. 50, 143 S.E. 2d 225 (1965) (listing factors to be considered in determining the constitutionality of exercising jurisdiction).

IV

In applying the foregoing law to the instant case, plaintiff argues that the necessary contacts exist by advancing two separate contentions: that LMT expressly contracted to assume the liabilities of Doral, and that by operation of the *alter ego* doctrine, all of Doral's activities are imputed to LMT.

As to plaintiff's first contention, we note that the 28 July 1981 contract is the only evidence offered as proof of LMT's assumption of Doral's liabilities. The copy was not signed by either Morton or Florence Mickenburg, and Morton Mickenburg testified that he had no independent recollection of that document, nor any recollection of negotiations or agreements that occurred at that time. In our opinion, this does not constitute competent evidence that LMT agreed to assume Doral's liabilities.

As to whether the *alter ego* doctrine may be used to establish *in personam* jurisdiction over LMT, plaintiff reasons that Doral did not contest North Carolina's exercise of jurisdiction over it, and because LMT was the *alter ego* of Doral, this assertion of jurisdiction over Doral must be imputed to LMT. We agree that Doral, by entering into a contract with Thompson, and delivering the materials to the job site, had sufficient minimum contacts with North Carolina to constitutionally justify the exercise of personal jurisdiction over it. We do not agree, however, that the relationship between the two corporations was such that North Carolina's *in personam* jurisdiction over Doral can be lawfully extended to LMT.

> The 'alter ego' or 'instrumentality' doctrine states that: '[W]hen a corporation is so dominated by another corporation, that the subservient corporation becomes a mere instrument, and is really indistinct from the controlling corporation, then the corporate veil of the dominated corporation will be disregarded, if to retain it results in injustice.'

Pilot Title Ins. Co. v. Bank, 11 N.C. App. 444, 450, 181 S.E. 2d 799, 803 (1971) (quoting *Nat'l Bond Finance Co. v. Gen'l Motors Corp.*, 238 F. Supp. 248, 255 (1964), *aff'd per curiam*, 341 F. 2d 1022 (8th Cir. 1965)). A recent case from this Court stressed the degree of control over the dominated corporation necessary to invoke the doctrine:

> 'The control necessary to invoke what is sometimes called the "instrumentality rule" is not mere majority or complete stock control but such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal. It must be kept in mind that *the control must be shown to have been exercised at the time the acts complained of took place in order that the entities be disregarded at the time.*'

Glenn v. Wagner, 67 N.C. App. 563, 577, 313 S.E. 2d 832, 841 (1984) (quoting *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 9, 149 S.E. 2d 570, 576 (1966)).

Even if we assume that Morton Mickenburg's unsupported testimony is correct, and that at some relevant point, LMT pur-

chased all of Doral's stock, the cases make clear that stock ownership alone is not determinative. *See, e.g., Glenn v. Wagner.* Rather, in deciding whether LMT is the *alter ego* of Doral, we need to evaluate all the pertinent circumstances to determine whether the requisite control existed.

Our review of the evidence satisfies us that the affiliation between LMT and Doral does not establish that the former controlled the latter to the extent that Doral had no separate corporate existence. The evidence shows only that the Teitelbaum brothers purchased Doral's loan, took a security interest in Doral's assets, and that when Doral's business continued to flounder, Harry Teitelbaum sent Joseph Makara to Doral as a consultant. Even Mickenburg's testimony does not indicate that Makara ran Doral, or that he participated in making decisions affecting the business. In a further effort to protect the investment of the Teitelbaum brothers, LMT supplied Doral with raw materials for a time, and also occasionally shipped some of Doral's manufactured products to buyers at LMT's expense. After Mickenburg left the company, because the Teitelbaum brothers held a valid security interest in Doral's assets, they took possession of Doral's equipment and also attempted to collect outstanding accounts. None of this evidence demonstrates that Doral's finances, policies and practices were so dominated by LMT that Doral ceased to function as a separate corporate entity and became a mere "phantom" or "puppet" corporation. *Pilot Title Ins. Co. v. Bank; see Glenn v. Wagner* (despite some unified administrative control, evidence did not show "complete identity of interest" between the two corporations).

LMT's activities were designed to protect the economic interest of the Teitelbaum brothers in the loan which they had purchased. They were not contacts with North Carolina that invoked the benefits and protections of its laws. If, by merely acquiring and subsequently protecting an economic interest in a foreign corporation, a person became responsible for every obligation incurred by that corporation, and subject to suit in whatever state the corporation happened to be located or incorporated, a negative impact on corporate investing and mergers would result. We find no justification in logic or law for discouraging investments in this fashion.

The fact that Doral and LMT were engaged in the same type of business does not affect the result here. Plaintiff's attempt to transform LMT's actions in protecting an investment in a corporation involved in manufacturing products similar to its own, into actions which prove that LMT controlled Doral, is not persuasive. Furthermore, for the *alter ego* doctrine to be satisfied, it must be shown that control was exercised at the time the acts complained of transpired. *See Glenn v. Wagner*, as quoted. Joseph Makara was not sent to Doral until after the contract between Doral and plaintiff Thompson had been entered into, and most of the materials had been delivered.

V

In conclusion, we hold that the evidence did not show minimum contacts between LMT and North Carolina sufficient to meet constitutional due process standards and satisfy any of the grounds for *in personam* jurisdiction over foreign corporations of G.S. Sec. 1-75.4 (1983) or G.S. Sec. 55-145 (1982). The judgment of the trial court must be reversed and the cause remanded for a new order consistent with this opinion.

Reversed and remanded.

Judges ARNOLD and WELLS concur.

CLARA JEAN PITTMAN, ADMINISTRATRIX OF THE ESTATE OF JANIS W. PITTMAN, DECEASED v. FIRST PROTECTION LIFE INSURANCE COMPANY

No. 8410SC402

(Filed 5 February 1985)

1. Insurance § 18.1— misrepresentation as to health—refusal of insurer to pay—issue submitted by trial court proper

In an action to recover on an insurance policy where defendant refused to pay because it contended that insured had a history of heart trouble and high blood pressure and had recently received medical treatment for it, but failed to indicate his condition in an application for insurance filled out by defendant's agent and signed by insured, while plaintiff contended that the information was made known to defendant's agent who negligently failed to write it on the form or to make further inquiry, the trial court did not err in submit-

ting to the jury one issue, "Was the false answer on the application for insurance caused by the agent of the defendant, . . ., without the knowledge of the Applicant," rather than the four issues requested by plaintiff.

2. **Insurance § 19.1— misrepresentation in application—agent's failure to disclose information to insurer—instructions proper**

In an action to recover on an insurance policy where defendant refused to pay because of misrepresentations in the application for insurance, the trial court properly instructed on the effect of an agent's failure to disclose to the insurer material facts which have been made known to him by the applicant or the agent's failure to make inquiry when his knowledge of certain facts should have prompted further inquiry.

3. **Insurance § 18.1— misrepresentation in application—signing by insured—knowledge of misrepresentation by insured immaterial**

An insured who signs an application for insurance adopts it as his statement, and the fact that he may have made a misrepresentation unknowingly does not, in the absence of bad faith on the part of the insurer or its agent, alter the effect of the misrepresentation.

Chief Judge HEDRICK concurring in result.

APPEAL by plaintiff from *Battle, Judge.* Judgment entered 17 November 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 4 December 1984.

This is a civil action in which plaintiff seeks benefits alleged to be due under an insurance policy issued by defendant.

On 2 September 1981, plaintiff and her late husband purchased a "van conversion" vehicle from Bobby Murray Chevrolet. The sale was closed and financing arrangements made in the office of Joe Maugham who was the "Finance and Insurance Manager" for Bobby Murray Chevrolet. Maugham was also a licensed insurance agent for defendant. During the closing, the Pittmans responded that they wanted "credit life insurance" so that, if the insured died, the payments on the vehicle would continue to be made. Mrs. Pittman testified at trial that, when Maugham asked which of them they wanted to insure, she responded, "[W]e want to insure Janis, he's just getting over a heart attack." Mrs. Pittman further testified that Maugham then turned a paper form around on his desk and asked Mr. Pittman to sign it. Mr. Pittman signed the form, an application for insurance, but neither he nor Mrs. Pittman read it.

The application form, furnished to Bobby Murray Chevrolet by defendant, requires the applicant to provide information re-

garding medical treatment within the preceding twelve months for:

> Any disease of the heart, or any disease of the circulatory system, high blood pressure or cancer or other malignant neoplasm or leukemia or uremia or any disease of the kidney or diabetes or tuberculosis, or emphysema, or any disease of the lungs, or cirrhosis of the liver or alcoholism.

The form indicates that the information provided will be used to determine the applicant's insurability. Nothing appears in the space provided for listing the information. Mr. Pittman's signature appears directly below this space.

Testifying at trial, Maugham could recall none of the specifics of the transaction and nothing unusual about it. He handled 700 closings in 1981. He testified that neither Mr. nor Mrs. Pittman indicated that Mr. Pittman had heart trouble, because if they had, he testified, "I would have had it on that form." The form was completed and the Pittmans paid a $567.38 premium. General Motors Acceptance Corp. was named as the primary beneficiary under the policy and Pittman's estate as the secondary beneficiary. Defendant thereafter issued a certificate of insurance on the life of Janis Pittman, effective 2 September 1981.

Mr. Pittman had been treated for high blood pressure since 1966. In September, 1978, he was hospitalized for a heart attack. Thereafter, he had complaints of chest pains and was regularly seen and treated by a cardiologist. He had a mild heart attack in July of 1981 and a fatal one on 13 December 1981.

Plaintiff filed a timely claim and proof of death of the insured with defendant. Defendant refused to pay the claim.

On 10 May 1982, plaintiff filed the complaint in this matter seeking compensatory damages in the amount due under the policy which, at the time of the claim, was $16,721.05. In addition to the breach of the insurance contract, plaintiff alleged in her complaint that Maugham was the agent of defendant and that he had acted negligently in failing to advise Mr. Pittman of the requirement that he indicate his recent medical treatment. Alternatively, plaintiff alleged that defendant was negligent in failing to train Maugham adequately so as to make appropriate inquiries

regarding the health of applicants for insurance, specifically Mr. Pittman.

Defendant answered, denying liability and counterclaiming for rescission of the insurance policy because of the false representations allegedly made by plaintiff and her husband.

After presentation of evidence and testimony by both sides, plaintiff requested that the following issues be submitted to the jury:

> 1. Was Joe Maugham the agent of First Protection Life Insurance Company on September 2, 1981, acting within the course and scope of his agency, as alleged in the Complaint?
>
> 2. Was a false representation made to First Protection Life Insurance Company by a failure to disclose such facts, that during the one year period prior to September 2, 1981, Janis W. Pittman had not been treated for any disease of the heart, any disease of the circulatory system, or high blood pressure, as alleged in the Answer?
>
> 3. If not, did the agent of First Protection Life Insurance Company fail to enter the facts disclosed on the application form, without the actual or implied knowledge of Janis W. Pittman, Deceased, as alleged in the Reply?
>
> 4. Is the Estate of Janis W. Pittman, Deceased, entitled to recover the death benefit of $16,721.05 payable under the Certificate of Insured issued by First Protection Life Insurance Company to Janis W. Pittman on September 3, 1981?

The court refused, submitting instead the following issue, which was answered as indicated:

> 1. Was the false answer on the application for insurance caused by the agent of the defendant, First Protection Life Insurance Company, without the knowledge of the Applicant, Janis W. Pittman?
>
> ANSWER: No.

Judgment was entered for defendant and plaintiff appealed.

Horton and Michaels, by Walter L. Horton, Jr., for plaintiff appellant.

Hatch, Little, Bunn, Jones, Few and Berry, by David H. Permar, for defendant appellee.

EAGLES, Judge.

[1] Plaintiff first contends that the trial court erred in the manner in which the case was submitted to the jury. Instead of the single issue, plaintiff argues that the court should have submitted the four issues tendered by her. Plaintiff contends that the single issue was deficient as to form and substance and deprived plaintiff of full consideration by the jury of the material questions of fact raised by the evidence. We disagree.

It is a well established principle of our law that the trial judge must submit to the jury those issues necessary to resolve the controversies raised in the pleadings and supported by the evidence. *Uniform Service v. Bynum International, Inc.*, 304 N.C. 174, 282 S.E. 2d 426 (1981); *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971). Our Rules of Civil Procedure specify that "[i]ssues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues." G.S. 1A-1, Rule 49(b). While the issues raised by the pleadings and evidence *must* be submitted to the jury, *East Coast Oil v. Fair*, 3 N.C. App. 175, 164 S.E. 2d 482 (1968) (decided under former law), the actual framing and wording of the issues lies within the discretion of the trial judge. *Uniform Service v. Bynum International, Inc., supra; Brant v. Compton*, 16 N.C. App. 184, 191 S.E. 2d 383, *cert. denied*, 282 N.C. 672, 196 S.E. 2d 809 (1972).

With these principles in mind, we believe that the single issue submitted to the jury by the trial court adequately presented the controversies fairly raised by the pleadings and evidence as well as the issues tendered by plaintiff. This action involves a suit on an insurance contract where the defendant insurance company has refused to pay the beneficiary under the terms of the policy upon the happening of the event insured against—the death of Janis Pittman. The reason for that refusal, as asserted by the defendant, is that Mr. Pittman had a history of heart trouble and high blood pressure and recently had received medical treatment for it but failed to indicate his condition in the

application for insurance which he signed. Plaintiff asserts that the information was made known to defendant's agent who negligently failed to write the information on the form that he asked Mr. Pittman to sign or to make further inquiry.

Certain pertinent facts are undisputed: (1) the application form was completed by Maugham who then requested Mr. Pittman to sign it; (2) the form was signed by Mr. Pittman; (3) the form bearing his signature indicates that Mr. Pittman had no recent history of disease, specifically heart disease or high blood pressure; and (4) Mr. Pittman had been treated for such problems within the preceding year and, in fact, died of a heart attack. Obviously, the application contained incorrect information. The insurance was issued on the assumption that the information was accurate.

It is a basic principle of insurance law that the insurer may avoid his obligation under the insurance contract by a showing that the insured made representations in his application that were *material* and *false. Tolbert v. Mutual Benefit Life Insurance Co.*, 236 N.C. 416, 72 S.E. 2d 915 (1952); *Willetts v. Integon Insurance Co.*, 45 N.C. App. 424, 263 S.E. 2d 300, *rev. denied*, 300 N.C. 562, 270 S.E. 2d 116 (1980). Here, there is no question that the representation on the application is false. By signing the application, the applicant adopts it as his own statement. *Jones v. Home Security Life*, 254 N.C. 407, 119 S.E. 2d 215 (1961). Representations made in an insurance application regarding the health of the applicant are material as a matter of law. *Sims v. Liberty Mutual Ins. Co.*, 257 N.C. 32, 125 S.E. 2d 362 (1962); *Eubanks v. First Protection Life Insurance Co.*, 44 N.C. App. 224, 261 S.E. 2d 28, *rev. denied*, 299 N.C. 735, 267 S.E. 2d 661 (1980). It is not necessary that the representation be intentional. *Huffman v. State Capitol Life Insurance Co.*, 8 N.C. App. 186, 174 S.E. 2d 17 (1970). The only factual question remaining then, is whether the material and false representation on the application in this case was made by the insured.

As defendant points out, only two of the four issues tendered by plaintiff are relevant to her argument. The fourth issue relates only to the amount of damages. The first issue raises the question of whether Joe Maugham was the agent of defendant. We note that the rule that the holder of a master policy for group insur-

ance is considered the agent of the insurer appears to apply only where the master policyholder is an employer and the "group" is his employees. *See First National Bank of Anson County v. Nationwide Insurance Co.*, 303 N.C. 203, 278 S.E. 2d 507 (1981). Since there is no employment relationship here, that rule would not apply. Nevertheless, the court instructed the jury that Joe Maugham was "a licensed agent for defendant First Protection Insurance Company." In effect the court decided plaintiff's first tendered jury issue and decided it in plaintiff's favor. The questions presented by plaintiff's second and third issues, in our view, ask no more than the single issue submitted by the court, though they are more specific. As we have noted, however, the form and wording of issues to be submitted to the jury are within the discretion of the court. *Uniform Service v. Bynum International, Inc., supra.* The issues submitted by the court adequately presents to the jury the controversies raised. Plaintiff has shown no abuse of discretion by the trial court. Her argument is not persuasive.

Plaintiff next contends that the trial court erred in failing to include in its charge to the jury certain special instructions requested by plaintiff pursuant to G.S. 1A-1, Rule 51(b). While plaintiff failed to object to the court's instructions at the end of the charge, as required by App. R. 10(b)(2), her request was at least partially denied and her objection to the instructions given was self-evident. Accordingly, App. R. 10(b)(2) does not require that the objection be repeated at the end of the charge. *Wall v. Stout*, 310 N.C. 184, 311 S.E. 2d 571 (1984).

Plaintiff requested five special instructions. As defendant points out, plaintiff's argument regarding the first three of these, which concern the nature and extent of the agency relationship between Maugham and defendant, is moot either because the court gave the requested instruction or because the court resolved the issue in plaintiff's favor before submission of the case to the jury. In any event, plaintiff's exceptions pertaining to these instructions have been abandoned by plaintiff's failure to argue them in her appeal. App. R. 28(b)(5).

[2] The remaining instructions deal with the effect of an agent's failure to disclose to the insurer material facts that have been made known to him by the applicant or the agent's failure to

make inquiry when his knowledge of certain facts should have prompted further inquiry. Plaintiff contends that the pleadings and evidence support a finding that Maugham, through inattention or negligence, either did not hear Ms. Pittman when she mentioned her husband's heart attack or, if he did hear, negligently failed to enter that information on the form. Plaintiff argues that she was entitled to have the jury instructed accordingly.

While we agree with plaintiff's statement of the law, *Link v. Link, supra*, we do not agree that the trial court failed to instruct the jury properly. From the record it is clear that the jury was instructed on the effect of Maugham's alleged negligence in filling out the form and that plaintiff might be entitled to recover despite the false information on the application if "the applicant, Janis Pittman, acted in good faith and did not have a reason to know that the agent was making such misrepresentations or false statements on the application." Though not in plaintiff's words, the instructions of the trial court adequately addressed the question presented by plaintiff's tendered instructions. Accordingly, they were sufficient and plaintiff's contention is without merit.

[3] Finally, plaintiff contends that the trial court erred in instructing the jury (1) that the signing of the application by Janis Pittman was, under the circumstances of the case, a misrepresentation as a matter of law and (2) that plaintiff must show that defendant's agent, Maugham, was aware that Janis Pittman had heart trouble. We disagree. The essence of plaintiff's argument is that, since there is evidence that her deceased husband did not know that the application was inaccurate when he signed it, he did not make a misrepresentation that forfeits the benefits of the policy. As discussed above, an insured who signs an application for insurance adopts it as his statement. *Jones v. Home Security Life, supra.* The fact that he may have done so unknowingly does not, in the absence of bad faith on the part of defendant or its agent, alter the effect of the misrepresentation. *Willetts v. Integon Insurance Co., supra.* The undisputed evidence here shows clearly that Janis Pittman signed an application for insurance that contained inaccurate information regarding his health. Whether this misrepresentation was his fault or the fault of defendant's agent was a question properly submitted to the jury. The jury decided the question in favor of defendant. Plaintiff's contentions are without merit.

Defendant on appeal brings forward several cross-assignments of error. Because we have decided the issues raised by plaintiff's appeal in favor of defendant, we do not consider the cross-assignments. In the trial below, we find

No error.

Judge WHICHARD concurs.

Chief Judge HEDRICK concurs in the result.

Chief Judge HEDRICK concurring in result.

I concur in the result reached by the majority, but I disagree with some of the things said in the majority opinion. I agree that the issue submitted was sufficient to allow the jury to resolve the material facts raised by the evidence. While I believe the instructions given did not sufficiently declare and explain the law arising from the evidence, the plaintiff has failed to show prejudicial error sufficient to entitle her to a new trial.

DOROTHY MAY WHITE v. C. BARRETT GRAHAM, ADMINISTRATOR CTA FOR THE ESTATE OF STEVE EDWARD WHITE

No. 843DC476

(Filed 5 February 1985)

Divorce and Alimony §§ 19.5, 21.8— separation agreement—support obligation—effect of Texas divorce decree

The trial court erred in determining that plaintiff's action to enforce decedent's obligation to provide her support pursuant to the parties' separation agreement was barred by a Texas divorce decree which stated that "this property division supercedes [sic] and overcomes any prior agreements between the parties making them null and void," since a Texas court could not modify decedent's support obligation without plaintiff's consent; plaintiff received a petition for divorce which requested that the Texas court make a fair division of all property accumulated during the marriage, but she lacked notice of the risk that the Texas proceedings would deal with decedent's contractual support obligation; and the Texas decree should be given full faith and credit only to the extent that it nullified the property division provisions of the parties' prior agreement, leaving decedent's contractual support obligation intact.

APPEAL by plaintiff from *Rountree, Judge.* Judgment entered 14 December 1983 in CRAVEN County District Court. Heard in the Court of Appeals 8 January 1985.

Plaintiff Dorothy White and decedent Steve White married in May 1976 in Texas. Plaintiff, a New York native, had attended Texas A & M University. The couple, in the course of decedent's military service, moved in June 1976 to Virginia, returning to Texas for one year before arriving in North Carolina in June 1979. They entered into a "Separation Agreement" in December 1980. The agreement included general provisions dividing real and personal property and waiving any rights to share in the respective estates. It also contained a provision, entitled "Education," which recognized that plaintiff was attending Craven County Community College and planned to obtain a bachelor's degree at East Carolina University by May 1982. Decedent agreed to pay plaintiff's tuition and fees, acknowledging a desire "to support and maintain" plaintiff until she obtained such degree. The next paragraph provided as follows:

SUPPORT AND MAINTENANCE OF WIFE

> 19. Husband shall support and maintain wife through May, 1982 at which time she should obtain a Bachelor of Science Degree from a college or university. Husband shall not be required to support and maintain wife after she graduates from a college or university. From the date hereof to and including the month of May, 1982, husband shall pay to wife the sum of Five Hundred Fifty and No/100 Dollars ($550.00), the sum of Two Hundred Seventy-Five and No/100 Dollars ($275.00) being paid on the 5th day of each month and the sum of Two Hundred Seventy-Five and No/100 Dollars ($275.00) on or before the 20th day of each month.

The agreement also released all other support obligations.

Decedent moved to Texas, his home state, where he filed a petition for divorce in January 1981. The petition contained a prayer for a property settlement. Plaintiff was duly served with the Texas summons and the petition, but did not respond or appear. A final divorce was entered in Texas in March 1981, which decreed that "this property division supercedes [sic] and overcomes any prior agreements between the parties making them

null and void." Decedent ceased making payments in May 1981 and plaintiff filed this action for specific performance of the agreement on 13 May 1981. Steve White died 26 May 1981, however, and C. Barrett Graham (hereinafter "defendant") was duly substituted. Plaintiff subsequently completed her degree, graduating in May 1982.

At trial, the major contested issue was whether the Texas decree was entitled to full faith and credit. The court, finding that plaintiff failed to show that the Texas court did not have jurisdiction, gave the Texas decree full faith and credit. It therefore concluded that plaintiff's claim was barred, and dismissed the action. Plaintiff appealed.

Dunn & Dunn, by Donald J. Dunn, for plaintiff.

Beswick, Herring, Graham & Barnhill, by Stephen J. Herring, for defendant.

WELLS, Judge.

A separation agreement is a contract, and the laws governing ordinary contracts apply. *See Lane v. Scarborough*, 284 N.C. 407, 200 S.E. 2d 622 (1973). Under North Carolina law, such an agreement may be modified only by the parties (absent circumstances not applicable here). *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E. 2d 793 (1982); *compare Henderson v. Henderson*, 307 N.C. 401, 298 S.E. 2d 345 (1983) (distinguishing agreement adopted by court). The death of Steve White did not terminate his obligation, which his estate could satisfactorily perform. *Shutt v. Butner*, 62 N.C. App. 701, 303 S.E. 2d 399, *disc. rev. denied*, 309 N.C. 462, 307 S.E. 2d 367 (1983). No fraud, failure of consideration, or other ground for rescission under North Carolina law appears. On the facts in this case, then, a North Carolina court could not nullify the separation agreement in a subsequent divorce. We must now determine whether a Texas court action has greater power.

It is well established in Texas that, where no children are involved, courts may only order division of marital property upon divorce. Public policy *forbids a court from ordering* payment of alimony after a final decree of divorce. *Francis v. Francis*, 412 S.W. 2d 29 (Tex. 1967), *followed Deen v. Deen*, 631 S.W. 2d 215 (Tex. Ct. App. 1982). However, Texas policy does not affect con-

tractual obligations to pay alimony; such agreements are accorded whatever force the law of contracts will give them. *Francis v. Francis, supra.* Texas policy also does not prevent enforcement of foreign money judgments predicated upon court-ordered support. *Layton v. Layton,* 538 S.W. 2d 642 (Tex. Civ. App. 1976) (*writ ref'd n.r.e.*). We have found no Texas authority for refusing to enforce contracts for support simply because they are entered into outside Texas. Texas has never adopted any policy reflective of an intent to provide a haven for spouses trying to escape their contractual obligations. Rather, Texas recognizes the sanctity of contracts and the "universal rule" that the validity and interpretation of a contract is determined by the law of the state where made, and if valid there is likewise valid elsewhere. *State of Calif.—Ment. Hyg. v. Copus,* 158 Tex. 196, 309 S.W. 2d 227 (1958), *cert. denied,* 356 U.S. 967 (1959); *Bergstrom A.F.B. Fed. Credit v. Mellon Mort.,* 674 S.W. 2d 845 (Tex. Ct. App. 1984) (Texas law controls only procedure). Steve White's death would not affect the validity of the contract under Texas law. *Republic National Bank of Dallas v. Beaird,* 475 S.W. 2d 344 (Tex. Civ. App. 1971) (*error refused*). A Texas court thus could not modify decedent's support obligation without plaintiff's consent. *Crutchley v. Crutchley, supra.*. Even under Texas law, support agreements may not be modified (absent fraud, accident or mutual mistake) without the consent of the parties. *Deen v. Deen, supra.*

No Texas decision has attempted to deal with the question directly presented here, in large part because Texas long-arm jurisdiction and general recognition of foreign decrees have both been only recently expanded to conform to current notions of jurisdictional due process. *See* Tex. Fam. Code Ann. § 3.26 (Vern. Supp. 1984) *and Mitchim v. Mitchim,* 518 S.W. 2d 362 (Tex. 1975), *discussed in* J. Sampson, Interstate Spouses, Interstate Property, and Divorce, 13 Tex. Tech. L. Rev. 1285 (1982). In light of the Texas courts' continued recognition of support agreements in the face of the state policy forbidding alimony, and the courts' willingness to enforce judgments based on foreign support orders, we conclude that Texas would not deviate from the general rule that provisions in a separation agreement providing for support are not automatically abrogated by a subsequent absolute divorce. *See* 24 Am. Jur. 2d *Divorce and Separation* § 851 (1983); 27B C.J.S. *Divorce* § 301(2)d (1959). Rather, the Texas cases appear to

go to some length in the opposite direction to avoid the potentially harsh results of the "no alimony" rule. *See Conner v. Bean*, 630 S.W. 2d 697 (Tex. App. 1981), *writ ref. n.r.e.* ("property settlement" need not refer to any property; enforceable post divorce); *Cornell v. Cornell*, 413 S.W. 2d 385 (Tex. 1967) (monthly payments until marriage or eligibility for Social Security held property settlement; enforceable). We therefore conclude that a Texas court would not undertake, absent plaintiff's consent, to nullify the support provisions of the North Carolina agreement.

Nevertheless, argues defendant, the Texas decree purports to nullify any prior agreements between these parties, and if the decree contained error of law, those errors must be addressed in the courts of Texas, not North Carolina; otherwise, the decree is entitled to full faith and credit by the courts of this state. U.S. Const. Art. IV, cl. 1. North Carolina courts may entertain attacks on foreign judgments on the grounds of lack of jurisdiction, fraud, or public policy issues. *Courtney v. Courtney*, 40 N.C. App. 291, 253 S.E. 2d 2 (1979). Plaintiff therefore attempted to attack the Texas court's exercise of *in personam* jurisdiction. However, the validity of that exercise involved questions of Texas, not North Carolina, law. Plaintiff, with the burden of overcoming the presumption of validity afforded foreign judgments, failed (both in the trial court and this court), to present any Texas authority indicating that Texas' excercise of jurisdiction was improper. The trial court thus did not err in granting the decree full faith and credit.

The trial court did err, however, in the extent it allowed the decree effect. The due process clause of the Fourteenth Amendment requires not only that a foreign court must otherwise have jurisdiction, but also that parties have *actual notice* of the proceedings. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Such notice must include not only jurisdictional notice (summons) but also notice of the nature of the proceedings (complaint). *Id.; see Childress v. Forsyth County Hospital Auth.*, 70 N.C. App. 281, 319 S.E. 2d 329 (1984), *disc. rev. denied*, --- N.C. ---, --- S.E. 2d --- (filed 8 January 1985); N.C. Gen. Stat. § 1A-1, Rules 3, -4 of the Rules of Civil Procedure (1983). Plaintiff received a petition for divorce, which requested that the Texas court make a fair division of all property accumulated during the marriage. She had a contract between herself and decedent,

which included an executed property settlement; the only executory provisions were those detailed above providing for plaintiff's support, which clearly constituted valid and binding support provisions under both North Carolina and Texas law. *Crutchley v. Crutchley, supra; Deen v. Deen, supra.* Under Texas law, a property division decree could not affect a valid support agreement, and in fact a Texas court would probably take extra care not to interfere with a valid support agreement in light of that state's "no alimony" rule. We conclude, therefore, that plaintiff lacked notice of the risk that the Texas proceedings would deal with decedent's contractual support obligation.

More importantly, we are constrained by the full faith and credit clause to treat foreign judgments the same as domestic judgments. *Boyles v. Boyles*, 59 N.C. App. 389, 297 S.E. 2d 405 (1982), *aff'd*, 308 N.C. 488, 302 S.E. 2d 790 (1983). They do not receive *extra* deference. An elementary North Carolina rule in the interpretation of judgments is that the pleadings, issues and other circumstances of the case must be considered. *Coach Co. v. Coach Co.*, 237 N.C. 697, 76 S.E. 2d 47 (1953); *Berrier v. Commissioners*, 186 N.C. 564, 120 S.E. 328 (1923). Judgments must be interpreted like other written documents, not by focusing on isolated parts, but as a whole, in light of practicality and the intention of the court. 46 Am. Jur. 2d *Judgments* §§ 73-76 (1969). And if a judgment is subject to two interpretations, the court will adopt that one which makes it harmonize with the applicable law. *Alexander v. Brown*, 236 N.C. 212, 72 S.E. 2d 522 (1952). The full faith and credit clause does not require that a decree valid as to one particular must be literally enforced as to all aspects. *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1956).

The Texas judgment was based on a petition for divorce and property division, and plaintiff received notice of a property division action. The decree provides exclusively for divorce and property division, making no mention of support or alimony. The language relied upon by defendant is that "this property division supercedes [sic] and overcomes any prior agreements. . . ." We do not interpret this language as nullifying any and all agreements, of whatever nature, between the parties. Rather, in view of the purposes of the order as a whole, in light of the facts of the case, and in harmony with the law of Texas regarding support, we interpret the decree to nullify *only* the property division provisions

of the prior agreement, and we give it full faith and credit only to that extent, leaving decedent's contractual support obligation intact. Both the constitutional notice considerations discussed above and practical rules of interpretation support this ruling.

A review of the public policy of both Texas and North Carolina provides further support. The law in both states strongly favors enforcing contracts as written, wherever they may be entered into. Policy does *not* favor allowing spouses to escape their lawful support obligations simply by crossing state lines. Both Texas and North Carolina have enacted the Uniform Reciprocal Enforcement of Support Act to prevent such misconduct. Tex. Fam. Code Ann. § 21.01 *et seq.* (Vernon 1975); N.C. Gen. Stat. § 52A-1 *et seq.* (1976). Texas has judicially refused to apply its public policy prohibiting court-ordered alimony to decrees of other states, *Layton v. Layton, supra*, by extension indicating at least equal protection to the preferred (in Texas) method of providing for support by contract including contracts entered into outside Texas. North Carolina has legislatively recognized separation agreements as binding in all respects as long as consistent with public policy. N.C. Gen. Stat. § 52-10.1 (Supp. 1983). And North Carolina continues to recognize a post-divorce obligation to provide continued support. N.C. Gen. Stat. § 50-16.1 *et seq.* (1976 and Supp. 1983).

We therefore conclude that the trial court erred in according full faith and credit to the Texas decree, in interpreting it to mean that it barred the present action to enforce decedent's contractual obligation to provide support. The court's order is therefore reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges ARNOLD and COZORT concur.

Walls v. Grohman

WALTER C. WALLS AND WIFE, SUSAN B. WALLS v. H. G. GROHMAN AND WIFE, CATHERINE H. GROHMAN

No. 845DC438

(Filed 5 February 1985)

Adverse possession § 3— belief that land was included in defendants' deed—possession not adverse

In an action to remove a cloud upon title where plaintiffs alleged that defendants claimed an interest in a 50 foot wide tract of plaintiffs' land, evidence was sufficient to support the finding of the district court that defendants' possession of the disputed lands was not adverse where the evidence tended to show that defendants exercised possession over the disputed area solely because they believed that it was in fact their land and that it was included in the description contained in their deed.

APPEAL by defendants from *Tucker, Judge.* Judgment entered 21 February 1984 in District Court, NEW HANOVER County. Heard in the Court of Appeals 6 December 1984.

This is an action to remove a cloud upon title filed by plaintiffs, Walter C. and Susan B. Walls, on 15 June 1981, alleging that defendants, H. G. and Catherine H. Grohman, claim an interest in fifty feet of plaintiffs' land.

The essential facts are:

Plaintiffs and defendants own adjoining lots on state road 1492 (Myrtle Grove Loop Road) in New Hanover County. Plaintiffs sought to move an old house to the northern edge of their property but were prevented from doing so by defendants' representation that they owned the portion of land in question, a tract approximately fifty feet wide. Plaintiffs brought this action to quiet title. All parties' titles originate from a common source, Mrs. Kittie Horn Lewis and husband, Henry G. Lewis. Plaintiffs' chain of title is as follows:

a) Kittie Horn Lewis and husband, Henry G. Lewis dated 21 June 1949.

b) Bruce Lewis and wife, Viola F. Lewis to Paul Griffin, Jr. and wife, Amanda Griffin dated 17 December 1955.

c) Amanda Griffin, widow to Walter C. Walls and wife, Susan B. Walls (plaintiffs) dated 9 November 1979.

Defendants' chain of title begins directly with a deed from Kittie Horn Lewis and husband, Henry G. Lewis to Catherine H. Grohman dated 28 October 1948.

Upon motion of the plaintiffs, this action to quiet title was assigned to a referee on 12 January 1982 by the Honorable Carter T. Lambeth, District Court Judge. On 26 January 1983, the referee filed a report with the district court compiled from matters of public record and a survey, but without a hearing, in which the referee concluded that plaintiffs' complaint failed to state a claim for which relief may be granted in that the description of the disputed land did not "cover any part of the 52 feet of gappage between the parties described tracts." The referee also found that "some findings of fact herein constitute evidence of possession" but the referee made no conclusions of law in favor of either party as to adverse possession, recommending instead that a hearing be held on that issue.

Plaintiffs excepted to the referee's first report and Judge Lambeth vacated and set it aside remanding the action for hearing on 15 September 1983.

A hearing was held before the referee on 5 October 1983. Based upon the referee's independent search of the public records of New Hanover County, evidence presented at the hearing and arguments of counsel, the referee made the following pertinent findings of fact:

> 6. The beginning point of [defendants'] deed is located without dispute as being the western right of way of State Road 1492, (120 feet from the centerline) 256 feet south of the northeast corner of Tract #5. [The entire tract of which plaintiffs' and defendants' lands are a part] The [defendants'] deed then calls for a distance along the road right of way of 242 feet to a stake. That distance does not extend the line to the southeast corner [of defendants' purported lot] as claimed by them, falling short about 51 feet.
>
> 7. The [plaintiffs'] deed calls for a beginning point at the [defendants'] southeast corner, and then runs along the roadway, south 212 feet to the P. T. Dicksey corner. That distance does not extend the [plaintiffs'] line to the P. T. Dicksey corner, falling short about 54 feet.

8. There is no disputed boundary between plaintiff[s] and any other owner of portions of Tract #5 but [defendants] . . . [T]his fact is consistent with Rules of Construction in that the [defendants'] call of 242 feet to a stake is not a call to a monument, and [defendants'] deed distance controls; however, the [plaintiffs'] call of 212 feet to the P. T. Dicksey corner is a call to an artificial monument (the adjoining landowner's line and corner) which was found to exist, and which controls over courses and distances in the resolution of inconsistent boundary line locations.

9. The Plaintiffs, although junior in time, have the better *record* title to that portion of land in dispute between them and the lands of Defendants. Since the Defendants' deed does not describe the land in question, their title will succeed or fail upon proof of adverse possession for not less than 20 years.

The referee then considered whether defendants had title to the disputed portion of land by adverse possession for not less than 20 years and made the following findings of fact:

1. The tract deeded to [defendants] was [Mrs. Grohman's] home tract on which the family residence was located. It had been farmed and the yards were tended for many years. When [Mrs. Grohman] was deeded the property in 1948 the line between [defendants'] tract [and that of] Bruce Lewis, [Plaintiffs' predecessor in title] had been surveyed and marked on the roadway with an iron pipe. Mrs. Grohman planted grass in the disputed area and had it tended under her supervision. [Mrs. Grohman's] father . . . farmed the two fields behind the house and had them cultivated up to the line claimed by the [defendants] until the time of his death in 1973.

2. Bruce Lewis . . . [plaintiffs' predecessor in title] had his land surveyed . . . in December 1955. As a result of the survey, he learned that his driveway and his well were on the [defendants'] side of the line . . . After Paul Griffin [also plaintiffs' predecessor in title] bought the tract, he moved the driveway and the well south of the line contended by [defendants], and did not claim or use any portion of the tract now in dispute as a claim of right.

3. Mrs. Grohman does not know what road frontage distance the deed called for, but claims all the lands to a stake her father showed her at the east terminus of the hedgerow, [planted by plaintiffs' predecessors in title, Bruce Lewis and Paul Griffin] and running westerly toward the walnut tree. Neighbors and former employees of Griffin and [Mrs.] Grohman agree to knowledge of that line as being the [defendants'] line.

The referee then concluded that while plaintiffs had better record title to the disputed land, defendants had been in exclusive possession of that disputed part of plaintiffs' tract south of the line called for in defendants' deed under a claim of right and title and that such possession by defendants had been actual, open, hostile, exclusive and continuous for a period of more than thirty years before plaintiffs were conveyed their tract.

On 14 November 1983, plaintiffs excepted to the second report of the referee and on 21 February 1984, the Honorable Elton G. Tucker, District Court Judge, entered an order finding, *inter alia*:

The Referee's report upon Findings set forth and enumerated . . . finds that the Plaintiff's have the better record title to the lands in dispute. This finding continues with the conclusion that the Defendants' title must succeed or fail upon proof of adverse possession for not less than 20 years. Defendants [sic] evidence reflected by both the Referee's report and by the transcript of the testimony introduced at the hearing on October 6, 1983 before the Referee indicates that the Defendants did not offer testimony controverting the record title of the Plaintiffs but sought to prove title by adverse possession. Defendants did not except to the Referee's report.

The order of the district court also found that defendants' possession of the disputed lands was not adverse, as adverse possession is defined under the laws of this state.

The district court then ordered title to the disputed lands quieted in plaintiffs and defendants appeal.

Carr, Swails and Huffine, by James B. Swails, for plaintiff-appellees.

Crossley and Johnson, by John F. Crossley, and Hewlett and Collins, by Addison Hewlett, Jr., for defendant-appellants.

EAGLES, Judge.

We note as a preliminary matter that defendants' failure to except to the findings of the referee that plaintiffs were vested with superior record title to the disputed lands makes the referee's findings conclusive on appeal. *In Re Hayes*, 261 N.C. 616, 135 S.E. 2d 645 (1964). Therefore, the sole question presented for review is whether defendants' possession of the disputed lands amounts to adverse possession under the well-settled principles of law in this state.

Under G.S. 1-40, adverse possession against an individual without color of title must run for 20 years before title ripens in the adverse possessor and is extinguished in the former owner. Adverse possession is defined as "the actual, open, notorious, exclusive, continuous and hostile occupation and possession of land of another" for the statutory period. Webster, Real Estate Law in North Carolina, Section 286 (Hetrick rev. 1981).

There was evidence at the referee's hearing that tended to show isolated acts of possession on the part of defendants as to portions of the disputed area. Mrs. Grohman testified that when the family division of the property of her mother and father was made, that it was her understanding that her land went to an iron stake and that it was her understanding that the property conveyed to her by her mother included the lands and premises which are the subject of this action. The property actually conveyed to Mrs. Grohman was by a deed that failed to convey the disputed lands.

This evidence, contained in the referee's report and in the transcript of the referee's hearing, was sufficient to support the district court's finding that

> This testimony was apparently the basis of a conclusion by the Referee that the property claimed by Mrs. Grohman was within the boundaries of lands believed and claimed to be

theirs as a matter of right and title from and after the deed to Mrs. Grohman from her mother.

In *Sipe v. Blankenship*, 37 N.C. App. 499, 246 S.E. 2d 527 (1978), *cert. denied*, 296 N.C. 411, 251 S.E. 2d 470 (1979), this court held

> It is the rule in this State that a grantee's occupation of land beyond the boundary called for in his deed under the mistaken belief that it was covered by the description in his deed will not be considered to be adverse. Thus, where a grantee goes into possession of a tract of land conveyed and also takes possession of a contiguous tract under mistaken belief that the contiguous tract is also included within the description of his deed, no act on his part, however exclusive, open and notorious, will constitute adverse possession of the contiguous tract prior to the time he discovers that the disputed area was not covered by the description in this deed.

Id. at 505, 246 S.E. 2d at 532.

It is interesting to note that in *Sipe v. Blankenship, supra*, the following testimony appears

> I am not claiming any of Mr. Sipes' land. Just ours. I'm claiming where the old line was set up. What's always been the old line. My mother pointed out to me where this old line was.

37 N.C. App. at 506, 246 S.E. 2d at 532.

Here, there was similar testimony from Mrs. Grohman:

> [O]ur dad took us down and showed us the iron stake at each point . . . and said that was the property I was getting . . .
>
> The iron stake that he showed me on what I call the right side, that's the iron stake in question here today. The iron stake lines up with the hedgerow . . . [my husband] and I possessed that property. It was our property.

Mr. H. G. Grohman testified at the referee's hearing, "[n]ow with regard to this 50 feet in question, [Mrs. Grohman] and I recognized that as our 50 feet throughout the years."

In view of this testimony from defendants, there was sufficient evidence from which the district court could find and conclude that defendants exercised possession over the disputed area solely because they believed that it was in fact their land and that it was included in the description contained in their deed. Such possession may not be considered adverse. *Sipe v. Blankenship, supra; Price v. Whisnant*, 236 N.C. 381, 72 S.E. 2d 851 (1952); *Garris v. Butler*, 15 N.C. App. 268, 189 S.E. 2d 809 (1972). *But see, Chambers v. Chambers*, 235 N.C. 749, 71 S.E. 2d 57, *reh. den.* 236 N.C. 766, 72 S.E. 2d 8 (1952); *Battle v. Battle*, 235 N.C. 499, 70 S.E. 2d 492 (1952).

Defendants argue on appeal that the deed conveying the property to Mrs. Grohman said that the distance along the road right of way was 242 feet to a stake and that since defendant is presumed to know what was in the deed, the possession of the 50 feet not embraced in the deed can only be adverse. We disagree. The evidence clearly shows that Mr. and Mrs. Grohman both thought the land was theirs and there was no intent to hold the 50 feet in question adversely to anyone. "It is the occupation with the intent to claim against the true owner, which renders the entry and possession adverse." *Gibson v. Dudley*, 233 N.C. 255, 63 S.E. 2d 630 (1951).

For the foregoing reasons, the order of the district court quieting title to the disputed land is

Affirmed.

Chief Judge HEDRICK and Judge WHICHARD concur.

SHARON WRIGHT v. T & B AUTO SALES, INC.

No. 8412DC189

(Filed 5 February 1985)

1. Appeal and Error § 57— findings of fact binding—conclusions of law reviewable

On appeal a trial court's findings of fact are binding if supported by any substantial evidence, but its conclusions of law are reviewable.

2. Uniform Commercial Code § 12— used car—implied warranty of merchantability—disclaimer ineffective

Defendant failed effectively to disclaim liability for the breach of an implied warranty of merchantability based on the terms of its used vehicle guarantee, since there was no conspicuous language mentioning "merchantability"; furthermore, the terms of defendant's form contract disclaiming implied warranties of merchantability on all used vehicles which were sold without express warranty or guarantee did not apply to plaintiff's action, since the vehicle sold by defendant to plaintiff did have a separate written warranty. G.S. 25-2-316(2).

3. Uniform Commercial Code § 12— used car—breach of implied warranty of merchantability—damages

In an action to recover for breach of an implied warranty of merchantability in a used car sales transaction, special circumstances as provided for in G.S. 25-2-714(2) warranted damages in the amount of the cost of a new engine, rather than in the amount of repairing reversed engine heads, since the reversed heads caused the total destruction of the engine.

APPEAL by defendant from *Cherry, Judge.* Judgment entered 27 September 1983 in District Court, CUMBERLAND County. Heard in the Court of Appeals 13 November 1984.

Carter & McSwain, by Ronald D. McSwain, for plaintiff appellee.

Downing, David, Vallery and Maxwell, by Harold D. Downing, for defendant appellant.

BECTON, Judge.

This case deals with the ineffective disclaimer of an implied warranty of merchantability in a used car sales transaction.

In February 1982, plaintiff, Sharon Wright, signed a form contract to purchase a 1977 Subaru automobile from defendant, T & B Auto Sales, Inc. (T & B) for the total price of $2,672.00. When Wright paid the balance due and took delivery of the car in March 1982, she received a T & B Auto Sales Approved Used Vehicle Guarantee. According to the guarantee, the mileage on the odometer read 51,900. Wright testified that she returned the vehicle to T & B within the first month with complaints that the oil light stayed on continuously and that the engine was overheating. T & B replaced the oil sending unit. Afterwards, the oil light stayed off, but as Wright testified: "The car was still overheating. I would take it back to [T & B] and he would work on it for a lit-

tle bit and it would drive right for a couple of days and the same problem would come back again." Wright continued to take the car back to T & B for repairs until September 1982. Several days later, the car would not start at all. Wright had it towed to Perkins Motors; they replaced the engine in October 1982 at a cost of $1,063.77. The Perkins service manager testified that reversed engine heads caused the overheating and near meltdown of the engine. Moreover, the oil light had either been disconnected or the line had burned on the engine. At the time, the mileage on the odometer read 61,572.

In December 1982, Wright instituted this action to recover $1,459.00, representing the repair costs, towing charges, and damages for loss of use of the automobile during the time required for repairs. In her Complaint, Wright alleged that T & B had breached express representations and an implied warranty of merchantability. From a judgment awarding Wright damages in the amount of the cost for replacing the engine, $1,063.77 plus interest, T & B appeals.

I

Following a trial before the judge, the trial court concluded that "plaintiff was proximately damaged by the defendant's breach of express warranty in that plaintiff had to pay for replacing the engine in the automobile." This, and other of the court's conclusions, were based on the following relevant findings of fact:

> 4. That at the time of delivery, Defendant gave Plaintiff a limited written guarantee covering the mechanical function of the automobile engine.
>
> 5. That the automobile engine did not function properly because the heads on the engine were reversed and on the wrong side causing the engine to over-heat and allow water and oil to mix.
>
> 6. That the Plaintiff gave Defendant timely notice of the defects by repeatedly returning the car to Defendant from March 1982 through September 1982 complaining that the car was overheating and that water was in the oil.
>
> 7. That Defendant failed to cure the defects in the engine.

8. That the Plaintiff was proximately damaged by the Defendant's breach of guarantee in that Plaintiff had to pay Perkins Motors, Inc., to replace the automobile engine in the car in October, 1982.

T & B excepts to the above findings of fact and the resulting conclusions of law. On appeal, T & B argues that the trial court erred in failing to find as fact that (a) the vehicle operated satisfactorily during the warranty period, and (b) Wright operated the vehicle for approximately ten thousand miles before the engine failed, and in failing to conclude that T & B's warranty extended only to defects discovered and complained of within one thousand miles or thirty days and replaced on T & B's premises on a 50-50 basis.

II

The underlying premise of T & B's assignments of error is that the limited express warranty included in the used vehicle guarantee furnished Wright's exclusive remedy. We disagree.

[1] Although the trial court concluded that T & B was liable to Wright based on a breach of the limited express written warranty, we are not bound by its legal conclusions. On appeal, a trial court's findings of fact are binding if supported by any substantial evidence, but its conclusions of law are reviewable *de novo*. *Davison v. Duke University*, 282 N.C. 676, 194 S.E. 2d 761 (1973). After reviewing the record, we find the findings of fact are supported by the evidence.

[2] We turn to the provisions of the used vehicle guarantee. The first clause of the guarantee provided:

> The automobile covered by this guarantee is warranted as defined by the dealer herein for the exclusive benefit of the purchaser for a period of thirty (30) days from the date of delivery, or one thousand (1,000) miles, whichever occurs first. This 50-50 guarantee means that the dealer will make any necessary mechanical repairs in his shop at a cost to the buyer of only 50% of the dealer's current list on both parts and labor, except where such repairs have become necessary by abuse, negligence, or collision.

The fifth clause of the guarantee provided: "No other guarantees, representations, or agreements, expressed or implied, have been made to the buyer."

T & B relies on the strict provisions of the limited express warranty in the first clause to disclaim liability since there is no evidence in the record as to the mileage on the car when the oil sending unit was replaced. T & B contends that the car was no longer under warranty and, therefore, that the car operated satisfactorily during the warranty period. However, the fifth clause of the used vehicle guarantee is the determinative provision. It is well-established in this jurisdiction that an implied warranty of merchantability is usually only excludable by language which mentions "merchantability" and, in case of a writing, is conspicuous. N.C. Gen. Stat. Sec. 25-2-316(2) (1965); *Billings v. Harris Co.*, 27 N.C. App. 689, 220 S.E. 2d 361 (1975), *aff'd*, 290 N.C. 502, 226 S.E. 2d 321 (1976). There is no evidence that the present case falls within the exception to G.S. Sec. 25-2-316(2) (1965), N.C. Gen. Stat. Sec. 25-2-316(3) (1965), "in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded." Official Comment 6. Reviewing the language of the fifth clause, we find no mention of "merchantability." Thus, T & B has failed to effectively disclaim liability for the breach of an implied warranty of merchantability based on the terms of the used vehicle guarantee.

T & B argues that the terms of T & B's form contract control and effectively disclaim any implied warranty of merchantability. We are not persuaded. In capital letters at the bottom of the page, the contract states:

> *UNLESS DEALER FURNISHES BUYER WITH A SEPARATE WRITTEN WARRANTY* OR SERVICE CONTRACT MADE BY DEALER ON ITS OWN BEHALF, DEALER HEREBY DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE; (A) ON ALL GOODS AND SERVICES SOLD BY DEALER; AND (B) *ON ALL USED VEHICLES WHICH ARE HEREBY SOLD—AS IS—NOT EXPRESSLY WARRANTED OR GUARANTEED.* (Emphasis added.)

When the language of a contract is plain and unambiguous, its construction is a matter of law for the court. *Renfro v. Meacham*, 50 N.C. App. 491, 274 S.E. 2d 377 (1981). We find the language of T & B's form contract unambiguous. Under its terms, T & B disclaimed all express or implied warranties, including implied

warranties of merchantability, on all vehicles sold without a "separate written warranty." The 1977 Subaru sold to Wright did have a "separate written warranty"—the T & B Auto Sales Approved Used Vehicle Guarantee. Therefore, the disclaimers listed in the contract are inapplicable to the present case.

A plaintiff may recover for a breach of implied warranty of merchantability without any proof of negligence if it establishes that:

> (1) a merchant sold goods, (2) the goods were not 'merchantable' at the time of sale, (3) the plaintiff (or his property) was injured by such goods, (4) the defect or other condition amounting to a breach of the implied warranty of merchantability proximately caused the injury, and (5) the plaintiff so injured gave timely notice to the seller.

Reid v. Eckerd's Drugs, Inc., 40 N.C. App. 476, 480, 253 S.E. 2d 344, 347, *disc. rev. denied*, 297 N.C. 612, 257 S.E. 2d 219 (1979); N.C. Gen. Stat. Sec. 25-2-314 (1965). The trial court in the case *sub judice* found that T & B "since 1976, has engaged in the business of automobile sales and service." T & B qualifies as a "merchant" under N.C. Gen. Stat. Sec. 25-2-104(1) (1965), "a person who deals in goods of the kind." To be "merchantable," goods must at least be "fit for the ordinary purposes for which such goods are used. . . ." G.S. Sec. 25-2-314(2)(c) (1965). The trial court found that "the automobile engine did not function properly because the heads on the engine were reversed and on the wrong side causing the engine to over-heat and allow water and oil to mix." Such a fundamental defect certainly did not render the car "fit for the ordinary purposes. . . ." The trial court's findings of fact numbers 6 and 8, cited *supra*, satisfy elements 3 through 5 under the *Reid* test. We conclude that Wright was entitled to recover for a breach of implied warranty of merchantability.

[3] The general measure of damages for breach of implied warranty of merchantability is "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." N.C. Gen. Stat. Sec. 25-2-714(2) (1965). If the Subaru had been as warranted, the engine heads would not have been reversed. The value of repairing the reversed engine heads by pull-

ing out the engine is not the accurate measure of damages, since the reversed heads caused the total destruction of the engine. In this case the "special circumstances" warrant damages in the amount of the cost of the new engine. We therefore affirm the trial judge's award of the $1,063.77 in repair costs to Wright, even though we base our decision on breach of implied warranty of merchantability rather than breach of the express limited warranty.

Affirmed.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. ROBERT PICCOLO, WILLIAM PAINTER, RICHARD MILFORD ARDIS

No. 8413SC89

(Filed 5 February 1985)

1. **Criminal Law § 91— speedy trial—exclusion of time defendant involved in another proceeding**

In determining whether defendant was denied his right to a speedy trial pursuant to the N.C. Speedy Trial Act, the trial court did not err in excluding from consideration a 117 day delay during which time defendant was indicted, arrested and arraigned on another charge; moreover, Brunswick County was conclusively presumed to be a county where, due to the limited number of court sessions, the 120 day time limit of the Speedy Trial Act could not reasonably be met, since there were only seven regularly scheduled criminal or mixed sessions of court in 1982-1984. G.S. 15A-701(b)(1) and (8).

2. **Criminal Law §§ 10, 11— accessory before and after fact to same crime—two convictions proper**

Defendant could be properly convicted of being both an accessory before the fact and an accessory after the fact to possession of more than one ounce of marijuana.

APPEAL by defendant Piccolo[1] from *Watts, Judge*. Judgments entered 9 March 1983 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 15 October 1984.

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1. Defendants Painter and Ardis withdrew their appeals after the record on appeal was docketed.

Defendant was charged in two bills of indictment with two counts of feloniously conspiring to possess more than one ounce of marijuana, with two counts of being an accessory before the fact to possession of more than one ounce of marijuana, and with one count of being an accessory after the fact to the possession of more than one ounce of marijuana. He was convicted on all counts, and was sentenced to consecutive prison terms totaling 40 years.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Donald W. Stephens, for the State.

Donald Ferguson and Allsbrook, Benton, Knott & White, by William O. White, Jr., for defendant appellant.

JOHNSON, Judge.

The primary issues presented by this appeal are whether the court erred in dismissing defendant's motions to dismiss pursuant to the Speedy Trial Act, G.S. 15A-701 *et seq.*, and whether the court erred in denying defendant's motion to dismiss the accessory after the fact charge. For the following reasons, we find no error.

[1] Defendant was originally indicted on 17 August 1981 and charged with conspiracy to possess, and with accessory before the fact to the possession of, approximately 36,500 pounds of marijuana aboard the seagoing vessel, the "Captain Tom" (hereinafter referred to as the Captain Tom case) on 4 September 1979. He was subsequently indicted on 26 July 1982 and charged with conspiracy to possess, and with accessory before and after the fact to the possession of, approximately 30,000 pounds of marijuana aboard a seagoing vessel during Hurricane David (hereinafter referred to as the Hurricane David case).

The unexcepted findings of fact indicate that defendant was served with the Captain Tom arrest warrant on 4 November 1981. On 25 November 1981, Donald Ferguson, a Florida attorney, filed a waiver of arraignment executed by defendant and Ferguson. The waiver, however, did not include the name or address of an attorney licensed to practice within North Carolina. After an exchange of correspondence regarding discovery between Ferguson and the Special Prosecutions Staff of the Office of the North

Carolina Attorney General, which represented the State, Assistant Attorney General Donald Stephens wrote Mr. Ferguson a letter dated 5 January 1982 in which he advised Mr. Ferguson of the requirements of North Carolina law for the admittance of out-of-state counsel *pro hac vice*. Stephens further advised Ferguson that the State would be unable to furnish voluntary discovery to defendant until a licensed North Carolina attorney filed a notice of entry into the case. On 12 February 1982, Stephens wrote Ferguson and defendant Piccolo another letter advising them that the State had scheduled arraignment proceedings for defendant on 22 February 1982. On that date, 22 February 1982, a North Carolina attorney, W. Douglas Parsons, entered an appearance on behalf of defendant and waived arraignment. Ferguson, however, was not admitted *pro hac vice* until 10 May 1982.

In the meantime, Attorneys Parsons and Ferguson filed pretrial motions on behalf of defendant on 11 March 1982. These motions were ruled upon on 11 May 1982.

At the 26 July 1982 regular session of court, the Hurricane David indictments were returned. Defendant was arrested and arraigned in the Hurricane David case at the next regular session of Brunswick County Superior Court commencing 16 August 1982. On 1 November 1982, the State filed motions to join all defendants and offenses arising out of the Captain Tom and Hurricane David cases. These motions were heard on 29 November 1982 and decided on 29 December 1982. The State wrote a letter to defendant's attorneys on 5 January 1983 advising them that it had obtained the approval of the Administrative Office of the Court of a special two-week term of Brunswick County Superior Court for the weeks of 21 February and 28 February 1983 for the trial of defendant's cases. Defendant's motion to dismiss pursuant to the Speedy Trial Act was heard on 21 February 1983 and his trial was held during the foregoing two week session of court.

For ease of reference, the following is a chronological listing of events pertinent to the speedy trial issue:

17 August 1981	Captain Tom indictment
4 November 1981	Captain Tom arrest warrant served upon defendant

25 November 1981	Defendant waives arraignment through out-of-state counsel
22 February 1982	Waiver of arraignment by North Carolina attorney for defendant
11 March 1982	Pre-trial motions filed on defendant's behalf
6 May 1982	State moved to join defendants
10 May 1982	Out-of-state counsel admitted
11 May 1982	Orders entered ruling upon defendant's pre-trial motions
9 June 1982	State's motion to join defendants allowed
26 July 1982	Hurricane David indictment
16 August 1982	Hurricane David arrest warrant served and arraignment
1 November 1982	State filed motions to join Captain Tom and Hurricane David offenses
29 December 1982	Order entered allowing State's motion to join offenses
5 January 1983	State obtains special two week term of court in Brunswick County beginning 21 February 1983 in which to try case
21 February 1983	Defendant's trial began

The Speedy Trial Act (the Act) provides that the trial of a defendant must begin "[w]ithin 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last." G.S. 15A-701(a1)(1). Here, the last occurring of the foregoing events was the service of the arrest warrant upon defendant on 4 November 1981. From that date until the date of trial, 21 February 1983, 474 days elapsed. From that period of time, the Act provides that "any period of delay resulting from other proceedings concerning the

defendant" must be excluded in computing the time within which the trial of a criminal offense must begin. G.S. 15A-701(b)(1).

The trial court excluded the following periods of time: from 4 November 1981 until 10 May 1982 for the period of delay resulting from the securing of admission of out-of-state counsel; from 11 March 1982 until 11 May 1982 for the period of delay resulting from defendant's pre-trial motions; from 6 May 1982 until 9 June 1982 for the period of delay occasioned by the State's motion to join defendants; from 9 June 1982 until 4 October 1982 for the period of delay resulting from the Hurricane David indictment, arrest and arraignment; and from 1 November 1982 until 21 February 1983 for the period of delay resulting from the State's motion to join the Captain Tom and Hurricane David offenses.

Defendant concedes in his brief that the Court properly excluded the following periods of time: from 30 November 1981 to 22 February 1982, a period of 84 days; from 11 March 1982 to 9 June 1982, a period of 90 days; from 1 November 1982 to 29 November 1982, a period of 28 days; and from 9 December 1982 to 21 February 1983, a period of 74 days. The longest period of time which defendant has found objectionable consisted of the 117 day period from 9 June 1982 until 4 October 1982. Defendant concedes that the court properly excluded 276 days. The pivotal question, then, is whether the court properly excluded the 117 days. If so, the court properly denied defendant's motion.

The court's unexcepted to findings indicate that the next regular session following the court's allowing of the State's motion for joinder of the defendants was on 26 July 1982. At that session, however, defendant was indicted for the Hurricane David case. At the next session of court, 16 August 1982, defendant was served with the Hurricane David arrest warrant and arraigned for the Hurricane David incident. The next regular session of court was not until 4 October 1982.

G.S. 15A-701(b)(1) provides that "[a]ny period of delay resulting from other proceedings concerning the defendant" shall be excluded in computing the time within which the trial must begin. Clearly, a grand jury indictment proceeding and an arraignment proceeding are "other proceedings concerning the defendant." The period from 9 June 1982 until 4 October 1982 was,

therefore, properly excluded, and defendant's motion was properly denied.

We add, also, taking judicial notice of the court calendars prepared by the Administrative Office of the Courts, that there were only seven regularly scheduled criminal or mixed sessions of Brunswick County Superior Court in 1982, 1983 and 1984. Brunswick County, thus, is conclusively presumed to be a county where, due to the limited number of court sessions, the 120 day time limit cannot reasonably be met. G.S. 15A-701(b)(8).

[2] The next issue is whether the court erred in denying defendant's motion to dismiss the charge of accessory after the fact. Defendant contends that he cannot be convicted of both accessory before the fact and after the fact. We disagree. The crimes of being an accessory before the fact and an accessory after the fact are separate and distinct crimes, having separate and distinct elements. *State v. Cabey*, 307 N.C. 496, 299 S.E. 2d 194 (1983). To convict one of being an accessory before the fact, the State must show that a crime was committed, that the defendant was not present at the scene of the crime and that the defendant counseled, procured, commanded or encouraged the principal to commit the crime. *State v. Saults*, 294 N.C. 722, 242 S.E. 2d 801 (1978). To convict one of being an accessory after the fact, the State must show that a crime was committed, that the defendant knew a crime was committed, and that the defendant personally assisted the perpetrator in escaping detection, arrest or punishment. *State v. McIntosh*, 260 N.C. 749, 133 S.E. 2d 652 (1963), *cert. denied*, 377 U.S. 939, 12 L.Ed. 2d 302, 84 S.Ct. 1345 (1964).

The evidence in the present case tends to show that two truck drivers, Richard Ardis and "Fat Freddie" transported at least 30,000 pounds of marijuana through North Carolina en route to a destination point, Racine, Wisconsin, designated by defendant and where defendant was present at the time of the arrival and distribution of the marijuana. Ardis was convicted of felonious possession of marijuana. "Fat Freddie" had not been apprehended at the time of trial. From this evidence the jury could infer that defendant knew Ardis and "Fat Freddie" had committed a crime and that defendant assisted them in escaping detection by helping them dispose of the marijuana. Defendant's motion was, therefore, properly denied.

We have also reviewed defendant's assignments of error concerning the court's limiting defendant's cross-examination of the State's key witness regarding the witness' prior psychiatric problems, the State's jury arguments, and the court's denial of his motion for mistrial and find neither prejudicial error nor an abuse of discretion.

For the foregoing reasons, we find

No error.

Chief Judge VAUGHN and Judge WHICHARD concur.

(Former Chief Judge VAUGHN concurred in the result reached in this case prior to 31 December 1984.)

STATE OF NORTH CAROLINA v. TONY GINOR SAMPSON

No. 8413SC361

(Filed 5 February 1985)

1. **Criminal Law § 138— sentencing—evidence of mitigating factors insufficient**

Evidence in a second degree murder case was insufficient to require the trial court to find as mitigating factors that defendant committed the offenses under duress or under strong provocation, that defendant acknowledged wrongdoing at an early stage of the criminal process, or that defendant was suffering from a mental condition or from limited mental capacity which significantly reduced his culpability for the murders. G.S. 15A-1340.4(a)(2)d, e, i & l.

2. **Criminal Law § 138— sentencing—victims held under water until drowned—aggravating circumstance of heinous or cruel crimes**

Evidence in a second degree murder case was sufficient for the trial court to find as an aggravating circumstance that the crimes were especially heinous, atrocious or cruel where it tended to show that the victims were held under water by defendant until they drowned.

3. **Criminal Law § 138— sentencing—young victims—same factor not used for two aggravating circumstances**

There was no merit to defendant's contention that the trial court used the same evidence to find two aggravating factors in violation of G.S. 15A-1340.4(a)(1)p, where the court found as an aggravating factor that both victims were very young, but the court did not use the factor of age in determining that the crimes were especially heinous, atrocious or cruel.

4. Criminal Law § 138— sentencing—crime committed during flight—aggravating circumstance

The trial court did not err in finding as an aggravating factor in each of two murder cases that the crime was committed while in flight following the kidnapping of the victim, since this factor was reasonably related to the sentence imposed.

APPEAL by defendant from *Hobgood (Robert H.), Judge.* Judgment entered 21 February 1983 in Superior Court, BLADEN County. Heard in the Court of Appeals on 9 January 1985.

The defendant, Tony Ginor Sampson, pled guilty to the felonious larceny of an automobile, the kidnapping of Regina R. Robinson, age three, and April Devone, age two, and the second-degree murders of Regina R. Robinson and April Devone. All of these crimes occurred 12 April 1982.

At the sentencing hearing the mother of the victims, Retha Mae Devone, testified that she lived with the defendant for fourteen months. While she lived with the defendant, he helped care for the children and was "good to the children." She testified that the children referred to the defendant as "daddy." S.B.I. Special Agent Michael Lowder testified that on 12 April 1982 he interviewed the defendant. Agent Lowder testified that the defendant said he took the children because Ricky Devone had returned to his wife, Retha Mae Devone, and the defendant did not want Ricky raising the children because the defendant believed Ricky Devone was a drug addict. The defendant stated he drove the children down a logging road until the car got stuck. The defendant told Lowder that he then walked down the road leaving the children behind in the car. When he returned to the car the children were not there. He said he walked into the woods where he found the children lying face down in water. He then dug a shallow grave and buried them. Sometime during the investigation the defendant was asked ". . . if he thought the children would drown by themselves?" The defendant answered, "No, that there is not enough water in the hole."

The defendant participated in the search on 12 and 13 April 1982, and he led the searchers to a shallow grave which contained the bodies of the victims.

Dr. John D. Butts and Dr. Thomas L. Bennett performed autopsies on the victims. The reports revealed the following infor-

mation. Concerning April Devone, the probable cause of death is "asphyxiation secondary to drowning." She was two years old and weighed 22 pounds. Her mouth, pharynx, larynx and stomach all contained plant material. The hands clutched plant material. There were abrasions on the neck, ear and forehead. Plant material was found in the lungs.

The probable cause of Regina Robinson's death was drowning. She was three years old and weighed 35 pounds. Water and plant debris were found in the airways and stomach. There were some minor abrasions.

At the sentencing hearing, Dan Jordan, a psychologist, testified that he examined the defendant on 28 July 1982. Mr. Jordan concluded the defendant had no psychosis or serious mental disorder, but that he had "borderline mental retardation and an overlay of reactive depression" along with a significant personality disorder. Mr. Jordan testified that the defendant's personality disorder rendered him very "fragile" in the face of stressful events such as the return of his girlfriend to her husband.

For each murder the trial court found three factors in aggravation of punishment and two factors in mitigation. The court determined the factors in aggravation outweighed the factors in mitigation.

For the murders the defendant was sentenced to two consecutive fifty-year prison terms. For the kidnapping the defendant was sentenced to two consecutive twelve-year terms. For the felonious larceny he received a three-year sentence to run concurrently with one of the kidnapping sentences. The defendant appeals only the sentences for the Second-Degree murders.

Attorney General Rufus L. Edmisten by Assistant Attorney General David Roy Blackwell for the State.

Moore, Melvin and Wall by David G. Wall and Hill and Womble, P.A., by H. Goldston Womble, Jr., for defendant appellant.

WEBB, Judge.

[1] The defendant first assigns error to the trial court's failure to find certain mitigating factors.

He argues that the court should have found, under G.S. 15A-1340.4(a)(2)b, that the defendant committed the offenses under duress, coercion, threat, or compulsion which was insufficient to constitute a defense but significantly reduced his culpability. He also argues that the court should have found, under G.S. 15A-1340.4(a)(2)i, that the defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating. The gist of the defendant's argument is that the record shows he loved the victims and acted out of a sincere desire to help them. Assuming for the sake of argument the truth of these contentions, they bear no relationship to the mitigating factors listed above.

He next argues that the court should have found as a mitigating factor that "[p]rior to the arrest or at an early stage of the criminal process, the Defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer." G.S. 15A-1340.4(a)(2)l. There is no evidence which would support such a mitigating factor. The defendant voluntarily acknowledged that he kidnapped the children, but he did not admit to the murders. He stated that he found the children dead in the swamp and he buried them. He also stated that he thought the children would not drown by themselves because there was "not enough water in the hole." None of this is evidence of admission of wrongdoing in connection with the murders.

The final arguments under the first assignment of error concern G.S. 15A-1340.4(a)(2)d and e. The defendant argues the court should have found that he was suffering from a mental condition and from limited mental capacity both of which significantly reduced his culpability for the murders.

The trial judge must find a mitigating factor where " 'the evidence so clearly establishes the fact in issue that no reasonable inference to the contrary can be drawn,' and that the credibility of the evidence is 'manifest as a matter of law' " (citations omitted) *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983).

We believe Mr. Jordan's testimony allows inferences that neither the defendant's mental condition nor his mental capacity significantly reduced his culpability for the murders.

On direct examination of Mr. Jordan, the defendant's attorney asked, "Were you able to diagnose whether he [defendant]

had any mental . . . disorder as a result of your tests offered to him?" Jordan replied,

> It depends upon—oftentimes mental disorder means different things to different people. And in the sense that anything was evident in the testing would not indicate any psychosis or any serious mental disorder, but he did have a significant personality disorder, along with borderline mental retardation and an overlay of reactive depression.

While the defendant may have a personality disorder, somewhat limited mental capacity and an "overlay of reactive depression," Mr. Jordan, both in the above quote and elsewhere in his testimony, said that there was no psychosis or serious mental disorder. When asked whether he had an opinion as to whether the defendant's limited mental capacity would have had a significant bearing on the commissions of the crimes, Mr. Jordan concluded, "I would not make it one of the greater [factors] . . ." While there may be sufficient evidence so that the trial court could have found the existence of those mitigating factors, we do not believe that the evidence so clearly establishes the fact in issue that no reasonable inference to the contrary can be found; thus, we cannot say that the trial court erred in failing to find these mitigating factors.

[2] In his second assignment of error the defendant argues there was not sufficient evidence for the Court to find certain aggravating factors. He first argues that there was not sufficient evidence that the crimes were especially heinous, atrocious, or cruel. The evidence was that both the victims died from drowning. The defendant told an officer "there is not enough water in the hole" for either of them to have drowned by themselves. It may be concluded from this that each of the children was held under water by the defendant until they drowned. This conclusion may be supported by the evidence that the children were clutching plant material and that plant material was found in the airways and stomachs of both. We hold that this evidence supports a finding that the murders were accomplished with more brutality or dehumanizing aspects than are normally present in second degree murder. *See State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

[3] The defendant also argues that the Court used the same evidence to find two aggravating factors in violation of G.S. 15A-1340.4(a)(1)p. The Court found as an aggravating factor that both the victims were very young. The defendant argues that the Court used this evidence to find the crimes were especially heinous, atrocious or cruel. The children's age was not necessary as evidence to prove their deaths were especially heinous, atrocious or cruel.

[4] The defendant next argues that the Court erred in finding as an aggravating factor in each of the murder cases that the "crime was committed while in flight following the kidnapping of this victim." The defendant argues that this aggravating factor is not reasonably related to the purpose of sentencing and that it violates G.S. 15A-1340.4(a)(1)o by finding as a factor a crime which was joinable with the crime for which he was being sentenced. *See State v. Lattimore*, 310 N.C. 295, 311 S.E. 2d 876 (1984). We believe this is a factor which is reasonably related to the sentence imposed. We think it aggravates a crime that it was committed to facilitate escape from another crime. We do not believe it violates the rule of *Lattimore* to use this as a factor. It was not the other crime of kidnapping which was used as a factor but the killing while escaping from the kidnapping.

Affirmed.

Judges EAGLES and COZORT concur.

JOE D. GODFREY AND WIFE, ANNIE MAE GODFREY v. VAN HARRIS REALTY, INC.

No. 8411DC446

(Filed 5 February 1985)

Easements § 6.1— roadway—use for less than 20 years—no prescriptive easement

In plaintiffs' action to establish an easement by prescription across defendant's land, the trial court erred in failing to grant defendant's motion for a directed verdict where plaintiffs failed to show continuous and uninterrupted adverse use of a roadway for a period of at least twenty years, since plaintiffs used the roadway for 18 years and 11 months before bringing this action;

plaintiffs' predecessor in title used the roadway for 6 to 9 months before plaintiffs acquired title; that left 4 to 7 months of the required 20 years when the roadway was not in continuous use; and 3 or 4 excursions across the roadway to examine timber by plaintiffs' predecessors while they were prospective purchasers of the land could not be tacked to fulfill the 20 year requirement because such use did not indicate hostile and adverse use sufficient to rebut the presumption that the use was permissive.

APPEAL by defendant from *Christian, Judge.* Judgment entered 22 December 1983 in District Court, LEE County. Heard in the Court of Appeals 6 December 1984.

Plaintiffs seek to establish an easement by prescription across defendant's land. The jury returned a verdict for plaintiffs and the court entered judgment declaring the easement. Defendant appeals.

Cameron, Hager & Kinnaman, P.A., by Richard B. Hager, for plaintiff appellees.

Love & Wicker, P.A., by Jimmy L. Love, for defendant appellant.

WHICHARD, Judge.

Plaintiffs prayed for a declaratory judgment establishing that they have an easement over a roadway across land owned by defendant. They claim the easement through prescriptive use by themselves and their predecessors in title. Defendant contends the court erred in failing to grant its motion for a directed verdict. We agree and accordingly reverse.

Under G.S. 1A-1, Rule 50 defendant is entitled to a directed verdict only if the evidence, considered in the light most favorable to plaintiffs, fails to show each and every element required to establish an easement by prescription. *Potts v. Burnette*, 301 N.C. 663, 665, 273 S.E. 2d 285, 287 (1981); *see also Dickinson v. Pake*, 284 N.C. 576, 583-84, 201 S.E. 2d 897, 902 (1974). The court must deem true all evidence which tends to support plaintiffs' position, resolving all evidentiary conflicts in their favor and giving them the benefit of all reasonable inferences. *Daughtry v. Turnage*, 295 N.C. 543, 544, 246 S.E. 2d 788, 789 (1978); *Potts*, 301 N.C. at 665, 273 S.E. 2d at 287.

The evidence, so considered, tends to show:

In mid-March 1964 plaintiffs bought from Ernest Brewer a tract of land adjacent to property now owned by defendant. Since purchasing the tract plaintiffs have used a roadway located on defendant's property as the primary means of getting to their land. There are no structures on the tract and plaintiffs have never resided there. They have performed some maintenance on the roadway.

After buying the tract plaintiffs used the roadway at least once a week. During the summer of 1965 and regularly since the spring of 1968, plaintiffs used it at least three or four times a week to prepare for and later to conduct a cattle raising operation. Both defendant and his predecessor in title knew plaintiffs were using the roadway. Plaintiffs used the roadway during a total of eighteen years and eleven months before bringing this action.

Plaintiffs' predecessor in title, Brewer, owned the tract from mid-March 1963 until mid-March 1964. Brewer and a business associate, Fred Powers, ran a sawmill operation on the tract for six to eight months beginning between mid-June and mid-September 1963. While the sawmill was in operation Powers and the sawmill crews used defendant's roadway daily as their sole means of access to the sawmill. Trucks hauled lumber across the roadway two to four times a day.

Three to six months before Brewer bought the tract he and Powers went onto it to examine the timber. During each of those three or four excursions between approximately mid-September and mid-December 1962, they used defendant's roadway to enter and leave. Powers did not ask permission to use the roadway for these excursions or for the later sawmill operation. Although Brewer did not testify, Powers does not believe Brewer ever asked permission.

Brewer's predecessor in title acquired the tract in May 1949. He later sold the timber rights to Piedmont Woodyards. In late 1952 or early 1953 a crew from Piedmont cut timber from the tract, using the roadway almost daily for six to eight months. The Piedmont employee in charge of the timber crew had no knowledge of anyone from Piedmont asking permission to use the roadway.

An easement by prescription, like adverse possession, is not favored in the law, and "it [is] the better-reasoned view to place the burden of proving every essential element, including hostility, on the party who is claiming against the interests of the true owner." *Potts*, 301 N.C. at 667, 273 S.E. 2d at 288; *accord Dickinson*, 284 N.C. at 580, 201 S.E. 2d at 900. To establish a prescriptive easement, the evidence must prove that the use (1) was adverse, hostile, or under claim of right; (2) was so open and notorious that the true owner probably had notice of it; (3) was continuous and uninterrupted for a period of at least twenty years; and (4) involved a way that had substantial identity throughout the twenty-year period. *Potts*, 301 N.C. at 666, 273 S.E. 2d at 287-88; *Dickinson*, 284 N.C. at 580-81, 201 S.E. 2d at 900-01.

Assuming without deciding that plaintiffs' evidence is sufficient to show the second and fourth elements, we find it insufficient to show continuous and uninterrupted adverse use for a period of at least twenty years. Since plaintiffs brought this action in mid-February 1983, they must show evidence of continuous adverse use since at least mid-February 1963. Use of the road by Powers and his sawmill crew began sometime between mid-June and mid-September 1963. The time period thus established is several months less than the requisite twenty years.

Plaintiffs contend that the use of the road by Powers and Brewer in 1962 can be tacked to fulfill the twenty-year requirement. We find insufficient evidence, however, that this 1962 use was adverse, hostile, or under claim of right. "A 'hostile' use is . . . a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right." *Dulin v. Faires*, 266 N.C. 257, 261, 145 S.E. 2d 873, 875 (1966). The 1962 use consisted of three or four excursions to examine timber while Brewer and Powers were prospective purchasers of the land. This evidence, without more, suggests at most mere random trespasses.

The law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears. *Henry v. Farlow*, 238 N.C. 542, 544, 78 S.E. 2d 244, 245 (1953). The testimony by Powers that he had not asked permission prior to the 1962 use, and that he was unsure if Brewer had done so, is tantamount to an assertion that he used the roadway in

silence. "Neither law nor logic can confer upon a silent use a greater probative value than that inherent in a mere use." *Id.*, 78 S.E. 2d at 246. The mere use of a way over another's land cannot ripen into an easement by prescription, no matter how long it may be continued. *Id.*, 238 N.C. at 543, 78 S.E. 2d at 245.

The evidence is not sufficient to show that the 1962 use was accompanied by other circumstances which would give it an adverse character and rebut the presumption that it was permissive. The few excursions by Powers and Brewer are distinguishable from uses in other cases where our courts have favorably considered the absence of permission to use a right-of-way. In *Oshita v. Hill*, 65 N.C. App. 326, 308 S.E. 2d 923 (1983), plaintiffs' evidence showed almost daily use of a road from 1932 until 1974 and repeated performance of extensive, costly and noticeable road maintenance, without any permission being given or sought. Likewise, in *Potts*, 301 N.C. 663, 273 S.E. 2d 285, the hostile character of the use was evinced not only by lack of permission but also by plaintiffs' performance of road maintenance, by plaintiffs' testimony that they considered the road their own, and by the fact that plaintiffs, their families and the public had used the road for fifty years for social and agricultural purposes, it being the only means of vehicular access to plaintiffs' property. In *Dickinson*, 284 N.C. 576, 201 S.E. 2d 897, the use by plaintiffs and their predecessors in title covered a twenty-nine-year period during which a family living in a house at the end of a neighbor's road used the road as their sole means of ingress and egress, as did all visitors to their home. Plaintiffs here offered no similar evidence to buttress their assertion that the 1962 use was hostile.

Plaintiffs also contend that they may tack the 1952 or 1953 use by Piedmont to establish at least twenty years of continuous use. We disagree. The requirement that the adverse use be continuous means that it must "be exercised more or less frequently, according to the purpose and nature of the easement." *Dickinson*, 284 N.C. at 581, 201 S.E. 2d at 900-01 (quoting J. Webster, Real Estate Law in North Carolina, Sec. 288 at 354 (1971)). Although the continuity requirement does not refer to a perpetually unceasing use, the use must "be often enough and with such regularity as to constitute notice to the potential servient owner that the user is asserting an easement." P. Hetrick, Webster's Real Estate Law in North Carolina, Sec. 321 at 345 (rev. ed. 1981). In the

absence of evidence of adverse use during ten consecutive years, one month of which was the initial portion of the prescriptive period asserted, the court could not, reasonably and in accord with the foregoing authorities, declare the establishment of a prescriptive easement.

In summary, the evidence fails to show continuous and uninterrupted use for a period of at least twenty years. Proof of such continuous use is an essential element of plaintiffs' claim for a prescriptive easement. Lacking such proof, the evidence was insufficient to go to the jury. The court thus erred in denying defendant's motion for a directed verdict.

Reversed.

Chief Judge HEDRICK and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. EDWARD HARPER

No. 844SC315

(Filed 5 February 1985)

1. Parent and Child § 2.2— child abuse—sufficiency of evidence

Testimony of defendant's niece and sister that they saw him beating his five-year-old son with a board and testimony by a doctor who treated defendant's son that in his opinion the child was suffering from battered child syndrome with the bruises to his head and eye being caused by blunt trauma was sufficient for the jury to find that defendant intentionally inflicted serious injury to the child and therefore to support a conviction for child abuse. G.S. 14-318.4(a)(3).

2. Parent and Child § 2.3— child neglect—sufficiency of evidence

Evidence was sufficient to convict defendant of contributing to the neglect of minors where it tended to show that defendant had been instructed as to the easily recognizable symptoms of a disease of his child which could be fatal; the child exhibited the symptoms, but defendant did not take any action and refused to give the child's medicine to a social worker in order for her to administer it; defendant's three children lived in a room which had a bad odor and which contained a bucket filled with urine, feces and worms; the children were dirty and were poorly clothed; and though defendant lived in poverty, he received enough assistance to provide for his children. G.S. 14-316.1; G.S. 7A-517(21).

State v. Harper

APPEAL by defendant from *Bruce, Judge.* Judgment entered 3 November 1983 in Superior Court, JONES County. Heard in the Court of Appeals on 7 January 1985.

The defendant was tried for felonious child abuse and three separate charges of misdemeanor contributing to the neglect of a minor. The State's evidence showed that on 21 July 1983 representatives of the Jones County Department of Social Services went to a mobile home in Jones County in which the defendant was living with his three minor children who were Edward Earl Harper, Jr., age five, Timothy Harper, age four, and Montoya Harper, age three. The defendant and his three children lived in one bedroom. There were two other bedrooms in the mobile home which were occupied by the defendant's mother, brother, sister and his sister's two children. The representatives of the Department of Social Services were accompanied by a deputy sheriff who had a court order for the Department to take custody of the three children.

The social workers and the deputy sheriff saw the defendant as they were on the way to his home. They told the defendant where they were going and asked him to follow them to his home, which he did not do. They arrived at the mobile home and found the room in which the defendant was living had an extremely bad odor. There was a toilet which was not functioning. There was a bucket in the room which appeared to be full of urine and feces. There were worms in this bucket. There was not a chest of drawers in the room but the room was full of boxes and clothing. A dirty blanket was on the bed. The children did not have shoes on their feet and they were not wearing underwear. The clothes they were wearing were torn and dirty. The defendant was receiving $221.00 per month in public assistance, $150.00 per month in food stamps, and $100.00 worth of Women's, Infants' and Children's nutritional stamps.

The children were taken to the Craven County Department of Social Services. The defendant came to this place and a social worker asked him if he had medicine for Edward Earl Harper, Jr. He told them that he did but refused to give it to them. Edward Earl Harper, Jr., was swollen about the body and face. His right eye was swollen shut and he had a bruise on his head. Frances Loftin, the defendant's sixteen year old niece, testified that she

lived in the mobile home with the defendant and his children. She testified further that before the children were taken by the social workers she saw the defendant strike Edward Earl Harper, Jr., with a board until the board was broken. The defendant hit his son at least ten times. The next day the child was swollen in the face and around his eyes. He also had a knot on his head. Lois Loftin, the defendant's sister, testified that she saw the defendant beat Edward Earl Harper, Jr., with a board. She said the defendant locked his legs around his son's neck and beat him with a board.

Thomas G. Irons, a pediatrician with a specialty in child abuse and neglect, testified that Edward Earl Harper, Jr., has a "medical condition which is known as nephrotic syndrome, which is a disease of the kidneys that causes Shorty periodically to leak protein into his urine in very large amounts." He was receiving a drug for this condition which had to be properly administered. If the drug is not properly administered the child will die. The signs of relapse are obvious. If there was a puffiness of his face or swelling of his abdomen this is a sign of early relapse. When this happens he needs to be started immediately on therapy and Dr. Irons had so instructed the defendant. Dr. Irons saw the defendant's son on 21 July 1983 at which time the puffiness in his face was a sign that he was well into relapse. In Dr. Irons' opinion he had been in relapse for at least a week. In the opinion of Dr. Irons the swollen eye and the swollen place on the child's head were caused by blunt trauma. In his opinion the child was suffering from a battered child syndrome.

The defendant was convicted on all charges. He appealed from the imposition of a prison sentence.

Attorney General Edmisten by Assistant Attorney General Robert E. Cansler for the State.

John H. Harmon for defendant appellant.

WEBB, Judge.

[1] The defendant first assigns error to the overruling of his motions to dismiss, to set aside the verdict, and for appropriate relief in all cases. All the motions were based on the insufficiency of the evidence to support the convictions. G.S. 14-318.4 provides in part:

(a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child who intentionally inflicts any serious physical injury which results in

. . . .

(3) substantial impairment of physical health

. . . .

is guilty of child abuse and shall be punished as a class I felon.

The defendant argues that there is no credible evidence that he intentionally inflicted any serious physical injury on his oldest son. We believe the testimony of the defendant's niece and his sister that they saw him beating the child with a board, and the testimony of Dr. Irons that in his opinion the child had a battered child syndrome with the bruises to his head and eye being caused by a blunt trauma is sufficient for the jury to find the defendant intentionally inflicted serious injury to the child. The defendant argues that Dr. Irons could not have formed an opinion as to a battered child syndrome on the basis of two bruises about the head. We believe it is within the expertise of Dr. Irons as to whether the bruises on the eye or head would have been inflicted by another person or were of a type which the child would have inflicted on himself in the normal course of events. See *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978).

The defendant, relying on *State v. Byrd*, 309 N.C. 132, 305 S.E. 2d 724 (1983), also argues that there is no evidence that he struck the child in the head. He points out that neither of the witnesses testified that she saw the defendant hit Edward Earl Harper, Jr., in the head. We believe the testimony by two witnesses that they saw the defendant hit the child with a board, coupled with the evidence that the defendant was in charge of the child who had received blows to the head distinguishes this case from *Byrd*.

The defendant does not contend the child did not receive a serious injury.

The Court properly denied the defendant's motions as to the charge of child abuse.

[2] As to the three charges of contributing to the neglect of a minor, G.S. 14-316.1 provides in part:

> Any person over sixteen years of age who knowingly causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated . . . neglected as defined by G.S. 7A-517 shall be guilty of a misdemeanor.

G.S. 7A-517(21) defines a neglected juvenile as:

> A juvenile who does not receive proper care, supervision, or discipline from his parent, . . . or who is not provided necessary medical care . . . or lives in an environment injurious to his welfare.

As to Edward Earl Harper, Jr., Dr. Irons testified that he had instructed the defendant of the easily recognizable symptoms of a disease of the child which could be fatal. These symptoms appeared at least a week before 21 July 1983. The defendant did not take any action on these symptoms and even refused to give the child's medicine to a social worker in order for her to administer it. We believe this is substantial evidence that the defendant did not provide necessary medical care for his son.

As to the other two children the evidence that they lived in a room that had a bad odor, that there was a bucket in the room which was filled with urine, feces, and worms, that the children were dirty and that they were poorly clothed is substantial evidence that they were not receiving proper care and supervision and their environment was injurious to their health. The defendant lived in poverty. He was receiving enough, however, to provide for his children better than he did. He could have kept the room clean and emptied the bucket which was used as a toilet without any cost. The defendant had an affirmative duty to care for his children.

We hold the defendant's motions as to contributing to the neglect of minors were properly denied.

The defendant last argues that the sentences imposed were excessive. The Court found an aggravating factor which the defendant does not challenge and imposed the maximum sentence on the felonious child abuse charge. It then imposed the maximum

sentence on each of the misdemeanor charges with the sentences to run consecutively with the felony sentence. We can find no error in this. The defendant contends that such a sentence is cruel and unusual but advances no reason why this is so. This assignment of error is overruled.

No error.

Judges EAGLES and COZORT concur.

GERALD F. SUMMERLIN v. NATIONAL SERVICE INDUSTRIES, INC.

No. 843SC357

(Filed 5 February 1985)

Pensions § 1; Uniform Commercial Code § 31— lump sum payment—wife's unauthorized endorsement of check—employer's liability not discharged

The trial court erred in directing verdict for defendant in plaintiff's action to recover pension funds which had accumulated during his employment with defendant where the evidence tended to show that plaintiff's wife signed his name to a lump sum payment check and deposited it in their joint account; plaintiff did not learn the status of his pension fund until three years later; plaintiff's wife was not a holder of the check within the meaning of G.S. 25-3-603(1) and her receipt and cashing of it did not discharge defendant's liability to plaintiff; the wife was not an authorized agent of plaintiff so that her endorsement and cashing of the check discharged defendant, nor did plaintiff ratify his wife's unauthorized endorsement; but an issue of fact remained as to whether plaintiff mentioned in his handwritten note to his wife when he left her that she would be receiving a check for approximately $4,000; and other evidence with regard to plaintiff's and his wife's actions raised an issue of credibility.

FROM an order signed by *Fountain, Judge*, on 20 June 1983 denying plaintiff's motion for summary judgment, and from a judgment signed by *Allsbrook, Judge*, on 8 November 1983 denying plaintiff's motion for a directed verdict and granting defendant's motion for a directed verdict, plaintiff appeals. Heard in the Court of Appeals 29 November 1984.

Willis A. Talton for plaintiff appellant.

James, Hite, Cavendish & Blount, by Marvin Blount, Jr. and Charles R. Hardee, for defendant appellee.

BECTON, Judge.

In this action filed 14 May 1982 by plaintiff, Gerald F. Summerlin, to recover pension funds which had accumulated during his fourteen years of employment with the defendant, National Service Industries, Inc., the trial court granted directed verdict for defendant. On appeal, the plaintiff contends that the trial court erred in denying his motion for summary judgment, or at the very least, erred when it denied his motion for directed verdict and granted defendant's motion for directed verdict. Believing that this case should have been submitted to the jury, we reverse.

I

In August of 1978, plaintiff terminated his employment with defendant, left his wife and home in Florida, and moved to North Carolina. According to plaintiff's wife, plaintiff left a note saying, among other things, that she would soon be receiving a check for approximately $4,000. The plaintiff denies indicating that a check in any amount would be coming to his wife.

The terms of the pension plan provided that, at the termination of his employment with defendant, plaintiff would have the option of either receiving a lump sum cash refund consisting of the value of his personal contributions to the plan immediately and a deferred monthly benefit or of receiving a larger monthly benefit starting the first day of the month following his sixty-fifth (65th) birthday. On 27 October 1978, plaintiff's wife opened a letter addressed to him at his Florida address, advising plaintiff of his election under the corporate pension plan. According to Mrs. Summerlin, when she could not locate her husband, she signed the document for her husband, electing a cash refund. Thereafter, defendant mailed a check in the amount of $3,361.38 made payable to the order of Gerald F. Summerlin to plaintiff's Florida address. Mrs. Summerlin endorsed the check "Gerald F. Summerlin," deposited it in the Summerlin's joint checking account, and paid some of the plaintiff's outstanding liabilities and some of the "outstanding joint liabilities" of the parties. According to plaintiff, he did not find out about the status of his pension fund until 1981, when the Internal Revenue Service assessed him for failing to include it on his 1978 tax return.

Defendant contends it satisfied its contractual obligations to plaintiff by mailing the check to his last known address; that plaintiff had constructively received the sum in controversy since his wife cashed the check and paid his obligations; and that, in any event, since the bank honored the signature on the check, defendant was no longer liable. We cannot agree with defendant.

Since the check issued to plaintiff constitutes a "negotiable instrument" under N.C. Gen. Stat. Sec. 25-3-104 (1965), defendant's ongoing liability on the check and on the underlying obligation is governed by the commercial paper provisions of the Uniform Commercial Code (the Code), codified at N.C. Gen. Stat. Sec. 25-3-101 *et seq.* (1965). A party is discharged from liability on a negotiable instrument "to the extent of [its] payment or satisfaction to the *holder*. . . ." N.C. Gen. Stat. Sec. 25-3-603(1) (1965) (emphasis added). Discharge of the party on the instrument also discharges him on the underlying obligation to the extent of his discharge on the instrument. N.C. Gen. Stat. Sec. 25-3-802(b) (Supp. 1983). The key issue becomes whether payment or satisfaction has been made to the "holder" in the case *sub judice*, thus discharging the defendant's liability on the instrument and the underlying obligation.

We begin with the definition of a "holder" as "a person who is in possession of . . . an instrument . . . issued or endorsed to him or to his order or to bearer or in blank." N.C. Gen. Stat. Sec. 25-1-201(20) (1965). From the record, it is clear that plaintiff's wife was in possession of a check which was neither "issued or endorsed to [her] or to [her] order or to bearer or in blank." *Id.* She therefore does not qualify as a "holder."

However, the parties have stipulated in the record that the check, labeled Plaintiff's Exhibit No. 1 and Defendant's Exhibit No. 3, was "made payable to the order of Gerald F. Summerlin." *See* N.C. Gen. Stat. Sec. 25-3-110 (1965) ("Payable to order"). Under N.C. Gen. Stat. Sec. 25-3-202 (1965) a "payable to order" instrument may be "negotiated by delivery with any necessary endorsement . . . written by or on behalf of the holder." Consequently, an endorsement by an authorized agent of the "holder" is sufficient to validate the transaction. This interpretation is substantiated by N.C. Gen. Stat. Sec. 25-1-201(43) (1965): an " '[u]nauthorized' signature or endorsement means one made

without actual, implied or apparent authority. . . ." Since an endorsement by an authorized agent of the "holder" is sufficient to negotiate an instrument, payment or satisfaction to an authorized agent of the "holder" is sufficient to discharge the defendant's liability on the instrument and on the underlying obligation.

Alternately, the defendant's liability on the instrument and the underlying obligation may be discharged, if the plaintiff has ratified the allegedly unauthorized endorsement or if the plaintiff is precluded from denying that the endorsement is unauthorized. N.C. Gen. Stat. Sec. 25-3-404 (1965) (unauthorized signatures and endorsements); *American Travel Corp. v. Central Carolina Bank & Trust Co.*, 57 N.C. App. 437, 291 S.E. 2d 892, *disc. rev. denied*, 306 N.C. 555, 294 S.E. 2d 369 (1982).

Therefore, if the plaintiff's wife had the actual, implied or apparent authority to endorse plaintiff's check, the check was negotiated and the defendant's liability on the check and on the underlying obligation was discharged. Similarly, if the plaintiff ratified his wife's unauthorized endorsement or if he is precluded from denying it, defendant's liability on the check and on the underlying obligation is discharged.

Significantly, we find no agency relationship between the plaintiff and his wife, nor any ratification by the plaintiff or facts precluding him from denying that the endorsement is unauthorized, as a matter of law. *See American Travel Corp. v. Central Carolina Bank & Trust Co.* Although we summarily reject the plaintiff's argument that he was entitled to summary judgment, we nevertheless believe that the case should have been submitted to the jury.

Because factual issues must be resolved by the jury, the trial court erred in entering a directed verdict for the defendant.

> A motion by a defendant for a directed verdict under G.S. 1A-1, Rule 50(a) of the Rules of Civil Procedure tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. On such a motion, plaintiff's evidence must be taken as true and considered in the light most favorable to the plaintiff, giving plaintiff the benefit of every reasonable inference to be drawn therefrom. A directed verdict for the defendant is not properly allowed

> unless it appears as a matter of law that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977); *Everhart v. LeBrun*, 52 N.C. App. 139, 277 S.E. 2d 816 (1981).

Koonce v. May, 59 N.C. App. 633, 634, 298 S.E. 2d 69, 71 (1982). In this case, neither party was entitled to recover, as a matter of law, considering the evidence presented. The evidence creates a factual dispute with regard to whether plaintiff mentioned in his handwritten note that his wife would be receiving a check for approximately four thousand dollars. And the fact that plaintiff left Florida without leaving a forwarding address and that the funds, when received by plaintiff's wife, were deposited in a joint account are not conclusive to show an agency relationship. For example, plaintiff's wife's testimony that she attempted to locate plaintiff before signing his name on the form requesting a cash payment and again before she endorsed the check made payable to him, seem incongruous with defendant's implicit argument that plaintiff's wife had authority to do what she wanted to with the money by virtue of the note plaintiff left her. Further, in resolving the credibility issue, the jury may also deem it significant that the plaintiff was unaware that the pension fund was paid until he was notified of that fact by the Internal Revenue Service. In this regard, a stipulation by the parties that the husband had the option of withdrawing his funds at the termination of employment or leaving them in the pension plan until he reached the age of sixty-five, becomes important, especially since the plaintiff was fifty-seven at the time he terminated his employment with defendant.

In short, since marriage alone does not create an agency relationship, and since the evidence does not so clearly establish the facts in issue that no reasonable inference to the contrary can be drawn, a directed verdict was inappropriate as credibility remained an issue. *See Snipes v. Snipes*, 55 N.C. App. 498, 286 S.E. 2d 591, *aff'd per curiam*, 306 N.C. 373, 293 S.E. 2d 187 (1982).

For the foregoing reasons, this matter is

Reversed and remanded.

Judges ARNOLD and WELLS concur.

HIGHWAY CHURCH OF CHRIST, INC. v. JOHN W. BARBER

No. 8412SC549

(Filed 5 February 1985)

1. **Rules of Civil Procedure § 59— new trial—no consideration given to another court's judgment**

In ruling on plaintiff's motion for a new trial, the trial court was not required to consider or refer to an order and supplemental memorandum of a federal district court judge in Tennessee who, in another case and prior to entry of judgment in this case, found that defendant was "entitled to no credibility in this court" because "[n]ever in the legal experience of this court, which spans 41 years as a lawyer and judge, has there ever been such a display of fraud, evasion and deceipt," since the Tennessee judge's order was not relevant in this case, even as it related to defendant's credibility.

2. **Rules of Civil Procedure § 52— findings and conclusions not labeled—no error**

Although it is the better practice to label separately the findings of fact and conclusions of law, the trial court in this case did not commit reversible error where the findings and conclusions were clear and distinguishable.

3. **Limitation of Actions § 4.3— action on note—accrual of action from date promise to pay is broken**

There was no merit to plaintiff's contention that the statute of limitations barred defendant's counterclaim on an $8,000 note, since the statute does not run from the time the contract is made but instead from the date the contractual promise to pay is broken. G.S. 1-52(1).

APPEAL by plaintiff from *Samuel E. Britt, Judge.* Judgment entered 28 November 1983 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 16 January 1985.

Nance, Collier, Herndon & Wheless, by James B. Wheless, Jr., and Teague, Campbell, Conely & Dennis, by John Wishart Campbell, for plaintiff appellant.

McGeachy and Hudson, by N. Hector McGeachy, for defendant appellee.

BECTON, Judge.

In this action based on allegations of fraud, conversion, and breach of contract, plaintiff, Highway Church of Christ, Inc., seeks to recover a total of $44,617.97 from defendant, John W. Barber, Bishop of the Apostolic Faith Church of God Live Forever, Inc. Plaintiff alleges that Bishop John Barber knew of its interest in a

church building and fund-raising program, and fraudulently induced Raymond Davis, Bishop of the Highway Church of Christ, Inc., to enter into a bond sales program which was to be financed through a sinking fund operated by Ambassador Church Finance, Inc. After Ambassador Church Finance, Inc. went into bankruptcy and other transactions between the parties failed, plaintiff filed this lawsuit. Defendant filed a counterclaim, in which he sought repayment of three loans made to plaintiff totalling $27,938.58.

The trial court, hearing the case without a jury, found against the plaintiff on all claims, found for the defendant upon his counterclaim on an $8,000 loan, and found against defendant on all other claims. On the basis of two assignments of error, brought forward on appeal, plaintiff argues: (1) that the trial court committed reversible error in denying plaintiff's motion for a new trial under Rule 59 of the North Carolina Rules of Civil Procedure; and (2) that the trial court committed reversible error in signing and entering the judgment. For the reasons that follow, we affirm the trial court's judgment.

I

[1] After the entry of judgment, plaintiff filed a motion for a new trial under Rule 59 of the North Carolina Rules of Civil Procedure but did not refer to any of the nine grounds listed in Rule 59(a). N.C. Gen. Stat. Sec. 1A-1, Rule 59(a) (1983). Nevertheless, the trial court conducted an evidentiary hearing and considered plaintiff's evidence, which consisted primarily of an order and supplemental memorandum of a federal district court judge in Tennessee, who, in another case and prior to the entry of judgment in this case, found that defendant John Barber was "entitled to no credibility in this court" because "[n]ever in the legal experience of this court, which spans 41 years as a lawyer and judge, has there ever been such a display of fraud, evasion and deceipt."

We summarily reject defendant's contention that the trial court had to consider or refer to the Tennessee judge's order before denying plaintiff's motion for a new trial. Simply put, the Tennessee judge's order is not relevant in this case even as it relates to defendant's credibility. Plaintiff has not only failed to show an abuse of discretion in the trial judge's denial of his Rule 59 motion, but he has also not even alleged an abuse of discretion.

See Worthington v. Bynum, 305 N.C. 478, 290 S.E. 2d 599 (1982). We hold that the trial judge's denial of the motion for a new trial was within his discretionary authority. The trial judge heard the evidence, examined the documents, weighed the credibility of witnesses, and found the facts. Further, plaintiff failed to rebut the presumption that the verdict is correct and failed to show by affidavit that he used due diligence to procure the evidence which he implicitly contends was not available at the time of trial.

II

In its second argument, that the trial court committed reversible error in signing and entering the judgment, the plaintiff contends the trial court erred in three ways: (a) by failing to make separate findings of fact and conclusions of law; (b) by finding facts not supported by the evidence; and (c) by failing to rule on plaintiff's statute of limitations claim. Having carefully reviewed the trial court's five-page statement of verdict in open court and its four-page signed judgment, we reject defendant's contentions.

[2] A. Although it is true that the trial court did not formally separate and label its conclusions of law, they are clear and distinguishable. In this case, the trial court stated its conclusion of law with regard to each contention contained in the plaintiff's complaint immediately after finding the facts as to that contention. By way of example, after the trial court made its findings of fact with regard to the bond program the plaintiff entered into, it then stated:

> The Plaintiff Corporation in the present lawsuit seeks to recover this $10,000.00 from the Defendant on several theories: (a) fraud, (b) conversion, (c) breach of contract, and (d) misrepresentation. The Plaintiff, however has shown no misrepresentation of any material fact by the Defendant concerning these transactions and no fraud on his part. There has been no conversion of anyone's property concerning these transactions by the Defendant and there was no contract concerning the $10,000.00 paid for the return of the Plaintiff's bonds either expressed or implied.

As can be seen, the conclusion of law above, while not separately labeled, is nevertheless clearly stated and easily distinguishable from the findings of fact. And although it is the better

practice to separately label the findings of fact and conclusions of law, we find no error, for as our Supreme Court has said: "the judge complies with [the requirement of N.C. Gen. Stat. Sec. 1A-1, Rule 52(a)(1) (1983)] if he separates the findings and conclusions in such a manner as to render them distinguishable, no matter how the separation is effected." *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E. 2d 368, 371-2 (1975).

B. We also reject defendant's contention that there is no evidence to support the trial court's finding (1) that there was no contract between the plaintiff and the defendant as to the bonds given to Messrs. Atkinson and Winters of Ambassador Church Finance, Inc.; (2) that the defendant secured loans totalling $21,500 from banks in Alabama for plaintiff; and (3) that the defendant loaned plaintiff $8,000. We have reviewed the record and there is evidence to support these findings.

There is also evidence that conflicts with the findings. For example, some evidence suggests that plaintiff only owed defendant $5,000 as opposed to $8,000. However, "[w]hen a jury trial is waived, the trial court's findings of fact have the force and effect of a verdict 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." *Blackwell v. Butts*, 278 N.C. 615, 619, 180 S.E. 2d 835, 837 (1971). Finding that there was competent evidence to support each of the trial judge's findings of facts excepted to, we reject this portion of defendant's argument.

[3] C. With regard to plaintiff's argument that the statute of limitations had run on the $8,000 loan counterclaim, we find no error. The statute of limitations on a liability arising out of a contract, N.C. Gen. Stat. Sec. 1-52(1) (1983), does not run from the time the contract is made. It does not begin to run until the date the contractual promise to pay is broken. *Pickett v. Rigsbee*, 252 N.C. 200, 113 S.E. 2d 323 (1960).

For the foregoing reasons, the judgment of the trial court is

Affirmed.

Judges JOHNSON and MARTIN concur.

In re Foreclosure of Property of Johnson

IN THE MATTER OF THE FORECLOSURE OF THE PROPERTY OF ESTELLE C. JOHNSON

No. 8415SC479

(Filed 5 February 1985)

Mortgages and Deeds of Trust § 25— foreclosure under power of sale—failure to show existence of valid debt

A party seeking to go forward with foreclosure under a deed of trust securing payment of a promissory note must establish by competent evidence the existence of a valid debt of which he is the holder. Petitioners in this case failed to carry this burden where they offered into evidence a copy of a deed of trust which was signed and which recited the existence of a note, but they did not offer the note into evidence, nor were they able to show that they were in possession of the note, due proof of ownership of the note, its execution, its delivery, or its loss or destruction.

APPEAL by petitioners from *Johnson, E. Lynn, Judge.* Order entered 30 January 1984 in Superior Court, CHATHAM County. Heard in the Court of Appeals 9 January 1985.

Petitioners William Reid Johnson, individually and as guardian ad litem for Delessup Johnson, James Myrover Johnson, Jr., Inez Maude Johnson, Michael Sherron Johnson, Johnny Nathan Johnson, and Mona Johnson Fontenot instituted this proceeding to foreclose under a deed of trust executed by Jonathan Johnson, borrower, to J. A. Moody, original trustee, for the benefit of Davis Johnson, payee. The petition alleged in pertinent part that on 12 November 1966 Jonathan Johnson executed to Davis Johnson a promissory note in the amount of $40,000.00; that Jonathan Johnson executed a deed of trust securing payment of the note and conveying a security interest in real property known as Johnson's Produce Market located in Chatham County; that Davis Johnson died intestate on 21 May 1969, his heirs constituting the aforementioned petitioners; that Jonathan Johnson died testate on 6 April 1982, leaving his widow, respondent Estelle C. Johnson, as his sole beneficiary; and that the present owner of the encumbered premises and the only person obligated to pay the underlying debt is the respondent. The Clerk of Superior Court denied the petition. Upon appeal *de novo*, Judge Johnson made the following finding of fact:

1. That there has not been shown the existence of a note with any terms sufficient to cause a foreclosure in this proceeding.

Based upon this finding of fact, Judge Johnson affirmed and incorporated by reference the following conclusions of law of the Clerk of Superior Court:

1. That Estelle Cook Johnson as survivor of Jonathan E. Johnson, Deceased, and present owner of the real estate securing said deed of trust, and all other persons entitled to notice under the terms of General Statute Section 45-21.16(a) and (b) have received notice of this hearing as required by law;

2. That Samuel E. West, Substitute Trustee, has been appointed . . .

3. That the petitioners have failed to prove either the execution of or the existence of any note or other evidence of debt and further that petitioners have failed to prove that they are the owners or holders in due course of any note or evidence of debt or that they have the right to seek foreclosure under the deed of trust hereinbefore referred.

NOW, THEREFORE, [IT] IS HEREBY ORDERED, ADJUDGED AND DECREED that the said Samuel E. West, Substitute Trustee, is precluded from proceeding to foreclose pursuant to the power of sale granted to him under the above described deed of trust.

From the entry of Judge Johnson's order, petitioners have appealed.

Parker and Smith, by Daniel E. Smith and Gerald C. Parker, for petitioners appellants.

Edwards and Atwater, by Phil S. Edwards, for respondent appellee.

MARTIN, Judge.

The issues presented in this appeal pertain to the burden upon a party seeking to foreclose under a deed of trust securing payment of a promissory note to establish the existence of a valid

debt of which he is the holder. We hold that petitioners have failed to carry this burden.

Petitioners contend the trial court erred in finding in its order that the petitioners had failed to show the existence of a promissory note with any terms sufficient to cause a foreclosure in this proceeding. A party seeking to go forward with foreclosure under a deed of trust securing payment of a promissory note must establish, *inter alia*, by competent evidence, the existence of a valid debt of which he is the holder. G.S. 45-21.16(d); *In re Foreclosure of Burgess*, 47 N.C. App. 599, 267 S.E. 2d 915, *appeal dismissed*, 301 N.C. 90 (1980). The Uniform Commercial Code defines a "holder" as "a person who is in possession of . . . an instrument . . . issued or endorsed to him or to his order . . . ." G.S. 25-1-201(20); *see also Hotel Corp. v. Taylor and Fletcher v. Foremans, Inc.*, 301 N.C. 200, 271 S.E. 2d 54 (1980). Possession is significant in determining whether a person is a holder, and the absence of possession defeats that status. *See In re Foreclosure of Connolly v. Potts*, 63 N.C. App. 547, 306 S.E. 2d 123 (1983); *Liles v. Myers*, 38 N.C. App. 525, 248 S.E. 2d 385 (1978); *see also* 1 Anderson, Uniform Commercial Code § 1-201: 105 through 116.

Applying these basic tenets to the case *sub judice*, petitioners were required to sustain the burden of proof as to the existence of a valid debt, at the time of trial, of which they were the holders. Petitioners offered into evidence a copy of a deed of trust, which was signed by Jonathan Johnson and which recited the existence of a note; however, petitioners did not offer the note into evidence, nor were they able to show the trial court that they were in possession of the note which the deed of trust secured. Petitioners argue that this evidence before the court demonstrated that the note was lost or destroyed under G.S. 25-3-804 so as to excuse its production and permit secondary evidence of its contents. However, G.S. 25-3-804 by its very terms requires "due proof of ownership, the facts which prevent his production of the instrument and its terms." It is necessary to prove the due execution of the instrument, its delivery, as well as its loss or destruction before secondary evidence of its contents may be shown. *See Downing v. Dickson*, 224 N.C. 455, 31 S.E. 2d 378 (1944).

The evidence offered by petitioners in this case fails to sustain their burden of proof. The record is devoid of any evidence

concerning due proof of ownership of the note, its execution, its delivery, or its loss or destruction. This failure is fatal to petitioners' action and renders correct the trial judge's order precluding a foreclosure pursuant to the power of sale under the deed of trust.

Petitioners next assert that the trial court erred by sustaining respondent's objection, preventing Estelle C. Johnson from testifying as to what reason Jonathan Johnson would be paying $4,000.00 to Inez Johnson other than in regard to the transaction involving Johnson's Produce Market. Respondent objected and when the objection was sustained, petitioners excepted but made no offer of proof. This exception is without merit since 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); *Carter v. Carr*, 68 N.C. App. 23, 314 S.E. 2d 281 (1984).

Petitioners next assign as error the trial court's refusal to allow into evidence copies of checks apparently bearing the signature of Jonathan Johnson and made payable to Inez Johnson, the widow of one of the heirs of Davis Johnson and a petitioner herein in the amount of $4,000.00, and another check in the amount of $1,200.00 apparently bearing the signature of Jonathan Johnson and made payable to James M. Johnson, another heir of Davis Johnson and petitioner in this action. The exhibits were intended to provide proof that the checks were payment to heirs of Davis Johnson, or his successors in interest, for the alleged sale of Johnson's Produce Market. We agree with petitioners that these exhibits were collateral to the basic issue in the case; however, we are restrained from saying their exclusion from the evidence was prejudicial. Before the issue of payment of the alleged debt could be reached, petitioners possessed the burden of proving the existence of a present debt of which they were the holder with terms sufficient to cause a foreclosure. Having failed to carry this burden, exclusion of the two copies of checks bearing the signature of Jonathan Johnson did not constitute prejudicial error.

Petitioners finally contend the trial court committed prejudicial error in affirming the conclusions of law of the Chatham County Clerk of Superior Court. Upon examination of the facts

and conclusions, we are of the opinion and so hold that the trial court correctly applied the facts that he found in affirming the Clerk of Superior Court's conclusions of law. Accordingly, the order of the trial judge is

Affirmed.

Judges BECTON and JOHNSON concur.

THE NORTHWESTERN BANK v. ELWOOD Y. GLADWELL AND WIFE, MRS. ELWOOD Y. GLADWELL A/K/A VERONA GLADWELL

No. 8418SC462

(Filed 5 February 1985)

Guaranty § 2— guaranty for debts to plaintiff's predecessor—note as renewal of prior debt to predecessor—genuine issue of fact

The trial court erred in granting summary judgment for plaintiff in its action to recover on a promissory note executed by defendant husband and allegedly guaranteed by defendant wife where the parties agreed that defendant wife was obligated by the terms of her guaranty agreement with Gateway Bank for debts incurred by her husband in relation to Gateway, that the merger of Gateway into plaintiff operated to transfer that obligation to plaintiff for debts existing at the time of the merger, and that defendant wife would not be liable under the terms of the guaranty agreement for debts incurred by defendant husband in relation to plaintiff following the merger; however, genuine issues of fact existed as to whether defendant husband was indebted to Gateway at the time of the merger and whether the note executed by defendant husband subsequent to the merger was a "renewal" of a prior debt to Gateway or, instead, evidence of a new and independent loan made by plaintiff to defendant husband.

APPEAL by defendant, Verona Gladwell, from *Walker (Hal H.), Judge*. Judgment entered 17 January 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 8 January 1985.

This is a civil action arising out of a promissory note executed by defendant Elwood Gladwell in favor of plaintiff bank and a guaranty agreement executed by defendant Verona Gladwell in favor of Gateway Bank. The record discloses the following undisputed facts:

On 4 January 1977 defendant Elwood Gladwell, a dealer in aircraft, entered into a "Wholesale Security Agreement" with Gateway Bank, whereby Gateway agreed to lend the defendant money "from time to time to finance inventory of goods held for resale." Also on 4 January 1977, defendant Verona Gladwell entered into a written "Guaranty Agreement," in favor of Gateway which contained the following pertinent provisions:

> the undersigned . . . hereby unconditionally guarantees to the Bank and its successors, endorsees and assigns the punctual payment when due, with such interest as may accrue thereon . . . of all debts and obligations of the Borrower . . . now existing or hereafter arising, whether created directly or acquired by endorsement, assignment or otherwise. . . . The undersigned consents . . . that the time or place of payment of any debt of the Borrower or of any securities therefor may be changed or extended, in whole or in part, to a time certain or otherwise, and may be renewed or accelerated, in whole or in part. . . .

On 31 December 1981 Gateway Bank merged into plaintiff, Northwestern Bank. On 8 March 1982 defendant Elwood Gladwell executed and delivered to plaintiff a secured promissory note in the amount of $42,967.00. Defendants received a letter dated 26 July 1982 from Robert Cone, attorney for plaintiff which letter stated that the Bank had demanded payment of the outstanding balance of $27,385.56 due on "a promissory note signed by you on March 8, 1982, in the original amount of $42,967.00."

On 8 September 1982 plaintiff filed a verified complaint seeking to recover $27,385.56 plus interest, the alleged balance due on the 8 March 1982 note, and an attorney's fee in the amount of $4,107.83. In its complaint, plaintiff alleged execution and delivery of the note, and further alleged that defendants had defaulted on payments thereon. The complaint also contained the following pertinent allegations:

> 4. That the said Note mentioned above consolidated prior debts to Gateway Bank, a North Carolina banking institution now merged into the plaintiff.
>
> 5. That defendant Mrs. Elwood Y. Gladwell a/k/a Verona Gladwell unconditionally guaranteed the above debt by vir-

tue of a guaranty agreement she executed on January 4, 1977.

Both defendants filed answers on 17 December 1982, accompanied by motions to dismiss the action under G.S. 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief may be granted. In her answer defendant Verona Gladwell denied all material allegations of plaintiff's complaint, with the exception of defendant Elwood Gladwell's execution and delivery of a promissory note to plaintiff, which was admitted. On 22 December 1983 plaintiff filed a motion for summary judgment supported by various documents and an affidavit of David W. Austin, Vice-President of Northwestern. In his affidavit Mr. Austin states that the 8 March 1982 promissory note was executed and delivered to plaintiff by Elwood Gladwell "as a renewal of prior indebtedness to Gateway Bank." Mr. Austin elaborated on this assertion in the following paragraphs of his affidavit:

> 4. As aforesaid, the note, a copy of which is attached as Exhibit "A," was a renewal of a prior loan from Gateway Bank, which loan was in the form of a "floorplan" with two advancements. In connection with the floorplan loan, Gateway Bank issued a "wholesale commitment letter" dated January 4, 1977, to Mr. Gladwell, a copy of which is attached hereto as Exhibit "C" and incorporated herein by reference. On the same day, Mr. Gladwell and Gateway Bank entered into a "wholesale security agreement," a copy of which is attached hereto as Exhibit "D" and incorporated herein by reference. On March 28, 1978, and again on September 8, 1978, Gateway made two advancements under the floorplan arrangement in the principal amounts of $36,717.00 and $6,250.00, respectively. Plaintiff The Northwestern Bank, at the time of the merger between Gateway and plaintiff, acquired the indebtedness (none of which had been repaid) of Mr. Gladwell, which indebtedness had been guaranteed by Verone [sic] C. Gladwell. The March 28 advancement by Gateway in the amount of $36,717.00 had been secured by the aforementioned Grumman aircraft, which remain unsold and in the hands of Mr. Gladwell at the time he executed the renewal note in favor of plaintiff. At the time of the said renewal note in favor of plaintiff and the new security agreement, no part of the indebtedness had been repaid.

5. A copy of the guaranty agreement executed by Mrs. Gladwell dated January 4, 1977, is attached hereto as Exhibit "E" and incorporated herein by reference.

6. As set forth in Mrs. Gladwell's guaranty, she unconditionally guaranteed to Gateway Bank, "*and its successors, endorsees and assigns* punctual payment when due, with such interest as may accrue thereon either before or after any final maturity(ies) thereof," all of the debts and obligations, of Elwood Y. Gladwell, whether then existing or thereafter arising, "whether created directly or *acquired by endorsement, assignment or otherwise* . . ." (Emphasis added.) In said guaranty Mrs. Gladwell also consented to any renewal, extension or acceleration of the debt of Mr. Gladwell. The guaranty of Mrs. Gladwell therefore inures to the benefit of the plaintiff in this action.

On 13 January 1984 defendant Verona Gladwell filed an affidavit in opposition to plaintiff's motion for summary judgment, which affidavit contained the following pertinent allegations:

2. I know of my own knowledge that my husband has paid all debts of every nature and kind which he had with the Gateway Bank. Thus, my obligation under the "Guaranty Agreement" I signed ended when my husband paid the last sums he owed Gateway Bank.

3. I am being sued in this pending lawsuit for a loan made by the Northwestern Bank to my husband in 1982. Northwestern Bank is attempting to hold me responsible for the loan under the "Guaranty Agreement" I signed guaranteeing payment of loans made by my husband from Gateway Bank.

4. I have never at any time agreed to or signed a "Guaranty Agreement" or other in which I have agreed to pay the indebtedness incurred by my husband with the Northwestern Bank. I owe Northwestern Bank nothing, and I owe Gateway Bank nothing by virtue of the fact that my husband owes Gateway Bank nothing.

On 17 January 1984 Judge Walker entered an order denying defendants' motions for dismissal under Rule 12(b)(6) and granting plaintiff's motion for summary judgment against both defendants.

The court awarded plaintiff the sum of $33,069.90 plus interest and an attorney's fee in the amount of $4,107.83 against both defendants, jointly and severally. Defendant Verona Gladwell appealed.

Boone, Higgins, Chastain & Cone, by Robert C. Cone, for plaintiff, appellee.

Max D. Ballinger for defendant Verona Gladwell, appellant.

HEDRICK, Chief Judge.

Defendant assigns error to the order granting plaintiff's motion for summary judgment. Summary judgment is proper under G.S. 1A-1, Rule 56(c) only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." An issue is material if "the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E. 2d 897, 901, *reh. denied*, 281 N.C. 516 (1972).

That summary judgment is inappropriate in the instant case is apparent upon examination of the record. The arguments advanced by plaintiff and defendant in their briefs contain no disagreement about the law governing defendant's obligations under the guaranty agreement. The parties agree that defendant is obligated by the terms of that agreement for debts incurred by her husband in relation to Gateway Bank and that the merger of Gateway into Northwestern operated to transfer that obligation to plaintiff for debts existing at the time of merger. The parties also agree that defendant would not be liable under the terms of the guaranty agreement for debts incurred by her husband in relation to Northwestern Bank following the merger. The parties obviously do not agree, however, on the factual issues of whether Elwood Gladwell was indebted to Gateway Bank at the time of the merger, and whether the note executed by Mr. Gladwell on 8 March 1982 was a "renewal" of a prior debt to Gateway or, instead, evidence of a new and independent loan made by plaintiff to Mr. Gladwell. These disputed issues of fact are determinative

of defendant's liability under the guaranty agreement and are thus without question material to a resolution of the action. We thus hold that summary judgment was improperly entered.

Reversed.

Judges WHICHARD and PARKER concur.

IN RE PATSY S. MILLER, MORTGAGOR, JOE H. LEONARD, TRUSTEE, DEED OF TRUST BOOK 583, PAGE 233, TRACT 1

No. 8422SC487

(Filed 5 February 1985)

Mortgages and Deeds of Trust § 30— upset bid—compliance bonds rejected by clerk—sale to highest bidder at foreclosure confirmed

Evidence was sufficient to support the trial judge's conclusions that an upset bid was void *ab initio* in that bonds accompanying the upset bid did not comply with the clerk's order and were not approved by the clerk, that appellant had not filed an upset bid within the time required by law, and that the sale to the highest bidder at foreclosure should be confirmed where the evidence tended to show that bonds first presented by appellant's brother and accepted by the clerk apparently complied with the clerk's order, since they totaled the amount required; but the brother misrepresented his assets and liabilities in an affidavit used to support his surety bond; the clerk was entitled to set aside his approval of the bond and conclude that the upset bid was consequently void; the superior court judge acquired authority to set aside the approval of the brother's surety bond when appellant appealed the controversy to him; since the bond and the upset bid were properly declared void, the trial court properly concluded that appellant had not filed an upset bid within the time required by law; and it was thus appropriate to order confirmation of the sale to the highest bidder at foreclosure. G.S. 45-21.27(b) & (j).

APPEAL by Eugene Morris Miller, Jr., from *Albright, Judge.* Judgment entered 11 January 1984 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 10 January 1985.

Eugene Miller appealed from a judgment disallowing an upset bid made in his name after the subject property had been bid on at foreclosure by Lexington State Bank (hereinafter, Bank). The trial judge conducted a hearing pursuant to G.S. 1-276 and made findings which are summarized as follows: The Bank was

high bidder at $100,000 on the property in question at a foreclosure resale held on 6 December 1983. On the same day, the clerk of court ordered that any upset bids be accompanied by a cash bond or surety bond approved by him, as set forth in G.S. 45-21.27(b). On 19 December 1983, John A. Miller, brother of Eugene Miller, called the clerk to ask if he could make an upset bid over the telephone. The clerk responded that a deposit was necessary, so John A. Miller deposited a certified check made payable to himself in the amount of $5,050 with the clerk. John A. Miller requested that his receipt be placed in the name of Eugene Miller. John A. Miller also presented the clerk with a $20,000 bond secured by real property, a $40,000 bond for which John A. Miller was the surety, individually, and a $40,000 bond for which John A. Miller was the surety as president and sole owner of the J. A. Miller Roofing and Sheet Metal Co., Inc., of Lexington, North Carolina. Both $40,000 bonds were accompanied by affidavits listing the assets and liabilities of John A. Miller individually and of his corporation.

The clerk discovered on 21 December 1983 that John A. Miller's purported corporation was not registered in Davidson County or with the Secretary of State. The clerk allowed a purchased bond from a bonding company to replace the bond of the nonexistent corporation.

John A. Miller had listed 598 head of cattle, valued at $373,700, among his assets. The clerk learned that a deputy sheriff could not locate the cattle. The clerk also discovered $16,900 worth of outstanding judgments on record against John A. Miller, whereas his affidavit listed only $2,300 in miscellaneous liabilities. Consequently, on 29 December 1983, but effective as of 19 December 1983, the clerk set aside his approval of John A. Miller's individual surety bond, declared the upset bid void, and confirmed the 6 December 1983 sale to Lexington State Bank.

Eugene Miller gave notice of appeal to the judge of superior court from the clerk's order of 29 December 1983, although he had not contacted or appeared in the clerk's office with respect to the events discussed above. Eugene Miller made his first appearance in this matter on 9 January 1984 at the hearing before the trial judge.

The trial judge made findings consistent with those of the clerk regarding defects in the surety bonds for the upset bid. He further found that John A. Miller had sworn that he had $80,000 in liabilities in an affidavit of indigency on 12 July 1983, compared to the mere $2,300 in liabilities he swore to in support of his surety bond. John A. Miller was also guilty of five worthless check violations in 1983. The trial judge found that John A. Miller intended to and did perpetrate a fraud on the court by misrepresenting his assets and liabilities regarding his surety bond for the upset bid he made in the name of his brother, Eugene Miller.

Based upon the foregoing findings, the trial judge concluded that the 19 December 1983 upset bid was void *ab initio* in that the bonds did not comply with the clerk's 6 December 1983 order and were not approved by the clerk. He further concluded that Eugene Miller had not filed an upset bid within the time required by law, and that the 6 December 1983 sale to Lexington State Bank should be confirmed. From judgment setting aside the initial approval of John A. Miller as surety, declaring the upset bid and bond securing it void *ab initio*, and confirming the foreclosure sale to the Bank, Eugene Miller appealed.

Charles E. Frye, III, for Eugene Morris Miller, Jr., appellant.

Smith and Penry, by Phyllis S. Penry, for Lexington State Bank, appellee.

HEDRICK, Chief Judge.

Eugene Miller assigns error to the admission of testimony by the trustee regarding a letter about Eugene Miller's role in an earlier foreclosure sale of the same property. He claims the letter was not authenticated and the testimony was irrelevant. He also assigns error on the grounds of relevance to the admission of testimony from the trustee concerning the procedural history of the foreclosure. This evidence was clearly admissible; however, the findings based on this evidence were not essential to the trial judge's conclusions or judgment, and thus there is no possibility of prejudicial error.

Eugene Miller contends that various findings of fact made by the trial judge are not supported by the evidence, and that the trial judge's order must be vacated and the cause remanded. We disagree for the following reasons:

Assuming that Eugene Miller is a "party aggrieved" within the meaning of G.S. 1-272, his appeal from the clerk to the trial judge empowered the judge "to hear and determine all matters in controversy." G.S. 1-276. The principal matter in controversy is whether the clerk's approval of the surety bond was properly set aside and the upset bid properly declared void.

G.S. 45-21.27(a) provides that an upset bid is an advanced, increased, or raised bid offering to purchase real property in an amount exceeding by a certain percentage the price at which the property previously sold, where the increased amount is deposited with the clerk, and where the deposit is made within ten days of the report of foreclosure sale required by G.S. 45-21.26 and 45-21.29(e). Whenever an upset bid is submitted, together with a compliance bond if one is required, G.S. 45-21.29(a) requires the clerk to order a resale. The provisions regarding compliance bonds are set forth in G.S. 45-21.27(b):

> The clerk of the superior court may require the person submitting an upset bid also to deposit a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk. The amount of such bond shall not exceed the amount of the upset bid less the amount of the required deposit.

On 6 December 1983 the clerk ordered that any upset bid be secured by a G.S. 45-21.27(b) compliance bond in the amount of the upset bid less the amount of the required deposit.

The undisputed evidence shows that the bonds first presented by John A. Miller and accepted by the clerk apparently complied with the clerk's order since they totaled $100,000. However, competent evidence also shows, in support of the trial judge's pertinent findings, that John A. Miller misrepresented his assets and liabilities in an affidavit used to support his surety bond. Indeed, Eugene Miller never excepted to the findings that John A. Miller swore to liabilities of $2,300 when he had outstanding judgments against him far in excess of that amount. Nor did he except to the finding that in July of 1983 he completed an affidavit of indigency which listed $80,000 in liabilities, compared to the $2,300 he listed in December 1983.

In light of all the evidence and findings that John A. Miller had misrepresented his security for the compliance bond, the

court was entitled to set aside its approval of the bond and conclude that the upset bid was consequently void. G.S. 45-21.27(b) specifically states that surety bonds must be approved by the clerk. A clerk is not bound by his initial approval of a surety bond if he subsequently finds it to be defective. The power of a clerk to set aside his initial approval is inherent in G.S. 45-21.27(b), and is also authorized by G.S. 45-21.29(j), which provides:

> The clerk of the superior court shall make all such orders as may be just and necessary to safeguard the interests of all parties, and shall have authority to fix and determine all necessary procedural details with respect to resales in all instances in which this Article fails to make definite provision as to such procedure.

The superior court judge likewise acquired authority to set aside the approval of John A. Miller's surety bond pursuant to G.S. 1-276 when Eugene Miller appealed the controversy to him.

Without a valid compliance bond, the upset bid had no effect and the clerk was not required to order a resale. G.S. 45-21.29(a). Since the bond and hence the upset bid were properly declared void, the trial judge properly concluded that Eugene Miller had not filed an upset bid within the time required by law. The record indicates that the ten day period of G.S. 45-21.27(a) for filing an upset bid elapsed without a valid bid being filed. It was thus appropriate to order confirmation of the resale to Lexington State Bank. G.S. 45-21.29(h).

Affirmed.

Judges WHICHARD and PARKER concur.

L. RICHARDSON MEMORIAL HOSPITAL, INC. v. LOUIS C. ALLEN, II, ADMINISTRATOR OF THE ESTATE OF MYRTLE GUY, DECEASED, AND MARY LOU SUMMERS GUY v. DALE ANDERSON TOWNSEND

No. 8418DC399

(Filed 5 February 1985)

1. Cancellation and Rescission of Instruments § 10.2— deeds—incompetency of grantor—sufficiency of evidence

In plaintiff's action to void the transfer of real property on the ground that the grantor was incompetent, the trial court properly denied defendant's motion to dismiss where the testimony of two intensive care nurses as to the grantor's behavior—her calling out and screaming, her confusion, her belief that she was somewhere else, the incoherency of her speech, her inability to feed herself, her frequent attempts to climb out of bed, necessitating restraint—coupled with the extreme illegibility of her signature on the deeds, the attending doctor's testimony that she was confused and disoriented, and the testimony of the notary that defendant had to lift the grantor's hand and put it on the line where she could sign was sufficient to support the plaintiff's contention that the grantor was not capable of comprehending the nature of and scope and effect of scrawling a mark or "signature" on the deeds.

2. Cancellation and Rescission of Instruments § 9.1— incompetency of grantor—testimony of nurses admissible

The trial court did not err in allowing two intensive care nurses to describe in general terms the events on the day the grantor allegedly "signed" three deeds and to give their opinions as to the grantor's mental capacity to execute the deeds, and the fact that the nurses watched the grantor through a video monitor did not affect their qualification to give an opinion, since the nurses could see the entire intensive care unit from their desk and could hear conversation within the unit; the nurses were responsible for watching and caring for the grantor for eight hours on the day in question and for making notes on her condition; this gave them reasonable or sufficient opportunity to observe her and to form an opinion as to her mental condition; and the nurses' testimony as to grantor's behavior during their observation of her, within several hours of her signing the deeds, was not too remote.

3. Cancellation and Rescission of Instruments § 9.1— incompetency of grantor—doctor's testimony admissible

In plaintiff's action to void the transfer of property on the ground that the grantor was mentally incompetent, the trial court did not err in admitting testimony of the attending physician who saw the grantor when she was first admitted to the hospital where the witness refused to give an opinion as to whether the grantor was capable of understanding the nature and consequences of her actions in signing the deeds but instead would only repeat his diagnosis of the grantor's condition.

L. Richardson Memorial Hospital v. Allen and Guy v. Townsend

APPEAL by defendant from *Daisy, Judge*. Judgment entered 18 November 1983 in District Court, GUILFORD County. Heard in the Court of Appeals 4 December 1984.

On 23 September 1981, Myrtle Guy, now deceased, was admitted to L. Richardson Memorial Hospital in Greensboro, suffering from an injured hip, uncontrolled diabetes, hypertension and organic brain syndrome. She was seventy years of age. On 24 September 1981, Ms. Guy was transferred from a regular ward in the hospital to the intensive care unit. She remained there until 26 September 1981, when she was returned to a regular hospital ward. She left the hospital on 24 October 1981 and died intestate on 2 February 1982.

On 25 September 1981, defendant Dale Townsend went to the hospital intensive care unit and caused Myrtle Guy to sign or make her mark on three deeds which defendant had prepared. All three deeds were "gift deeds" conveying real property belonging to Myrtle Guy to defendant. The defendant is Myrtle Guy's niece.

On 3 March 1982, the plaintiff L. Richardson Memorial Hospital, Inc., brought suit against defendant to void the transfer of real property from Myrtle Guy to defendant on 25 September 1981, on grounds that Myrtle Guy was incompetent, and that the conveyance was accomplished by undue influence, or in the alternative, that if Myrtle Guy was mentally competent, the conveyance was fraudulent. Louis C. Allen, III, the administrator of Myrtle Guy's estate, was allowed to intervene as a real party in interest by order filed 22 August 1983. Mary Lou Summers Guy, Ms. Guy's daughter, was allowed to intervene and be joined as a party plaintiff by a consent order filed 25 August 1983.

The trial court dismissed with prejudice the plaintiffs' and intervenors' claims of undue influence and conveyance to defraud creditors. It found, however, that Myrtle Guy did not possess sufficient mental capacity to execute the three deeds conveying her real property to defendant. It decreed that the three deeds were null and void, and cancelled of record.

The defendant appeals the judgment.

Mary K. Nicholson for defendant appellant.

Donald K. Speckhard for plaintiff appellee Mary Lou Summers Guy.

William C. Ingram for plaintiff appellee L. Richardson Memorial Hospital, Inc.

Louis C. Allen, III, for plaintiff appellee Administrator of the Estate of Myrtle Guy, Deceased.

ARNOLD, Judge.

Defendant first contends that the trial court erred in failing to allow her motion to dismiss as to parties in interest. Early in the litigation, on 1 April 1982, defendant moved to dismiss for failure to state a claim on the grounds that plaintiff Hospital did not have standing to sue on behalf of Myrtle Guy's estate or heirs. On 26 August 1982, the trial court issued an order allowing the parties to attempt settlement and holding open the matter until the parties completed settlement negotiations. This continued defendant's motion to dismiss. On 22 August 1983 the administrator of Myrtle Guy's estate was joined as a real party in interest, and on 25 August 1983 Mary Lou Summers Guy, daughter and sole heir of Myrtle Guy, was joined as a party plaintiff by a consent order.

The joinder of the administrator as real party in interest occurred within a reasonable time, given that the parties were engaged in settlement negotiations after the defendant made her motion. Under North Carolina Rule of Civil Procedure 17(a), the commencement of the action was properly ratified, and it cannot be dismissed on the ground that it is not prosecuted in the name of the real party in interest.

[1] Defendant contends next that the trial court erred in denying her motion to dismiss at the end of plaintiffs' evidence and at the close of all the evidence on the issue of Myrtle Guy's mental capacity to make the three deeds. In considering a motion for dismissal at the close of the evidence in a non-jury trial, the trial court must determine whether the evidence is sufficient to show plaintiff's right to relief. *Jones v. Nationwide Mutual Insurance Co.*, 42 N.C. App. 43, 255 S.E. 2d 617 (1979).

The record indicates that the evidence was clearly sufficient to establish a right to relief. The testimony of the two intensive care nurses as to Myrtle Guy's behavior—her calling out and screaming, her confusion, her belief that she was somewhere else,

the incoherency of her speech, her inability to feed herself, her frequent attempts to climb out of bed, necessitating restraint—coupled with the extreme illegibility of her signature on the deeds, the attending doctor's testimony that she was confused and disoriented, and the testimony of the notary that the defendant had to lift Ms. Guy's hand and put it on the line where she could sign, are sufficient to support the plaintiffs' contention that Ms. Guy was not capable of comprehending the nature of, and scope and effect, of scrawling a mark or "signature" on the deeds. Defendant's motion for dismissal was properly denied.

[2] Defendant claims that the trial court erred in allowing the intensive care nurses to describe in general terms the events of 25 September 1981 and to give their opinions as to Ms. Guy's mental capacity to execute the deeds. Defendant argues that because the nurses watched Ms. Guy through a video monitor, they were not qualified to give an opinion. Yet, the nurses could from their desk see the entire intensive care unit, and hear conversation within the unit. The nurses were responsible for watching and caring for Ms. Guy for an extended period of time (8 or more hours) on the day in question, and making notes on her condition. This gave them a reasonable or sufficient opportunity to observe her and to form an opinion as to her mental condition. "Evidence of mental condition before and after the critical time is admissible, provided it is not too remote to justify an inference that the same condition existed at the latter time." 1 Brandis on North Carolina Evidence § 127 (2d rev. ed. 1982), *cited in Ashley v. Delp*, 59 N.C. App. 608, 611, 297 S.E. 2d 905, 908 (1982). The nurses' testimony as to her behavior during their period of observation of her, within several hours of her signing the deeds, was not too remote. Admission of this testimony was not error.

The fact that both intensive care nurses were employees of the hospital and might be interested parties goes to the credibility of their testimony, which is a matter for the trial judge to determine.

[3] The defendant objects generally to testimony by Dr. Blount as an "expert," and to his testimony as to reactions to drugs and as to his opinion of Ms. Guy's mental health. None of these objections has merit.

Dr. Blount carefully qualified his role in diagnosing Ms. Guy's illnesses and treating her. He testified that he was the "attendant in charge," that he saw Ms. Guy when she was first admitted to the hospital, that he observed her on daily "rounds," and that he did not actually treat her. He did an initial diagnosis and then referred her to consultants who treated her specific problems. When asked whether he had an opinion as to whether she was capable of understanding the nature and consequences of her actions on 25 September, he said that he could only repeat his diagnosis (that she was an uncontrolled diabetic, had severe hypertension, and organic brain syndrome) and that she was "confused." Dr. Blount refused to give the opinion plaintiffs sought; rather, he gave a careful medical opinion which on the basis of his contact with her and training as a general practitioner he was well qualified to make.

Defendant complains that Dr. Blount described a drug, Mellaril, and its effects and uses with elderly patients, which prejudiced defendant. The trial judge struck this testimony on defendant's motion, and defendant has no reason now to claim error.

The trial court had before it competent evidence in the nurses' and doctor's testimony to support its findings of ultimate fact that Ms. Guy, when she signed or made her marks on the three deeds conveying her real properties to defendant, "did not understand what she was doing nor the nature or consequences of her acts, nor did she know what lands she was disposing of, to whom and how." The findings supported its conclusion of law that she lacked sufficient mental capacity to execute the deeds and that they are accordingly null and void.

Affirmed.

Judges WELLS and BECTON concur.

DONALD LEE EATMAN v. EDGAR ROGER BUNN

No. 8410DC577

(Filed 5 February 1985)

1. **Animals § 3; Automobiles §§ 73, 74.1— cow in road—beers consumed by driver—contributory negligence—directed verdict improper**

In an action to recover for damages to plaintiff's automobile allegedly sustained when it struck defendant's cow in a public road, the trial court erred in directing verdict against plaintiff on the ground that he was contributorily negligent when the plaintiff's evidence revealed that he was operating his automobile within the lawful speed limit at night when he was suddenly confronted by a black cow in the roadway; such evidence did not disclose contributory negligence as a matter of law; plaintiff admitted that he had consumed two "pony" bottles of beer during the evening, but there was conflicting evidence as to whether his faculties were impaired; and such evidence did not so clearly establish plaintiff's negligence that no other reasonable inference could be drawn therefrom.

2. **Animals § 3— collision between car and cow—negligence of cow owner—damages to car owner**

Evidence tending to show that defendant's fences were in poor repair, his cows had been found at large on previous occasions, and on at least one such occasion a car had collided with one of the cows was sufficient to permit the jury to find that defendant was negligent in preventing his cattle from escaping the pasture and roaming at large and that defendant should have reasonably foreseen that his failure to keep his cattle within the fences would likely result in some injurious consequences; therefore, the trial court erred in granting defendant's motion for a directed verdict on plaintiff's claim to recover for damages to his automobile sustained when it struck defendant's cow.

3. **Animals § 3— collision between car and cow—damages to cow owner**

The trial court erred in directing a verdict dismissing defendant's counterclaim for damages resulting from the death of his cow which was struck by plaintiff's automobile where defendant's evidence could warrant findings by the jury that the cow escaped because defendant's fence had been damaged by a State Highway Department mower rather than by any negligence on his own part, and that defendant's cow was killed due to the negligence of plaintiff in failing to maintain a proper lookout and in driving his automobile while he was under the influence of alcohol.

APPEALS by plaintiff and defendant from *Redwine, Judge.* Judgment entered 19 March 1984 in District Court, WAKE County. Heard in the Court of Appeals 18 January 1985.

Plaintiff brought this action to recover for damage to his automobile, allegedly sustained when it struck the defendant's

cow in a public road. By counterclaim, the defendant sought reimbursement for damages incurred as a result of the death of the cow. The case was called for trial before a jury and each party presented evidence. At the close of all of the evidence, the trial court granted each party's motion for a directed verdict as to the claim of the other, finding ". . . that the defendant was guilty of negligence and the plaintiff also guilty of contributory negligence." Both parties appealed.

E. Gregory Stott for plaintiff.

Hatch, Little, Bunn, Jones, Few and Berry, by Thomas D. Bunn, for defendant.

MARTIN, Judge.

The questions presented for our consideration are the same for each appeal: whether the trial court erred in granting the respective motions for directed verdict, dismissing the plaintiff's claim and the defendant's counterclaim. We conclude that in both instances the motion for directed verdict was improvidently granted and we therefore reverse and remand for a new trial.

The plaintiff, Donald Lee Eatman, offered evidence tending to show that on 26 August 1983, after dark, he was driving his automobile within the speed limit on a rural road when the defendant's black Angus cow suddenly appeared in his path. He applied his brakes and swerved to the left, however, the cow also turned in the same direction and a collision ensued in which Eatman's automobile was damaged and the cow was fatally injured. The plaintiff admitted that he had consumed two "pony" bottles of beer during the evening but offered evidence, through a passenger in his car, that he was not impaired. Further evidence tended to show that the defendant's fences, in the area of the collision, consisted only of a strand of wire ten to twelve inches from the ground and that the wire had been pulled loose from the fence posts at several locations. The plaintiff offered witnesses who testified that the defendant's cows had been observed running loose on other occasions and that on at least one other occasion a collision had occurred between an automobile and one of the defendant's cows.

The defendant testified that his cows had gotten loose on previous occasions and that as a result, he had checked and re-

paired his fences, and that the fences were in good repair on the date of this collision. He testified that after this collision he discovered that his cow had escaped from a place in the fence that had been cut by a State Highway Department mower which had mowed grass in the area within a week before the collision. He also offered evidence tending to show that immediately after the collision the plaintiff was rude, profane, unsteady on his feet and appeared to be under the influence of alcohol.

Upon the foregoing evidence, the trial court concluded that both the plaintiff and the defendant had been negligent and directed verdicts against each of them.

The purpose of a motion for directed verdict, made pursuant to G.S. 1A-1, Rule 50(a), is to test the legal sufficiency of the evidence to take the case to the jury and to support a verdict for the non-moving party. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979); *Wallace v. Evans*, 60 N.C. App. 145, 298 S.E. 2d 193 (1982). In passing upon the motion, the court must consider the evidence in the light most favorable to the non-moving party, taking all evidence which tends to support his position as true, resolving all contradictions, conflicts and inconsistencies in his favor and giving him the benefit of all reasonable inferences. *Daughtry v. Turnage*, 295 N.C. 543, 246 S.E. 2d 788 (1978). The motion may be granted only if the evidence is insufficient, as a matter of law, to support a verdict for the non-moving party. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). The same test is apposite whether considering a Rule 50(a) motion directed at the plaintiff's claim or at the defendant's counterclaim.

I. PLAINTIFF'S APPEAL

[1] We first consider the plaintiff's appeal from the directed verdict dismissing his claim. The court granted the motion for directed verdict upon the explicit finding that the plaintiff was contributorily negligent. In order for a directed verdict to be granted against plaintiff upon the ground of contributory negligence, the evidence, considered in the light most favorable to him, must so clearly establish his contributory negligence that no other conclusion can be reasonably drawn therefrom. *Beatty v. Owsley & Sons, Inc.*, 53 N.C. App. 178, 280 S.E. 2d 484, *disc. rev. denied*, 304 N.C. 192, 285 S.E. 2d 95 (1981).

The plaintiff's evidence, when so gauged, reveals that he was operating his automobile within the lawful speed limit at night when he was suddenly confronted by a black cow in the roadway. He did not see the cow until it was right in front of his car. Similar evidence has been considered by this Court and has been held not to disclose contributory negligence as a matter of law. *See Timber Co. v. Smith*, 12 N.C. App. 137, 182 S.E. 2d 607, *cert. denied*, 279 N.C. 397, 183 S.E. 2d 245 (1971); *Duke v. Tankard*, 3 N.C. App. 563, 165 S.E. 2d 524 (1969).

Nor does the plaintiff's admission that he had consumed two "pony" bottles of beer so clearly establish his own negligence that no other reasonable inference may be drawn therefrom. A passenger in plaintiff's automobile testified that in his opinion neither the plaintiff's mental or physical faculties were impaired, while the defendant offered conflicting evidence that the plaintiff was noticeably under the influence of alcohol. The credibility of the witnesses is for the jury. *Naylor v. Naylor*, 11 N.C. App. 384, 181 S.E. 2d 222 (1971).

[2] Defendant contends that even if the trial court erred in finding that the plaintiff was contributorily negligent as a matter of law, the granting of the motion for directed verdict was nevertheless proper because the plaintiff failed to offer sufficient evidence of the defendant's negligence to take the case to the jury. Taken in the light most favorable to the plaintiff, his evidence tends to show that the defendant's fences were in poor repair, his cows had been found at large on previous occasions, and that on at least one such occasion a car had collided with one of the cows. This evidence was sufficient to permit the jury to find that the defendant was negligent in preventing his cattle from escaping the pasture and roaming at large. *See Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976); *Kelly v. Willis*, 238 N.C. 637, 78 S.E. 2d 711 (1953). The evidence was likewise sufficient to warrant a finding that the defendant should have reasonably foreseen that his failure to keep his cattle within the fences would likely result in some injurious consequence. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

When reasonable men can reach different results or conclusions on issues of negligence and proximate cause, the case is for the jury. *Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E. 2d 147,

cert. denied, 279 N.C. 395, 183 S.E. 2d 243 (1971). We therefore hold that the trial court erred in granting the defendant's motion for a directed verdict.

II. DEFENDANT'S APPEAL

[3] We next consider the defendant's appeal from the directed verdict dismissing his counterclaim for damages resulting from the death of his cow. The defendant's evidence, when considered in the light most favorable to him, giving him the benefit of all reasonable inferences and resolving all conflicts in his favor, could warrant a finding by the jury that the cow escaped because the fence had been damaged by a State Highway Department mower, rather than by reason of any negligence on his own part. His evidence was also sufficient to permit a finding by the jury that his cow was killed due to the negligence of the plaintiff in failing to maintain a proper lookout and in driving the automobile while he was under the influence of alcohol. These questions of fact were for resolution by the jury, not by the court. We therefore hold that the trial court erred in granting the plaintiff's motion for directed verdict.

Upon plaintiff's appeal from the granting of a directed verdict in favor of the defendant—reversed and remanded.

Upon defendant's appeal from the granting of a directed verdict in favor of the plaintiff—reversed and remanded.

Judges BECTON and JOHNSON concur.

STATE OF NORTH CAROLINA v. VICTOR LAWRENCE COLLIER

No. 843SC416

(Filed 5 February 1985)

Rape § 7; Criminal Law § 138— deadly weapons held by codefendant—aggravating factor

Defendant's commission of a rape through the use of deadly weapons in the hands of his codefendant was a circumstance transactionally related to the commission of second degree rape and reflective of his individual culpability for the crime, and, as such, was properly considered by the trial judge and found as an aggravating factor.

State v. Collier

APPEAL by defendant from *Strickland, Judge*. Judgment entered 18 January 1984 in Superior Court, PITT County. Heard in the Court of Appeals 16 January 1985.

Defendant was charged in a true bill of indictment with first degree rape in violation of G.S. 14-27.2(a)(2)c. Pursuant to a plea arrangement, he entered a plea of guilty to second degree rape. After a sentencing hearing, Judge Strickland made written findings of the following aggravating factors:

> 26. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement.
>
> 27. Additional written findings of factors in aggravation: The defendant acting in concert with the co-defendants used a deadly weapon in the commission of the offense, both a handgun and a knife.

No mitigating factors were found and the defendant was sentenced to imprisonment for a term of forty years. The defendant appeals pursuant to G.S. 15A-1444(a1).

Attorney General Rufus L. Edmisten, by Assistant Attorney General Floyd N. Lewis, for the State.

Russell Houston, III, for defendant appellant.

MARTIN, Judge.

The sole question presented for decision is whether the trial court erred in defendant's sentencing hearing by considering as an aggravating factor that the defendant, acting in concert with the co-defendants, used a deadly weapon in the commission of the offense of second degree rape. We find no error and affirm the judgment.

The evidence discloses that on 26 June 1982 the defendant and James Bullock went to the apartment occupied by the victim, Mrs. Diane Marie Edwards, and her two small children. Bullock, who was known to Mrs. Edwards, asked to use the telephone and for a glass of water for the defendant. Bullock and the defendant were admitted to the apartment and shortly thereafter Bullock pulled a gun and made Mrs. Edwards and her children go into her bedroom and sit on the floor. Bullock and the defendant then

removed a number of items from Mrs. Edwards' apartment and took them to an automobile where Keith Lewis was waiting. After they had finished carrying things out of the apartment, they returned and pulled the telephone cord from the wall and tied Mrs. Edwards' hands and feet. Bullock then took out a knife and split Mrs. Edwards' shirt and panties and asked the defendant if he wanted to have sexual intercourse with her. The defendant said that he did, and he and Bullock picked Mrs. Edwards up and carried her to another bedroom where the defendant had vaginal intercourse with her. Lewis and Bullock also had intercourse with Mrs. Edwards. Throughout the entire incident, Bullock was the only one who held the gun or knife.

The defendant contends that the trial court erred in considering, for sentencing purposes, the actions of the co-defendant, Bullock, in using the gun and the knife in the commission of the rape, under the theory of "acting in concert." He argues that the law imposes a liability upon the defendant for the actions of a co-defendant under the theory of "acting in concert" for the purposes of guilt determination only.

In expounding this argument, the defendant relies upon *State v. Benbow*, 309 N.C. 538, 308 S.E. 2d 647 (1983). In *Benbow*, the defendant participated with three others in the planning of a robbery of an elderly man. He accompanied the others to the victim's place of business and acted as a lookout. When the victim came out of his office, two of the co-defendants beat him savagely, with large sticks and robbed him. At the time of the beating and robbery, Benbow was located approximately twenty-five feet away. The victim died as a result of the beating. Benbow entered a plea of guilty to second degree murder and was sentenced to life imprisonment. He appealed, contending, among other things, that the trial court erred in finding as an aggravating factor that the killing was especially heinous, atrocious or cruel, and in failing to find as a mitigating factor that Benbow was a passive participant in the crime. Our Supreme Court sustained the finding of the aggravating factor that the beating death of the victim was especially heinous, atrocious and cruel, even though Benbow did not participate, but remanded the case for resentencing for other errors committed in connection with the sentence. The Supreme Court noted that the evidence did not support a finding that Benbow was a passive participant in the robbery, because he had

clearly played an active role in its planning and commission. However, as to the murder, the Supreme Court held that the evidence could support a finding that Benbow was a passive participant because he was acting as a lookout, did not participate in the beating and did not anticipate that a murder would result from the robbery. The Supreme Court stated,

> [w]e emphasize that a defendant's liability for a crime, including whether he was the principal offender or an accessory, is determined at the guilt phase of a trial or, as in the case *sub judice*, by a plea. At sentencing the focus must be on the offender's *individual* culpability. It is therefore proper at sentencing to consider the defendant's actual role in the offense as opposed to his legal liability for the acts of others.

Id. at 546, 308 S.E. 2d at 652 (original emphasis). It is upon this language that defendant reasons that the use of deadly weapons by his co-defendant, Bullock, cannot enhance the defendant's sentence.

This reasoning cannot be sustained. In *Benbow, supra*, the Supreme Court approved the finding of the aggravating factor that the killing was especially heinous, atrocious and cruel based on the evidence of a savage beating administered by two co-defendants with whom Benbow was acting in concert, even though he did not personally participate in the beating. Unlike Benbow, the defendant personally engaged in vaginal intercourse with Mrs. Edwards against her will at a time when her submission had been brought about by the defendant and by Bullock, acting jointly, with Bullock displaying the weapons. We hold that the defendant's individual culpability, therefore, for the rape is the same as if he had personally held the weapons.

The defendant was indicted for first degree rape. Through plea bargaining, he was permitted to plead guilty to second degree rape. The use of a deadly weapon is not an element of the offense of second degree rape. "As long as they are not elements essential to the establishment of the offense to which the defendant pled guilty, all circumstances which are transactionally related to the admitted offense and which are reasonably related to the purposes of sentencing must be considered during sentencing." *State v. Melton*, 307 N.C. 370, 378, 298 S.E. 2d 673, 679 (1983). We hold that the defendant's commission of this rape

through the use of deadly weapons in the hands of his co-defendant is a circumstance transactionally related to the commission of second degree rape and reflective of his individual culpability for the crime. As such, it was properly considered by the trial judge and found as an aggravating factor.

Affirmed.

Judges BECTON and JOHNSON concur.

STATE OF NORTH CAROLINA v. CHARLES ADNELL JOHNSON

No. 8416SC429

(Filed 5 February 1985)

1. **Automobiles §§ 110, 113.1— driving while intoxicated—culpable negligence—sufficiency of evidence of manslaughter**

The violation of a statute prohibiting driving while intoxicated is culpable negligence; therefore, the trial court did not err in failing to dismiss the charge of manslaughter against defendant where the jury could conclude that defendant operated his vehicle in a culpably negligent manner and that this negligence was the proximate cause of the death of his passenger.

2. **Automobiles § 112.2— speed of vehicle—evidence inadmissible—error not prejudicial**

Though the trial court erred in permitting an officer to give opinion testimony as to the speed of defendant's vehicle prior to an accident because the officer did not observe the accident but based his opinion on physical evidence at the scene, defendant was not prejudiced in light of curative instructions given by the trial court and in light of the fact that it was not necessary to prove speed at the time of the accident in order to convict defendant of manslaughter.

3. **Automobiles §§ 115, 130— driving with blood alcohol level over .10%—involuntary manslaughter—conviction of both crimes improper**

It was error for the trial court not to arrest judgment on the verdict of guilty of driving with a blood alcohol level in excess of .10%, since driving with this level of alcohol was an element of involuntary manslaughter, and defendant could not be convicted of both crimes.

APPEAL by defendant from *Lane, Judge*. Judgment entered 4 November 1983 in Superior Court, ROBESON County. Heard in the Court of Appeals on 16 January 1985.

The defendant was tried for careless and reckless driving, a violation of G.S. 20-140, driving under the influence of an alcoholic beverage, a violation of G.S. 20-138, and involuntary manslaughter, a crime punishable under G.S. 14-18.

The State's evidence at trial tended to show the following. On the morning of 13 March 1983, the defendant was driving an automobile east on State Road 2202 near Lumberton. Neil Archie Locklear was a passenger in the car. The road was wet and held some large puddles. The speed limit was 55 miles per hour. The defendant's car crossed the westbound lane and left the road from the inside of a sharp curve which angled to the north. The car struck a tree before it came to a stop twenty-six feet from the road.

Highway Patrolman R. V. Moore investigated the accident and found skid marks 128 feet long. These marks began in the eastbound lane, crossed the westbound lane, and went to the edge of the pavement on the inside of the curve.

Patrolman Moore talked with the defendant shortly after the accident. He noticed that the defendant's speech was slurred and that he was unsteady on his feet. The defendant's breath smelled of alcohol and his eyes were red and glassy. The defendant told Patrolman Moore that he had had four beers before the accident. A breathalyzer test showed the defendant's blood alcohol content was .18%.

The Lumberton Rescue Squad removed Neil Archie Locklear from the wreck and found he had no pulse, he was not breathing, and his eyes were dilated. Neil Archie Locklear was pronounced dead upon arrival at Southeastern General Hospital.

The defendant was convicted of involuntary manslaughter and driving with a blood alcohol level in excess of .10%. The defendant was sentenced to three years imprisonment for the manslaughter and one year for the .10% violation. He appealed.

Attorney General Rufus Edmisten by Assistant Attorney General Evelyn M. Coman for the State.

Regan and Regan, by Cabell J. Regan for defendant appellant.

WEBB, Judge.

[1] The defendant first assigns error to the failure to dismiss the charge of manslaughter at the close of all the evidence. He argues, relying on *State v. Markham*, 5 N.C. App. 391, 168 S.E. 2d 449 (1969), that there was not sufficient evidence of manslaughter to be considered by the jury. In *Markham* there was evidence the defendant was intoxicated at the time of a fatal accident but little evidence as to the manner in which he was driving. This Court held it was error not to allow the defendant's motion to dismiss made at the close of the evidence. In *State v. McKenzie*, 292 N.C. 170, 232 S.E. 2d 424 (1977), there was evidence that the defendant was operating an automobile under the influence of alcohol at the time of a fatal accident. He struck from the rear the deceased who was riding a bicycle. The bicycle had a reflector and the night was clear. There were 66 feet of tire marks at the scene of the accident. We believe the holding of *McKenzie* is that a jury may find from evidence of intoxication by an automobile driver at the time of a fatal accident that the driver is criminally negligent which negligence is a proximate cause of the death. We believe *McKenzie* overrules *Markham* to the extent *Markham* holds otherwise.

In *State v. Cope*, 204 N.C. 28, 167 S.E. 456 (1933), our Supreme Court ordered a new trial because the Superior Court applied the test of civil liability rather than criminal liability in a vehicular death case. In discussing criminal liability in automobile death cases it said "culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." It said that an unintentional violation of a safety statute is not culpable negligence but an intentional, wilful or wanton violation of such a statute is culpable negligence. We believe that consistent with *Cope* and *McKenzie* the violation of a statute prohibiting driving while intoxicated is culpable negligence. We take judicial notice of the large percentage of fatal accidents in which those under the influence of alcohol are involved. We hold that driving under the influence of alcohol constitutes a "thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." This is culpable negligence. The jury in this case could conclude that the defendant operated the vehicle in a culpably

negligent manner and that this negligence was the proximate cause of the death of Neil Archie Locklear.

[2] The defendant next assigns error to the admission of opinion testimony by the highway patrolman who investigated the accident as to the speed of the vehicle the defendant was driving. The trooper did not observe the accident but based his opinion on physical evidence at the scene. The testimony was admitted over the objection of the defendant and at the opening of court the next morning the jury was told not to consider it. It was error to admit this testimony. *See* Brandis on N.C. Evidence, 2d Rev. Ed. § 131, p. 509. The question is whether it was prejudicial error. See G.S. 15A-1443. We have held that it was not necessary to prove speed at the time of the accident in order to convict the defendant. In light of this and the curative instructions given by the Court we cannot hold there would have been a different result had the error not been committed. See *State v. Haynes*, 54 N.C. App. 186, 282 S.E. 2d 830 (1981).

[3] As to the verdict of guilty to driving with a blood alcohol level in excess of .10% it was error not to arrest judgment on this charge. Driving with this level of alcohol was an element of involuntary manslaughter and the defendant could not be convicted of both crimes. See *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980).

No error as to involuntary manslaughter.

Judgment arrested as to driving with blood alcohol content in excess of .10%.

Judges EAGLES and COZORT concur.

BUXTON HARRELL v. CHARLES CLARKE AND SYMERA CLARKE

No. 846SC226

(Filed 5 February 1985)

Contracts § 6.1— plaintiff as unlicensed contractor—sufficiency of evidence

In an action to recover for breach of contract the trial court properly granted summary judgment for defendants on the ground that plaintiff was an unlicensed contractor in violation of G.S. 87-1 and therefore not entitled to any recovery where the evidence tended to show that defendants accepted a second set of house plans over a first set and chose some colors to be used in the house but did not exercise any great degree of control over plaintiff, and plaintiff was free to hire any persons he deemed suitable, to use his credit to purchase the materials, to purchase the materials at places of his choice, and to install the requisite materials as he saw best or as the persons he hired saw best.

APPEAL by plaintiff from *Brown, Judge.* Order entered 6 December 1983 in Superior Court, HERTFORD County. Heard in the Court of Appeals 14 November 1984.

Plaintiff filed this civil action on 4 June 1982 alleging breach of contract and damages upon an agreement and contract between plaintiff and defendants. Defendants filed an answer denying the material allegations of the complaint and filed a counterclaim alleging breach of contract by plaintiff. Plaintiff then filed a reply denying the material allegations of the counterclaim.

On 28 February 1983, defendants moved for summary judgment as to the plaintiff's claim upon the grounds plaintiff was an unlicensed contractor in violation of G.S. 87-1. The motion was denied on 2 May 1983. The case was tried before a jury on 5 December 1983 and after plaintiff presented his evidence and rested his case, defendants moved for a directed verdict. The trial court granted defendants' motion on 6 December 1983 and dismissed plaintiff's claim with prejudice. From the granting of the directed verdict, plaintiff appeals.

Law Firm of Carter W. Jones, by Carter W. Jones, Kevin M. Leahy and Charles A. Moore, for plaintiff appellant.

Slade and Vick, by Charles Slade, Jr. and Jerry Vick, Jr., for defendant appellees.

JOHNSON, Judge.

Plaintiff contends the trial court committed prejudicial error in granting defendants' motion for directed verdict.

A motion for a directed verdict under Rule 50(a) presents substantially the same question as formerly presented by motion for judgment of nonsuit. In passing upon motion at the close of plaintiffs' evidence in a jury case, as here, the evidence must be taken as true, considered in the light most favorable to plaintiffs and may be granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiffs. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). It is well settled in North Carolina that a general contractor within the meaning of G.S. 87-1 who has no license may not recover for the owner's breach of the contract, or for the value of the work and services furnished or materials supplied under the contract on the theory of unjust enrichment. *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968). Plaintiff asserts that he was merely acting in a supervisory role during the construction of defendants' home and was not acting in the role of a general contractor. Defendants assert that plaintiff was a general contractor, therefore he cannot recover in this action and the trial court's granting of the motion was proper. If the plaintiff was acting as the general contractor during the construction of defendants' home, he cannot recover and we must affirm the trial court. Therefore, the issue becomes whether, from the evidence presented, plaintiff can be classified as a general contractor.

G.S. 87-1 in pertinent part provides:

> For purpose of this Article, a "general contractor" is defined as one who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct any building . . . where the cost of the undertaking is thirty thousand dollars ($30,000) or more. . . .

The principal characteristic of a general contractor, as opposed to a subcontractor or mere employee, is the degree of control to be exercised by the contractor over the construction of the entire project. *Roberts v. Heffner*, 51 N.C. App. 646, 277 S.E. 2d 446 (1981). Plaintiff, from the evidence presented at trial, passed the threshold that distinguishes a mere employee doing supervisory

work from a general contractor. Plaintiff exercised the requisite degree of control to be classified as a general contractor by the trial court.

The evidence shows that plaintiff and defendants met at plaintiff's home and reached an agreement concerning the construction of defendants' home. At plaintiff's suggestion, a bank account was opened in the joint names of plaintiff and Mrs. Lillian McCallum, defendant Charles Clarke's sister. For a check to be issued on this account, it had to be signed by both persons. After a first set of construction plans were rejected, a second larger set of construction plans were drawn up and agreed upon by all parties. Defendants, after reaching an agreement with plaintiff, returned to the State of New Jersey where they resided, with defendant Mrs. Clarke returning to make various decisions as to style. Plaintiff was to arrange to have the necessary subcontractors and material suppliers available. In fact, plaintiff testified he hired (1) Mr. Lassiter to do the carpentry work; (2) Mr. Farmer to do the masonry work; (3) Mr. Askew to put the shingles on the roof; (4) Mr. Early of White and Woodley to do the plumbing, wiring and heating; and (5) Furniture Galleries to put in the carpet. Plaintiff testified further that, "They didn't know anything about the sub—White & Woodley or Mr. Farmer, didn't know nothing about nobody. They left it up to me." There was testimony that defendant Mrs. Clarke picked out the colors for the bathroom fixtures and the roof. Plaintiff actually picked the bathroom fixtures and the roof.

We find that from these facts, the trial court was correct in classifying plaintiff as the general contractor. The few decisions defendants made as to accepting the second set of plans over the first set and the colors to be employed were not enough to conclude they exercised any great degree of control over the plaintiff. Plaintiff was free to hire any persons he deemed suitable; to use his credit to purchase the materials; to purchase the materials at places of his choice; and to install the requisite materials as he saw best or as the persons he hired saw best.

The trial court, from this evidence, was correct in concluding plaintiff was a general contractor. Plaintiff has admitted that he is not a licensed general contractor. Applying the law to these facts, the evidence, as a matter of law, was insufficient to justify a verdict for plaintiff.

Plaintiff contends that if his claim is dismissed, it will effectuate harsh results. Our Supreme Court in *Brady v. Fulghum*, 309 N.C. 580, 308 S.E. 2d 327 (1983) addressed this very same point. The Court stated, "[i]f, by virtue of these rules, harsh results fall upon unlicensed contractors who violate our statutes, the contractors themselves bear both the responsibility and the blame." *Id.* at 586, 308 S.E. 2d at 332.

The decision of the trial court is

Affirmed.

Judges WHICHARD and PHILLIPS concur.

GREENSBORO NATIONAL BANK v. TRULOVE ENGINEERING, INC.

No. 8418DC312

(Filed 5 February 1985)

Bills and Note § 19; Evidence § 32— action on note—parol evidence admissible to show method of payment

In an action to recover the unpaid balance of principal and interest allegedly due on a promissory note given by defendant, the trial court did not err in allowing testimony concerning an oral agreement allegedly made between the parties and one of defendant's debtors to collect the note from the debtor rather than from defendant, since the evidence was admissible to show a mode of payment contemplated by the parties other than that specified in the written instrument and to show the bank's breach of its agreement to transfer the loan to defendant's debtor's account.

APPEAL by plaintiff from *Lowe, Judge.* Judgment entered 17 November 1983 in District Court, GUILFORD County. Heard in the Court of Appeals 28 November 1984.

Plaintiff sued to recover the unpaid balance of principal and interest allegedly due on a promissory note given by defendant on 30 July 1982. By its terms, the note was payable within ninety days in the principal amount of $5,000 with interest thereon at an annual rate of nineteen percent. Defendant, through its president, answered and admitted execution of the note, but pleaded in defense and avoidance an oral contract allegedly entered into by

the parties and one Leon I. Roberts, a building contractor, at the same time the note was executed. What was agreed, according to defendant's allegation, was that when the note became due Roberts would either pay it, or the bank would transfer it to Roberts' account with the bank, and defendant would not have to pay it. Also alleging that Roberts was the bank's agent in his development of a certain subdivision, defendant counterclaimed for the value of surveying and engineering work done for the development.

At trial, over plaintiff's objections, defendant presented testimony to the following effect: On 10 November 1981, Leon I. Roberts or his corporation, Leon I. Roberts & Associates, owed defendant approximately $17,000 for services rendered at various of their subdivisions. When Thomas A. Trulove, defendant's president, requested payment, Roberts asked him if he would accept $5,000 until Roberts could close out some other deals. Trulove agreed to accept the $5,000 and Roberts took Trulove to one of plaintiff's branches where they met with Vernon Spaulding, the manager. In their conversation Trulove was told by Spaulding that Roberts, a longtime customer of the bank, was over his credit limit and because of banking regulations no loan could be made to him at that time; but that a loan for $5,000 could be made if it was made in defendant's name. In the discussion it was stated that when the note became due Roberts would either pay it or the bank would transfer it to Roberts' account, and payment would not be sought from defendant. And it was on this basis, so Trulove testified, that defendant executed the note. Roberts, as a witness for the defendant, testified to the same effect. Other evidence, either presented by defendant or elicited from plaintiff, showed that the original note was renewed several times, Roberts paid the accrued interest each time, and Roberts made one payment of $100 on the principal. Plaintiff's evidence indicated that the loan was made to defendant with the understanding that defendant would repay it.

In answering the issues the jury found that the plaintiff agreed not to hold defendant liable on the note and that the plaintiff bank was not liable for Leon Roberts engaging defendant's help on the development referred to. From judgment entered on the verdict, that neither party recover of the other, plaintiff appealed.

Allen & Harris, by W. Steven Allen, for plaintiff appellant.

Hunter, Hodgman, Greene, Goodman & Donaldson, by Robert S. Hodgman, for defendant appellee.

PHILLIPS, Judge.

The sole question presented by this appeal is whether the court erred in receiving into evidence the testimony concerning the oral agreement allegedly made between the parties and Roberts to collect the note from Roberts, rather than the defendant. Plaintiff contends that this evidence contradicted the terms of the written note and thus its receipt violated the parol evidence rule. We disagree. The testimony objected to was properly admitted under rules discussed in *Jefferson Standard Life Insurance Co. v. Morehead*, 209 N.C. 174, 183 S.E. 606 (1936) and *Borden v. Brower*, 284 N.C. 54, 199 S.E. 2d 414 (1973) to show a mode of payment contemplated by the parties other than that specified in the written instrument. *North Carolina National Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976). The evidence was also admissible to show the bank's breach of its agreement to transfer the loan to Roberts. *Mozingo v. North Carolina National Bank*, 31 N.C. App. 157, 229 S.E. 2d 57 (1976), *disc. rev. denied*, 291 N.C. 711, 232 S.E. 2d 204 (1977).

No error.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. LUIS MERCADO

No. 8412SC219

(Filed 5 February 1985)

Homicide § 21.9— intentional shooting—submission of involuntary manslaughter error

Where defendant was charged with first degree murder of the man who allegedly raped his wife and on another occasion attempted to break into his home, the trial court erred in submitting involuntary manslaughter as a possible verdict, since the evidence established that defendant intentionally shot his victim with a sawed-off shotgun and the issue over which the State and de-

fendant disagreed was whether the shooting was done with an intent to kill or merely an intent to maim the victim; moreover, the error was prejudicial to defendant where there was a reasonable possibility that defendant would have been acquitted of other offenses submitted if the involuntary manslaughter issue had not been submitted.

APPEAL by defendant from *Bowen, Wiley F., Judge.* Judgment entered 15 December 1983 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 3 December 1984.

Defendant was charged in a proper bill of indictment with the first degree murder of Ruben Barrera. At trial, the State presented evidence which tended to show the following. On 27 August 1982, the defendant's wife was raped. In late November, she identified Ruben Barrera as the man who raped her. Barrera was arrested, and later released on bond. On 5 January 1983, Mrs. Mercado discovered Barrera attempting to break into her house again. She called defendant at work, and informed him of this incident. Later that afternoon, defendant saw Barrera near his home. Defendant then drove home, picked up a sawed-off shotgun, and went to Barrera's house trailer. He threw a rock through the trailer's window, and when Barrera emerged from the trailer, words were exchanged. Defendant fired one shot which struck Barrera in the groin area. Barrera died as a result of loss of blood from the gunshot wound.

When the police who were investigating the shooting learned that Barrera had been accused of raping Mrs. Mercado, they went to the Mercado residence, and asked defendant to accompany them to the police department for questioning. During interrogation, Mercado confessed to shooting Barrera.

Defendant presented evidence at trial which tended to show that he shot Barrera, but that he only meant to injure him, not kill him. He also presented numerous witnesses who attested to his good character.

The court submitted as possible verdicts, guilty of first degree murder, guilty of second degree murder, guilty of voluntary manslaughter, guilty of involuntary manslaughter and not guilty. The jury convicted defendant of involuntary manslaughter. From a judgment sentencing him to the presumptive term of three years imprisonment, defendant appealed.

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

James R. Parish for defendant appellant.

ARNOLD, Judge.

The question presented by this appeal is whether, as defendant contends, the court erred in submitting involuntary manslaughter as a possible verdict, because there was no evidence presented to support its submission. It was error and defendant's conviction must be reversed.

"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). Evidence presented, both by the State and by the defendant, tends to show that the defendant intentionally shot Barrera with a sawed-off shotgun. The issue over which the State and the defendant disagreed was whether the shooting was done with an intent to kill or merely an intent to maim the victim. We have carefully examined the record and have been unable to find any evidence which would support a finding that defendant's actions constituted an unlawful act not amounting to a felony, nor have we found any evidence which would tend to show that the victim was killed by a culpably negligent act. It was error, therefore, to submit the issue of whether defendant was guilty of involuntary manslaughter since there was no evidence in the record to support its submission. *State v. Ray*, 299 N.C. 151, 261 S.E. 2d 789 (1980).

Even if it was error to submit the offense of involuntary manslaughter to the jury, the State argues that such error was harmless because under the defendant's theory of the case he should have been convicted of a greater offense. Errors such as the one committed here are not always prejudicial, but 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 found to be prejudicial. *Id.*

Involuntary manslaughter is not a lesser included offense of first degree murder. *State v. Cason*, 51 N.C. App. 144, 275 S.E. 2d 221 (1981). As this Court has stated: "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 of the offense submitted, they would have convicted of another offense which does not have all the elements of the offense of which the defendant was convicted." *Id.* at 146, 275 S.E. 2d at 222. Guided by these principles we believe that there is a reasonable possibility that defendant would have been acquitted of the other offenses submitted, had involuntary manslaughter not been submitted as a possible verdict.

Defendant has been acquitted of all degrees of homicide other than involuntary manslaughter. The charge of involuntary manslaughter was improperly submitted to the jury because there was no evidence to support it. This error was prejudicial. Therefore, the judgment of the superior court is reversed, and defendant is hereby ordered discharged.

Reversed.

Judges WELLS and EAGLES concur.

STATE OF NORTH CAROLINA v. LEON GRAY ANGE, JR.

No. 842SC439

(Filed 5 February 1985)

Rape § 4.1— evidence of another rape committed by defendant—admissibility of evidence for identification

The trial court did not err in admitting testimony of a witness who claimed to have been raped by defendant on a prior occasion for the purpose of identifying defendant as the perpetrator of the crime charged in this case where defendant's identity was not admitted by defendant or defense counsel and was thus in issue, and the behavior of the perpetrator, reflecting serious mental and emotional problems, combined with other similarities as to where and how the crimes were carried out, provided a basis for a reasonable inference that the man who the witness claimed attacked her was the same man the prosecutrix claimed attacked her.

State v. Ange

APPEAL by defendant from *Phillips, Judge.* Judgment entered 18 January 1984 in Superior Court, WASHINGTON County. Heard in the Court of Appeals 17 January 1985.

The defendant was convicted of second-degree rape. The prosecutrix testified that she first met defendant on 5 November 1983 at approximately 5:45 p.m. at a market near where she was staying with friends. After purchasing groceries, the prosecutrix went to a pinball machine inside the store. The defendant approached her, struck up a conversation, and they played a game of pinball. Defendant told her his name was Leon Ange. The prosecutrix then told defendant she had to go home. Defendant asked her for a ride, and she agreed to take him.

Defendant gave the prosecutrix directions to his home. He told her to stop on a dirt road a short distance from a house which he said was his. Defendant then told the prosecutrix to turn off the headlights. He appeared angry. He forced her down onto the seat, locked the door, and struck her on the left side of the head. He forced her to have sexual intercourse. He said he planned to kill her. Later, he started crying, and said that he would call the police to turn himself in, and that he would pay her. Defendant left the car and walked home. Prosecutrix drove back to the place she was staying, where her friends assisted her in going to the police and to the hospital.

At trial, the State offered corroborating testimony from a witness, who also claimed that defendant had raped her. After a voir dire hearing, the trial court admitted the witness's testimony for the purpose of identifying the defendant as the person who raped the prosecutrix in the present case. Defendant objected to the admission of the witness's testimony on the grounds that it was prejudicial, and appeals the judgment on the basis of error in its admission.

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

Howard P. Neumann for defendant appellant.

ARNOLD, Judge.

The sole question presented on appeal is whether the trial court erred in allowing the testimony of a witness who claimed to

have been raped by defendant on a prior occasion. We conclude that the evidence was properly admitted and find no error in defendant's trial.

The trial court admitted the witness's testimony for the purpose of identifying the defendant as the perpetrator of the crime charged by the prosecutrix in the present case. Although 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," *State v. McClain*, 240 N.C. 171, 173, 81 S.E. 2d 364, 365 (1954), when "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." *State v. McClain*, 240 N.C. at 175, 81 S.E. 2d at 367.

The defendant argues that the question of identity was not at issue in his trial, and that therefore the identity exception does not apply. The defendant cites *State v. Pace*, 51 N.C. App. 79, 275 S.E. 2d 254 (1981), where evidence of a prior rape was held to be inadmissible because the identity of the defendant as the perpetrator was not in issue. Yet, in *Pace*, before the witness who would testify to the prior rape was called, the defense counsel informed the court that defendant would rely upon the defense of consent. Further, the defendant there took the stand, and his testimony tended to show that he was with the prosecuting witness at the time involved and that acts of intercourse and fellatio did occur. *State v. Pace*, 51 N.C. App. at 83, 275 S.E. 2d at 256.

In the present case, the record contains no indication that the defense counsel removed the issue of identity. Nor did the defendant or any witness for the defendant take the stand and give evidence that defendant and the prosecutrix were together on the evening in question, and had sexual intercourse. The State thus had the burden of proving that the prosecutrix's attacker and the defendant were one and the same. In the absence of an admission by the defendant or defense counsel, the identity of the perpetrator was an issue at trial.

The defendant argues that even if identity was at issue, the two incidents were so dissimilar that it cannot be reasonably inferred that the crime charged and the prior offense were committed by the same person. The trial court made detailed findings of the similarities between the two incidents. In both crimes the perpetrator asked the victim for a ride home in her car, had her stop on a deserted country road, requested that she engage in sex, and when she refused, then raped her. The most compelling similarity of the two crimes, however, was the behavior of the perpetrator during and after the crime. In both incidents, he threatened and screamed at the victim, then after the sexual act, became irrational and extremely emotional, expressing remorse, apologizing to the victims and saying he would turn himself in, expressing concern for his own mental and emotional state, and saying that he intended to get help. The behavior of the perpetrator, reflecting serious mental and emotional problems, combined with the other similarities as to where and how the crimes were carried out, provide a basis for a reasonable inference that the man who the witness claims attacked her was the same man the prosecutrix claims attacked her.

The trial court did not err in admitting the witness's testimony for the purpose of identifying the defendant as the man who raped the prosecutrix.

No error.

Judges WELLS and EAGLES concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. LEAMON N. FONVILLE, DEFENDANT; FRANK MOSELEY, SURETY

No. 848SC420

(Filed 5 February 1985)

Arrest and Bail § 11.4— remission of forfeited appearance bond—extraordinary cause

The trial court did not err in determining that efforts made by a bondsman amounted to extraordinary cause pursuant to G.S. 15A-544(h) and in remitting the bond where the petitioner was not a professional bondsman but

apparently signed the bond for defendant because he was his friend; he received no payment for signing the bond; he possessed very limited assets; he got in touch with defendant after defendant failed to appear; and he picked defendant up and carried him to court the day he paid his fine.

APPEAL by the Lenoir County Board of Education and the State of North Carolina from *Walker, Russell G., Jr., Judge.* Order entered 16 December 1983 in Superior Court, LENOIR County. Heard in the Court of Appeals 16 January 1985.

The State and the Lenoir County Board of Education appeal from an order remitting a bond forfeiture. The evidence at the hearing on the petition for remission showed that the defendant was charged with driving under the influence of alcohol and leaving the scene of an accident. Frank Moseley signed a $2,000.00 appearance bond for the defendant. The defendant failed to appear for trial on 31 August 1982 and the Court ordered his arrest and the forfeiture of the bond. The surety brought the defendant to Superior Court at which time his case was remanded to District Court on 31 March 1983. The defendant then complied with the judgment in District Court in April 1983. On 31 March 1983 the Court entered a judgment for $2,000 against the defendant and the surety. The surety filed a petition on 3 October 1983 for remission of the bond. The surety testified that he was 68 years of age, that he was not a professional bondsman and that he did not receive any compensation for signing the bond. He introduced his tax listing in Lenoir County which showed his only real estate in the County was one house and lot.

Judge Walker made findings of fact based on the evidence and concluded that the efforts made by Frank Moseley amounted to extraordinary cause. He ordered that the judgment against Mr. Moseley be remitted. The State and the Board of Education appealed.

Harvey W. Marcus for appellant Lenoir County Board of Education.

Robert B. Hulbert, Jr., Assistant District Attorney for the State.

Joretta Durant for petitioner appellee.

WEBB, Judge.

G.S. 15A-544(e) and (h) provide for the remission of bond forfeitures. Subsection (e) provides that the Court may order a remission within 90 days of the entry of judgment or on the first day of the next session of court commencing more than 90 days after the entry of judgment if it appears that justice requires the remission. The petition for remission in this case was not filed within this time period. G.S. 15A-544(e) does not apply in this case.

G.S. 15A-544(h) provides that for "extraordinary cause shown, the court which has entered judgment may . . . remit the judgment in whole or in part." The question posed by this appeal is whether the petitioner has shown "extraordinary cause" which allows the Court to remit the bond forfeiture. In *State v. Locklear*, 42 N.C. App. 486, 256 S.E. 2d 830, appeal dismissed, 298 N.C. 302, 259 S.E. 2d 303 (1979), the Superior Court found extraordinary cause when the evidence showed the bondsman had made several trips of 20 miles or less as well as several telephone calls in an effort to locate the defendant. He found the defendant who was in jail on a different charge in another county and notified the sheriff of the county in which he had signed the bond who returned the defendant for trial. In affirming the order for remitting a part of the bond this Court said:

> The efforts of the bondsman, while not dramatic, did result in the principal's detention on the charge for which the bond had secured the principal's appearance. The goal of the bonding system is the production of the defendant, not increased revenues for the county school fund . . . [citation omitted] and in this case the surety's efforts led directly to achieving that goal.

The efforts of the petitioner in this case were not dramatic, but they led to the defendant's appearance in court. Petitioner was not a professional bondsman; he apparently signed the bond for the defendant because he was his friend; he received no payment for signing the bond; and he possessed very limited assets. In light of all these circumstances we cannot say the Court erred in concluding that petitioner showed extraordinary cause pursuant to G.S. 15A-544(h) for remission of the forfeiture judgment.

The appellants contend that the Court made irrelevant findings of fact. This does not constitute reversible error so long as other findings of fact support the order. See *Brown v. Hurley*, 243 N.C. 138, 90 S.E. 2d 324 (1955). We have held that there are sufficient findings of fact to support the order.

The appellants also contend that there was not sufficient evidence to support the findings of fact that the petitioner procured the appearance of the defendant in court and the surety's sole asset is the house in which he resides.

There was testimony that Mr. Moseley got in touch with the defendant after the defendant failed to appear, that he picked the defendant up and carried the defendant to court the day he paid his fine. This supports the finding of fact that the surety procured the appearance of the defendant in court.

There was evidence in the form of the tax listing which showed the surety owned one house and lot in Lenoir County. There was no evidence that he owned any other property. This evidence supports the Court's finding of fact that the surety's sole asset is the house in which he resides.

Affirmed.

Judges EAGLES and COZORT concur.

IN THE MATTER OF HERMAN BARNHILL

No. 8412DC403

(Filed 5 February 1985)

Insane Persons § 1.2— involuntary commitment—no examination by second physician—commitment improper

The trial court erred in involuntarily committing respondent to a hospital for treatment where the person who initially petitioned for issuance of a custody order was a doctor, but there was no indication in the record that a second qualified physician examined respondent as required by G.S. 122-58.3(d).

In re Barnhill

APPEAL by respondent from *Cherry, Judge.* Order entered 10 February 1984 in District Court, CUMBERLAND County. Heard in the Court of Appeals 15 January 1985.

Respondent appealed from an order of involuntary commitment, committing him to HSA Cumberland in Fayetteville, North Carolina, for hospitalization and treatment for a sixty-day period, pursuant to N.C. Gen. Stat. Sec. 122-58.7.

Attorney General Rufus L. Edmisten, by Associate Attorney T. Byron Smith, for the State.

Michael O'Foghludha, Assistant Public Defender, for respondent, appellant.

HEDRICK, Chief Judge.

N.C. Gen. Stat. Chap. 122, Article 5A, establishes the procedures to be followed in involuntary commitment of the mentally ill to inpatient mental health facilities. G.S. 122-58.3 sets out the mechanism by which a "person who has knowledge of a mentally ill . . . person" may petition a district court magistrate for "issuance of an order to take the respondent into custody for examination by a qualified physician." G.S. 122-58.4(b1) details the nature and extent of the examination; G.S. 122-58.6 specifies that, following examination, the physician shall determine which of several enumerated conditions exist. Should he conclude that the respondent is mentally ill or an inebriate and is dangerous to himself or others, the physician is to "hold the respondent at the facility pending the district court hearing." G.S. 122-58.7 provides that the district court hearing shall be held within ten days.

In the instant case the person with knowledge of a mentally ill person who initially petitioned for issuance of a custody order was Dr. Robert Blackburn, Medical Director of the Chemical Dependency Unit at HSA Cumberland. G.S. 122-58.3(d) contains the following provision:

> If a physician executes an affidavit for inpatient commitment of a respondent, a *second* qualified physician shall be required to perform the examination required by G.S. 122-58.6.

(Emphasis added.) Examination of the record reveals no indication that this statutory provision was complied with in the instant

case. Other than respondent, Dr. Blackburn was the only witness who testified at the district court hearing. The court's finding of fact that "Respondent was examined by a qualified physician at HSA Cumberland . . . whose professional opinion is that Respondent is mentally ill or inebriate and is a danger to himself and others and recommends involuntary hospitalization," is clearly based on Dr. Blackburn's testimony.

Petitioner contends that the record shows compliance with statutory provisions in that Dr. Blackburn testified that "I gave [respondent] under the care of Dr. Gomez, as I am not a psychiatrist." The above-quoted testimony contains the sole reference in this record to Dr. Gomez. We think it clear beyond peradventure that this testimony falls far short of establishing that "a second qualified physician . . . perform[ed] the examination required by G.S. 122-58.6." Our courts have held that the requirements of G.S. 122-58.3 must be followed diligently. *In re Reed*, 39 N.C. App. 227, 249 S.E. 2d 864 (1978). *See also In re Hernandez*, 46 N.C. App. 265, 264 S.E. 2d 780 (1980). Because the record shows that the statutory requirements were not complied with, we hold the order entered by the court must be vacated.

Our disposition of this case renders unnecessary a discussion of respondent's remaining assignments of error.

Vacated.

Judges WHICHARD and PARKER concur.

BOB TATE CONSTRUCTION, INC. v. CLYDE JAMES SCHULTZ AND ROZSIKA CAROL SCHULTZ

No. 8427SC165

(Filed 5 February 1985)

Contracts § 29.4— home constructed in unworkmanlike manner—builder's recovery for labor and materials—amount of offset—failure to give guiding instructions error

In an action to recover a sum due for labor and materials expended by plaintiff pursuant to a contract for the construction of a home for defendants where defendants claimed that plaintiff had constructed the home in an un-

workmanlike manner, the trial court erred in instructing the jury that plaintiff was entitled to recover for his labor and materials, less any amounts paid by defendants, less any offset or credit, without instructing that the allowable offset or credit consisted of remedying defects or omissions, if any.

APPEAL by plaintiff from *Sitton, Judge.* Judgment entered 23 September 1983 in Superior Court, GASTON County. Heard in the Court of Appeals 26 October 1984.

Plaintiff instituted this action seeking to recover the sum of $14,687.32 allegedly due for labor and materials it had expended pursuant to a contract for the construction of a home for defendants. Defendants counterclaimed, alleging that plaintiff had constructed the home in an unworkmanlike manner. The jury found that the parties had entered into a contract, and that defendants breached that contract, but awarded only nominal damages in the sum of $1.00. Plaintiff appeals.

Harris, Bumgardner & Carpenter, by Don H. Bumgardner, for plaintiff appellant.

Frank Patton Cooke, by H. Randolph Sumner, for defendant appellees.

JOHNSON, Judge.

At issue is whether the court's instructions on damages were proper. For the following reasons, we hold the court's instructions were erroneous and remand the cause for a new trial on the issue of damages.

Plaintiff has excepted to the following instructions of the court:

> As to actual damages, the burden of proof on this is on the plaintiff to satisfy you, by the greater weight of the evidence, first, that the plaintiff has sustained actual damages in some amount, and, second, the amount of those damages. A party injured by a breach of a contract is entitled to be placed, as far as this can be done by money, in the same position one would have occupied if there had not been a breach of the contract. The way in which you will determine these damages is to first determine what amount, if any, the plaintiff would be entitled to for material and labor furnished and what

> amount was paid by the defendant by deducting the amount that was paid by the defendant from the amount you find the plaintiff was entitled to recover.
>
> So, I instruct you upon this issue that if you find, by the greater weight of the evidence, that the plaintiff Tate has sustained some amount of damages under the rule which I have explained to you, then the plaintiff is entitled to recover the difference between the amount he was entitled to recover in all for his labor, material furnished, less the amount which was paid by the defendants, less any offset or credit which you find from the evidence the defendants might be entitled to, based upon the evidence.

Plaintiff contends that the court's instructions were erroneous because they failed to give the jury guidance as to what could be offset or credited. We agree.

The evidence was undisputed that plaintiff did not complete construction of the house, but had completed most of it. In such instances, the rule of damages is stated as follows:

> Where a building contract is substantially, but not exactly, performed, the amount recoverable by the contractor depends upon the nature of the defects or omissions. "Where the defects or omissions are of such a character as to be capable of being remedied, the proper rule for measuring the amount recoverable by the contractor is the contract price less the reasonable cost of remedying the defects or omissions so as to make the building conform to the contract." (Citations omitted.)
>
> In an action to recover the unpaid portion of the contract price, the defendant, under his denial of plaintiff's alleged performance, may show, in diminution of plaintiff's recovery, the reasonable cost of supplying omissions, if any, and of remedying defects, if any; and, if such costs exceed the unpaid portion of the contract price, the defendant may, by counterclaim, recover the amount of such excess. (Citations omitted.)

Lumber Co. v. Construction Co., 249 N.C. 680, 684, 107 S.E. 2d 538, 540-41 (1959). The court thus erred in the present case by failing to instruct the jury that the allowable offset or credit con-

sisted of the cost of remedying defects or omissions, if any. Instead, the court left the jury to its own devices to determine what to offset or credit. Because of the real danger the jury improperly considered certain matters as an offset or credit, the cause must be remanded for a new trial on the issue of damages.

New trial.

Judges WHICHARD and PHILLIPS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 FEBRUARY 1985

ASHLEY v. CONE MILLS CORP. No. 8410IC377	Industrial Commission (I-0661)	Affirmed
BENNETT v. BENNETT No. 849DC510	Vance (82CVD309)	Affirmed
IN RE EXHUMATION OF DeBRUHL No. 847SC508	Wilson (84SP10)	Affirmed
IN RE WALL No. 8418DC276	Guilford (81J318)	Affirmed
KNIGHT v. KNIGHT No. 8322SC1306	Iredell (83CVS0373)	Affirmed
STATE v. BAYSDON No. 8416SC362	Robeson (83CRS9939)	No Error
STATE v. ERWIN No. 8420SC387	Union (83CRS7318)	New Trial
STATE v. ERWIN No. 8420SC388	Union (83CRS6848)	New Trial
STATE v. NEWELL No. 8412SC290	Cumberland (83CRS11953)	No Error
STATE v. SISTARE No. 8412SC218	Cumberland (82CRS19201)	Affirmed
STATE v. WELLINGTON No. 842SC419	Beaufort (83CRS5396)	No Error

Alford v. Shaw

FRANK O. ALFORD, WILKIE P. BEATTY, AS EXECUTRIX OF THE ESTATE OF PAUL B. BEATTY, CARSON INSURANCE AGENCY, INC., PATRICIA A. EDLUND, STANLEY EDLUND, JAMES M. GILFILLIN, LARRY G. GOLDBERG, RAQUEL T. GOLDBERG, BETTY F. RHYNE, ROBERT R. RHYNE AND NORMAN V. SWENSON, DERIVATIVELY IN THE RIGHT OF ALL AMERICAN ASSURANCE COMPANY, PLAINTIFFS v. ROBERT T. SHAW, AMERICAN COMMONWEALTH FINANCIAL CORPORATION, GREAT COMMONWEALTH LIFE INSURANCE COMPANY, ICH CORPORATION, CHARLES E. BLACK, S. J. CAMPISI, ROY J. BROUSSARD, TRUMAN D. COX, FRED M. HURST, C. FRED RICE AND PEGGY P. WILEY, DEFENDANTS AND ALL AMERICAN ASSURANCE COMPANY, BENEFICIAL PARTY

No. 8426SC371

(Filed 5 February 1985)

Corporations §§ 4, 6— shareholders' action—litigation committee appointed by board of directors—power to bind corporation—procedure improper—application of business judgment rule improper

Directors of North Carolina corporations who are parties to a derivative shareholders' action may not confer upon a special committee of the board of directors the power to bind the corporation as to its conduct of the litigation; therefore, the trial court erred in granting summary judgment by applying the "business judgment rule" to a decision by a litigation evaluation committee appointed by defendant's board of directors to seek summary judgment as to the great bulk of plaintiff's derivative claims and to settle the rest.

APPEAL by plaintiffs from *Snepp, Judge*. Judgment entered 12 December 1983 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 3 December 1984.

Plaintiffs brought this derivative action, alleging a variety of fraudulent, unlawful and self-interested actions by defendants. Plaintiffs alleged that defendants Shaw and Rice and the named corporate defendants ("the Shaw group") had manipulated the assets and actions of All American Assurance Company ("All American") to "loot" All American's assets and transfer the bulk of its capital to the Shaw group. [All American had previously undergone rehabilitation, resulting in an earlier action involving many of the same parties and counsel. *See Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E. 2d 279 (1978), *disc. rev. denied and appeal dismissed*, 296 N.C. 740, 254 S.E. 2d 181-83 (1979).]

Pursuant to plaintiffs' original demand for recovery of losses resulting from the allegedly wrongful transactions, the Board of Directors ("the Board") of All American retained counsel to select

a Special Investigative Committee ("the Committee"). Counsel recommended Marion G. Follin, a retired insurance executive, and attorney Frank M. Parker, formerly a judge of this court. The Board elected Follin and Parker to membership and designated them as the Committee, according them full investigative powers and giving them binding authority regarding institution of any legal action. The Committee conducted an investigation, and submitted a report which concluded that action be taken only with regard to two of plaintiffs' specific allegations, representing only a small portion of the total claim. The Committee negotiated a settlement of these claims with the two corporations involved.

Based on the Committee's report, All American moved for approval of the settlement and summary judgment as to the remaining issues. The individual directors, with the exception of Shaw and Rice, also moved for summary judgment. The trial court ruled that the "business judgment rule" controlled the case, and that the only issues were whether the Committee consisted of disinterested, independent directors acting in good faith, and whether the investigation was appropriate as to scope and procedure. From an order granting both motions, plaintiffs appealed.

Cansler & Lockhart, P.A., by Thomas Ashe Lockhart and Bruce M. Simpson, for plaintiff.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Daniel W. Fouts and Bruce H. Connors, for defendants Black, Broussard, Campisi, Cox, Hurst and Wiley.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by R. M. Stockton, Jr. and Daniel R. Taylor, Jr., for All American Assurance Company.

WELLS, Judge.

None of the parties raises the issue, but we must first address the appealability of the judgment. *In re Watson*, 70 N.C. App. 120, 318 S.E. 2d 544 (1984). The summary judgment disposed of fewer than all parties, leaving the Shaw group nominally in the action, and the court did not certify that there was no just reason for delay. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) of the Rules of Civil Procedure (1983). Since the unresolved claim against the Shaw group is also a derivative claim, whether or not the order

was technically interlocutory it did in fact effectively terminate plaintiffs' action. It thus affected a substantial right and is immediately appealable. N.C. Gen. Stat. § 1-277 (1983); N.C. Gen. Stat. § 7A-27(d) (1976).

The only real question presented by this appeal is whether the court could properly grant summary judgment by applying the "business judgment rule" to the Committee's decision to seek summary judgment as to the great bulk of plaintiffs' derivative claims and settle the rest. Both sides properly treat this as a question of first impression in this state. The issue arose in *Swenson* but we did not need to reach it since the record there clearly showed that the decision not to pursue the derivative claim was made by the interested directors themselves, and not their "litigation evaluation committee."

The derivative action has only recently achieved legislative recognition in North Carolina. 1973 N.C. Sess. Laws c. 469, s. 12, *codified at* N.C. Gen. Stat. § 55-55 (1982). The North Carolina statute contains liberal provisions favoring, by contrast with laws of other jurisdictions, suits by minority shareholders. *See* R. Robinson, N.C. Corporation Law and Practice § 14-1 (3d ed. 1983) [hereinafter "Robinson"]. The derivative action allows minority shareholders, for the benefit of the corporation, to sue directors for corporate mismanagement. *See Id.* at § 14-2. Although with closely held corporations individual relief may be more appropriate (and derivative action futile), *see Miller v. Ruth's of North Carolina, Inc.*, 68 N.C. App. 40, 313 S.E. 2d 849, *disc. rev. denied*, 311 N.C. 760, 321 S.E. 2d 140 (1984), with larger publicly held corporations, such as All American, a derivative action may provide the only truly effective legal means for minority shareholders to prevent or remedy destructive acts of wrongdoing directors. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (policy and history reviewed). Of course, minority shareholders may always sell out, but when the value of their shares has been substantially undermined by corrupt dealings, legal action to remedy the destruction in value may be preferable. As a matter of policy, then, our courts should look favorably on derivative actions and discourage procedural devices designed to frustrate them.

Procedurally, the shareholder plaintiffs must first seek to obtain their remedy within the corporation itself, unless such de-

mand would be futile. G.S. § 55-55(b); *Swenson v. Thibaut, supra.* The demand requirement serves the obvious purpose of allowing the corporation the opportunity to remedy the alleged problem without resort to judicial action, or, if the problem cannot be remedied without judicial action, to allow the corporation, as the true beneficial party, the opportunity to bring suit first against the alleged wrongdoers. *See generally Hill v. Erwin Mills, Inc.,* 239 N.C. 437, 80 S.E. 2d 358 (1954). The Committee was established in the present case to respond to plaintiffs' demand, made in accordance with the statute, for action against the allegedly self-dealing directors.

Defendants sought, and obtained, application of the "business judgment rule" to the Committee's decision. The rule simply means that courts, honoring principles of corporate self-government, will not inquire into good faith decisions involving business judgment; directors not being liable for mere mistakes of judgment. *Robinson, supra,* § 12-6. It is well established that where a corporation, pursuant to a good faith business decision by the board of directors, elects *not* to pursue a claim upon demand, the business judgment rule prevents a shareholder from substituting his or her judgment by initiating a derivative action. *See United Copper Secur. Co. v. Amalgamated Copper Co.,* 244 U.S. 261 (1917) (authoritative opinion of Justice Brandeis) (cited in *Swenson*). When the alleged wrongdoing involves fraud or other breach of fiduciary duty by serving directors, however, and those same directors decide not to bring suit on behalf of the corporation, the business judgment rule, premised on good faith, clearly has no application at the summary disposition stage. Such was the situation in *Swenson*, and we accordingly affirmed an order denying the corporate defendants' motion to dismiss. *See also Robinson, supra,* § 14-13; *Nussbacher v. Continental Ill. Nat. B. & T. Co., Chicago,* 518 F. 2d 873 (7th Cir. 1975), *cert. denied,* 424 U.S. 928 (1976). Traditionally, this has meant that the business judgment rule has been a defense on the merits in such cases, *see Swenson v. Thibaut, supra,* making a case difficult to dispose of summarily and thus raising the threat of "strike suits," *i.e.*, marginally meritorious claims brought not for the nominal corporate relief sought but to harass or to compel lucrative settlements. *See Robinson, supra,* § 14-1; *Surowitz v. Hilton Hotels Corp.,* 383 U.S. 363, *reh'g denied,* 384 U.S. 915 (1966).

In recent years, however, corporations have begun to use the rule as a "sword" to cut off derivative actions premised on breaches of fiduciary duty. *Robinson, supra,* § 14-13. They have done so through the device of "special litigation committees," groups of serving directors with no direct interest in the alleged wrongful transactions, or disinterested outsiders elected to serve on the board. Typically, the committee is invested with power to decide for the board whether or not to pursue the claim. If such a committee cannot independently bind the board, its role would remain purely advisory, subject to the control of the alleged wrongdoers, and thus the committee's decision would essentially be meaningless. That was the situation in *Swenson;* since the committee's recommendation there was not independent, we did not reach the question of whether it conclusively precluded a derivative action. Where the committee members are genuinely disinterested and have binding authority, however, their good faith decision not to pursue a claim may present the application of the business judgment rule. Following the landmark decision in *Auerbach v. Bennett,* 47 N.Y. 2d 619, 393 N.E. 2d 994 (1979), many courts have allowed the decisions of independent committees to control derivative litigation, subject only to varying levels of inquiry into the good faith and procedural adequacy of the committees' decisions. The application of *Auerbach* was argued in *Swenson,* and *dicta* in our opinion suggests that this court would follow it. However, such *dicta* does not control our decision here. *State ex rel. Utilities Comm. v. Central Telephone Co.,* 60 N.C. App. 393, 299 S.E. 2d 264 (1983).

Plaintiffs do not contest the disinterested status of the Committee selected in this case. The Committee's decision provided the sole basis for the judgment below. It is clear that the Board possessed statutory authority to establish such a committee and to authorize it to take binding action. N.C. Gen. Stat. § 55-31 (1982). The questions of the effect of the Committee's decision not to pursue plaintiffs' claims, and the application of the business judgment rule thereto as grounds for summary judgment, therefore are squarely presented for the first time in this state.

Before discussing the various apposite cases of other jurisdictions, we note again the public policy favoring derivative actions. We also note the fiduciary relation of the directors to the corporation and its stockholders, which requires the "most scrupulous

observance" of their duty to protect the corporation and to refrain from acts injuring it or depriving it of its proper opportunities. *Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E. 2d 551 (1983) (citing *Guth v. Loft*, 23 Del. Ch. 255, 5 A. 2d 503 (1939)). In the present procedural context of this case, the Committee's report justifies summary judgment only if it conclusively establishes a complete defense. All evidentiary conflicts are resolved in favor of plaintiffs, whose papers are treated indulgently, while defendants' papers are scrutinized with care. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980).

We start our analysis of the applicable law with *Auerbach*: despite the novelty of the special litigation concept, the principles adopted therein have generally been accepted. The Court of Appeals of New York began with "the prudent recognition that courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments." *Auerbach v. Bennett, supra.* Absent evidence of bad faith or fraud, the courts should respect such decisions, including the decision to pursue (or not) a derivative claim, given the "variety of disparate considerations" which enter such a decision. *Id.* The court accordingly limited its investigation of the committee itself to whether the directors were in fact disinterested and independent. Citing its typically extensive experience with fact finding procedures, the court also undertook to review the adequacy of the committee's investigative procedures. *Id.* The question thus presented was only whether the procedures were so restricted in scope or execution as to raise questions of bad faith or fraud; absent such evidence, the substantive evaluation of the committee lay "beyond the reach" of the court. *Id.* The court expressly rejected the contention that the board, with alleged wrongdoers sitting on it, could not legally delegate to a committee the authority to terminate derivative action against it. *Id.* The two-part *Auerbach* test, restricted to disinterestedness of the committee and adequacy of its procedures, has been adopted by a number of other courts. *See Lewis v. Anderson*, 615 F. 2d 778 (9th Cir. 1979), *cert. denied*, 444 U.S. 869 (1980) (California law) ("clear trend in corporate law"); *Genzer v. Cunningham*, 498 F. Supp. 682 (E.D. Mich. 1980) (Michigan law); *Roberts v. Alabama Power Co.*, 404 So. 2d 629 (Ala. 1981) (Alabama law).[1]

1. Note that the federal decisions, relying on *Burks v. Lasker*, 441 U.S. 471 (1979), have followed state rather than federal law in determining whether the

The essentially procedural approach adopted in *Auerbach* has created judicial concern that litigation committees will destroy the effectiveness of the derivative action as a means of policing corporate boards of directors. The leading case suggesting a second level of inquiry is *Zapata Corp. v. Maldonado*, 430 A. 2d 779 (Del. 1981). While recognizing the threat posed by *Auerbach* to the vitality of the derivative action, the Supreme Court of Delaware also recognized the value of an internal device by which corporations could rid themselves of meritless litigation. *Id.* The court, searching for a "balancing point" between stockholder and director power, generally adopted the *Auerbach* test, but added that the court should then have discretion to determine, applying its *own* business judgment, whether the suit should nonetheless be maintained even when the *Auerbach* procedural test had been satisfied. *Id.* "The second step is intended to thwart instances where corporate actions meet the criteria of step one [the *Auerbach* test], but the result does not appear to satisfy its spirit, or where corporate actions would simply prematurely terminate a stockholder grievance deserving of further consideration in the corporation's interest." *Id.* The more probing *Zapata* approach has been followed by several courts. *See Abella v. Universal Leaf Tobacco Co., Inc.*, 546 F. Supp. 795 (E.D. Va. 1982) (Virginia law); *Joy v. North*, 692 F. 2d 880 (2d Cir. 1982), *cert. denied sub nom, City Trust v. Joy*, 460 U.S. 1051 (1983) (Connecticut law) (modifying *Zapata*).[2]

This trend in corporate law has not been without controversy, even in those courts which have adopted one of the two tests. In one case, dissent arose over the fairness and reasonableness of

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business judgment rule can be used to dismiss derivative claims, absent some overriding federal policy to the contrary. The only court to reverse on ostensible policy grounds was faced with a situation where all the defendant directors in effect shared in the proceeds of the hidden transactions and therefore had a financial interest. *Galef v. Alexander*, 615 F. 2d 51 (2d Cir. 1980) (Ohio claims linked with federal claims).

2. We note that *Zapata* was a case in which no demand had been made for action, and the court restricted its application to "no demand" cases. We see no reason however why it should not apply to cases such as this one, where demand was made although it could legitimately have been excused on the grounds of the directors' self-interest. *See Loy v. Lorm Corp.*, 52 N.C. App. 428, 278 S.E. 2d 897 (1981). To rule otherwise would exalt the form of the demand over its main purpose to avoid resort to the courts, if possible.

the settlement recommended by the committee, even though state law specifically authorized such committees. *In re General Tire & Rubber Co. Sec. Litigation*, 726 F. 2d 1075 (6th Cir. 1984) (Wellford, J., dissenting in part) (Ohio law). And in another case, a court exercised its discretion to *disregard* a committee's decision in ruling on a motion to dismiss on the pleadings. *Reilly Mortg. Group v. Mt. Vernon Sav. & Loan Ass'n*, 568 F. Supp. 1067 (E.D. Va. 1983). *See also Lasker v. Burks*, 567 F. 2d 1208 (2d Cir. 1978) (decision should be ignored if contrary to public policy), *rev'd* 441 U.S. 471 (1979). In *Joy v. North, supra*, the second circuit noted that "[i]t is not cynical to expect that such committees will tend to view derivative actions against the other directors with skepticism. Indeed, if the involved directors expected any result other than a recommendation of termination at least as to them, they would probably never establish the committee." The court refused to accept the committee report as conclusive, applying a somewhat tougher version of *Zapata*. The Sixth Circuit, predicting Massachusetts law, considered applying a conclusive presumption *against* the good faith of such committees, before strictly construing and applying the disinterestedness test of *Auerbach*. *Hasan v. CleveTrust Realty Investors*, 729 F. 2d 372 (6th Cir. 1984). *See also Abbey v. Computer & Communications Technology Corp.*, 457 A. 2d 368 (Del. Ch. 1983) (procedural complications caused by *Zapata*). And even in *Zapata*, the court cautioned trial courts to give special consideration "to matters of law and public policy in addition to the corporation's best interests." *Zapata Corp. v. Maldonado, supra*. *See also Auerbach v. Bennett, supra*, (Cooke, C.J., dissenting) (business judgment rule should be only conditionally applicable pending disclosure of facts on which committee relied).

The cases rejecting the special committee device are few. The leading case is *Miller v. Register And Tribune Syndicate, Inc.*, 336 N.W. 2d 709 (Iowa 1983). The Supreme Court of Iowa examined the rationale of *Zapata*, *i.e.*, that although the taint of self-interest precludes application of the business judgment rule to defendant directors, those same directors may delegate their power to an independent committee which may obtain the protection of the rule. Left unanalyzed and unanswered, continued the court, was the question of why the disqualification to act directly did not also disqualify defendant directors from participating in

the selection of a committee. *Id.* The court analyzed the problem in terms of "'structural bias' . . . which suggests that it is unrealistic to assume that the members of independent committees are free from personal, financial or moral influences which flow from the directors who appoint them." *Id.* Without analyzing the matter at much greater length[3] and while conceding the directors' statutory authority to appoint litigation committees, the court concluded:

> We believe that the *potential* for structural bias on the part of a lititgation committee appointed by directors who are parties to derivative actions is sufficiently great and sufficiently difficult of precise proof in an individual case to require the adoption of a prophylactic rule. We conclude that we should prevent the potential for structural bias in *some* cases by effectively limiting the powers of such directors in *all* cases.

Id. (emphasis added). The court accordingly established a blanket rule against delegation of binding authority as to litigation by directors who were parties to that litigation. *Id.* The court noted that this prophylactic rule did not mean the end of special litigation committees; corporations could apply for the appointment of such committees by Iowa courts of equity. *Id.* The court left untouched the delegation power of non-defendant directors.

In *Maldonado v. Flynn*, 413 A. 2d 1251 (Del. Ch. 1980), *rev'd sub nom, Zapata Corp. v. Maldonado, supra*, the court carefully distinguished between the stockholder and corporate interests in a derivative suit, holding that a corporation which refused to bring suit could not control the individual action to which the corporate right had attached. This rationale was decisively rejected by the Supreme Court of Delaware in *Zapata*; interestingly, and perhaps reflective of other courts' distaste for the *Auerbach* rule, other courts quickly followed *Maldonado v. Flynn, supra. See Maher v. Zapata Corp.*, 490 F. Supp. 348 (S.D. Tex. 1980) (Delaware law) (disregarding two federal decisions); *Abella v. Universal Leaf Tobacco Co., Inc.*, 495 F. Supp. 713 (E.D. Va. 1980) (Virginia law) (denying motion to dismiss) (business judgment rule

3. The paucity of detailed judicial analysis *pro or con* is undoubtedly responsible. *See* G. Dent, The Power of Directors to Terminate Shareholder Litigation: The Death of the Derivative Suit?, 75 N.W. U. L. Rev. 96 (1980) [hereinafter Dent].

"irrelevant"), *summary judgment granted*, 546 F. Supp. 795 (E.D. Va. 1982) (applying *Zapata*).

Our review of the case law indicates that the majority of jurisdictions which have considered the matter have adopted either *Auerbach* or *Zapata*, although this trend has not been unanimous or devoid of controversy. We also must bear in mind that whether corporate boards can dispose of derivative litigation by committees remains essentially a question of state law. *Burks v. Lasker, supra.* Many of the federal decisions *predict* state court rulings on a truly novel question of law, *e.g., Lewis v. Anderson, supra; Genzer v. Cunningham, supra*, and therefore diminish in persuasiveness.

Commentators have expressed concern over the continued vitality of the derivative suit in light of the development of special committees. *See in particular* Dent, *supra* note 3; J. Cox, Searching for the Corporation's Voice in Derivative Suit Litigation: A Critique of *Zapata* and the ALI Project, 1982 Duke L. J. 959 (hereinafter Cox); R. Brown, Shareholder Derivative Litigation and the Special Litigation Committee, 43 U. Pitt. L. Rev. 601 (1982) (hereinafter Brown). Dent in particular criticizes the structural deficiencies in the committee device and the courts' inattention to the myriad intracorporate pressures on allegedly disinterested directors. The committee device, he argues, has effectively shifted to plaintiffs the burden of proof as to the independence of the committee and the reasonableness of the decision not to sue. Moreover, the committee decision is typically made with the assistance of neutral counsel and out of court; the plaintiff's position is not vigorously represented and no possibility exists to compel truthful testimony or suggest changes in the law. *Id.* Dent accordingly makes numerous proposals, including placing the burden of proof on the corporation on its motion to dismiss or for summary judgment, allowing at least limited discovery of committee members, requiring consultation with plaintiffs on selection of counsel, and requiring the committee to explain with particularity the facts and assumptions underlying each reason for the decision not to sue. *Id. See also* Brown, *supra* (proposing clear, cogent, and convincing evidence standard). Following the path set by the cases to date, Dent suggests, will mean the death of derivative suits. While Cox is not as sanguine about the ill effects of the special committee device, he criticizes even the more

active *Zapata* approach as according too great deference to committee decisions and not adequately addressing "structural bias." Finally, Dent, *supra* note 3 (footnote omitted) summarizes the state of the law thus:

> It is doubtful whether the shareholders' derivative suit deserves the sudden interment it is being given. At the very least, pronouncement of this death sentence by the courts constitutes unjustifiable judicial legislation. More shocking is that the courts have neither offered a rationale for condemning the derivative suit nor even acknowledged that they have condemned it. One hopes that the courts simply do not realize that they are endangering the derivative suit and that once they do realize it they will act quickly to reverse the trend by significantly restricting the board's power to terminate derivative suits.

We now must adopt a rule to guide the North Carolina courts. Having reviewed the case law and the commentators, and with due regard to the realities of the situation, we conclude that the approach adopted by the Supreme Court of Iowa in *Miller v. Register And Tribune Syndicate, Inc., supra* must control. The varying degrees of judicial intervention proposed by the various commentators provide too many complications and possibilities for litigation-extending error. And the sweep of the business judgment rule is too broad, once applied, to allow meaningful review. A simple prophylactic rule will better serve the courts in dealing with this sort of case, and further the legislative policy favoring derivative litigation. Accordingly we hold, as did the Iowa court, that directors of North Carolina corporations who are parties to a derivative action may not confer upon a special committee of the board of directors the power to bind the corporation as to its conduct of the litigation.

Practical considerations reinforce our decision. First, we note that the duty required of corporate directors is a strict one, *Meiselman v. Meiselman, supra*, and when breach of that duty is alleged in a derivative suit the directors bear a heavy burden of proof when seeking to dispose summarily of the action. Since subjective intent is frequently involved, summary disposition is not favored, *see Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980), and plaintiffs will have a better opportunity to develop

their case. Should we adopt the majority view, however, the burden would effectively be shifted to plaintiff stockholders to show interest, a most difficult task in view of stockholders' lack of access to corporate records and information and of the many levels of financial, social, occupational, and psychological pressures that a corporation's board may be in a position to exert.

Moreover, our review of the cases yields one telling statistic: not one committee, in all these instances, has decided to proceed with suit. Some have recognized the existence of valid claims and settled them, as in the present case, but these have generally constituted a minor portion of the overall claim, as also happened here. This strongly suggests that the problem of structural bias is indeed real.

The business judgment rule has been traditionally used by our courts as a defense *on the merits* to allegations of fraud, not as a procedural device to dispose of derivative litigation. *See Gaines v. Manufacturing Co.*, 234 N.C. 331, 67 S.E. 2d 355 (1951); *Bank v. Bridgers*, 207 N.C. 91, 176 S.E. 295 (1934); *Swenson v. Thibaut, supra; Milling Co., Inc. v. Sutton*, 9 N.C. App. 181, 175 S.E. 2d 746 (1970). It served in the cited cases as an evidentiary standard *in court* to test the sufficiency of the *facts* offered by plaintiff, not as a defense as a matter of law. By adopting the committee approach, and focusing only on disinterest and procedure, we would remove those facts and circumstances from judicial scrutiny. Thus the courts would effectively be bypassed. This we will not allow, any *dicta* in *Swenson* notwithstanding.

Having reached this decision, we discuss briefly its import. We have not abolished the special committee device altogether; it remains viable, particularly where the derivative suit seeks action by the corporation against third-party outsiders. We express no opinion on the use of special committees where the suit alleges wrongdoing by a minority of the board or by single "control persons." Summary judgment will remain an appropriate device where plaintiffs bring suits of little or no merit, and protective orders are available to protect corporations against discovery "fishing expeditions" into irrelevant areas. N.C. Gen. Stat. § 1A-1, Rules 56, -26 of the Rules of Civil Procedure (1983). Consistent with our application of the business judgment rule, such summary judgment must however be on the merits of the decision, not on

the adequacy of intracorporate procedures used to determine those merits.

Corporations represent the dominant form of business organization in this state. They exist at the sufferance of the state and under a legal framework established by the state. Their directors have a high and strict duty to avoid impropriety. Under these circumstances, the courts cannot abdicate their critical fact-finding role as guardians of the public interest to internal corporate committees.

Applying the rule and policy we have established to the facts before us, the court clearly erred in granting summary judgment. The named defendants were members of the Board that selected the Committee, and as such could not delegate to the Committee the authority to terminate plaintiffs' suit. Plaintiffs' expert affidavit, treated indulgently, tends to show a pattern of corrupt dealings, instigated by the Shaw group and approved by the other defendants, clearly justifying relief far beyond the minor settlements arranged by the Committee. Summary judgment was thus inappropriate. Accordingly, the judgment entered must be vacated and the cause remanded for further proceedings consistent with this opinion.

Vacated and remanded.

Judges HEDRICK and EAGLES concur.

DARLENE PEED (NOW BENNETT) v. WILLIAM LINTON PEED

No. 849SC140

(Filed 5 February 1985)

1. Partnership § 1.1— dairy operation—existence of partnership between spouses—directed verdict improper

The trial court erred in directing verdict against plaintiff on her claim of partnership in a dairy business with her former husband where a jury could infer from the registration of cattle, the financing of the dairy operation, plaintiff's description of her conversations with defendant concerning a partnership arrangement, and plaintiff's contribution of time and money to the dairy operation that a partnership, an association of two or more people to carry on as co-

owners a business for profit, existed; furthermore, there was no merit to defendant's argument that the jury's finding that the parties were not co-owners of the dairy herd made the judge's error on the directed verdict harmless, since the fact that one partner owns certain property in the business, or provides the capital, while the other performs certain services does not mean that they are not co-owners of the business.

2. **Rules of Civil Procedure § 15; Partnership § 3— plaintiff's interest in partnership property—motion to amend complaint improperly denied**

Defendant could not have been surprised or prejudiced when plaintiff sought to add to her complaint a cause of action alleging that she owned a one-half undivided interest in dairy cattle, farm equipment and milk base, and the trial court erred in denying plaintiff's motion to so amend her complaint where plaintiff alleged that she and defendant were business partners and should share equally in the remainder of the partnership assets, that, in the alternative, she had loaned defendant money for use in the farming operations which should be repaid, that, in the alternative, she and defendant had a joint venture in the farming operation and that she should recover a portion of the accumulated assets of the joint venture, and that she was entitled to a constructive trust upon one-half of the proceeds of the sale of the dairy cows; both plaintiff and defendant testified that they were co-owners of the cattle, and over two hundred registration certificates reflecting the parties' co-ownership were introduced into evidence.

3. **Husband and Wife § 4.1— dairy operated by husband and wife—confidential relationship—failure of court to instruct erroneous**

In an action by plaintiff to recover her share of a dairy operated by the parties while husband and wife and continued by defendant after their separation, the trial court committed reversible error by failing to give the jury an instruction concerning the confidential relationship which exists between husband and wife and which must be upheld in dealings between husbands and wives.

4. **Partnership § 6; Trial § 35— dairy operation—registration certificates for cows—peremptory instruction as to ownership not required**

In an action by plaintiff to recover her share of a dairy operation, the trial court did not err in failing to give the jury a peremptory instruction to the effect that the registration certificates for cattle, titled in the names of both parties, made plaintiff an owner of a one-half undivided interest as tenant in common of the cattle with defendant, since defendant testified to the contrary, and a peremptory instruction would have been improper in light of the conflict in the evidence.

APPEAL by plaintiff from *Herring, J.* Judgment entered 16 September 1983 in Superior Court, GRANVILLE County. Heard in the Court of Appeals 25 October 1984.

The plaintiff, Darlene Peed (now Bennett), married the defendant, W. L. Peed, in 1955. Prior to their marriage defendant

had been engaged in a farming and dairy operation. Defendant continued the operation after their marriage. At the time of the marriage, plaintiff contributed $3,000 in savings to the operation, and after marriage contributed part of her earnings from work at the Liggett and Myers Tobacco Company to the expenses of the dairy. In 1957 or 1958, the defendant, at his wife's insistence, jointly listed both their names on the registration certificates of certain cows in the dairy herd.

The Peeds were separated in 1977 and later divorced. In 1978, during the period of their separation, defendant sold the dairy cows, and the increase therefrom, for $38,000. He did not pay any of this to plaintiff, although she claimed one-half of it.

The plaintiff filed for divorce on 26 February 1979 and on 10 December 1979 the divorce was granted. Plaintiff filed this suit on 4 December 1980, claiming a one-half interest in the sale proceeds of the dairy herd, and in other property connected with the farming and dairy operation. She alleged four causes of action based on the following theories: partnership, loan, joint venture, and constructive trust. She attempted to add a fifth cause of action, but her motion to amend was denied. The trial judge rendered directed verdicts against plaintiff on the partnership, loan and joint venture causes, but allowed the issue of constructive trust to go to the jury. After the jury found against the plaintiff on this last issue, she moved for judgment non obstante verdicto. The motion was denied. Plaintiff appeals the denial of her motion to amend, the grant of directed verdict on the partnership claim, and the denial of her motion JNOV, as well as other alleged errors made at trial.

Watkins, Finch & Hopper, by William L. Hopper, for plaintiff appellant.

Edmundson & Catherwood, by R. Gene Edmundson, Robert K. Catherwood, and John W. Watson, Jr., for defendant appellee.

ARNOLD, Judge.

The plaintiff contends that the trial court erred by granting the defendant's motion for a directed verdict on the issue of whether or not the plaintiff and defendant were partners. A directed verdict motion concerns whether evidence is sufficient to

go to the jury. *Rappaport v. Days Inn of America, Inc.*, 296 N.C. 382, 384, 250 S.E. 2d 245, 247 (1979). In passing on such a motion, the trial judge must consider the evidence in the light most favorable to the non-movant (in this case, the plaintiff), resolving all conflicts and giving to her the benefit of every inference reasonably drawn in her favor. *Summey v. Cauthen*, 283 N.C. 640, 647, 197 S.E. 2d 549, 554 (1973). The trial judge should grant a motion for directed verdict only if the evidence is insufficient, as a matter of law, to support a verdict for the plaintiff. *Husketh v. Convenient Systems, Inc.*, 295 N.C. 459, 461, 245 S.E. 2d 507, 509 (1978).

Under the North Carolina Uniform Partnership Act, a "partnership" is defined as "an association of two or more persons to carry on as co-owners a business for profit." G.S. 59-36(a). The statute, G.S. 59-37, sets out factors to be considered in determining whether a partnership exists:

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

a. As a debt by installments or otherwise,

b. As wages of an employee or rent to a landlord,

c. As an annuity to a widow or representative of a deceased partner,

d. As interest on a loan, though the amount of payment vary with the profits of the business,

e. As the consideration for the sale of a goodwill of a business or other property by installments or otherwise.

Thus, for example, if a person merely makes repayable advances and loans of money to another, it cannot be inferred from that fact that they are partners. *McGurk v. Moore*, 234 N.C. 248, 253, 67 S.E. 2d 53, 56 (1951). Further, if one person is an employee of another, and receives wages, then the two are not partners. *Williams v. Biscuitville, Inc.*, 40 N.C. App. 405, 253 S.E. 2d 18 (1979), *disc. rev. denied*, 297 N.C. 457, 256 S.E. 2d 810 (1979).

We stress that the determination of whether a partnership exists, and whether the parties are co-owners, involves examining all the circumstances. As the court in *Eggleston v. Eggleston*, 228 N.C. 668, 47 S.E. 2d 243 (1948), wrote:

> "Partnership is a legal concept but the determination of the existence or not of a partnership, as in the case of a trust, involves inferences drawn from an analysis of 'all the circumstances attendant on its creation and operation,'" [citations omitted].
>
> Not only may a partnership be formed orally, but "it may be created by the agreement or conduct of the parties, either express or implied," [citations omitted] . . . . "A voluntary association of partners may be shown without proving an express agreement to form a partnership; and a finding of its existence may be based upon a rational consideration of the acts and declarations of the parties, warranting the inference that the parties understood that they were partners and acted as such." [Citation omitted.]

228 N.C. at 674, 47 S.E. 2d at 247, *quoted in Reddington v. Thomas*, 45 N.C. App. 236, 240, 262 S.E. 2d 841, 843 (1980).

[1] Considering all the evidence in the light most favorable to the plaintiff, we find that the plaintiff did present evidence sufficient to carry the matter of partnership to the jury. The plaintiff testified that she and the defendant conducted the farming operation together. At the time of their marriage, both were employed off the farm, and used their earnings to pay farm expenses. Plaintiff brought her savings of around $3,000 into the marriage, and invested that into the farming operation. The farm was in con-

siderable debt at the time the Peeds were married. Plaintiff testified that she discussed the finances of the farm with her husband, saying that she was not going to continue putting her earnings into the farm and signing notes, when she had no part of it, and received no share of the profits.

Plaintiff testified further that she and defendant reached an agreement that they would become partners in the dairy, that the dairy cows would be registered in both their names, and that the title of the farm would be changed to contain both their names. Defendant quit his public job in 1958 to devote more time to the farm. Plaintiff testified that they discussed from time to time the progress of the farm, and farm purchases, that plaintiff went to the farm almost daily, and that she wrote checks on a joint account kept for the dairy farm. She testified that she and her husband, although separated, discussed the need to sell the dairy cattle, and the price of sale. Plaintiff testified that she did not know whether she and defendant filed a partnership income tax return, and that income tax matters were handled by defendant and accountants.

Defendant testified that he changed the registration of the cows to contain both his and plaintiff's names because the plaintiff had said that if she were the owner, the defendant's family could not take them if something happened to defendant. Defendant also testified that he changed the registration not so much to protect plaintiff, as to stop her from talking to him about it each day. Yet, defendant also testified that the joint registration showed that both he and plaintiff were owners of the cows. He testified that he changed the deeds of the land on which the dairy was operated to add plaintiff's name. Defendant testified that plaintiff did not have much time to work on the farm, with her job at Liggett & Myers; that her earnings from Liggett & Myers were spent on groceries and clothes; and that his wife could have signed notes in the dairy operation back through the years, although he had difficulty remembering. Finally, defendant testified that the money from sale of the cows was his, although he admitted that the cows were bought partly through the sale of milk produced by cows owned by him and plaintiff.

Considering this evidence in the light most favorable to the plaintiff, and therefore believing plaintiff's testimony as true, we

find that a jury could infer from the registration of the cattle, the financing of the dairy operation, plaintiff's description of her conversations with defendant, concerning a partnership arrangement, and of her contribution of time and money to the dairy operation that a partnership, an association of two or more persons to carry on as co-owners a business for profit, existed. The evidence was sufficient to produce a question for the jury, and we therefore hold that the trial judge's grant of a directed verdict against plaintiff on the partnership issue was reversible error.

We note that while the registration certificates do not give title, nonetheless, they are evidence of ownership. Indeed, the defendant conceded that by changing the certificates he made himself and his wife co-owners.

Further, we reject defendant's argument that the jury's finding that the parties were not co-owners of the dairy herd made the judge's error on the directed verdict harmless. The partnership statute provides that a partnership is an association of persons as *co-owners of a business.* The fact that one partner owns certain property in the business, or provides the capital, while the other performs certain services, does not mean that they are not co-owners of the *business. Southern Fertilizer Co. v. Reames,* 105 N.C. 283, 11 S.E. 467 (1890). The plaintiff testified that she told her husband that since she contributed her money to the dairy expenses and debts, she wished to have a part in the operation and a share of the profits. He agreed that they would become partners, that the dairy cows would be re-registered in both their names, and that title to the farm would be changed to both their names. The plaintiff contributed considerable money to the operation as well as her time in managing and doing bookkeeping. Even if the defendant was sole owner of the herd, the plaintiff's testimony provides evidence of an agreement which gave her an interest in the operation and a share of the profits, as well as evidence of her contribution in money and effort to the business. This was sufficient as a matter of law to take the issue to the jury.

[2] The plaintiff claims that the trial court abused its discretion and committed reversible error in refusing to grant plaintiff's motion to amend her complaint under Rule 15(b) to conform the complaint to the evidence by stating an additional cause of action,

that the plaintiff owned a one-half undivided interest in the cattle, farm equipment, and milk base. The defendant claims that the trial court did not abuse its discretion, because the defendant would have been prejudiced by the amendment. Prejudice, the defendant asserts, would have arisen because the pleadings did not alert the defendant that the issue of joint ownership was crucial to plaintiff's case, and that evidence such as the registration certificates were directed to that issue. The defendant also notes the time elapsed between commencement of the plaintiff's suit and the filing of the motion to amend as reason for the denial of the plaintiff's motion to amend.

Rule 15(b) provides in pertinent part: that the trial judge "may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him. . . ."

Rule 15(b) represents a departure from the former strict code doctrine of variance by allowing issues to be raised by liberal amendments to pleadings, and in some cases, by the evidence. *Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972). For amendment to be proper under this rule, "there must be evidence of an unpleaded issue introduced without objection, and it must appear that the parties understood, or at least reasonably should have understood, that the evidence was aimed at an issue not expressly pleaded." *Evans v. Craddock*, 61 N.C. App. 438, 444, 300 S.E. 2d 908, 913 (1983). Yet, even when the evidence is objected to on the grounds 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 its merits." *Roberts v. Memorial Park*, 281 N.C. 48, 58, 187 S.E. 2d 721, 727 (1972). The party who objects to the amendment has the burden of proving prejudice. *Evans v. Craddock*, 61 N.C. App. 438, 444, 300 S.E. 2d 908, 913 (1983); *Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977). We note that it is not error to allow an amendment to conform made late in the trial, even after the jury arguments. *Reid v. Consolidated Bus Lines*, 16 N.C. App. 186, 191 S.E. 2d 247 (1972). Finally, our standard of review of this matter is whether the trial judge committed an abuse of discretion in refusing to

grant the motion. *Evans v. Craddock*, 61 N.C. App. 438, 445, 300 S.E. 2d 908, 913 (1983).

Although the trial judge had broad discretion in considering whether to allow amendments, we believe that in this case justice would better have been served by allowing amendment of the complaint. The plaintiff presented four causes of action in her complaint: (1) that she and defendant were business partners and should share equally in the remainder of the partnership assets; (2) that, in the alternative, she had loaned the defendant money for use in the farming operations, which should be repaid; (3) that, in the alternative, she and defendant had a joint venture in the farming operation, and that she should recover a portion of the accumulated assets of the joint venture; and (4) that plaintiff was entitled to a constructive trust upon one-half of the proceeds of the sale of the dairy cows.

The complaint frequently alleges that plaintiff and defendant were joint owners of the property in the tobacco and dairy businesses and shared equally in the profits from those businesses, which were not reinvested. In particular, the plaintiff claimed that she owned a one-half interest in the dairy cattle. The plaintiff demanded in the complaint one-half of the proceeds of farm equipment sold and farm products raised and sold from and after 1 January 1977. In light of these allegations in the complaint, as well as plaintiff's and defendant's testimony that they were co-owners of the cattle, and the introduction into evidence of over two hundred registration certificates reflecting their co-ownership, we do not see how defendant could have been surprised or prejudiced when plaintiff sought to add to the complaint a cause of action alleging that plaintiff owned a one-half undivided interest in the cattle, farm equipment and milk base. Thus, although defendant may have objected to the introduction of the registration certificates as outside the pleadings, defendant's complete failure to meet its burden of showing prejudice—indeed his own admission that the certificates did reflect joint ownership—convinces us that the trial judge should have allowed amendment of the complaint in order that the merits of the case could have been presented to the jury in a more intelligible fashion. Indeed, the fact that the trial judge made the issue of joint ownership of *the dairy herd alone* the fulcrum of this case, when he would not permit the plaintiff to better define the issue

of joint ownership of the rest of the farming operation, suggests that the way in which the case was framed, and the outcome of the trial, were affected by the refusal to allow plaintiff to clarify her allegations on the ownership issue. In the interim, between filing of this opinion and retrial, the pleadings should be amended to add the issue of joint ownership of the dairy herd, milk base and farming equipment. *See Mangum v. Surles*, 281 N.C. 91, 187 S.E. 2d 697 (1972).

[3] The plaintiff alleges that the trial court abused its discretion and committed reversible error by failing to give the jury an instruction concerning the confidential relationship which exists between husband and wife, and which must be upheld in dealings between husbands and wives. We agree that the failure to instruct on this confidential relationship was serious error. As a matter of law, the relationship between the Peeds was one of husband and wife, the most confidential of all, *see Cline v. Cline*, 297 N.C. 336, 344, 255 S.E. 2d 399, 404 (1979); *Fulp v. Fulp*, 264 N.C. 20, 23, 140 S.E. 2d 708, 711 (1965). Moreover, the fact that the Peeds had separated did not in any way diminish the confidentiality of the relationship, unless the wife employed an attorney during the period of separation and dealt through him with her husband as an adversary, *see Joyner v. Joyner*, 264 N.C. 27, 32, 140 S.E. 2d 714, 719 (1965). The evidence suggests that she had not employed an attorney at that stage.

Further, the trial judge dispensed with all issues except for that of constructive trust, which often, if not usually, involves a violation or abuse of a confidential relationship, *see Bowen v. Darden*, 241 N.C. 11, 84 S.E. 2d 289 (1954); *Newton v. Newton*, 67 N.C. App. 172, 312 S.E. 2d 228 (1984). Yet, he gave only general instructions as to what a confidential relationship is. Given that the Peeds were husband and wife at the time of the sale of the dairy herd, that as a matter of law their relationship was therefore confidential, and that plaintiff asserted this relationship as a material aspect of her case for constructive trust, the trial judge erred in refusing to instruct the jury as to the confidentiality of the Peeds' relationship as husband and wife. *See Overman v. Saunders*, 4 N.C. App. 678, 680, 167 S.E. 2d 536, 537-38 (1969). On retrial, the trial judge should instruct as to the confidentiality of their relationship.

The plaintiff contends that the trial court committed reversible error by granting the defendant's motion in limine to exclude all testimony concerning the defendant's abuse of alcohol and by failing to permit the plaintiff to include in the record what the plaintiff would have testified to concerning defendant's abuse of alcohol. The power to grant a motion in limine is within the discretion of the trial court. *Duke Power v. Mom and Pop's Ham House, Inc.*, 43 N.C. App. 308, 258 S.E. 2d 815 (1979). The trial judge found that evidence of alcoholism was not relevant to the issues in the case, but also found that if later the evidence should appear relevant, then the court would make other orders. The plaintiff's counsel did not ask to submit the alcoholism testimony into the record at that time, nor did they request the court to alter its order later to admit the testimony at trial. Rather, they waited until the conclusion of the instruction conference, and requested to submit the evidence into the record at that time. Defendant's request to enter the testimony at that time was not a reasonable one, and we find that the trial judge, in light of his duty to maintain the progress of the trial, properly denied their request.

[4] Plaintiff contends also that the trial court abused its discretion and committed reversible error by failing to give the jury a peremptory instruction to the effect that the registration certificates for the cattle, titled in the name of both plaintiff and defendant, made the plaintiff an owner of a one-half undivided interest as tenant in common of the cattle with the defendant. As to this issue, the plaintiff had the burden of proof. "It is settled law that a peremptory instruction in favor of the party upon whom rests the burden of proof is proper when there is no conflict in the evidence and all the evidence tends to support the party's right to relief." *Braswell v. Purser and Purser v. Braswell*, 16 N.C. App. 14, 25, 190 S.E. 2d 857, 864, *affirmed* 282 N.C. 388, 193 S.E. 2d 90 (1972). In the present case, although the registration certificates listed the husband and wife as co-owners, the husband testified to the contrary. In view of this conflict in the evidence, the trial judge properly refused to give a peremptory instruction.

Since we have granted a new trial, we have no need to reach the plaintiff's contention regarding the trial court's denial of her motion for judgment notwithstanding the verdict.

We remand for retrial upon amended pleadings.

New trial.

Judges WELLS and BECTON concur.

MAUREEN SCHNEIDER AND THOMAS SCHNEIDER v. WILLIAM B. BRUNK, D.D.S.; BRUCE V. WAINRIGHT, D.D.S. AND BRUCE V. WAINRIGHT, D.D.S., P.A.

No. 8310SC1314

(Filed 5 February 1985)

1. **Appeal and Error § 6.2— all claims not disposed of—substantial right affected—appeal proper**

Though the trial court's order did not totally dispose of all of plaintiff's claims against two defendants and did not dispose of any of their claims against the third defendant, nor did the trial court certify in its order that there was no just reason for a delay in entering the final judgment, plaintiffs could still appeal from the order because it affected a substantial right in that plaintiffs were faced with the possibility of inconsistent verdicts; they were faced with the virtual eradication of their claims against the two defendants; there was a strong likelihood that the trial court would make the same ruling on the third defendant's motion to dismiss; and many of the facts to be proved in the claims against the three defendants were identical and/or very closely related in time.

2. **Physicians, Surgeons and Allied Professions § 13— dental malpractice—accrual of cause of action from last act by defendant—determination of "last act"**

In an action for dental malpractice based on defendant's alleged failure to diagnose and treat plaintiff's periodontal disease, defendant's "last act" within the meaning of G.S. 1-15(c) occurred on the date of plaintiff's last routine dental checkup by defendant, 27 October 1978, and plaintiffs' cause of action accrued on that date, not in January 1977 when defendant extracted four of plaintiff's teeth.

Judge ARNOLD dissenting.

APPEAL by plaintiffs from *Smith, Judge*. Order entered 12 August 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 27 September 1984.

Crisp, Davis, Schwentker & Page, by Cynthia M. Currin, for plaintiff appellants.

Moore, Ragsdale, Liggett, Ray & Foley, P.A., by Jane Flowers Finch, for defendant appellees.

BECTON, Judge.

This case deals with the application of the malpractice statute of limitations, N.C. Gen. Stat. Sec. 1-15(c) (1983), to a dental malpractice action involving a failure to diagnose and treat a periodontal disease.

On 12 November 1981 the plaintiffs, Maureen Schneider and her husband, Thomas Schneider, instituted this action to recover damages for the defendants' negligent treatment of Mrs. Schneider. The Schneiders alleged that the defendants, Bruce V. Wainright, D.D.S., a dentist, and his corporate entity, Bruce V. Wainright, D.D.S., P.A. (hereinafter referred to as the Wainright defendants) negligently treated Mrs. Schneider from October 1976 until 27 October 1978. The Schneiders further alleged that the defendant, William B. Brunk, D.D.S. (Brunk), an orthodontist, negligently treated Mrs. Schneider from October 1976 until 2 November 1978.

All the defendants filed motions to dismiss based on the statute of limitations under N.C. Gen. Stat. Sec. 1A-1, Rule 12(b)(6) (1983). The trial court treated the Wainright defendants' motion to dismiss as a motion for summary judgments under N.C. Gen. Stat. Sec. 1A-1, Rule 56 (1983), after considering matters outside the pleadings, including depositions. From its grant of partial summary judgment to the Wainright defendants on all claims arising prior to 23 October 1978, the Schneiders appeal.

I

The Wainright defendants contend that this interlocutory appeal is premature and therefore should be dismissed. All the parties have stipulated in the record on appeal that Brunk's Rule 12(b)(6) motion to dismiss based on the statute of limitations has never been "heard, ruled upon, withdrawn, dismissed, or in any way disposed of at any time during the pendency of this matter." Moreover, all the parties have stipulated in the record that Brunk is not a participant in this appeal.

[1] Is the trial court's order granting the Wainright defendants partial summary judgment subject to appellate review at this juncture? The order did not totally dispose of all the Schneiders' claims against the Wainright defendants, nor did it dispose of any of their claims against Brunk. Significantly, the trial court did not certify in the order that there was no just reason for delay in entering a final judgment. Therefore, under G.S. Sec. 1A-1, Rule 54(b) (1983) no appeal would ordinarily lie. However, the order may still be appealable of right if it affects a "substantial right." N.C. Gen. Stat. Sec. 1-277(a) (1983); N.C. Gen. Stat. Sec. 7A-27(d) (1981).

The facts and circumstances of each case and the procedural context of the orders appealed from are the determinative factors in deciding whether a "substantial right" is affected. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). Recently our Supreme Court held that a plaintiff's right to have all his claims against joint tortfeasors heard before the same jury affects a substantial right. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982) (possibility of inconsistent verdicts); *see also Swindell v. Overton*, 62 N.C. App. 160, 302 S.E. 2d 841 (1983), *rev'd on other grounds*, 310 N.C. 707, 314 S.E. 2d 512 (1984).

In the case before us the Schneiders are not only faced with the possibility of inconsistent verdicts, but they are also faced with the virtual eradication of their claims against the Wainright defendants. Originally they sought damages for the two-year period from October 1976 until 27 October 1978. The entry of partial summary judgment for the Wainright defendants reduced the Schneiders' claim to the four-day period from 23 through 27 October 1978. There was only one contact between Mrs. Schneider and the Wainright defendants during that time. The remaining four-day claim is a symbolic vestige of the original Complaint. Moreover, there is a strong likelihood that the trial court will make the same ruling on Brunk's Rule 12(b)(6) motion. Further, many of the facts to be proved in the claims against the three defendants are identical and/or very closely related in time. *See Estrada v. Jaques*, 70 N.C. App. 627, 321 S.E. 2d 240 (1984). Therefore, we are persuaded that a "substantial right" is affected and the Schneiders' appeal is before this Court of right.

II

Maureen Schneider first consulted Dr. Wainright in October 1976 after she and her husband moved to Raleigh, North Carolina. At the time she was aware of limited periodontal problems—gingival recession and shifting teeth. In fact, she had been treated by a periodontist for several months prior to the move. She told Dr. Wainright that her periodontist had recommended that her new dentist again refer her to a periodontist. In its brief, the Wainright defendants acknowledge that in October 1976 Dr. Wainright "found that Mrs. Schneider suffered from generalized recession, and food impaction problems." However, Dr. Wainright suggested an alternate form of treatment to Mrs. Schneider; he referred her to an orthodontist, Dr. Brunk, rather than a periodontist. On 10 and 24 January 1977 Dr. Wainright extracted a total of four of Mrs. Schneider's teeth. In February 1977 Brunk placed orthodontic appliances (braces) on the remaining teeth. Mrs. Schneider continued seeing Dr. Wainright for regular checkups until 27 October 1978, a total of six visits subsequent to the extractions. In their Complaint, the Schneiders allege the following negligent acts:

> 28. The defendants failed to diagnose the existence of a periodontal disease in the plaintiff when such disease should have been evident in the exercise of the degree and professional skill and judgment ordinarily exercised by a member of their professions similarly situated.
>
> 29. Defendants failed to note the marked progression of the periodontal disease in the plaintiff even though such progression was readily visible and was apparent in the exercise of the degree of care and professional skill and judgment ordinarily exercised by a member of the defendants' profession, similarly situated.
>
> 30. As a result of the orthodontic treatment provided to plaintiff Maureen Schneider, by defendants Bruce V. Wainright and William B. Brunk, whereby four more healthy bicuspid teeth were removed from Maureen Schneider, there was excessive movement of the surrounding teeth, resulting in dental problems including but not limited to root resorption, gaps between the molar teeth and severe periodontal problems and periodontal disease.

31. The orthodontic treatment caused or aggravated the periodontal problems and periodontal disease resulting in severe damage to the gum tissue and bone of plaintiff.

32. Defendants Bruce V. Wainright and William B. Brunk were negligent in failing to provide proper diagnosis and treatment to plaintiff Maureen Schneider in removing four extra teeth and placing braces on the plaintiff's remaining teeth.

33. Defendants Bruce V. Wainright and William B. Brunk were negligent in removing more teeth than necessary, and in placing braces on plaintiff's teeth.

According to the Schneiders, the proximate results of the three defendants' negligence included:

> extensive periodontal surgery including but not limited to soft tissue grafts, gingival flaps, bone grafts, bone surgery, and periodontal prophylaxis, and extensive reconstructive work on [Mrs. Schneider's] teeth including but not limited to root canal therapy on two of her teeth and the placement of crowns on other teeth in order to fill the gaps between her teeth and to attain maximum gingival health.

[2] The Schneiders argue on appeal that the malpractice statute of limitations, G.S. Sec. 1-15(c) (1983), is not a bar to their claims against the Wainright defendants for the period from October 1976 through 22 October 1978; the statute did not begin to run until Mrs. Schneider's last dental visit with Dr. Wainright on 27 October 1978. For the following reasons we agree and conclude that the trial court erred in granting partial summary judgment for the Wainright defendants on the statute of limitations defense.

Summary judgment may be granted when the movant establishes a complete defense. *Ballinger v. Dep't 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). In ruling on the motion the trial court must accept the evidence in favor of the non-movant in the light most favorable to that party, with all reasonable inferences therefrom. *Whitley v. Cubberly*, 24 N.C. App. 204, 210 S.E. 2d 289 (1974). The trial court must consider all papers before it, including the pleadings and any depositions. *Estrada v. Jaques*.

We begin our analysis with the plain language of the relevant statute, G.S. Sec. 1-15(c) (1983). It provides, in pertinent part, that: "a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of *the last act* of the defendant giving rise to the cause of action. . . ." *Id.* (Emphasis added.) As can be seen, G.S. Sec. 1-15(c) establishes two separate grounds for malpractice: (1) the performance of professional services; and (2) the failure to perform professional services.

The Wainright defendants assert that the teeth extraction in January 1977 was Dr. Wainright's "last act," since all subsequent contacts were "routine dental checkups." They mistakenly rely on *Stanley v. Brown*, 43 N.C. App. 503, 259 S.E. 2d 408 (1979), *disc. rev. denied*, 299 N.C. 332, 265 S.E. 2d 397 (1980). In *Stanley* the plaintiff discovered a protrusion on the left side of her vagina several days after the defendant doctor had operated on her vagina. During two follow-up visits to the defendant doctor, he did not acknowledge any negligence. Another doctor informed plaintiff that the defendant had incorrectly performed the operation. This Court held that the date of the plaintiff's operation was the time of the defendant's "last act," although plaintiff had had two follow-up visits. Thus, in *Stanley*, the plaintiff's injury and the defendant's malpractice occurred through the defendant's performance during the operation.

Stanley is distinguishable from this case. Here, the defendant's *failure to perform* is the grounds for the malpractice action. The Schneiders allege that Dr. Wainright failed to diagnose and treat Mrs. Schneider's periodontal disease over a prolonged period of time. From Dr. Wainright's deposition testimony it is clear that each "routine dental check-up" was a separate opportunity to discover periodontal problems. He admitted in his deposition joint ongoing responsibility with Dr. Brunk, while Mrs. Schneider was in his care, for monitoring her periodontal condition and referring her to a periodontist if there were any deterioration. Consequently, Dr. Wainright's duty to diagnose and treat Mrs. Schneider's periodontal disease did not terminate with the teeth extraction; it continued for the entire time she was under his care. *See Sunbow Industries, Inc. v. London*, 58 N.C. App. 751, 294 S.E. 2d 409, *disc. rev. denied*, 307 N.C. 272, 299 S.E. 2d 219 (1982) (attorney's continuing duty to file financing state-

ment). Therefore, the Schneiders' cause of action accrued on 27 October 1978, the date of the last "routine dental checkup." The visit on 27 October 1978 signified the "last act" of Dr. Wainright —in this case—his last neglected opportunity to diagnose and treat Mrs. Schneider's periodontal disease.

We hold that the trial court erred in granting the Wainright defendants' partial summary judgment on all claims arising prior to 23 October 1978.

Vacated and remanded.

Judge PHILLIPS concurs.

Judge ARNOLD dissents.

Judge ARNOLD dissenting.

Because I believe the order appealed from does not affect a substantial right, I would dismiss the appeal as premature.

N.C. Gen. Stat. Sec. 1-277 in pertinent part provides:

> (a) An appeal may be taken from every judicial order . . . which affects a substantial right claimed in any action or proceeding. . . .

N.C. Gen. Stat. Sec. 7A-27(d) in pertinent part provides:

> From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which
>
> (1) Affects a substantial right . . .
>
> . . .
>
> appeal lies of right directly to the Court of Appeals.

Our courts have recognized that these statutes run counter to the policy discouraging the delay and expense of fragmented appeals, and so have held that the statutes permitting immediate appeal of interlocutory orders should be strictly construed. *See, e.g., Buchanan v. Rose*, 59 N.C. App. 351, 296 S.E. 2d 508 (1982); *Funderburk v. Justice*, 25 N.C. App. 655, 214 S.E. 2d 310 (1975). Recognizing this "restricted view of the 'substantial right' excep-

tion," this Court, in *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 334, 299 S.E. 2d 777, 780 (1983) recently said:

> [A]voidance of a rehearing or trial is not a "substantial right" entitling a party to an immediate appeal. [Citations omitted.] The right must be one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment. In other words, the right to immediate appeal is reserved for those cases in which the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed.

Id. at 335, 299 S.E. 2d at 780-81.

The majority bases its conclusion that the order in the instant case affects a substantial right on four considerations. I find each of the factors relied on by the majority to be unpersuasive in light of the facts and circumstances of this case, and will discuss each factor in turn.

First, says the majority, plaintiffs' right to have all their claims heard before the same jury is a substantial right that will be affected if this Court delays decision of this appeal. The majority cites *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982) and *Swindell v. Overton*, 62 N.C. App. 160, 302 S.E. 2d 841 (1983), *modified on other grounds*, 310 N.C. 707, 314 S.E. 2d 512 (1984) in support of its ruling in this regard. I have examined the cited cases and find them readily distinguishable from the instant case. I do not believe the principle set out by our Supreme Court in *Bernick* should be routinely applied in all cases involving multiple claims or parties so as to eliminate the provisions of Rule 54(b), nor do I believe that *Bernick* contemplates such a result. In *Bernick* the plaintiff demonstrated a genuine risk that he would be unjustly deprived of any recovery if forced to proceed separately against the defendants because the jury's decision as to the liability of one defendant was logically essential to its determination of the liability of the other defendant. In the instant case, the plaintiffs have alleged that a dentist and an orthodontist each treated plaintiff Maureen Schneider in a negligent manner. The liability of one defendant is in no way contingent upon or connected to the liability of the other. Any verdict returned by the jury as to Dr. Wainright will not be "inconsistent" as a matter of law with any verdict returned as to Dr. Brunk. Because the cir-

cumstances presented in *Bernick* are not present here, I find the case inapposite.

The majority next notes that plaintiffs "are also faced with the virtual eradication of their claims against the Wainright defendants." While I do not disagree with this statement, I believe it goes to the merits of the case rather than to the issue of whether plaintiffs will be "irremediably adversely affected if the order is not reviewable before final judgment." *Blackwelder* at 335, 299 S.E. 2d at 780.

The third factor noted by the majority in support of its ruling that a substantial right is involved is the "strong likelihood that the trial court will make the same ruling on Brunk's Rule 12(b)(6) motion." I believe the majority here indulges in precisely the unnecessary speculation about future rulings of the trial court that the provisions of Rule 54(b) seek to prevent. Furthermore, the probable decisions of the court below as to defendant Brunk are irrelevant to the question whether plaintiffs have demonstrated that the order appealed from affects a substantial right.

Finally, the majority notes that the claims against all defendants involve facts that are "identical and/or very closely related in time." This aspect of the case is irrelevant to the statutory requirement that an interlocutory appeal will be allowed only if the order appealed from affects a substantial right. While perhaps properly considered in ruling on a petition for a writ of certiorari under App. Rule 21, I believe it is improperly relied on by the majority in the procedural context of this case.

Finally, I wish to point out that the majority's treatment of the question of whether this appeal is premature is an example of what I believe to be an increasingly frequent but misplaced concern for judicial economy. While it is indeed tempting for parties and judges alike to seek resolution of issues at the earliest possible moment, the Legislature and our Courts have decided that such an approach is, more often than not, "penny wise, pound foolish," recognizing that review of interlocutory orders prior to final judgment presents a dangerous risk of delay, unnecessary expense, and fragmentary appeals. Because I believe the instant case involves all of those dangers and that plaintiffs have failed to

demonstrate that the order appealed from affects any substantial right, I would dismiss the appeal.

STATE OF NORTH CAROLINA v. ROBERT LEON FINGER A/K/A ROBERT H. FINGER A/K/A ROBERT LEO FINGER

No. 8421SC261

(Filed 5 February 1985)

1. **Automobiles § 3.3— driving while license revoked—evidence of prior charges and convictions admissible**

In a prosecution of defendant for driving while his license was revoked, the trial court did not err in allowing testimony regarding prior charges, convictions and court proceedings relating to defendant since the evidence showed that defendant had several driving violations of which he was aware but which he falsely represented when he obtained a license; the evidence was thus admissible to show intention; it also showed the law enforcement officer's personal knowledge of defendant's license status and therefore the reason the officer stopped defendant; and the evidence was relevant on the issue of identity.

2. **Automobiles § 3.1— driving while license revoked—sufficiency of notice of revocation**

In a prosecution of defendant for driving while his license was revoked, evidence of a letter from the Division of Motor Vehicles to defendant stating that his license was revoked for four years beginning on 25 June 1978 was insufficient notice to defendant that his license was revoked on 10 June 1983, the date of his arrest for driving while his license was revoked; however, a judgment dated 15 September 1980 entered in defendant's presence upon his conviction for driving under the influence and ordering him not to drive for three years was sufficient notice to defendant of revocation of his license.

APPEAL by defendant from *Washington, Judge.* Judgments entered 27 October 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 5 December 1984.

Attorney General Rufus Edmisten, by Associate Attorney General Michael Smith, for the State.

Sapp and Mast, by David P. Mast, Jr., for defendant appellant.

BECTON, Judge.

The defendant, Robert Leon Finger, was convicted of driving while his license was revoked, displaying a fictitious driver's license, and making a false affidavit to obtain a driver's license. From judgments imposing an 18-month active sentence on the driving while license revoked charge, and a two-year suspended sentence on the other two misdemeanor charges which had been consolidated for judgment, the defendant appeals. Defendant has made numerous assignments of error concerning, *inter alia*, the admission of evidence, the sufficiency of the evidence, erroneous instructions on the law, the expressions of opinion by the trial court, and the imposition of a sentence which is in excess of the statutory maximum. We find no error in the driving while license revoked charge, but we reverse defendant's conviction of making a false affidavit to obtain a driver's license.

I

[1] Defendant first argues that the trial court erred in allowing testimony of law enforcement officers, court officials, and one of his former attorneys regarding prior charges, convictions, and court proceedings relating to the defendant. The defendant directs our attention first to the general rule 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." *State v. Spillars*, 280 N.C. 341, 352, 185 S.E. 2d 881, 888 (1972). Defendant argues that the rule is particularly applicable in this case in which the State, in its case in chief, put on evidence of defendant's prior charges and convictions. Defendant also cites *State v. Thomas*, 17 N.C. App. 8, 193 S.E. 2d 450 (1972), in which the general rule is applied to the specific facts of a driving while license suspended case. In *Thomas*, we said:

> It violated the rule that evidence of other offenses is inadmissible 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. While the fact that the defendant's driver's license was in a state of suspension was competent as evidence in the case, the reasons for the suspension were incompetent and their admission into evidence amounted to prejudicial error. The fact that the defendant may have been

> convicted of reckless driving on another occasion while his driver's license was suspended and for driving while his driver's license was suspended does not come within any of the exceptions to the general rule excluding evidence of the commission of other offenses as set out in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). Moreover, we are of the opinion that the fact that defendant was later properly cross-examined concerning his prior convictions for the purpose of impeaching his credibility did not cure the error. If we were to hold otherwise, it would amount to a condonation of a practice which the rules of evidence forbid.

17 N.C. App. at 10-11, 193 S.E. 2d at 452.

With the general rule we have no quarrel. The facts of this case present an exception to the general rule, and this case is distinguishable from *State v. Thomas*. To sustain its burden of proof on two of the charges involving fraudulent conduct, the State had to show not only the defendant's acts, but also his intentions. That is, the State had to prove that the defendant possessed and displayed a driver's license that he knew was fictitious, N.C. Gen. Stat. Sec. 20-30(1) (1983), and that he made a false statement in applying for a driving license, N.C. Gen. Stat. Sec. 20-30(5) (1983).

In this case, State Highway Patrolman Hall testified that he stopped defendant, who was driving a 1973 Buick, on 10 June 1983 because he knew that defendant's license was permanently revoked. Division of Motor Vehicles Officer Gwyn testified that defendant applied for a North Carolina driver's license on 27 May 1982 and presented a North Carolina birth certificate. In response to the questions on the application, defendant informed Gwyn that he had not had a ticket in North Carolina, that his license had never been suspended, and that he had never suffered from drug or alcohol problems. Defendant's birth certificate showed his proper name as Robert H. Finger. Defendant signed the application "Robert H. Finger" and a driver's license was issued to Robert H. Finger on 27 May 1982.

On these facts, it was essential for the State to show (1) the officer's and defendant's knowledge of defendant's prior driving record, (2) the defendant's conduct in obtaining his license in May 1982, and (3) the defendant's conduct during his arrest in June

1983, as those factors bore on the defendant's intentions and acts. We find the evidence objected to admissible for reasons other than character. It showed that defendant had several driving violations of which he was aware, but which he falsely represented when he obtained a license in May 1982. It showed the law enforcement officers' personal knowledge of defendant's license status. Further, the evidence was relevant on the issue of identity. The evidence objected to comes within the exceptions set out in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954).

II

Having held the evidence objected to in section I admissible, we summarily reject defendant's second argument that the trial court erred by admitting into evidence State's Exhibits 4 through 8 which were court files relating to defendant's prior convictions.

III

Defendant styles his third argument as follows:

> The trial court committed reversible error in the 'driving while license revoked' case, in denying defendant's motion to dismiss on the ground of insufficient evidence, and in particular for the failure to introduce any evidence showing notice to defendant of revocation of his license, at the conclusion of the State's evidence and again at the conclusion of all the evidence.

We do not agree with defendant. Our analysis follows.

[2] A defendant must have actual or constructive knowledge of the revocation of his license before there can be a conviction under N.C. Gen. Stat. Sec. 20-28(a) (1983). Our Supreme Court recently said:

> We have previously held that a conviction under G.S. 20-28(a) requires that the State prove beyond a reasonable doubt (1) the operation of a motor vehicle by a person (2) on a public highway (3) while his operator's license is suspended or revoked.
>
> However, we believe that the legislature also intended that there be actual or constructive knowledge of the suspension or revocation in order for there to be a conviction under this statute.

State v. Atwood, 290 N.C. 266, 271, 225 S.E. 2d 543, 545 (1976).

N.C. Gen. Stat. Sec. 20-48(a) (1983) addresses specifically the constructive notice issue:

> Whenever the Division is authorized or required to give any notice under this Chapter or other law regulating the operation of vehicles, unless a different method of giving such notice is otherwise expressly prescribed, such notice shall be given either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person at his address as shown by the records of the Division. The giving of notice by mail is complete upon the expiration of four days after such deposit of such notice. Proof of the giving of notice in either such manner may be made by the certificate of any officer or employee of the Division or affidavit of any person over 18 years of age, naming the person to whom such notice was given and specifying the time, place, and manner of the giving thereof.

The notice requirements of G.S. Sec. 20-48 have been applied by our Court in *State v. Chester*, 30 N.C. App. 224, 226 S.E. 2d 524 (1976) and *State v. Hayes*, 31 N.C. App. 121, 228 S.E. 2d 460 (1976).

At no time before the close of all the evidence in this case did the State introduce any evidence that a letter was sent to the defendant giving notice of revocation as provided in G.S. Sec. 20-48 (1983). State's Exhibit 11a, a certified Division of Motor Vehicles license check on Fred Robert Leo Finger had been admitted in evidence before the close of all the evidence. It is true that, after the close of all the evidence and following the renewed argument of the defendant for dismissal, the trial court asked the district attorney if he wanted to offer the remaining three pages of State's Exhibit 11 into evidence. The district attorney indicated that he did. The court ordered the remaining portions of State's Exhibit 11 admitted in evidence and, for convenience, we have labeled those portions State's Exhibits 11b, 11c, and 11d. State's Exhibit 11b is a letter to Fred R. Finger from the Division of Motor Vehicles entitled "Official Notice and Record of Revocation of Driving Privilege." The first paragraph of that letter reads: "Effective 12:01 a.m. June 25, 1978, your North Carolina driving privilege is revoked four (4) years for a second conviction

of driving under the influence of intoxicating liquor or drugs—G.S. 20-17(2) and 20-19(d)."

Without regard to the court's efforts in assisting the State in this case, we still find this evidence insufficient to show that defendant had constructive notice that his license was revoked on 10 June 1983, the date of his arrest for the offenses charged herein. The most State's Exhibit 11b shows is that the State forwarded a letter to Fred R. Finger advising him that his driving privilege had been revoked for four years effective 25 June 1978 to 25 June 1982, which ending date was almost a year prior to the time the defendant was charged with driving while his license was revoked in the case at bar.

Realizing the shortcomings of this letter, the State, in its brief, attempts to shore up its argument by asserting that State's Exhibit 11a, the certified Division of Motor Vehicles license check on Fred Robert Leo Finger, is admissible to prove revocation. The State relies on *State v. Herald*, 10 N.C. App. 263, 178 S.E. 2d 120 (1970). Although *Herald* stands for the proposition that a properly certified copy of the driver's license record of the defendant on file with the Department of Motor Vehicles is admissible as evidence that defendant's license was in a state of revocation for a period covering the date of the offense for which he was charged, it does not satisfy the notice requirements of G.S. Sec. 20-48 (1983). Although State's Exhibit 11a indicates that Fred Robert Leo Finger's driver's license was permanently revoked for "driving under the influence three or more—G.S. 20-17-2 and 20-19(e)," it, significantly, was a record maintained by the Division of Motor Vehicles. It was not sent to the defendant, Fred R. Finger.

The State also argues that a judgment dated 15 September 1980 entered in defendant's presence, ordering him not to drive for three years, is sufficient notice of revocation. We agree. The underlying charge that caused the Division of Motor Vehicles (DMV) mandatorily to revoke defendant's driver's license was defendant's 15 September 1980 driving while under the influence conviction under N.C. Gen. Stat. Sec. 20-138 (1978). Mandatory revocation of defendant's operator's license under G.S. Sec. 20-17(2) (1978) for driving while under the influence is the performance of a ministerial duty. *Fox v. Comm'r of Motor Vehicles*,

241 N.C. 31, 84 S.E. 2d 259 (1954). And, as we said in *State v. Teasley*, 9 N.C. App. 477, 176 S.E. 2d 838, *cert. denied and appeal dismissed*, 277 N.C. 459, 177 S.E. 2d 900 (1970), construing the provisions of N.C. Gen. Stat. Sec. 20-24, the surrendering of defendant's license to the trial court, and the forwarding of it to the DMV, gave defendant sufficient notice that his driver's license had been revoked.

IV

We summarily reject defendant's next argument that the Court erred by admitting in evidence State's Exhibits 11b-11d after all parties had rested.

As indicated in section III, *supra*, State's Exhibit 11b was not relevant to any issue tried since, under it, the period of revocation expired almost a year prior to the time defendant was charged with driving after revocation. We have examined State's Exhibits 11c and 11d and likewise find them to be irrelevant.

V

We summarily reject defendant's next two arguments regarding (1) a requested instruction different from that given, which was in accordance with North Carolina Criminal Pattern Jury Instruction 271.10, and (2) the trial court's failure sufficiently to instruct the jury on its duty to apply the law to the evidence especially relating to defendant's contention that he never received any notice of revocation.

VI

Since the license issued to defendant in May 1982 was issued in his proper name, as evidenced by his birth certificate, defendant next argues that his license could not, therefore, be deemed "a fictitious license," and that the trial court erred in denying his motion to dismiss the fictitious license charge under G.S. Sec. 20-30(1) (1983). We summarily reject this insufficiency of the evidence argument, since, construing the provisions of G.S. Sec. 20-30(1) and (5) (1983) together, proof that the defendant possessed or displayed a license obtained by fraud and deceit is sufficient under G.S. Sec. 20-30(1) (1983).

VII

Defendant styles his next assignment of error as follows:

> The trial court committed reversible error in the 'perjury' (changed to 'making false affidavit to obtain driving license') case in denying the defendant's motion for dismissal on the ground of insufficient evidence at the close of the State's evidence and again at the close of all evidence, there being no sworn statement in evidence.

Defendant was originally charged under N.C. Gen. Stat. Sec. 20-31 (1983), which states, in relevant part, that "[a]ny person who shall make any false affidavit, or shall knowingly swear or affirm falsely, to any matter or thing required by the terms of this Article to be sworn to or affirmed shall be guilty of perjury . . . ." At the close of all the evidence, the trial court allowed the defendant's motion to dismiss the charge of "perjury," but submitted to the jury the issue whether defendant was guilty of the lesser included offense, G.S. Sec. 20-30(5) (1983), which reads as follows:

> It shall be unlawful for any person to commit any of the following acts:
>
> . . .
>
> (5) to use a false or fictitious name or give a false or fictitious address in any application for a driver's license or learner's permit, or any renewal or duplicate thereof, or knowingly to make a false statement or knowingly conceal a material fact or otherwise commit a fraud in any such application . . . .

We agree with defendant that the offense described in G.S. Sec. 20-30(5) (1983) is not a lesser included offense of G.S. Sec. 20-31 (1983) dealing with perjury. Moreover, the perjury indictment does not contain all of the elements required under G.S. Sec. 20-30(5) (1983). Defendant may be guilty of a G.S. Sec. 20-30(5) violation, but he was not charged with that. G.S. Sec. 20-30(5) (1983) is not a lesser included offense of G.S. Sec. 20-31 (1983), and defendant's conviction on this charge is, therefore, reversed.

VIII

We summarily reject defendant's two remaining substantive assignments of error in which he asserts that the trial court expressed an opinion on the facts and failed to set aside the verdict.

IX

Finally, it is not necessary to address defendant's one procedural assignment of error dealing with the imposition of a suspended sentence of two years on the making a false affidavit to obtain a driver's license charge, since we have already concluded that it was not a lesser included offense of the perjury charge and should not have, therefore, been submitted to the jury.

X

To summarize, in defendant's driving while license revoked case, and in defendant's displaying a fictitious driver's license case, we find

No error.

However, defendant's conviction of making a false affidavit to obtain a driver's license is

Reversed.

Judges JOHNSON and BRASWELL concur.

Judge BRASWELL concurred prior to 31 December 1984.

BICYCLE TRANSIT AUTHORITY, INC. v. DR. RITCHIE BELL, INDIVIDUALLY AND TRADING AS ABIES RENTALS, WALTER TRIPLETTE AND LIVINGSTON LEWIS

No. 8415SC198

(Filed 5 February 1985)

Contracts § 7— bike shop—covenant not to compete—meaning of "be under contract with" and "be associated with"—summary judgment improper

The trial court erred in entering summary judgment for defendant on plaintiff's claim that defendant violated a covenant not to compete where the contract between the parties provided that defendant would not "be under contract with" or "be associated with" any business which was a competitor of plaintiff within a two county area, but the evidence showed that defendant did in fact lease the other half of the building in which plaintiff operated his business to a competitor of plaintiff, deferred collection of the first two months

rent for one year, and gave the competitor the option to purchase the entire building, exercisable during the term of plaintiff's lease.

Judge ARNOLD dissenting.

APPEAL by plaintiff from *McLelland, Judge.* Judgment entered 27 December 1983 in ORANGE County Superior Court. Heard in the Court of Appeals 13 November 1984.

This is a civil action wherein plaintiff alleged that defendant Bell violated the terms of a Non-Competition and Consulting Agreement (hereinafter "agreement") and engaged in unfair and deceptive trade practices affecting commerce. Bell answered denying the allegations, and counterclaimed for money due under the agreement. Plaintiff replied denying liability under the agreement and contended that Bell's breach of the agreement relieved it of any further obligation to pay under the agreement. Subsequently, plaintiff amended its complaint to add defendants Triplette and Lewis.

The action arose out of the following transactions. On 1 August 1980, plaintiff and defendants, in their capacities as shareholders of Carolina Bikeways, Inc., entered into a contract whereby plaintiff purchased from defendants a bicycle sales and service business, known as "The Clean Machine," located at 110 West Main Street, Carrboro, North Carolina, and a similar business in Durham, North Carolina. The contract provided that the seller was to procure a lease for The Clean Machine to remain at its present location for seven years. In conjunction with the execution of the contract, plaintiff and defendant Bell, individually, entered into a lease agreement, leasing the premises located at 110 West Main Street, Carrboro, North Carolina to plaintiff for seven years.

On 1 August 1980, plaintiff and each of the defendants executed the non-competition agreement which in pertinent part provided:

> [Defendants] hereby agree that for a period of seven (7) years from July 30, 1980, they will not jointly or severally (unless they have obtained . . . [plaintiff's] prior written consent) directly or indirectly be employed by, be associated with, be under contract with, own, manage, operate, join, control or participate in the ownership, management, operation, or con-

> trol of, or be connected in any manner with, any business which is a competitor of . . . [plaintiff] in Durham County or Orange County, North Carolina. . . . In consideration for such covenant, . . . [plaintiff] agrees to pay to . . . [defendants] (to be divided among . . . [defendants] as they themselves shall decide and determine) the sum of $30,000. The $30,000 shall accrue interest at the rate of 10% per annum for the period of two years from August 4, 1980, thereby making the unpaid principal and accrued interest the sum of $36,000 at the end of the second full year. This sum of $36,000 shall be paid in a lump sum to . . . [defendants] on August 3, 1987. However, at the end of the two year period referred to above, the $36,000 principal and accrued interest thereon shall continue to accrue interest at the rate of 10% per annum, which interest shall be paid in equal quarterly installments in the amount of Nine Hundred Dollars ($900.00) each until the above-styled $36,000 sum becomes due and payable on August 3, 1987.

On 6 October 1982, Bell and Alan Garrett Snook entered into a lease agreement whereby Bell leased to Snook the premises located next door to plaintiff's business. The lease stated that the "premises shall be used by the Lessee to operate a mail order and walk-in bicycle business . . . ." Other provisions of the lease provided that Bell would defer collection of the first two months rental for one year, and would give Snook an option to purchase the entire building. Snook, by oral agreement, sublet the property to Performance Bicycle Shop, Inc., a corporation in which he was the majority stockholder. The company's business consists of selling bicycle parts, components, accessories and clothing to walk-in and direct mail customers. Many of these items are identical to items sold by plaintiff.

Based upon the facts stated above, all the parties moved for summary judgment stipulating that the sole issue to be decided was whether Bell's conduct constituted a violation of the non-competition clause in the parties' agreement. On 27 December 1983, the trial court entered an order denying plaintiff's motion for summary judgment and allowing defendants' motion for summary judgment. From this judgment, plaintiff appealed.

Casey, Haythe & Krugman, by Samuel T. Wyrick, III and Emily R. Copeland, for plaintiff.

Sessoms & Marin, P.A., by Stuart M. Sessoms, Jr., for defendants.

WELLS, Judge.

Summary judgment is appropriate when there is no genuine issue of material fact. N.C. Gen. Stat. § 1A-1, Rule 56(c) of the Rules of Civil Procedure (1983). When a contract is in writing and free from ambiguity, such that no disputed facts exist, the intention of the parties becomes a question of law for the court. *Lane v. Scarborough*, 284 N.C. 407, 200 S.E. 2d 622 (1973). If the writing leaves it uncertain as to the true agreement, however, what was meant by the parties may be made certain by parol evidence and the question is for the finder of fact. *Cleland v. Children's Home*, 64 N.C. App. 153, 306 S.E. 2d 587 (1983). The fact that both parties have moved for summary judgment does not necessarily mean that summary judgment should be granted. *See Id.; Steinberg v. Adams*, 90 F. Supp. 604 (S.D.N.Y. 1950) (under similar federal rule). "Whether or not a genuine issue of material fact exists is a determination for the court, not the parties, and the fact that the parties may have thought there was no material fact in issue is in no way controlling." *Cram v. Sun Insurance Office, Ltd.*, 375 F. 2d 670 (4th Cir. 1967); *see also Soley v. Star & Herald Co.*, 390 F. 2d 364 (5th Cir. 1968) (error to overlook factual issue). We believe there was a factual issue as to whether Bell's entering into the lease with Snook constituted direct or indirect contract with, or association with, competition in violation of the contract. Summary judgment was therefore improperly granted.

The prerequisites for validity and enforceability of covenants not to compete have been discussed at length elsewhere and need not be repeated here. *See A.E.P. Industries v. McClure*, 308 N.C. 393, 302 S.E. 2d 754 (1983); *Jewel Box Stores v. Morrow*, 272 N.C. 659, 158 S.E. 2d 840 (1968). Under North Carolina law, the reasonableness of such covenants is a matter of law for the court to decide. *Id.* The court here did not rule that the covenant was unreasonable (nor do defendants so contend), only that Bell did not violate it in leasing to Snook. Since the reasonableness of the covenant depends on the circumstances of the case, *Id.*, which

have not been fully developed, we will confine our examination to the question decided, whether Bell's conduct constituted a breach of that covenant. This requires interpretation of the contractual language "be associated with" or "be under contract with."

Defendants argue that covenants not to compete are not favored and that the contractual language should therefore be strictly construed against plaintiff. Our review of the modern cases indicates that North Carolina has shown increasing willingness, in light of modern business conditions, to recognize and enforce such covenants. *A.E.P. Industries v. McClure, supra; Enterprises, Inc. v. Heim,* 276 N.C. 475, 173 S.E. 2d 316 (1970). Rather than apply rules of strict construction, our supreme court has given such covenants "reasonable and fair" construction. *Jewel Box Stores v. Morrow, supra.* We are aware of one recent North Carolina case using a rule of strict construction, but that resulted from application of Georgia law as *lex loci contractus. Wallace Butts Ins. Agency v. Runge,* 68 N.C. App. 196, 314 S.E. 2d 293 (1984). Giving the cited contractual language a reasonable and fair construction, we conclude there was at least a jury question whether Bell's conduct fell within the contractual anti-competitive provisions.

First of all, it is well established that a lease is a contract, or at least an "association." Bell's lease agreement with Snook specifically recognized that Snook would operate a bicycle business in the other half of the building. Bell gave Snook a substantial business concession by allowing him to postpone payment of rent. The record does not reflect what constitutes typical commercial rents in Carrboro; the evidence at trial may well show that Snook received preferential treatment here as well. Moreover, the lease contained an option provision, *exercisable during plaintiff's occupancy,* allowing Snook to purchase the entire building. Taking this evidence in the light most favorable to plaintiff, we conclude that summary judgment for Bell on this issue was incorrectly granted. Since the claims of the other defendants arise under the same contract and are identical with Bell's, and since it is well established that breach by Bell of his promise would justify non-performance by plaintiff, summary judgment in their favor was also incorrect.

Kramer v. Old, 119 N.C. 1, 25 S.E. 813 (1896), does not require a different result. There the plaintiff purchased a milling

business and the three defendant sellers contracted not to "continue business of milling." The supreme court held that this language forbade defendants from taking stock in, organizing or managing a rival mill. The court continued:

> While the courts will not restrain a party bound by such a contract from selling or leasing his premises to others to engage in the business which he has agreed to abstain from carrying on, or from selling to them the machinery or supplies needed in embarking in it (*Reeves v. Sprague*, 114 N.C. 647), a different rule must prevail when it appears that the prohibited party attempts, not to sell outright to others, but to furnish the machinery or capital, or a portion of either, in lieu of stock, in a corporation organized with a view to competition with the person protected by his contract against such injury. The three contracting defendants have presumably received the full value of the business sold, and which is protected by their own agreement against their own competition, and equity will not allow them, with the price in their pockets, to evade their contract under the thin guise of becoming the chief stockholders in a company organized to do what they can not lawfully do as individuals.

Id. The contract in *Kramer*, as in the *Reeves* case cited, precluded *engaging* in the same *business*: the contract here is not "such a contract," *Kramer v. Old, supra*, but precludes a broader range of activities. As suggested above in *Kramer*, a court of equity will in any event look behind the mere form of subsequent dealings by the seller to enforce the spirit of the agreement. *See also Reeves v. Sprague, supra* (court considered enjoining non-party, but insufficient proof). The record here contains a sufficient forecast of evidence to show genuine issues of material fact.

For the foregoing reasons, summary judgment was improperly granted. The order is reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judge BECTON concurs.

Judge ARNOLD dissents.

Judge ARNOLD dissenting.

I respectfully dissent from the majority's decision for the following reasons. The majority states that Bell's conduct raises, at least, a jury question regarding whether his conduct violated the agreement's anti-competition provision. However, as the majority points out in their statement of the facts, the parties stipulated, at the hearing on the motions for summary judgment, that the only issue to be decided was whether Bell's leasing of property to plaintiff's competitor violated the terms of the agreement. This is a question of law, not a question of fact, and, therefore, I believe that the majority improperly concluded that a genuine issue of material fact existed for a jury to decide.

Furthermore, I believe the trial judge properly concluded that Bell's conduct did not violate the anti-competition agreement. Covenants in restraint of trade are in direct derogation of our common law, and as such are generally disfavored, even so, our courts have recognized that they are necessary to preserve the value of the intangible assets of good will within a business. *See, Kramer v. Old*, 119 N.C. 1, 25 S.E. 813 (1896). In order for such a covenant to be valid it must be reasonably necessary to protect the legitimate interest of the purchaser, must be reasonable with respect to time and territory, and must not interfere with the interest of the public. *Jewel Box Stores v. Morrow*, 272 N.C. 659, 158 S.E. 2d 840 (1968). Such covenants should be strictly construed, and they should receive a construction that will effectuate the intention of the parties, and the parties' intentions are to be determined by considering the whole of the covenants, rather than selected parts. *Faust v. Rohr*, 166 N.C. 187, 81 S.E. 1096 (1914).

Viewing the agreement as a whole, it is clear that it was the intention of the parties to prevent the sellers from engaging either directly or indirectly in a business which was in competition with the plaintiff. Research has revealed no North Carolina case which has decided whether the leasing of property to a competitor is a violation of a promise not to compete indirectly with a covenantee, however, the following cases may be helpful in making such a determination. In *Kramer v. Old*, 119 N.C. 1, 25 S.E. 813 (1896), the defendants sold their milling business to the plaintiff and entered into a covenant that they would "not continue in

the milling business." Defendants later secured stock in another milling company. Our Supreme Court found that such an acquisition was in violation of the covenant, but in dicta the court stated that "the courts will not restrain a party bound by such a contract from selling or leasing his premises to others to engage in the business which he has agreed to abstain from carrying on, or from selling to them the machinery or supplies needed in embarking in it. . . ." *Id.* at 12, 25 S.E. at 815.

Our Supreme Court has also found that it was not a violation of a covenant not to compete for a covenantor to sell part of his inventory to a third party, *see, Jefferson Reeves & Co. v. Sprague,* 114 N.C. 647, 19 S.E. 707 (1894), and, that it was not a violation of such a covenant for a covenantor to loan money to start a new firm to engage in competition with the covenantee. *See, Finch Brothers v. Michael,* 167 N.C. 322, 83 S.E. 458 (1914).

Plaintiff argues that these cases are not dispositive of this issue, because the covenants involved in those cases were not as broad or as specific as the covenant in the case *sub judice.* Instead, it urges acceptance of the reasoning of the California Court of Appeals found in *Dowd v. Bryce,* 95 Cal. App. 2d 644, 213 P. 2d 500 (1950). In *Dowd* the court found that the defendant's leasing of land to one of plaintiff's competitors was a violation of an agreement not to indirectly compete with the plaintiff since it was "one link in the chain which creates the very competition which it was the object of the clause . . . to prevent." *Id.* at 647, 213 P. 2d 502.

The reasoning of *Dowd* is inapposite here because the covenant which the parties signed was much broader than in the case at bar in that the parties specifically had agreed that the seller would not sell any real property to a competitor of or one contemplating becoming a competitor of the covenantee. The agreement evidences an intention by the parties to prevent any actions which might subject the covenantee to any form of competition. Such is not the case in the agreement entered into between plaintiff and the defendants.

Based upon the reasoning of our Supreme Court in the cases cited herein and the parties' intent as evidenced by the agreement, I conclude that the agreement entered into between the plaintiff and the defendants does not prohibit Bell from leasing

property to a competitor of the plaintiff. Therefore, I find no error in the trial court's denial of plaintiff's Motion for Summary Judgment.

Plaintiff also argues that the judgment is improper because it awards the defendants Triplette and Lewis a judgment for the accrued interest even though they had not counterclaimed for such a judgment. The record reveals that plaintiff is correct in its assertion that Triplette and Lewis have not counterclaimed for the interest due. The judgment, therefore, should be modified to award only defendant Bell a judgment for the principal sum of $4,500 and interest thereon as set forth in the judgment.

JOSEPH S. MARION v. ROBERT R. LONG, IMPORT PERFORMANCE CENTRE, LTD. AND WILLIAM FERRETTI D/B/A THOMPSON INDUSTRIES

No. 8422SC540

(Filed 5 February 1985)

Process § 14.3— Georgia auto repair shop—insufficient contacts with N.C.—no in personam jurisdiction

In personam jurisdiction could not constitutionally be exercised over defendant auto parts and auto repair shops whose only places of business were in Georgia, though defendants did advertise in magazines reasonably expected to reach N.C., since only incidental services, including trailering plaintiff's car from N.C. to Georgia, were performed in N.C., as opposed to all the actual contract work of repairing the car, which took place in Georgia; the parties' contract was not in writing; defendants never came to N.C. except to perform incidental and apparently gratuitous services; and these contacts were insufficient to establish minimum contacts required for exercise of in personam jurisdiction.

APPEAL by defendants from *Collier, Judge*. Order entered 19 January 1984 in DAVIE County Superior Court. Heard in the Court of Appeals 15 January 1985.

Plaintiff Joseph Marion sought to have the engine of his 1954 Bentley automobile repaired. He contacted defendant William Ferretti, doing business in auto parts as Thompson Industries in Douglasville, Georgia, using an advertisement placed by Ferretti in a national car collectors' magazine. Plaintiff asked Ferretti if he could repair the car. When Ferretti answered in the negative, plaintiff asked Ferretti if he knew anyone in the area who could.

Ferretti referred plaintiff to defendant Robert Long, president of Import Performance Centre, a repair shop which had its sole place of business in Chamblee, Georgia. Plaintiff had one of his employees, who lived in Georgia, visit Long's shop. Thereafter Ferretti and Long came to North Carolina and trailered the Bentley back to Georgia. At some point a contract was entered into between defendants and plaintiff to repair the car. After increasing conflict concerning the garaging of the car and the repair work, plaintiff regained possession of his car in late 1982.

Plaintiff commenced this action in June 1983. He sought damages for breach of contract and wrongful retention of certain irreplaceable automobile parts, asserting punitive damages and unfair trade practices claims. Total actual damages alleged were $5,770. Defendants sought dismissal for lack of jurisdiction over the person, but the court denied their motions. Defendants appealed.

Henry P. Van Hoy, II, for plaintiff.

Brock & McClamrock, by Grady L. McClamrock, Jr., for defendants.

WELLS, Judge.

To determine if foreign defendants may be subjected to *in personam* jurisdiction in this state, we apply a two-pronged test. First, we determine whether North Carolina jurisdictional statutes allow our courts to entertain the action. Second, we determine whether our courts can constitutionally exercise such jurisdiction consistent with due process of law. *See Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977); *Sola Basic Industries v. Parke County*, 70 N.C. App. 737, 321 S.E. 2d 28 (1984).

Statutory jurisdiction arises under N.C. Gen. Stat. § 1-75.4 (1983), the North Carolina "long-arm" statute, which is a legislative attempt to assert *in personam* jurisdiction to the full extent permitted by the United States Constitution. *Dillon v. Funding Corp., supra.* The statute should receive liberal construction, in favor of finding jurisdiction. *Leasing Corp. v. Equity Associates*, 36 N.C. App. 713, 245 S.E. 2d 229 (1978). The burden is on plaintiff to establish *prima facie* that one of the statutory grounds applies. *See Public Relations, Inc. v. Enterprises, Inc.*, 36 N.C. App. 673,

245 S.E. 2d 782 (1978); *Bryson v. Northlake Hilton*, 407 F. Supp. 73 (M.D.N.C. 1976). Jurisdiction here lies under G.S. § 1-75.4(4):

> Local Injury; Foreign Act.—In any action . . . claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:
>
> a. Solicitation or services activities were carried on within this State by or on behalf of the defendant; . . . .

The Bentley, in North Carolina and property of the North Carolina plaintiff, allegedly was damaged by the wrongful acts of the Georgia defendants in removing and retaining certain parts. Defendants admitted coming to North Carolina and discussing the repairs and then loading and transporting the car. Construing the statute liberally, we conclude that the statutory time and place requirements were met and that defendants carried on "service activities" in North Carolina. Accordingly, we hold that there were statutory grounds for exercise of jurisdiction.

We do not agree with the trial court that such jurisdiction could constitutionally be exercised in this case. The constitutional question requires application of the familiar "minimum contacts" test. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The existence of minimum contacts cannot be ascertained by mechanical rules, but rather by consideration of the facts of each case in light of traditional notions of fair play and justice. *Id.; Dillon v. Funding Corp., supra.* The factors to be considered are (1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties. *Sola Basic Industries, Inc. v. Parke County Rural Electric Membership Corp., supra; see also United Advertising Agency, Inc. v. Robb*, 391 F. Supp. 626 (M.D.N.C. 1975); Annot. 62 L.Ed. 2d 853 (1981).

The existence of minimum contacts in this case can depend on only two contacts: (1) the advertisement placed in a national car collectors' magazine by Ferretti, and (2) defendants' trip to North Carolina and the alleged closing of the contract here. This court had held that jurisdiction cannot constitutionally rest solely on placement of advertisements in national magazines. *Hankins v.*

Somers, 39 N.C. App. 617, 251 S.E. 2d 640, *disc. rev. denied*, 297 N.C. 300, 254 S.E. 2d 920 (1979). Due process requires more.[1] In *Hankins*, it was satisfied by defendants' independent marketing program conducted in North Carolina over a period of three years. *See also Lane v. WSM, Inc.*, 575 F. Supp. 1246 (W.D.N.C. 1983) (national magazine advertising *and* direct mail campaigns in North Carolina alone insufficient; but with continuous broadcasts from Tennessee soliciting customers minimum contacts existed); *Southern Case, Inc. v. Mgmt. Recruiters Intern.*, 544 F. Supp. 403 (E.D.N.C. 1982) (advertising, together with ongoing franchise contracts, visits by representatives, training, and royalty collection sufficient); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (advertising only one of several factors). The advertisement alone thus did not constitute sufficient minimum contacts to support jurisdiction. Plaintiff has not shown any broader solicitation campaign which might support a different ruling.

The trip to North Carolina by defendants came after plaintiff had contacted them in Georgia. While the time and place of formation of the contract is disputed, the uncontradicted record before us shows (1) that it was an oral contract, (2) that it did not specify what law, if any, applied, and (3) that the services contracted for, repair of the Bentley, were to be performed exclusively in Georgia.[2] Defendants' affidavits show that their places of business lie exclusively in Georgia. Applying the factors we outlined above, both the quantity and quality of these contacts are minimal indeed. Had defendants not agreed to trailer the Bentley to Georgia, a service entirely incidental to the purpose of the contract, nothing in the record suggests that they would have ever come to North Carolina for any business purpose. On the other hand, the cause of action did arise out of this one contact. The interests of the two states as a forum appear equally bal-

1. The court in *Southern Case, Inc. v. Mgmt. Recruiters Intern.*, 544 F. Supp. 403 (E.D.N.C. 1982), suggested that such advertising would suffice by itself under North Carolina law. It relied on, and apparently misread, *Federal Insurance Co. v. Piper Aircraft Corp.*, 341 F. Supp. 855 (W.D.N.C. 1972), *aff'd*, 473 F. 2d 909 (4th Cir. 1973) (mem.); there advertising was only one of eleven factors in a comprehensive solicitation, sales, and service program.

2. Although trailering the car from North Carolina may have been a service, it was merely incidental, and without the repair contract would not have been undertaken at all.

anced. The convenience factor suggests Georgia may be the preferable forum, since (1) the witnesses on the contract performance issue (the actual work done on the Bentley) will more probably be located there, (2) defendants contend, and plaintiff does not deny, that plaintiff has employees in Georgia who visited defendants before the contract was entered into, and (3) the record reflects that both sides have Georgia as well as North Carolina counsel. Based on our evaluation of these factors, in particular the isolated nature of defendants' trip to North Carolina, we conclude that it would be inconsistent with due process of law for North Carolina courts to exercise personal jurisdiction over these defendants in this case based on this contract and the associated visit.

While we are aware that jurisdiction may constitutionally be based on a single contract, *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Dillon v. Funding Corp., supra,* the single-contract cases finding sufficient contact have, unlike this one, involved other factors beyond simple formation of a contract. These include great disparity in litigation resources, *McGee v. International Life Ins. Co., supra*; lack of a better forum for plaintiff under circumstances where it would be inequitable to force suit in defendants' home state, *Dillon v. Funding Corp., supra*; express contract provisions that the law of the forum state would apply, *Harrelson Rubber Co. v. Dixie Tire and Fuels*, 62 N.C. App. 450, 302 S.E. 2d 919 (1983); a longstanding business relationship, *Leasing Corp. v. Equity Associates, supra*; or substantial other business in North Carolina, *Fiber Industries v. Coronet Industries*, 59 N.C. App. 677, 298 S.E. 2d 76 (1982). None of these factors appears here. Rather, this case more closely resembles *Phoenix America Corp. v. Brissey*, 46 N.C. App. 527, 265 S.E. 2d 476 (1980), in which all acts related to the contract, with one exception, occurred outside North Carolina; this court held there that jurisdiction should be declined.

We also conclude that the combination of the advertisement and the contract/visit does not support jurisdiction. The activity in addition to advertising does not rise to the level found in any of the "advertising" cases discussed above; nor does the addition of the advertisement to the contract move this case into the group of "contract" cases discussed above. The contacts shown are simply too isolated to warrant exercise of *in personam*

jurisdiction. The type of showing necessary to support such exercise was demonstrated in a recent Fifth Circuit case in which Louisiana residents successfully invoked Louisiana jurisdiction over a Texas amusement park, site of an alleged personal injury. *Pedelahore v. Astropark, Inc.*, 745 F. 2d 346 (5th Cir. 1984). Not only did plaintiffs show the particular extent of the advertising campaign, but they also demonstrated the results of the campaign in terms of the Louisiana patronage of defendant's park. No such showing was made here; plaintiff simply alleged advertisement in a national magazine, without showing the extent of its circulation in North Carolina, or its effect on defendants' sales.

Our holding in *Sola Basic* reinforces our conclusion here. There defendant, a rural electric company, operating exclusively in Indiana, purchased a transformer in Indiana from plaintiff Wisconsin corporation, which had a plant in Goldsboro, North Carolina. The transformer failed and was brought (apparently under warranty) by plaintiff to Goldsboro. The warranty had expired, however, and the parties entered into a written repair contract. Defendant sent a representative to Goldsboro to witness the repair work. Plaintiff sued in North Carolina when defendant refused to pay the repair bill of some $70,000 after the transformer was returned to Indiana. No other contacts existed between defendant and North Carolina. We held that this one "isolated business excursion" did not provide adequate constitutional basis for the exercise of *in personam* jurisdiction. Although these defendants, unlike defendant in *Sola Basic*, did advertise in magazines reasonably expected to reach North Carolina, their other contacts were much less significant: only incidental services were performed in North Carolina in this case, as opposed to all the actual contract work; the present contract was not in writing; and defendants never came to North Carolina except to perform incidental and apparently gratuitous services. Our ruling here, that jurisdiction in this case must be declined, follows the standard of constitutional fairness we set in *Sola Basic*.

Decisions of other states support our holding. *See Fleet Leasing, Inc. v. District Court, Etc.*, 649 P. 2d 1074 (Colo. 1982) (Oregon repair shop with no other contacts sued for negligent repair; no jurisdiction); *Bev-Mark, Inc. v. Summerfield GMC Truck Co., Inc.*, 268 Pa. Super. 74, 407 A. 2d 443 (1979) (Indiana repair shop with substantial advertising near interstate highway sued

for negligent repair; no jurisdiction); *Lumber Mart, Inc. v. Haas Intern. Sales & Serv.*, 269 N.W. 2d 83 (N. Dak. 1978) (negligent repair action; related sales negotiations and unrelated hauling operations did not support jurisdiction). We also note that in *Fleet Leasing* and *Bev-Mark*, the actions were personal injury actions, in which the plaintiffs' home state typically has a stronger interest than contract actions.

Accordingly, we hold that the trial court erred in denying defendants' motions to dismiss. Under the circumstances of the case as shown by this record, *in personam* jurisdiction could not constitutionally be exercised over these defendants. The order appealed from must be reversed, and the cause remanded for entry of an order dismissing the complaint.

Reversed and remanded.

Judges ARNOLD and MARTIN concur.

FOOTE & DAVIES, INC. v. ARNOLD CRAVEN, INCORPORATED

No. 8418SC314

(Filed 5 February 1985)

1. Guaranty § 1— guaranty as part of original transaction—consideration

Evidence was sufficient for the jury to find that a guaranty executed by defendant was negotiated and agreed to as part of the original transaction between the parties and thus was supported by adequate consideration where the evidence tended to show that plaintiff agreed to print catalogs for defendant's mail order business on credit terms requested by defendant but plaintiff would require a guaranty from defendant.

2. Corporations § 8; Guaranty § 1— president of corporation—authority to guarantee account of subsidiary

Defendant's president had the apparent authority to execute a guaranty binding defendant to pay the debt of its subsidiary to plaintiff where the officers, directors and shareholders of defendant and its subsidiary consisted solely of a mother, father, son and daughter-in-law; the by-laws of defendant authorized the president to sign written contracts of the corporation; defendant wholly owned the subsidiary and stood to benefit from its business; it had on at least five previous occasions guaranteed the obligations of its subsidiary; guaranteeing the account and obtaining advertising materials were in defendant's own interest as well as that of its subsidiary; defendant president stated

that he thought he had the authority as president to bind the corporation to the guaranty; and the president at no time advised plaintiff that the board of directors needed to approve the guaranty.

APPEAL by plaintiff from *Freeman, Judge.* Judgment entered 5 January 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 28 November 1984.

Plaintiff appeals from summary judgment for defendant in an action to enforce a guaranty.

Jackson N. Steele for plaintiff appellant.

Haworth, Riggs, Kuhn, Haworth and Miller, by John Haworth and David B. Ashcraft, for defendant appellee.

WHICHARD, Judge.

Plaintiff contends the court erred in granting defendant's motion for summary judgment, in that defendant's president had either actual, implied, or apparent authority to bind the corporation to its guaranty, and the guaranty was supported by adequate consideration. We hold that there was evidence sufficient to warrant a jury finding that the guaranty signed for the corporation by its president was supported by valuable consideration. We also hold as a matter of law that defendant's president had the apparent if not the actual authority to make a guaranty agreement binding on the corporation.

The test on a motion for summary judgment is whether the materials presented raise an issue of fact so essential that its resolution can defeat a party, of such nature as to affect the outcome of the action, or of such nature as to constitute a legal defense. Summary judgment is proper only if no such factual issue exists. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534-35, 180 S.E. 2d 823, 830 (1971); *Gillespie v. DeWitt*, 53 N.C. App. 252, 256, 280 S.E. 2d 736, 740, *disc. rev. denied*, 304 N.C. 390, 285 S.E. 2d 832 (1981).

The evidence is as follows:

Defendant-corporation operates a retail clothing store. Three family members—father, mother, and son—are its only stockholders and directors. The father is chairman of the board, the mother is secretary-treasurer, and the son is president. The son

was also president of a mail order sales subsidiary of defendant that did business at another location. Defendant owned all the stock in the subsidiary.

Plaintiff is a printing company. In late 1981 plaintiff's representative solicited a catalog-printing order for the subsidiary from its president. Following negotiations in which plaintiff's representative learned of the son's presidency of both defendant and the subsidiary, final arrangements were made for plaintiff's printing of catalogs for defendant's subsidiary. Plaintiff's representative delivered to the son, as president of defendant's subsidiary, a letter enclosing a proposal along with a proposed letter from defendant guaranteeing its subsidiary's payment for the catalogs. The son accepted and signed the proposal. After having the guaranty typed under the subsidiary's letterhead, the son signed it as defendant's president and mailed it to plaintiff.

Plaintiff later learned that defendant's subsidiary was having difficulty raising sufficient operating capital. After discussions of that situation between defendant's president and plaintiff's representative, plaintiff printed the catalogs. It then billed defendant's subsidiary for approximately $225,000.00. The following day defendant's subsidiary filed a petition for liquidation in Bankruptcy Court in which it listed its debt to plaintiff. Upon demand, neither the subsidiary nor defendant paid the debt.

I.

[1] A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is liable therefor in the first instance.[1] *Gillespie*, 53 N.C. App. at 258, 280 S.E. 2d at 741, quoting *O'Grady v. Bank*, 296 N.C. 212, 220, 250 S.E. 2d 587, 593 (1978). The en-

1. The novelist Charles Dickens, through his character Mr. Pancks, offered the following amusing commentary on guaranty agreements:

> It's no satisfaction to be done by two men instead of one. One's enough. A person who can't pay, gets another person who can't pay, to guarantee that he can pay. Like a person with two wooden legs getting another person with two wooden legs, to guarantee that he has got two natural legs. It don't make either of them able to do a walking match. And four wooden legs are more troublesome to you than two, when you don't want any.

C. Dickens, *Little Dorrit* 319 (Penquin Books ed. 1983).

forceability of the guarantor's promise is determined primarily by the law of contracts. *Id.* at 259, 280 S.E. 2d at 741. Therefore, for a guaranty to be enforceable, it must be supported by consideration. *Id.*, 280 S.E. 2d at 742. However, the same consideration may suffice for both the principal obligation or debt and a guaranty if the guaranty is part of the transaction which created the debt it guarantees. *Id.* at 260, 280 S.E. 2d at 742; 38 Am. Jur. 2d *Guaranty* Sec. 44, at 1047 (1968). In that case the extension of credit by the obligee supplies consideration for both the principal debt and the guaranty. *Id.*

We note the following forecast of evidence from the deposition of defendant's president.

> Q. Do you have any recollection of whether you first raised the possibility of [defendant] guaranteeing [the subsidiary's] account with [plaintiff] or whether that was raised first by [plaintiff's representative]?
>
> A. No,—I didn't raise that possibility.
>
> Q. Is it your best recollection that [plaintiff's representative] raised it when he indicated that [plaintiff] could give you the credit terms . . . that you requested, but would require a guaranty from [defendant]?
>
> A. That was probably at the point that it was requested. . . . I think that is probably the point that he requested that.
>
> Q. Is that your best recollection of the sequence of events?
>
> A. Uh-huh . . . that . . . would seem to be correct to me.

Further evidence from defendant's president was as follows:

> Q. Prior to the time that you and [plaintiff's representative] entered into the agreement for [plaintiff] to print the catalog, he requested a guaranty from [defendant], didn't he?
>
> . . . .
>
> A. He said that our credit—that the credit terms had been approved and that they would like to have the guaranty of [defendant].

Q. And you told him that that wouldn't be any problem?

A. That is correct.

Q. And that you would send it to him later?

A. That's correct.

From this evidence a jury could find that the guaranty was negotiated and agreed to as part of the original transaction and thus was supported by adequate consideration.

II.

[2] A principal is liable upon a contract duly made by its agent with a third person in three instances: when the agent acts within the scope of his or her actual authority; when a contract, although unauthorized, has been ratified; or when the agent acts within the scope of his or her apparent authority, unless the third person has notice that the agent is exceeding actual authority. *Investment Properties v. Allen*, 283 N.C. 277, 285-86, 196 S.E. 2d 262, 267 (1973). *See* G.S. 55-36(e). Where a third party in good faith and with reasonable prudence deals with an agent having apparent authority, the principal is bound by the agent's acts. *Thompson v. Assurance Society*, 199 N.C. 59, 64, 154 S.E. 21, 24 (1930).

Apparent authority includes authority to do whatever is usual and necessary to transact the business an agent is employed to transact. *Research Corporation v. Hardware Co.*, 263 N.C. 718, 721, 140 S.E. 2d 416, 419 (1965), citing *Wynn v. Grant*, 166 N.C. 39, 47, 81 S.E. 949, 953 (1914). The law of apparent authority usually depends upon the unique facts of each case, *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 32, 209 S.E. 2d 795, 800 (1974), such as the ordinary course of business, the nature and reasonableness of the contract, the officer negotiating it, the size of the corporation, and the number of shareholders. Thus, in a case where the evidence is conflicting, or susceptible to different reasonable inferences, the nature and extent of an agent's authority is a question of fact to be determined by the trier of fact. 3 Am. Jur. 2d *Agency* Sec. 360, at 719 (1962). Where different reasonable and logical inferences may not be drawn from the evidence, the question is one of law for the court. *Id.* at 720. Such is the case here.

The law of this state is clear as to the apparent authority of the president of a closely-held corporation to enter into contracts for the corporation. The president of a corporation is the head and general agent of the corporation and may act for it in matters that are within the corporation's ordinary course of business or incidental to it. *Zimmerman*, 286 N.C. at 32, 209 S.E. 2d at 800; *Burlington Industries v. Foil*, 284 N.C. 740, 758, 202 S.E. 2d 591, 603 (1974).

The officers, directors, and shareholders of defendant and its subsidiary consist solely of a mother, father, son, and daughter-in-law. This kind of small, closely-held corporation has been said by our Supreme Court to "more nearly resemble . . . a partnership than . . . a corporation." *Zimmerman*, 286 N.C. at 33, 209 S.E. 2d at 801. The Court stated:

> "Although the same broad principles of corporation and agency law determine the powers of officers in both close and publicly held corporations, the factual differences in the patterns of operation of the two kinds of corporations lead to wide disparities in the powers the courts actually recognize in corporate officers. In a close corporation, ownership and management normally coalesce; and the participants often conduct their enterprise internally much as if it were a partnership. The courts have seldom articulated a difference in the rules governing officers' powers in close and publicly held corporations; yet they appear in fact to have often cut through the technical legal form of close corporations to reach the results that would be reached if the enterprises were conducted as partnerships. In other words, the courts frequently, and perhaps usually, recognize in officers of a close corporation the same powers that are possessed by partners in a firm under the general rule of partnership law which makes each partner an agent of the firm for the purposes of its business and empowers each partner to bind the firm by acts apparently carried on to further the usual business of the partnership.
>
> "The courts have rather consistently held officers in a close corporation to possess powers to bind the corporation under circumstances which would make a similar holding questionable in a publicly held corporation. . . . In view of

> the typical patterns of operation in close corporations, holdings of this kind can usually be reconciled with traditional doctrine by viewing an officer whose powers are questioned as in fact a general manager of the company or as having a general manager's broad powers, or by applying principles of ratification or of authority or apparent authority by acquiescence. In any event, only in rare instances have courts failed to hold a close corporation bound by *inter vivos* contracts entered into by any officer of the corporation."

Id. at 33-34, 209 S.E. 2d at 801, quoting 2 O'Neal, Close Corporations Sec. 8.05 (1971).

Here the by-laws of defendant authorize the president to sign written contracts of the corporation. Defendant wholly owned the subsidiary and stood to benefit from its business. It had on at least five previous occasions guaranteed the obligations of its subsidiary, including a guarantee to the previous printer. The catalog of the subsidiary is identified simply by defendant's corporate name. Guaranteeing the account and obtaining the advertising materials thus was in defendant's own interest as well as that of its subsidiary.

Defendant's president stated that he thought he had the authority as president to bind the corporation to the guaranty; he at no time advised plaintiff that the board of directors needed to approve the guaranty. Nothing in the facts and circumstances here would put an ordinarily prudent person on notice that defendant's president was exceeding the scope of his authority. Without such notice, the principal is bound. *Zimmerman*, 286 N.C. at 31, 209 S.E. 2d at 799. Moreover,

> [t]he general rule that a person dealing with an agent must know the extent of his authority does not apply when dealing with one who is a general agent, as the president of a corporation. In such case the burden is upon the principal to show that the other party had notice of a restriction upon the power of the general agent.

Bank v. Oil Co., 157 N.C. 302, 304, 73 S.E. 93, 94 (1912); *Zimmerman*, 286 N.C. at 33, 209 S.E. 2d at 800. Defendant here has not carried that burden.

III.

We hold as a matter of law, therefore, that defendant's president had the apparent authority to execute a guaranty binding defendant to pay the debt of its subsidiary to plaintiff. We remand for a jury trial on the issue of consideration.

Reversed and remanded.

Judges JOHNSON and PHILLIPS concur.

DUBOSE STEEL, INC. v. BRANCH BANKING AND TRUST COMPANY

No. 844SC113

(Filed 5 February 1985)

Uniform Commercial Code § 36.1— letter of credit—precise compliance with terms required—substitution of purchase orders

Plaintiff beneficiary did not meet the terms of defendant's letter of credit precisely and therefore could not force defendant to pay where the letter in question provided that defendant would pay upon presentation of a bona fide invoice requesting payment for creditor's invoice #0046, but plaintiff and its customer agreed to a change in the order as evidenced by new purchase orders #0060 and #0064 which were substituted for #0046; #0046 was cancelled; defendant was not informed of the change nor did anyone seek an amendment of the letter of credit; and plaintiff submitted the purchase orders #0060 and #0064 to defendant. Furthermore, plaintiff's evidence did not raise issues of waiver and estoppel, and it was irrelevant whether plaintiff performed satisfactorily under the underlying contract with the creditor.

APPEAL by plaintiff from *Johnson, E. Lynn, Judge.* Judgment entered 6 September 1983 in Superior Court, SAMPSON County. Heard in the Court of Appeals 24 October 1984.

This is an action seeking payment on a letter of credit issued by defendant Branch Banking and Trust Company. From the entry of summary judgment for defendant, plaintiff appeals.

Hunter, Wharton & Howell, by V. Lane Wharton, Jr., for plaintiff appellant.

Moore, Van Allen and Allen, by Julia V. Jones and George V. Hanna, III, for defendant appellee.

JOHNSON, Judge.

The issue presented by this appeal is whether the court erred in granting summary judgment for defendant. For the following reasons, we affirm.

In the summer of 1981, Great Dominion Corporation contacted plaintiff, Dubose Steel, Inc., regarding the purchase of some steel from plaintiff. As a result of this contact, Mr. Don Shaw, plaintiff's credit manager, called Mr. Fred Miller, an employee of defendant Branch Banking and Trust Company (hereinafter "Bank"), regarding the financing of the sale of steel to Great Dominion, and was advised that the Bank had extended a line of credit to Great Dominion. Shaw subsequently requested a letter of credit from the Bank assuring plaintiff that it would be paid for steel shipped to Great Dominion. As a result of these contacts, Miller wrote a letter to Shaw dated 7 October 1981 which read:

Mr. Don Shaw
Dubose Steel Company
P. O. Box 1098
Roseboro, North Carolina 28382

RE: Great Dominion Corporation
Kings Mountain, North Carolina

Dear Mr. Shaw:

We hereby certify that we will pay upon presentation any bona fide invoice on behalf of the captioned company. The aggregate amount of such invoice or combination of invoices shall not exceed $100,000, One Hundred Thousand Dollars.

It is understood that such payment will be contingent on the approval of Great Dominion Corporation. Payment shall be made after a reasonable lapse of time for trade credit; sixty (60) days after date of delivery.

If we may be of further assistance, please do not hesitate to contact us.

Very truly yours,

Frederick L. Miller
Vice President

No presentations for payment or payments by the Bank were made pursuant to the 7 October 1981 letter. Later, in December 1981, after Great Dominion had paid off the balance due on its account to plaintiff, Great Dominion sent another purchase order, dated 30 December 1981, bearing #0046, and calling for the purchase of various quantities and sizes of steel, in the sum of $67,795.33. At the request of Mr. Bill Bennett, plaintiff's president, defendant issued a second letter of credit, dated 5 January 1982, which read:

> Mr. Don Shaw
> Dubose Steel Company
> P. O. Box 1098
> Roseboro, North Carolina 28382
>
> RE: Great Dominion Corporation
> Kings Mountain, North Carolina
>
> Dear Mr. Shaw:
>
> We hereby certify that we will pay upon presentation a bona fide invoice requesting payment for Great Dominion Corporation invoice #0046 in an aggregate amount not to exceed $75,000.00, Seventy Five Thousand Dollars.
>
> Such payment shall be made as long as the materials delivered are acceptable to Great Dominion and conformed to specifications and terms set forth by Great Dominion Corporation. Such payments shall be made after a reasonable lapse of time for trade credit; sixty (60) days after date of delivery.
>
> Our letter, dated October 7, 1981, is null and void and we have no further obligation under same.
>
> Very truly yours,
>
> Frederick L. Miller
> Vice President

Later in January 1982, plaintiff and Great Dominion agreed to a change in the order as evidenced by new purchase orders #0060 and #0064, which were substituted for order #0046. The Bank, however, was not informed of this change, nor did anyone seek an amendment of the 5 January 1982 letter of credit. At the

time of these changes, part of the steel under order #0046 had already been shipped. Great Dominion returned this steel to plaintiff for which it issued credit memos. Plaintiff shipped the steel according to the new orders, which called for hot rolled structural steel, the same as in order #0046, but in different forms. This steel, in the sum of $72,133.76, was delivered to Great Dominion within 60 days of 5 January 1982, was accepted by Great Dominion, and conformed to the specifications and terms of the orders.

When Great Dominion did not pay for the steel, plaintiff originally made an oral demand for payment from the Bank. Plaintiff later submitted to the Bank invoices based upon Great Dominion's orders #0060 and #0064, but never presented invoices based upon order #0046. The Bank refused to make any payment under the letter of credit because plaintiff failed to present invoices based upon order #0046.

In *Courtaulds North America, Inc. v. North Carolina National Bank*, 528 F. 2d 802 (4th Cir. 1975), the defendant bank issued a letter of credit on behalf of its customer, Adastra Knitting Mills, Inc. One of the conditions of the letter of credit was that the draft plaintiff presented for payment be accompanied by a "[c]ommercial invoice . . . stating that it covers . . . 100% acrylic yarn." The bank denied liability on the ground that the draft did not agree with the letter's conditions since the accompanying invoices stated that the goods were "Imported Acrylic Yarn." Applying North Carolina law, the Fourth Circuit held that the bank was not liable on the letter of credit because the accompanying invoices did not conform to the terms of the letter of credit. The Court relied in part upon the following provisions of G.S. 25-5-109:

> Insurer's obligation to its customer.—(1) An insurer's obligation to its customer includes good faith and observance of any general banking usage but unless otherwise agreed does not include liability or responsibility
>
> (a) for performance of the underlying contract for sale or other transaction between the customer and the beneficiary; or
>
> . . .
>
> (c) based on knowledge or lack of knowledge of any usage of any particular trade.

(2) An insurer must examine documents with care so as to ascertain that on their face they appear to comply with the terms of the credit but unless otherwise agreed assumes no liability or responsibility for the genuineness, falsification or effect of any document which appears on such examination to be regular on its face.

The Court also relied upon the majority black letter law of letters of credit that the beneficiary must meet the terms of the credit precisely in order to force the issuer to perform. Without such strict compliance with the letter of credit, the beneficiary could not recover from the bank. H. Harfield, Bank Credits and Acceptances, at p. 73 (5th ed. 1974).

We find the reasoning of the Fourth Circuit to be persuasive. Plaintiff urges this Court to adopt a rule of "substantial compliance" rather than follow the majority rule of strict compliance. We refuse to adopt such a new rule as the majority rule is based upon sound reasoning and commercial reality. *Courtaulds, supra; Philadelphia Gear Corp. v. Central Bank*, 717 F. 2d 230, *rehg. denied*, 720 F. 2d 1291 (5th Cir. 1983); *Consolidated Aluminum Corp. v. Bank of Virginia*, 544 F. Supp. 386 (D. Md. 1982), *aff'd*, 704 F. 2d 136 (4th Cir. 1983).

Summary judgment is particularly appropriate in suits involving letters of credit. *Data General Corp. v. Citizens National Bank of Fairfield*, 502 F. Supp. 776 (D. Conn. 1980). In the case *sub judice*, it is undisputed that plaintiff did not present an invoice based upon order #0046. Plaintiff thus did not comply with the terms of the letter of credit and the Bank was not liable thereon. *Courtaulds, supra.* There being no genuine issue of material fact and the Bank being entitled to judgment as a matter of law, summary judgment was properly entered for defendant. G.S. 1A-1, Rule 56(c).

Plaintiff, however, argues that summary judgment was improperly entered by attempting to raise issues of fact as to waiver and estoppel. Plaintiff contends that there was evidence that Great Dominion waived the non-compliance by plaintiff, since Great Dominion stated it was satisfied with the steel it received and found it conforming. This argument fails for three reasons. First, the letter of credit contained two requirements: (1) presentation of an invoice requesting payment for Great Dominion in-

voice #0046; and (2) acceptance of the goods by Great Dominion. The statement of Mr. Dickens of Great Dominion that the goods were acceptable only satisfied the second requirement of the letter of credit. There is no evidence that Great Dominion waived the presentation of the invoice. Second, even if Great Dominion had waived the presentation of the document, the Bank was not required to consent to such a waiver. G.S. 25-5-109; G.S. 25-5-114; *Philadelphia Gear, supra.* Third, a bank does not have a good faith duty to seek a waiver from its customer. *See AMF Head Sports Wear, Inc. v. Ray Scott's All-American Sports Club, Inc.*, 448 F. Supp. 222 (D. Ariz. 1978); *Corporacion De Mercadeo Agricola v. Mellon Bank International*, 608 F. 2d 43 (2d Cir. 1979).

Plaintiff also contends that the Bank should be estopped from denying liability because the Bank knew plaintiff would not ship the goods unless the Bank issued a letter of credit, and because the Bank drafted the letter of credit to require the presentation of a non-existent Great Dominion *invoice* #0046, although there was a Great Dominion purchase order by that number, but which the Bank did not have before it when it drafted the letter. These contentions fail because Great Dominion and plaintiff, without informing the Bank, cancelled purchase order #0046. Plaintiff also knew that the invoice number referred to in the letter was actually Great Dominion purchase order #0046. Plaintiff also contends that the Bank should have allowed it to cure its presentation before dishonoring it. Cure, however, was impossible because order #0046 had been cancelled, and new orders, calling for different quantities and forms of steel, substituted.

Plaintiff's major complaint is that it performed satisfactorily under the underlying contract with Great Dominion and that it is unfair for it not to be paid under the letter of credit. However, in determining the Bank's duty to honor the letter of credit, one does not look to the underlying contract:

> An insurer must honor a draft or demand for payment which complies with the terms of the relevant credit *regardless* of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary. . . . (Emphasis added.)

G.S. 25-5-114(1). The bank's duty to honor arises only when the demand for payment *complies* with the relevant credit. Plaintiff had

the burden of showing that its demand for payment complied with the terms of the letter of credit. *Philadelphia Gear Corp. v. Central Bank*, 717 F. 2d 230 (5th Cir. 1980). Having failed to comply, plaintiff could not recover from the Bank. *Courtaulds, supra.*

Affirmed.

Judges WHICHARD and BECTON concur.

BILLY L. BANDY, SR. AND WIFE, NINA B. BANDY v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, DURHAM LIFE INSURANCE COMPANY AND T. A. UPCHURCH, TRUSTEE

No. 8426SC495

(Filed 5 February 1985)

1. **Attorneys at Law § 7.3— inverse condemnation—attorney fees allowable**

Former G.S. 160A-243.1 allowed for attorney fees and costs in common law inverse condemnation suits.

2. **Attorneys at Law § 7.3— inverse condemnation—attorney fees—contingent contract not controlling**

Plaintiffs in an inverse condemnation proceeding were entitled to attorney fees and costs pursuant to G.S. 160A-243.1 in an amount determined by the court in its discretion to be the actual reasonable value of the attorneys' services, and plaintiffs were not limited to an amount provided in their contingent fee contract with their attorney.

APPEAL by plaintiffs and defendant City of Charlotte from *Gaines, Judge*. Judgment entered 21 December 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 January 1985.

This is an appeal from an award of attorney fees and costs in plaintiffs' suit against defendant City (defendant) for inverse condemnation. Defendant appeals from the portion of the judgment granting plaintiffs attorney fees, costs, and expenses under former G.S. 160A-243.1. Plaintiffs appeal from the portion of the judgment limiting the amount of attorney fees to those provided in plaintiffs' contingent fee contract.

Weinstein, Sturges, Odom, Groves, Bigger, Jonas & Campbell, P.A., by T. LaFontine Odom and L. Holmes Eleazer, Jr., for plaintiffs.

Underwood, Kinsey & Northey, P.A., by William E. Underwood, Jr., and C. Ralph Kinsey, Jr., for defendant.

WHICHARD, Judge.

This appeal arises out of a jury verdict for plaintiffs on their claim of inverse condemnation due to defendant's taking of an avigation easement over and in their property. Plaintiffs' case was the first tried of approximately 250 separate inverse condemnation suits arising out of the operation of the north/south runway at defendant's airport. Plaintiffs were awarded $13,750 as the diminution in market value of their home due to aircraft noise and low and frequent flights of jet aircraft.

Plaintiffs had a contingent fee contract with their attorney for an amount equal to thirty per cent of the judgment plus thirty per cent of the interest paid on the judgment. The court found that "[t]he cost to [plaintiffs] to pursue their claim against the City through trial was greatly in excess of [their] financial means . . . ." The court further found that

> [t]he reasonable value of plaintiffs' counsel's legal services in the opinion of the court based upon the observations of the [c]ourt during trial and upon the materials presented at the hearing on the petition for fees after the trial is $35,000.00, and that this greatly exceeds the fee contracted for in the contingency fee arrangement.

G.S. 160A-243.1 provides that in an action against a city seeking compensation for the taking of property where judgment is for plaintiff, "the court shall award to the plaintiff as a part of the judgment a sum that, in the opinion of the court, will reimburse the plaintiff for his reasonable costs, disbursements and expenses (including reasonable attorney, appraisal, and engineering fees) incurred because of the action." Although G.S. 160A-243.1 was repealed effective 1 January 1982, *see* 1981 N.C. Sess. Laws, ch. 919, sec. 28, the court concluded that G.S. 40A-1 provided a savings clause for proceedings pending prior to 1 January 1982. G.S. 40A-1 states,

> It is the intent of the General Assembly that the procedures provided by this Chapter shall be the exclusive condemnation procedures to be used in this state by all private condemnors and all local public condemnors. All other provisions . . . are hereby repealed effective January 1, 1982. Provided, that any condemnation proceeding initiated prior to January 1, 1982, may be lawfully completed pursuant to the provisions previously existing.

Since plaintiffs filed their claim on 15 June 1981, the court concluded that a grant of attorney fees and costs could be awarded "pursuant to the provisions previously existing" in G.S. 160A-243.1.

The court apparently interpreted the "incurred" language of G.S. 160A-243.1 to mean those amounts which plaintiffs were legally obligated to pay under their contingent fee contract. While it awarded surveyor fees in excess of $300, appraiser fees in excess of $5,000, engineering fees in excess of $7,000, and other reasonable costs in excess of $3,000, the court limited its award of attorney fees to $4,125, the contingent amount. Although this amount is substantially less than the court's factual finding as to the reasonable value of plaintiffs' counsel's services, *supra*, the court as a matter of law "deem[ed] . . . such fee to be reasonable in amount."

The issues raised are whether plaintiffs are entitled to attorney fees and costs pursuant to G.S. 160A-243.1 and, if so, whether the court may award a reasonable fee in excess of that contracted for by plaintiffs and their counsel. We affirm the trial court on the first issue and reverse on the second.

[1] Defendant contends that the savings provision of G.S. 40A-1 applies only to proceedings initiated by municipalities, not to inverse condemnation proceedings. Defendant reasons that the "provisions previously existing" to which the statute refers are those sections of Ch. 160A repealed by Ch. 40A. In this reasoning defendant is correct. Defendant further argues, however, that the provisions of Ch. 160A authorize only condemnations by the City in the exercise of its power of eminent domain and not inverse condemnation suits brought by landowners. In *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E. 2d 101 (1982), the Supreme Court held otherwise. It stated:

> Chapter 160A clearly contemplates landowner recourse to a common law inverse condemnation action where there has been an uncompensated taking by a municipality and even provides for payment by the City of the costs of a successful landowner's action. G.S. Sec. 160A-243.1.

Id. at 211, 293 S.E. 2d at 116. *Long* involved one set of plaintiffs in the 250 inverse condemnation suits filed against defendant. The Court there noted that the resolution of the legal questions before it would govern the individual trials of the numerous cases already pending. *Id.* at 188-89 n. 1, 293 S.E. 2d at 103 n. 1. As plaintiffs' case is one of these, and as *Long* clearly establishes the statutory authority for attorney fees and costs in common law inverse condemnation suits under G.S. 160A-243.1, defendant's contention is without merit.

[2] Defendant also contends that G.S. 160A-243.1 allows the court no discretion to award attorney fees in excess of the contingent amount. Defendant urges us to construe the terms "incurred" and "reimburse" to mean an amount no greater than that which plaintiffs are obligated to pay under their contingent fee contract.

According to defendant, where there is a contingent fee agreement the court must first determine what amount is due under the agreement. These are the expenses "incurred." Then the court must determine if the amount due, *i.e.*, contracted for, is reasonable. If the contingent amount is unreasonably high, the court may reduce the award; if the contingent amount is unreasonably low, the court can do nothing because any increase is beyond what plaintiffs owe on their contract. Defendant thus does not suggest that the trial court is bound by the contingent fee contract, but only that the contract establishes the upper limit for the court's award.

Defendant therefore impliedly recognizes the thrust of recent decisions which hold that when attorney fees are awarded under condemnation statutes, the courts cannot simply award contingent fees but must award reasonable fees. The first case to set forth this principle was *Redevelopment Comm. v. Hyder*, 20 N.C. App. 241, 201 S.E. 2d 236 (1973). In that case, attorneys for the property owners contracted to be paid a contingent fee of thirty per cent. The statute which authorized the attorney fees provided

for "reasonable counsel fees fixed by the court." G.S. 160-456(10)(h)(3). The Court stated,

> When a statute provides for attorney fees to be awarded as a part of the costs to be paid by the governmental authority which is appropriating the property, it is not a contingent fee, but an amount equal to the actual reasonable value of the attorney's services. (Citations omitted.) . . . There are numerous factors for consideration in fixing reasonable attorney fees—the kind of case, the value of the properties in question, the complexity of the legal issues, the time and amount involved, fees customarily charged for similar services, the skill and experience of the attorney, the results obtained, whether the fee is fixed or contingent, all afford guidance in reaching the amount of a reasonable fee.

Hyder, 20 N.C. App. at 245-46, 201 S.E. 2d at 239. As defendant admits and as *Hyder* makes clear, contingent fee agreements cannot be binding on the court if they are at variance with the reasonable value guide: "These fee contracts [are] binding upon the parties who executed them but not upon the court which, under the statute, fixes the fees to be taxed against a third party." *Id.* at 246, 201 S.E. 2d at 239.

Further, *Hyder* does not limit the court solely to a reduction of the contingent fee to a reasonable amount. The *Hyder* court, *id.* at 245, 201 S.E. 2d at 239, cites cases in which courts of other jurisdictions have allowed reasonable statutory attorney fees that are larger than the normal contingent fee. *See, e.g., Dumas v. King*, 157 F. 2d 463, 466 (8th Cir. 1946) (court said statute did not contemplate contingent fee, but a reasonable fee; appellate court will interfere where allowance "clearly excessive *or insufficient*"); *Henlopen Hotel Corp. v. Aetna Ins. Co.*, 251 F. Supp. 189, 193 (D. Del. 1966); *Morton County Bd. of Park Comm'rs v. Wetsch*, 136 N.W. 2d 158, 159-60 (N.D. 1965) ("the fee . . . determine[d] to be the reasonable fee . . . may be less than the [contingent fee], and . . . it may be more than such fee would amount to").

Subsequent decisions have followed the holding and rationale of *Hyder*. In *Redevelopment Comm. v. Weatherman*, 23 N.C. App. 136, 141-42, 208 S.E. 2d 412, 415-16 (1974), a condemnation proceeding, this Court vacated an order fixing counsel fees at a contingent fee amount and remanded for a determination of

reasonable counsel fees. In *Cody v. Dept. of Transportation*, 60 N.C. App. 724, 300 S.E. 2d 25 (1983), an action for inverse condemnation, this Court considered an attorney fee statute—G.S. 136-119—which, like G.S. 160A-243.1 here, provides for reimbursement of expenses actually incurred. The Court found the amount awarded by the trial court to be "fair, just, and reasonable under all the circumstances of the case." *Cody*, 60 N.C. App. at 728, 300 S.E. 2d at 28. The *Cody* court cited *Hyder* for the premise that an award of statutory attorney fees should equal "the actual reasonable value of the attorney services," not a contingent fee amount. *Id.*, 300 S.E. 2d at 29.

We see no reason to distinguish this case from others this Court has considered. When the legislature authorizes the courts to reimburse plaintiffs for fees incurred in inverse condemnation proceedings, we believe its intent is to allow reasonable fees, *see Hyder*, 20 N.C. App. at 246, 201 S.E. 2d at 239, based on work actually done, despite the contractual arrangement of plaintiffs and their counsel. The purpose is to permit the owner "to receive the award for his property, even after legal action, without having it reduced by the payment of attorney fees." *Id.* at 245, 201 S.E. 2d at 239. The statute thus sets the policy of the state for the court to award reasonable attorney fees.

We therefore hold that plaintiffs are entitled to attorney fees and costs pursuant to G.S. 160A-243.1 in an amount determined by the court in its discretion to be the actual reasonable value of the attorneys' services. The portion of the judgment limiting the attorney fees to those provided in the contingent fee contract is thus reversed, and the cause is remanded for the awarding of a reasonable fee.

Affirmed in part, reversed in part, and remanded.

Chief Judge HEDRICK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. EARL LEE JONES

No. 8412SC332

(Filed 5 February 1985)

1. **Larceny § 6.1— ownership and value of property—evidence admissible**

In a prosecution of defendant for felonious larceny of a television and video recorder from an appliance store, there was no merit to defendant's contention that the trial court erred in allowing the store manager to give inadmissible hearsay testimony as to ownership and value of the stolen items.

2. **Criminal Law § 162— voluntariness of confession—failure to object—no appellate review**

Defendant was not entitled to appellate review of the trial court's determination with respect to voluntariness of his incriminating statements, since defendant did not move to suppress or object at trial to their admission. G.S. 15A-1446; Appellate Rule 10(b)(1).

3. **Criminal Law § 138— sentencing—defendant's immaturity or limited mental capacity—no mitigating factor**

Evidence was insufficient to require the trial court to find as a statutory mitigating factor that defendant's immaturity or his limited mental capacity at the time of the commission of the offense significantly reduced defendant's culpability for the offense, since the evidence consisted of testimony by a member of the Fayetteville Police Department who testified, on cross-examination, that defendant had never been able to keep a job and could not read or write, and that defendant had gone to high school for several years; furthermore, the evidence did not address the issue of culpability, i.e., whether defendant understood the nature and severity of the offense he committed. G.S. 15A-1340.4(a)(2)(3).

APPEAL by defendant from *Britt, Samuel E., Judge.* Judgment entered 1 December 1983 in CUMBERLAND County Superior Court. Heard in the Court of Appeals 8 January 1985.

Defendant was convicted of felonious larceny. At trial, the State's evidence tended to show the following events and circumstances. Defendant and another male were observed in the Curtis Mathes Store in Fayetteville. Defendant engaged Mike Beal, the store manager, in conversation while the other man went to the rear of the store. After about ten minutes, the man who had gone to the rear of the store returned to the front, stated he was "ready to go," and the two men then left the store. Shortly thereafter, Donna Lloyd came in the store and stated that two men had just left the rear of the store with some merchandise. Beal then determined that a 13 inch color television set and

a video recorder were missing from the store. Donna Lloyd and Laura Sanders saw defendant and another man carrying a television set and a video recorder out of the rear of the store and place the items in a car and drive off. Debra Valentine identified defendant as the person driving the car. Detective James Johnson arrested defendant. Following questioning by Johnson, defendant made an incriminating statement to Johnson.

Defendant did not testify, but presented evidence tending to show that he was not at the Curtis Mathes Store on the day of the crime.

Defendant was sentenced to a term of six years, a sentence in excess of the presumptive term.

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

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

WELLS, Judge.

[1] Pursuant to his first assignment of error, defendant contends that the trial court erred in allowing Mike Beal, the Curtis Mathes store manager, to give inadmissible hearsay testimony as to ownership and value of the stolen television set and video recorder. The objected to testimony occurred in the following exchange:

> Q. What happened next?
>
> A. All right. The next thing that happened was Mrs. Lloyd, Donna Lloyd came in just a few minutes after they left and told us that she had seen two black males leave the back of our store with a television and a video recorder. So, we decided it was ours and I called Sanford to get an inventory of our floor, what we had on the floor.
>
> Q. Did they provide the inventory for you?
>
> A. Right.
>
> Q. What did the inventory show?

A. All right. We—

Q. —of course, I assume you checked it against what you had?

A. We checked everything on the floor then and confirmed that we had a 13 inch—

Mr. Williams: Objection, your Honor.

Court: Objection to what?

Mr. Williams: To what he is fixing to say about somebody else telling him some information about what inventory they had.

Court: He hasn't testified to that. He is fixing to testify to what he determined. Overruled.

Mr. Ammons: What did you determine?

A. We checked our inventory against the inventory that was in Sanford and determined that we were missing a 13 inch remote television and a video recorder.

Q. What was the value of the 13 inch television set?

A. $585.00.

We do not find that the probative force of Mr. Beal's testimony, as it related to the ownership or value of the missing items, as being dependent upon the competency or credibility of any other person, or that the assertion of any other person than Mr. Beal was offered to prove the ownership or value of the missing items. *See* 1 Brandis, N.C. Evidence § 128 (2d rev. ed. 1982) and cases cited and discussed therein. This assignment is overruled.

[2] Pursuant to his next assignment of error, defendant contends that his statements to Detective Johnson were involuntary and were obtained in violation of defendant's rights to be free from self-incrimination. The record (trial transcript) shows that defendant did not object to the introduction of his statement nor to testimony by Detective Johnson as to the contents of defendant's statement. Defendant contends, however, that such an objection is not necessary to afford appellate review, *citing State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574 (1982) and *State v. Pearce*, 266 N.C. 234, 145 S.E. 2d 918 (1966) in support of his argument. N.C. Gen.

Stat. § 15A-1446 (1983) provides the requisites for preserving the right to appellate review of a criminal trial. Subsection (a) of the statute provides that "[e]xcept as provided in subsection (d), error may not be asserted upon appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion." Defendant's asserted error in this assignment does not fall within any of the exceptions set forth in subsection (d). Furthermore, Rule 10(b)(1) of the Rules of Appellate Procedure (effective 1 July 1975) provides the scope of appellate review shall be limited to exceptions "properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule of law was deemed preserved or taken without any such action. . . ."

In *Davis*, the defendant, after having been given *Miranda* warnings, confessed to murder. Upon appeal, the defendant contended that his confession should have been suppressed because it was coerced, having been given after defendant had stated to his interrogators that he did not want to talk about the case he was being questioned about, and that his statement was therefore involuntary even though it was given after defendant had been given *Miranda* warnings. The supreme court resolved this issue against the defendant, finding that defendant's statement was made in a non-custodial setting. In resolving this issue against the defendant, the court found that the trial court's order following a *voir dire* hearing on the defendant's motion to suppress was faulty. We quote the portion of the court's opinion on which defendant in this case relies:

> The defendant quite correctly points out in his brief that the trial court found as a fact that the defendant was not in custody on the first occasion during which he was questioned in the detective offices and that the trial court failed to make any conclusion as to whether the defendant was in custody during the second and crucial period of questioning. The determination whether an individual is 'in custody' during an interrogation so as to invoke the requirements of *Miranda* requires an application of fixed rules of law and results in a conclusion of law and not a finding of fact. To the extent that our prior opinion in *State v. Clay*, 297 N.C. 555, 256 S.E. 2d

176 (1979) may be taken as indicating that this determination is a finding of fact, that case is disapproved.

The defendant further contends, and we agree, that these circumstances do not prevent us from determining the admissibility of the defendant's confession in the present case. Since the legal significance of the findings of fact made by the trial court is a question of law, these findings are sufficient to allow us to resolve the issue presented. *See State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981). Further, where the historical facts are uncontroverted and clearly reflected in the record, as in the present case, we may review the trial court's ruling on the admissibility of a confession in the absence of complete findings of fact and conclusions of law and even in the absence of a ruling by the trial court on the admissibility of the confession. *See State v. Pearce*, 266 N.C. 234, 145 S.E. 2d 918 (1966).

State v. Davis, supra.

We reject the notion that any of the above quoted material of the court's opinion in *Davis* provides the basis for appellate review of the admission of a confession or incriminating statement where there has been no motion to suppress the statement or objection at trial to its admission. *State v. Pearce, supra*, having been decided prior to the enactment of G.S. § 15A-1446 or the present Rules of Appellate Procedure, it is of no avail to defendant on this argument. This assignment is overruled.

We have carefully considered defendant's argument presented pursuant to defendant's third assignment of error. We find defendant's argument to be totally without merit, and therefore overrule it without discussion.

[3] Pursuant to his fourth assignment of error, defendant contends that the trial court erred in imposing a sentence in excess of the presumptive term. The trial court found one factor in aggravation and found no mitigating factors. Defendant contends that the trial court should have found as a statutory mitigating factor that defendant's immaturity or his limited mental capacity at the time of the commission of the offense significantly reduced defendant's culpability for the offense. N.C. Gen. Stat. § 15A-1340.4(a)(2)(e) (1983).

Our supreme court has held that the trial court has the "duty . . . to find a mitigating factor that has not been submitted by defendant arises only when the evidence offered at the sentencing hearing supports the existence of a mitigating factor *specifically listed in N.C. Gen. Stat. § 15A-1340.4(a)(2)* and when the defendant meets the burden of proof established in *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983)." *State v. Gardner*, 312 N.C. 70, 320 S.E. 2d 688 (1984) (emphasis in original). Defendant's assignment of error meets the first *Gardner* criteria; assertion of a statutory mitigating factor under G.S. § 15A-1340.4(a)(2).

Defendant did not meet his burden of proof of the statutory mitigating factor as required by the second prong of *Gardner*. In *State v. Jones, supra* (citations omitted) the court held that:

> [T]he defendant bears the burden of persuasion on mitigating factors if he seeks a term less than the presumptive. Thus, when a defendant argues, as in the case at bar, that the trial court erred in failing to find a mitigating factor proved by uncontradicted evidence, his position is analogous to that of a party with the burden of persuasion seeking a directed verdict. He is asking the court to conclude that 'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn,' and that the credibility of the evidence 'is manifest as a matter of law.'

The evidence that defendant contends supports his argument consisted of the testimony of a member of the Fayetteville Police Department who testified, on cross-examination, that defendant had never been able to keep a job and could not read or write and that defendant had gone to high school for several years. While the foregoing evidence was not contradicted, it was not sufficient to require the trial court to find either that defendant was immature, or of limited mental capacity; or assuming *arguendo* that the trial court could have found either immaturity or limited mental capacity on such sparse evidence, such evidence did not address the issue of culpability, i.e., whether defendant understood the nature and severity of the offense he committed. This assignment is overruled.

No error.

Judges ARNOLD and COZORT concur.

STATE OF NORTH CAROLINA v. GERALD LYNN WILSON

No. 8428SC316

(Filed 5 February 1985)

Constitutional Law § 31— transcript of former trial—denial of defendant's motion—granting State's motion—error

The trial court committed prejudicial error in allowing the State to have the defendant's alibi witness's testimony in defendant's second trial transcribed while at the same time refusing to furnish defendant a transcript of the prosecuting witness's testimony from the same trial, since the prosecution and defendant both wanted the transcriptions for the purpose of impeaching the other's witness; both had the same alternatives to the actual transcription of the testimony available to them; and it was fundamentally unfair to allow the State to have its desired testimony transcribed and to force the defendant alone to seek other alternatives.

APPEAL by defendant from *Howell, Judge.* Judgment entered 2 September 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 7 January 1985.

Attorney General Rufus L. Edmisten by Associate Attorney J. Allen Jernigan for the State.

Assistant Public Defender Lawrence C. Stoker and Albert L. Williams, II, for defendant appellant.

COZORT, Judge.

Gerald Lynn Wilson was arrested on 19 August 1982 and charged with common law robbery. The first two trials on the matter were declared mistrials when the jury was unable to reach a unanimous verdict. In his third trial for the alleged offense, the defendant was convicted. The defendant's major assignments of error on appeal concern: (1) the refusal of the trial judge to furnish the defendant a complete transcript of the second trial; and (2) the trial judge's refusal to allow the defendant to transcribe a portion of the testimony from the second trial, as he had allowed the State. For reasons stated below, we order a new trial.

The defendant's first trial began on 9 February 1983. When the jury was unable to reach a unanimous verdict, Judge Ronald W. Howell declared a mistrial and ordered the case recalendared. Before the case was tried a second time, the defendant's

attorney, Robert L. Harrell, withdrew from the case and Lawrence C. Stoker, Assistant Public Defender, was assigned to represent the defendant. The defendant requested and received a transcript of the first trial.

On 24 August 1983, the second trial of the case, again before Judge Howell, resulted in a mistrial. The defendant again moved to obtain a transcript of the second trial. However, this motion was denied by the trial court on the basis that there was no substantial variation between the second trial and the first trial of which the defendant already had a transcript.

On 31 August 1983, a third trial on the matter began. The State's evidence tended to show, as in the two previous trials, that the defendant ran up behind Deborah Hunter, snatched her purse, and ran down the street. The defendant presented the testimony of Deborah Reed to support an alibi defense that the defendant was with her at the time of the alleged crime.

In the rebuttal portion of the third trial, the State offered two additional witnesses and moved to have a portion of Deborah Reed's testimony in the second trial transcribed. Over the defendant's objection, the trial court recessed and ordered the court reporter to prepare a portion of Deborah Reed's testimony for the State. The State was allowed to introduce Reed's transcribed testimony into evidence and to read a portion of it to the jury. The defendant renewed his motion for a complete transcript of the second trial which was denied. The defendant thereafter requested a transcript of the testimony of Deborah Hunter, the prosecuting witness, from the second trial for the purpose of showing inconsistencies in her testimony. This motion was also denied.

The jury failed to reach a verdict during its deliberation on 1 September 1983. On the following day, before the jury retired to deliberate, the trial court inquired as to the numerical division of the jury and learned that it was split "six-six." The trial court briefly reinstructed the jury. Approximately forty-five minutes later, the jury returned a verdict, finding the defendant guilty of common law robbery.

The major question for our consideration is whether the trial court committed prejudicial error when it denied the defendant's

motion for a transcript of the second trial. As set forth in *Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed. 2d 400 (1971), the test in any case where a transcript has been requested is whether it is needed for an effective defense or appeal. In *Britt* the U.S. Supreme Court identified two factors relevant to this determination:

> (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript.

Id. at 227, 92 S.Ct. at 434, 30 L.Ed. 2d at 403-04.

The State argues that the facts of this case not only demonstrate the lack of necessity for the transcript of the second trial, but also the existence of several readily available alternatives. When Judge Howell first denied the defendant's motion for a transcript of the second trial, the following circumstances existed: the third trial would begin in only one week; the defendant would be represented at the third trial by the same counsel who appeared on his behalf in the second; the defendant had a transcript of the first trial, the only trial in which Lawrence Stoker did not appear as his counsel; the same trial judge who presided over the first two trials would preside over the third; and the court reporter of the first two trials would also record the third. These facts are similar to those in *Britt* and in other cases where the trial judge's refusal to order the defendant a transcript of his trial was upheld. *See State v. McNeill*, 33 N.C. App. 317, 235 S.E. 2d 274 (1977); *State v. Gibbs*, 29 N.C. App. 647, 225 S.E. 2d 837 (1976).

Ordinarily, we would agree with the State that under these circumstances the trial court properly denied the defendant's request for a transcript of the second trial. *See State v. Matthews*, 295 N.C. 265, 289-90, 245 S.E. 2d 727, 742 (1978), *cert. denied*, 439 U.S. 1128, 99 S.Ct. 1046, 59 L.Ed. 2d 90 (1979). However, we find that the trial judge committed prejudicial error when he later gave the State a transcript of part of the second trial and denied the defendant's request for a transcript of part of the second trial.

Specifically, the defendant argues, and we agree, that Judge Howell committed prejudicial error when he recessed the pro-

ceedings, ordered the court reporter to transcribe the defendant's alibi witness's testimony in the second trial, and permitted this former testimony to be introduced into evidence, while refusing to furnish him a transcript of the prosecuting witness's testimony from the same trial. Both the defense and the prosecution wanted the earlier testimony of these witnesses for impeachment purposes to highlight inconsistencies in their testimonies at the last two trials. The trial judge justified the difference in treatment of the State's request from the defendant's similar request on the basis that he failed to find any inconsistencies in the prosecuting witness's testimonies which would warrant a transcription of her previous testimony.

Because the prosecuting witness's testimony in the second trial was never transcribed, we cannot determine, as the trial judge summarily determined, if her testimony was in fact consistent with her most recent testimony. Moreover, from our review of the testimony of the defendant's alibi witness, we fail to see what portion of her testimony was so highly inconsistent to warrant the transcription of her testimony alone. The most important aspect of her testimony was that the defendant was with her during and for a short period after the time the alleged crime was committed. This portion of her testimony remained constant in all three trials. The only difference in her testimony was that in the second trial she stated that the defendant was with her until 4:30 or 5:00, "closer to 5:00," and in the third trial she testified that he was with her until 4:20, the time she left to pick up her husband from work.

In *State v. Matthews*, *id.* at 290, 245 S.E. 2d at 742, the Supreme Court held that the "defendants here suffered no prejudice from the lack of a transcript" because "neither the district attorney nor counsel for the defense had a transcript of the former trial. The scales were not tipped in favor of the State on this count." In the present case, we believe the scales were tipped in favor of the State.

The record reveals that the prosecution and the defendant had the same reasons for wanting the other's witness's testimony transcribed. More importantly, they both had the same alternatives to the actual transcription of the testimony available to them. Thus, it was fundamentally unfair to allow only the State to

have its desired testimony transcribed and to force the defendant alone to seek other alternatives. Therefore, because of the unfairness and unequal treatment surrounding the availability and the use of the second trial's transcript and because we recognize, as this Court did in *McNeill, supra*, at 323, 235 S.E. 2d at 277, that "the benefits of the availability of a transcript . . . to the State as well as the defendant are manifest," we hold the trial court committed prejudicial error in allowing only the State to have a portion of the second trial testimony transcribed and we grant the defendant a new trial.

The defendant has made several other assignments of error. We do not consider them because the questions they pose are unlikely to arise on retrial.

New trial.

Judges WEBB and EAGLES concur.

DONNIE RAY GROGAN v. MILLER BREWING COMPANY, INC.

No. 8417SC9

(Filed 5 February 1985)

1. **Negligence § 39— injury by forklift—last clear chance—instruction not required**

In an action to recover for personal injury sustained by plaintiff when he was struck by a forklift operated by defendant's employee, the trial court did not err in failing to instruct the jury on the issue of last clear chance where plaintiff's evidence tended to show that he did not see and was not aware of the forklift approaching until it struck his foot; defendant's evidence tended to show that plaintiff was walking beside the forklift with his hand on its cage; he looked down at his papers momentarily; he suddenly turned and stepped in front of the forklift; the forklift operator watched plaintiff at all times; and when plaintiff turned into the path of the forklift, the operator immediately slammed on brakes.

2. **Negligence § 37.1— failure to sound horn—refusal to instruct**

Since the issue of defendant's negligence was answered in plaintiff's favor, the trial court's error, if any, in refusing to charge the jury on defendant's negligence which resulted from its agent's failure to sound her horn was harmless.

APPEAL by plaintiff from *Seay, Judge.* Judgment entered 20 September 1983 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 15 October 1984.

This is a civil action to recover for personal injury received by plaintiff from a forklift operated by an employee of Miller Brewing Company. The court instructed the jury on the issues of negligence and contributory negligence. Plaintiff requested submission of the issue of last clear chance to the jury, thereafter the trial court denied the request. From a verdict finding defendant negligent and plaintiff contributorily negligent, plaintiff appeals. Plaintiff contends the court erred in failing to instruct the jury on the issue of last clear chance and in failing to instruct the jury on defendant's negligence, which resulted from defendant's agent's failure to sound her horn.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan and William L. Young, for defendant appellee.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Michael K. Curtis and Henry N. Patterson, for plaintiff appellant.

JOHNSON, Judge.

Plaintiff, Ray Grogan, testified that on 11 February 1982 he was present at Miller Brewing Company for the purpose of picking up a load of beer to be transported in his truck. He was in the process of walking from the terminal clerk's cage to the exit when he was struck from behind by a forklift driven by defendant's agent, Sylvia Ann Moore. Plaintiff stated that prior to the accident he saw Ms. Moore on the forklift truck and said "hi" to her, thereafter he left the cage and headed towards the exit. Plaintiff did not see Ms. Moore from the time he walked from the cage to the time he felt a pain in his leg. He did not hear any warning sound, a horn or other device immediately or in the period immediately prior to the time he was struck by the forklift.

Sylvia Ann Moore, the driver of the forklift, testified that there was not a lot of traffic in the area at the time of the accident. Ms. Moore stated Mr. Grogan was holding onto the cage portion of her forklift and that she was talking with Mr. Grogan as he was walking beside the forklift holding onto it. Mr. Grogan

was just slightly ahead of the forklift when he looked down at his papers while continuing to walk alongside of the forklift. She was watching him the entire time, but he suddenly turned and stepped directly into the path of the forklift.

Billy Eugene Beasley, an employee of Miller Brewing Company, testified that he also saw the accident. He was watching Ms. Moore and Mr. Grogan from the time Mr. Grogan left the cage area until the time he was injured. Mr. Grogan was holding the side of the forklift and walking alongside of it when he turned loose of the forklift, took three or four steps, then suddenly turned and stepped in front of the forklift at which time the forklift struck him.

[1] Plaintiff contends that the trial court, based on the facts presented, erred by failing to instruct the jury on the issue of last clear chance. There are four elements that must be satisfied before the trial court is required to instruct the jury as to the doctrine of last clear chance. They are:

> (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care;
>
> (2) That the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands;
>
> (3) That the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and
>
> (4) That the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him.

Watson v. White, 309 N.C. 498, 308 S.E. 2d 268 (1983). Considering the evidence in the light most favorable to the plaintiff, we hold that the plaintiff has failed to establish each element necessary to require the issue to be submitted to the jury.

Plaintiff has satisfied the first element, that he could not escape by exercise of reasonable care the position of peril he negligently or inadvertently placed himself. Plaintiff's evidence tends to show that he did not see nor was he aware of the forklift approaching. Therefore, it is reasonable to conclude that plaintiff could not extricate himself from the position of peril in which he had inadvertently placed himself. *See Exum v. Boyles*, 272 N.C. 567, 158 S.E. 2d 845 (1968).

Plaintiff has failed to satisfy the second element, that defendant, through its agent, Sylvia Ann Moore, knew or by exercise of reasonable care could have discovered the plaintiff's perilous position and his incapacity to escape from it before the endangered plaintiff suffered injury at hand. Plaintiff's evidence tends to show that after leaving the cage, he started walking in the direction of the exit. He was unaware of the forklift's approach until it struck his foot. Defendant's evidence tends to show that Ms. Moore saw the plaintiff walking, first alongside of the forklift, then slightly ahead of it. She watched the plaintiff the entire time he was walking near the forklift.

The doctrine of last clear chance imposes liability upon a defendant who did not actually know of the plaintiff's situation if, but only if, the defendant owed a duty to the plaintiff to maintain a lookout and would have discovered his situation had such a lookout been maintained. *Id.* at 575-76, 158 S.E. 2d at 852; *Sink v. Sumrell*, 41 N.C. App. 242, 248, 254 S.E. 2d 665, 670 (1979). Plaintiff has failed to put forth any evidence that defendant knew of plaintiff's perilous position or that by the exercise of reasonable care it could have discovered plaintiff's perilous position. Defendant owed plaintiff a duty to maintain a proper lookout and from the uncontradicted evidence presented by the defendant, its agent, Ms. Moore, maintained a proper lookout while operating the forklift. The evidence reveals that she kept plaintiff in her line of vision at all times prior to the accident. She exercised reasonable care, but was still unable to discover plaintiff's perilous situation.

Assuming *arguendo* that plaintiff did satisfy the first two elements, we hold that plaintiff failed to establish the third element, that defendant's agent had the time and means to avoid the injury to the plaintiff by the exercise of reasonable care after she

discovered plaintiff's perilous position. The evidence tends to show that the plaintiff was walking slightly ahead of the forklift, then suddenly and without any prior warning stepped directly into the path of the forklift. Ms. Moore stated she was watching plaintiff while he was walking near the forklift and when he turned in the path of the forklift she immediately slammed on brakes. Ms. Moore, from the evidence presented, did not have the time or means to avoid the injury.

> [T]he doctrine of last clear chance is invoked "only in the event it is made to appear that there was an appreciable interval of time between the plaintiff's negligence and his injury during which the defendant, by exercise of ordinary care, could or should have avoided the effect of plaintiff's prior negligence." Where there is no evidence that a person exercising a proper lookout would have been able, in the exercise of reasonable care, to avoid the collision, the doctrine of last clear chance does not apply.

Watson v. White, 309 N.C. 498, 308 S.E. 2d 268 (1983) (quoting *Mathis v. Marlow*, 261 N.C. 636, 639, 135 S.E. 2d 633, 635 (1964)). From the facts presented, we find that the trial court properly declined to submit the issue of last clear chance to the jury.

[2] Plaintiff, in his second assignment of error, contends the trial court committed reversible error in refusing to charge the jury on defendant's negligence which resulted from Ms. Moore's failure to sound her horn. The jury found the defendant negligent, thus answering this issue in favor of the plaintiff. Since the issue of defendant's negligence was answered in plaintiff's favor, error, if any, in the ruling challenged by this assignment of error is harmless. *Wooten v. Cagle*, 268 N.C. 366, 150 S.E. 2d 738 (1966); *Hanks v. Insurance Co.*, 47 N.C. App. 393, 267 S.E. 2d 409 (1980); 1 Strong's N.C. Index 3d Appeal and Error, sec. 48, p. 307.

No error.

Chief Judge VAUGHN and Judge WHICHARD concur.

(Former Chief Judge VAUGHN concurred in the result reached in this case prior to 31 December 1984.)

YAMAHA INTERNATIONAL CORPORATION v. MICHAEL T. PARKS, ELLEN W. PARKS AND CLIFF ROBINSON

No. 8410DC401

(Filed 5 February 1985)

Guaranty § 2— oral modification of guaranty—summary judgment proper

In an action to collect on a guaranty agreement signed by defendants, the trial court properly entered summary judgment for plaintiff where defendants contended that, by virtue of an oral modification, they were released from their written agreement with plaintiff guaranteeing the debts of a corporation, since defendants offered evidence tending to show that plaintiff was notified that defendant husband had withdrawn from the corporation; plaintiff was asked whether the corporation needed to sign a new dealer agreement due to defendant's withdrawal; the corporation dealt with plaintiff's traveling representatives but not with plaintiff's corporate credit manager, who filed an affidavit on plaintiff's behalf; based on defendant's prior dealings with plaintiff, defendants relied on the oral representations of plaintiff's traveling representatives and thought they were released from liability on the guaranty; such evidence did not raise an issue of material fact as to whether plaintiff's traveling representative by act or word modified the guaranty agreement; and the evidence did not establish an issue of material fact as to whether plaintiff and defendants made a new agreement containing all the essential elements of a contract.

APPEAL by defendants Michael T. Parks and Ellen W. Parks from *Cashwell, Judge.* Judgment entered 30 November 1983 in District Court, WAKE County. Heard in the Court of Appeals 4 December 1984.

Plaintiff sought to collect on a guaranty agreement signed by Michael T. and Ellen W. Parks (defendants), guaranteeing the debts of Whetstone Music, Inc. (corporation), now in bankruptcy proceedings along with defendant Cliff Robinson individually. The agreement provided, *inter alia,* that

> the validity of this guarantee shall not be impaired by any . . . changes of status or of personnel on the part of the debtor, by any act, omission, . . . forbearance, indulgence or other like transaction of any kind whatsoever, and no such act or omission shall be construed in any way to impair the obligations of this guarantee.

It further provided, "This guarantee shall continue until cancelled by written notice to [plaintiff]."

Defendants answered that they no longer had an ownership interest in the corporation and that they have "been released of all liability [for corporate debts] by Defendant Cliff Robinson, the sole owner of [corporation] in an agreement dated 25 May 1982."

In support of its motion for summary judgment, plaintiff filed an affidavit in which its corporate credit manager swore the following:

> 5. That at the outset of granting credit to Whetstone Music, Inc. the plaintiff Yamaha requested and received personal guaranty agreements from the individual principals of Whetstone Music, Inc. including among them the personal guaranty agreements of Michael T. Parks and wife, Ellen W. Parks. . . .
>
> 6. The plaintiff . . . relied upon said personal guarantee in consenting to grant credit on an open account basis to Whetstone Music, Inc.
>
> . . . .
>
> 8. The defendants . . . in their answer and counterclaim contend that they were released from their personal guarantee on May 25, 1982 . . . however said agreements, if any, were made not between plaintiff . . . but rather between [corporation], Mr. Cliff Robinson and defendants Parks.
>
> 9. That plaintiff . . . has not nor has it ever been a party to any agreement oral or written releasing defendants . . . from their personal guarantee.
>
> 10. That the plaintiff . . . did not receive notice nor was it an actual [or] implied party to any agreements between the principals of [corporation] . . . .
>
> . . . .
>
> 12. That the personal guarantee executed by [defendants] were [sic] guarantee of payment.

In their defense, defendants submitted the affidavit of Cliff Robinson in which he made the following pertinent statements:

> (3) That in May of 1983, I signed an Agreement with Michael Parks wherein I purchased his interest in [corporation];

(4) That, shortly after the May Agreement, I paid the account to [plaintiff] down to a zero balance;

(5) That, at the time I paid the account off, I specifically informed [plaintiff's traveling representative] that Michael Parks had withdrawn from [corporation];

(6) That at the time I informed [plaintiff's traveling representative] of Mr. Parks' withdrawal, I asked whether I needed to sign a new dealer agreement because of Mr. Parks' withdrawal, and he said that it would not be necessary;

. . . .

(8) That, in addition, I had by telephone notified [plaintiff] of the withdrawal of Mr. Parks from the [corporation] and that this information was given to a sales representative . . .;

(9) That I did not intend to have [defendants] guarantee the debts of [corporation] subsequent to the time of [Mr. Parks'] withdrawal from the company.

Defendant Michael T. Parks also submitted his own affidavit which stated:

(11) That based on the oral representations of [plaintiff's] representatives, I thought that my wife . . . and I had been released from the guaranty agreements;

(12) That if I had known that [plaintiff's] representative had not released me from any liability, I would have formally requested the withdrawal of our names from the guaranty;

(13) That based upon my prior dealings with [plaintiff] I relied on the oral representations of the traveling representatives, and thought that I was released from any liability.

The court concluded that there was no genuine issue as to any material fact and entered judgment for plaintiff as a matter of law. Defendants appeal.

Smith, Debnam, Hibbert & Pahl, by Carl W. Hibbert, for plaintiff appellee.

W. C. Stuart, III, for defendant appellants.

WHICHARD, Judge.

Defendants contend that by virtue of an oral modification they have been released from their written guaranty agreement with plaintiff. Notwithstanding contract provisions to the contrary, such as those here, *supra*, a written contract may be modified by a subsequent parol agreement, which may be either express or implied by the conduct of the parties. *Son-Shine Grading v. ADC Construction Co.*, 68 N.C. App. 417, 422, 315 S.E. 2d 346, 349 (1984); *Electro Lift v. Equipment Co.*, 4 N.C. App. 203, 207, 166 S.E. 2d 454, 456 (1969).

The burden is on defendants, however, to show the modification contended for. *Russell v. Hardwood Co.*, 200 N.C. 210, 211, 156 S.E. 492, 493 (1931); *Insurance Agency v. Leasing Corp.*, 31 N.C. App. 490, 492, 229 S.E. 2d 697, 699 (1976). They have not met that burden here. The only forecast of evidence, *supra*, is the following: plaintiff was notified that defendant Michael T. Parks had withdrawn from the corporation; plaintiff was asked whether the corporation needed to sign a new dealer agreement due to defendant Michael T. Parks' withdrawal; corporation dealt with plaintiff's traveling representatives but not with plaintiff's corporate credit manager, who filed an affidavit on plaintiff's behalf; based upon defendant Michael T. Parks' prior dealings with plaintiff, defendants relied upon the oral representations of plaintiff's traveling representatives and thought they were released from liability on the guaranty.

Defendants argue that considered in the light most favorable to them, the foregoing forecast of evidence raises an issue of material fact as to whether plaintiff's traveling representative by act or word modified the guaranty agreement. We disagree.

A guarantor of a principal obligation may be discharged from liability under the guaranty contract by a valid release by the creditor. 38 Am. Jur. 2d *Guaranty* Sec. 79, at 1086 (1968). The release, or agreement discharging the guarantor, is binding upon the creditor if the agreement possesses the elements of a contract. *Id.*, Sec. 80, at 1087. Thus, modification of a contract is as much a matter of contract as the original agreement. *Electro Lift*, 4 N.C. App. at 207, 166 S.E. 2d at 456-57. The effect of a modification is the production of a new agreement, which must contain all the essential elements of a contract. *Id. See also* 38 Am. Jur. 2d

Guaranty Sec. 80, at 1087 (1968). Mutual consent is as much a requisite in effecting a contractual modification as it is in the initial creation of a contract. *Electro Lift*, 4 N.C. App. at 207, 166 S.E. 2d at 457.

Defendants here have not forecast evidence establishing an issue of material fact as to whether plaintiff and defendants made a new agreement containing all the essential elements of a contract. The evidence forecast makes no reference either directly or indirectly to the original agreement between the parties, or to a new agreement. Defendants cannot reasonably contend that that which was neither directly nor indirectly spoken of was modified by a new agreement.

Summary judgment is proper if the pleadings and forecast of evidence establish that there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c); *Frye v. Arrington*, 58 N.C. App. 180, 182, 292 S.E. 2d 772, 773 (1982). The pleadings and forecast of evidence here established that defendants owed plaintiff the sums claimed under the guaranty agreement. The only alleged defense was that plaintiffs had released defendants from their obligation by a subsequent oral modification of the agreement. Because defendants failed to forecast evidence that would sustain their burden of proof on this issue, the court properly granted plaintiff's motion for summary judgment.

Defendants contend that the affidavit of plaintiff's corporate credit manager is not made on personal knowledge as required by G.S. 1A-1, Rule 56(e) and is therefore inadmissible. Assuming without deciding that defendants' contention has merit, defendants waived any objection they may have had by not raising it at the hearing on plaintiff's motion. On a motion for summary judgment, uncertified or otherwise inadmissible documents may be considered if not challenged by timely objection. *Insurance Co. v. Bank*, 36 N.C. App. 18, 26, 244 S.E. 2d 264, 269 (1978). This objection, first raised on appeal, is not timely. *See Bank v. Harwell*, 38 N.C. App. 190, 192, 247 S.E. 2d 720, 722 (1978), *cert. denied*, 296 N.C. 410, 267 S.E. 2d 656 (1979). We note additionally that even absent a consideration of plaintiff's affidavit, defendants raised no issue of material fact.

Defendants contend the court erred in continuing the case to allow plaintiff an opportunity to cure notice defects in its motion for summary judgment. Granting a continuance is within the sound discretion of the trial court and we find no abuse of that discretion.

Affirmed.

Chief Judge HEDRICK and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. DAVID LEE SMITH, JR.

No. 8421SC133

(Filed 5 February 1985)

1. **Criminal Law § 66.8— photograph after defendant's lawful detention—pretrial identification not prejudicial**

A photograph taken of defendant after he was lawfully detained was not taken in violation of his Fourth and Fourteenth Amendment rights, and pretrial identifications of defendant by two witnesses who viewed the photograph were not prejudicial.

2. **Criminal Law § 66.9— photographic identification by victim—procedure not suggestive**

A pretrial identification of defendant by a kidnapping victim was not the result of a suggestive procedure where the victim was with defendant for an hour during full daylight at the time of the crime; she observed defendant's face unobtrusively for 10 or 15 minutes with the intention that she would later identify him; within a few minutes after reporting the crimes the witness viewed three to four hundred photographs, but defendant's was not among them; seven or eight hours after reporting the incident, the victim viewed six photographs and identified one as that of defendant; all of the photographs were of black males similar in appearance; and there was no distinguishing characteristic to defendant's photograph and no intimation as to which photograph the victim should pick.

3. **Criminal Law § 66.9— photographic identification—procedure not suggestive**

The trial court did not err in admitting into evidence a pretrial identification of defendant by a witness who observed him and had a 30 second conversation with him while he was in the company of his kidnapping victim during full daylight, since the witness chose, without any suggestion from the presenting officer, defendant's photograph from among six photographs placed before him.

State v. Smith

APPEAL by defendant from *Lewis, Judge.* Judgment entered 5 October 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 15 October 1984.

Defendant, David Lee Smith, Jr., was charged with carrying a concealed weapon, robbery with a dangerous weapon and second degree kidnapping. On 3 October 1983, defendant entered a plea of guilty to the charge of carrying a concealed weapon and a plea of not guilty to robbery with a dangerous weapon and second degree kidnapping. A jury found defendant guilty of robbery with a dangerous weapon and second degree kidnapping. Defendant was sentenced to fourteen years imprisonment on the charge of robbery with a dangerous weapon, eight years imprisonment on the charge of second degree kidnapping and six months imprisonment on the charge of carrying a concealed weapon. The fourteen years imprisonment for robbery with a dangerous weapon and the eight years imprisonment on the charge of second degree kidnapping are to run consecutively; the six months imprisonment for carrying a concealed weapon is to run concurrently with the eight years imprisonment for second degree kidnapping. From the verdict and sentences on the charges of robbery with a dangerous weapon and second degree kidnapping, defendant appeals.

Attorney General Edmisten, by Associate Attorney General J. Allen Jernigan, for the State.

L. G. Gordon, Jr. and Mallory M. Barber, for defendant appellant.

JOHNSON, Judge.

Defendant presents three questions for review: (1) whether the trial court erred in denying defendant's motion to suppress the pre-trial and trial identification made by the State's witness, Cheryl Jones; (2) whether the trial court erred in denying defendant's motion to suppress the pre-trial identification made by the State's witness, Edward Armstrong; (3) whether the trial court erred in allowing extraneous matters to be covered during rebuttal evidence offered by the State and in allowing repetitious matters to be admitted during rebuttal. For the reasons set forth below, we find no prejudicial error.

The State's evidence tended to show that Cheryl Jones, after leaving work, was proceeding to Zayres. After she stopped her

car, a black male forced his way by gunpoint into her car and told her to drive. Ms. Jones further testified that the black male was seated on the passenger side of the car and was in her presence for about an hour. She later identified the defendant as the black male that forced his way into her car. Ms. Jones testified that when she looked to see if a car was approaching she could see the defendant's entire body and that she observed his facial features for ten or fifteen minutes. The entire episode occurred in the afternoon during daylight hours.

The State's evidence further showed that Edward Armstrong had an opportunity to observe Ms. Jones and the defendant together. Defendant was within fifteen feet of Mr. Armstrong. The encounter, which consisted of a short conversation, occurred during daylight hours and lasted about thirty seconds. Mr. Armstrong later identified the defendant from about five or six photographs he examined.

[1] Defendant first assigns error to the trial court's denial of his motion to suppress the pre-trial and trial identifications made by Cheryl Jones and Edward Armstrong. Defendant contends that the pre-trial identifications made by Cheryl Jones and Edward Armstrong constituted prejudicial error and violated the defendant's rights against unreasonable search and seizure guaranteed by the Fourth and Fourteenth Amendments. Defendant cites *State v. Accor and State v. Moore*, 277 N.C. 65, 175 S.E. 2d 583 (1970) as dispositive of this issue. We disagree and find *Accor and Moore* distinguishable. In that case, photographs by which defendants were identified were indeed held inadmissible on the grounds they were taken in violation of defendants' Fourth and Fourteenth Amendment rights. The court's ruling was based upon the fact the defendants were picked up and brought to the police station without a warrant and without probable cause. The evidence was silent as to the circumstances under which defendants were picked up and there was no evidence that either defendant voluntarily accompanied the officers. Prior to the issuance of warrants for their arrest or collection of sufficient evidence to support probable cause of their guilt of any crime, the defendants were photographed.

In the case *sub judice*, there was sufficient evidence to find that the defendant was legally detained prior to being photo-

graphed. The State put forth evidence that the defendant was a passenger in a car stopped by Officer Haigh. Officer Haigh asked the defendant to step from the car, whereupon she noticed an impression in his right back pocket. The officer then seized a gun from defendant's right back pocket. The seizure of the gun was not due to an unreasonable search or seizure nor does defendant contend it was. *See Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 888 S.Ct. 1868 (1968). The State's evidence further showed that the defendant was placed in Officer Haigh's police car and fully searched by another officer. Defendant was later charged with carrying a concealed weapon. Based upon the foregoing evidence, we must conclude that the defendant was lawfully detained when his picture was taken; therefore, defendant's constitutional rights were not violated. Defendant's contention is therefore without merit.

[2] Defendant's second contention is that the pre-trial identification made by Cheryl Jones violated his rights to due process guaranteed by the Fifth and Fourteenth Amendments. It is settled law that identification evidence must be excluded as violating the due process clause where the facts of the case reveal a pretrial identification procedure so impermissibly suggestive that there is a substantial likelihood of irreparable misidentification. *State v. Thompson*, 303 N.C. 169, 171, 277 S.E. 2d 431, 433 (1981). If, however, there is a finding that the pre-trial identification procedure was not impermissibly suggestive then the court's inquiry is at an end and the credibility of the identification evidence is for the jury to weigh. *State v. Green*, 296 N.C. 183, 250 S.E. 2d 197 (1978).

In the case at bar, the trial court held a *voir dire* hearing and concluded that the photographic lineup procedure was not unduly suggestive, in fact, that it was not suggestive at all. The court found that Ms. Jones (1) had an opportunity on 7 July 1983 to observe the defendant for about an hour, while the daylight was full; (2) that she observed the defendant's face for a period of ten or fifteen minutes; (3) that about ten to fifteen minutes after reporting she was robbed, the police gave Ms. Jones three to four hundred photographs to view; that the defendant's picture was not among the three to four hundred she viewed; that seven to eight hours after having reported the incident, she viewed six photographs and identified State's Exhibit No. 1 for *voir dire* as

the defendant; (4) that the six photographs placed before her on a table were all black males of approximately the same age or similar appearance, facial features, and there were no distinguishing clothing or marks as to the defendant and indeed he was not in the attire in which he had been described as wearing to wit: light t-shirt and a hat. There were others of the persons photographed in light t-shirts, the defendant was not in the photograph; (5) that the victim observed the defendant as closely as she could without arousing suspicion that she was observing him, so she could in fact identify him; (6) that she observed the defendant was carrying a small caliber pistol. The defendant was arrested with a small caliber pistol. The findings of fact made by the trial court as to identification procedures are conclusive on appeal if supported by competent evidence in the record. *State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1978). We find there was competent evidence in the record to support the trial court's findings of fact. The identification evidence was properly admitted and its credibility was for the jury. Defendant's second contention is without merit.

[3] Defendant assigns as error the admission of the pre-trial identification made by Edward Armstrong as being violative of his rights to Due Process of Law guaranteed by the Fifth and Fourteenth Amendments. We disagree. The trial court held a *voir dire* hearing outside the presence of the jury. The trial court made findings of facts, which are not disputed by the defendant. The court found, *inter alia*, that Mr. Armstrong was presented with State's Exhibit No. "3," six photographs of persons already identified in this record and from that group chose only one photograph, that being the photograph of the defendant. The court also found that no indication was made to the witness, Armstrong, of any particular photograph by the presenting officer and that the presentation was made some two weeks after the incident. Again, the trial court concluded that there was no unduly suggestive identifications of the defendant's photograph. Once the trial court concluded that the pre-trial identification procedure was not unduly suggestive, then its inquiry was at an end. *State v. Green, supra.* The admission of the pre-trial identification by Edward Armstrong was properly admitted and defendant's contention is without merit.

Finally, we deal with the issue of allowing extraneous and repetitious matters to be covered by the State during its rebuttal. The admission of additional evidence is within the discretion of the trial judge. G.S. 15A-1226(b).

> G.S. 15A-1226(b) specifically provides that the trial judge may exercise his discretion to permit any party to introduce additional evidence at any time prior to the verdict. This is so even after arguments to the jury have begun and even if the additional evidence is testimony from a surprise witness. (Citations omitted.)

State v. Revelle, 301 N.C. 153, 270 S.E. 2d 476 (1980). The trial court's ruling will not be disturbed absent a showing of gross abuse of discretion. *State v. Carson*, 296 N.C. 31, 249 S.E. 2d 417 (1978). We have reviewed the entire record in light of defendant's contention and we fail to find any such abuse.

No error.

Chief Judge VAUGHN and Judge WHICHARD concur.

(Former Chief Judge VAUGHN concurred in the result reached in this case prior to 31 December 1984.)

IN THE MATTER OF: THE APPEALS OF THE GREENSBORO OFFICE PARTNERSHIP AND THE GUILFORD COUNTY TAX SUPERVISOR FROM THE VALUATION OF THE WACHOVIA BANK BUILDING IN GREENSBORO, N.C. BY THE GUILFORD COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1982

No. 8410PTC556

(Filed 5 February 1985)

Taxation § 25.7— ad valorem tax—valuation of bank building—potential market rentals properly considered

In determining the proper tax valuation for the Wachovia Building and its lot in Greensboro, the Property Tax Commission did not err in rejecting the $6,300,000 sales price recently received in an arm's length negotiated sale as the basis for valuation and valuing the property according to potential market rentals rather than its actual rental income pursuant to G.S. 105-283 and G.S. 105-317(a).

In re Appeal of Greensboro Office Partnership

APPEAL by petitioner from a final decision of the North Carolina Property Tax Commission entered 28 February 1984. Heard in the Court of Appeals 17 January 1985.

The Greensboro Office Partnership, taxpayer, petitioned the Guilford County Board of Commissioners, sitting as the 1982 Guilford County Board of Equalization and Review, for review of the tax valuation of the Wachovia Building and its lot. Both petitioner and respondent Guilford County appealed to the Property Tax Commission, sitting as the State Board of Equalization and Review, from the decision of the 1982 Guilford County Board of Equalization and Review.

The Property Tax Commission's (hereinafter Commission) findings of fact, which are unchallenged on appeal, show the following: The Greensboro Office Partnership (hereinafter petitioner) bought the Wachovia Building and its lot in September, 1981, for $6,300,000. The Wachovia Building and its lot (hereinafter the property) along with an adjoining lot had been valued together at $9,262,180 in the 1980 octennial reappraisal. After petitioner purchased the property, but not the adjoining lot, respondent assigned a $9,071,800 value to it.

The Guilford County Board of Equalization and Review reduced the property valuation to $8,104,410, which was purportedly a 12.5% reduction. A 12.5% reduction would actually result in a value of $7,937,825.

Petitioner's purchase of the property for $6,300,000 was the product of an arm's length transaction reached after an extensive sales campaign by the previous owner. At the time of the sale, the price of the property was diminished by the existence of a lease encumbering the property for another fifteen years at a below-market rental rate. The lease had originally been negotiated in an arm's length transaction in order to secure construction financing for the Wachovia Building. The lease provided for a thirty-year term and had set a rental rate at market level as of the date it was executed, but since then market rentals for comparable properties have increased, thereby adversely affecting the price for which the Wachovia Building could be sold.

Respondent's tax appraiser valued the property at $9,703,000 with a comparable sales method of analysis, at $9,182,000 with an

income method of analysis, and at $14,972,632 with a cost method of analysis. In determining the valuation based on income, the tax appraiser used an estimated market rental income rather than the property's actual rental income, which was affected by the unfavorable below-market rental rate set in the lease.

The Commission concluded in part that:

(1) The September, 1981, sale of the property under appeal was a bona fide, arm's length transaction between the parties to the transaction.

(2) The long-term lease at below-market rentals held by Wachovia Bank at the time of sale was and is an encumbrance on the property under appeal which, as stipulated by the parties, affected and diminished the price paid by the taxpayer for the property.

(3) The $6,300,000 sales price or market price for the property under appeal was not equal to its market value at the time of sale.

(4) The sales price of $6,300,000 paid by the taxpayer was consideration for an interest in real property that was and is something less than total fee ownership rights in the property.

(5) The fair market value of the taxpayer's interest in the Wachovia Building is less than the fair market value of the total property interest which is subject to ad valorem taxation.

(6) The taxpayer failed to produce substantial evidence of the fair market value of the property under appeal other than the sales price of $6,300,000.

(7) It was not arbitrary or illegal for the county to utilize potential market rentals instead of actual rental income in the income-approach method of appraising the property under appeal.

(8) It was not arbitrary or illegal for the county to utilize and weigh heavily the income-approach method of appraising the property under appeal.

(9) The valuation placed on the property under appeal by the tax supervisor—$9,071,800—is supported by competent and substantial evidence.

Thus the Commission based the true value or fair market value of the property on its potential market rental income rather than its market price. From judgment setting a valuation of $9,071,800, petitioner appealed to this Court under G.S. 105-345.

Smith, Moore, Smith, Schell & Hunter, by Larry B. Sitton and E. Garrett Walker, for petitioner, appellant.

William B. Trevorrow for respondent, appellee.

HEDRICK, Chief Judge.

The scope of appellate review is set forth in G.S. 105-345.2, which in pertinent part provides:

(b) . . . The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions; or

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

(3) Made upon unlawful proceedings; or

(4) Affected by other errors of law; or

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

(6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record . . . and due account shall be taken of the rule of prejudicial error.

Ad valorem tax assessments are presumed correct, so petitioner must show under G.S. 105-345.2 that "(1) Either the county tax

supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property." *In re Appeal of Amp, Inc.*, 287 N.C. 547, 563, 215 S.E. 2d 752, 762 (1975) (emphasis in original). *See also In re Odom*, 56 N.C. App. 412, 289 S.E. 2d 83, *cert. denied*, 305 N.C. 760, 292 S.E. 2d 575 (1982).

Petitioner contends the Commission erred in (1) rejecting the $6,300,000 sales price as the basis for valuation, and (2) valuing the property according to potential market rentals rather than its actual rental income. Two statutes, which must be read in conjunction, are relevant to these contentions. G.S. 105-283 provides in part:

> All property . . . shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

G.S. 105-317(a) states specific factors to be considered in arriving at "true value":

> Whenever any real property is appraised it shall be the duty of the persons making appraisals:
>
> . . .
>
> (2) In determining the *true value* of a building or other improvement, to consider at least its location; type of construction; age; replacement cost; cost; *adaptability for* residence, *commercial*, industrial, *or other uses; past income; probable future income; and any other factors that may affect its value.*

(Emphasis added.) Thus, there are a multitude of factors to be considered. The Commission's findings show it considered the sales price, petitioner's affidavits of value, the actual rental income, and valuations derived from cost analysis, income analysis,

and comparable sales analysis. All this evidence was relevant to the statutory factors that must be considered in arriving at "true value." However, the weight to be attributed to the evidence is a matter for the fact finder, which in this case is the Commission.

The Commission's findings and conclusions indicate it placed much weight on respondent's income analysis valuation and little or no weight on petitioner's evidence of value, including the sales price. Contrary to petitioner's claims, neither G.S. 105-283 nor 105-317(a) requires the Commission to value property according to its sales price in a recent arm's length transaction when competent evidence of a different value is presented. G.S. 105-317(a) authorizes valuation on the basis of commercial use, past and future income, and other factors. Our Supreme Court has held that potential rental income is a proper basis for valuation under an earlier version of this statute in a case where unfavorable leases yielded a much lower actual rental income:

> The statute . . . in fixing the guide which assessors must use in valuing property for taxes, includes as a factor "the past income therefrom, its probable future income." But the income referred to is not necessarily actual income. The language is sufficient to include the income which could be obtained by the proper and efficient use of the property. To hold otherwise would be to penalize the competent and diligent and to reward the incompetent or indolent.
>
> . . . If it appears that the income actually received is less than the fair earning capacity of the property, the earning capacity should be substituted as a factor rather than the actual earnings. The fact-finding board can properly consider both.

In re Pine Raleigh Corp., 258 N.C. 398, 403, 128 S.E. 2d 855, 859 (1963). Thus, the Commission's conclusions of law numbers 7, 8, and 9, which accepted respondent's valuation derived from the earning capacity of the property, are entirely appropriate and support its valuation decision.

Affirmed.

Judges WHICHARD and PARKER concur.

CATHY'S BOUTIQUE, INC. v. WINSTON-SALEM JOINT VENTURE; JACOBS, VISCONSI & JACOBS COMPANY; AND CENTER RIDGE CO.

No. 8421SC534

(Filed 5 February 1985)

1. **Libel and Slander § 14.1— cat cartoon—words susceptible of two interpretations—allegations insufficient**

Where plaintiff tenant in a shopping mall alleged that it had been libeled by a "cat cartoon" published in defendant's advertising supplement, the trial court did not err in dismissing plaintiff's complaint where it failed to allege that the cartoon was susceptible of two meanings and that the defamatory meaning was intended and so understood by those to whom the publication was made.

2. **Unfair Competition § 1— publication of cat cartoon—no unfair or deceptive trade practice**

Defendant's publication of an advertising supplement which included a cartoon depicting a smiling cat holding a fancy flea collar and stating, "Look what I got at Cathy's Boutique . . . a designer flea collar!" did not constitute an unfair or deceptive trade practice, and the trial court properly dismissed plaintiff's claim therefor.

APPEAL by plaintiff from *Collier, Judge.* Order entered 30 January 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals on 7 January 1985.

William Y. Wilkins for plaintiff appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready by Penni L. Pearson for defendant appellees.

COZORT, Judge.

The plaintiff, Cathy's Boutique, Inc., filed this action alleging that it had been libeled by a "cat cartoon" published in the defendants' advertising supplement. The trial court pursuant to the defendants' G.S. 1A-1, Rule 12(b)(6) and 12(c) motions dismissed the plaintiff's action. On appeal, the plaintiff argues that the trial court erred in granting the defendants' motions and improperly considered material outside the pleadings. We affirm the order of the trial court.

In 1976, Cathy's Boutique, Inc. entered into a ten-year lease agreement with Winston-Salem Joint Venture (hereinafter re-

ferred to as Joint Venture) for a space in its shopping mall. By the end of December 1982, Cathy's Boutique was experiencing financial difficulties. Cathy's Boutique notified the manager of the mall on 14 January 1983 of its financial troubles and of its desire to discuss its lease obligations with Joint Venture.

Shortly thereafter, a cartoon, which referred to Cathy's Boutique, was published in the 19-20 January 1983 Hanes Mall Herald, an advertising supplement to the Winston-Salem Journal and Sentinel. The plaintiff has alleged that it was libeled by the publication of this cartoon which depicts a smiling cat holding a fancy flea collar and stating, "Look what I got at Cathy's Boutique . . . a designer flea collar!"

In a letter to the plaintiff, dated 24 January 1983, Joint Venture refused to enter into discussions with Cathy's Boutique. On 31 January 1983, Cathy's Boutique was closed and its Hanes Mall premises were vacated. Cathy's Boutique on 2 February 1983 then sent Joint Venture a second letter, reminding it of its duty to mitigate any damages it might incur due to the shop's closing. Eight months later, on 30 September 1983, Joint Venture informed the plaintiff that unless a full payment was made of all claimed damages, totaling $8,227.84, it would file suit immediately. On 13 October 1983 Cathy's Boutique filed this libel action against Joint Venture, Jacobs, Visconsi and Jacobs Company, who handled the actual leasing of the Hanes Mall spaces, and Center Ridge Company, who managed the mall. On 3 November 1983, Joint Venture sued the plaintiff to recover the damage it sustained due to the plaintiff's alleged breach of its lease agreement. This Court's opinion in that action, No. 8421SC437, has also been filed today.

The major issue on appeal in this libel action is whether the trial court properly granted the defendants' G.S. 1A-1, Rule 12(b)(6) and Rule 12(c) motions. The scope of our review of a Rule 12(b)(6) motion is to determine whether " 'it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.' " *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E. 2d 161, 166 (1970), *quoting* 2A J. Moore's Federal Practice ¶ 12.08 (2d ed. 1968). A motion for judgment on the pleadings pursuant to Rule 12(c) is proper when all the material allegations of fact are admitted in the pleadings and the

movant can show, even when viewing the facts and permissible inferences in the light most favorable to the nonmoving party, that he is clearly entitled to judgment as a matter of law. *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974).

The plaintiff contends that the allegation of libel in the complaint was properly pled and sufficient to withstand the defendants' motion for judgment on the pleadings. The complaint alleges that the defendants caused a false statement concerning the plaintiff to be published and distributed throughout Forsyth County and that this false statement damaged the plaintiff's business reputation and its business sales, subjecting the plaintiff to ridicule, public hatred, contempt, and disgrace.

In North Carolina, there are three classes of libel: "(1) publications obviously defamatory which are called libel *per se*; (2) publications susceptible of two interpretations, one of which is defamatory and the other not; and (3) publications not obviously defamatory but when considered with innuendo, colloquium, and explanatory circumstances becomes libelous, which are termed libels *per quod*." *Arnold v. Sharpe*, 296 N.C. 533, 537, 251 S.E. 2d 452, 455 (1979). The plaintiff in its brief contends that the cartoon constitutes libel "of the second class in that it may be susceptible to two interpretations, one defamatory, one not." We disagree.

[1] In the first place, the plaintiff's complaint fails to bring the cat cartoon within the second class of libel because the complaint does not allege that the cartoon is susceptible of two meanings. *Renwick v. News and Observer Publishing Co.*, 310 N.C. 312, 312 S.E. 2d 405 (1984). Furthermore, a complaint does not state a cause of action under the second class of libel unless it alleges that the defamatory meaning was intended and was so understood by those to whom the publication was made. *Robinson v. Insurance Co.*, 273 N.C. 391, 159 S.E. 2d 896 (1968); *Flake v. News Co.*, 212 N.C. 780, 195 S.E. 55 (1938). As the record reveals, the plaintiff's complaint contains no such allegations.

Secondly, the plaintiff's libel claim must fail because the cat cartoon on its face is susceptible to only one meaning. The words spoken by the cat are clear and unambiguous. As noted by the Supreme Court in *Flake*:

> The general rule is that publications are to be taken in the sense which is most obvious and natural and according to

> the ideas that they are calculated to convey to those who see them. The principle of common sense requires that courts shall understand them as other people would. The question always is how would ordinary men naturally understand the publication.

Id. at 786, 195 S.E. at 60. Ordinary men would naturally understand that the complained of publication is a cartoon published as a humorous advertisement for the plaintiff in a newspaper advertising supplement. Since the selling of flea collars, even designer flea collars, would be a legitimate business endeavor, the plaintiff cannot under any set of facts show that it has been defamed by this cartoon. We hold that the trial court properly granted the defendants' Rule 12(b)(6) and Rule 12(c) motions.

[2] The plaintiff also maintains that the trial court erred in dismissing its Chapter 75 unfair or deceptive trade practice claim. G.S. 75-1.1 provides:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

However, "[t]he determination of whether an act is unfair or deceptive is a question of law for the court." *Bernard v. Central Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 230, 314 S.E. 2d 582, 584 (1984). Since there was no existing material issue of fact with regard to this claim, the granting of the defendants' motion for judgment on the pleadings was proper if the defendants also demonstrated that they were entitled to judgment in their favor as a matter of law. *See Ragsdale, supra.* We believe, even after viewing the allegations in the light most favorable to the plaintiff, that the trial court correctly concluded as a matter of law that this cartoon did not constitute an unfair or deceptive act or practice by the defendants. Since there is no set of facts that the plaintiff can prove in this case which would entitle it to Chapter 75 relief and because the defendants are entitled to judgment as a matter of law, we hold the trial court properly granted the defendants' Rule 12(b)(6), Rule 12(c) motions with regard to this claim.

Finally, the plaintiff asserts that the trial court improperly considered material other than the parties' pleadings when ruling on the defendants' Rule 12 motions. The complained of material

consisted of pages H5 and H9 of the Hanes Mall Herald, the supplement which contained the alleged libelous cartoon. Since we have held that it was proper for the trial court to dismiss this action on a Rule 12(b)(6) motion because the cartoon is incapable of a defamatory meaning, it is not necessary for us to rule on plaintiff's objection to the trial court's consideration of this other material.

The order of the trial court is

Affirmed.

Judges WEBB and EAGLES concur.

FORSYTH COUNTY BOARD OF SOCIAL SERVICES AND FORSYTH COUNTY DEPARTMENT OF SOCIAL SERVICES v. DIVISION OF SOCIAL SERVICES, AND DIVISION OF MEDICAL ASSISTANCE, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, AND CALVIN TROGDON

No. 8421SC207

(Filed 5 February 1985)

Social Security and Public Welfare § 1— paralyzed individual—motorcycle as essential vehicle—total countable assets—Medicaid

An individual who was paralyzed from the armpits down qualified for Medicaid benefits since a motorcycle owned by him and used before his accident for all his transportation needs, including going to and from work and going for medical care, was an essential vehicle and therefore excludable from his countable assets, and, when so excluded, the injured man's countable assets did not exceed $1,000.

APPEAL by petitioners from *Hairston, Judge*. Judgment entered 19 August 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 14 November 1984.

On 29 June 1981, Calvin Trogdon was injured in a motorcycle accident which left him permanently paralyzed from the armpits down. On 21 September 1981, persons acting on behalf of Trogdon filed with petitioner an application seeking Aid to Families with Dependent Children benefits. These persons later submitted an application on behalf of Trogdon for Medicaid benefits. The For-

syth County Department of Social Services merged the two applications into one. On 17 February 1982, the Forsyth County Department of Social Services approved Trogdon's application for Medicaid, with an effective date of 28 January 1982 instead of the application date of 21 September 1981. This decision was affirmed by the Forsyth County Board of Social Services. From the denial of Medicaid benefits from the date of application, 21 September 1981, Trogdon appealed to the North Carolina Department of Human Resources, Division of Social Services and Division of Medical Assistance. A hearing was held before a Department of Human Resources hearing officer, who reversed the decision of the Forsyth County Department of Social Services which denied benefits from 21 September 1981. The Department of Human Resources subsequently affirmed and adopted the decision of the hearing officer. The Forsyth County Department of Social Services and the Forsyth County Board of Social Services filed a petition for judicial review in Forsyth County Superior Court. After reviewing the record and briefs of the parties, the Forsyth County Superior Court found and concluded the Department of Human Resources' decision was supported by substantial evidence and complied with the law and regulations. Petitioners appeal.

Bruce E. Colvin, for petitioner appellants.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Steven Mansfield Shaber, for respondent appellees.

JOHNSON, Judge.

At the time Trogdon applied for Medicaid, in order for a single applicant to qualify for Medicaid benefits, the value of the applicant's countable assets could not exceed the sum of $1000. 10 N.C.A.C. 32F.0101 (1980).[1] The foregoing sum was called the reserve maximum. *Id.* The value of Trogdon's assets, which included one motorcycle, exceeded the sum of $1000. The rules and regulations promulgated by the Department of Human Resources ("Department") pursuant to the authority delegated it by G.S. 108-23 and 143B-155, however, allowed certain assets to be excluded from the reserve maximum. One such excludable asset was "[o]ne vehicle of any value which is specially equipped for a

1. Subchapter 32F.0101 was repealed effective 1 September 1984.

disabled individual, used to obtain medical care, or used to obtain or retain employment. . . ." 10 N.C.A.C. 33E.0204 (1980).[2] Such a vehicle was called an "essential vehicle." If the value of Trogdon's motorcycle was excludable as an essential vehicle, the value of Trogdon's assets fell below the reserve maximum. The dispositive question, therefore, is whether Trogdon's motorcycle qualified as an essential vehicle.

The Department hearing officer found that prior to the accident Trogdon had used the motorcycle for "all of the transportation requirements of normal living, including transportation to and from work." Based upon the foregoing finding and a construction of 10 N.C.A.C. 33E.0204, the Department hearing officer concluded that Trogdon's motorcycle qualified as an essential vehicle. The hearing officer further added: "Although his resultant disability caused the motorcycle to be clearly inappropriate to his needs for an indefinite period of time, it would remain the essential vehicle until recovery permitted its usual and customary use, or until it was replaced by a more appropriate essential vehicle."

The findings of fact of an administrative agency are conclusive if they are supported by competent, material and substantial evidence when the record is reviewed as a whole. *In re Faulkner v. North Carolina State Hearing Aid Dealers and Fitters Board*, 38 N.C. App. 222, 247 S.E. 2d 668 (1978). Moreover, "[t]he construction of statutes adopted by those who execute and administer them is evidence of what they mean." *State of North Carolina ex rel. Commissioner of Insurance v. North Carolina Automobile Rate Administrative Office*, 294 N.C. 60, 67, 241 S.E. 2d 324, 329 (1978). The evidence was uncontradicted that Trogdon used the motorcycle as his primary means of transportation to and from work and to medical care prior to the accident.

Petitioners urge a literal interpretation of the definition of an essential vehicle. They argue that since the definition is worded in the present tense, and that since the motorcycle was not being used for any of the listed purposes at the time of application, it did not qualify as an essential vehicle. They claim the Department's construction would lead to absurd consequences.

2. Chapter 33 was repealed effective 1 January 1983.

However, when a strict literal interpretation of the language of a statute contravenes its manifest purpose, the reason and purpose of the law should control and its strict letter should be disregarded. *In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978). In accepting federal grants for the institution of the Medicaid program, the General Assembly declared that the provisions of statutes concerning Medicaid should be liberally construed towards carrying out the intent of the federal act which granted the funds. G.S. 108-59, 108-61. The stated purpose of Medicaid is to furnish medical assistance and rehabilitation and other services on behalf of families with dependent children, and of aged, blind or disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services. 42 U.S.C. sec. 1396 (1983). Further, the standards, policies, and procedures for determining eligibility adopted by the Medicaid agency must be consistent with the objectives of the Medicaid program and the best interests of the applicant or recipient. 42 C.F.R. secs. 435.902 & .903 (1983).

Petitioners' argument is the one which leads to absurd consequences. Under petitioners' interpretation, if Trogdon had not been so severely injured, he would have been able to use the motorcycle to obtain medical treatment and would have qualified for Medicaid benefits, but since Trogdon was paralyzed, he could not qualify. Such an interpretation is clearly contrary to the legislative intent. We believe the Department's decision is a common sense one, consistent with the purpose of the Medicaid program.

For the foregoing reasons, we hold that the regulation was properly construed and applied, and that the findings of fact were supported by competent, material and substantial evidence.

Affirmed.

Judges WHICHARD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. JASON LEE COONEY

No. 845SC325

(Filed 5 February 1985)

Automobiles § 2.4— limited driving privilege—driving after drinking—violation of conditions—insufficiency of evidence

The trial court erred in denying defendant's motions to dismiss a charge against him of driving while his license was in a state of revocation based on his violation of the conditions of his limited driving privilege where one of the conditions was that he should not drive within three days after consuming any alcoholic beverages; there was considerable evidence that defendant operated a motor vehicle and that he consumed alcoholic beverages; but there was no evidence as to whether defendant consumed the alcohol before 1:00 a.m., the time at which he last drove, or between 1:00 a.m. and 2:25 a.m. during which time he was at his friend's home and subsequent to which he was in the custody of a police officer.

Judge WHICHARD dissenting.

APPEAL by defendant from *Llewelyn, Judge.* Judgment entered 25 January 1984 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 8 January 1985.

Defendant was charged in a warrant with operating a motor vehicle on a public highway while under the influence of alcoholic beverages, second offense, and with driving while his driver's license was in a state of revocation, in violation of N.C. Gen. Stat. Sec. 20-28. The jury returned a verdict of not guilty in the case wherein defendant was charged with driving under the influence and a verdict of guilty in the case wherein defendant was charged with driving while his license was revoked. The court entered judgment on the verdict sentencing defendant to not less than 10 nor more than 15 months in jail and ordering defendant to pay a $200 fine; the sentence was suspended on condition that defendant serve eight consecutive weekends in jail. Defendant appealed.

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

D. Webster Trask for defendant, appellant.

HEDRICK, Chief Judge.

The record contains the following "Stipulation of Counsel:"

> The defendant stipulated that he was previously convicted of driving under the influence of alcoholic beverages on September 12, 1983, in the District Court of New Hanover County. The defendant further stipulated that on said date he was issued a restricted driving privilege which contained a provision that he should not drive within three days after consuming any alcoholic beverages.

N.C. Gen. Stat. Sec. 20-179(b)(5), which was in effect at the time of the offense, provides that a violation of the conditions applicable to a limited driving privilege "shall constitute the offense of driving while license revoked as set forth in G.S. 20-28(a)."

Defendant first assigns error to the court's denial of his motions to dismiss the charge against him on the grounds that the evidence was insufficient to show that he violated the conditions of his limited driving privilege. Considered in the light most favorable to the State, the evidence tends to show the following:

On 28 September 1983 at approximately 1:00 A.M. defendant was driving his car on a rural paved road in New Hanover County. When he attempted to turn into the entrance of a trailer park, the right front end of the car went into a ditch. Defendant left the car and walked into the trailer park, to the home of a friend, "to see about calling someone to come get the vehicle out of the ditch." At approximately 1:15 Trooper J. R. Todd, an officer of the State Highway Patrol, learned of the accident and went to the scene. Trooper Todd called a wrecker and watched as defendant's car was towed away. He then left the scene. Approximately fifteen to twenty minutes later Trooper Todd received word from the radio dispatcher that the owner of the car had called the Highway Patrol concerning the accident. Defendant spoke briefly to Trooper Todd on a pay telephone, giving him directions to the trailer from which he was calling. The officer arrived at the trailer at 2:25 A.M., where he observed defendant and another man "leaning up against a car." At the officer's request, defendant got into the patrol car. In response to questioning by Trooper Todd, defendant explained that he was unfamiliar with the road on which the accident occurred and that he had missed

the driveway and turned into the ditch instead. After a few minutes of conversation, the officer noticed that defendant's eyes were red and his face flushed, and he detected a "faint odor of alcohol about him." The officer arrested defendant and took him to the Wilmington Police Department, where a breathalyzer test was administered at 3:31 A.M. The results indicated a blood-alcohol level of .12.

In order to convict defendant of driving while his license was in a state of revocation based on his violation of the conditions of his limited driving privilege, the State must show: (1) that defendant operated a motor vehicle; (2) that defendant consumed alcoholic beverages, and (3) that defendant's consumption of alcoholic beverages occurred within the seventy-two-hour period preceding his operation of a motor vehicle. In the instant case the State offered considerable evidence on the first and second elements, but offered no evidence on the third element. Succinctly stated, defendant's intoxication at 3:31 is without probative value as to the crucial question whether defendant consumed alcoholic beverages within the seventy-two-hour period prior to 1:00 A.M., the time at which defendant last drove. Defendant may have consumed alcohol prior to 1:00 A.M. or in the period between 1:00 and 2:25 A.M., during which time he was at his friend's home; the evidence offers no reasonable basis for concluding that the former, rather than the latter, occurred.

Our disposition of this case renders unnecessary any consideration of defendant's remaining assignments of error.

Reversed.

Judge WHICHARD dissents.

Judge PARKER concurs.

Judge WHICHARD dissenting.

When a motion for [dismissal] questions the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. (Citations omitted.) If so, it is for the jury to decide whether the facts, taken singly or in combination,

satisfy them beyond a reasonable doubt that defendant is guilty. (Citation omitted.)

State v. Snead, 295 N.C. 615, 618, 247 S.E. 2d 893, 895 (1978).

The evidence here permits only two reasonable inferences: (1) that defendant had been drinking immediately prior to the accident, or (2) that defendant consumed a significant quantity of alcohol between 1:00 a.m., the time of the accident, and shortly after 2:25 a.m. when the officer first detected characteristics of alcohol consumption about him. As noted in *State v. Cummings*, 267 N.C. 300, 302, 148 S.E. 2d 97, 98 (1966), a driver who has an accident "isn't likely to hurry off for more intoxicants to make his condition more noticeable and his breath more 'odoriferous.'" The more reasonable inference thus is that defendant had been drinking immediately prior to the accident, and I believe the court properly permitted the jury to draw that inference.

While the facts here are less compelling than those in *Snead*, I believe they are "sufficient to permit a reasonable inference that defendant was intoxicated at the time of the accident." *Snead*, 295 N.C. at 618, 247 S.E. 2d at 896. I thus find *Snead* authoritative and would hold, pursuant thereto, that the trial court correctly denied the motion to dismiss.

I find no merit in defendant's other arguments. I thus vote to find no error in the trial.

LAWRENCE COLLINS, EMPLOYEE v. DAVID L. GARBER, ALLEGED EMPLOYER; TRANSAMERICA INSURANCE COMPANY, ALLEGED CARRIER; AND/OR PAUL E. BLEILE COMPANY, ALLEGED EMPLOYER; STATE AUTOMOBILE INSURANCE COMPANY, ALLEGED CARRIER

No. 8410IC156

(Filed 5 February 1985)

Master and Servant § 95— workers' compensation—award by Commission—no standing of insurer to appeal

Where there was a question as to whether a contractor and its insurer or a subcontractor and its insurer were required to pay workers' compensation, and a deputy commissioner and subsequently the Full Industrial Commission rendered decisions ordering the subcontractor and its insurer, Transamerica,

to pay the compensation, but Transamerica did not appear at the hearing before the deputy commissioner or the Full Commission, Transamerica did not have standing in the Court of Appeals to bring this appeal, and there was no merit to Transamerica's contention that it did not have notice of the hearings where there was evidence of return receipt from the U.S. Postal Service indicating notice to defendant subcontractor from the N.C. Industrial Commission; pursuant to G.S. 97-97, notice of the injury given to an employer is deemed notice to the insurer; there was evidence that the opinion and award filed by the deputy commissioner was forwarded to Transamerica by certified mail, return receipt requested on 5 November 1982 and that it was delivered on 16 November 1982; Transamerica, in a letter to the Chairman of the Industrial Commission, acknowledged that documents from the Commission were being sent to and received by Transamerica, though not by the claims department; and no application was made to the Full Commission by Transamerica for a review of the award rendered by the Commission.

APPEAL by defendant, Transamerica Insurance Company, from the North Carolina Industrial Commission. Opinion and Award filed 22 August 1983. Heard in the Court of Appeals 26 October 1984.

Plaintiff, employed by defendant Garber & Son, Inc. (hereinafter Garber), was injured on 12 July 1981 by an accident arising out of and in the course of his employment. The claim for workers' compensation was originally heard before Deputy Commissioner Morgan Scott on 2 August 1982. However, defendant Paul E. Bleile and its insurance carrier, State Automobile Insurance Company moved that Transamerica Insurance Company (hereinafter Transamerica) be added as a party-defendant citing documents in their possession that indicated Garber was insured by Transamerica as the grounds. The motion was granted on 2 August 1982. The matter was then reset for hearing on 9 September 1982. The record reveals a notice of the hearing was received by defendant-employer Garber on 17 August 1982, as evidenced by a postal receipt number and a return receipt received by the Commission on 9 September 1982.

A hearing was held on 9 September 1982 which was attended by plaintiff, plaintiff's attorney, and Mr. Dayle Flammia, attorney appearing and representing defendant Paul E. Bleile and State Automobile Insurance Company. Neither defendant Garber nor defendant Transamerica was present or represented by counsel at the hearing. From evidence received at the hearing, Deputy Commissioner Sellers rendered an opinion and award on 4 November

1982 releasing defendants Bleile and State Automobile Insurance Company from liability, while ordering defendants Garber and Transamerica to pay workers' compensation benefits to the injured plaintiff.

On 23 November 1982, plaintiff gave Notice of Appeal to the Full Commission for the limited review of the order releasing defendants Bleile and State Automobile Insurance Company. Plaintiff requested an order holding defendants Bleile and State Automobile Insurance Company secondarily liable in the event defendants Garber and Transamerica were not liable for plaintiff's injuries. Defendants Garber and Transamerica did not appeal from the order of the Deputy Commissioner. Plaintiff's case was heard before the Full Commission on 18 August 1983, but defendants Garber and Transamerica were not in attendance. On 22 August 1983, the Full Commission entered its order affirming and adopting as its own the opinion and award rendered by Deputy Commissioner Sellers. Thereafter, defendant Transamerica entered a Notice of Appeal to this Court.

Tate, Young, Morphis, Bogle, Bach and Farthing, by Edwin G. Farthing, for defendant appellant.

Teague, Campbell, Conely & Dennis, by C. Woodrow Teague and Dayle A. Flammia, for defendant appellees.

JOHNSON, Judge.

The issue confronting us is not whether plaintiff's injury is compensable, for all parties have stipulated that it is. The issue lies as to which defendant is to pay the compensation, the contractor and its insurer or the subcontractor and its insurer. Deputy Commissioner Sellers and the Full Commission have rendered decisions ordering the subcontractor Garber and its insurer Transamerica to pay the compensation. Transamerica, who did not appear at the hearing before Deputy Commissioner Sellers nor the Full Commission, seeks now to appeal the order and award of the Full Commission. We hold that defendant Transamerica does not have standing in this Court to bring this appeal.

This case presents facts strikingly similar to the facts presented in *McPherson v. Motor Sales Corp.*, 201 N.C. 303, 160 S.E. 283 (1931), *appeal dismissed*, 286 U.S. 527, 76 L.Ed. 1269, 52

S.Ct. 499 (1932). *McPherson* was also a workers' compensation case filed before the North Carolina Industrial Commission. After notice was given to each defendant, the cause was heard before Commissioner Dorsett, who found facts and made an award in favor of the plaintiff. The award, together with a statement of findings of fact, rulings of law, and other matters pertinent to the questions at issue, was filed with the record of the proceedings, and a copy of the award was duly sent to each of the parties. No application was made to the Commission by the defendant-employer, Henry Motor Sales Corporation, for a review of the award rendered by the Commissioner. Defendant, Hartford Accident & Indemnity Company, applied to the North Carolina Industrial Commission for a review by the Full Commission of the findings of fact and conclusions of law upon which the award made by Commissioner Dorsett was founded. The defendant-employer, Henry Motor Sales Corporation, did not appear at the hearing before the Full Commission, nor did it except to or appeal from its award to the Superior Court of Guilford County.[1]

The Court held that the defendant, Henry Motor Sales Corporation, had no standing in the Superior Court of Guilford County, as an appellant or otherwise, on the hearing of the appeal of defendant, Hartford Accident & Indemnity Company, to said court. Its appeal conferred no right on the defendant, Henry Motor Sales Corporation, to be heard in the Superior Court of Guilford County or in the Supreme Court, for the reasons that said defendant did not except to or appeal from the award of the North Carolina Industrial Commission in the cause. The Court, therefore, dismissed the appeal of the defendant, Henry Motor Sales Corporation.

We are confronted with the same situation. The plaintiff, in the instant case, filed a claim with the North Carolina Industrial Commission. Deputy Commissioner Sellers made findings of fact and rendered an award in favor of the plaintiff. Defendant Transamerica contends it did not have notice of this hearing. We find that both defendants, Garber and Transamerica, had notice of the hearing before Deputy Commissioner Sellers. First, there is

1. The Legislature in a 1967 amendment gave appellate jurisdiction over decisions of the Industrial Commission to the Court of Appeals. Formerly the Superior Court had appellate jurisdiction.

evidence that defendant David L. Garber received notice of the injury and the hearing on 17 August 1982. This is evidenced by return receipt from the U. S. Postal Service indicating notice delivered to defendant Garber from the North Carolina Industrial Commission. Pursuant to G.S. 97-97, notice to or acknowledgment of the occurance of the injury on the part of the insured employer shall be deemed notice or knowledge as the case may be, on the part of the insurer; that jurisdiction of the insured . . . shall be jurisdiction of the insurer. Second, there is evidence in the record that the opinion and award filed by Deputy Commissioner Sellers on 4 November 1982 was forwarded to defendant Transamerica by certified mail, return receipt requested on 5 November 1982 and that it was delivered on 16 November 1982. Third, defendant Transamerica, in a letter to Chairman Stephenson of the Industrial Commission, acknowledges documents from the Commission were being sent and received by Transamerica, they were not being received by the claims department. From this evidence we are compelled to find defendant Transamerica received notice of the hearings before the Deputy Commissioner and the Full Commission.

The award and opinion of the Deputy Commissioner was sent to defendant Transamerica; however, no application was made to the Full Commission by defendant Transamerica for a review of the award rendered by the Commissioner. Plaintiff-employee Collins applied to the North Carolina Industrial Commission for a review by the Full Commission of the order by Deputy Commissioner Sellers releasing defendants Bleile and State Automobile Insurance Company from liability, but this appeal conferred no rights upon defendant Transamerica to be heard in this Court. Defendant Transamerica did not appear at the hearing before the Full Commission.

The award of Deputy Commissioner Sellers, which was duly filed with the Full Commission, was therefore conclusive and binding on defendant Transamerica. *McPherson, supra.* Defendant Transamerica does not have standing to bring this suit, therefore this appeal is dismissed.

Appeal dismissed.

Judges WHICHARD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. CHARLES FRED WILLIAMSON

No. 8413SC433

(Filed 5 February 1985)

1. **Homicide § 31; Criminal Law § 138— second degree murder—sentence—factors in aggravation**

Evidence in a second degree murder case was sufficient to support the trial court's finding in aggravation that the killing occurred after premeditation and deliberation where it tended to show that defendant's actions were unprovoked; he continued to fire his gun after his victim fell to the ground; the parties were involved in a bitter battle over visitation rights; and defendant told the victim after shooting her, "I told you I would get you."

2. **Homicide § 31; Criminal Law § 138— second degree murder—sentence—aggravating factor of violent propensities—sufficiency of evidence**

Evidence was sufficient to support the trial court's finding in aggravation that defendant suffered from a mental condition which caused him to go into turmoil when faced with extreme stress and that he demonstrated a propensity to react with extremely violent acts which were dangerous to other people where defendant's own testimony was that he had previously assaulted his wife and hit a co-worker in the head with a bottle; a judge testified that defendant had a very bad reputation for violence and that, in all the cases he had been involved in with defendant, all the parties and witnesses had been afraid of him; and expert testimony by a forensic psychiatrist characterized defendant as tending to react in a very hostile manner when things did not go his way.

APPEAL by defendant from *Hobgood (Robert H.), Judge.* Judgment entered 20 April 1983 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 17 January 1985.

Defendant was charged in a proper bill of indictment with murder in the first degree. In exchange for the State's agreement to reduce the charge to murder in the second degree, defendant agreed to enter a plea of guilty. The matter came on for sentencing on 18 April 1983, and Judge Hobgood found the following factors in aggravation:

> 15. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement.
>
> 16. Additional written findings of factors in aggravation: The killing occurred after the Defendant premeditated and deliberated the killing.

17. The Defendant suffers from a mental condition which when faced with a crisis with extreme stress his mind goes into a turmoil and he has demonstrated a propensity to react with extremely violent acts which are dangerous to other persons.

The court also found factors in mitigation. Upon finding that the factors in aggravation outweigh the factors in mitigation, the court imposed a prison sentence of twenty-five years, which exceeds the presumptive term established by N.C. Gen. Stat. Sec. 14-17. Pursuant to the provisions of N.C. Gen. Stat. Sec. 15A-1444(a1), defendant appealed.

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

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

HEDRICK, Chief Judge.

[1] Defendant first assigns error to the court's finding in aggravation that "[t]he killing occurred after the Defendant premeditated and deliberated the killing." Defendant contends that this finding is not supported by a preponderance of the evidence, as is required by N.C. Gen. Stat. Sec. 15A-1340.4(b).

Our Supreme Court has discussed many times the meaning of the terms "premeditation" and "deliberation." In *State v. Corn*, 303 N.C. 293, 278 S.E. 2d 221 (1981), the Court said:

> Premeditation has been defined by this Court as thought beforehand for some length of time, however short. No particular length of time is required; it is sufficient if the process of premeditation occurred at any point prior to the killing. [Citations omitted.] An unlawful killing is committed with deliberation if it is done in a "cool state of blood," without legal provocation, and in furtherance of a "fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose." [Citations omitted.]

Id. at 297, 278 S.E. 2d at 223. The Court went on to say

> Since premeditation and deliberation are processes of the mind, they are not susceptible to direct proof and must

> almost always be proved by circumstantial evidence. Among the circumstances which may be considered as tending to prove premeditation and deliberation are: lack of provocation by the deceased; defendant's acts and comments before and after the killing; the use of grossly excessive force or the infliction of lethal blows after the deceased has been felled; and any history of altercations or ill will between the parties.

Id.

In the instant case the evidence tended to show the following: the relationship between defendant and the victim, Joan Powell Williamson, began in 1970 and was characterized by tumult and conflict. Mrs. Williamson was married to Joe Powell when she met the defendant, and the subsequent affair between the victim and defendant prompted repeated threats from Mr. Powell. On one occasion defendant shot Mr. Powell's brother in the leg. Defendant was prosecuted for the offense and found to be not guilty by reason of self-defense. On another occasion defendant and the victim became involved in an argument, terminating when the victim shot defendant with a .22 caliber rifle. Mrs. Williamson was not prosecuted for this offense. In January, 1981, the victim's divorce became final, and she and the defendant were married. In February defendant and his wife had a daughter.

Shortly after their marriage in January, the relationship between defendant and his wife deteriorated, and they separated. Mrs. Williamson obtained a divorce from bed and board and began to date another man. Defendant argued with Mrs. Williamson about visitation with his daughter. Mrs. Williamson accused defendant of burning down her tobacco barn. In the fall of 1981 defendant entered a drug and alcohol program in Texas. Four months later, he telephoned the victim, and the two began to discuss reconciliation.

In March, 1982, defendant returned to Columbus County. He again experienced difficulty in seeing his daughter, and retained an attorney. A hearing on the matter was scheduled for 23 April, and was continued to 30 April 1982. Between 23 April and 30 April both defendant and his sister received phone calls from Mrs. Williamson in which she threatened the defendant. Defendant spoke to several persons about his fear of the victim.

On 30 April 1982 defendant attended the hearing to determine his visitation rights with his daughter. Following a conference defendant was told that he would be permitted to visit the child at his mother's home, an arrangement to which he had strong objections. Court recessed for lunch, at which time defendant obtained a gun from his brother-in-law and put it in the car glove compartment. After lunch court reconvened; defendant became visibly upset during his testimony, following which Judge Wood told defendant he would be permitted visitation rights only at his mother's home. Shortly after the hearing Joan Williamson and her attorney were walking together on the street when defendant ran up to them, pulled a gun, and fired five shots. When he fired the last two or three shots, defendant was bending over the victim. As he fired, defendant stated, "I told you I would get you." We think it abundantly clear that this evidence, particularly considered in light of the factors discussed in *Corn*, supports the court's finding that defendant acted with premeditation and deliberation in killing Joan Williamson. The evidence tends to show that defendant's actions were unprovoked, that he continued to fire after his victim fell to the ground, and that the parties were involved in a bitter battle over visitation rights. Defendant's statement that "I told you I would get you," is additional evidentiary support for the court's finding. This assignment of error is without merit.

[2] Defendant next challenges the sufficiency of the evidence to support the court's finding that

> The Defendant suffers from a mental condition which when faced with a crisis with extreme stress his mind goes into a turmoil and he has demonstrated a propensity to react with extremely violent acts which are dangerous to other persons.

Defendant contends that "aside from his having shot and killed his wife, the evidence does not support a finding of a propensity to react violently or dangerousness to others." We disagree. Defendant's own testimony was that he had previously assaulted his wife and hit a co-worker in the head with a bottle. Judge Wood testified that "Mr. Williamson has a very bad reputation for violence. In all of the cases that I have been involved in with him, all of the parties and witnesses have all been afraid of him." Expert testimony by Dr. Bob Rollings, a forensic psychiatrist,

characterized defendant as tending to react "in a very hostile manner" "when things don't go [his] way." In response to questioning about whether defendant is "a dangerous person," Dr. Rollings said:

> Well, he certainly has been on more than one occasion in the past. And given the same kind of circumstances, the probability of dangerous behavior would be pretty significant I would think.

We think the evidence before the judge supports the challenged finding of the factor in aggravation.

Affirmed.

Judges WHICHARD and PARKER concur.

STATE OF NORTH CAROLINA v. JACOB LEONARD WATTS

No. 8425SC310

(Filed 5 February 1985)

1. **Criminal Law § 66— identity of defendant as perpetrator of crime—sufficiency of evidence**

   There was no merit to defendant's contention that the arresting officer who testified for the State failed to identify defendant as the perpetrator of the alleged offenses where the officer testified that he "first saw the automobile of the defendant Jacob Leonard Watts when he was travelling on 14th Avenue, N.W."; he continued to testify that he arrested "defendant" for driving under the influence of alcohol and also that he found a pistol in "defendant's" glove box; and this was sufficient identification of defendant for the jury to find that he was the perpetrator of the alleged offenses.

2. **Weapons and Firearms § 2— possession of firearm by felon—previous convictions—no contest plea**

   If a defendant enters a plea, including a plea of no contest, so that a felony judgment or imprisonment for more than two years may be imposed, then it constitutes a conviction under G.S. 14-415.1, the statute making it a felony for a person convicted of certain crimes to have in his possession a handgun.

3. **Searches and Seizures § 9— arrest for driving under influence—search of car—admissibility of pistol**

   There was no merit to defendant's contention that the trial court erred in admitting evidence of a pistol found in the glove compartment of his car

because the officer discovered it during an illegal search, since defendant was arrested for driving under the influence of alcohol and the officer's search of the vehicle, including the glove compartment, at that time was legal.

4. Automobiles § 126.3— driving under the influence—blood test—qualified person

In a prosecution of defendant for driving while under the influence of alcohol, testimony that defendant's blood was drawn by a blood technician at Frye Memorial Hospital was sufficient evidence that the sample was drawn by a qualified person as required by G.S. 20-139.1(c).

APPEAL by defendant from *Ferrell, Judge.* Judgments entered 18 November 1983 in Superior Court, Catawba County. Heard in the Court of Appeals 7 January 1985.

The defendant was tried for driving while under the influence of alcohol, a violation of G.S. 20-138 and possession of a firearm by a felon, a violation of G.S. 14-415.1.

The evidence for the State showed the following: On 4 February 1983, Rick Jordan, an officer of the City of Hickory Police Department, saw a car driven by the defendant Jacob Leonard Watts "weave back and forth several times." Mr. Jordan stopped the defendant's car and upon approaching the defendant he smelled a strong odor of alcohol. Mr. Jordan asked the defendant to exit the car, and as the defendant did so, he staggered. Mr. Jordan then informed the defendant that he was suspected of driving under the influence. Mr. Jordan asked the defendant to perform some field sobriety tests. After failing one, the defendant refused to perform any of the other tests. Mr. Jordan then arrested the defendant for driving under the influence of alcohol. Mr. Jordan then left the defendant with another police officer and began to search the car the defendant had been driving. In the glove compartment he found a 9 caliber Barretta automatic pistol loaded with six rounds of ammunition.

The defendant was taken to the hospital where someone the officer identified as "the blood technician" drew some blood. Carl Kempe, a chemist for the State Bureau of Investigation, analyzed the defendant's blood sample and found that it contained .26% alcohol. He also testified that alcohol used to clean the skin before inserting the needle used in drawing blood sample could cause a reading to be .07 to .10 higher. He did not know if alcohol was used on this defendant.

Sue Weston, a deputy clerk of Superior Court for Catawba County, testified that her office held two files which revealed that "Jacob Leonard Watts, Sr." in an earlier case had pleaded no contest to a felony controlled substance violation and that the court entered a judgment on this plea.

The defendant was convicted of both charges. He appealed from the imposition of an active prison sentence.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General Isaac T. Avery, III for the State.

Bartlett, Hannah & Greene by Thomas N. Hannah for defendant appellant.

WEBB, Judge.

[1] The defendant first argues that the State's witness failed to identify the defendant in the courtroom as the perpetrator of the alleged offenses. Mr. Jordan testified that he "first saw the automobile of the defendant Jacob Leonard Watts, when he was traveling on 14th Avenue, N.W." He continued to testify that he arrested the "defendant" for driving under the influence of alcohol and also that he found a pistol in the "defendant's" glove box. This is sufficient identification of the defendant for the jury to find he was the perpetrator of the alleged offenses.

[2] The defendant next argues that evidence of his "no contest" plea in a prior case is insufficient to prove the element of a prior felony conviction under G.S. 14-415.1. The defendant argues our cases hold that pleas of no contest may not be used in subsequent matters. G.S. 14-415.1, which makes it a felony for a person convicted of certain crimes to have in his possession a handgun, defines conviction ". . . as a final judgment in any case in which felony judgment, or imprisonment for a term not exceeding two years, as the case may be, is permissible, without regard to the plea entered or to the sentence imposed." We believe the plain words of this statute require us to hold that if a defendant enters a plea, including a plea of no contest, so that a felony judgment or imprisonment for more than two years may be imposed then it constitutes a conviction under G.S. 14-415.1.

The defendant next argues that the prosecution failed to prove that the pistol was operable and thus failed to prove that it

was a firearm under G.S. 14-415.1. This assignment of error is overruled pursuant to *State v. Baldwin*, 34 N.C. App. 307, 237 S.E. 2d 881 (1977).

The defendant next argues the State failed to prove that Jacob Leonard Watts, Senior, identified in the previous judgment, was the person on trial in this case. Under G.S. 15A-924, the name "Jacob Leonard Watts, Senior," is sufficiently similar to "Jacob Leonard Watts" to constitute prima facie evidence that the "two defendants are the same person."

[3] The defendant next contends that the trial court erred in admitting evidence of the pistol because the officer discovered it during an illegal search.

In *New York v. Belton*, 453 U.S. 454, 69 L.Ed. 2d 768, 101 S.Ct. 2860 (1981), the defendant was removed from his car and arrested. Then, a search of the unoccupied passenger compartment of the car yielded cocaine. The U.S. Supreme Court held that the search did not violate the Fourth and Fourteenth Amendments because the defendant was the subject of a lawful custodial arrest and the area searched was " '. . . within the arrestee's immediate control' within the meaning of the *Chimel* [395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034 (1969)] case." Footnote 4 in the majority opinion of *Belton* states that closed glove compartments are searchable containers. 453 U.S. at 460, 69 L.Ed. 2d at 775, 101 S.Ct. at 2864.

In the present case the defendant contends he was arrested and held in custody away from the car while the arresting officer searched the glove compartment. *Belton* holds that such a search is legal.

[4] The defendant's final argument is that the trial court erred in admitting evidence of the defendant's blood alcohol level because it was not established that the sample was drawn by a qualified person as required by G.S. 20-139.1.

G.S. 20-139.1(c) states that a valid chemical analysis requires blood drawn by "a physician, registered nurse, or other qualified person . . ." Mr. Jordan testified that the sample was drawn by a blood technician at Frye Memorial Hospital. This is evidence that the sample was drawn by a qualified person.

No error.

Judges EAGLES and COZORT concur.

JAMES A. FRIESON v. NORTH CAROLINA REAL ESTATE LICENSING BOARD

No. 8410SC322

(Filed 5 February 1985)

1. **Brokers and Factors § 8— revocation of real estate license—failure to account for home purchaser's funds**

Evidence was sufficient to support defendant's order revoking petitioner's license as a real estate agent where it tended to show, among other things, that petitioner failed to forward a purchaser's mortgage payments to the mortgagees; foreclosure proceedings were instituted but terminated only after petitioner delivered the payments and paid a penalty; and petitioner failed and refused to account to a purchaser for the funds paid to him on her house purchase.

2. **Brokers and Factors § 8— hearing on revocation of real estate license—no continuance—due process rights not violated**

In a proceeding to revoke petitioner's license as a real estate agent, there was no showing that defendant's refusal to continue an evidentiary hearing violated petitioner's due process rights, since petitioner received advanced written notice of the hearing; neither petitioner nor his attorney ever contacted or communicated with defendant in any manner about the hearing; and telephone calls made by the secretaries of petitioner and his attorney to defendant's counsel stated no justifiable reason for continuing a long-scheduled administrative hearing.

APPEAL by petitioner from *Farmer, Judge*. Judgment entered 16 November 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 28 November 1984.

The petitioner is a licensed real estate agent, whose place of business is in Charlotte. The North Carolina Real Estate Licensing Board brought this proceeding to revoke his license for violating certain provisions of G.S. 93A-6, the North Carolina Real Estate Licensing Law. The proceeding is based on allegations that in handling the sale of a piece of property in Mecklenburg County to Mrs. Leona Winchester petitioner made her pay more than the contract price, failed to promptly forward mortgage

payments he received from her, refused to account for funds of hers that he handled, failed to maintain a running balance of the funds so held, and commingled her funds and those of others with his own.

Pursuant to the provisions of G.S. 150A-23 petitioner was duly notified of these charges via certified mail. The notice received by petitioner on 21 June 1983 stated that an evidentiary hearing would be held at the Board's office in Raleigh twenty-three days later, on 14 July 1983 at 1:30 p.m. On 12 July 1983 the Board's counsel received a telephone call from petitioner's secretary, who stated that the hearing date was not convenient for petitioner and requested that the hearing be continued until September. She was told by the Board's counsel, however, that he had no authority to continue the hearing, only the Board had that authority, and the request should be made either by petitioner or his attorney. Later that same day the secretary of petitioner's attorney telephoned the Board's counsel, stating that petitioner's attorney would be out of town on 13 July 1983; but she, too, was told that only the Board could continue the hearing and either petitioner or his attorney should be at the hearing on 14 July 1983 and ask the Board for a continuance, if one was desired. On 14 July 1983 when time for the hearing came, neither petitioner nor his attorney was present; and after considering the two telephone messages the Board refused to continue the hearing and proceeded to hear the evidence presented by the complainant.

Following the hearing the Board in effect found that Mrs. Winchester's allegations were true, concluded that petitioner had thereby violated the Real Estate Licensing Law in certain specified respects, and entered an order revoking his license. Upon appeal to the Superior Court, the Board's decision and order of revocation was affirmed and petitioner appealed to this Court.

George Ligon, Jr. for petitioner appellant.

Attorney General Edmisten, by Assistant Attorney General Harry H. Harkins, Jr., for respondent appellee.

PHILLIPS, Judge.

[1] In appealing from the judgment of the Superior Court, which affirmed the Board's revocation of his license as a real estate

agent, petitioner made but three assignments of error. The first two assignments, though couched in constitutional terms, amount simply to the claim that the Board's findings of fact and conclusions of law do not support the order of revocation. If, of course, the Board's revocation order is not supported by appropriate conclusions of law, or if the conclusions of law are not supported by appropriate findings of fact, the order cannot stand; on the other hand, if the order is supported by proper conclusions of law that in turn are supported by appropriate findings of fact the order must be upheld. The sufficiency of the evidence to support the Board's findings of fact is not before us, since no exceptions were made to the findings. *Cox v. Real Estate Licensing Board*, 47 N.C. App. 135, 266 S.E. 2d 851, *disc. rev. denied*, 301 N.C. 87, 273 S.E. 2d 296 (1980). The Board's revocation order is well supported. It rests on four conclusions of law that petitioner violated the North Carolina Real Estate Licensing Law in as many respects, each of which is a valid basis under the express terms of G.S. 93A-6(a) for revoking an agent's license to sell real estate. One of the Board's conclusions is that petitioner violated G.S. 93A-6(a)(7) "by failing to account to Mrs. Winchester for her payments to him." This statute makes it a license-revocable offense for an agent to fail "within a reasonable time, to account for or to remit any moneys coming into his possession which belong to others." This conclusion is supported by findings of fact that are both appropriate and to the point. One finding is that because petitioner failed to forward Mrs. Winchester's mortgage payments to the mortgagees foreclosure proceedings were begun, which he was able to terminate only after delivering the payments and paying a penalty. Another finding states that petitioner "failed and refused to account to Mrs. Winchester for the funds paid to him on her house purchase." Better support for a valid conclusion of law would be hard to find. Under the circumstances the other three conclusions, each of which is also well supported by the Board's detailed findings of fact, need not be discussed.

[2] Petitioner's remaining assignment of error, likewise superfluously couched in constitutional terms, is that the Board's refusal to continue the evidentiary hearing violated his due process rights. But why petitioner needed a continuance, much less was legally entitled to one, the record does not show. So far as the record reveals neither petitioner nor his attorney ever contacted

or communicated with the Board in any manner about the hearing; and the telephone calls made by their secretaries to the Board's counsel stated no justifiable reason for continuing a long-scheduled administrative or judicial hearing. The record does show, however, that petitioner received advance written notice of the hearing and that neither he nor his counsel appeared. G.S. 150A-25 states that "[i]f a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party." This provision is permissive, of course, not mandatory, and it authorized the Board to continue the hearing or not as it deemed meet in the sound exercise of its discretion. *Davis v. N.C. Dept. of Transportation*, 39 N.C. App. 190, 250 S.E. 2d 64 (1978), *disc. rev. denied*, 296 N.C. 735, 254 S.E. 2d 177 (1979). No abuse of discretion being apparent from the record, this assignment must be and is overruled. *In re Judicial Review by Republican Candidates*, 45 N.C. App. 556, 264 S.E. 2d 338, *disc. rev. denied*, 299 N.C. 736, 267 S.E. 2d 672 (1980); *Elmore v. Lanier, Commissioner of Insurance*, 270 N.C. 674, 155 S.E. 2d 114 (1967).

The order appealed from is affirmed.

Affirmed.

Judges WHICHARD and JOHNSON concur.

FRANCINE D. DEGREE v. WALTER B. DEGREE

No. 8418DC524

(Filed 5 February 1985)

Divorce and Alimony § 21.6; Husband and Wife § 11— separation agreement not included in court order—no jurisdiction of court to modify alimony provisions

The trial court had no jurisdiction to modify the alimony provisions of the parties' separation agreement which was not incorporated into a court order but remained a contract between the parties; moreover, the parties' stipulation in a pretrial conference that the court had jurisdiction of the parties and the subject matter was ineffective to confer jurisdiction upon the court, since the parties to an action cannot by consent give a court jurisdiction over subject matter of which it would not otherwise have jurisdiction.

DeGree v. DeGree

APPEAL by defendant from *Lowe, Judge.* Judgment entered 9 November 1983 in District Court, GUILFORD County. Heard in the Court of Appeals 11 January 1985.

The parties to this action were formerly husband and wife. They entered into a separation agreement on 16 June 1978 and were divorced on 20 March 1979. The provisions of the separation agreement were not incorporated into any court order. On 18 September 1980, plaintiff filed this civil action seeking enforcement of, and an increase in, the child support provisions of the separation agreement. An order was entered on 30 December 1980 by the court increasing defendant's support obligations.

On 29 June 1983 plaintiff filed a motion in the cause to enforce the alimony provisions of the separation agreement. Defendant responded and moved to dismiss on the ground that the motion was improperly before the court. The court denied defendant's motion to dismiss and ordered that plaintiff's motion be treated as a "supplemental complaint" pursuant to Rule 15(d) of the North Carolina Rules of Civil Procedure. Defendant filed an answer and counterclaim to the supplemental complaint wherein he admitted his failure to make alimony payments pursuant to the separation agreement and asserted as an affirmative defense plaintiff's alleged cohabitation with another male to whom she was not married. Defendant's counterclaim asserted that the alleged cohabitation was contrary to the terms of the separation agreement thereby ending his alimony obligations. Defendant also sought damages based on plaintiff's acceptance of alimony payments for a period in excess of three years during which the alleged cohabitation was taking place.

The case proceeded to trial. The jury returned a verdict favorable to plaintiff, and judgment was entered thereon. Defendant moved for a new trial on the grounds of manifest disregard by the jury of the court's instructions and that the verdict was contrary to law. Defendant's motion was denied and he has appealed.

Smith, Patterson, Follin, Curtis, James and Harkavy, by Norman B. Smith and John A. Dusenbury, Jr., for plaintiff appellee.

Harold F. Greeson, by Constance L. Floyd, for defendant appellant.

MARTIN, Judge.

The issue on appeal is whether the District Court of Guilford County should have assumed jurisdiction, in this case, to enforce alimony provisions of the 1978 separation agreement. We conclude the court had no jurisdiction to hear the matter of alimony enforcement.

Plaintiff's "supplemental complaint" was clearly a motion in the cause to modify the alimony provisions of the 1978 separation agreement. However, the separation agreement was not incorporated into a court order, but rather remained a contract between the parties. As such, it was enforceable only as an ordinary contract, *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964), and the court was without power to modify it except for the court's power to provide for adequate support for minor children, absent the mutual consent of both parties thereto. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963); *McKaughn v. McKaughn*, 29 N.C. App. 702, 225 S.E. 2d 616 (1976).

Although the parties stipulated in a pre-trial conference "that the court has jurisdiction of the parties and of the subject matter," we find such to be ineffective in conferring jurisdiction upon the court. A stipulation by the parties that the court has jurisdiction of the matter of alimony enforcement does not confer jurisdiction since the parties cannot, by consent, give a court jurisdiction over subject matter of which it would not otherwise have jurisdiction. *See State v. Fisher*, 270 N.C. 315, 154 S.E. 2d 333 (1967); *Collins v. Collins*, 18 N.C. App. 45, 196 S.E. 2d 282 (1973). Consequently, the trial court erred in denying defendant's motion to dismiss and in treating plaintiff's motion as a supplemental pleading pursuant to Rule 15(d) of the North Carolina Rules of Civil Procedure. Therefore, the judgment of the trial court is vacated and the action dismissed.

Vacated and dismissed.

Judges BECTON and JOHNSON concur.

COUNTY OF DURHAM v. MADDRY AND COMPANY, INC., THOMAS E. MADDRY, INDIVIDUALLY AND AS AN OFFICER OF MADDRY AND COMPANY, INC., AND JAMES A. MADDRY, INDIVIDUALLY AND AS AN OFFICER OF MADDRY AND COMPANY, INC.

No. 8414SC529

(Filed 5 February 1985)

Municipal Corporations § 30.11— zoning ordinance—minor automotive repair garage—permitted use

Defendants' operation of a minor automotive repair garage was a permitted use within the Highway Commercial Zone applicable to their property, though the Village Commercial Zone of plaintiff's zoning ordinance specifically provided for the operation of a business devoted exclusively to automobile repairs, since the operation of a gasoline service station doing light repair work was a permitted use within the Highway Commercial Zone, and other uses permitted in this zone were diverse and in keeping with a minor automotive repair garage.

APPEAL by defendants from *McLelland, Judge.* Order entered 6 March 1984. Heard in the Court of Appeals 15 January 1985.

Defendants appeal from an order permanently enjoining operation of an automobile repair service on their premises.

Thomas Russell Odom, Assistant County Attorney, for plaintiff appellee.

David M. Rooks, III, for defendant appellant.

WHICHARD, Judge.

The sole issue is whether defendants' operation of a minor automotive repair garage is a permitted use within the Highway Commercial Zone applicable to their property. We hold that it is.

According to the Durham County Zoning Ordinance, the operation of a "[g]asoline service station where . . . the repair, replacement or adjustment to vehicles shall be limited to minor accessory parts" is a permitted use within the Highway Commercial Zone. Durham County Zoning Ordinance, Highway Commercial District, Sec. XIII. Under *In Re Couch*, 258 N.C. 345, 128 S.E. 2d 409 (1962), which we find controlling, "[o]n the theory that the whole includes all the parts, [defendants] have the right to erect a

building for any one or more of the permitted uses." *Id.* at 346, 128 S.E. 2d at 411. In *Couch* the petitioners were allowed to erect and operate a car wash because washing of automobiles was "a permitted activity on the part of automobile service stations selling gasoline and oil, and doing light repair work," which stations the applicable zone permitted. *Id.*, 128 S.E. 2d at 410. Since the ordinance here permits a service station to do minor repairs in a Highway Commercial Zone, under the *Couch* rationale a garage devoted exclusively to minor repairs should also be permitted in that zone.

Plaintiff notes that the Village Commercial Zone, Durham County Zoning Ordinance, Sec. XIV, specifically provides for the operation of a business devoted exclusively to automobile repairs. In light of the holding in *Couch*, however, we see no reason to limit the operation of a garage for minor repairs to the Village Commercial District.

Nor are policy reasons for doing so apparent. In addition to gasoline service stations, the uses permitted in a Highway Commercial Zone (Sec. XIII) include mobile home courts, tourist camps, restaurants, offices, clinics, medical and dental laboratories, retail stores, wholesale distributors, barber and beauty shops, shoe repair shops, banks, laundry and dry cleaning pick-up stations, recreation establishments and clubs, sales rooms for nurseries or greenhouses, truck terminals, and billboards. Given the type and diversity of uses permitted in this zone, we find no rational basis for permitting minor car repairs if defendants sell gas but not if they only repair vehicles. Moreover, it has long been the rule that zoning ordinances are in derogation of the right of private property and where possible should be construed in favor of freedom of use. *In Re Application of Construction Co.*, 272 N.C. 715, 718, 158 S.E. 2d 887, 890 (1968).

Defendants concede that they are in violation of State Building Code Sec. 105.6(h) since they converted their building without final inspection by the County. They also conceded in oral argument that they are in violation of Subsection 3, Sec. XIII of the Zoning Ordinance, *supra*, which requires that "[a]utomobiles or similar vehicles shall not be parked or stored for the purpose of removing parts or for the purpose of making major or extensive repairs."

We thus reverse and remand, directing that defendants may be enjoined from operation of a minor automotive repair garage on their premises only for as long as they remain in violation of the State Building Code or the Durham County Zoning Ordinance, *supra*, concerning parked vehicles. This directive shall apply unless cause for a permanent injunction, for reasons other than those on which the instant injunction is based, have arisen since the hearing below.

Reversed and remanded.

Chief Judge HEDRICK and Judge PARKER concur.

WINSTON-SALEM JOINT VENTURE, A PARTNERSHIP v. CATHY'S BOUTIQUE, INC.

No. 8421DC437

(Filed 5 February 1985)

Rules of Civil Procedure § 13— libel action—action for breach of lease—no compulsory counterclaim

There was no logical connection between defendant tenant's action for libel and plaintiff landlord's action for breach of lease which would require that the action for breach of lease be filed as a compulsory counterclaim pursuant to G.S. 1A-1, Rule 13(a).

APPEAL by defendant from *Alexander, Judge.* Order entered 23 January 1984 in District Court, FORSYTH County. Heard in the Court of Appeals 7 January 1985.

This is a civil action in which plaintiff, Winston-Salem Joint Venture (Joint Venture), seeks damages from defendant Cathy's Boutique, Incorporated (Cathy's), for breach of a lease agreement.

On 13 October 1983, Cathy's filed an action against Joint Venture and other named defendants alleging libel and unfair and deceptive trade practices arising out of a cartoon published in the *Hanes Mall Herald*, a newspaper containing news, advertisements and promotional material for tenants and customers of Hanes Mall in Winston-Salem. (83CVS5410)

On 3 November 1983, Joint Venture filed the action for breach of lease that is the subject of this appeal. (83CVD5764)

On 5 January 1984, Cathy's filed a motion to dismiss Joint Venture's action on the lease pursuant to G.S. 1A-1, Rules 12(b)(1) and 13(a). This motion to dismiss was denied on 23 January 1984 by the Honorable Abner Alexander, Chief District Court Judge.

Cathy's appealed and Joint Venture filed a motion to dismiss the appeal as interlocutory.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready by Penni L. Pearson for the plaintiff-appellee.

William Y. Wilkins, for the defendant-appellant.

EAGLES, Judge.

I

We first consider the interlocutory nature of this appeal. As grounds for its motion to dismiss Joint Venture's action for breach of lease, Cathy's asserts that the action is a compulsory counterclaim to Cathy's libel action filed 13 October 1983. In *Atkins v. Nash*, 61 N.C. App. 488, 300 S.E. 2d 880 (1983) we said:

> Our Supreme Court has treated refusal to abate on grounds of a prior pending action as immediately appealable. [Citations omitted.] Subsequent to the adoption of G.S. 1A-1, Rule 13(a), relating to compulsory counterclaims, that Court has treated denial of a motion to dismiss on the ground of a prior action pending as a motion pursuant to that rule, and has allowed immediate review. [Citation omitted.]

Id. at 489, 300 S.E. 2d at 881. Accordingly, we consider this appeal on its merits.

II

The sole issue on appeal is whether the trial court erred in refusing to grant Cathy's motion to dismiss Joint Venture's action for breach of lease filed 3 November 1983, as a compulsory counterclaim to the libel action filed by Cathy's on 13 October 1983. We find no error.

G.S. 1A-1, Rule 13(a) states, in pertinent part

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.

The basis of Cathy's argument is that the action for breach of lease "arises out of the transaction or occurrence that is the subject matter" of Cathy's libel action, which was filed before the action for breach of lease, and is properly a compulsory counterclaim. We do not agree.

> In order to find that an action must be filed as a compulsory counterclaim pursuant to G.S. 1A-1, Rule 13(a), a court must first find a logical relationship between the factual backgrounds of the two claims. In addition, the court must find a logical relationship between the nature of the actions. Rule 13(a) is a tool designed to further judicial economy. The tool should not be used to combine actions that, despite their origin in a common factual background, have no logical relationship to each other. *Apartments, Inc. v. Landrum*, 45 N.C. App. 490, 494, 263 S.E. 2d 323, 325 (1980).

Here, the only relationship existing between the fact, claims and nature of the action is the landlord-tenant relationship. Here, we find no logical nexus between the action for libel and the action for breach of lease which would require that the action for breach of lease be filed as a compulsory counterclaim pursuant to G.S. 1A-1, Rule 13(a).

Defendant's assignment of error is overruled and the order of the trial court denying the motion to dismiss as a compulsory counterclaim is affirmed.

Judges WEBB and COZORT concur.

MARSHALL STEWART, III AND EVELYN STEWART v. JAMES ALLEN GRAHAM, COMMISSIONER, NORTH CAROLINA DEPARTMENT OF AGRICULTURE; WILLIAM G. PARHAM, DEPUTY COMMISSIONER, NORTH CAROLINA DEPARTMENT OF AGRICULTURE; ALEX M. LEWIS, CONTROLLER, NORTH CAROLINA DEPARTMENT OF AGRICULTURE; SAMUEL G. RAND, MANAGER, NORTH CAROLINA STATE FAIR; JANE SMITH PATTERSON, SECRETARY, NORTH CAROLINA DEPARTMENT OF ADMINISTRATION; CHARLES E. GRADY, DIRECTOR, STATE PROPERTY OFFICER, NORTH CAROLINA DEPARTMENT OF ADMINISTRATION

No. 8410SC435

(Filed 5 February 1985)

State §§ 2, 4— lease of State property—invalid contract—no waiver of sovereign immunity

In an action by plaintiff flea market operators alleging breach of their oral contract to lease buildings on the grounds of the N. C. State Fair, the trial court properly determined that it had no jurisdiction over the subject matter because of the doctrine of sovereign immunity, since the purported contract between plaintiffs and defendants was not approved by the Governor and Council of State pursuant to G.S. 146-27, was not a valid contract, and therefore could not constitute an exception to the application of the sovereign immunity rule.

APPEAL by plaintiffs from *Ellis, Judge*. Order entered 6 February 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 6 December 1984.

Plaintiffs are operators of a Flea Market located on the grounds of the North Carolina State Fair (State Fair). Plaintiffs allege breach of their oral contract to lease Education and Commercial Buildings from State Fair, a division of the North Carolina Department of Agriculture. Defendants are all state officials or employees. The land to be leased is state land. Prior leases between plaintiffs and State Fair were in the name of the State and were executed on its behalf by the Governor and Secretary of State. Each prior lease recites its approval by the Governor and Council of State. The last such lease was signed on 6 April 1981 and provided for a three-year term.

In granting defendants' motion to dismiss, the court stated that it had "no jurisdiction to entertain the causes of action alleged." Plaintiffs appeal.

Purser, Cheshire, Manning & Parker, by Thomas C. Manning, for plaintiff appellants.

Attorney General Edmisten, by Special Deputy Attorney General T. Buie Costen and Deputy Attorney General Millard R. Rich, Jr., for defendant appellees.

WHICHARD, Judge.

All parties agree that the issue determined by the trial court and hence reviewable on appeal is whether the trial court's jurisdiction over the subject matter of the controversy is defeated by the doctrine of sovereign immunity. Under that doctrine, the State cannot be sued without its consent. *Smith v. State*, 289 N.C. 303, 309, 222 S.E. 2d 412, 417 (1976).

Consent is implicitly given, however, whenever the State enters into a valid contract. *Id.* at 320, 222 S.E. 2d at 423-24. In the event it breaches, the State has implicitly consented to be sued for damages on the contract. *Id.* In such case the doctrine of sovereign immunity is no defense and the State occupies the same position as any other litigant. *Id. See also MacDonald v. University of North Carolina*, 299 N.C. 457, 263 S.E. 2d 578 (1980); *Wojsko v. State*, 47 N.C. App. 605, 267 S.E. 2d 708 (1980).

Plaintiffs contend that the decision in *Smith*, which abrogates the doctrine of sovereign immunity for breach of contract, confers jurisdiction on the court here. We disagree.

Smith contemplates a waiver of sovereign immunity only when the State has entered into a "valid contract." *Smith*, 289 N.C. at 320, 222 S.E. 2d at 424. "The State is liable only upon contracts authorized by law." *Id.* at 322, 222 S.E. 2d at 425. Plaintiffs here have not alleged or proven the existence of a valid contract in accordance with law enforceable against the State.

Chapter 146 of the General Statutes governs the management, control, and disposition of state lands. Article 7, Subchapter II of Chapter 146 specifically controls the disposition of state lands or interests therein. G.S. 146-27 provides, "Every sale, lease, or rental of land owned by the State or by any State agency shall be made by the Department of Administration and approved by the Governor and Council of State." Further, "[a]ny sale, lease, rental or other disposition of State lands or of any interest or right therein, made or entered into contrary to the provisions of this Chapter, shall be voidable in the discretion of the Governor and Council of State." G.S. 146-66.

For purposes of upholding legislative intent, we decline to distinguish between an agreement to lease, as here, and a lease agreement. An agreement to lease should be governed by the

same statutory provisions as a lease itself. To hold otherwise would defeat the legislative intent to protect the State and taxpayers from liability for the unauthorized and invalid agreements of the State's numerous agents.

Plaintiffs allege that defendants Lewis, Rand, and Pitzer made oral representations to them which constituted an oral contract to enter a lease subsequent to the expiration of their prior lease and upon which they relied. Under the provisions of G.S. 146-27, *supra*, however, only the Department of Administration, upon approval by the Governor and Council of State, has the authority to create an enforceable contract for the lease of land owned by the State.

Not having been approved by the Governor and Council of State, the purported oral agreement between plaintiffs and defendants Lewis, Rand, and Pitzer, therefore, is not the valid contract with the State which the *Smith* exception to sovereign immunity requires. Since the State has not explicitly or implicitly consented to be sued, the court correctly determined that it had no jurisdiction and dismissed the action.

Affirmed.

Chief Judge HEDRICK and Judge EAGLES concur.

CHERYL LYN FEAGIN, BY HER GUARDIAN AD LITEM, DONALD B. FEAGIN; AND DONALD B. FEAGIN, INDIVIDUALLY v. BURGESS M. STATON AND JOHN W. FAULKNER

No. 8420SC531

(Filed 5 February 1985)

1. Negligence § 27— child playing on trash dumpster—condition of dumpster after accident—evidence inadmissible

In an action to recover for personal injuries sustained by the minor plaintiff when a trash dumpster fell on her, the trial court did not err in excluding testimony by plaintiff father concerning statements made to him by one of defendant's employees as to the condition and safety of the dumpster as he found it after the accident, since the testimony was inadmissible hearsay; it was not admissible as an admission because there was no evidence that the

employee's employment as an ambulance driver related to the dumpster or that defendant had authorized the employee to make any statements regarding the dumpster; and plaintiff father's own testimony indicated that the dumpster was less level after the accident than before, thus rendering inadmissible any testimony as to the condition of the dumpster after the accident.

2. **Negligence § 29.3— child playing on trash dumpster—attractive nuisance—no foreseeability**

In an action to recover for personal injuries sustained by the minor plaintiff when a trash dumpster fell on her, there was no merit to plaintiff's contention that the evidence could have permitted the jury to find that the dumpster was an "attractive nuisance," since there was no evidence that the dumpster was a dangerous instrumentality or created an unreasonable risk, and neither defendant was aware of children in the vicinity being attracted to the dumpster and neither could therefore have reasonably foreseen injury.

APPEAL by plaintiffs from *McKinnon, Judge*. Judgment entered 13 October 1983 in Superior Court, ANSON County. Heard in the Court of Appeals 15 January 1985.

Plaintiffs brought this action to recover compensation for injuries sustained by Cheryl Lyn Feagin, who was seven years old at the time, when a trash dumpster fell on her. Plaintiffs' evidence shows the following: The dumpster was located in a trailer park owned by defendant Faulkner, close to the mobile home plaintiffs lived in and rented from Faulkner. Defendant Staton supplied and serviced the dumpster. The dumpster weighed about 300 pounds, was three or four feet tall, and had a sloped front end with a metal bar across it. On 10 December 1976, Cheryl was swinging from the bar on the front of the dumpster while several other children were walking on top of it. The dumpster began to fall forward, and the other children jumped off, but Cheryl was pinned beneath it.

Cheryl testified that she had seen other trash dumpsters tip over on other occasions when children would swing on them. Her father, plaintiff Donald Feagin, testified that twelve days after the accident the dumpster was "not really level," that it was tilted forward. He also stated that the dumpster was located in a "fairly level" area, that he had taken trash to it approximately fifty times prior to the accident, and that he had not had any complaints about the dumpster prior to the accident. He never noticed it as being unlevel before the accident, but it was unlevel afterwards.

The dumpster was not braced in front or tied down. Jackie Lee McFadder testified that it would lean forward when loaded with trash toward the front, but that he could not rock it and it probably would take several people to push over the dumpster when it had weight in the front. Several witnesses testified that the dumpster was situated on fairly level ground.

Neither defendant ever saw children playing on the dumpsters in the trailer park where plaintiffs lived.

At the close of plaintiffs' evidence, the trial court granted directed verdicts in favor of both defendants. Plaintiffs appealed.

Henry T. Drake for plaintiffs, appellants.

F. O'Neil Jones for defendant, appellee, Burgess M. Staton.

Golding, Crews, Meekins, Gordon & Gray, by James P. Crews, for defendant, appellee, John W. Faulkner.

HEDRICK, Chief Judge.

[1] Plaintiffs contend the trial court erred in excluding testimony from plaintiff Donald Feagin concerning statements made by Jack McFadder. McFadder had discussed the condition and safety of the dumpster, as he found it after the accident, with Feagin. This testimony was properly excluded as hearsay, and it was not admissible as an admission, even though defendant Faulkner employed McFadder as an ambulance driver, since there was no evidence that McFadder's employment related to the dumpster or that Faulkner had authorized him to make any statements regarding the dumpster. *See* 2 H. Brandis, *Brandis on North Carolina Evidence* Sec. 169 (2d rev. ed., 1982). Moreover, Feagin's own testimony indicated that the dumpster was less level after the accident than before, and this change of condition renders inadmissible any testimony as to the condition of the dumpster after the accident. 1 H. Brandis, *Brandis on North Carolina Evidence* Sec. 90 (2d rev. ed., 1982).

[2] Plaintiffs contend the directed verdicts in favor of defendants were error because the evidence could have permitted the jury to find that the dumpster was an "attractive nuisance." We disagree. Plaintiffs were required to present evidence showing (1) that the dumpster was a dangerous instrumentality or created an

unreasonable risk, and (2) that children had been attracted to it to such an extent and over such a period of time that a person of ordinary prudence would have foreseen that injury was likely to result. *Samuel v. Simmons*, 50 N.C. App. 406, 409, 273 S.E. 2d 761, 763, *disc. rev. denied*, 302 N.C. 399, 279 S.E. 2d 352 (1981). Plaintiffs' evidence fails in both respects. Cheryl Feagin could not specifically remember having seen the dumpster that injured her tip over on previous occasions. All the other testimony indicates that the dumpster that injured her had never been seen to fall over, it could not be rocked or tipped without several people pushing it, and it sat on fairly level ground. Thus, plaintiffs failed to show the dumpster was a dangerous instrumentality. Nor did defendant Staton create an unreasonable risk in not securing the dumpster to the ground since it was his customary practice not to secure dumpsters to the ground, and there was no showing that this practice was unreasonable.

Even if the dumpster had been inherently dangerous, neither defendant reasonably could have foreseen injury because they were not aware of children in that trailer park being attracted to the dumpsters. Plaintiffs have failed to satisfy critical elements of their negligence claim. *See Samuel v. Simmons*, 50 N.C. App. 406, 273 S.E. 2d 761 (1981).

Affirmed.

Judges WHICHARD and PARKER concur.

STATE OF NORTH CAROLINA v. WILLIE VANDER McNAIR

No. 8411SC409

(Filed 5 February 1985)

Burglary and Unlawful Breakings § 5.8; Larceny § 7.4— possession of recently stolen property—sufficiency of evidence

In a prosecution of defendant for felonious breaking or entering and larceny, evidence was sufficient to be submitted to the jury under the doctrine of possession of recently stolen property, though the State did not show that defendant had an ownership interest in the car in which the stolen goods were found, where the evidence did show that there were no passengers other than defendant in the car in which the stolen goods were found, and defendant

alone possessed and controlled the car near the crime scene at the time of the breaking and entering and soon thereafter when the stolen goods were found.

APPEAL by defendant from *Beaty, James A., Judge.* Judgment entered 25 October 1983 in JOHNSTON County Superior Court. Heard in the Court of Appeals 15 January 1985.

Defendant was indicted and tried for felonious breaking and entering and felonious larceny.

At trial, the state's evidence tended to show the following circumstances and events. Mr. and Mrs. Christopher Olive left their residence in the morning of 30 August 1983 at about 12:15 p.m. Some neighbors observed a 1968 or 1969 grey Ford automobile near the Olive home. One of the neighbors talked to the driver of the car and identified defendant as the driver. The neighbor, being suspicious, called the Sheriff's Office. Mr. Olive returned home about 1:00 p.m. and found his home had been broken into. Numerous articles of personal property were missing from the home. Olive called the Sheriff's Office to investigate. Soon thereafter, Deputy Smith observed an older grey Ford headed toward Goldsboro. He identified defendant as the driver. Deputy Smith then went to Goldsboro, met a Wayne County Deputy Sheriff, and proceeded to locate the grey Ford parked at a residence on Elm Street. Defendant was standing by the car. Defendant opened the trunk of the vehicle, where the officers found the property missing from the Olive home.

Defendant did not testify, but presented alibi witnesses and testimony to the effect that defendant was driving the grey Ford at the request of a friend.

From judgments and sentences entered on the verdict, defendant has appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney General Michael Smith, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Robin E. Hudson, for defendant.

WELLS, Judge.

Defendant has assigned error to the denial of his motion to dismiss for insufficiency of the state's evidence. In his argument,

defendant contends that since the state's case was based upon the doctrine of recent possession, the case must fall because the state was unable to show that defendant had an ownership interest in the car in which the stolen goods were found. Defendant cites *State v. Maines*, 301 N.C. 669, 273 S.E. 2d 289 (1981) in support of his argument.

In *Maines*, the state's evidence showed that the defendant was driving a car containing stolen goods, with the owner of the car seated beside him. There were two other passengers in the car. The court reversed Maines' conviction, concluding that the circumstances in that case would not allow an inference that Maines was in control of the stolen goods, or had dominion over them.

The facts in the case now before us readily distinguish this case from *Maines*. Here, there were no other passengers in the car in which the stolen goods were found and the evidence showed that defendant alone possessed and controlled the car near the crime scene approximately at the time of the breaking and entering and soon thereafter when the stolen goods were found. Under such circumstances, to establish dominion and control of the car, it was not necessary to show that defendant owned the car. We judicially note that borrowed, rented, or stolen cars may be used in criminal activities, including robberies and larcenies.

In *Maines*, the court established the test of the use of the recent possession doctrine rule to establish the presumption that the possessor of stolen goods is the thief. The elements are (1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control to the exclusion of others, though not necessarily found in the defendant's hands or on his person so long as defendant had the power and intent to control the goods, and (3) the possession was recently after the larceny. *Id.* The state's evidence in this case met this test and the trial court properly denied defendant's motion to dismiss.

No error.

Judges ARNOLD and MARTIN concur.

SHIRLEY T. FORBES v. BEN W. FORBES, JR.

No. 8411DC415

(Filed 5 February 1985)

Divorce and Alimony § 27— child custody and support contested—authority of court to award counsel fees

Where both child custody and support were contested, and the trial court found that plaintiff was an interested party who had acted in good faith but was without sufficient means to defray the costs and expenses of the action, the trial court erred in holding that it could not order defendant to pay counsel fees.

APPEAL by plaintiff from *Pridgen, Judge.* Judgment entered 22 February 1984 in District Court, LEE County. Heard in the Court of Appeals 14 January 1985.

The parties to this action were married but have been divorced. The plaintiff brought this action for custody and support of their minor child. The defendant contested the custody and support. On 26 January 1984 the Court entered an order giving custody of the child to the plaintiff. In an order filed 22 February 1984 the Court ordered the defendant to pay child support. In its order for child support the Court found that "Plaintiff is an interested party who has acted in good faith . . . but without sufficient means to defray the costs and expenses hereof." The Court also found that the plaintiff was not entitled to past support of the child and was not entitled to recover her counsel fees.

The plaintiff appealed the court's refusal to allow her counsel's fee.

J. Douglas Moretz, P.A., by Michael L. Stephenson, for plaintiff appellant.

No brief for defendant appellee.

WEBB, Judge.

G.S. 50-13.6 provides that attorney fees may be awarded in a child custody or support action "to an interested party acting in good faith who has insufficient means to defray the expense of the suit." The statute provides that in a support action the Court must also find before ordering payment of a counsel fee "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." This provision does not apply to this action because it is one for both custody and support. It was error for the Court to hold it could not order the defendant to pay counsel fees.

We do not believe this case is inconsistent with *Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980) or *Gibson v. Gibson*, 68 N.C. App. 566, 316 S.E. 2d 99 (1984). In both those cases a spouse had asked for custody and support. In each case the custody was determined prior to the decision as to support and was not at issue when the matter of support was contested. No attorney fees were allowed in those cases because there was not a showing that the supporting party had refused to provide adequate support at the time the action for support was filed. In this case both custody and support were contested. The plaintiff was not deprived of the right to have attorney fees because the order for custody was entered before the order for support.

Reversed and remanded.

Judges EAGLES and COZORT concur.

STATE OF NORTH CAROLINA v. MICHAEL STREATH

No. 843SC375

(Filed 5 February 1985)

Criminal Law § 18.1 — insufficiency of record to show jurisdiction in trial court — no jurisdiction of court on appeal

Since jurisdiction of the Court of Appeals is derivative of that of the trial court, the jurisdiction of the trial court must affirmatively appear in the record on appeal. The record in this case failed to show the jurisdiction of the trial court where each judgment showed that defendant was convicted in superior court on misdemeanors, but made no reference to any proceedings in the district court, the court with exclusive jurisdiction in the trial of misdemeanors.

State v. Streath

APPEAL by defendant from *Allsbrook, Judge.* Judgment entered 14 November 1983 in CRAVEN County Superior Court. Heard in the Court of Appeals 10 January 1985.

Following a jury trial in superior court, defendant was convicted of the offenses of indecent exposure, assault on a female, and false imprisonment. From judgment and sentences entered on the verdict, defendant has appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General William F. Briley, for the State.

Beaman, Kellum & Stallings, P.A., by Edward Daniels Nelson, for defendant.

WELLS, Judge.

The only criminal pleadings which appear in the record on appeal are warrants for defendant's arrest. Each judgment in the record on appeal shows that defendant was convicted in superior court on misdemeanors. The record on appeal makes no reference to or otherwise discloses any proceedings in the district court.

The district court, with certain exceptions, has exclusive jurisdiction in the trial of misdemeanors, N.C. Gen. Stat. § 7A-272 (1981). None of the exceptions allowing the superior court original jurisdiction apply in this case. *See* N.C. Gen. Stat. § 7A-271 (1981).

It is settled law that the jurisdiction of this court being derivative of that of the trial court, for an appeal to lie here, the jurisdiction of the trial court must affirmatively appear in the record on appeal. *State v. Guffey*, 283 N.C. 94, 194 S.E. 2d 827 (1973); *State v. McKoy*, 44 N.C. App. 516, 261 S.E. 2d 226, *cert. denied*, 299 N.C. 546, 265 S.E. 2d 405 (1980); *State v. Parks*, 20 N.C. App. 207, 200 S.E. 2d 837 (1973); *State v. Marshall*, 11 N.C. App. 200, 180 S.E. 2d 464 (1971); *State v. Byrd*, 4 N.C. App. 672, 167 S.E. 2d 522 (1969).

This record not showing the jurisdiction of the trial court, we have no jurisdiction to consider this appeal.

Dismissed.

Judges ARNOLD and PARKER concur.

APPENDIX

AMENDMENTS TO RULES OF
APPELLATE PROCEDURE

AMENDMENTS TO RULES OF APPELLATE PROCEDURE

Rules 18, and 20 of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, are hereby amended to read as in the following pages. Rule 19 of those Rules is hereby repealed and reserved for future use.

Inasmuch as these rules make the procedures for direct appeals from administrative agencies to the appellate division consistent with the rules for bringing appeals from the courts of the trial division which we amended on 27 November 1984, to be effective 1 February 1985, these amendments shall be applicable to all appeals in which the notice of appeal is filed on or after 15 March 1985.

Adopted by the Court in Conference this 27th day of February, 1985. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

EARL W. VAUGHN
For the Court

ARTICLE IV. DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO APPELLATE DIVISION

RULE 18

TAKING APPEAL; RECORD ON APPEAL— COMPOSITION AND SETTLEMENT

(a) **General.** Appeals of right from administrative agencies, boards, or commissions (hereinafter "agency") directly to the appellate division under G.S. 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as hereinafter provided in this Article.

(b) **Time and Method for Taking Appeals.**

(1) The times and methods for taking appeals from an agency shall be as provided in this Rule 18 unless the statutes governing the agency provide otherwise, in which case those statutes shall control.

(2) Any party to the proceeding may appeal from a final agency determination to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within 30 days after receipt of a copy of the final order of the agency. The final order of the agency is to be sent to the parties by Registered or Certified Mail. The notice of appeal shall specify the party or parties taking the appeal; shall designate the final agency determination from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) **Composition of Record on Appeal.** The record on appeal in appeals from any agency shall contain:

(i) an index of the contents of the record, which shall appear as the first page thereof;

(ii) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the agency over persons or property sought to be bound in the proceeding, or a statement showing same;

(iii) copies of all other notices, pleadings, petitions, or other papers required by law or rule of the agency to be filed

with the agency to present and define the matter for determination;

(iv) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the agency from which appeal was taken;

(v) so much of the evidence taken before the agency or before any division, commissioner, deputy commissioner, or hearing officer of the agency, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2) and (3);

(vi) where the agency has reviewed a record of proceedings before a division, or an individual commissioner, deputy commissioner, or hearing officer of the agency, copies of all items included in the record filed with the agency which are necessary for an understanding of all errors assigned;

(vii) copies of all other papers filed and statements of all other proceedings had before the agency or any of its individual commissioners, deputies, or divisions which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed pursuant to Rule 9(c)(2) and (3);

(viii) a copy of the notice of appeal from the agency, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3); and

(ix) exceptions and assignments of error to the actions of the agency, set out as provided in Rule 10.

(d) **Settling the Record on Appeal.** The record on appeal may be settled by any of the following methods:

(1) **By Agreement.** Within 60 days after appeal is taken, the parties may by agreement entered in the record on appeal

settle a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within 60 days after appeal is taken, file in the office of the agency head and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within 30 days after service of the proposed record on appeal upon him, an appellee may file in the office of the agency head and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) **By Conference or Agency Order; Failure to Request Settlement.** If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the agency head to convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the agency head, shall be served upon all other parties. If only one appellee or only one set of appellees proceeding jointly have so filed and no other party makes timely request for agency conference or settlement by order, the record on appeal is thereupon settled in accordance with the one appellee's, or one set of appellees', objections, amendments, or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for agency conference or for settlement by order results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

Upon receipt of a request for settlement of the record on appeal, the agency head shall send written notice to counsel for all parties setting a place and a time for a conference to settle the record on appeal. The conference shall be held not later than 15 days after service of the request

upon the agency head. The agency head or his delegate shall settle the record on appeal by order entered not more than 20 days after service of the request for settlement upon the agency; provided, however, that when the agency head is a party to the appeal, the agency head shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these Rules and the appointing order.

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by agency order.

(e) **Further Procedures.** Further procedures for perfecting and prosecuting the appeal shall be as provided by these Rules for appeals from the courts of the trial divisions.

(f) **Extensions of Time.** The times provided in this Rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

Adopted: 13 June 1975.

Amended: 21 June 1977;
7 October 1980—18(d)(3)—effective 1 January 1981;
27 February 1985—applicable to all appeals in which the notice of appeal is filed on or after 15 March 1985.

RULE 19

(PARTIES TO APPEAL FROM AGENCIES)

REPEALED

RESERVED FOR FUTURE USE

Adopted: 13 June 1975.

Amended: 21 June 1977—19(d).

Repealed: 27 February 1985—effective 15 March 1985.

RULE 20

MISCELLANEOUS PROVISIONS OF LAW GOVERNING IN AGENCY APPEALS

Specific provisions of law pertaining to stays pending appeals from any agency to the appellate division, to pauper appeals therein, and to the scope of review and permissible mandates of the Court of Appeals therein shall govern the procedure in such appeals notwithstanding any provisions of these rules which may prescribe a different procedure.

Adopted: 13 June 1975.

Amended: 27 February 1985—effective 15 March 1985.

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.

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UNFAIR COMPETITION
UNIFORM COMMERCIAL CODE

VENUE

WEAPONS AND FIREARMS
WITNESSES

ADVERSE POSSESSION

§ 3. Hostile Character of Possession as Affected by Belief that Land Is Included in Description of Claimant's Deed

Evidence was sufficient to support the court's finding that defendants' possession of the disputed lands was not adverse where the evidence tended to show that defendants exercised possession over the disputed area solely because they believed that it was in fact their land and that it was included in the description contained in their deed. *Walls v. Grohman*, 443.

ANIMALS

§ 3. Injury or Damage Caused by Animals Roaming at Large

In an action to recover for damages to plaintiff's automobile allegedly sustained when it struck defendant's cow in a public road, the trial court erred in directing verdict against plaintiff on the ground that he was contributorily negligent because he had consumed beer on the evening of the accident. *Eatman v. Bunn*, 504.

Evidence was sufficient to permit the jury to find that defendant was negligent in preventing cattle from escaping and roaming at large and that defendant should reasonably have foreseen that his failure to keep his cattle within fences would likely result in some injurious consequences. *Ibid.*

The trial court erred in directing verdict dismissing defendant's counterclaim for damages resulting from the death of his cow which was struck by plaintiff's automobile. *Ibid.*

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability

A mandatory injunction requiring a highway contractor to remove rock waste was a final judgment from which there was the right to an immediate appeal. *Clark v. Asheville Contracting Co., Inc.*, 143.

§ 16. Powers of Trial Court after Appeal

Where one defendant's motion to dismiss for failure to state a cause of action was granted and plaintiff appealed from the order of dismissal, the trial court had jurisdiction to hear and rule upon a second defendant's motion to dismiss while plaintiff's appeal was pending. *Jenkins v. Wheeler*, 363.

Motions to dismiss an appeal for failure of an appellant to provide appropriate security for cost on appeal must be directed to the appellate court where the appeal is docketed. *Wade v. Wade*, 372.

§ 42.2. Judicial Notice and Presumptions with Respect to Record

There was no error in striking from defendant appellants' proposed record ninety-six pages of pleadings and transcripts in earlier actions between the parties because all the material necessary for a determination of the appeal had been filed in prior appeals. *Four Seasons Homeowners Assoc., Inc. v. Sellers*, 189.

Assignments of error concerning the admission of the husband's real estate appraiser's report and the husband's summaries of checks were deemed abandoned where neither exhibit was included in the record on appeal. *Loeb v. Loeb*, 205.

§ 57.3. Review of Findings in General

Where there were no exceptions to findings in a declaratory judgment action, the scope of review was limited to determining whether the findings of fact supported the conclusions of law. *Denise v. Cornell*, 358.

ARBITRATION AND AWARD

§ 9. Attack of Award

The granting of a motion to vacate an arbitration award rendered moot a motion to confirm the award. *In re Arbitration Between State and Davidson & Jones*, 149.

Arbitrators were not guilty of misconduct and their decision was not based upon ex parte evidence where one party furnished to the arbitrators copies of articles written by such party's witness pursuant to a request made by one arbitrator at a hearing attended by all the parties. *Ibid.*

ARREST AND BAIL

§ 11.4. Judgments against Sureties

The trial court did not err in determining that efforts made by a bondsman amounted to extraordinary cause pursuant to G.S. 15A-544(h) and in remitting the bond. *S. v. Fonville*, 527.

ATTORNEYS AT LAW

§ 5. Duty to Represent Client

Respondents in an action to terminate parental rights could not complain that the trial court erred in failing to appoint separate attorneys for each respondent and that the court was predisposed to decide the case for or against them as a couple. *In re Byrd*, 277.

§ 7. Fees Generally

The trial court did not err in denying attorney's fees in an action to determine the legal effect of a proposed lease. *Nat'l Medical Enterprises, Inc. v. Sandrock*, 245.

§ 7.3. Compensation in Condemnation Proceedings

Plaintiffs in an inverse condemnation proceeding were entitled to attorney fees and costs pursuant to G.S. 160A-243.1 in an amount determined by the court in its discretion to be the actual reasonable value of the attorneys' services, and plaintiffs were not limited to an amount provided in their contingent fee contract with their attorney. *Bandy v. City of Charlotte*, 604.

§ 7.4. Fees Based on Provisions of Notes or other Instruments

A prior appeal was res judicata even as to awards of attorneys' fees in excess of the statutory maximum where the prior appeal had affirmed the payment of attorneys' fees and defendant had not raised the applicability of G.S. 6-21.1. *Four Seasons Homeowners Assoc., Inc. v. Sellers*, 189.

AUTOMOBILES

§ 2.4. Rights and Procedures in Revocation Proceedings Related to Drunk Driving

The trial court erred in denying defendant's motion to dismiss a charge against him of driving while his license was in a state of revocation based on his violation of the condition of his limited driving privilege that he should not drive within three days after consuming any alcoholic beverages. *S. v. Cooney*, 649.

AUTOMOBILES — Continued

§ 3.1. Sufficiency of Notice of Revocation of License

A letter from the Division of Motor Vehicles to defendant was insufficient notice that his license was revoked on the date of his arrest for driving while his license was revoked, but a judgment entered in defendant's presence upon his conviction for driving under the influence and ordering him not to drive for three years was sufficient notice to defendant of revocation of his license. *S. v. Finger*, 569.

§ 3.3. Offense of Driving without Valid License; Admissibility of Evidence

In a prosecution of defendant for driving while his license was revoked, the trial court did not err in allowing testimony regarding prior charges, convictions and court proceedings relating to defendant. *S. v. Finger*, 569.

§ 74.1. Nonsuit on Ground of Contributory Negligence; Intoxication

In an action to recover for damages to plaintiff's automobile allegedly sustained when it struck defendant's cow in a public road, the trial court erred in directing verdict against plaintiff on the ground that he was contributorily negligent because he had consumed beer on the evening of the accident. *Eatman v. Bunn*, 504.

§ 112.2. Homicide; Evidence of Defendant's Speed

The trial court's error in permitting an officer to give opinion testimony as to defendant's speed was not prejudicial. *S. v. Johnson*, 512.

§ 113.1. Sufficiency of Evidence of Homicide

The trial court did not err in failing to dismiss a charge of manslaughter against defendant where the jury could conclude that the intoxicated defendant operated his vehicle in a culpably negligent manner and that this negligence was the proximate cause of the death of a passenger. *S. v. Johnson*, 512.

§ 126.3. Driving under the Influence; Qualification of Expert Administering Blood Test

Testimony that defendant's blood was drawn by a blood technician at a named hospital was sufficient evidence that the sample was drawn by a qualified person as required by G.S. 20-139.1(c). *S. v. Watts*, 661.

§ 130. Driving under the Influence; Verdict Generally

It was error for the trial court not to arrest judgment on the verdict of guilty of driving with a blood alcohol level in excess of .10%, since driving with this level of alcohol was an element of involuntary manslaughter, and defendant could not be convicted of both crimes. *S. v. Johnson*, 512.

BILLS AND NOTES

§ 19. Competency of Parol Evidence

In an action to recover the unpaid balance of principal and interest allegedly due on a promissory note given by defendant, the trial court did not err in allowing testimony concerning an oral agreement allegedly made between the parties and one of defendant's debtors to collect the note from the debtor rather than from defendant. *Greensboro Nat'l Bank v. Trulove Engineering*, 519.

BROKERS AND FACTORS

§ 8. Licensing and Regulation

Evidence was sufficient to support defendant's order revoking petitioner's license as a real estate agent. *Frieson v. N. C. Real Estate Licensing Bd.*, 665.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.8. Sufficiency of Evidence of Breaking and Entering and Larceny of Residential Premises

Evidence was sufficient for the jury in a prosecution for felonious breaking or entering and larceny under the doctrine of possession of recently stolen property. *S. v. McNair*, 681.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 10.2. Sufficiency of Evidence of Mental Capacity

The trial court properly denied defendant's motion to dismiss the plaintiff's action to void the transfer of real property on the ground that the grantor was incompetent. *L. Richardson Memorial Hospital v. Allen and Guy v. Townsend*, 499.

CONSTITUTIONAL LAW

§ 24.7. Service of Process and Jurisdiction over Foreign Corporations

Defendant Florida insurance agency had sufficient minimum contacts with North Carolina so that the exercise of personal jurisdiction over it in an action concerning a homeowner's insurance policy did not offend due process. *Jellen v. Ernest Smith Ins. Agency*, 51.

The evidence did not show minimum contacts between defendant and N. C. sufficient to meet constitutional due process standards and satisfy any of the grounds for in personam jurisdiction over foreign corporations of G.S. 1-75.4 or G.S. 55-145. *J. M. Thompson Co. v. Doral Manufacturing Co.*, 419.

§ 31. Affording the Accused the Basic Essentials for Defense

The trial court committed prejudicial error in allowing the State to have defendant's alibi witness's testimony in defendant's second trial transcribed while at the same time refusing to furnish defendant a transcript of the prosecuting witness's testimony from the same trial. *S. v. Wilson*, 616.

§ 50. Speedy Trial Generally

A delay of fourteen months in bringing defendant to trial was prima facie unreasonable and required the district attorney to fully justify the delay. *S. v. Pippin*, 387.

Defendant's speedy trial motion under the N. C. Speedy Trial Act was not an assertion of his constitutional right to a speedy trial. There was no violation of the rule that ordinarily one superior court may not modify, overrule or change the judgment of another superior court made in the same action where defendant's first motion for dismissal was for violation of his right to a speedy trial pursuant to the N. C. Speedy Trial Act, and his second motion alleged a violation of his constitutional right to a speedy trial. *Ibid.*

§ 51. Speedy Trial; Delay between Arrest and Indictment

The trial court did not err in failing to exclude time engaged in plea bargaining when determining the number of days between defendant's arrest and indictment. *S. v. Pippin*, 387.

CONSTITUTIONAL LAW — Continued

§ 76. Self-Incrimination; Nontestimonial Disclosures by Defendant

Where a defendant was not given Miranda warnings, his silence about that which any rational person would have spoken was properly used to impeach his testimony. *S. v. Hunt*, 59.

CONTRACTS

§ 6.1. Contracts by Unlicensed Contractors

In an action to recover for breach of contract the trial court properly granted summary judgment for defendants on the ground that plaintiff was an unlicensed contractor in violation of G.S. 87-1. *Harrell v. Clarke*, 516.

§ 7. Contracts Restricting Business Competition Generally

The trial court erred in entering summary judgment for defendant on plaintiff's claim that defendant violated a covenant not to compete where the contract between the parties provided that defendant would not "be under contract with" or "be associated with" any business which was a competitor of plaintiff within a two-county area, but the evidence showed that defendant did in fact lease the other half of the building in which plaintiff operated his business to a competitor of plaintiff, deferred collection of the first two months rent for one year, and gave the competitor the option to purchase the entire building, exercisable during the term of plaintiff's lease. *Bicycle Transit Authority v. Bell*, 577.

§ 29.4. Measure of Damages; Mitigation

In an action to recover a sum due for labor and materials expended by plaintiff pursuant to a contract for the construction of a home for defendants where defendants claimed that plaintiff had constructed the home in an unworkmanlike manner, the trial court erred in failing to give guiding instructions as to what the allowable offset or credit consisted of. *Tate Construction, Inc. v. Schultz*, 532.

CORPORATIONS

§ 4. Authority and Duties of Directors

Directors of N. C. corporations who are parties to a derivative shareholders' action may not confer upon a special committee of the board of directors the power to bind the corporation as to its conduct of the litigation. *Alford v. Shaw*, 537.

§ 8. Authority of President and Power to Bind the Corporation

Defendant's president had the apparent authority to execute a guaranty binding defendant to pay the debt of its subsidiary to plaintiff. *Foote & Davies, Inc. v. Arnold Craven, Inc.*, 591.

COUNTIES

§ 6.2. Expenditure of Funds

The county was obligated for emergency medical treatment administered to a person wounded by a deputy sheriff, handcuffed, and transported to the hospital. *Annie Penn Memorial Hosp., Inc. v. Caswell Co.*, 197.

CRIMINAL LAW

§ 9.2. Mutual Aiders and Abettors

The State's evidence was sufficient to support conviction of all three defendants for common law robbery and two defendants for assault inflicting serious injury under the concerted action principle. *S. v. Begley*, 37.

§ 10. Accessories before the Fact

Defendant could properly be convicted of being both an accessory before the fact and an accessory after the fact to possession of more than one ounce of marijuana. *S. v. Piccolo*, 455.

§ 11. Accessories after the Fact

The State's evidence was sufficient to support conviction of two defendants for accessory after the fact of second degree murder. *S. v. Upright*, 94.

§ 18.1. Sufficiency of Record to Show Jurisdiction in Superior Court

The record failed to show jurisdiction of the trial court where judgments showed that defendant was convicted in superior court on misdemeanors, but made no reference to any proceedings in the district court, the court with exclusive jurisdiction in the trial of misdemeanors. *S. v. Streath*, 685.

§ 43. Diagrams

The trial court did not err in allowing a witness to testify with the aid of a diagram depicting the scene of the crime. *S. v. Oden*, 360.

§ 66. Evidence of Identity by Sight

Testimony by the arresting officer was sufficient to identify defendant as the perpetrator of the alleged offenses. *S. v. Watts*, 661.

§ 66.2. Identity of Defendant; Effect of Uncertainty of Witness

An identification of defendant at his preliminary hearing was not impermissibly suggestive. *S. v. Brooks*, 254.

§ 66.8. Identification of Defendant from Photographs; Taking of Photographs

A photograph taken of defendant after he was lawfully detained was not taken in violation of his Fourth and Fourteenth Amendment rights, and pretrial identifications of defendant by two witnesses who viewed the photograph were not prejudicial. *S. v. Smith*, 630.

§ 66.9. Suggestiveness of Photographic Identification Procedure

A pretrial identification of defendant from a four photograph array was not impermissibly suggestive. *S. v. Brooks*, 254.

A pretrial identification of defendant by a kidnapping victim was not the result of a suggestive procedure. *S. v. Smith*, 630.

§ 66.17. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving other Pretrial Identification Procedures

A robbery and assault victim's in-court identification of the female defendant was of independent origin and not tainted by any suggestive pretrial procedures. *S. v. Begley*, 37.

§ 74.1. Divisibility of Confession

The trial court did not err in allowing the State to attack certain exculpatory portions of defendant's confession which the State had introduced as evidence. *S. v. Oden*, 360.

CRIMINAL LAW — Continued

§ 86.4. Impeachment of Defendant; Prior Arrests, Indictments and Accusations of Crime

In a prosecution for second degree murder where the husband had testified that his relationship with his wife was entirely harmonious, a prior assault warrant sworn out by the wife was competent and admissible. *S. v. Hunt*, 59.

§ 86.5. Impeachment of Defendant; Particular Questions and Evidence as to Specific Acts

The trial court erred in permitting the prosecutor to cross-examine defendant for impeachment purposes regarding previous attempts by him and his look-alike brother to fool or confuse their victims and other witnesses at trial by dressing and sitting alike in the courtroom, but such error was not prejudicial. *S. v. Brooks*, 254.

§ 90. Rule that Party Is Bound by and may not Discredit His own Witness

The trial court erred in permitting the State to introduce its witness's prior inconsistent statement into evidence and the jury to view it. *S. v. Greenlee*, 269.

§ 91. Speedy Trial

A 140-day delay between defendant's first and final indictment violated the N. C. Speedy Trial Act where the delay was attributable to the district attorney's failure to secure a proper indictment and prosecute the case. *S. v. Pippin*, 387.

In determining whether defendant was denied his right to a speedy trial pursuant to the N. C. Speedy Trial Act, the trial court properly excluded from consideration a 117 day delay during which time defendant was indicted, arrested and arraigned on another charge. *S. v. Piccolo*, 455.

§ 92.2. Consolidation of Charges against Multiple Defendants Proper; Related Offenses

Charges against defendant for second degree murder and charges against two codefendants for accessory after the fact to second degree murder were properly consolidated for trial. *S. v. Upright*, 94.

§ 92.5. Severance

A defendant charged with accessory after the fact of murder and a codefendant charged with murder did not present antagonistic defenses which required severance of their trials. *S. v. Upright*, 94.

§ 102.4. Conduct of Prosecutor during Trial Generally

Defendant was not prejudiced when the prosecutor passed defendant's statements to the jury where the statements were immediately withdrawn from the jury upon defendant's objection. *S. v. Upright*, 94.

§ 112.1. Instructions on Reasonable Doubt

When read contextually, the trial court's instructions sufficiently emphasized the State's burden of proving the elements of the offense and defendant's guilt thereof beyond a reasonable doubt. *S. v. Upright*, 94.

§ 138. Severity of Sentence and Determination Thereof

The trial court's imposition of a sentence in excess of the presumptive term for second degree murder was supported by the single aggravating factor that defendant had a conviction punishable by more than 60 days confinement. *S. v. Upright*, 94.

The evidence did not require the trial court to find as a mitigating factor for second degree murder that defendant had been drinking. *Ibid.*

CRIMINAL LAW — Continued

Evidence that defendant held his victims under water until they were drowned was sufficient for the trial court to find as an aggravating circumstance that the crimes were especially heinous, atrocious or cruel. *S. v. Sampson*, 461.

The trial court did not use the same evidence to find two aggravating factors where the court found that both victims were very young, but the court did not use the factor of age in determining that the crimes were especially heinous, atrocious or cruel. *Ibid.*

The trial court did not err in finding as an aggravating factor in each of two murder cases that the crime was committed while in flight following the kidnapping of the victim. *Ibid.*

Defendant's commission of a rape through the use of deadly weapons in the hands of his codefendant was properly considered by the trial judge and found as an aggravating factor. *S. v. Collier*, 508.

Evidence was insufficient to require the trial court to find as a statutory mitigating factor that defendant's immaturity or his limited mental capacity at the time of the commission of the offense significantly reduced defendant's culpability. *S. v. Jones*, 610.

Evidence in a second-degree murder case was sufficient to support the trial court's findings in aggravation that the killing occurred after premeditation and deliberation and that defendant had violent propensities. *S. v. Williamson*, 657.

DAMAGES

§ 10. Credit on Damages

The erroneous admission of evidence as to the salary received by plaintiff as sick leave benefits while she was unable to work because of the accident in question did not constitute a denial of a substantial right which would allow the trial court to set aside the verdict under Rule 61. *Marley v. Gantt*, 200.

DEEDS

§ 15. Special Limitations

Operation of a hospital under a proposed lease to plaintiff for profit corporation would be contrary to the intent of the grantor of the land on which the hospital stood and would terminate a county's determinable fee in favor of defendant's reversion. *Nat'l Medical Enterprises, Inc. v. Sandrock*, 245.

DIVORCE AND ALIMONY

§ 21.6. Effect of Separation Agreements

The trial court had no jurisdiction to modify the alimony provisions of the parties' separation agreement which was not incorporated into a court order but remained a contract between the parties. *DeGree v. DeGree*, 668.

§ 21.8. Foreign Alimony Awards

The trial court erred in determining that plaintiff's action to enforce decedent's obligation to provide her support pursuant to the parties' separation agreement was barred by a Texas divorce decree. *White v. Graham*, 436.

DIVORCE AND ALIMONY — Continued

§ 24.7. Modification of Child Support Order where Evidence of Changed Circumstances Is Sufficient

The evidence showed a substantial change in circumstances which supported the trial court's order increasing the father's child support obligation from $10 per week per child to $125 per month per child. *Kennon v. Kennon*, 161.

§ 24.9. Child Support; Findings

In an action for divorce and child custody, the court's findings were sufficient to support an order that defendant wife be solely responsible for the support and maintenance of the child placed in her custody. *Toney v. Toney*, 30.

§ 25.3. Custody; Consideration of Child's Preference

In an action for divorce and child custody, a finding that the court had not interviewed one of the children because defendant objected merely reported bare facts and did not reflect any interference with defendant's constitutional rights. *Toney v. Toney*, 30.

§ 25.4. Custody with Father

The court's conclusion that awarding plaintiff husband the custody of one brother would be in the child's best interest was supported by its findings. *Toney v. Toney*, 30.

§ 25.9. Modification of Custody Order where Evidence of Changed Circumstances Is Sufficient

The trial court did not err in modifying a previous custody order by allowing an additional week of custody with the mother during the summer months due to her summer vacation. *Kennon v. Kennon*, 161.

§ 27. Child Custody and Support; Attorney's Fees Generally

The trial court erred in awarding attorney fees of $450 to the wife in an action to modify child support and custody where the wife had a substantial income and the court failed to make sufficient findings. *Kennon v. Kennon*, 161.

The trial court erred in holding that it could not order defendant to pay counsel fees where both child custody and support were contested. *Forbes v. Forbes*, 684.

§ 30. Equitable Distribution of Marital Property

A 1976 separation agreement settled the property rights of the parties and barred plaintiff's claim for equitable distribution. *Blount v. Blount*, 193.

Clear, cogent, and convincing evidence is needed to rebut the presumption created by the Equitable Distribution Act that all property acquired during the course of the marriage is marital property. *Loeb v. Loeb*, 205.

The wife did not meet her burden of proof in contending that jointly held tracts conveyed to the parties as tenants by the entirety as a gift by the wife's mother were intended to be a gift to the wife alone. *Ibid.*

The court did not err by finding that cash gifts from the wife's mother were deposited in joint savings and checking accounts and combined with the other income of the family where the wife was unable to state the value of the gifts and the gifts could not be traced in the joint accounts. *Ibid.*

In an action for divorce and equitable distribution, the court did not err in finding that a condominium, certificates of deposit, and money market certificates were purchased with funds from joint bank accounts. *Ibid.*

DIVORCE AND ALIMONY — Continued

The court did not err in finding that a condominium purchased in the wife's name had been purchased with marital property where it was purchased with funds from joint savings, stocks and bonds in the wife's name purchased from joint accounts, and $2,000 from a gift to the wife by her mother after the parties separated. *Ibid.*

The court did not err by dividing the marital property equally according to value even though the parties' income was significantly disproportionate. *Ibid.*

The court did not err by specifically finding the marital property of the parties where its finding as to the property acquired and owned by the parties tracked the language of the statutory definition of marital property. *Ibid.*

Common law equitable distribution of marital property has been expressly rejected and a wife may not claim equitable distribution where the divorce was nearly three years prior to the marital property act. *Williams v. Williams*, 184.

A lump sum pension payment made to plaintiff by his employer and deposited in the parties' joint savings account was plaintiff's separate property and not marital property as determined by the trial court. *Brown v. Brown*, 332.

The trial court's findings of fact were insufficient to support an unequal division of marital property, and the court erred in dividing the property according to its fair market value rather than according to its net value. *Ibid.*

The trial court's order of equitable distribution of marital property must be vacated where the court did not identify with sufficient detail the property which it determined was marital property. *Wade v. Wade*, 372.

The provision of G.S. 50-20(b)(2) that the "increase in value of separate property . . . shall be considered separate property" refers only to passive appreciation of separate property. *Ibid.*

Where plaintiff acquired real property before the parties' marriage and they built a house thereon during the marriage with defendant making substantial contributions toward its construction, the property originally held by plaintiff should be considered separate in character and the house constructed during the marriage should be considered marital in character. *Ibid.*

The theory of transmutation through commingling is specifically rejected by the Court of Appeals. *Ibid.*

The trial court erred in using the fair market value rather than the net value of property in determining the equitable distribution of marital property. *Ibid.*

In determining the equitable distribution of marital property, the trial court may not punish a party by considering his misconduct during litigation. *Ibid.*

A spouse's interest in a professional partnership is a marital asset subject to equitable distribution. *Weaver v. Weaver*, 409.

The trial court properly calculated the present value of defendant's interest in an accounting partnership for the purpose of equitable distribution, but the trial court used an improper interest rate to discount the payments to defendant of his partnership interest. *Ibid.*

Where the trial judge ordered an equal division of the net value of all marital property except for certain personal property, the trial judge's failure to make specific findings on all the factors set out in G.S. 50-20(c) was not error. *Ibid.*

The trial court's reliance on the parties' oral agreement for division of their household furnishings at the time of separation and his failure to make specific findings under G.S. 50-20(c) explaining the equitable distribution of furnishings was error. *Ibid.*

EASEMENTS

§ 6.1. Easements by Prescription; Evidence

In plaintiffs' action to establish an easement by prescription across defendant's land, the trial court erred in failing to grant defendant's motion for a directed verdict where plaintiffs failed to show continuous and uninterrupted adverse use of a roadway for a period of at least 20 years. *Godfrey v. Van Harris Realty, Inc.*, 466.

EMINENT DOMAIN

§ 6.2. Value of Property in Vicinity

In a land condemnation proceeding, whether two properties are sufficiently similar to admit evidence of the sales price of one as evidence of the value of another is a matter within the sound discretion of the trial court. *City of Winston-Salem v. Cooper*, 173.

§ 6.5. Testimony of Witness as to Value

In a trial to determine damages for land condemnation, the court did not err by refusing to strike the testimony of an expert witness regarding the value of property because the testimony was based on an erroneous understanding of the controlling zoning ordinance. *City of Winston-Salem v. Cooper*, 173.

§ 6.9. Evidence of Value; Cross-examination of Witness

In a condemnation trial at which the amount of damages was the only issue, the court erred by not permitting the City to ask defendants' expert witnesses on cross-examination whether they could point to any vacant acreage on an aerial photograph of the area that had ever sold for more than $3,000. *City of Winston-Salem v. Cooper*, 173.

EVIDENCE

§ 12. Communications between Husband and Wife

In an action to recover on a fire policy where defendant alleged that plaintiff burned his house to collect insurance benefits, the trial court did not err in refusing to exclude, on the ground that it was protected by the husband-wife privilege, plaintiff's wife's testimony that plaintiff threatened her and threatened to burn down their house. *Freeman v. St. Paul Ins. Co.*, 292.

§ 32. Parol Evidence Affecting Writings

In an action to recover the unpaid balance of principal and interest allegedly due on a promissory note given by defendant, the trial court did not err in allowing testimony concerning an oral agreement allegedly made between the parties and one of defendant's debtors to collect the note from the debtor rather than from defendant. *Greensboro Nat'l Bank v. Trulove Engineering*, 519.

EXECUTION

§ 17. Execution against the Person

The court should have granted defendant's motion to dismiss an order of arrest issued as part of the execution of a judgment against defendant's person where the order did not contain required findings. *Windham Dist. Co., Inc. v. Davis*, 179.

EXECUTORS AND ADMINISTRATORS

§ 38. Personal Liabilities of Personal Representative in General

A proceeding to remove an executor and to revoke his letters of administration is not res judicata as to a later civil action for damages between the parties. *Shelton v. Fairley*, 1.

FRAUDULENT CONVEYANCES

§ 1.2. Bulk Sales

An action by plaintiff receivers based on the bulk transfer statutes of the Uniform Commercial Code was barred by the statute of limitations of G.S. 25-6-111. *Doby v. Lowder*, 22.

§ 3.1. Action to Set Aside Conveyances as Fraudulent; Pleadings

Plaintiffs' complaint was insufficient to state a cause of action for fraud in the transfer of real estate by the corporate defendant to the individual defendants. *Doby v. Lowder*, 22.

§ 3.4. Action to Set Aside Conveyances as Fraudulent; Sufficiency of Evidence

The forecast of evidence on motion for summary judgment was insufficient to support a finding of fraud in the corporate defendant's conveyance of real estate to the individual defendants. *Doby v. Lowder*, 22.

GUARANTY

§ 1. Generally

Evidence was sufficient for the jury to find that a guaranty executed by defendant was negotiated and agreed to as part of the original transaction between the parties and thus was supported by adequate consideration. *Foote & Davies, Inc. v. Arnold Craven, Inc.*, 591.

Defendant's president had the apparent authority to execute a guaranty binding defendant to pay the debt of its subsidiary to plaintiff. *Ibid.*

§ 2. Action to Enforce Guaranty

The trial court erred in granting summary judgment for plaintiff in its action to recover on a promissory note executed by defendant husband and allegedly guaranteed by defendant wife. *Northwestern Bank v. Gladwell*, 489.

In an action to collect on a guaranty agreement signed by defendants, the trial court properly entered summary judgment for plaintiff where defendants contended that, by virtue of an oral modification, they were released from their written agreement with plaintiff guaranteeing the debts of a corporation. *Yamaha Corp. v. Parks*, 625.

HIGHWAYS AND CARTWAYS

§ 7.2. Construction of Highways; Liability of Contractor for Property Damage

In actions arising from the placing of rock waste from a highway project near and in a subdivision, the court should have dismissed all claims against the contractor except those alleging that agents of the contractor had entered the property, cut trees, and dumped rock without permission of the owners. *Clark v. Asheville Contracting Co., Inc.*, 143.

A motion to dismiss was properly denied as to the president of a contractor which placed rock waste from a highway project near a subdivision and on two lots the contractor's president had purchased in the subdivision. *Ibid.*

HIGHWAYS AND CARTWAYS — Continued

Summary judgment should not have been granted for plaintiffs in an action arising from the disposal of rock waste from a highway construction project because there were issues of fact as to whether the Department of Transportation created a public nuisance which diminished the value of plaintiffs' property. *Ibid.*

HOMICIDE

§ 21.7. Sufficiency of Evidence of Guilt of Second Degree Murder

The State's evidence was sufficient to support conviction of defendant for second degree murder of a victim who was shot while playing cards in a bar. *S. v. Upright*, 94.

§ 21.9. Sufficiency of Evidence of Guilt of Manslaughter

Evidence was sufficient for the jury to conclude that defendant used excessive force and he could therefore properly be convicted of voluntary manslaughter. *S. v. Oden*, 360.

Where the evidence established that defendant intentionally shot his victim, the trial court erred in submitting involuntary manslaughter as a possible verdict, and such error was prejudicial where there was a reasonable possibility that defendant would have been acquitted of other offenses submitted if the involuntary manslaughter issue had not been submitted. *S. v. Mercado*, 521.

§ 30.2. Submission of Guilt of Manslaughter

Evidence of the victim's assault of a third person which was unknown to defendant was not legally sufficient provocation to require the trial court to instruct on voluntary manslaughter. *S. v. Upright*, 94.

§ 31.7. Punishment for Second Degree Murder

Evidence in a second-degree murder case was sufficient to support the trial court's findings in aggravation that the killing occurred after premeditation and deliberation and that defendant had violent propensities. *S. v. Williamson*, 657.

HOSPITALS

§ 1. Definitions; Public and Charitable Hospitals

A proposed lease between plaintiff county and plaintiff for profit corporation which proposed to operate the hospital was illegal and void. *Nat'l Medical Enterprises, Inc. v. Sandrock*, 245.

Operation of a hospital under a proposed lease to plaintiff for profit corporation would be contrary to the intent of the grantor of the land on which the hospital stood and would terminate a county's determinable fee in favor of defendant's reversion. *Ibid.*

HUSBAND AND WIFE

§ 11. Binding and Conclusive Effect of Separation Agreements

The trial court had no jurisdiction to modify the alimony provisions of the parties' separation agreement which was not incorporated into a court order but remained a contract between the parties. *DeGree v. DeGree*, 668.

§ 17.1. Termination of Estate by Entireties; Separation

Plaintiff's former husband did not abandon his property interest in the marital home simply by leaving. *Williams v. Williams*, 184.

INDICTMENT AND WARRANT

§ 8.4. Election between Offenses

Defendant's due process rights were not violated when the prosecutor proceeded to trial on a charge against him for accessory after the fact of second degree murder without dismissing a murder indictment against him. *S. v. Upright*, 94.

INFANTS

§ 9.1. Authority of Guardian Ad Litem

The court did not err by ordering the Department of Social Services to furnish the guardian ad litem for two children with information as to the home in which the children had been placed for adoption. *In re Wilkinson v. Riffel*, 220.

INJUNCTIONS

§ 3. Mandatory Injunctions

Where there was evidence that performance of a mandatory injunction to remove rock waste would take nine years and cost $13,500,000.00, there should have been findings regarding convenience-inconvenience and comparative injuries to the parties. *Clark v. Asheville Contracting Co., Inc.*, 143.

INSANE PERSONS

§ 1.2. Findings required by Involuntary Commitment Statute

The trial court erred in involuntarily committing respondent to a hospital for treatment where the person who initially petitioned for issuance of a custody order was a doctor, but there was no indication in the record that a second qualified physician examined respondent. *In re Barnhill*, 530.

INSURANCE

§ 6. Construction and Operation of Policies Generally

In an action to recover on a policy for fire damage to a piece of logging machinery, the trial court erred in entering summary judgment for defendant insurer where there was a genuine issue of material fact as to whether plaintiff leased the machinery or sold it on an installment basis to the person in whose possession it sustained damage. *Squires Timber Co. v. The Ins. Co. of Penn.*, 344.

§ 18.1. Avoidance of Life Insurance Policy for Misrepresentations as to Health

An insured who signs an application for insurance adopts it as his statement, and the fact that he may have made a misrepresentation unknowingly does not, in the absence of bad faith on the part of the insurer or its agent, alter the effect of the misrepresentation. *Pittman v. First Protection Life Ins. Co.*, 428.

§ 19.1 Waiver of Right to Declare Forfeiture for Misrepresentations; Imputation to Insurer of Knowledge of its Agent.

In an action to recover on an insurance policy where defendant refused to pay because of misrepresentations in the application for insurance, the trial court properly instructed on the effect of an agent's failure to disclose information to the insurer. *Pittman v. First Protection Life Ins. Co.*, 428.

§ 21. Incontestability Clauses

Defendant beneficiary of two life insurance policies could not invoke the incontestability clause of the policies, since the clause prohibited plaintiff from con-

INSURANCE — Continued

testing the policies after "two years from the policy date," 5 December 1980, and insured died 2 December 1982. *Nationwide Ins. Co. v. Ojha*, 355.

§ 90. Automobile Liability Insurance; Limitations on Use of Vehicle

Defendant lessor of a truck was not "in the business of" plaintiff lessee at the time he was involved in an automobile accident, and plaintiff lessee's insurance policy written by defendant insurance company therefore provided coverage. *McLean Trucking Co. v. Occidental Casualty Co.*, 285.

§ 95.1. Cancellation of Compulsory Automobile Liability Insurance; Notice to Insured

The "Premium Notice" and "Expiration Notice" mailed by defendant insurer to plaintiff insured were not manifestations of a willingness to renew an automobile liability insurance policy which were refused by the insured, nor were they effective notice of refusal to renew by the insurer for nonpayment of premium as required by G.S. 20-310(f). *Smith v. Nationwide Mut. Ins. Co.*, 400.

§ 100.1. Automobile Liability Insurance; Refusal of Insurer to Defend on Ground that Action not within Coverage of Policy

In an action to determine whether insurance companies must defend an action against a waste collection and transportation company for groundwater contamination at a landfill, allegations in the complaint did not establish a causal connection sufficient for coverage under automobile insurance policies. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 80.

§ 110.1. Payment on Automobile Liability Insurance Policy; Liability for Costs and Interest

G.S. 24-5 allowing interest on compensatory damages does not violate the due process and equal protection clauses of the Constitution because it distinguishes between insured and uninsured judgment debtors. *Ervin v. Speece*, 366.

§ 121. Fire Insurance; Provisions Excluding Liability

In an action to recover on a fire insurance policy, evidence was sufficient to submit the issue of intentional burning to the jury though defendant could not show that plaintiff was at the scene of the fire when it occurred. *Freeman v. St. Paul Ins. Co.*, 292.

§ 149. General Liability Insurance

An insured has a right to a defense whenever the complaint's allegations show potential liability within the insurance coverage, and there are no allegations which would necessarily exclude coverage. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 80.

In an action to determine whether insurance companies had a duty to defend a waste disposal company in an action for groundwater contamination, summary judgment for the insurance companies was not proper where the complaint suggested that the insured was careless and negligent in disposing of the chemicals. *Ibid.*

In an action arising from groundwater contamination at a landfill, cleanup costs were essentially compensatory damages for injuries to common property which would be covered by general liability insurance. *Ibid.*

INTEREST

§ 2. Computation

G.S. 24-5 allowing interest on compensatory damages does not violate the due process and equal protection clauses of the Constitution because it distinguishes between insured and uninsured judgment debtors. *Ervin v. Speece*, 366.

JUDGMENTS

§ 16. Direct and Collateral Attack

The trial court erred in directing verdict in favor of plaintiff nullifying a judgment entered pursuant to a small claims action where the magistrate's judgment was valid on its face. *Drummond v. Cordell*, 262.

§ 50. Actions on Domestic Judgments

Where a consent judgment required the former husband to indemnify the former wife for debts incurred on behalf of the husband, the wife was required to make payments on the husband's note when he defaulted, and the husband promised to pay the wife $1,000 for damages she had suffered thereby, the ten-year statute of limitations for judgments applied to the wife's action on the husband's loan repayment obligation. *Kennon v. Kennon*, 161.

§ 55. Right to Interest

G.S. 24-5 allowing interest on compensatory damages does not violate the due process and equal protection clauses of the Constitution because it distinguishes between insured and uninsured judgment debtors. *Ervin v. Speece*, 366.

LABORERS' AND MATERIALMEN'S LIENS

§ 3. Lien of Subcontractor or Material Furnisher; Recovery against Owner

Evidence of an oral agreement between the parties for the purchase of building supplies was sufficient to show a contract necessary for the perfecting of a statutory lien on real property pursuant to G.S. 44A-8. *Carolina Builders Corp. v. Howard-Veasey Homes, Inc.*, 224.

Defendant builder's equitable interest in land at the time building materials were first furnished by plaintiff followed by his subsequent legal interest satisfied the ownership requirement of the materialmen's lien statute. *Ibid.*

§ 9. Priorities

An intervening construction loan deed of trust defeated the priority that defendant's purchase money deed of trust ordinarily would have had over plaintiff's materialmen's lien under the doctrine of instantaneous seisin. *Carolina Builders Corp. v. Howard-Veasey Homes, Inc.*, 224.

LARCENY

§ 6.1. Ownership and Value of Property Stolen

In a prosecution of defendant for felonious larceny of goods from an appliance store, there was no merit to defendant's contention that the trial court erred in allowing the store manager to give inadmissible hearsay testimony as to ownership and value of the stolen items. *S. v. Jones*, 610.

§ 7.4. Sufficiency of Evidence; Possession of Stolen Property

Evidence was sufficient for the jury in a prosecution for felonious breaking or entering and larceny under the doctrine of possession of recently stolen property. *S. v. McNair*, 681.

LIBEL AND SLANDER

§ 14.1. Pleadings; Words Susceptible of Two Meanings

The trial court did not err in dismissing plaintiff's complaint for libel where the complaint failed to allege that a cartoon was susceptible of two meanings and that the defamatory meaning was intended and so understood by those to whom the publication was made. *Cathy's Boutique v. Winston-Salem Joint Venture*, 641.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action and Time from which Statute Begins to Run

In an action for breach of fiduciary duty and damages against the executor of an estate and his attorneys, the court should not have dismissed plaintiff's claims with prejudice based upon the statute of limitations. *Shelton v. Fairley*, 1.

§ 4.3. Accural of Cause of Action for Breach of Contract

Where a consent judgment required the former husband to indemnify the former wife for debts incurred on behalf of the husband, the wife was required to make payments on the husband's note when he defaulted, and the husband promised to pay the wife $1,000 for damages she had suffered thereby, the ten-year statute of limitations for judgments applied to the wife's action on the husband's loan repayment obligation. *Kennon v. Kennon*, 161.

There was no merit to plaintiff's contention that the statute of limitations barred defendant's counterclaim on an $8,000 note since the statute does not run from the time the contract is made but instead from the date the contractual promise to pay is broken. *Highway Church of Christ v. Barber*, 481.

§ 12.1. New Action after Failure of Original Suit

Plaintiff's complaint stated a potential cause of action where he alleged that defendant attorney had negligently advised him that he could refile his malpractice complaint against a Florida doctor within one year of a voluntary dismissal in a North Carolina Federal Court. *Stokes v. Wilson and Redding Law Firm*, 107.

LIS PENDENS

§ 2. Property within Doctrine

Filing of a notice of lis pendens was not authorized where plaintiffs' action was for a money judgment based on fraud in the conveyance of realty from the corporate defendant to the individual defendants. *Doby v. Lowder*, 22.

MASTER AND SERVANT

§ 55.3. Workers' Compensation; Particular Injuries as Constituting Accident

The Industrial Commission properly concluded that plaintiff sustained an injury by accident where the injury occurred while the employee was engaged in new duties involving unfamiliar turning and jerking movements. *Gunter v. Dayco Corp.*, 329.

§ 68. Workers' Compensation; Occupational Diseases

Evidence in a workers' compensation proceeding was insufficient to show that claimant was informed clearly, simply and directly by competent medical authority that he had an occupational disease and that his illness was work related so that his claim was time barred under G.S. 97-58(c). *Jones v. Beaunit Corp.*, 351.

MASTER AND SERVANT — Continued

§ 82. Workers' Compensation; Determination of which of Two Insurers Is Liable

The Industrial Commission erred in holding defendant insurance carriers jointly liable for compensating an employee disabled by an occupational disease. *Jones v. Beaunit Corp.*, 351.

§ 93.2. Workers' Compensation; Proceedings before Industrial Commission; Admissibility of Evidence

Defendants in a workers' compensation proceeding failed to show prejudicial error in the Commission's consideration of the transcript of an earlier hearing on plaintiff's claim. *Thompson v. Lenoir Transfer Co.*, 348.

§ 95. Workers' Compensation; Right to Appeal from Award

An insurer had no standing to appeal an award by the Industrial Commission where the insurer did not appear at hearings before the deputy commissioner or the full commission, nor did it make application to the full commission for a review of the award. *Collins v. Garber*, 652.

§ 108.1. Right to Unemployment Compensation; Effect of Misconduct

Findings by the Employment Security Commission did not support the conclusion that claimant was discharged as a health care technician in an institution for the mentally retarded for misconduct connected with her work so as to disqualify her from receiving unemployment compensation benefits. *Lancaster v. Black Mountain Center*, 136.

MORTGAGES AND DEEDS OF TRUST

§ 1.1. Equitable Liens

The trial court properly directed a verdict against plaintiff wife on her claim for an equitable lien in real property titled in both names where there was no representation by the husband that the house would be titled in the wife's name, and a loan by the wife's father for construction of the house was to both parties. *Williams v. Williams*, 184.

§ 25. Foreclosure by Exercise of Power of Sale in the Instrument

A procedure for sale under a deed of trust pursuant to G.S. 45-21.1 is commenced by serving a notice of hearing and not a summons, and is therefore a special proceeding. *Phil Mechanic Construction Co. v. Haywood*, 318.

When a mortgagee or trustee elects to pursue foreclosure under a power of sale pursuant to G.S. 45-21.1 et seq., issues decided thereunder as to the validity of the debt and the trustee's right to foreclose are res judicata and cannot be relitigated in an action for strict judicial foreclosure. *Ibid.*

Petitioners seeking foreclosure under a deed of trust securing payment of a promissory note failed to carry their burden of showing the existence of a valid debt of which they were the holders. *In re Foreclosure of Property of Johnson*, 485.

§ 30. Upset Bids

Evidence was sufficient to support the trial judge's conclusions that an upset bid was void ab initio and that bonds accompanying the upset bid did not comply with the clerk's order and were not approved by the clerk, that appellant had not filed an upset bid within the time required by law, and that the sale to the highest bidder at foreclosure should be confirmed. *In re Miller*, 494.

MUNICIPAL CORPORATIONS

§ 30.11. Zoning; Particular Restrictions; Specific Businesses

Defendants' operation of a minor automotive repair garage was a permitted use within the zoning ordinance applicable to their property. *County of Durham v. Maddry & Co., Inc.*, 671.

NEGLIGENCE

§ 29.3. Sufficiency of Evidence; Proximate Cause; Foreseeability

In an action to recover for personal injuries sustained by the minor plaintiff when a trash dumpster fell on her, there was no merit to plaintiff's contention that the evidence could have permitted the jury to find that the dumpster was an attractive nuisance. *Feagin v. Staton*, 678.

§ 39. Instruction on Last Clear Chance

In an action to recover for personal injury sustained by plaintiff when he was struck by a forklift operated by defendant's employee, the trial court did not err in failing to instruct the jury on the issue of last clear chance. *Grogan v. Miller Brewing Co.*, 620.

PARENT AND CHILD

§ 1.5. Procedure for Termination of Parental Rights

The trial court did not err in admitting into evidence the court file on a minor child in a proceeding to terminate parental rights. *In re Byrd*, 277.

The admissibility of prior orders of child neglect in hearings for termination of parental rights is not conditioned on whether the parents were represented by counsel. *Ibid.*

In a proceeding for the termination of parental rights, the trial court did not err in admitting expert testimony that the child was in need of permanent placement in a stable home environment. *Ibid.*

In a proceeding to terminate parental rights, respondents could not object to evidence with regard to results of a breathalyzer test. *In re McDonald*, 234.

Expert testimony as to respondents' parenting abilities was admissible in a proceeding for the termination of parental rights. *Ibid.*

§ 1.6. Sufficiency of Evidence in Proceeding for Termination of Parental Rights

The evidence supported the termination of respondent father's parental rights for neglect of the child. *In re Clark*, 118.

The trial court's finding in an order terminating parental rights that respondent did not present evidence contradicting the allegations set forth in the petition did not in effect place the burden on respondent to produce evidence of the absence of any basis for terminating his parental rights. *Ibid.*

Evidence that respondent had directed a third person to shoot the mother while she held the child in her arms when the child was six weeks old was not required to be excluded on the ground of remoteness. *Ibid.*

The trial court erred in terminating respondents' parental rights for failure to pay costs of child care for six months next preceding the filing of the petition, since respondents were incarcerated during those six months, and their convictions were ultimately reversed. *In re Byrd*, 277.

PARENT AND CHILD — Continued

Respondents in an action to terminate parental rights could not complain that the trial court erred in failing to appoint separate attorneys for each respondent and that the court was predisposed to decide the case for or against them as a couple. *Ibid.*

The trial court did not err in basing its termination of a mother's parental rights on neglect where the court based its finding upon a prior adjudication of neglect and upon evidence of a continuing alcohol problem. *In re McDonald*, 234.

Evidence was sufficient to support the trial court's order terminating a mother's parental rights on the ground that she had willfully left her children in foster care for more than two years without a showing that substantial progress had been made in correcting conditions which led to the removal of the children from her care. *Ibid.*

Evidence was sufficient to support the trial court's termination of parental rights on the ground of failure to provide support pursuant to G.S. 7A-289.32(4). *Ibid.*

§ 2.2. Child Abuse

In a prosecution for felonious child abuse by a day care operator, defendant's motion to dismiss was properly denied. *S. v. Riggsbee*, 167.

In an action for felonious child abuse by a day care operator, there was no error in the denial of defendant's motion in limine to prohibit the State from cross-examining her about injuries to two other children in her care. *Ibid.*

In a prosecution for felonious child abuse by a day care operator, there was no error in admitting evidence of a prior striking of another infant by defendant. *Ibid.*

Testimony by witnesses that they saw defendant beat his five-year-old son with a board and testimony by a doctor who treated defendant's son that the child was suffering from battered child syndrome was sufficient to support a conviction for child abuse. *S. v. Harper*, 471.

§ 2.3. Child Neglect

Evidence was sufficient to convict defendant of contributing to the neglect of minors. *S. v. Harper*, 471.

§ 6.3. Proceedings to Determine Custody; Evidence

Evidence was insufficient to support the trial court's conclusion that a child's best interest required that her custody be changed from defendant grandparents to plaintiff mother. *Smith v. Burgess*, 340.

PARTNERSHIP

§ 1.1. Existence of Partnership

The trial court erred in directing verdict against plaintiff on her claim of partnership in a dairy business with her former husband. *Peed v. Peed*, 549.

§ 3. Rights, Duties, Liabilities of Partners Among Themselves

Defendant could not have been surprised or prejudiced when plaintiff sought to add to her complaint a cause of action alleging that she owned a one-half undivided interest in dairy cattle, farm equipment and milk base, and the trial court erred in denying plaintiff's motion to so amend her complaint. *Peed v. Peed*, 549.

PENSIONS

§ 1. Generally

The trial court erred in directing verdict for defendant in plaintiff's action to recover pension funds which had accumulated during his employment with defendant where the evidence tended to show that plaintiff's estranged wife signed his name to a lump sum payment check and deposited it in their joint account. *Summerlin v. Nat'l Service Industries*, 476.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 13. Limitations of Action for Malpractice

In an action for dental malpractice based on defendant's alleged failure to diagnose and treat plaintiff's periodontal disease, defendant's "last act" within the meaning of G.S. 1-15(c) occurred on the date of plaintiff's last routine dental checkup by defendant, and plaintiff's cause of action accrued on that date. *Schneider v. Brunk*, 560.

§ 14. Burden of Proof in Malpractice Action

The trial court in a medical malpractice case properly granted summary judgment for defendant where plaintiff failed to offer any medical expert testimony in support of his allegations. *Beaver v. Hancock*, 306.

§ 15.2. Malpractice; Who may Testify as Experts

The court erred by not allowing a pathologist to testify as an expert on the proper treatment in Sampson County of decubitus ulcers. *Bryant v. Sampson Memorial Hosp.*, 203.

§ 16.1. Sufficiency of Evidence of Malpractice

The court should not have granted defendant's motion to dismiss where plaintiff's doctor would have testified that the proper treatment for the deceased's ulcers would include turning her at regular intervals, which was not done. *Bryant v. Sampson Memorial Hosp.*, 203.

§ 20.1. Causal Connection between Malpractice and Injury

In a medical malpractice action for negligent failure to timely diagnose premature labor, the court properly granted defendants' motions for directed verdicts where plaintiffs did not show sufficient causation. *Bridges v. Shelby Women's Clinic, P.A.*, 15.

The trial court properly entered a directed verdict for defendants on a claim for negligent infliction of mental anguish arising from the premature birth of a child and resulting injuries to the child where plaintiffs failed to show proximate cause. *Ibid.*

PRINCIPAL AND AGENT

§ 4. Proof of Agency Generally

Summary judgment was properly granted for defendant in an action by a subcontractor to recover monies due under a contract to supply milk to defendant's contractor under a federally funded summer lunch program. *Pet, Inc. v. UNC*, 128.

§ 4.2. Proof of Agency; Extrajudicial Statements of Agent

In an action by a subcontractor against the local sponsor of a summer lunch program, statements by the contractor that it had agreed as an agent of the defendant to pay for delivery of milk did not create a genuine issue of fact as to agency. *Pet, Inc. v. UNC*, 128.

PROCESS

§ 14.3. Service of Process on Foreign Corporation; Sufficiency of Evidence of Minimum Contacts

The North Carolina courts had authority to exercise personal jurisdiction over defendant Florida insurance agency in an action concerning a homeowner's insurance policy under the statute relating to actions which arise out of promises to deliver things of value to North Carolina and under the statute relating to corporations which repeatedly solicit business in North Carolina. *Jellen v. Ernest Smith Ins. Agency*, 51.

The evidence did not show minimum contacts between defendant and N. C. sufficient to meet constitutional due process standards and satisfy any of the grounds for in personam jurisdiction over foreign corporations of G.S. 1-75.4 or G.S. 55-145. *J. M. Thompson Co. v. Doral Manufacturing Co.*, 419.

Defendant auto parts and auto repair shop located in Georgia had insufficient contacts with N. C. to permit exercise of in personam jurisdiction. *Marion v. Long*, 585.

QUASI CONTRACTS AND RESTITUTION

§ 5. Recovery of Payments; Particular Situations and Applications

The trial court properly directed a verdict against plaintiff wife on her claim against her former husband for unjust enrichment in the purchase of real property where there was no representation by the husband that the house would be titled in the wife's name and a loan by the wife's father for construction of the house was to both parties. *Williams v. Williams*, 184.

RAPE

§ 1. Nature and Elements of the Offense

Physical force as that phrase is generally understood in sexual offense and kindred cases requires more than the physical touching which constitutes the sexual act itself. *S. v. Raines*, 300.

§ 4. Relevancy and Competency of Evidence

The trial court did not err in excluding evidence of semen stains found on jeans worn by the prosecutrix on the date of the assault on the basis of the rape victim shield statute. *S. v. Langley*, 368.

§ 4.1. Evidence of other Acts and Crimes

The trial court did not err in admitting testimony of a witness who claimed to have been raped by defendant on a prior occasion for the purpose of identifying defendant as the perpetrator of the crime charged in this case. *S. v. Ange*, 524.

§ 5. Sufficiency of Evidence

Evidence was insufficient for the jury in a prosecution of defendant nurse for second degree rape of one of the patients under his care where there was no evidence of physical or constructive force. *S. v. Raines*, 300.

§ 7. Sentence and Punishment

Defendant's commission of a rape through the use of deadly weapons in the hands of his codefendant was properly considered by the trial judge and found as an aggravating factor. *S. v. Collier*, 508.

ROBBERY

§ 4.7. Insufficiency of Evidence

Evidence was insufficient to be submitted to the jury on a charge of common law robbery where the fear necessary to sustain a conviction occurred in this case only after the taking of the victim's personal property. *S. v. Brooks*, 254.

RULES OF CIVIL PROCEDURE

§ 4. Process

Service of process against the partners of a law firm as individuals by delivering summons to one partner at their law offices was valid only as to the partner served. *Shelton v. Fairley*, 1.

Where an action was filed on 1 April 1983, but there was no service of a properly issued summons until a second summons was issued and served on 2 May 1983, and the defendant did not move to dismiss prior to being served with the second summons, the second summons revived and commenced a new action. *Stokes v. Wilson and Redding Law Firm*, 107.

§ 4.1. Service of Process by Publication

In personam jurisdiction may be obtained over a defendant through service of process by publication within 90 days of the issuance of the original summons, but before the issuance of an alias or pluries summons. *County of Wayne ex rel. Williams v. Whitley*, 155.

In personam jurisdiction was not obtained by service of process by publication. *Ibid.*

§ 8.1. Complaint

The trial court erred by dismissing plaintiff's attorney malpractice complaint where the pro se plaintiff did not consistently and doggedly ignore the court's order by refusing to delete ad damnum clauses which violated Rule 8(a)(2) and plaintiff was not allowed an opportunity to cure his violation. *Stokes v. Wilson and Redding Law Firm*, 107.

§ 13. Counterclaim

There was no logical connection between defendant tenant's action for libel and plaintiff landlord's action for breach of lease which would require that the action for breach of lease be filed as a compulsory counterclaim. *Winston-Salem Joint Venture v. Cathy's Boutique*, 673.

§ 15. Amended and Supplemental Pleadings

An issue of whether the penalty and attorney fees provisions of G.S. 44A-4(g) were applicable in this case was properly before the trial court, though plaintiff in her complaint did not elect to proceed under G.S. 44A-1 et seq., since defendant admitted that G.S. 44A-4(e) and (f) were not substantially complied with. *Drummond v. Cordell*, 262.

§ 37. Failure to Make Discovery; Consequences

The trial court erred in ordering sanctions against defendants for failure to produce corporate documents at a deposition. *Carrigan v. Shenandoah Transplants, Inc.*, 324.

§ 39. Trial by Jury

Plaintiff employee was entitled to have his action to recover damages for discharge from his job in retaliation for filing a workers' compensation claim tried before a jury. *Jackson v. Lundy Packing Co.*, 337.

RULES OF CIVIL PROCEDURE — Continued

§ 52. Findings by Court Generally

Although it is the better practice to label separately the findings of fact and conclusions of law, the trial court did not commit reversible error where the findings and conclusions were clear and distinguishable. *Highway Church of Christ v. Barber*, 481.

§ 56. Summary Judgment

An affidavit was not properly before the court in a hearing on a motion for summary judgment where it was not served before the day of the hearing. *Doby v. Lowder*, 22.

§ 59. New Trials

In an action for divorce and equitable distribution, defendant's Rule 59 motion for a new trial, based on allegations that plaintiff had falsely answered an interrogatory about whether he had consulted an expert and had reneged on an oral stipulation concerning the admission of the wife's property appraisal, was properly denied. *Loeb v. Loeb*, 205.

In ruling on plaintiff's motion for a new trial, the trial court was not required to consider or refer to an order and supplemental memorandum of a federal district court judge in Tennessee. *Highway Church of Christ v. Barber*, 481.

§ 60.2. Grounds for Relief from Judgment

Defendant's motion to have a judgment against him declared void for errors of law was properly denied where the trial court had the authority and jurisdiction to enter the judgment. *Windham Dist. Co., Inc. v. Davis*, 179.

SALES

§ 1.1. Contracts by Agents

Summary judgment was properly granted for defendant in an action by a subcontractor for monies due under a contract to supply milk to defendant's contractor for a federally funded Summer Food Service Program for Children for which defendant served as a local sponsor. *Pet, Inc. v. UNC*, 128.

SEARCHES AND SEIZURES

§ 9. Search and Seizure Incident to Arrest for Traffic Violations

The trial court did not err in admitting evidence of a pistol found in the glove compartment of defendant's car at the time of defendant's arrest for driving under the influence. *S. v. Watts*, 661.

SHERIFFS AND CONSTABLES

§ 2. Deputies Sheriff

A deputy sheriff had the authority to bind the county for emergency medical treatment for a person wounded by the deputy and transported to the hospital. *Annie Penn Memorial Hosp., Inc. v. Caswell Co.*, 197.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1. Generally

A decision by the Department of Human Resources denying plaintiff's claim for Medicaid benefits on the basis of disability was unsupported by findings of fact and affected by error of law. *Lowe v. N.C. Dept. of Human Resources*, 44.

SOCIAL SECURITY AND PUBLIC WELFARE — Continued

An individual who was paralyzed from the armpits down qualified for Medicaid benefits since a motorcycle owned by him and used before his accident for all his transportation needs was an essential vehicle and therefore excludable from his countable assets and, when so excluded, the injured man's countable assets did not exceed $1,000. *Forsyth Co. Bd. of Social Services v. Div. of Social Services*, 645.

STATE

§ 4. Actions against the State; Sovereign Immunity

A purported contract between the parties for lease of buildings on the State fairgrounds was not approved by the Governor and Council of State pursuant to G.S. 146-27, was not a valid contract, and therefore could not constitute an exception to the application of the sovereign immunity rule. *Stewart v. Graham, Com'r of Agriculture*, 676.

TAXATION

§ 25.7. Ad Valorem Taxes; Factors Determining Market Value Generally

In determining the proper tax valuation for the Wachovia Building and its lot in Greensboro, the Property Tax Commission did not err in rejecting the $6,300,000 sales price recently received in an arm's length negotiated sale as the basis for valuation and valuing the property according to potential market rentals rather than its actual rental income. *In re Appeal of Greensboro Office Partnership*, 635.

§ 32. Taxes on Intangibles

An executor actively administering an estate is ineligible for the intangibles tax exemption for "property held or controlled by a fiduciary . . . for the benefit of any organization exempt under this section" when the exempt organization is a beneficiary under decedent's will. *Blumenthal v. Lynch, Sec. of Revenue*, 55.

TRIAL

§ 3.2. Particular Grounds for Continuance

The trial court did not err in denying plaintiff receivers' motion for continuance of a hearing on defendants' motions for summary judgment and to strike a notice of lis pendens on the ground that the Court of Appeals had ruled that the law firm representing plaintiffs had been improperly appointed to represent plaintiffs in another case, and plaintiffs were uncertain of the authority of the law firm to represent them in this case. *Doby v. Lowder*, 22.

TRUSTS

§ 19. Sufficiency of Evidence in Action to Establish Constructive Trust

The court correctly directed a verdict against plaintiff wife on her claim for a constructive trust in real property purchased by her former husband in both names because there was no evidence of fraud, breach of duty, or other wrongdoing by the husband. *Williams v. Williams*, 184.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

Defendant's publication of an advertising supplement which included a cartoon referring to plaintiff's place of business did not constitute an unfair or deceptive trade practice. *Cathy's Boutique v. Winston-Salem Joint Venture*, 641.

UNIFORM COMMERCIAL CODE

§ 12. Implied Warranties of Merchantability

Defendant failed effectively to disclaim liability for the breach of an implied warranty of merchantability based on the terms of its used vehicle guarantee. *Wright v. Auto Sales, Inc.*, 449.

In an action to recover for breach of an implied warranty of merchantability in a used car sales transaction, special circumstances as provided for in G.S. 25-2-714(2) warranted damages in the amount of the cost of a new engine. *Ibid.*

§ 31. Rights of a Holder

While plaintiff did not qualify as holder of a promissory note because he did not have possession, he could nevertheless maintain an action where the note's ownership and terms could be proven and its absence could be accounted for. *Good v. Good*, 312.

The trial court erred in directing verdict for defendant in plaintiff's action to recover pension funds which had accumulated during his employment with defendant where the evidence tended to show that plaintiff's estranged wife signed his name to a lump sum payment check and deposited it in their joint account. *Summerlin v. Nat'l Service Industries*, 476.

§ 33. Liability of Parites; Signatures

The trial court erred in dismissing plaintiff's action on a promissory note as to the female defendant since the order in a prior special proceeding addressed the issue of whether she signed a deed of trust but did not address the issue of whether she signed the promissory note. *Phil Mechanic Construction Co. v. Haywood*, 318.

§ 36.1. Bank Collections; Stop Payment Orders

Plaintiff beneficiary did not meet the terms of defendant's letter of credit precisely and therefore could not force defendant to pay. *Dubose Steel, Inc. v. BB&T*, 598.

VENUE

§ 8. Removal for Convenience of Parties

The trial court did not err in allowing plaintiff mother's motion for a change of venue of a motion to modify child support and custody to the county where both parties had moved. *Kennon v. Kennon*, 161.

WEAPONS AND FIREARMS

§ 2. Carrying or Possessing Weapons

If a defendant enters a plea, including a plea of no contest, so that a felony judgment or imprisonment for more than two years may be imposed, then it constitutes a conviction under G.S. 14-415.1, the statute making it a felony for a person convicted of certain crimes to have in his possession a handgun. *S. v. Watts*, 661.

WITNESSES

§ 1.1. Mental Capacity

The trial court did not err in denying defendants' pretrial motion to disqualify a witness for mental incompetency where the court afforded them a voir dire hearing at trial to offer evidence of the incompetency of the witness. *S. v. Begley*, 37.

The trial court did not abuse its discretion in allowing a robbery and assault victim who suffered brain damage from the assault to testify. *Ibid.*

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