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ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

LOU S. NELSON v. SIMMONS I. PATRICK; JOHN E. FLOURNOY; GWENDOLYN S. ROMBOLD AND KINSTON RADIOLOGICAL ASSOCIATES, P.A.

No. 843SC465

(Filed 19 February 1985)

1. Physicians, Surgeons, and Allied Professions § 11.1— medical malpractice— standard of practice in similar community

In a medical malpractice action against radiologists who practiced in Kinston, the trial court did not err in allowing plaintiff's expert witness to testify about the standard of medical care and acceptable practice in Chapel Hill where evidence had been admitted showing that Chapel Hill and Kinston were similar communities with respect to the standards of practice among radiologists.

2. Physicians, Surgeons, and Allied Professions § 15.1— medical testimony—extent of damage

The trial court did not err in permitting plaintiff's referring gynecologist to testify that the bowel damage suffered by plaintiff from radiation therapy was greater than any he had seen.

3. Physicians, Surgeons, and Allied Professions § 15; Witnesses § 6.2— malpractice action—character evidence inadmissible

In a medical malpractice action based on alleged negligence in failing to obtain plaintiff's informed consent to radiation therapy, the trial court properly refused to permit defense counsel to ask plaintiff's referring gynecologist about a notation in plaintiff's medical records that plaintiff had asked him not to tell her husband that she had been taking birth control pills since the only relevance of the excluded evidence was to suggest that plaintiff was of bad character.

4. **Appeal and Error § 49— exclusion of evidence—evidence of same import thereafter admitted**

The exclusion of testimony is not prejudicial when the same witness is thereafter allowed to testify to the same import or testifies to facts with substantially the same meaning.

5. **Trial § 16— allowance of motion to strike—failure to instruct the jury to disregard testimony**

Although the better procedure, upon allowing a motion to strike, is for the court to instruct the jury to disregard the witness's answer immediately after allowing the motion, the failure to do so was not prejudicial in this case where defense counsel's objection and motion to strike were promptly sustained in the presence of the jury, and the jury could only have interpreted the ruling as meaning that the answer was not to be regarded as evidence in the case.

6. **Partnership § 5— professional corporation—liability of partner for torts**

As a partner in defendant professional corporation, defendant physician could be held jointly and severally liable for any negligence of his partner which occurred during the course of the corporation's business, and he could be made a party to an action based on such negligence.

7. **Physicians, Surgeons, and Allied Professions § 15.1— radiation therapy—basis for opinion—exclusion of testimony—absence of prejudice**

Where the issue in a medical malpractice case was not whether defendant was negligent in recommending that plaintiff have radiation therapy but was whether he was negligent in failing properly to inform plaintiff about the therapy and its risks, the relevance of evidence purportedly relied on by defendant in formulating his opinion as to the advisability of radiation therapy for plaintiff was questionable at best, and any error in the exclusion of such evidence was harmless.

8. **Physicians, Surgeons, and Allied Professions § 17.1— medical malpractice—lack of informed consent—submission of general negligence issue**

The trial court in a medical malpractice action based on lack of informed consent did not err in submitting a general issue as to whether plaintiff was injured by the negligence of defendant where the trial court carefully and properly instructed the jury to determine the issues submitted on the basis of whether plaintiff gave her informed consent, within the meaning of the law as applied to this case, to the treatment rendered.

9. **Damages § 3.5; Physicians, Surgeons, and Allied Professions § 21— medical malpractice—housewife—loss of future earning capacity**

The plaintiff in a medical malpractice case was not deprived of the right to recover damages for loss of future earning capacity simply because she was a housewife and was not engaged in any particular employment at the time of her injury.

10. Physicians, Surgeons, and Allied Professions § 17.1— informed consent—discretion of physician—common law rule no longer applicable

While a physician's discretion may be relevant in determining what information is customarily provided, failure to inform of certain risks because the physician determines that the need to know is outweighed by the anxiety the disclosure might cause will no longer shield the physician from liability if the information customarily would be provided by other physicians, or if a reasonable person would need to be informed of those risks to have a general understanding of the procedure and its inherent hazards. G.S. 90-21.13.

11. Physicians, Surgeons, and Allied Professions § 20.2— medical malpractice—lack of informed consent—failure to instruct on alternative basis—harmless error

In a medical malpractice case in which the trial court instructed that plaintiff could prove that defendant did not obtain her informed consent to radiation treatment by showing that he failed to provide information which would permit a reasonable person to have a general understanding of the proposed treatment and of the usual and most frequent risks and hazards inherent in the treatment, G.S. 90-21.13(a)(2), the trial court's failure to instruct that plaintiff could also prove lack of informed consent by showing that defendant failed to provide such information about the radiation treatment and its inherent risks as was customarily provided by other therapeutic radiologists in Kinston and similar communities, G.S. 90-21.13(a)(1), was error favorable to defendant and did not justify setting aside the verdict for plaintiff.

12. Trial § 13— permitting jury to view exhibits in courtroom

While it is error to permit the jury to take exhibits into the jury room and to retain them during deliberations without the consent of the parties, it is not error for the trial court to permit the jury to view exhibits in the courtroom in its presence and in the presence of the parties.

APPEAL by defendants from *Bruce, Judge*. Judgment entered 20 May 1983 in Superior Court, PITT County. Heard in the Court of Appeals 8 January 1985.

This is a medical malpractice action in which plaintiff alleged that the individual defendants were negligent in administration of radiation therapy to her and in failing to obtain her informed consent to the therapy. In October 1976 plaintiff underwent a total abdominal hysterectomy. Examination of the tissue removed revealed cancerous cells. Plaintiff's gynecologist, Dr. Satterfield, recommended that plaintiff undergo radiation therapy to reduce the risk of a recurrence or persistence of the cancer, and referred her to defendants for the therapy. As a result of radiation treatments administered by defendants, plaintiff suffered severe damage to her intestines.

At the first trial plaintiff voluntarily dismissed her claim based on alleged negligence in administering the therapy. On motion of defendants, plaintiff's remaining claim based on failure to obtain her informed consent was dismissed as barred by the one year statute of limitations for a battery. This Court reversed, finding that the three year statute of limitations for negligence applied and that the action thus was not time barred. *Nelson v. Patrick*, 58 N.C. App. 546, 293 S.E. 2d 829 (1982).

Upon retrial plaintiff voluntarily dismissed her claim against defendant Rombold. Following a jury verdict for plaintiff, the remaining defendants appealed from the judgment entered.

Narron, Holdford, Babb, Harrison and Rhodes, by William H. Holdford and James C. Lanier, Jr., for plaintiff appellee.

Smith, Anderson, Blount, Dorsett, Mitchell and Jernigan, by Timothy P. Lehan and James D. Blount, Jr., for defendant appellants.

WHICHARD, Judge.

[1] Defendants contend the court erred in allowing plaintiff's expert witness, Dr. Montana, to testify about the standard of medical care and acceptable practice in Chapel Hill. They argue that no evidence showed that Chapel Hill was a community similar to Kinston, where defendants practiced, and that therefore Dr. Montana's testimony was irrelevant and its admission was prejudicial.

Plaintiff's first evidence was the following sworn testimony of defendant Patrick from his deposition:

> Q. To your knowledge, Dr. Patrick, in November, 1976, in those communities which have been named, that is to say, Wilson, Greenville, Rocky Mount, Goldsboro, New Bern, Jacksonville, Wilmington, Fayetteville, Raleigh, Durham and Chapel Hill, was there any difference in the standards of practice in the different communities?
>
> A. To what extent are you talking about standards?
>
> Q. I assume that you have standards in your profession?
>
> A. Yes, sir.

Q. And attempt to adhere to as acceptable medical practices?

A. I wouldn't think there is any difference in what is accepted as accepted medical practice.

Q. Of the communities which have been named, which of them do you consider communities similar to Kinston as far as the standard of medical care?

A. Is this overall medical care?

Q. In your particular field?

A. In my field?

Q. Of therapeutic radiology?

A. New Bern. Goldsboro. Of course, the teaching institutions, and Wilmington.

Q. By teaching institutions, you're referring to the University of North Carolina Medical School and Duke University Medical Center?

A. Yes, sir.

This testimony, admitted without objection, was sufficient to show that Chapel Hill and Kinston were similar communities with respect to the standards of practice among therapeutic radiologists in November 1976 when the alleged negligence occurred. Since evidence had been admitted showing that the two communities were similar, evidence concerning the standards of medical practice in Chapel Hill among members of the same health care profession as defendants in November 1976 was clearly relevant. *See* G.S. 90-21.13(a). Defendant Patrick testified that he was a board certified radiologist practicing therapeutic radiology. Dr. Montana, who was accepted as a medical expert specializing in therapeutic radiology, testified specifically about the standards of practice among board certified radiologists practicing therapeutic radiology in Chapel Hill in 1976; therefore, his testimony was relevant and was properly allowed.

[2] Defendants contend the court erred in allowing plaintiff's referring gynecologist, Dr. Satterfield, who testified that he had seen only a few cases of bowel damage caused by radiation, to

testify further that the bowel damage plaintiff suffered was greater than any he had seen. They argue that the probative value of this testimony was outweighed by its prejudicial effect. We find the testimony relevant to show the extent to which plaintiff was damaged by the radiation treatments. "Relevant evidence will not be excluded simply because it may tend to prejudice the opponent or excite sympathy for the cause of the party who offers it." 1 H. Brandis, North Carolina Evidence, Sec. 80 at 294 (2d rev. ed. 1982).

[3] Defendants contend the court erred in refusing to permit defense counsel to ask Dr. Satterfield about a notation in his medical records concerning plaintiff's first visit with him. The notation indicated that plaintiff had asked him not to tell her husband that she had been taking birth control pills. The only relevance of the excluded evidence was to suggest that plaintiff was of bad character. Evidence of the bad character of a party to a civil action is generally inadmissible. 1 H. Brandis, North Carolina Evidence, Sec. 103 at 385 (2d rev. ed. 1982). The court thus properly excluded this evidence.

[4] Defendants contend the court erred in refusing to allow Dr. Satterfield to testify about the advice he was given by a cancer specialist whom he had consulted. While no offer of proof shows specifically what his testimony would have been, it appears that it would have shown that he consulted a cancer specialist who advised that plaintiff have radiation treatment.

The exclusion of testimony is not prejudicial when the same witness is thereafter allowed to testify to the same import or testifies to facts with substantially the same meaning. *Terrell v. Insurance Co.*, 269 N.C. 259, 262-63, 152 S.E. 2d 196, 199 (1967); *Rhyne v. O'Brien*, 54 N.C. App. 621, 623, 284 S.E. 2d 122, 123 (1981). Dr. Satterfield was permitted to testify that he had consulted a physician who specialized in the treatment of cancer in female organs before recommending that plaintiff undergo radiation therapy, and to explain fully the basis for his recommendation to plaintiff. Further, Dr. Satterfield's testimony indicates that he relied on the specialist's advice in deciding upon plaintiff's course of treatment. Dr. Satterfield thus testified to substantially the same import as the excluded evidence; therefore, the error, if any, was harmless. Since defendants failed to offer proof showing

that, if permitted, Dr. Satterfield would have testified in greater detail about the advice given him by the specialist, we are unable to determine whether the error, if any, in excluding that additional testimony was prejudicial. *See Currence v. Hardin*, 296 N.C. 95, 100, 249 S.E. 2d 387, 390 (1978). This assignment of error is overruled.

Defendants contend the court erred in refusing to permit Dr. Satterfield to answer the following question on cross-examination:

> And is it not true that in view of Mrs. Nelson's condition as you observed it as her attending gynecologist, even though you knew of those risks and hazards [of the radiation therapy], that you felt it was worth those to be sure as you possibly could of getting rid of the cancer completely?

They argue that the court thereby erroneously refused to allow Dr. Satterfield to explain the basis for his opinion that the best course of treatment was radiation therapy.

As stated previously, however, the court allowed Dr. Satterfield to explain fully the basis for his recommendation to plaintiff. Additionally, Dr. Satterfield was permitted to testify that he was aware of the hazards and risks of radiation therapy and that it was his firm and strong recommendation that plaintiff undergo the therapy. Therefore, Dr. Satterfield was allowed to testify to the same import as the excluded answer. *See Terrell*, 269 N.C. at 262-63, 152 S.E. 2d at 199; *Rhyne*, 54 N.C. App. at 623, 284 S.E. 2d at 123. We thus find this assignment of error without merit.

[5] Defendants' next two assignments of error relate to plaintiff's response to the following question by her counsel: "Mrs. Nelson, if you had not been subjected to the radiation treatments you still would not have cancer?" Immediately prior to this question, plaintiff testified on cross-examination that as far as she knew she did not presently have cancer. To clarify that plaintiff's cancer-free condition was as likely due to statistical probabilities as to the radiation treatments, her counsel asked the above question. Defense counsel's objection to form was overruled and plaintiff was permitted to answer that as far as she knew she would not have cancer. Defendants contend it was error to permit plaintiff to answer the question because it called for speculation. We find the error, if any, harmless.

When plaintiff attempted to explain her answer, defense counsel again objected and the court instructed plaintiff to testify only to those matters that were within her personal observations. Plaintiff's counsel then asked plaintiff the same question a second time. Plaintiff answered, but before she finished defense counsel objected and moved to strike the whole answer. The court sustained the objection and the trial proceeded. Defendants assign as error the failure to instruct the jury to disregard plaintiff's answer.

Although the better procedure, upon allowing a motion to strike, is for the court to instruct the jury to disregard the witness' answer immediately after allowing the motion, *see State v. Franks*, 300 N.C. 1, 13, 265 S.E. 2d 177, 184 (1980), the failure to do so here was not prejudicial. Since defense counsel's objection and motion to strike were promptly sustained in the presence of the jury, the jury could only have interpreted the ruling as meaning that the answer was not to be regarded as evidence in the case. *See Moore v. Insurance Co.*, 266 N.C. 440, 450, 146 S.E. 2d 492, 500 (1966); *Vandiver v. Vandiver*, 50 N.C. App. 319, 323, 274 S.E. 2d 243, 246 (1981), *disc. rev. denied*, 302 N.C. 634, 280 S.E. 2d 449 (1981).

[6] Defendants contend the court erred in denying the motion by defendant Flournoy for a directed verdict on the ground that there was no evidence of negligence on his part. In ruling on the motion, the court stated:

> As to the defendant John Flournoy, the Court finds that there is no evidence of any act of negligence on his part and that there is no genuine issue as to partnership of Flournoy and Patrick, and that the jury will be instructed at the appropriate time that any negligence or damages for which Dr. Patrick is liable as a matter of law, that Flournoy will be liable as a matter of law, jointly and severally on those damages; and that Kinston Radiological Associates, P.A. will be liable for any damages proximately caused by the negligence of Patrick.

A professional corporation is liable to the same extent as if it were a partnership. G.S. 55B-9; *Zimmerman v. Hogg & Allen*, 22 N.C. App. 544, 546, 207 S.E. 2d 267, 269 (1974), *rev'd on other grounds*, 286 N.C. 24, 209 S.E. 2d 795 (1974). As a partner in

defendant professional corporation, defendant Flournoy could be held jointly and severally liable for any negligence of his partner, defendant Patrick, which occurred during the course of the corporation's business, and he could be made a party to the action. *See Dwiggins v. Bus Co.*, 230 N.C. 234, 237-39, 52 S.E. 2d 892, 894-95 (1949). The court clearly indicated in its ruling and instructions that this was the basis of any liability on the part of defendant Flournoy. This assignment of error is thus overruled.

[7] Defendants contend the court erred in excluding those parts of defendant Patrick's medical file on plaintiff which read, "Dr. Satterfield has contacted the doctors at Chapel Hill who believe the patient should receive cobalt radiation" and "Awaiting report, Dr. Fowler. Re: CA." Defendants indicate that the latter quotation refers to the fact that Dr. Satterfield was awaiting a report from the cancer specialist regarding plaintiff's condition. They argue that the excluded evidence was relevant because defendant Patrick relied on it in formulating his opinion as to the advisability of radiation therapy for plaintiff.

The issue, however, was not whether defendant Patrick was negligent in recommending that plaintiff have the radiation therapy but whether he was negligent in failing properly to inform her about the therapy and its attendant risks. The relevance and admissibility of the excluded evidence is thus at best questionable. Assuming error, *arguendo*, we find it harmless.

[8] Defendants contend the court erred in formulating the issue of negligence too generally. The court submitted the issue: "Was the plaintiff . . . injured by the negligence of the defendant, Simmons I. Patrick?" It denied defendants' request that the issue be stated more narrowly by adding "in failing to inform or in failing to obtain her informed consent."

The form, number and phraseology of the issues rest within the sound discretion of the trial court. *Chalmers v. Womack*, 269 N.C. 433, 435-36, 152 S.E. 2d 505, 507 (1967); *Johnson v. Lamb*, 273 N.C. 701, 706, 161 S.E. 2d 131, 136 (1968). The court here carefully and properly instructed the jury to determine the issue submitted on the basis of whether plaintiff gave her informed consent, within the meaning of the law as applied to this case, to the treatment rendered. Considering the issue in light of the instructions, we do

not believe defendants were prejudiced by its form. We thus find no abuse of discretion in the phrasing of the issue.

[9] Defendants contend the court erred in instructing on plaintiff's loss of future earning capacity when at the time of the alleged negligence plaintiff was a housewife and had not been employed outside the home for approximately fifteen years. Despite defendants' assertions to the contrary, the allegations and the evidence were sufficient to warrant the instruction. Plaintiff was not deprived of the right to recover damages for loss of earning capacity simply because she was not engaged in any particular employment at the time of the injury. *Johnson v. Lewis*, 251 N.C. 797, 802, 112 S.E. 2d 512, 516 (1960). "The fact that a woman attends merely to household duties will not deprive her of a right to recover for loss of earning capacity." *Id.* at 802-03, 112 S.E. 2d at 516.

[10] Defendants contend the court erred in refusing requested instructions based on case law decided prior to the effective date of G.S. 90-21.13, the informed consent statute. They maintain that enactment of G.S. 90-21.13 was not intended to supersede the common law in the area of informed consent.

G.S. 90-21.13, in relevant part, provides as follows:

> (a) No recovery shall be allowed against any health care provider upon the grounds that the health care treatment was rendered without the informed consent of the patient . . . where:
>
> (1) The action of the health care provider in obtaining the consent of the patient . . . was in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities; and
>
> (2) A reasonable person, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities; or

(3) A reasonable person, under all the surrounding circumstances, would have undergone such treatment or procedure had he been advised by the health care provider in accordance with the provisions of subdivisions (1) and (2) of this subsection.

Thus the health care provider must provide such information about the treatments or procedures and their inherent hazards and risks as is customarily provided by other members of the same health care profession with similar training and experience situated in the same or similar communities, *see* G.S. 90-21.13 (a)(1), *and* provide information which would permit a reasonable person to "have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments," *see* G.S. 90-21.13(a)(2). *See also* Byrd, The North Carolina Medical Malpractice Statute, 62 N.C. L. Rev. 711, 738 (1984). The provider may not be held liable, however, if a reasonable person, under the surrounding circumstances, would have undergone the treatment or procedure had he or she been advised in accordance with G.S. 90-21.13(a)(1) and (2). G.S. 90-21.13(a)(3).

Under the common law, by contrast, much was left to the physician's discretion in determining what the patient should be told about possible adverse consequences of a procedure or treatment, particularly when the likelihood of an adverse consequence was relatively slight. *See Starnes v. Taylor*, 272 N.C. 386, 392-93, 158 S.E. 2d 339, 344 (1968); *Watson v. Clutts*, 262 N.C. 153, 159-60, 136 S.E. 2d 617, 621 (1964). As our Supreme Court stated in *Watson* at 159, 136 S.E. 2d at 621, "[t]he doctor's primary duty is to do what is best for the patient. Any conflict between this duty and that of a frightening disclosure ordinarily should be resolved in favor of the primary duty." Advice calculated to increase the patient's anxiety by recounting unlikely possibilities of undesirable consequences was viewed as inconsistent with the physician's duty to the patient. *Starnes v. Taylor*, 272 N.C. at 393, 158 S.E. 2d at 344.

The continued authority of these cases is doubtful. *Byrd, supra*, at 739. Whether the physician properly exercised discretion in deciding not to inform a patient of certain adverse consequences of a procedure or treatment is no longer the controlling

consideration. While a physician's discretion may be relevant in determining what information is customarily provided, failure to inform of certain risks because the physician determines that the need to know is outweighed by the anxiety the disclosure might cause will no longer shield the physician from liability if the information customarily would be provided by other physicians, or if a reasonable person would need to be informed of those risks to have a general understanding of the procedure and its inherent hazards. We conclude that the case law on which defendants' requested instructions were based is inconsistent with the language and purpose of G.S. 90-21.13, and that the court therefore properly refused to give the instructions.

[11] Defendants contend the court erred by not instructing the jury consistent with G.S. 90-21.13. In addition to the instructions based on the common law of informed consent, defendants submitted proposed instructions which closely tracked N.C.P.I.—Civil 809.45, which is modeled after G.S. 90-21.13. Because there was no question that plaintiff consented to the treatments, the court concluded there was no question for the jury as to whether the action of defendants in obtaining plaintiff's consent was in accordance with the standards of practice among other board certified therapeutic radiologists situated in the same or similar communities. It therefore refused to give that part of the proposed instructions which tracked G.S. 90-21.13(a)(1).

The court properly instructed that one of the things plaintiff had to prove in order to prevail was that defendant Patrick did not obtain plaintiff's informed consent to the treatments. The court then instructed as follows:

> In order to prove . . . that the defendant did not obtain the plaintiff's informed consent, the plaintiff must prove that the defendant failed to provide information to the plaintiff which would, under the same or similar circumstances, have given a reasonable person a general understanding of the procedures and treatments to be used and the usual and most frequent risks and hazards inherent in the treatments as recognized by other therapeutic radiologists in the same or similar communities.

This was a correct statement of the law as set forth in G.S. 90-21.13(a)(2). The court erred, however, in not instructing that

plaintiff could prove that defendant Patrick did not obtain her informed consent by proving that he failed to provide such information about the radiation treatment and its inherent hazards and risks as was customarily provided by other therapeutic radiologists in Kinston or similar communities. *See* G.S. 90-21.13(a)(1). The court should have instructed that plaintiff could prove that defendant Patrick did not obtain her informed consent by showing either that he failed to comply with G.S. 90-21.13(a)(1) or that he failed to comply with G.S. 90-21.13(a)(2).

By failing to provide the jury with an alternative basis on which to find for plaintiff, however, the court erred in defendants' favor. To have a judgment set aside, defendants must show not only that the court erred, but also that the error was material and prejudicial and that a different result likely would have ensued but for the error. *Glenn v. Raleigh*, 248 N.C. 378, 383, 103 S.E. 2d 482, 487 (1958). No such showing has been made. We thus find the error harmless.

[12] Defendants finally contend the court erred in permitting the jury, over objection, to review plaintiff's medical bills. During their deliberations the jurors asked whether they could see these bills. The court inquired whether defendants objected to sending the bills to the jury room. Defendants did and the court sustained the objection. The court then ruled in its discretion that the jurors should be returned to the courtroom and the evidence requested passed among them. Defendants objected but their objections were overruled. The jurors were returned to the courtroom, given precautionary instructions, and allowed to view the medical bills.

It is well established that it is error to permit the jury to take exhibits into the jury room and to retain them during deliberations without the consent of the parties. *Watson v. Davis*, 52 N.C. 178, 181 (1859); *Collins v. Realty Co.*, 49 N.C. App. 316, 321, 271 S.E. 2d 512, 515 (1980). Our Supreme Court explained the reason for the rule as follows:

> The jury ought to make up their verdict upon evidence offered to their senses, *i.e.*, what they see and hear in the presence of the court, and should not be allowed to take papers, which have been received as competent evidence, into the juryroom, so as to make a comparison of hand-

> writing, or draw any other inference which their imaginations may suggest, because the opposite party ought to have an opportunity to reply to any suggestion of an inference contrary to what was made in open court.

Watson, 52 N.C. at 181.

We find no authority, however, which prohibits the court from permitting the jury to view the exhibits in the courtroom in its presence and in the presence of the parties. In that setting, where subject to objections by the parties and supervision by the court, the viewing may aid the fact-finding process. This is statutorily permitted in criminal trials, *see* G.S. 15A-1233(a), and we see no reason for a different rule in civil trials. This assignment of error is thus overruled.

No error.

Chief Judge HEDRICK and Judge PARKER concur.

E-B GRAIN COMPANY v. WILLIS T. DENTON AND WIFE, KARLA S. DENTON AND STEPHENSON TOBACCO WAREHOUSE, INC.

No. 847SC609

(Filed 19 February 1985)

1. **Agriculture § 5— sale of secured tobacco—breach of security interests by warehouse**

The court properly denied defendant tobacco warehouse's Rule 12(b)(6) motion to dismiss where plaintiff's complaint, construed liberally, alleged that the provisions of a future advance note and security agreement were breached by selling tobacco subject to the security interest without plaintiff's prior written consent, that plaintiff had a recorded security interest in proceeds from the disposition of the tobacco, that defendant did not provide plaintiff with proceeds from the sale, and that defendant had refused to pay plaintiff any amount.

2. **Uniform Commercial Code § 40; Rules of Civil Procedure § 56.4— existence of security agreement—unauthenticated copy—no objection or opposing evidence —summary judgment proper**

There was no genuine issue of material fact as to the existence of a written security agreement executed by the debtors where the only evidence offered to prove the agreement was a copy attached to plaintiff's unverified

complaint and where defendant did not object to the court's consideration of the document or offer any evidence in opposition that raised a genuine issue as to authenticity. G.S. 25-9-203(1).

3. Uniform Commercial Code § 40— adequacy of debtors' address on financing statement—no prejudice

A financing statement with the mailing address "Whitakers, N. C. 27891" was not so incomplete as to be misleading or as to interfere with the notice function of the filing; moreover, defendant had regular dealings with the debtor and was in a position to inquire about the security interest, and defendant admitted that it did not check the filings and thus could not have been prejudiced by technical defects in the document. G.S. 25-9-402.

4. Uniform Commercial Code § 40; Agriculture § 5— U.C.C. financing statement —use of ASCS numbers

A U.C.C. financing statement did not contain an ineffective description of the real property on which the tobacco used as collateral was grown where the statement listed the number of acres involved, the kind of crop grown on the land, the county in which the land was located, and the agriculture stabilization and conservation service numbers, which are shown on maps in ASCS county offices and which are used as a matter of course by those connected with the business of farming. Under G.S. 25-9-402(1), a description of real estate is sufficient if it permits identification of the land involved by recourse to public records. G.S. 25-9-110 (Cum. Supp. 1983).

5. Rules of Civil Procedure § 56.4; Agriculture § 5— conversion of secured tobacco—summary judgment against warehouse proper

Summary judgment was properly granted against defendant warehouse on a claim for conversion of tobacco used as collateral where the sale bills prepared by defendant contained ASCS farm numbers identifying the source of the tobacco. The future advance note and security agreement expressly prohibited sale of the collateral without plaintiff's prior written consent, which was not obtained; and defendant did not come forward in response to plaintiff's motion for summary judgment with any evidentiary material in support of its allegations of waiver, estoppel, and laches. G.S. 1A-1, 56(e), G.S. 25-9-307 (Cum. Supp. 1983).

6. Courts § 2.4; Judges § 1.2— summary judgment heard on Saturday, out of session, over defendant's objection—proper

A resident superior court judge had the authority to hear plaintiff's motion for summary judgment under G.S. 7A-47.1 on Saturday, out of session, and over defendant's written objection.

7. Agriculture § 5— conversion of secured tobacco—summary judgment as to damages improper

In an action for conversion of tobacco used as collateral, summary judgment as to damages was not proper. Tobacco sale bills provided by defendant warehouse were some evidence of fair market value but were not sufficient to establish the absence of any genuine issue of material fact.

APPEAL by defendant, Stephenson Tobacco Warehouse, Inc., from *Winberry, Judge.* Judgment entered 28 March 1984 in Superior Court, NASH County. Heard in the Court of Appeals 6 February 1985.

This is a civil action wherein plaintiff seeks to recover pursuant to a note and security agreement executed by defendants Mr. and Mrs. Denton, debtors, and for conversion of collateral by defendant Stephenson Tobacco Warehouse, Inc., (hereinafter Stephenson). The record discloses the following:

On 25 February 1983 plaintiff instituted this action by filing an unverified complaint containing allegations that are summarized herein: Plaintiff, a general farm supply business, sold defendants, Mr. and Mrs. Denton, "a quantity of farm supplies," in return for which the Dentons executed a "future advance note and security agreement." This document executed by defendants is attached to plaintiff's complaint; its terms provide that the Dentons "grant unto Secured Party a security interest under the North Carolina Uniform Commercial Code in . . . [a]ll crops . . . now planted, growing or grown, or which are hereafter planted . . . on the following described real estate. . . ." There follows descriptions of various farm lots. Also attached to the complaint are two financing statements filed by plaintiff in connection with the security agreement executed by defendants. Plaintiff's complaint further alleges that the Dentons owe plaintiff $63,430.12 on the account described above, that they have refused to pay this debt, and that they sold defendant Stephenson "a quantity of tobacco . . . on which plaintiff had a security interest." Defendant Stephenson, says plaintiff, "did not apply proceeds from the sale of the tobacco . . . to the account of the plaintiff and has refused to pay any amount." In its prayer for relief plaintiff asked for judgment against all defendants "jointly and severally, in the amount of $63,430.12."

Defendant Stephenson filed an answer and crossclaim, in which it denied the material allegations contained in plaintiff's complaint, raised several affirmative defenses, and sought indemnification by the Dentons. On 8 April 1983 the Clerk of Superior Court, Nash County, made an entry of default and on 26 August 1983 plaintiff obtained a default judgment against defendants, Dentons, in the amount of $63,430.12 plus attorney's fees. On 9

January 1984 plaintiff filed a motion for summary judgment, which was heard on 10 March 1984. From grant of summary judgment for plaintiff, defendant Stephenson appealed.

Fields, Cooper & Henderson, by Milton P. Fields, for plaintiff, appellee.

Mast, Tew, Armstrong & Morris, P.A., by L. Lamar Armstrong, Jr., and George B. Mast, for defendant, appellant.

HEDRICK, Chief Judge.

We note at the outset that in its complaint plaintiff sought to recover for conversion of tobacco grown in Edgecombe and in Nash Counties. While the record is less than clear, the parties conceded in oral argument before this Court that Judge Winberry allowed plaintiff to recover damages only for conversion of the tobacco grown in Nash County. In its argument before this Court plaintiff concedes that Judge Winberry properly denied plaintiff's claim based on conversion of the Edgecombe County tobacco because of plaintiff's failure to perfect its security interest in this tobacco. For purposes of this appeal, then, we are concerned only with the ruling of the trial court as it relates to the tobacco grown in Nash County.

[1] Defendant first assigns error to the court's denial of its motion to dismiss for failure to state a claim for relief. Its contention in this regard rests on two grounds: First, it argues that Mr. and Mrs. Denton were not in default on the future advance note when the complaint was filed on 25 February 1983 because the face of the note reveals that principal and interest were not due and payable until 15 March 1983. This argument ignores provisions of the future advance note and security agreement which state:

> Debtor will . . . not . . . sell or otherwise dispose of [the collateral] or any interest therein, or permit others to do so, without the prior written consent of Secured Party. . . .
>
> . . .
>
> Default shall exist hereunder if Debtor fails to . . . observe or perform any covenants or agreements herein. . . . Upon any such default . . . Secured Party, at its option, with or without notice as permitted by law, may (a) declare the un-

> paid balance on the Note and any indebtedness secured hereby immediately due and payable. . . .

Construed liberally, as is required, *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970), plaintiff's complaint sufficiently alleges that defendants breached the provisions of the future advance note and security agreement by selling tobacco subject to plaintiff's security interest to defendant Stephenson without plaintiff's prior written consent; such violation of the terms of the agreement constitutes default, rendering the unpaid balance on the note immediately due and payable.

Defendant's second argument in support of its contention that its motion to dismiss should have been granted is that "the complaint failed to allege any claim against Stephenson or that Stephenson owed plaintiff any sum of money." While the allegations in plaintiff's complaint in regard to defendant Stephenson are not as detailed as might be desired, we think it clear that plaintiff has alleged facts sufficient to state a claim for relief. The complaint asserts that plaintiff has a recorded security interest in tobacco as well as proceeds from the disposition of such tobacco, that this collateral was sold by the debtors to defendant Stephenson, that defendant Stephenson did not provide plaintiff with proceeds from the sale, and that defendant Stephenson has refused to pay plaintiff any amount. These allegations are sufficient to state a claim for relief based on conversion of collateral by Stephenson. *See Hall v. Odom*, 240 N.C. 66, 81 S.E. 2d 129 (1954). *See also* Annot., 96 A.L.R. 2d 208 (1964). This assignment of error is without merit.

Defendant next assigns error to the court's grant of summary judgment for plaintiff. Defendant contends that the competent evidence introduced by plaintiff in support of its motion was insufficient to show the absence of a genuine issue of material fact as to each essential element of its claim for conversion.

Conversion is "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Gallimore v. Sink*, 27 N.C. App. 65, 67, 218 S.E. 2d 181, 183 (1975) (citations omitted). Summary judgment was properly granted in the instant case only if the materials properly considered by the trial judge establish: (1) plaintiff's interest in

the property, and (2) defendant Stephenson's unauthorized assumption and exercise of the right of ownership to the exclusion of plaintiff's rights. We now turn to the evidence introduced by plaintiff in support of its motion for summary judgment.

[2] We first note that plaintiff's claim of "ownership" in the tobacco so as to support a claim for conversion is based on its claim that it possesses a valid security interest in the property pursuant to the North Carolina Commercial Code. *See F.D.I.C. v. Loft Apartments*, 39 N.C. App. 473, 250 S.E. 2d 693 (action for wrongful conversion of security interest may be maintained in North Carolina), *disc. rev. denied*, 297 N.C. 176, 254 S.E. 2d 39 (1979). In support of its claim in this regard plaintiff offered into evidence two documents: a copy of the "future advance note and security agreement," executed by the Dentons in favor of plaintiff, and a copy of a financing statement, admitted by defendant to be a genuine copy of the statement filed in the office of the Nash County Register of Deeds.

Defendant vigorously contends that plaintiff failed to offer competent evidence that "it had a valid and enforceable security agreement covering tobacco grown by the Dentons." Defendant bases this contention on its argument that the only evidence offered by plaintiff to prove the agreement between plaintiff and the Dentons was the copy of the security agreement attached to plaintiff's unverified complaint. Defendant asserts that proof of the security agreement was essential to plaintiff's claim, and that the copy offered by plaintiff was never properly authenticated and is thus incompetent evidence.

Defendant correctly asserts that proof of a written security agreement between plaintiff and the debtors is essential to its claim of an enforceable security interest in the tobacco. G.S. 25-9-203(1) provides in pertinent part:

> [A] security interest is not enforceable against the debtor or third parties . . . unless . . . the debtor has signed a security agreement which contains a description of the collateral. . . .

Consistent with the language of the statute, our Courts have recognized that "[t]he mere filing of a financing statement . . . does not necessarily indicate that a security interest exists." *Evans v. Everett*, 10 N.C. App. 435, 438, 179 S.E. 2d 120, 123 (cita-

tion omitted), *rev'd on other grounds*, 279 N.C. 352, 183 S.E. 2d 109 (1971). "[A] financing statement does not ordinarily *create* a security interest. It merely gives notice that one is or may be claimed." *Evans v. Everett*, 279 N.C. 352, 358, 183 S.E. 2d 109, 113 (1971) (citation omitted).

Defendant points out that the copy of the security agreement attached to the unverified complaint was never admitted by defendant to be genuine, and argues that because it was never properly authenticated, the security agreement could not be considered by Judge Winberry in ruling on plaintiff's motion for summary judgment. The record reveals that defendant, in its answer, generally denied plaintiff's allegations of a security agreement between plaintiff and the Dentons based on its lack of "sufficient knowledge to form a belief as to the truth of these allegations." The record does not reflect that defendant made timely objection to the court's consideration of the document it now challenges on appeal, nor does the record contain any evidentiary material introduced by defendant in opposition to plaintiff's motion for summary judgment that raises a genuine issue as to the authenticity of the security agreement. "[A]s is true of other material introduced on a summary judgment motion, uncertified or otherwise inadmissible documents may be considered by the court if not challenged by means of a timely objection." *Insurance Co. v. Bank*, 36 N.C. App. 18, 26, 244 S.E. 2d 264, 269 (1978) (holding court did not err in granting summary judgment based on copy of certificate of deposit attached to unverified complaint). *See also Gebb v. Gebb*, 67 N.C. App. 104, 312 S.E. 2d 691 (1984) (holding court did not err in granting summary judgment based on copy of contract of sale attached to unfiled deposition of party). We hold the court correctly concluded that there exists no genuine issue of material fact as to the existence of a written security agreement executed by the debtors.

[3] Defendant next challenges the effectiveness of the financing statement introduced by plaintiff and identified as Exhibit 64. Defendant first alleges that the financing statement is not signed by the debtor as is required by G.S. 25-9-402(1). Exhibit 64, admitted by defendant to be a genuine copy of plaintiff's filing in Nash County, clearly bears the signatures of the debtors, however, and so we hold defendant's contention in this regard to be without merit.

Defendant also contends that the financing statement does not contain the debtors' mailing address as is required by G.S. 25-9-402(1). Examination of Exhibit 64 reveals that the debtors' address is listed as "Whitakers, N.C. 27891." Our Supreme Court has recognized that G.S. 25-9-402 "adopts a system of notice filing," *Evans v. Everett*, 279 N.C. 352, 355, 183 S.E. 2d 109, 112 (1971), which "indicates merely that the secured party who has filed may have a security interest in the collateral described." *Id.* at 356, 183 S.E. 2d at 112 (quoting Official Comment to G.S. 25-9-402(1)). Consistent with the "notice filing" policy identified in *Evans*, G.S. 25-9-402(8) (Cum. Supp. 1983) provides: "A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading." We think that the debtors' mailing address as shown on Exhibit 64 is not so incomplete as to be misleading or as to interfere with the notice function of the filing. We are cognizant of the fact that defendant Stephenson had regular business dealings with the debtor, and so was in a position to directly inquire about plaintiff's security interest had defendant wished to do so. Furthermore, the deposition of defendant Stephenson's president, introduced by plaintiff, contains the following statement: "[W]e do not check the records in the various counties to determine if a crop lien has been filed." Because defendant Stephenson did not check the Nash County filings, it was not aware of the financing statement in question and thus could not have been prejudiced by technical defects in that document.

[4] Defendant next contends the Nash County financing statement was ineffective because "it contained no description of the real property on which the alleged tobacco was to be grown." G.S. 25-9-402(1) (Cum. Supp. 1983) requires that "[w]hen the financing statement covers crops growing or to be grown, the statement must indicate that the collateral is or includes crops and must contain a description of the real estate concerned." In the instant case, the financing statement identified "the real estate concerned" by means of farm numbers Q1959 and V2567, in addition to listing the number of acres involved, the kind of crop grown on the land, and the county in which the land was located. The record contains affidavits explaining that the United States Department of Agriculture, through the Agricultural Stabilization and

Conservation Service, assigns tobacco farms identification numbers, known as ASCS numbers. Each ASCS county office has maps showing the location of farms in that county as indicated by ASCS numbers. ASCS farm numbers are used as a matter of course by farmers and others connected with the business of farming, and are an integral part of the regulatory system established by the Department of Agriculture. Defendant Stephenson, in its answer to plaintiff's request for admissions, has admitted its familiarity with ASCS farm numbers and with the United States tobacco marketing program.

In its brief defendant argues that "the question of sufficiency of description cannot be answered simply by establishing that the property could have been identified through a series of searches." We do not agree, for we believe that under G.S. 25-9-402(1) a description of real estate is sufficient if the description permits identification of the land involved by recourse to public records. *See* G.S. 25-9-110 (Cum. Supp. 1983): "For the purposes of this article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described." *See also* Amended Official Comment to G.S. 25-9-110: "The test of sufficiency of a description laid down by this section is that the description do the job assigned to it—that it make possible the identification of the thing described."

[5] Having held that plaintiff introduced evidence sufficient to establish the absence of genuine issues of material fact as to its perfected security interest in the collateral, we next examine plaintiff's evidentiary showing as to the second element of its claim for conversion: defendant Stephenson's unauthorized assumption and exercise of the right of ownership to the exclusion of plaintiff's rights. In this regard defendant first contends that plaintiff has not demonstrated that the tobacco sold by Stephenson was tobacco subject to plaintiff's perfected security interest. The record, however, does not bear out defendant's contentions. Exhibits 1 through 62, admitted by defendant to be genuine copies of tobacco sale bills prepared by defendant, contain ASCS farm numbers identifying the source of tobacco for each sale. Identification of tobacco grown on farms Q1959 and V2567 and purchased from the Dentons through defendant Stephenson is thus easily accomplished by reference to these records.

Defendant next argues that plaintiff has not adequately demonstrated that its sale of the tobacco in question was unauthorized and wrongful. Defendant points to the rule, set out in the Amended Official Comment to G.S. 25-9-307 (Cum. Supp. 1983), which provides that a buyer of collateral takes free of a security interest where the secured party has expressly or impliedly authorized the sale. Defendant argues, in essence, that the evidence demonstrates that plaintiff knew or could have learned that the Dentons were selling their tobacco through defendant, and that plaintiff "failed to notify Stephenson or contact it in any way." This evidence, says defendant, raises genuine issues of material fact as to the affirmative defenses of waiver, estoppel, and laches. We do not agree. We first note that the future advance note and security agreement executed by the Dentons expressly prohibited sale of the collateral without plaintiff's prior written consent. Thus there was no express authorization of sale here. As to whether plaintiff may be said to have impliedly consented to such sale, and as to the related defenses of estoppel, waiver, and laches, we note the provisions of G.S. 1A-1, Rule 56(e), North Carolina Rules of Civil Procedure:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

In the instant case, defendant raised the affirmative defenses of waiver, estoppel, and laches in its answer. In response to plaintiff's motion for summary judgment, however, defendant did not come forward with any evidentiary material in support of its allegations. Consequently, the record discloses no genuine issue of material fact in this regard. We hold that summary judgment for plaintiff was properly granted.

[6] Citing *Hardin v. Ray*, 89 N.C. 364 (1883); *Coates v. Wilkes*, 94 N.C. 174 (1886); and *May v. Insurance Co.*, 172 N.C. 795, 90 S.E. 890 (1916), defendant next contends that Judge Winberry was without jurisdiction to hear plaintiff's motion for summary judgment "on Saturday, out of session and over Stephenson's written

objection." Suffice it to say that the cases upon which defendant relies are clearly distinguishable and do not support its contention. The controlling statute is G.S. 7A-47.1 which provides:

> In any case in which the superior court in vacation has jurisdiction, and all the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or during a session of court, at their election. The resident judge of the judicial district and any special superior court judge residing in the district and the judge regularly presiding over the courts of the district have concurrent jurisdiction in all matters and proceedings in which the superior court has jurisdiction out of session; provided, that in all matters and proceedings not requiring a jury or in which a jury is waived, the resident judge of the district and any special superior court judge residing in the district shall have concurrent jurisdiction with the judge holding the courts of the district and the resident judge and any special superior court judge residing in the district in the exercise of such concurrent jurisdiction may hear and pass upon such matters and proceedings in vacation, out of session or during a session of court.

We take judicial notice that Judge Winberry is a resident superior court judge in the seventh judicial district, of which Nash County is a part. We believe Judge Winberry clearly had authority under G.S. 7A-47.1 to hear plaintiff's motion for summary judgment, even though defendant's counsel objected. To interpret the statute in the manner advocated by defendant would mean that no superior court judge could hear any matter, whether in or out of session, without "all the parties unit[ing] in the proceedings." The assignment of error is without merit.

[7] Defendant finally contends that "the court erred in its calculation of damages that plaintiff was entitled to recover from Stephenson." It is well settled "under the common law, that the measure of damages for a wrongful conversion of personal property is the fair market value of the chattel at the time and place of conversion," *Russell v. Taylor*, 37 N.C. App. 520, 524, 246 S.E. 2d 569, 573 (1978), limited, of course, to the extent of plaintiff's ownership interest in the property converted, i.e., the amount secured by the collateral in question. "Fair market value is the

price the property would bring when offered for sale by one who desires, but is not compelled to sell, and is bought by one desiring to buy, but not under the necessity of purchasing." *City of Kings Mountain v. Cline*, 19 N.C. App. 9, 10, 198 S.E. 2d 64, 65 (1973). Our Supreme Court has said that summary judgment may be proper on the issue of damages "where the moving party sufficiently establishes by competent documents that a liquidated amount is owing him, and the opposing party fails to show facts which dispute that evidence." *Conner Co. v. Spanish Inns*, 294 N.C. 661, 678, 242 S.E. 2d 785, 795 (1978). Where damages are not reduced to a liquidated amount, however, but are instead measured by fair market value, a genuine issue of material fact is presented which must be resolved by the jury. 22 Am. Jur. 2d *Damages* Section 342 (1965) ("The assessment of unliquidated damages must rest in the sound discretion of the jury, under the guidance and control of the trial judge.").

In the instant case, the only evidence before Judge Winberry in regard to damages was in the form of tobacco sale bills showing the amount paid by defendant Stephenson to the Dentons after Stephenson deducted its commission, a handling fee, and an auction fee from the amount it received from tobacco companies purchasing the tobacco. While some evidence of the fair market value of the tobacco at the time and place of conversion, the tobacco sale bills relied on by the judge are not sufficient to establish the absence of any genuine issue of material fact in this regard. Accordingly, summary judgment as to damages owed plaintiff by defendant Stephenson must be vacated and the cause remanded for trial on this issue.

The result is: That portion of the judgment declaring defendant liable to plaintiff for its wrongful conversion of tobacco grown on and sold from Nash County farm lot numbers Q1959 and V2567 will be affirmed; that portion of the judgment assessing damages in the amount of $45,007.53 with interest will be vacated and the cause will be remanded to the superior court for trial on the issue of the amount of damages plaintiff is entitled to recover from defendant for its wrongful conversion of plaintiff's security interest in the tobacco grown on and sold from the Nash County farms.

Affirmed in part, vacated and remanded for trial in part.

Judges BECTON and COZORT concur.

STATE OF NORTH CAROLINA v. ANN MAJORS

No. 8412SC335

(Filed 19 February 1985)

Criminal Law § 99.5— judge's comments prejudicial—prejudice not cured

Comments made by the trial court were inherently prejudicial and the resulting taint was not dissipated by curative instructions where, during the *voir dire* of the jury, at a bench conference requested by the State regarding the composition of the jury at that time, the trial court said to defense counsel that the court did not know "what the hell [defense counsel] was doing" or "what the hell was going on with this case."

Judge MARTIN dissenting.

APPEAL by defendant from *Samuel E. Britt, Judge.* Judgment entered 30 November 1983 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 9 January 1985.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the State.

Assistant Public Defender Gregory A. Weeks, for defendant appellant.

BECTON, Judge.

Defendant, Ann Majors, was convicted of second degree murder in the stabbing death of her live-in boyfriend, William Corbett, who, just hours prior to his death, had left the defendant and had taken with him certain items of furniture and stereo equipment from their joint home.

Defendant brings forward four assignments of error, two of which deal with the trial court's comments, heard by two members of the jury panel, that defense counsel "had excused five whites" from the jury panel and that "the court did not know what in the hell [defense counsel] was doing" or "what in the hell

was going on with this case." Defendant first argues that the trial court's comments were prejudicial, entitling her to a new trial. The defendant next argues that the trial court erred in denying her motions for a mistrial, to continue, or for the trial judge to recuse himself based on the comments made. Believing the comments to be reversibly prejudicial, we grant a new trial. We therefore need not reach defendant's two remaining assignments of error.

I

We postulate at the outset that some comments by trial judges are inherently prejudicial; that some comments are so prejudicial that not even curative instructions can right the wrong. That explains in part why mistrials are sometimes granted in the face of complete and accurate instructions to the jury, including curative instructions. And, using common sense as a measuring stick, we have not waited for trial judges to commit the obvious and gross indiscretion of telling the jury in explicit terms how they feel. Recognizing the effect of innuendo and nuances, our inquiry has centered not so much on what exactly was said, but rather on the probable effect of the comments on the jury. *State v. Staley*, 292 N.C. 160, 232 S.E. 2d 680 (1977).

It is not surprising, then, that our courts have been "consistently vigilant to protect the right of every criminal defendant to the assistance of counsel at a trial 'before an impartial judge and an unprejudiced jury in an atmosphere of *judicial calm*.' " *Id.* at 161, 232 S.E. 2d at 681 (quoting *State v. Carter*, 233 N.C. 581, 583, 65 S.E. 2d 9, 10 (1951) (emphasis added). And we have done so with the strongest of language. In *State v. Smith*, 240 N.C. 99, 81 S.E. 2d 263 (1954), our Supreme Court forbade "the expression of any opinion *or even an intimation* by the judge, at any time during the course of the trial, which might be calculated to prejudice either party." 240 N.C. at 101, 81 S.E. 2d at 265. (Emphasis added.) In *State v. Staley*, we find these words: "Any expression as to the merits of the case, or any intimation of contempt for a party or for counsel may be highly deleterious to that party's position in the eyes of the jury." 292 N.C. at 162, 232 S.E. 2d at 682. In *State v. Holden*, 280 N.C. 426, 185 S.E. 2d 889 (1972), our Supreme Court said: "[R]emarks from the bench which tend to belittle and humiliate counsel, or which suggest that counsel is not

acting in good faith, reflect not only on counsel but on the defendant as well and may cause a jury to disbelieve all evidence adduced in defendant's behalf." 280 N.C. at 429, 185 S.E. 2d at 892.

II

With these expressions as our benchmark, we turn our attention to the trial judge's comments and the context in which they were made. Prior to the selection of the jury, the trial judge denied defendant's motion requesting that the court prohibit the district attorney from exercising peremptory challenges against prospective black jurors solely on the basis of race, or a "group bias." The trial court also denied defendant's motion requesting that the court reporter note the race of prospective jurors who were examined; the trial court did, however, allow defense counsel to ask the race of those jurors challenged peremptorily by the district attorney in order to preserve the issue of "group bias" by the State. The trial judge then gratuitously added: "I suppose, if you carried it to its logical conclusion, the State would be filing a motion wherein you have got a black defendant peremptorily challenging white persons. It don't make sense. You carry this race thing to an illogical conclusion."

During the *voir dire* of the jury, at a bench conference requested by the State regarding the composition of the jury at that time, the trial court said to defense counsel that the court did not know "what the hell [defense counsel] was doing" or "what the hell was going on with this case." The trial judge admitted making these remarks upon defendant's motion for a mistrial, or, in the alternative her motion for continuance and recusation, but the judge found as a fact that the remarks were not heard by the jury. Defense counsel was thereafter granted permission to inquire as to what, if anything, had been heard by the jurors. Juror Tew replied: "I heard him say that you dismissed five whites. I also heard him say that he didn't know what the hell you were doing." Juror Spriggs heard the court say: "He didn't know what the hell was going on or, you know, that's all I heard." Thereafter, the trial judge inquired of Jurors Spriggs and Tew:

> Now, the two jurors that have indicated, in any way does that affect your ability to decide this case fairly? Is there anything that I have said that has prejudiced you one way or

> another against the State or the defendant? I'll ask the lady first.
>
> Ms. Spriggs: Not me.
>
> Court: You, sir?
>
> Mr. Tew: No, sir.

Thereafter the court inquired of the remaining jurors:

> Court: Asking the rest of the jurors, having found out what was said and heard these two jurors say what they heard, is there any other juror in any respect prejudice and feel they cannot in any respect be fair and impartial to both the State and the Defendant in this case? If so, please indicate it.
>
> The record will reflect that all jurors are sitting without giving any indication to the Court that they have been prejudiced.

It would have been unquestionably better for the trial judge to have addressed each juror individually. Nevertheless, we assume, *arguendo*, that all jurors would have said no, if the question had been asked them individually, although psychologists and some lawyers know, as H. Bodin has noted, it is more difficult to speak a lie than to suppress the truth by remaining silent to a group question. *See* H. Bodin, *Selecting a Jury, in Civil Litigation and Trial Techniques* (1976).

And, it is not without significance that the trial judge said he did not know what was going on when, in fact, the pretrial exchange between the trial judge and defense counsel suggests that the trial judge knew exactly what was going on. In our view, the statement directed to defense counsel, at a time when the District Attorney had asked to approach the bench, tended to belittle and humiliate defense counsel before the jury. "The strength of the attorney's role as advocate is crucial to the success of our judicial system: his duty vigorously to represent his client requires him 'to present everything admissible that favors his client and to scrutinize by cross-examination everything unfavorable.'" *State v. Staley*, 292 N.C. at 161, 232 S.E. 2d at 682 (quoting Annot., 62 A.L.R. 2d 166, 237 (1958)). Therefore, comments tending to reflect on the competency of counsel "may be highly deleterious" to de-

fendant's case. *State v. Staley*. Again, "[t]he effect on the jury of the remark and not the judge's motive in making it, is determinative." *Id.* at 165, 232 S.E. 2d at 684. And, would there even be room for argument had the trial judge said to defense counsel, "You're incompetent?"

We believe the comments made in this case were inherently prejudicial and that the resulting taint was not dissipated by the curative instructions. *Compare Zebouni v. United States*, 226 F. 2d 826 (5th Cir. (1955)) (defendant denied fair trial because judge described an objection made by his attorney as "foolish" even though the jury had been admonished to disregard the remark), and *McAlister v. State*, 206 Ark. 998, 178 S.W. 2d 67 (1944) (new trial granted when trial judge said it would be "silly" to grant a motion made by defendant's attorney and that he was not going to put up with any more of "this foolishness").

We emphasize that this is not a case in which the trial judge failed to see the relevance of certain evidence, or even defendant's trial strategy. *See, e.g., State v. Robinson*, 279 N.C. 495, 183 S.E. 2d 650 (1971), *cert. denied*, 405 U.S. 1017, --- L.Ed. 2d ---, --- S.Ct. --- (1972) ("I can't see what the key has to do with this case, frankly."); *State v. Conrad*, 275 N.C. 342, 168 S.E. 2d 39 (1969) ("I don't see the relevancy, but I don't see the harm."); and *State v. Currie*, 293 N.C. 523, 238 S.E. 2d 477 (1977) ("I fail to see any relevance to this."). Nor is this a case like *State v. Holden*, 280 N.C. 426, 185 S.E. 2d 889 (1972), in which the Supreme Court found the judge's indiscreet and improper remarks harmless because Holden, although tried on second degree murder, was convicted of manslaughter. Specifically, the *Holden* Court said:

> The judge's critical remarks were indiscreet and improper, and should not have been made. In a different setting they could be prejudicial so as to require a new trial. Here, however, in light of the evidence and considering the totality of circumstances, we hold that the comments from the bench of which defendant complains, constituted harmless error.
>
> The facts and attendant circumstances in this case reveal a senseless killing, apparently without the slightest provocation. The evidence would support a conviction of murder in the second degree. Defendant offered no evidence in explana-

> tion or mitigation. . . . Even so, defendant was only convicted of manslaughter. In this setting it is apparent that the words of the judge here under attack had no prejudicial effect on the result of the trial and must therefore be considered harmless.

280 N.C. at 430, 185 S.E. 2d at 892.

The "different setting" referred to in *Holden* is present in this case. In the case *sub judice*, the evidence elicited by defendant on cross-examination regarding William Corbett's size, his aggressiveness and combativeness, and the out-of-court statement by one of the State's witnesses, offered in evidence by the State, that she saw a tussle between defendant and William Corbett at the time Corbett was stabbed distinguishes this case from *Holden*. Moreover, in this case, defendant was found guilty of second degree murder, not a lesser offense.

Believing that the circumstances "might reasonably have had a prejudicial effect on the result of the trial . . . ," *State v. Perry*, 231 N.C. 467, 471, 57 S.E. 2d 774, 777 (1950), we grant defendant a new trial, and we close with the words of our Supreme Court in 1907 that the judge

> should be the embodiment of even and exact justice. He should at all times be on the alert, lest, in an unguarded moment, something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged.

Withers v. Lane, 144 N.C. 184, 191-92, 56 S.E. 855, 857-58 (1907).

For the foregoing reasons, defendant is entitled to a

New trial.

Judge JOHNSON concurs.

Judge MARTIN dissents.

Judge MARTIN dissenting.

I must respectfully dissent from the majority opinion. In so doing, I hasten to add that I do not commend or approve the ill-advised and intemperate remarks of the trial court to counsel regardless of whether they were made in the presence or absence of the jurors. It is my belief that attorneys who appear in the trial courts of this state, as well as their clients, are entitled to be treated with the same degree of respect and courtesy as the court is entitled to receive from them. Canon 3A(3) of the North Carolina Code of Judicial Conduct provides: "A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control." To require any less standard would diminish the public confidence in the integrity and impartiality of our judicial system. Injudicious treatment of litigants or their counsel by judges at any level cannot be condoned.

The question before us on appeal, however, is not whether the remarks of the trial judge were inappropriate; of that there is no room for disagreement. The question is whether the remarks, under all of the circumstances of this case, were prejudicial to the defendant's cause so as to entitle her to a new trial.

> Not every ill-advised expression by the trial judge is of such harmful effect as to require a reversal. The objectionable language must be viewed in light of all the facts and circumstances, "and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless."

State v. Holden, 280 N.C. 426, 430, 185 S.E. 2d 889, 892 (1972), *quoting State v. Perry*, 231 N.C. 467, 471, 57 S.E. 2d 774, 777 (1950).

The court's unfortunate remarks were made during jury selection on the afternoon of 28 November 1983, during a bench conference regarding jury selection. Unfortunately they were overheard by two jurors. Although the better practice would have been for the court to examine these two jurors separately as to what they had heard and its effect, if any, upon them, the court

chose instead to permit defense counsel to examine them in the presence of all of the jurors with the result that all of the jurors were made aware of what had been said. Even so, none of the jurors indicated, in response to questioning, that the court's remarks had prejudiced them against the State or the defendant. The selection of an alternate juror was then completed and the jury was empaneled. The trial resumed on 29 November and concluded on 30 November with a verdict finding the defendant guilty of second degree murder. The transcript does not reveal any instance during the presentation of evidence, the jury arguments or the instructions when the trial judge acted in any manner other than with complete impartiality and courtesy to all participants. At the conclusion of the instructions the court admonished the jurors

> not to draw any inference from any ruling that I have made or any inflection in my voice or any expression on my face or any question I have asked a witness *or anything else that I may have said or done during this trial* that I have an opinion or have intimated an opinion as to whether any part of the evidence should be believed or disbelieved, as to whether a fact has or has not been proved or as to what your findings ought to be . . . .

(Emphasis added.)

Thus, an examination of the record indicates a single occurrence at the initial stage of the trial, rather than "a general tone or trend of hostility or ridicule which has a cumulative effect of prejudice" as was the case in *State v. Staley*, 292 N.C. 160, 165, 232 S.E. 2d 680, 684 (1977), relied upon by the majority. In *Staley*, there was repeated interrogation of a witness by the trial judge, repeated failure to rule on objections made by defense counsel, and a heated reprimand of defense counsel by the judge for "speech-making" giving rise to the possibility that, on the totality of the trial record, the jury may have inferred that the trial judge was expressing an opinion. The record in the case *sub judice* is devoid of such circumstances which might give the impression of "judicial leaning." Rather, the incident which occurred during jury selection fits more nearly the situation described by Justice Exum when he wrote, in *Staley, supra* at 162, 232 S.E. 2d at 682, "We recognize that both the trial judge and the lawyer are

human and that quite heated conversations may ensue with the preservation nonetheless of strict impartiality on the one hand and consistent respect on the other."

The burden of showing that she has been deprived of a fair trial by remarks of the trial judge is upon the defendant. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974); *State v. Green*, 268 N.C. 690, 151 S.E. 2d 606 (1966). The defendant argues, and the majority holds, that prejudice is apparent because the defendant was convicted of the offense with which she was charged. Again, I must disagree. The evidence presented at trial showed that the defendant and the victim, William Corbett, had been living together but that their relationship had deteriorated. On 11 July 1983, Corbett moved his belongings out of the residence and evidently destroyed some of the defendant's clothes. Upon returning to the residence and finding Corbett's belongings gone and her clothing damaged, the defendant called a friend, Julia Mosley, to come to the residence. When Mosley arrived, the defendant requested her to drive the defendant to the home of another acquaintance, where the defendant obtained a large kitchen knife, telling the acquaintance that Mosley wanted the knife. Julia Mosley then drove the defendant back to the defendant's residence. When they arrived, William Corbett was there with Johnny Copeland, cleaning out the garage. The defendant walked up to the decedent and stabbed him. According to Julia Mosley, there was a "tussle," which she described as an arm being raised; she did not see whose arm it was. Immediately thereafter Corbett ran away, saying that he had been stabbed. Johnny Copeland testified that Corbett was leaning over a trash box when the defendant stabbed him in the ribs. The defendant's statement to law enforcement officers, offered by the State, was inconsistent, but considered in the light most favorable to her, tended to show that as she walked by Corbett with the knife he asked her what she had in her hand. When she responded that she had a knife and was taking it in the house, Corbett tried to grab her hand and she stabbed him, she thought, in the leg. In fact, Corbett was stabbed through the heart. The defendant offered no evidence. Her counsel advised the Court that, in his opinion, the evidence did not support an instruction on self-defense. The Court submitted second degree murder, voluntary manslaughter (committed during heat of passion) and not guilty as the possible verdicts. The

jury convicted the defendant of second degree murder. The evidence of passion produced upon adequate provocation was minimal at best, and arose, if at all, only upon the defendant's statement. The evidence with regard to Corbett's size and aggressiveness does not provide the "different setting" described by the majority in attempting to distinguish this case from *State v. Holden, supra*; self-defense was not present.

On this record, there is no reason to believe that another trial would produce a different result more favorable to the defendant. "The bare possibility . . . that an accused may have suffered prejudice from the conduct or language of the judge is not sufficient to overthrow an adverse verdict." *State v. Carter*, 233 N.C. 581, 583, 65 S.E. 2d 9, 10-11 (1951). Although the trial judge's improvident remarks to counsel were error, I do not find them prejudicial.

ELIZABETH LUCAS WINSTEAD, WIDOW OF KENNETH E. WINSTEAD, DECEASED; FRANCES A. LUCAS, GUARDIAN AD LITEM FOR CHAD PAUL BREWER AND RONALD CARL BREWER, CLAIMANTS-APPELLEES v. LINDA GAYLE DERREBERRY, GUARDIAN FOR MELANIE RACHELLE WINSTEAD, CLAIMANT-APPELLANT v. VARCO-PRUDEN BUILDINGS, EMPLOYER-APPELLEE, TRAVELERS INSURANCE COMPANY, CARRIER-APPELLEE

No. 8410IC561

(Filed 19 February 1985)

1. **Master and Servant § 79.1— qualification for death benefits—stepchildren—substantial dependency required**

The Industrial Commission's award of death benefits to stepchildren under the Workers' Compensation Act was affirmed where the deceased contributed approximately 69% of the stepchildren's support in 1981 and 84% in 1982. Stepchildren are not conclusively presumed to be wholly dependent upon a supporting stepparent, but are entitled to death benefits if they are in fact "substantially" dependent upon the stepparent. G.S. 97-38 (Cum. Supp. 1983), G.S. 97-39 (1979), G.S. 97-2(12) (1979).

2. **Constitutional Law § 20— recovery of workers' compensation death benefit by stepchildren—no Equal Protection violation**

Allowing non-legally dependent stepchildren to recover death benefits as dependents under the Workers' Compensation Act does not violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States or the fundamental law of North Carolina.

APPEAL by claimant from opinion and award of the Industrial Commission filed 6 April 1984. Heard in the Court of Appeals 17 January 1985.

The pertinent facts relating to this appeal were stipulated by the parties before the Industrial Commission. Kenneth E. Winstead died as the result of an accidental injury arising out of and in the course of his employment with Varco-Pruden Buildings. At the date of death, Kenneth Winstead was married to Elizabeth Lucas Winstead, his second wife. Elizabeth Winstead had two minor children, Chad and Ronald Brewer, by a previous marriage, both under eighteen years of age, and who lived with Kenneth and Elizabeth Winstead. Kenneth Winstead also had a child by a previous marriage, Melanie Rachelle Winstead, who lived with her father and Elizabeth Winstead.

Kenneth and Elizabeth Winstead were both employed, and both contributed to the financial support of the family. Chad and Ronald Brewer received support payments of approximately $100 per month, occasionally $150 per month, from their natural father. Melanie Winstead received some support from her natural mother. Based on the stipulated facts Deputy Commissioner Ed Turlington entered an opinion and award concluding as a matter of law that Chad and Ronald Brewer, as stepchildren of Kenneth Winstead, were conclusively presumed to be wholly dependent upon the deceased at the time of his death, entitling them to share equally in death benefits payable under the Workers' Compensation Act. The Full Commission, upon application of claimant Melanie Winstead, who alleged error in the award of benefits to the stepchildren, affirmed and adopted the Deputy Commissioner's order of benefits to Winstead's stepchildren.

Claimant Melanie Winstead appealed.

Hunter, Hodgman, Greene, Goodman & Donaldson, by Robert N. Hunter, Jr., for appellant.

Ling & Farran, by Stephen D. Ling, for appellees.

WELLS, Judge.

[1] Claimant Melanie Winstead brings forth four assignments of error to the Commission's order, each challenging payment of

death benefits to deceased's two minor stepchildren under the Workers' Compensation Act [hereinafter the Act]. These assignments of error essentially present the sole question of whether a stepchild who is substantially but not legally dependent upon a stepparent can receive death benefits under the Act, a question of first impression before our appellate courts. We hold that stepchildren are not conclusively presumed to be wholly dependent upon a supporting stepparent but are entitled to death benefits if substantially dependent upon the stepparent, and affirm the Industrial Commission's award.

The applicable provisions of the Workers' Compensation Act provide that:

> If death results proximately from the . . . [covered] accident . . . weekly payments of compensation . . . [shall be paid] to the person or persons entitled thereto as follows:
>
> (1) Persons *wholly dependent* for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons. . . .

N.C. Gen. Stat. § 97-38 (Cum. Supp. 1983) (emphasis added). A claimant may be found "wholly dependent" by two distinct avenues. First, a claimant may be factually determined to be "wholly dependent" when that person subsists entirely on the earnings of the decedent worker. The claimant is "wholly dependent" even though occasionally receiving "gratuitous services . . ., or . . . financial assistance . . ., or . . . other minor considerations or benefits which do not substantially modify or change the general rule. . . ." *Thomas v. Gas Co.*, 218 N.C. 429, 11 S.E. 2d 297 (1940).

Certain classes of individuals, widow, widower, and child, are conclusively presumed to be "wholly dependent." N.C. Gen. Stat. § 97-39 (1979) states that a:

> [C]hild shall be conclusively presumed to be wholly dependent for support upon the deceased employee.

The term "child" is defined by the Act as including a:

> *[S]tepchild or acknowledged illegitimate child dependent upon the deceased,* but does not include married children unless wholly dependent upon him. . . . 'Child' . . . include[s] only persons who at the time of the death of the deceased employee are under 18 years of age.

N.C. Gen. Stat. § 97-2(12) (1979).

We are guided in our determination of this case by time-honored rules of statutory construction with respect to the Workers' Compensation Act.

> First, the . . . [Act] should be liberally construed, whenever appropriate, so that benefits will not be denied upon mere technicalities or strained and narrow interpretations of its provisions. . . . Second, such liberality should not, however, extend beyond the clearly expressed language of those provisions, and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of 'judicial legislation.' . . . Third, it is not reasonable to assume that the legislature would leave an important matter regarding the administration of the Act open to inference or speculation; consequently, the judiciary should avoid 'ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced.' . . . Fourth, in all cases of doubt, the intent of the legislature regarding the operation or application of a particular provision is to be discerned from a consideration of the Act as a whole—its language, purposes and spirit. . . . Fifth, and finally, the Industrial Commission's legal interpretation of a particular provision is persuasive, although not binding, and should be accorded some weight on appeal and not idly cast aside, since that administrative body hears and decides all questions arising under the Act in the first instance. . . .

Deese v. Lawn and Tree Expert Co., 306 N.C. 275, 293 S.E. 2d 140 (1982) (citations omitted). Melanie Winstead contends that because G.S. § 97-2(12) abrogated the common law rule that a stepchild has no right of support from a stepparent the statute must be strictly construed and the liberal interpretation accorded to the Act only applies in situations where liability, not benefits, is in issue. We disagree. The *Deese* court applied a liberal interpretation standard under facts in which apportionment of benefits, not

liability of the employer, was in issue. *See also e.g., Hewett v. Garrett*, 274 N.C. 356, 163 S.E. 2d 372 (1968).

Applying the *Deese* principles, we begin our review of the legislature's purpose in G.S. § 97-38. It intends that death benefits will be first payable to those who were "wholly" dependent upon the deceased worker for financial support. If any claimant, or more than one claimant, is determined to be "wholly" dependent all death benefits are paid to that individual or individuals. If no claimant is found "wholly dependent" then benefits are paid to any claimant determined "partially dependent" to the exclusion of all others. If no person is either "wholly" or "partially" dependent, death benefits are paid to deceased's "next of kin."

With certain exceptions, not applicable to the facts before us, any individual who is factually "wholly" dependent upon the deceased worker is entitled to share in benefits. *E.g. Thomas v. Gas Co., supra* (deceased's mother); *Scott v. Auman*, 209 N.C. 853, 184 S.E. 830 (1936) (deceased's father). In addition, G.S. § 97-39 conclusively establishes three classes of individuals, widow, widower and children, to be "wholly" dependent, even if not factually dependent. *Compare Bass v. Mooresville Mills*, 11 N.C. App. 631, 182 S.E. 2d 246 (1971), *cert. denied*, 281 N.C. 755, 191 S.E. 2d 353 (1972) (wife living separate from husband under separation agreement and not factually dependent may be entitled to benefits if conjugal relations resumed shortly before deceased's death thereby vitiating separation agreement); *with Sloop v. Exxon Service*, 24 N.C. App. 129, 210 S.E. 2d 111 (1974) (no benefits if valid separation agreement in full force and effect). The terms "child," "widow" and "widower" are defined by G.S. §§ 97-2(12), -2(14), -2(15). *See e.g., Carpenter v. Tony E. Hawley, Contractors*, 53 N.C. App. 715, 281 S.E. 2d 783, *disc. rev. denied*, 304 N.C. 587, 289 S.E. 2d 564 (1981) (child over 18 before decedent's death lost conclusive presumption of "child" and must prove factual dependency in order to qualify as "wholly" dependent under G.S. § 97-38). Within G.S. § 97-2(12) the term "child" is defined to include a natural, adopted, illegitimate, married children and a stepchild. Except for natural children, each subgroup defined as a child is limited in some fashion; adoption must be completed before the injury proximately causing death, illegitimate children must be acknowledged and dependent, and married children must be "wholly dependent" on the deceased. A

fair reading of these provisions reveals the General Assembly's intent to afford the conclusive presumption of dependency to those persons who would most usually be factually dependent upon the deceased thereby alleviating the burdensome requirement of proof of dependency in every case. Mandating a conclusive presumption often effectuates the Act's goal of swift and certain award of benefits.

Melanie Winstead contends that the term "dependent" in G.S. § 97-2(12) which qualifies the words "stepchild" and "illegitimate" must be interpreted as legal, not factual, dependency *citing Hewett v. Garrett, supra; Lippard v. Express Co.*, 207 N.C. 507, 177 S.E. 801 (1935). The *Lippard* court considered the award of benefits to a deceased worker's acknowledged illegitimate child born posthumously. The court held that in the context of illegitimate children "dependent" must be interpreted as legal not factual dependency stating:

> The dependency with the statute recognizes as the basis of the right of the child to compensation grows out of the relationship, which in itself imposes upon the father the duty to support the child, and confers upon the child the right to support by its father. The status of the child, social or legal, is immaterial.
>
> The philosophy of the common law, which denied an illegitimate child any rights, legal or social, as against its father, and imposed no duty upon the father with respect to the child, is discarded by the statute.

Lippard v. Express Co., supra. Melanie Winstead contends that because a stepparent is not legally obligated to support a stepchild, *e.g. In re Dunston*, 18 N.C. App. 647, 197 S.E. 2d 560 (1973), a stepchild can receive death benefits under the conclusive presumption of G.S. § 97-38 only if the stepchild can show legal dependency. The argument fails under its own logic. As a stepchild has no legal right of support from a stepparent, we can envision no practical set of circumstances under which a stepchild could be legally dependent upon the stepparent short of legal adoption.

Chad and Ronald Brewer argue that the term "stepchild" is not qualified by the statutory language "dependent upon the

deceased." To adopt this argument would result in every stepchild qualifying for the conclusive presumption of G.S. § 97-39 and for death benefits in every such case. Chad and Ronald Brewer rely on *Chinault v. Pike Electrical Contractors*, 53 N.C. App. 604, 281 S.E. 2d 460 (1981), *affirmed*, 306 N.C. 286, 293 S.E. 2d 147 (1982) in which this court considered apportionment of death benefits among certain family members of a deceased employee, including one stepchild. The Industrial Commission awarded the stepchild an equal share of death benefits. The award of benefits to the stepchild was not in issue in that case, however, the issue being the amount and duration of benefit payments for each claimant. We have carefully reviewed the Industrial Commission's order and award in that case to determine the basis of its award to the stepchild because of its possible precedential value under *Deese*. In *Chinault*, the Commission found as fact that the stepchild was "wholly" dependent upon the deceased. In its conclusion of law awarding benefits to the stepchild, the Commission listed the widow, two children born of the marriage and the stepchild and stated that the claimants "were actually and/or presumptively wholly dependent upon decedent for support and are entitled to the entire death benefit. . . ." Because the Commission aggregated all claimants in one conclusion of law and the award to the stepchild was not apparently in issue before the Commission, we are unable to determine the interpretation of the Act on which it based its award to the minor stepchild and decline to accord that case the precedential value contended for by Chad and Ronald Brewer.

Grammatically, the phrase "stepchild or acknowledged illegitimate child dependent upon the deceased," is set off within the sentence by commas, and we believe that in order to give meaning to the wording of the statute and to effectuate the purpose of the Workers' Compensation Act to provide benefits to those individuals who have relied upon the deceased for financial support as *Deese* requires, a "stepchild" must be factually "dependent" upon the deceased employee.

Having held that stepchildren must be factually dependent upon the deceased employee, the remaining question we must resolve is the degree of dependency required. We hold that the test to be applied is "substantial" dependency upon the deceased employee. This result is derived from the wording of the various

dependency tests employed by the Act. As previously noted, the Act requires certain individuals not within the presumptive classifications to be "wholly" dependent, as defined by *Thomas*. Even if within the presumptive classifications, G.S. § 97-2(12) requires that married children must be "wholly" dependent. The term "wholly dependent," therefore, is a term of art as employed by the General Assembly, and it chose not to qualify the definition of stepchild with that term, electing to limit "stepchild" only by the word "dependent." On the opposite end of the spectrum, to hold that any economic dependency would qualify a stepchild for death benefits would not further the purpose of G.S. § 97-38 to first afford benefits to those persons who have relied on the deceased employee for support. Employing a "substantial" dependency test most closely accomplishes the purpose of the Act. We do not purport to establish a minimum percentage or to require mathematical certainty to determine substantial dependency of a stepchild. The substantial dependency standard is a question of fact to be determined under the facts of each case, the burden of proof being on the stepchild under the evidentiary standards normally employed in workers' compensation cases. The factors to be considered are the actual amount and consistency of the support derived by the stepchild from (1) the deceased stepparent, (2) the natural parent married to the stepparent, (3) the estranged natural parent, whether such support is voluntary or required by law, (4) the income of the stepchild, and (5) any other funds regularly received for the support of the stepchild. As in *Thomas*, we hold that *de minimis* amounts irregularly received and used in support of the stepchild must be excluded from the computation. The ultimate fact to be determined is whether the stepchild was substantially dependent on the financial support of the deceased stepparent as compared with all other sources of financial support available to maintain his accustomed standard of living.

In the case before us, the Commission's order contained detailed unchallenged findings of fact as to Chad and Ronald Brewer's standard of living and sources of support. In reaching its conclusions of law, however, the Full Commission assumed that the relationship of stepparent and stepchild, standing alone, was sufficient to award the stepchildren death benefits. This conclusion of law is erroneous based on our holding in this case. We affirm the Full Commission's award of benefits to the stepchil-

dren, however, as the record before us establishes that deceased's stepchildren were substantially dependent on him for support. The Commission's findings establish that in 1981 annualized expenses for the stepchildren were $7,857.60 (calculated by taking total family living expenses and dividing by two-fifths), the estranged natural father voluntarily contributed $1,200 to their support, the deceased had a gross income of $17,832, and the deceased's wife had a gross income of $6,652. From these findings of fact, we calculate that the deceased stepparent contributed approximately sixty-nine percent of the stepchildren's support during that portion of the year in which the parties were married (calculated by determining the percentage of deceased's income from total contributions from deceased, estranged parent, and deceased's wife who is the childrens' natural parent). In 1982, the deceased's gross income was $20,748, the deceased's wife earned $2,781, and the estranged parent contributed approximately $1,200. Based on the same formula used above, the deceased contributed approximately eighty-four percent of the stepchildren's support. These facts are sufficient to establish "substantial" dependency for the purpose of G.S. § 97-2(12), qualifying the stepchildren as a "child" dependent on deceased under G.S. § 97-39 and, therefore, entitled to a share of death benefits under G.S. § 97-38.

[2] Finally, Melanie Winstead contends that allowing non-legally dependent stepchildren to recover under the Act would violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and its counterpart in the fundamental law of the Constitution of North Carolina. Winstead's argument is based on the potential "double recovery" by stepchildren which natural children could not receive. Under our holding, a stepchild could receive death benefits from the stepparent based on substantial factual dependency and from the estranged natural parent under the conclusive presumption of total dependency for a natural child. Two jurisdictions have directly considered this question and have held awards to stepchildren constitutional. *Flint Ave. Mills v. Henry*, 239 Ga. 347, 236 S.E. 2d 583 (1977), *appeal dismissed*, 434 U.S. 1003 (1978); *Shahan v. Beasley Hot Shot Service, Inc.*, 91 N.M. 462, 575 P. 2d 1347 (1978). We are persuaded that these decisions are sound. The result we have reached does not violate the Equal Protection

Clause of the Fourteenth Amendment of the Constitution of the United States or the fundamental law of North Carolina.

For the reasons stated herein the decision of the Industrial Commission awarding benefits to deceased's minor stepchildren is

Affirmed.

Judges ARNOLD and EAGLES concur.

CARL M. WIGGINS AND CLARA P. WIGGINS v. THE CITY OF MONROE, A MUNICIPAL CORPORATION, AND JOHNNIE H. ROLLINS, JR.

No. 8420SC138

(Filed 19 February 1985)

1. **Municipal Corporations § 9— chief building inspector—no authority to demolish dwelling**

Defendant's chief building inspector had no authority to have plaintiff's building demolished where, pursuant to the city code, the inspector's order requiring repair or demolition, and the city's order requiring the inspector to take the actions dictated in his order, the inspector had the option to have city employees repair or demolish the dwelling or to have plaintiffs do so; the inspector chose to have plaintiffs proceed with the repairs; and once plaintiffs began the repairs within the time limit set by the inspector, he had no authority to pursue the demolition until the 60-day repair period which he allowed for had elapsed.

2. **Municipal Corporations § 10— demolition of dwelling—liability of building inspector**

Defendant city's building inspector, in initially ordering the repair or demolition of plaintiffs' dwelling and in later complying with the city council's ordinance requiring him to enforce his order, was a public official performing governmental duties involving the exercise of judgment and discretion; however, plaintiffs' affidavits that the inspector directed them to repair their house within ten days, signed a building permit authorizing them to begin repairs, and then demolished the house after they had begun timely repairs tended to show that the inspector's behavior was corrupt or malicious or that he acted outside of and beyond the scope of his duties, and the inspector therefore was not immune from liability.

3. **Municipal Corporations § 12.3— acts of building inspector—liability of city—purchase of insurance—waiver of sovereign immunity**

Defendant city waived its immunity from liability for torts of its officers committed while they were performing a governmental function by the pur-

chase of a comprehensive general liability insurance policy which provided coverage for an "occurrence" which resulted in "bodily injury or property damage neither expected nor intended from the standpoint of the insured."

APPEAL by plaintiffs from *Helms, Judge.* Order entered 30 October 1983 in Superior Court, UNION County. Heard in the Court of Appeals 25 October 1984.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Christian R. Troy, for plaintiff appellants.

Love & Milliken, by John R. Milliken, for defendant appellees.

BECTON, Judge.

In this case we must determine whether summary judgment was properly granted in favor of the defendants, the City of Monroe and Johnnie H. Rollins, Jr., the City's chief building inspector, in the Wigginses' action to recover damages sustained as a result of the demolition by the defendants of a house owned by the Wigginses.

I

N.C. Gen. Stat. Sec. 160A-441 (1982) authorizes cities and counties to exercise their police powers "to repair, close or demolish" dwellings which "are unfit for human habitation due to dilapidation. . . ." Pursuant to G.S. Sec. 160A-441 *et seq.* (1982), the City of Monroe enacted its minimum housing standards, as codified in the Monroe City Code (Code) at Sec. 9-1031 *et seq.* (Supp. 1979). Finding that the house owned by the Wigginses was "unfit for human habitation" and that the cost of repairs would exceed 60% of the value of the building, thereby qualifying it as a "dilapidated" building under Code Sec. 9-1032(4) (Supp. 1979), Chief Building Inspector Rollins, on 17 April 1980, pursuant to Code Sec. 9-1045(b) (Supp. 1979) and G.S. Sec. 160A-443(3) (1982), ordered the Wigginses to bring the dwelling into compliance by "vacating—repairing and/or demolishing" it before 29 April 1980. The Wigginses did not pursue the administrative remedies provided under Code Sec. 9-1045(d) (Supp. 1979) and G.S. Sec. 160A-446(c) (1982). When the Wigginses failed to comply with Rollins' order, the Monroe City Council, by ordinance dated 20 May 1980, directed Rollins to take the actions dictated in his

order. The ordinance set no time limit on the building inspector's actions. Again, the Wigginses did not appeal the Council's decision.

Rollins chose to have the house repaired, and, according to his affidavit, "indulged the plaintiffs until April 6, 1981 in an effort to allow them to make the necessary repairs." On 24 March 1981, Rollins wrote the Wigginses a letter advising them that they had to begin repairs on the house within ten days and to complete the repairs within 60 days or the house would be demolished. Nine days later, on 2 April 1981, the Wigginses obtained what they contend was a building permit from the City, signed by Rollins, authorizing them to remodel and repair the house. Rollins contends that what he signed was a zoning check request with reference to the subject property and not the actual permit. The Wigginses further contend that they began to repair the house on 2 April 1981; the defendants contend that they merely began to assemble building repair materials on that date. In any event, on 6 April 1981, the defendants demolished the house despite the protests of the Wigginses. Defendant Rollins personally directed and completed the demolition.

II

On appeal, the Wigginses contend that summary judgment was improper because the evidence before the court raised genuine issues of material fact with respect to (a) whether the defendants were estopped from demolishing the Wigginses' house, rather than insuring its repair; (b) whether Rollins was acting with a corrupt or malicious intent when he personally signed a building permit authorizing the repair of the house and later directed its destruction four days after repairs had been started; and (c) whether the demolition was done in accordance with G.S. Sec. 160A-443 (1982). The defendants, on the other hand, contend that (a) Rollins' letter to plaintiffs "was simply an additional extension granted by the defendant Rollins and was not a requirement of law . . . [and therefore] could not work an estoppel on the City insofar as its ordinance dated May 20, 1980 is concerned"; (b) "governmental immunity" is a bar to the Wigginses' action; and (c) the Wigginses, by failing to challenge the administrative proceedings taken against them or to otherwise appeal from the enactment of the 20 May 1980 ordinance, are barred from now

challenging the validity of the proceedings. For the following reasons, we believe summary judgment was improperly granted.

III

Summary judgment is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Ragland v. Moore*, 299 N.C. 360, 261 S.E. 2d 666 (1980). And, the standard is well-known: All the evidence must be viewed in the light most favorable to the non-moving party; and questions of witness credibility are to be resolved by the jury. *Id.*

A.

[1] We turn to the relevant provision of the Monroe City Code, Sec. 9-1045(c)(2) (Supp. 1979):

> After failure of an owner of a . . . dilapidated dwelling, to comply . . ., the Inspector shall submit to the City Council an ordinance ordering the Inspector to cause such dwelling . . . to be repaired, altered, improved, or vacated and closed and removed or demolished, as provided in the original order of the Inspector. . . .

and the relevant portion of the 20 May 1980 ordinance, issued pursuant thereto: "The building inspector is hereby authorized and directed to proceed to repair or demolish the above described dwelling in accordance with his order to the owner thereof dated the 17th day of April 1980, and with the housing code and G.S. Sec. 16A-443." Generally, municipal ordinances are to be construed according to the same rules as statutes enacted by the legislature. *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 265 S.E. 2d 379 (1980). The aim is to ascertain and effectuate the intent of the municipal legislative body. *George v. Town of Edenton*, 294 N.C. 679, 242 S.E. 2d 877 (1978).

Construing the provisions of the Monroe City Code Sec. 9-1045(c)(2) (Supp. 1979), the 17 April 1980 order, and the 20 May 1980 ordinance together, we discern that Rollins had the option, under the terms of the 20 May 1980 ordinance, to either have city employees repair or demolish the Wigginses' dwelling, or to have the Wigginses themselves repair or demolish the dwelling. Ac-

cording to the Wigginses' pleadings, affidavits, and exhibits, Rollins chose to have the Wigginses proceed with the repairs. The Wigginses allege that they invested in materials and labor and timely commenced the repairs, but that the building was nevertheless demolished. The defendants argue that the 20 May 1980 ordinance authorized the demolition. In their pleadings the defendants state that Rollins' letter to the Wigginses "was simply an additional extension granted by the defendant Rollins and was not a requirement of law." We disagree.

The defendants rely on *Helms v. Charlotte*, 255 N.C. 647, 122 S.E. 2d 817 (1961) to support their argument. We find *Helms* distinguishable, since the *Helms* ordinance was not phrased in the disjunctive. The 20 May 1980 ordinance authorized alternative remedies—repair or demolition, which, under certain circumstances, are mutually exclusive. This case is such an instance. Once the Wigginses allegedly began the repairs within the 10-day time limit set by Rollins in his letter, Rollins had no authority to pursue the demolition until the 60-day repair period had elapsed. Although Rollins had the legal right initially to pursue either remedy—repair or demolition—he could not abandon the chosen remedy—the reparations—in midstream.

Our construction is consistent with the perceived intent of the municipal body, namely, to encourage property owners to invest in repairs rather than absorb the total loss of their property. Once the alternate remedy is elected, it cannot be arbitrarily withdrawn. We need not apply the doctrine of estoppel to grant the plaintiffs relief on this issue.

B.

Further, the Wigginses' forecast of evidence suggests that governmental immunity will not be a bar in this case.

Rollins' Immunity

[2] In *Pigott v. City of Wilmington*, 50 N.C. App. 401, 273 S.E. 2d 752, *cert. denied*, 303 N.C. 181, 280 S.E. 2d 453 (1981), this Court held that the chief building inspector for the City of Wilmington, in ordering the demolition of greenhouses which allegedly were not in compliance with the Wilmington building code, was a "public official" performing governmental duties involving the

exercise of judgment and discretion. Applying the *Pigott* analysis to the present facts, we hold that chief building inspector Rollins, in initially ordering the repair or demolition of the Wigginses' dwelling and in later complying with the City Council's 20 May 1980 ordinance, duties assigned to him by G.S. Sec. 160A-441 *et seq.* (1982) and by the Monroe City Code Sec. 9-1031 *et seq.* (Supp. 1979), was similarly a "public official" performing governmental duties involving the exercise of judgment and discretion.

Such a "public official" is immune from liability for "mere negligence" in the performance of those duties, but he is not shielded from liability if his alleged actions were "corrupt or malicious" of if "he acted outside of and beyond the scope of his duties." *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E. 2d 783, 787 (1952); *Pigott v. City of Wilmington.*

After reviewing the Wigginses' allegations in their pleadings and their forecast of evidence, we conclude that Rollins' motion for summary judgment was improperly granted. First, the Wigginses alleged in their Complaint that Rollins "wilfully, wantonly and maliciously ordered, supervised, and participated in the demolition of the property of the plaintiffs despite the obvious commencement of repairs. . . ." Second, the Wigginses' affidavits support their allegations—that Rollins directed them to repair the house within ten days, signed a building permit authorizing them to begin repairs, and then demolished the house after they had begun timely repairs. The affidavits tend to show that Rollins' behavior was corrupt or malicious or that he acted outside of and beyond the scope of his duties. Therefore, Rollins, on these facts, is not immune from liability.

The City's Immunity

[3] Turning to the City's potential liability, we stress that, under the common law, a municipality is immune from liability for the torts of its officers committed while they were performing a governmental function. *Galligan v. Town of Chapel Hill*, 276 N.C. 172, 171 S.E. 2d 427 (1970); *Vaughn v. County of Durham*, 34 N.C. App. 416, 240 S.E. 2d 456 (1977), *disc. rev. denied*, 294 N.C. 188, 241 S.E. 2d 522 (1978). However, N.C. Gen. Stat. Sec. 160A-485(a) (1982) establishes an exception to the common-law rule:

> Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability. No formal action other than the purchase of liability insurance shall be required to waive tort immunity, and no city shall be deemed to have waived its tort immunity by any action other than the purchase of liability insurance.

See generally P. Harper, *Statutory Waiver of Municipal Immunity upon Purchase of Liability Insurance in North Carolina and the Municipal Liability Crisis,* 4 Campbell L. Rev. 41 (1981).

Included in the record on appeal is a Travelers Insurance Comprehensive General Liability Insurance Policy issued to the City of Monroe. The City asserts that, under the terms of its policy, it has not been indemnified against the intentional acts of its employees and, therefore, has not waived its immunity pursuant to G.S. Sec. 160A-485(a) (1982). In support of its motion for summary judgment, the City included a letter from Thomas L. Poe, a Travelers Insurance agent, denying coverage on the intentional act theory. We are not bound by the insurance company's interpretation of its own policy's coverage.

The Travelers Insurance policy provides, in pertinent part:

> The company will pay on behalf of the *insured* all sums which the *insured* shall become legally obligated to pay as damages because of
>
> Coverage A. *bodily injury*
>
> Coverage B. *property damage*
>
> to which this insurance applies, caused by an occurrence. . . .

"Occurrence" is defined in the policy 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*. . . ."

In *Edwards v. Akion,* 52 N.C. App. 688, 279 S.E. 2d 894, *aff'd per curiam,* 304 N.C. 585, 284 S.E. 2d 518 (1981), this Court held that an intentional assault committed by a city employee qualified as an "occurrence" under an identically-worded South Carolina In-

surance "occurrence" definition since the assault was neither intended nor expected by the City. This Court went on to hold in *City of Wilmington v. Pigott*, 64 N.C. App. 587, 307 S.E. 2d 857 (1983), *disc. rev. denied*, 310 N.C. 308, 312 S.E. 2d 650 (1984), that the acts of a public official merely exercising his discretion in the performance of his governmental duties did not constitute an "accident" within an identically-worded Travelers Insurance "occurrence" definition.

> The words 'accident' and 'accidental' have generally been held by the courts to mean 'that which happens by chance or fortuitously, without intention or design, and which is unexpected, unusual, and unforeseen.' 43 Am. Jur. 2d Insurance, Sec. 559; *Skillman v. Insurance Co.*, 258 N.C. 1, 7, 127 S.E. 2d 789, 793 (1962). We cannot label Inspector Rowan's order to the Pigotts to remove their greenhouses an 'accident.' The decision did not happen by chance and was not unexpected, unusual or unforeseen. It was certainly intended by the City that as chief building inspector Rowan would exercise his discretion to make these sorts of decisions as he saw fit.

Id. at 589, 307 S.E. 2d at 859. This Court had already ruled in the companion case, *Pigott v. City of Wilmington*, 50 N.C. App. 401, 273 S.E. 2d 752 (1981), discussed *supra*, that summary judgment was properly granted for the chief building inspector, absent allegations of corruption, malice, or exceeding the scope of his official duties. Thus, the 1983 case simply confirmed that the chief building inspector's conduct fell within the acceptable and foreseeable norms of official discretion. In the present case, however, the Wigginses' forecast of evidence that Rollins acted corruptly or with malice or exceeded the scope of his official authority, was sufficient to withstand Rollins' motion for summary judgment. By the same token, Rollins' alleged conduct, if proven, qualifies, under *Edwards v. Akion*, as an "occurrence," since it was "neither expected, nor intended from the standpoint of the [City] . . . ." *See generally Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 72 N.C. App. 80, --- S.E. 2d --- (1984) (subjective examination of intent or expectation controls).

Consequently, the liability insurance policy purchased by the City indemnifies the City from the torts alleged in the case at

hand. We are persuaded that the City has waived its immunity from liability in tort on these facts.

C.

Finally, the Wigginses assign error to the wordings of the 17 April 1980 order and the 20 May 1980 ordinance. As mentioned earlier, the Wigginses did not pursue any of the administrative remedies set forth in N.C. Gen. Stat. Sec. 160A-446(c) (1982). They are, therefore, barred from arguing this issue on appeal. *See Harrell v. City of Winston-Salem*, 22 N.C. App. 386, 206 S.E. 2d 802, *cert. denied*, 285 N.C. 757, 209 S.E. 2d 281 (1974).

IV

For the reasons stated, summary judgment in favor of the defendants was erroneously granted. The trial court's order is therefore

Reversed.

Judges ARNOLD and WELLS concur.

YASSOO ENTERPRISES, INC. D/B/A DIAMOND JIM'S v. NORTH CAROLINA JOINT UNDERWRITING ASSOCIATION

No. 8421SC486

(Filed 19 February 1985)

1. Insurance § 136; Evidence § 29.2— intentional burning—records of burglar alarm service—admission harmless error

In an action arising from defendant insurer's refusal to pay damages resulting from a deliberately set fire in plaintiff's business premises, the court erred by admitting testimony that plaintiff's burglar alarm system had a "bad control" and that a service call was refused. The witness presenting the testimony was not the custodian of records and there was no showing of how the records were maintained or of who had access to the records. Subsequent testimony as to the identity of the employee whose service was refused, admitted without objection, did not waive the earlier objection because the witness was testifying on the basis of an improperly admitted document; however, the admission of the document and related testimony was harmless because the evidence was irrelevant and proved nothing.

2. Insurance § 136; Evidence § 48.2— intentional burning—expert testimony as to forcible entry

In an action arising from defendant insurer's refusal to pay damages resulting from a deliberately set fire on plaintiff's business premises, the court did not err by allowing a fire chief and an S.B.I. agent to testify that plaintiff's building was not forcibly entered. The fire chief's testimony was admitted after the court became acquainted with his experience and background, and the fact that the S.B.I. agent examined the door nearly a year after the fire and after the door had been painted and new locks installed went to its credibility, not its competence.

3. Insurance § 136— intentional burning—evidence sufficient

Plaintiff's motions for directed verdict and for judgment n.o.v. were properly denied where the evidence on the issue of intentional burning tended to show that the fire was intentionally set and had been started inside the building, that the building was locked when plaintiff's president left it, that he had the only key, that the doors had not been forced open, that there was evidence apparently meant to look like forced entry, that there were no signs of damage, vandalism, or larceny, that plaintiff's president was the sole owner, that plaintiff was experiencing financial difficulty, and that the fire insurance had been increased twice shortly before the fire.

4. Insurance § 136— intentional burning—instructions on motive

In an action against an insurer for failing to pay damages resulting from a deliberately set fire, the court did not err by refusing to instruct the jury that evidence of motive has no probative value unless there is other evidence directly linking plaintiff or an agent of plaintiff to the fire.

APPEAL by plaintiff from *Walker (Russell G., Jr.), Judge.* Judgment entered 19 October 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 9 January 1985.

This is a civil action in which plaintiff seeks recovery on an insurance policy issued by defendant for damages resulting from a fire in business premises occupied by plaintiff.

James Warren was the president and sole shareholder of plaintiff Yassoo Enterprises, Inc. Plaintiff corporation owned and operated a private social club called "Diamond Jim's" which was located on leased premises in Winston-Salem. Prior to September 1980, plaintiff owned and operated a club in the same building called "The Power Company." During September 1980, the club was renovated and the name was changed to attract a different clientele.

At about 2:30 a.m. on 13 February 1981, the Winston-Salem Fire Department, returning from a fire call, discovered a fire at

Diamond Jim's. The fire had apparently been burning for one or two hours when discovered and had almost burned itself out. In the course of extinguishing the fire, firemen discovered a wrecking bar just outside an open rear door on the basement level of the club. Two empty five gallon gasoline cans were found inside the club. There were distinct pour patterns on the floor and stairs inside the club. Because of the materials involved and weather conditions, accidental or spontaneous combustion was eliminated as the cause of the fire.

At the time of the fire, an insurance policy issued by defendant to plaintiff on 20 October 1980 was in effect. It insured against all direct loss by fire. The initial coverage of $73,000 had been increased twice and, at the time of the fire, was $88,000.

Warren, who had left the club at about 11:45 p.m. the night before, was notified of the fire at 6:00 a.m., when he returned home after spending the night with one of the club's employees. He immediately notified the local agency for defendant. W. R. Cutler, defendant's adjuster, and Warren inspected the burned premises and prepared an inventory of damaged property. Warren provided information concerning the extent of plaintiff's loss, alleging it was in excess of the policy amount. Defendant refused to pay plaintiff's claim and plaintiff filed its complaint alleging a breach of the insurance contract.

In its answer, defendant denied liability for the loss and asserted several defenses on the basis that Warren or other agents of plaintiff had set or procured the setting of the fire and that plaintiff otherwise had failed to comply with the provisions of the policy.

From a judgment on a jury verdict for defendant denying plaintiff recovery, plaintiff appealed.

Pfefforkorn, Cooley, Pishko and Elliot, by David C. Pishko, for plaintiff-appellant.

Yates, Fleishman, McLamb and Weyher, by Joseph W. Yates, III, and Barbara B. Weyher, for defendant-appellee.

EAGLES, Judge.

I

[1] Plaintiff contends that it was error for the trial court to admit certain documentary evidence and to allow testimony as to its contents. We agree. The document in question was a copy of the installation and service record of plaintiff's burglar alarm system. It indicates that the system was purchased on 13 September 1979. The record shows that the system had been serviced on 15 October 1980 and a "bad control" found, and that a service call to correct the problem was refused on 30 January 1981. The witness who testified with regard to the document was the custodian of business records, including service records, for Alarmaster, Inc. Those records included plaintiff's service record.

Alarmaster was a successor corporation to Sentinel-Guard, the company that had sold and installed plaintiff's burglar alarm. The witness was not employed as custodian of records for either company at the time the entries were made on plaintiff's service record. Though she indicated general familiarity with the records of Sentinel-Guard, she was not personally familiar with plaintiff's record. Further, there is no showing how the records of either company were maintained. Specifically, there is no indication who had access to the records of Sentinel-Guard, who would have made the entries indicating that service was refused or whether the record entry was made in the normal course of business at or near the time of the alleged refusal of service. The only indication that the record was made in the usual course of business is in defendant's counsel's question to the witness, which was immediately followed by plaintiff's objection to the ensuing testimony. The court overruled that objection and a later objection to the admission of the document. In our view, the foundation for the admission of this evidence was inadequate, failing to establish the usual indicia of reliability that should accompany admissible business records. *See Pinner v. Southern Bell*, 60 N.C. App. 257, 298 S.E. 2d 749, *rev. denied*, 308 N.C. 387, 302 S.E. 2d 253 (1983). *See generally*, Brandis, *N.C. Evidence*, Section 155 (1982 and Supp. 1983).

Defendant argues that, even if the document and related testimony were wrongly admitted, plaintiff's objections were

waived by his failure to object to the following question by defendant's counsel and the witness's response:

> Q. Do you know who the individual was who attempted to repair the system on January 30, 1981 but whose service was refused?
>
> A. Mr. Rundo.

We disagree. Objections to the earlier admission of evidence are waived only when evidence of the *same import* is later admitted without objection. *Harvel's, Inc. v. Eggleston*, 268 N.C. 388, 150 S.E. 2d 786 (1966). The question and response quoted above do not constitute evidence of the same import as that objected to and incorrectly admitted. Plaintiff's objection to the admission of the earlier evidence was not waived by his failure to object to this question. Further, since the witness by her own admission was testifying only on the basis of a document that was improperly in evidence, and since counsel's question was apparently drawn from that same evidence, plaintiff's opposition to this evidence was self-evident and did not require an additional objection. *Duke Power v. Winebarger*, 300 N.C. 57, 265 S.E. 2d 227 (1980).

Though it was error to admit the document and the related testimony, the error was harmless because the evidence is irrelevant and proves nothing. There is no evidence or suggestion in the record as to why service was refused. Contrary to the testimony of the witness, the service record does not show that James Warren refused the service, only that service was refused. Further, there is no evidence tending to show that the "bad control" rendered the burglar alarm inoperable. Indeed, the three months delay between the discovery of the bad control and the service call to repair it indicates that the faulty control did not affect the system's effectiveness. Further, plaintiff has not shown that the verdict of the jury was probably influenced by this error. *State v. Murvin*, 304 N.C. 523, 284 S.E. 2d 289 (1981); *Collins v. Lamb*, 215 N.C. 719, 2 S.E. 2d 863 (1939). Plaintiff has shown no prejudicial error and his contention is without merit.

II

[2] Plaintiff next contends that the testimony of two witnesses that the building was not forcibly entered should have been excluded because the witnesses were not qualified by the court as

experts in the field of determining whether entry was forced. We disagree. The witnesses in question were Chief O'Ferrell of the Statesville Fire Department and Eugene Bishop of the State Bureau of Investigation. Chief O'Ferrell was initially qualified only as an expert in arson investigation. Later, after becoming acquainted with his experience and background, the court allowed O'Ferrell to give his opinion, over plaintiff's objection, as to whether the door had been forcibly opened. Though not formally designated an expert, the court's ruling to that effect was implied by its action. *Apex Tire and Rubber Co. v. Merritt Tire Co.*, 270 N.C. 50, 153 S.E. 2d 737 (1967).

With regard to Agent Bishop, plaintiff contends that his testimony that the basement door to the club had not been forced open was meaningless because Bishop did not examine the door until nearly a year after the fire and after the door had been painted and new locks had been installed. Plaintiff argues therefore that the testimony should have been excluded. This argument is not persuasive. Plaintiff's objections to Bishop's testimony go to its credibility, not its competence. The evidence is relevant and admissible. Whether it proves anything is a question for the jury, not the judge. *In re Durham Annexation Ordinance*, 66 N.C. App. 472, 311 S.E. 2d 898, *rev. denied*, 310 N.C. 744, 315 S.E. 2d 701 (1984). *See generally*, Brandis, *supra*, Section 8 (1982 and Supp. 1984). Plaintiff's contentions are without merit.

III

[3] Plaintiff contends also that it was error for the trial court to deny its motions for directed verdict, made at the close of the evidence, and for judgment n.o.v. The basis for both motions and for plaintiff's argument on appeal is that defendant's evidence on the issue of intentional burning fails to establish a link between the fire and Warren or any other agent of plaintiff. We disagree.

In civil cases involving intentional burnings, this court has held on at least two occasions that a jury may properly infer from circumstantial evidence that a party caused or procured a fire.

> Ordinarily, there is no direct evidence of the cause of a fire, and therefore, causation must be established by circumstantial evidence. . . . 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. . . . 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. [Citations omitted.]

Fowler-Barham Ford, Inc. v. Lumbermen's Mutual, 45 N.C. App. 625, 263 S.E. 2d 825, *rev. denied,* 300 N.C. 372, 267 S.E. 2d 675 (1980); *Freeman v. Saint Paul Fire and Marine Ins. Co.,* 72 N.C. App. 292, --- S.E. 2d --- (1985).

Plaintiff nevertheless contends that, because there was no evidence placing Warren or another agent at the fire scene when the fire started, the evidence falls short of the standards pronounced in *Fowler-Barham Ford, supra.* For this proposition, plaintiff relies on *State v. Tew,* 62 N.C. App. 190, 302 S.E. 2d 633, *rev. denied,* 309 N.C. 464, 307 S.E. 2d 370 (1983), a criminal case in which it was held that a criminal defendant may not be convicted of arson unless there was some evidence placing him near the scene at the time of the fire.

We note first that plaintiff's reliance on *State v. Tew* is misplaced because that case involves the more strict standards required to withstand a motion to dismiss criminal charges. However, in *Freeman v. Saint Paul, supra,* a case involving facts similar to those before us, the plaintiff contended that "North Carolina courts should require an insurer to show proof of opportunity to set the fire before relying on the defense of intentional burning." *Id.,* slip opinion p. 6. The *Freeman* court rejected that argument, finding "such a requirement to be too stringent." *Id.* Accordingly, we reject plaintiff's argument here.

It is well established that the purpose for a motion for a directed verdict is to test the legal sufficiency of the evidence to support a verdict for the plaintiff and to submit the contested issue to a jury. *E.g., Manganello v. Permastone,* 291 N.C. 666, 231 S.E. 2d 678, 90 A.L.R. 3d 525 (1977); *Wallace v. Evans,* 60 N.C. App. 145, 298 S.E. 2d 193 (1982). Where a motion for directed verdict is made at the close of the evidence, the court must consider the evidence in the light most favorable to the non-movant and give him the benefit of every reasonable inference. *E.g., Cook v. Export Leaf Tobacco Co.,* 50 N.C. App. 89, 272 S.E. 2d 883 (1980), *rev. denied,* 302 N.C. 396, 279 S.E. 2d 350 (1981). Any contradic-

tions, conflicts or inconsistencies in the evidence must be resolved in favor of the opposing party. *Hart v. Warren*, 46 N.C. App. 672, 266 S.E. 2d 53, *rev. denied*, 301 N.C. 89, --- S.E. 2d --- (1980). The court should deny the motion if there is more than a scintilla of evidence to support the plaintiff's *prima facie* case. *Wallace v. Evans, supra. See generally*, 11 N.C. Index 3d, *Rules of Civil Procedure*, Section 50 (1978).

A motion for judgment n.o.v. is essentially a renewal of a motion for directed verdict, *Harvey v. Norfolk Southern Ry.*, 60 N.C. App. 554, 299 S.E. 2d 664 (1983), and the same standards govern the trial court's consideration of it as for a directed verdict motion. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). Those standards are also clearly established in our law. *See Morrison v. Concord Kiwanis Club*, 52 N.C. App. 454, 279 S.E. 2d 96, *rev. denied*, 304 N.C. 196, 285 S.E. 2d 100 (1981).

Bearing these principles in mind, some of defendant's evidence on the issue of intentional burning tends to show: (1) that the fire was intentionally set and that it had been started from inside the building; (2) that the building was locked when Warren left it; (3) that Warren had the only key; (4) that the doors to the club had not been forced open; (5) that there was evidence apparently meant to look like entry had been forced; (6) that there were no signs of damage, vandalism or larceny; (7) that Warren was the sole owner; (8) that plaintiff was experiencing financial difficulty; and (9) that the fire insurance had been increased twice shortly before the fire. Plaintiff's evidence tends to show that Warren drove two female employees home after closing the club for the night and locking up at 11:45 p.m.; that he remained at the residence of one of the employees until after the fire had been extinguished and returned home at 6:00 a.m.

Although there is no direct evidence linking Warren or another agent of plaintiff with the fire, the circumstantial evidence is clearly sufficient to allow the case to be submitted to the jury and to support the verdict in defendant's favor. *Fowler-Barham Ford v. Ins. Co.; Freeman v. Saint Paul*, both *supra*. The court did not err in denying plaintiff's motions for directed verdict and for judgment n.o.v.; plaintiff's contentions are without merit.

[4] Plaintiff finally contends that the trial court should have given the jury the instructions requested by it: that evidence of motive has no probative value unless there is other evidence directly linking plaintiff or an agent of plaintiff to the fire. We disagree. Plaintiff's sole authority for this argument is *State v. Tew, supra,* which, as we pointed out above, does not govern this civil action. Moreover, we note that the instructions actually given by the trial court emphasize that the jury must resolve the question of whether plaintiff had participated in the burning, not just whether plaintiff had motive.

Plaintiff makes several other assignments of error, but has failed to bring them forward in an argument. Those assignments are abandoned. N.C. App. R. 28(b)(5). In the trial below, we find

No error.

Judges WEBB and COZORT concur.

STATE OF NORTH CAROLINA v. JAMES ERVIN THOMPSON, JR.

No. 8410SC139

(Filed 19 February 1985)

1. Searches and Seizures § 3— van—no legitimate expectation of privacy

Defendant failed to demonstrate a legitimate expectation of privacy in a van that was searched and therefore failed to show any infringement of his Fourth Amendment rights where defendant specifically testified that he did not own the van, that he never owned it, and that he did not know what items were in the van; he did not acknowledge ownership of any particular item inside the van; and there was no evidence that any item seized, other than a coat which was seized on a subsequent search, was taken from a duffle bag as opposed to some open area of the van.

2. Criminal Law § 91— speedy trial—exclusion of time involving discovery

Though defendant was not tried within the 120-day time period of the Speedy Trial Act, he was nevertheless brought to trial within apt time where the trial court properly excluded the period of delay resulting from defendant's request for discovery and the State's efforts to comply.

3. Criminal Law § 93— corroborating testimony—order of admission—no error

The trial court did not err in allowing a detective to testify prior to a witness whose testimony the detective was supposed to corroborate, since,

when the admissibility of evidence depends upon some preliminary showing, the trial judge may permit its introduction upon counsel's assurance that such showing will be forthcoming.

4. **Criminal Law § 71— purpose of travel—shorthand statement of fact**

Testimony by a codefendant that he, defendant, and others agreed to leave St. Louis and come to Raleigh for the purpose of committing burglaries was properly admitted by the trial judge as a shorthand statement of fact and was not excludable as being conclusory.

APPEAL by defendant from *Farmer, Judge.* Judgments entered 25 October 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 16 October 1984.

Attorney General Edmisten, by Assistant Attorney General Archie W. Anders, for the State.

Yeargan, Thompson & Mitchiner, by W. Hugh Thompson, for defendant appellant.

BECTON, Judge.

I

Principally on the basis of the testimony of co-defendant, William Nobe, the defendant, James Thompson, Jr., was convicted of thirty-four separate charges—one charge of breaking or entering, fourteen charges of second degree burglary, twelve charges of felonious larceny, one charge of possession of implements of housebreaking, one charge of safecracking, and five charges of conspiracy to commit burglary—and was given active prison sentences totalling 105 years.

Having reason to believe that defendant was a member of a well-known Medina gang, which operated out of St. Louis, Missouri, and which was considered responsible for hundreds of burglaries in the southeastern United States, and having a hunch, but no real evidence, that defendant had been involved in a recent breaking and entering in Raleigh, law enforcement officers stopped the 1978 GMC van defendant was driving, detained defendant at the scene for approximately four hours until a search warrant was obtained, and then searched the van. The search revealed nothing considered by the officers at that time to be important, except two screwdrivers, two pairs of gloves, one flashlight, and one pair of tennis shoes. Having seized those items

in the search, Raleigh police officers charged defendant with possessing burglary tools. The following day, Raleigh police detectives found a brown button at the scene of a recent burglary. Recalling that the search of defendant's 1978 GMC van the previous day had also revealed the existence of a coat missing a button similar to the one found at the burglary scene, the officers obtained a second search warrant and seized the coat as well as other items from the van.

Based on the testimony of William Nobe, the co-defendant turned State's evidence, the State's theory was simple—Sam Medina, William Nobe, and the defendant, came to Raleigh in the summer of 1982 to burglarize homes. They registered in motels under false names and then drove through "exclusive" neighborhoods picking out homes to burglarize. When the list was completed, the three would go to a public library and secure telephone numbers from the Raleigh City Directory. When they discovered, by telephoning, that the homes were not occupied, they would burglarize them. Using the same modus operandi, the three came back to Raleigh in February 1983 to burglarize more homes. Defendant was indicted on 14 March, 25 April and 20 June 1983 on the various charges.

II

Although defendant brings forward several assignments of error concerning the admission of evidence and the sufficiency of evidence on the burglary charges, defendant's primary arguments on appeal relate to the denial of his motions to suppress evidence. Defendant contends that he had a legitimate expectation of privacy in the area searched; that neither affidavit sets forth sufficient facts to support a determination by the magistrate that probable cause existed for the searches; and that the second affidavit is defective for the additional reason that it is the "tainted fruit of the first search." For the reasons that follow, we find no error in defendant's trial.

III

A. 27 February 1983 Stop and Search

On 27 February 1983, the defendant and William Nobe were observed by City of Raleigh detectives placing filled duffle bags and gym bags in a 1978 GMC van while it was parked at the

Howard Johnson Motel at Crabtree Valley. Defendant drove the van from the motel through Raleigh and was later stopped on Highway 70 in Garner. Defendant was charged with improper use of a traffic lane and driving without being licensed as an operator by the North Carolina Department of Motor Vehicles, but those charges were later dismissed. Defendant, as driver of the van, and Nobe, as passenger, were detained at the scene for approximately four hours while detective Williams of the Raleigh Police Department obtained a search warrant, listing defendant and Nobe as persons to be searched and the van as the vehicle to be searched. The 27 February 1983 search warrant is titled "In the Matter of: Thompson & Nobe" and the accompanying inventory of seized property is titled: "In the Matter of James Ervin Thompson." The application for the search warrant contains a long affidavit of detective Williams, which we need not discuss, considering our disposition of the "legitimate expectation of privacy" issue in part IV, *infra.*

B. The 28 February 1983 Search Warrant

On the following day, Raleigh police detectives applied for a second search warrant to search the 1978 GMC van and executed an affidavit in support of the search warrant. This second search warrant was titled: "In the Matter of James Ervin Thompson, Jr." and the inventory of seized property noted that James Ervin Thompson, Jr., was the "owner of the place searched, from whom the items were seized or in apparent control."

Upon defendant's motion to suppress evidence and testimony relating to items found or observed during the two searches of the van, the trial court, at a pre-trial suppression hearing, denied the motions to suppress on the basis that defendant had not shown any "expectation of privacy in the van or its contents and; therefore, [had] failed to make a showing that the Fourth amendment was even applicable to the alleged search and seizure in this case."

IV

[1] Although the probable cause issues raised by defendant appear to have merit, we do not reach them, because defendant has failed to carry his threshold burden of showing that the State infringed his individual Fourth Amendment rights. *Rakas v. Illinois*, 439 U.S. 128, 58 L.Ed. 2d 387, 99 S.Ct. 421 (1978); *State v. Green-*

wood, 301 N.C. 705, 273 S.E. 2d 438 (1981); *State v. Melvin*, 53 N.C. App. 421, 281 S.E. 2d 97 (1981), *cert. denied*, 305 N.C. 762, 292 S.E. 2d 578 (1982). In other words, "a defendant is obliged to show that he had a legitimate expectation of privacy in the area searched before he can invoke the protection of the Fourth Amendment." *United States v. Smith*, 621 F. 2d 483, 486 (2d Cir. 1980), *cert. denied*, 449 U.S. 1086, --- L.Ed. 2d ---, --- S.Ct. --- (1981).

The old automatic standing rule—permitting the defendant to suppress evidence when he was "legitimately on [the] premises where a search occur[red]," *Jones v. United States*, 362 U.S. 257, 267, 4 L.Ed. 2d 697, 706, 80 S.Ct. 725, 734 (1960)—was rejected in *United States v. Salvucci*, 448 U.S. 83, 65 L.Ed. 2d 619, 100 S.Ct. 2547 (1980). The *Salvucci* Court stated: "The person in legal possession of a good seized during an illegal search has not necessarily been subject to a Fourth Amendment deprivation. . . . [A]n illegal search only violates the rights of those who have 'a legitimate expectation of privacy in the invaded place'." 448 U.S. at 91-2, 65 L.Ed. 2d at 627-8, 100 S.Ct. at 2552-3 (quoting *Rakas v. Illinois*, 439 U.S. at 143, 58 L.Ed. 2d at 401, 99 S.Ct. at 430).

At the hearing on his motion to suppress, the defendant in this case specifically testified that he did not own the van, that he never owned it, and that he did not know what items were in the van. Further, the defendant did not acknowledge ownership of any particular item inside the van, including the duffle and gym bags.

Defendant argues that he should prevail because he introduced the search warrant, the affidavit in support of the search warrant, and the inventory of seized property, all of which refer to him, or as in the case of the second inventory of seized property, list him as "the owner of the place searched, from whom the items were seized or in apparent control." We are not persuaded, considering (a) the testimony at the suppression hearing; (b) the absence of evidence that defendant owned or ever possessed any items seized, including the green coat; and (c) the absence of evidence that any item seized, other than the green coat, came from a duffle bag as opposed to some open area of the van.

In *United States v. Smith,* quoted above, the defendant, who was driving the car, did not own the car, denied any ownership interest in the property seized from the trunk, and argued that he had no knowledge of any property in the trunk. Finding that *Smith* took no precautions to maintain any privacy in any area of the car, the *Smith* Court concluded that Smith had no legitimate expectation of privacy in the trunk of the car. In *United States v. Goshorn,* 628 F. 2d 697 (1st Cir. 1980), the United States Court of Appeals for the First Circuit said:

> Since appellee was not the registered owner of the Valiant, he was required to establish his personal interest in the parcel by asserting either that he had placed it in the trunk or that he had some possessory interest in the contents of the bags. This he did not do. Furthermore, with respect to the parcel itself, the record is silent on whether the bags were sealed or otherwise secured in such a manner that would support an inference of a reasonable expectation of privacy.

Id. at 701.

Likewise, the defendant in this case has failed to show any infringement of his Fourth Amendment rights. He failed to carry his threshold burden of demonstrating a legitimate expectation of privacy in the van that was searched. As a result of our holding, it is not necessary to reach the probable cause issues raised by the defendant, or defendant's contention that the testimony concerning the items seized and the scientific analysis performed on those items should have been suppressed.

V

[2] Defendant next argues that "the trial court committed reversible error in denying the defendant's motion to dismiss actions 83CRS13436 [possession of burglary tools], 83CRS14021 [breaking or entering and larceny], and 83CRS23969 [conspiracy to commit burglary] because defendant was not tried on said charges within the time period of the speedy trial act." We reject this argument.

It is true that defendant was not tried within the 120-day time period set forth in N.C. Gen. Stat. Sec. 15A-701(a)(1) (1983). The trial court excluded the period of delay resulting from defendant's request for discovery and the State's efforts to comply.

On the basis of N.C. Gen. Stat. Sec. 15A-701(b) (1983) and *State v. Marlow*, 310 N.C. 507, 313 S.E. 2d 532 (1984), the trial judge was correct.

G.S. Sec. 15A-701 (1983) reads, in relevant part:

> (b) The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:
>
> (1) Any period of delay resulting from other proceedings including, but not limited to, delays resulting from:
>
> . . .
>
> d. Hearings on any pretrial motions or the granting or denial of such motions.
>
> The period of delay under this subdivision must include all delay from the time a motion or other event occurs that begins the delay until the time a judge makes a final ruling on the motion or the event causing the delay is finally resolved . . . .

With regard to this statute, the *Marlow* Court said:

> After careful consideration, we have determined that the Speedy Trial Act's rule of exclusion, specifically subsection (b) of section 701, should include the period of delay resulting from a defendant's request for discovery. This excludable discovery period shall commence upon the service of defendant's motion for request for discovery upon counsel for the State, and shall encompass only such time which occurred after the speedy trial period has been triggered. . . . Furthermore, there are various circumstances in which the investigative process is hindered by the secretion, disposition or attempted elimination of evidence by not only interested parties, but also by innocent persons unaware of the significance of such information.
>
> Our decision to exclude discovery time does not force the defendant to anxiously await, at the mercy of the State, the completion of discovery within a reasonable time. The State remains bound not only by requirements of good faith to proceed in a timely manner, but also by the defendant's ability to compel earlier discovery, pursuant to N.C. Gen. Stat. Sec. 15A-909.

310 N.C. at 515-6, 313 S.E. 2d at 537-8.

Findings of fact by the trial judge are conclusive on appeal when supported by competent evidence. *State v. Jackson,* 306 N.C. 642, 295 S.E. 2d 383 (1982). In this case, the trial judge made twenty-three findings of fact, all of which were supported by the evidence. Based on these findings of fact, the trial court concluded that the defendant had been brought to trial within the time limits established by G.S. Sec. 15A-701 (1983). We agree, and conclude that the trial court properly denied defendant's motion to dismiss the case based on speedy trial violations.

VI

We summarily reject defendant's arguments concerning the admission of evidence.

[3] A. We find no error in the trial court's decision to allow detective Williams to testify prior to witness Nobe, when detective Williams's testimony was offered to corroborate the anticipated testimony of witness Nobe. When the "admissibility of evidence depends upon some preliminary showing, [the trial judge may] permit its introduction upon counsel's assurance that such showing will be forthcoming." 1 H. Brandis, Jr., *North Carolina Evidence* Sec. 24, at 87-8 (2d rev. ed. 1982); *see State v. Hinson,* 310 N.C. 245, 311 S.E. 2d 256 (1984). Considering the cited authority and the trial court's cautionary instructions which follow, we find no error:

> Members of the jury, any testimony by this witness as to what Mr. Nobe told him is offered for the sole purpose of corroborating the testimony of Mr. Nobe when he testifies later, if in fact it does corroborate, and for that purpose only.

[4] B. Witness Nobe's testimony that he, defendant, and others agreed to leave St. Louis and come to Raleigh for the purpose of committing burglaries was properly admitted by the trial judge as a "shorthand statement of the fact" and was not excludable as being "conclusory." *See* 1 H. Brandis, Jr., *supra,* Sec. 125.

C. We reject defendant's contention that the trial court erred in admitting a fingerprint card into evidence, and in admitting certain testimony concerning the fingerprint card, since our review of the record reveals that a proper foundation was laid for

the introduction of the fingerprint card and the corresponding testimony.

D. We also reject defendant's final assignment of error concerning the trial court's admission of testimony with regard to how much time detective Williams spent investigating this case. Even if the testimony is irrelevant and immaterial, it was, in any event, not prejudicial.

VII

Finding that the State proved all essential elements of each crime, that the questioned indictments support the charges of second degree burglary, and that the trial court did not err in failing to submit breaking or entering as a lesser included offense of burglary, we summarily reject defendant's next two assignments of error.

For the foregoing reasons, we find

No error.

Chief Judge HEDRICK and Judge PHILLIPS concur.

GEORGE D. PHILLIPS v. JANE D. PHILLIPS

No. 843DC350

(Filed 19 February 1985)

1. Divorce and Alimony § 30— Constitutional Law § 24.9—equitable distribution —no right to jury trial

The trial court in an equitable distribution action erred by submitting to the jury questions about marital property and equitable distribution that were not pure issues of fact. There is no right to a jury trial on an equitable distribution claim, and an "advisory jury" under Rule 39(c) of the North Carolina Rules of Civil Procedure may only try issues of fact. G.S. 50-20, G.S. 50-21, N.C. Constitution Art. I, § 25.

2. Divorce and Alimony § 30— equitable distribution—evidence and findings of fault improper

The trial court in an equitable distribution action erred by admitting evidence of fault and making findings as to the relative fault of the parties.

3. Divorce and Alimony § 30— equitable distribution—assets acquired by loan from corporation—repaid during marriage

In an action for equitable distribution where defendant owned 98% of a corporation prior to the marriage, assets acquired after the marriage by loans from the corporation which were repaid at least in part by income earned during the marriage should not have been treated as immune from equitable distribution. G.S. 50-20(b)(2).

4. Divorce and Alimony § 30— equitable distribution—condo purchased after separation

In an action for equitable distribution, the court did not err in permitting the C.P.A. who handled plaintiff's corporate accounting to testify concerning the source of funds used to purchase assets; did not err in making findings as to where the defendant's child lived after the parties separated and as to defendant's remarriage, her employment, and her new husband's employment; and did not err in allowing defendant to testify that plaintiff gave her $9,000 to purchase a condominium after the parties separated. Marital funds are not converted into separate property by an exchange for other property after separation. G.S. 50-20(c)(1), G.S. 50-20(c)(4).

APPEAL by defendant from *Ragan, Judge*. Judgment entered 2 December 1983 in District Court, CARTERET County. Heard in the Court of Appeals 29 November 1984.

Plaintiff and defendant were married on 7 November 1970. They separated on 1 June 1981. Plaintiff filed an action for divorce on grounds of adultery on 7 May 1982. Defendant denied the adultery and filed counterclaims for divorce absolute and equitable distribution of the marital property. Plaintiff demanded a jury trial of all issues arising out of the counterclaim.

Plaintiff's action for divorce was dismissed by stipulation on 8 July 1982 and defendant was granted judgment of absolute divorce on 15 July 1982. The counterclaim of equitable distribution was tried before a jury and upon the verdict of the jury the judge entered judgment dated 2 December 1983.

Defendant appeals the judgment.

Bennett, McConkey & Thompson, by Thomas S. Bennett, for defendant appellant.

Wheatly, Wheatly & Nobles, by C. R. Wheatly, Jr., for plaintiff appellee.

ARNOLD, Judge.

I

[1] A primary question presented by this appeal is whether the plaintiff had a right to trial by jury in this action based on the Equitable Distribution Act, G.S. 50-20, -21. The Act does not expressly or implicitly provide for jury trial. Rather, G.S. 50-21(a) states, in pertinent part, ". . . [n]othing in G.S. 50-20 or this section shall restrict or extend the right to trial by jury as provided by the Constitution of North Carolina."

The North Carolina Constitution 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." N.C. Const. art. I, § 25 (formerly § 19).

Chief Justice Parker, in discussing jury trial under Section 19 (now 25), stated that, "[u]nder this constitutional provision, 'trial by jury is only guaranteed where the prerogative existed at common law or by statute at the time the Constitution was adopted.' [citation omitted]." *In re Wallace*, 267 N.C. 204, 207, 147 S.E. 2d 922, 923 (1966). *Accord In re Ferguson*, 50 N.C. App. 681, 683, 274 S.E. 2d 879, 880 (1981).

The rights to property provided for by the Equitable Distribution Act did not exist prior to the Act in either statute or the common law. *See* Sharp, Equitable Distribution of Property in North Carolina: A Preliminary Analysis, 61 N.C. L. Rev. 247, 247-48 (1983). Our research indicates that no right to equitable distribution, or to an action to vindicate that right triable by a jury, existed at the time of the adoption of the North Carolina Constitution. Under the rule of *In re Wallace*, the plaintiff had no right to a jury trial of the equitable distribution claim.

The plaintiff argues that the trial judge used the jury as an "advisory jury" pursuant to Rule 39(c) of the North Carolina Rules of Civil Procedure. We agree that the trial judge, in his discretion, may use an advisory jury in actions where no right to jury trial exists. Yet, such a jury may only try issues of fact.

Our review of the issues put to the jury in the present case indicates that the trial judge asked the jury to determine ques-

tions, such as what was marital property and what was an equitable distribution of the marital property, that were not pure questions of fact. Indeed, given that the equitable distribution action is, as per its title, "equitable," we are doubtful whether many of the issues to be determined, except for, say, property valuation, are properly determined by a jury, even an advisory one.

While the trial judge in the present case made separate findings, and as to one of the issues, overruled the jury's answer, still we find that he did submit issues to the jury, which he should have decided himself, and apparently relied on the jury's answers in his findings of fact. On remand, the trial judge should identify the marital property, find its net value (with a jury's help, if he wishes), and then, considering the statutory factors, determine whether the property should be equally divided or not, and then if he divides the property unequally, make the proper findings.

II

[2] The defendant contends further that the trial judge erred in admitting evidence as to the fault of the parties. We agree. In our recent opinion *Hinton v. Hinton*, 70 N.C. App. 665, 321 S.E. 2d 161 (1984), we held that a trial court's admission and consideration of evidence of marital misconduct, or fault, constituted prejudicial error. On retrial, the court should exclude such evidence pursuant to our directions in *Hinton.*

We agree also with the defendant that the trial court's findings of fact as to the fault of the parties were improper. Finding Number 31, concerning plaintiff's alcohol consumption, violent behavior, and treatment of defendant, and Finding Number 32, describing plaintiff's testimony as to examples of his love and affection for his wife and her failure to respond, concerned the relative fault of the parties and constituted prejudicial error.

III

[3] We next deal with defendant's objections to the identification of certain property, including Spooners Creek real estate, a one-third interest in a tract in Swansboro, and an interest in a corporation called Ocean Air, Inc., as separate property. The jury and the trial court apparently approved the plaintiff's argument that this property was separate property because it was acquired through the withdrawal of funds from another piece of separate

property, a closely-held corporation, Pak-a-Sak. Plaintiff's premise is that the whole of his interest in Pak-a-Sak was separate property, because he acquired it prior to his marriage to the defendant, and because its increase in value during marriage was also separate property. Our recent opinions, however, give reason to doubt plaintiff's premise that the whole of Pak-a-Sak's value remained separate property during the course of the marriage.

The Equitable Distribution Act says that "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[,]" is "marital property," subject to distribution under the Act. G.S. 50-20(b)(1). "Separate property" includes property acquired before marriage, as well as property acquired in exchange for separate property. G.S. 50-20(b)(2). Moreover, "[t]he increase in value of separate property and the income derived from separate property shall be considered separate property." *Id.*

Under the interpretation of G.S. 50-20(b)(2) advocated by plaintiff, if one spouse harvests the increase in value of his or her separate property, say, a business, or corporation, and exchanges it for other assets during the marriage, then those assets are separate property. Under this view, these assets are immune from equitable distribution, even if the spouse who acquired them was only able to do so because his or her spouse devoted time and money to maintaining the household, enabling him or her to engage in profitable business dealings. If this is the case, then equitable distribution simply is no help to the person whose spouse is a businessman or entrepreneur, who brings considerable corporate property into the marriage, and acquires most of the assets used in the marriage by profit-making manipulation of corporate funds.

This same problem exists in the present case. The plaintiff owned 98% of a corporation called "Pak-a-Sak Food Stores, Inc.," the other 2% being owned by his sister. He acquired this interest prior to his marriage to defendant. He borrowed money from the corporation ($110,649.75) after his marriage to defendant to purchase land, the "Spooners Creek Lots." He sold a number of these lots, and combined the proceeds with premarital assets on 1

July 1979 to purchase a Swiss annuity, of value $92,000 on 1 June 1981. Plaintiff also withdrew $35,000 from corporate funds of Pak-a-Sak to purchase land for a Pak-a-Sak store in Swansboro. Plaintiff had a one-third interest in the property. Rents from the property were used to repay the indebtedness created by the loan as well as the upkeep and ad valorem taxes.

Plaintiff again borrowed funds from Pak-a-Sak, purchased two airplanes, and created a corporation, "Ocean Air, Inc.," whose assets were the two airplanes. Plaintiff retained one of the planes for his private use. The other was a rental plane. Ocean Air was created on 28 April 1980 and was in existence on 1 June 1981.

Plaintiff used corporate funds to build a home on one of the Spooners Creek lots. This was the marital home. It was carried as a corporate asset until the IRS objected and by an IRS-corporate agreement required that the property be transferred to plaintiff and declared a dividend. The land was conveyed to plaintiff by deed on 12 December 1980.

Plaintiff claims that the remaining Spooners Creek lots, the Swiss annuity, the one-third interest in the Swansboro store and Ocean Air, Inc., are all separate property because acquired by exchange of separate property, funds borrowed from Pak-a-Sak. The jury and trial court agreed. No attempt was made to identify any assets of Pak-a-Sak as marital property.

Thus, considerable assets were acquired by plaintiff after the parties' marriage by loans from a corporation of which plaintiff was virtually the sole owner. These loans from the corporation were offset or paid back, it appears, by (1) plaintiff's liquidation of personal property acquired prior to marriage, (2) plaintiff's earnings after marriage, and (3) profits, rents, and sales of portions of the acquired properties during the course of the marriage. Thus, although the acquired properties may have initially been acquired by corporate loans, they eventually were paid for at least in part by income earned during the marriage.

In our recent decision of *Wade v. Wade*, slip op. No. 8415DC52 (N.C. App. February 5, 1985), we recognized that in these circumstances the language of G.S. 50-20(b)(2) could produce unfair results, unintended by the Legislature. We thus ruled that:

> 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. (Citations omitted.)

Wade, slip op. at 9 (emphasis added).

In the present case, then, the trial court should, on retrial, attempt to determine the "active appreciation" of the Pak-a-Sak corporation during the marriage of the parties, that is, the increase in net value due to the contributions in personal effort or money earned during the marriage by either or both of the spouses. In turn, the court should determine the extent to which that increase in net value was siphoned off and used to purchase the assets at issue in this case (the Spooners Creek lots, the Swiss annuity, etc.) and the degree to which those assets increased in value due to plaintiff's or defendant's personal managerial efforts or investment of earnings. Because he controlled a closely-held corporation, plaintiff could shift funds and reap profits without having to draw funds as more highly taxable direct income. We do not believe that merely by covering his transactions with the corporate veil plaintiff can claim that any assets acquired thereby are wholly insulated from equitable distribution. As we observed in *Wade*:

> 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).

Wade, slip op. at 10.

On retrial the court should include evidence which would be useful in valuing the Pak-a-Sak corporation, such as Exhibit 39, which it excluded below. Exhibit 39 contained plaintiff's response

to interrogatories concerning gross sales, cost of goods sold, profit, operating expenses, and income and retained earnings of Pak-a-Sak Food Stores, Inc., for the years 1976-81. The trial judge also should include defendant's testimony as to the stock ownership in Ocean Air, Inc., and the airplanes which were transferred to the corporation.

IV

We now deal briefly with defendant's other contentions:

[4] (IV) The defendant contends that the court erred in allowing defendant to testify that plaintiff gave defendant $9,000 to purchase a condominium, because this occurred after the separation of the parties. Simply because the transaction occurred after the parties' separation does not mean that the condominium is not marital property. If the funds plaintiff gave defendant were marital funds, then their exchange for other property after separation does not convert them into separate property. On retrial, the court should consider the source of the $9,000 and whether it can be classified as a marital asset.

(VI), (VII) The court did not err in permitting Thomas Horne to testify as to the source of funds used to purchase the Swiss annuity and Spooners Creek lots, and as to the sale and resale of securities sold and disposed of in plaintiff's investment account. Mr. Horne is a certified public accountant, who had handled accounting for Pak-a-Sak and plaintiff since the early sixties, and was qualified to testify as to these matters. The weight to be given his testimony was for the trial judge to determine.

(VIII) The court did not err in allowing plaintiff's Exhibits 1-4. Plaintiff's objection goes to the weight to be given the evidence, which the trial court, in his discretion may determine.

Finding of Fact Number 23, concerning where the defendant's child lived after the parties separated and now lives, was not improperly made because it went to one of the statutory factors to be considered by the trial court. *See* G.S. 50-20(c)(4).

Finding of Fact 24, concerning remarriage of the defendant, her present employment and the present employment of her new husband, also went to one of the statutory factors, *see* G.S. 50-20(c)(1), and was not improperly made.

Given our rulings above, defendant's other assignments of error do not merit our attention at this time.

Reversed and remanded.

Judges WELLS and BECTON concur.

TERRY E. CASE v. HAROLD V. CASE, JR.

No. 8418DC317

(Filed 19 February 1985)

1. **Husband and Wife § 12— resumption of marital relations—separation agreement not voided**

The parties' reconciliation and resumption of marital relations did not void their separation agreement since provisions of the agreement regarding division of real and personal property were already executed prior to resumption of the marital relationship.

2. **Husband and Wife § 11.2— separation agreement—division of personal property**

There was no merit to defendant's contention that the parties did not agree upon a division of their personal property, since the parties' separation agreement did provide for such a division, and the provision was free from ambiguity and clear enough for the trial court to render judgment as a matter of law.

3. **Husband and Wife § 11; Divorce and Alimony § 30— separation agreement—effect of Equitable Distribution Act**

The Equitable Distribution Act, G.S. 50-20, did not purport to change the validity of separation agreements or to modify existing agreements; therefore, the parties' separation agreement entered into on 3 March 1981, before the Act was enacted, was not affected by its passage.

4. **Rules of Civil Procedure § 56.1— discovery procedures pending—summary judgment proper**

There was no merit to defendant's contention that summary judgment was improperly entered while discovery was still pending, since the trial court ruled as a matter of law that the parties' separation agreement was valid and no genuine issue of material fact existed, and thus no useful information could have been gained through discovery.

APPEAL by defendant from *John, Judge*. Order entered 14 September 1983 in District Court, GUILFORD County. Heard in the Court of Appeals 28 November 1984.

Plaintiff and defendant were married on 28 November 1964 in Flint, Michigan. One child, Rick James Case, was born of the marriage on 3 February 1966. Plaintiff and defendant, in September 1972, purchased as tenants by the entirety a home located in Greensboro, North Carolina, where they and the minor child lived until the parties separated on 10 November 1980. Thereafter, plaintiff remained in the house, while defendant and minor child took up residence in an apartment.

Plaintiff and defendant sought a reconciliation, but only after the parties agreed to enter into a separation agreement. On 3 March 1981, the parties entered into a separation agreement, disposing of their property rights and other rights and obligations arising out of the marriage relation. On the same day the separation agreement was executed, defendant, in accordance with the agreement, conveyed by quitclaim deed his interests in the homeplace to plaintiff.

Plaintiff and defendant reconciled for approximately one week during April 1981. During the reconciliation, they lived together, engaged in sexual intercourse and attempted to settle their marital difference. After this attempted reconciliation, the parties separated again with the defendant taking the minor child.

Plaintiff filed this action on 22 February 1983 seeking an absolute divorce from the defendant. Defendant filed an answer and counterclaim admitting that grounds existed for a divorce pursuant to a year's separation and seeking child custody, child support, attorney's fees, possession of the family residence and an equitable distribution of the marital property. Plaintiff's reply did not contest the child custody or child support issues, but pleaded the separation agreement as a bar to the claim for equitable distribution.

Plaintiff, on 23 June 1983, filed an affidavit and a motion for partial summary judgment on the issue of equitable distribution. The court granted plaintiff's motion for partial summary judgment as to defendant's counterclaim for equitable distribution. The parties were granted an absolute divorce on 21 November 1983. A hearing was held on 19 October 1983 in which defendant was granted custody of the child and child support.

From entry of the order granting plaintiff's motion for partial summary judgment, defendant appeals.

Douglas, Ravenel, Hardy, Crihfield, and Lung, by G. S. Crihfield and James W. Lung, for plaintiff appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by Dolores D. Follin, for defendant appellant.

JOHNSON, Judge.

Defendant assigns as error the trial court's granting of plaintiff's motion for partial summary judgment. Before we address defendant's assignment of error, we must first determine if defendant's appeal is premature at this stage of the proceedings. G.S. 1A-1, Rule 56(d) clearly contemplates that summary judgment may be entered upon less than the whole case and that the court may make a summary adjudication that is not final. *Patrick v. Hurdle*, 16 N.C. App. 28, 190 S.E. 2d 871, *cert. denied*, 282 N.C. 304, 192 S.E. 2d 195 (1972). In this instance, the partial summary judgment is interlocutory and not final, thus an immediate appeal does not lie to this court. *Id.* In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. G.S. 1A-1, Rule 54(b).

The trial judge entered summary judgment as to defendant's counterclaim for equitable distribution, leaving for trial plaintiff's claim for absolute divorce and defendant's remaining counterclaims for child custody and child support. The granting of the summary judgment motion is not appealable, G.S. 1A-1, Rule 54(b) unless the appeal is provided for elsewhere in the statute. Defendant may immediately appeal from this interlocutory order if it affects a substantial right. G.S. 1-277. It has been held that an order which completely disposes of one of several issues in a lawsuit affects a substantial right. *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976). The trial court in granting summary judgment concluded that the separation agreement was valid and not revoked by the reconciliation of the parties. The separation agreement was a bar to the counterclaim for equitable distribu-

tion, thus there existed no genuine issue of material fact. The trial court's conclusion completely disposes of the issue of equitable distribution, thereby affecting a substantial right of the defendant rendering the appeal reviewable.

At this point, we address defendant's assignment of error that the trial court erroneously concluded there was no genuine issue of material fact and entered summary judgment as to the issue of equitable distribution.

A

[1] Defendant first contends that the parties' reconciliation voided the separation agreement. It is well settled in our law that a separation agreement between husband and wife is terminated for every purpose insofar as it remains executory upon their resumption of the marital relation. *In re Estate of Adamee*, 291 N.C. 386, 230 S.E. 2d 541 (1976). "[A] reconciliation and resumption of marital relations by the parties to a separation agreement would not revoke or invalidate a duly executed deed of conveyance in a property settlement between the parties. (Citations omitted.) . . . 'Regardless of what the rule may be as to a settlement with executory provisions, an executed property settlement is not affected by a mere reconciliation and resumption of cohabitation.'" (Citations omitted.) *Jones v. Lewis*, 243 N.C. 259, 90 S.E. 2d 547 (1955).

The parties entered into a separation agreement on 3 March 1981, which contained the following pertinent provisions relating to distribution of marital property:

> II. *Personal Property.* The parties have previously agreed between themselves on the division of personal property, including motor vehicles, and said agreement is ratified.
>
> Each party shall retain sole ownership of all stocks, bonds, securities, insurance policies, club memberships or other like property which such party heretofore owned individually.
>
> III. *Proceeds from Personal Injury Settlement.* In the summer of 1980, Husband and the parties' minor child received a substantial settlement for injuries each suffered in an automobile collision. Husband entrusted Six Thousand Five

> Hundred Dollars ($6,500.00) of said settlement proceeds to wife. Simultaneously with the execution of this Agreement, Wife will return Two Thousand Five Hundred Dollars ($2,500.00) to Husband.
>
> IV. *Real Property.* The parties are presently owners as tenants by the entirety of a home located at 3105 Shallowford Drive, Greensboro, North Carolina. Simultaneously with the execution of this Agreement, Husband shall deed all of his rights, title and interest in said property to Wife by a quitclaim deed.

On the same day the separation agreement was executed, defendant conveyed his interest in the homeplace to plaintiff. Defendant's conveyance occurred prior to the parties resuming the marital relationship, which rendered the provision concerning real property executed, not executory, and therefore not terminated by the resumption of the marital relationship. The remaining provisions of the separation agreement were likewise already executed, thus not terminated.

> An "executory contract" is one in which a party binds himself to do or not to do a particular thing *in the future.* When all future performances have occurred and there is no outstanding promise calling for fulfillment by either party, the contract is no longer "executory," but is "executed." (Citations omitted.) Thus when our cases speak of the "executory provisions" of a separation agreement, they are referring to those provisions which require a spouse to do some future act in accordance with the terms of the agreement. . . .

Whitt v. Whitt, 32 N.C. App. 125, 129-30, 230 S.E. 2d 793, 796 (1977). Taking these principles into account, we must hold that the parties' reconciliation did not terminate any provisions concerning the distribution of marital property.

B

[2] Defendant next attacks the validity of the separation agreement by contending that contrary to paragraph II, *supra,* of the separation agreement, the parties did not agree upon a division of their personal property. A separation agreement is a contract and, therefore, its meaning is ordinarily determined by the same

rules used to interpret any other contract. *Lane v. Scarborough*, 284 N.C. 407, 200 S.E. 2d 622 (1973). When a separation agreement is in writing and free from ambiguity, its meaning and effect is a question of law for the court. *Id.; McArthur v. McArthur*, 68 N.C. App. 484, 315 S.E. 2d 344 (1984). Paragraph II provided for the distribution of the parties' personal property, as agreed upon and ratified by both parties. This provision is free from ambiguity and definitely clear enough for the trial court to render judgment as a matter of law. We find defendant's contention is without merit.

C

[3] Defendant contends the separation agreement was executed before the equitable distribution statute was enacted, thus he could not bargain away his right to equitable distribution of marital property since such a right did not exist at the time of the execution of the separation agreement. The parties entered into a separation agreement on 3 March 1981. The Equitable Distribution Act (hereinafter Act) was enacted thereafter, G.S. 50-20 (Supp. 1983), and applies to all divorce actions instituted on or after 1 October 1981. Plaintiff filed this action for an absolute divorce on 22 February 1983. It is North Carolina's public policy that "an equitable distribution of property shall follow a decree of absolute divorce." G.S. 50-21(a). However, a resort to the equitable distribution law is not the only recognized way for married people to dispose of their marital property. An alternative is in G.S. 50-20(d):

> Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.

Hendrix v. Hendrix, 67 N.C. App. 354, 313 S.E. 2d 25 (1984). The clear language of this statute reveals that the Act did not purport to change the validity of separation agreements or modify existing agreements. *McArthur, supra.* Defendant's contention is, therefore, without merit.

D

[4] Defendant's final contention is that summary judgment was improperly entered while discovery was still pending. "Ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 256 S.E. 2d 216 (1979). The trial court is not barred in every case from granting summary judgment before discovery is completed. *Joyner v. Hospital*, 38 N.C. App. 720, 248 S.E. 2d 881 (1978).

A request for equitable distribution of property may not be granted in the face of a prior, valid agreement disposing of the parties' marital property, G.S. 50-20(d). *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E. 2d 97 (1984). Defendant, by affidavit as well as arguments before this court, has unsuccessfully attacked the validity of the separation agreement. Summary judgment was proper absent a showing by defendant that the separation agreement was not valid. The trial court ruled as a matter of law that the separation agreement was valid and no genuine issue of material fact existed, thus no useful information could have been gained through discovery. The rule that summary judgment should not be granted while discovery is pending, presupposes that any information gleaned will be useful. *Manhattan Life Ins. Co. v. Miller Machine Co.*, 60 N.C. App. 155, 159, 298 S.E. 2d 190, 193 (1982), *cert. denied*, 307 N.C. 697, 301 S.E. 2d 389 (1983).

We conclude that the trial court properly granted summary judgment for plaintiff. The order is

Affirmed.

Judges WHICHARD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. RUFUS NEWKIRK, JR.

No. 844SC329

(Filed 19 February 1985)

1. Constitutional Law § 65— State not required to locate confidential informant—good faith effort unsuccessful

In a prosecution for the sale and delivery of a controlled substance, the denial of defendant's motion to compel the State to locate a confidential informant was proper where the officer in charge of the undercover operation informed the court that the witness was a professional confidential informant who moved about the state and that the officer had attempted to locate the informant for two months without success, even making inquiries of the S.B.I., which was the informant's last known employer. The State cannot be compelled to produce a witness it cannot, in good faith, locate after a reasonable search.

2. Narcotics § 4.5— jury instruction—sale and delivery of a controlled substance—correct in context

A trial court's jury charge on sale and delivery of a controlled substance was correct where, viewed contextually, the court instructed that to be convicted defendant must have knowingly given a controlled substance to another for the purpose of selling and delivering it.

3. Criminal Law § 26.4— possession of controlled substance—no double jeopardy

Judgment was properly entered on two convictions for possession of the same controlled substance where the evidence clearly established that a different tablet of the same substance was obtained from defendant on two separate days. Defendant's possession was therefore different in both law and fact.

APPEAL by defendant from *Llewellyn, Judge.* Judgment entered 8 November 1983 in ONSLOW County Superior Court. Heard in the Court of Appeals 8 January 1985.

Defendant was indicted for and convicted of two counts of sale and delivery of a controlled substance, phenmetrazine, and two counts of possession of a controlled substance with intent to sell and deliver. One count of each charge was alleged for separate transactions occurring on 27 and 28 January 1983.

The state offered evidence which tended to show that at approximately midnight on the evening of 26 January 1983 Officer J. P. Smith, of the Hickory Police Department, working undercover with the Jacksonville Police Department, and Earl Gray, a confidential informant employed by the Jacksonville Police De-

partment, went to Soul City Bar-B-Que, owned by defendant. They met a man identified as "Hightop," later identified as Akhtab Shaheed. Officer Smith testified that the confidential informant approached "Hightop" and asked if he knew where they could buy a "bam," the street name for phenmetrazine. "Hightop" walked up to defendant, engaged him in a brief inaudible conversation, and defendant appeared to hand something to "Hightop" in a closed fist, even though Officer Smith did not actually see anything in defendant's hand. "Hightop" then nodded for Officer Smith to follow him outside where "Hightop" sold him a tablet, later identified as phenmetrazine, for twenty dollars. Officer Smith went inside and left with the confidential informant.

Shaheed, "Hightop," testified that he had known the defendant for over one year. On 26 January 1983, he met the confidential informer who was accompanied by a lady, at defendant's restaurant. They asked him if he knew where they could purchase some "bams," but he didn't know. As Officer Smith and Gray started to leave, defendant asked Shaheed what they wanted, and Shaheed told him they wanted some "bams." Defendant told Shaheed that he had the drug and passed it to Shaheed. Shaheed sold the "bam" to Officer Smith outside the restaurant and gave the twenty dollars to defendant.

As to the transaction on 28 January 1983, Officer Smith stated that she and Gray returned to defendant's restaurant and met with "Hightop." When Officer Smith asked for another "bam," she and "Hightop" went outside immediately and completed the sale for twenty dollars. They returned inside and Officer Smith saw Shaheed place the twenty dollars on the counter behind the bar, and, looking at defendant, tell him that he was leaving the money there. Defendant walked over and put the money in his shirt pocket. Officer Smith and Gray left the restaurant.

Shaheed testified that the transaction relating to the second sale was about the same as the first sale; defendant passed the "bam" to him across the bar counter as the undercover agents waited, and he delivered it to Officer Smith outside the restaurant. Shaheed stated that after the sale, he went inside and handed the money to defendant, but did not recall saying anything to defendant.

Shaheed admitted that he had been previously convicted and sentenced on four drug offenses arising from his sale of drugs to Officer Smith and that the trial court had sentenced him to an active prison term on one count, reserving sentencing on the remaining three counts with the explicit understanding that Shaheed would receive sentences of time served if he cooperated with the state in the prosecution of defendant.

The defendant offered no evidence.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Douglas A. Johnston, for the State.

Appellate Defender Adam Stein, by James R. Glover, for defendant.

WELLS, Judge.

Defendant brings forth three assignments of error, contending that the trial court erred in (1) failing to require the state to account for the whereabouts of its confidential informant, Earl Gray; (2) failing to adequately instruct the jury so as to require that the state prove both sale and delivery counts as to Officer Smith; and (3) entering judgment for two counts of possession of the same controlled substance. We find no prejudicial error.

[1] In his first assignment of error, defendant contends that the trial court improperly refused to require the state to use reasonable efforts to produce Earl Gray at trial. Essentially, defendant argues that he was entitled to an order from the trial court directing the state to attempt to locate the confidential informant, or to make a showing that his absence occurred in spite of reasonable efforts to ensure his presence at trial.

It is well established that the state is privileged to withhold from a defendant the identity of a confidential informant, with certain exceptions. The test applied, when disclosure of an informant's identity is requested, is set forth in *Roviaro v. United States*, 353 U.S. 53 (1957). The government, to promote disclosure of crimes, may withhold a confidential informant's identity except when disclosure of a communication will not reveal the name of the informer, or when the informer's identity has already been disclosed.

> A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.

Id.; see also State v. Gilchrist, 70 N.C. App. 180, 321 S.E. 2d 445 (1984). Once defendant has made a "plausible" showing of the materiality of the informer's testimony, *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), *State v. Grainger*, 60 N.C. App. 188, 298 S.E. 2d 203 (1982), *disc. rev. denied*, 307 N.C. 579, 299 S.E. 2d 648 (1983), the trial court must balance the public's interest with defendant's right to present his case "taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Roviaro v. United States, supra; see also State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973). Two factors weighing in favor of disclosure are (1) the informer was an actual participant in the crime compared to a mere informant, *e.g., Roviaro v. United States, supra; State v. Ketchie*, 286 N.C. 387, 211 S.E. 2d 207 (1975), and (2) the state's evidence and defendant's evidence contradict on material facts that the informant could clarify, *McLawhorn v. State of North Carolina*, 484 F. 2d 1 (4th Cir. 1973); *State v. Orr*, 28 N.C. App. 317, 220 S.E. 2d 848 (1976). Several factors vitiating against disclosure are whether the defendant admits culpability, offers no defense on the merits, or the evidence independent of the informer's testimony establishes the accused's guilt. *State v. Cameron, supra.*

Upon cross examination of Officer Smith, defendant, for the first time, requested the identity and current whereabouts of the confidential informer briefly mentioned in Officer Smith's direct examination. The state initially objected to disclosure but promptly withdrew the objection. Officer Smith identified the informer as Earl Gray, but denied any knowledge of his present whereabouts. Following cross examination, defendant moved for the trial court to compel the state to produce Gray's current address, telephone number, or contact him in order "to see if he's [sic] any exculpatory evidence that we might use." Defendant

justified this request based on Officer Smith's testimony that Gray was a witness to the occurrences inside the restaurant and remained in defendant's presence while Officer Smith and Shaheed consummated the alleged drug sale outside.

The trial court extensively questioned Lieutenant Paul Buchanan, Supervisor of the Special Operations Division in charge of the undercover operation, as to Gray's present whereabouts. Buchanan informed the trial court that Gray was a professional confidential informant who moved about the state and that he had attempted to locate Gray for two months without success, even making inquiries of the State Bureau of Investigation, who had employed Gray on occasion and was Gray's last known employer. The trial court denied defendant's motion indicating if Gray had been in Onslow County that he would compel his production, but as his testimony would not appear to be helpful to defendant, attempting to locate him might jeopardize any undercover operation he was presently involved in.

We hold that the trial court's denial of defendant's motion to compel the state to locate Gray was proper. Assuming for the purpose of this appeal that Gray was a participant in the alleged transactions and that his testimony could have helped clarify Officer Smith's testimony, the state cannot be compelled to produce a witness it cannot, in good faith, locate after a reasonable search. In *State v. Brockenborough*, 45 N.C. App. 121, 262 S.E. 2d 330 (1980), the court affirmed the trial court's denial of the defendant's request for the state to produce an informer stating:

> Prior to arraignment and trial, the court declared . . . [the informant] a material witness and ordered the State to furnish defendant with the best information available to the district attorney and local law enforcement officers as to . . . [the informant's] whereabouts. It was further ordered that if an address for . . . [the informant] was found, the State was to inform the court and defendant. We hold this was all the State was required to do.

In the case before us, it clearly appears that the state made a good faith attempt to locate the informer but was unable to do so. Unlike *Brockenborough*, the trial court did not order the state to provide Gray's whereabouts if he was located, but this was the result of defendant's motion being made during the first day of a

two-day trial rather than at arraignment. Under the facts of this case, we find that the state's good faith effort to locate the confidential informant was all that was required. This assignment is overruled.

[2] In defendant's second assignment of error he contends that the trial court improperly instructed the jury on sale and delivery of a controlled substance. He argues that the following portion of the jury charge permitted conviction if defendant delivered a controlled substance to Shaheed without knowing that Shaheed would sell and deliver the controlled substance.

> Now, handing a phenmetrazine tablet to Akhtab Shaheed for exchange of twenty dollars from J. P. Smith that's, that handing being done by the defendant would be a sale and delivery of a controlled substance.

It is axiomatic in this state that the trial court's jury charge must be construed contextually as a whole and that isolated errors are not necessarily prejudicial. *State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683, *cert. denied*, 409 U.S. 948 (1972). Placing the contested portion of the jury charge in context, the trial court instructed:

> [T]o find the defendant guilty of selling and delivering phenmetrazine, a controlled substance, the State must prove beyond a reasonable doubt that the defendant *knowingly sold and delivered phenmetrazine to J. P. Smith.*
>
> Now, handing a phenmetrazine tablet to Akhtab Shaheed for exchange of twenty dollars from J. P. Smith that's, that handing being done by the defendant, would be a sale and delivery of a controlled substance. Now, I instruction you for a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. *If two or more persons acting together with a common purpose to commit sale and delivery of phenmetrazine, each of them is held responsible for the acts of the others done in the commission of selling phenmetrazine.*
>
> So, I charge if you find from the evidence that . . . Rufus Newkirk, Jr. acting either by himself or acting together with Akhtab Shaheed *knowingly handed a phenmetrazine tablet to Akhtab Shaheed for exchange of twenty dollars*

from J. P. Smith, it would be your duty to return a verdict of guilty as charged. [Emphasis added.]

Viewing the trial court's instruction contextually, the trial court properly instructed that defendant, to be convicted, must have knowingly given a controlled substance to Shaheed for the purpose of selling and delivering it to Officer Smith. This assignment is overruled.

[3] In defendant's final assignment of error he contends that the trial court erred by entering judgment for two convictions of possession of the same controlled substance, contending that he was twice put in jeopardy for the same offense. "For the plea of former jeopardy to be good, the plea must be grounded on the 'same offense' both in law and in fact." *State v. Lewis*, 32 N.C. App. 298, 231 S.E. 2d 693 (1977) (quoting *State v. Cameron, supra*). Shaheed's and Officer Smith's testimony clearly establishes that Shaheed obtained a different tablet of the same controlled substance on two separate days from defendant. Defendant's possession, therefore, was different both in law and in fact. This assignment of error is overruled.

The record before us reflects that defendant received a fair trial in which we find

No error.

Judges ARNOLD and COZORT concur.

STATE OF NORTH CAROLINA v. GILBERT LEROY CAMERON

No. 8423SC330

(Filed 19 February 1985)

1. Indictment and Warrant § 17.4— ownership of property stolen—variance between indictment and proof not fatal

There was no fatal variance between the indictment, which alleged that the house of "Mrs. Narest Phillips" was broken into and items of property belonging to her were stolen, and the proof, which showed that the victim of the crimes in question was "Mrs. Ernest Phillips," since the names were suffi-

ciently similar to fall within the doctrine of *idem sonans*, and the variance was immaterial.

2. **Criminal Law § 34.8— evidence of other offenses—admissibility to show common plan**

   In a prosecution for breaking or entering and larceny the trial court did not err in allowing into evidence the testimony of a State's witness that he and defendant committed at least five other similar break-ins in the county and surrounding area, since such evidence was admissible to show a common plan embracing a series of related crimes; moreover, defendant originally opened the door to the testimony and invited it where he elicited the testimony to show the witness's motive for testifying against him.

3. **Burglary and Unlawful Breakings § 1; Larceny § 1— breaking or entering—no lesser offense of larceny**

   Breaking or entering is not a lesser included offense of felonious larceny.

APPEAL by defendant from *Freeman, Judge.* Judgment entered 13 December 1983 in Superior Court, WILKES County. Heard in the Court of Appeals 8 January 1985.

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

Appellate Defender Adam Stein by James R. Glover for defendant appellant.

COZORT, Judge.

The defendant was convicted of breaking or entering and felonious larceny and sentenced to two consecutive terms of ten years' imprisonment. The defendant contends on appeal: (1) that there was a fatal variance between the indictment and the proof at trial as to the identity of the owner of the building and the property stolen, and (2) that the trial court improperly admitted evidence of offenses committed by the defendant other than the ones charged in the indictment. He also maintains that he was wrongfully convicted of both offenses and should not have received consecutive sentences on the theory that breaking or entering should be a lesser included offense of felonious larceny. We hold the defendant's trial was free from prejudicial error. The facts follow.

Mrs. Mary Belle Phillips owned a house on Cole Street in North Wilkesboro. While she was visiting her daughter in Bur-

lington, Robert Rogers agreed to keep an eye on her house. On 1 February 1982, Rogers stopped to check on the house and discovered that since his last visit, approximately one week earlier, the house had been broken into through the back door, the furniture had been moved about, and drawers had been emptied onto the floor. Rogers went next door and had a neighbor call the police.

Detective Captain David Pendry of the North Wilkesboro Police Department answered the call and came to Mrs. Phillips' house to investigate the alleged break-in. He found the house in the same state as Rogers had found it. Mrs. Phillips was notified and returned that day with her daughter to North Wilkesboro. They made a list of the items that were missing and gave it to Captain Pendry. The missing items included a color television set, a love seat, a wingback chair, towels, china, and stainless steel flatware.

Almost a year later, on 26 January 1983, Danny Hawkins, who had been confined in the Wilkes County Jail on a first-degree burglary charge, asked to speak with Captain Pendry. Hawkins told Pendry that he, the defendant, and a man named Charlie Reavis committed the Phillips' house break-in. He also confessed to a series of other break-ins that he and the defendant had committed. This information confirmed what Pendry's own investigation had indicated.

At trial, Hawkins testified that he helped the defendant and Reavis only after the defendant had threatened to hurt him if he refused. He stated that they went to Mrs. Phillips' house in the defendant's Cadillac. Reavis drove the car around while the defendant and Hawkins broke into the house through the back door. They carried out of the house and down an embankment a television, a chair, a love seat, dishes, flatware, as well as other items. They placed the stolen goods into the Cadillac which Reavis had waiting.

Hawkins further revealed that the defendant sold the love seat to a man who lived in Moravian Falls, and gave the defendant's trailer park landlord the stolen wingback chair. He further stated that on the defendant's instruction he threw the stolen china into the river off a bridge on Brown's Ford Road. Hawkins took Captain Pendry to each of these places. Pendry retrieved these items and returned them to Mrs. Phillips. Moreover, Haw-

kins testified on cross and redirect examinations that he and the defendant had committed three other break-ins in Wilkes County, one break-in in Alleghany County, and one break-in in Ashe County.

The defendant offered no evidence.

[1] In his first assignment of error, the defendant asserts that the trial court improperly denied his motion to dismiss due to a fatal variance between the owner of the stolen property alleged in the indictment and the owner of the property actually proven at trial. The indictment against the defendant contains one count of breaking or entering "a building occupied by Mrs. Narest Phillips used as a residence located at Coles Street" and one count of felonious larceny involving "the personal property of Mrs. Narest Phillips." At trial, Mrs. Mary Belle Phillips, widow of Dr. Ernest Nicholas Phillips, testified that it was her home on Cole Street which was broken into and her personal property which was stolen.

The defendant, citing *State v. Eppley*, 282 N.C. 249, 192 S.E. 2d 441 (1972), correctly states in his brief that a material variance exists, requiring dismissal of the charge, when the evidence at trial shows the property to be owned by someone other than the person named in the indictment. In *Eppley*, the indictment alleged that two shotguns belonging to James Ernest Carriker were stolen. Carriker testified at trial that one of the shotguns was actually the property of his father. The Supreme Court held the variance between the indictment and the evidence with regard to this shotgun to be fatal.

In the present case, the person alleged as the owner of the house and the stolen property in the indictment is the same person as indicated as the owner by the evidence at trial. The indictment names the victim of these crimes as "Mrs. Narest Phillips." At trial, the evidence revealed the victim to be "Mrs. Ernest Phillips." Therefore, these names are sufficiently similar to fall within the doctrine of *idem sonans*, and the variance was immaterial. The record reveals that the proof at trial matched the allegations in the indictment in all other respects. Thus, the defendant was not surprised or placed at any disadvantage in preparing his defense to the crimes charged in the indictment. Because the variance is wholly immaterial, we hold the trial court

properly denied the defendant's motion to dismiss. *See State v. Isom*, 65 N.C. App. 223, 226, 309 S.E. 2d 283, 285 (1983).

[2] The defendant further contends that the trial court erred in allowing into evidence the testimony of a State's witness, Danny Hawkins, that he and the defendant committed at least five other similar break-ins in Wilkes County and the surrounding area. As a general rule, the State in the prosecution for a particular crime 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). However, evidence of these other crimes is admissible "when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission." *Id.* at 176, 81 S.E. 2d at 367. Although we believe Hawkins' testimony was admissible as evidence tending to show a common plan embracing a series of related crimes, we find it unnecessary to determine the admissibility of Hawkins' testimony on this basis alone.

From our review of the transcript, it is evident that the defendant originally opened the door to this testimony and invited the testimony of which he now complains. On cross-examination, the defendant elicited the following testimony from Hawkins:

> Q. [Defense counsel] Let's see, you've admitted to breaking and entering and committing larceny, burglarizing about four homes over in North Wilkesboro, haven't you?
>
> [Prosecution]: Are you asking him if he has been convicted of it, or what?
>
> [Defense counsel]: I'm asking him if he did it.
>
> Q. And you admit it, don't you?
>
> A. Yes.
>
> * * * *
>
> Q. You haven't been charged with any of those that you've admitted to David Pendry, have you?

A. No.

*　*　*　*

Q. And there is about four or five of those houses that you broke into and told, or confessed, about?

A. *Well, that Cameron and I broke into. Yes.* (Emphasis added.)

*　*　*　*

Q. And you admitted to burglarizing and breaking into a house in Ashe County, and you haven't been charged with it, have you?

A. No, sir.

Q. And you've admitted burglarizing and breaking and entering a house in Alleghany County, or houses, and you haven't been charged with those cases, have you?

*　*　*　*

A. No.

As stated in *State v. Brown*, 310 N.C. 563, 571, 313 S.E. 2d 585, 590 (1984), "[t]he basis for the rule commonly referred to as 'opening the door' is that when a defendant in a criminal case offers evidence which raises an inference favorable to his case, the State has the right to explore, explain or rebut that evidence." The defendant elicited this testimony to show Hawkins' motive for testifying against him. Therefore, the State could in return properly explore and further explain that evidence.

In response to this cross-examination, the State on redirect asked Hawkins: "All right, Danny, you were asked if you had admitted to committing three or four break ins in Wilkesboro—who was with you when you committed those break ins, Danny?" Over the defendant's objection, Hawkins answered: "Gilbert Cameron." The State also asked Hawkins about the Ashe and Alleghany break-ins. Again, over the defendant's objection, Hawkins replied that the defendant had been with him on each occasion. Thus, the State only explored those break-ins that the defendant had already mentioned on cross-examination. We hold that since the defendant had previously opened the door with regard to these

offenses, the trial court did not commit prejudicial error by allowing Hawkins' similar testimony on redirect examination. Also, because Hawkins actually stated on cross-examination that the defendant had been his accomplice in these other crimes, the defendant lost the benefit of his later objections to evidence of the same import. *State v. Covington*, 290 N.C. 313, 339, 226 S.E. 2d 629, 647 (1976).

[3] Finally, the defendant argues that breaking or entering is a lesser included offense of felonious larceny, and that he could not properly be convicted and sentenced consecutively for both. Current law, as the defendant admits in his brief, is to the contrary. At present, breaking or entering is not a lesser included offense of felonious larceny. *State v. Downing*, 66 N.C. App. 686, 311 S.E. 2d 702, *disc. rev. allowed*, 312 N.C. 86 (1984); *State v. Smith*, 66 N.C. App. 570, 312 S.E. 2d 222, *disc. rev. denied*, 310 N.C. 747, 315 S.E. 2d 708 (1984). We note, however, that in *State v. Edmondson*, 70 N.C. App. 426, 430, 320 S.E. 2d 315, 318 (1984), *disc. rev. allowed*, 312 N.C. 799 (1985), this Court found "considerable merit" in the defendant's argument that felonious breaking or entering is indeed a lesser included offense of felonious larceny. Nevertheless, following precedent, the *Edmondson* court held that the defendant's conviction of both crimes was not error. The Supreme Court's allowance of discretionary review in *Edmondson* and *Downing*, should resolve this issue. Until the Supreme Court reverses *Edmondson* or *Downing*, we follow the law as it stands and hold that the defendant was properly convicted and sentenced for both crimes.

No error.

Judges ARNOLD and WELLS concur.

JERRY C. WILSON v. SHIRLEY DENNY WILSON

No. 8418DC256

(Filed 19 February 1985)

1. **Divorce and Alimony § 30— equitable distribution—property acquired after separation—not marital property**

In an action for equitable distribution where the parties separated in 1975, the action for divorce began in 1982, and judgment was entered in October 1983, the 1 August 1983 amendment to G.S. 50-20(b)(1) applied, so that property purchased with money earned or acquired after the separation date was not marital property. The 1981 version of the statute, which defined marital property as property acquired during the course of the marriage, created a right to the equitable distribution of property, not a vested right to particular property.

2. **Divorce and Alimony § 30— equitable distribution—property acquired after separation—findings not supported by evidence**

In an action for divorce and equitable distribution in which plaintiff husband refused to cooperate in determining marital property and introduced no evidence, the court erred by finding that assets were marital property because they were acquired before the divorce. The inquiry should be whether the property was acquired before the parties' separation, and statutory provisions punishing misconduct are appropriate if plaintiff continues to obstruct the resolution of the case. G.S. 1A-1, Rule 37(b), G.S. 5A-11 *et seq.* (1981), G.S. 50-20(i).

APPEAL by plaintiff from *Bencini, Judge.* Judgment entered 4 October 1983 in District Court, GUILFORD County. Heard in the Court of Appeals 15 November 1984.

The plaintiff, Jerry C. Wilson, and the defendant, Shirley Denny Wilson, married on 30 March 1973. Plaintiff was a licensed attorney who practiced in High Point until approximately December, 1974. On or about 20 September 1974, the plaintiff borrowed the sum of $15,992.40 from the North Carolina National Bank. He and the defendant gave a promissory note for the loan. In December 1974 the plaintiff left North Carolina. He subsequently defaulted on repayment of the loan and the Bank obtained a recovery against the defendant of $15,830.54.

In January, 1975, the plaintiff and defendant contracted with Central Trane Air Conditioning Company for the installation of an air conditioning system at the High Point residence, then occupied only by defendant. The Company required the parties to

execute an Affidavit and Confession of Judgment for its use in the event of default. Plaintiff informed defendant he would pay for the installation of the air conditioning system, which he did not, and defendant was left liable under the Confession of Judgment.

After plaintiff left North Carolina, he contacted defendant and told her not to institute divorce proceedings since so long as they were married defendant could not be forced to testify against plaintiff in the event of disbarment proceedings against him. The parties agree in the pleadings that they were separated on 1 July 1975.

In a letter dated 27 July 1982, the plaintiff informed defendant he would hold her harmless for judgments docketed against her in the North Carolina National Bank and Central Trane Air Conditioning Company collection matters. He has failed to do so. In the same letter, plaintiff acknowledged that he had agreed to assist defendant in the purchase of a residence. Defendant alleges that plaintiff submitted a financial statement regarding his personal worth to Brown Realty Company of Greensboro, for consideration incident to the proposed purchase of the residence for defendant.

Plaintiff filed an action for absolute divorce, based on a one-year separation, on 24 July 1982. The defendant filed an answer and counterclaim for absolute divorce and equitable distribution of marital property on 28 July 1982. On 2 September 1982, the parties were granted a judgment of absolute divorce.

The defendant's counterclaim for equitable distribution came on for trial on 27 September 1983. Prior to trial, defendant submitted two discovery requests to plaintiff, which he failed to answer, despite court orders to comply. Plaintiff did not appear at the trial. The trial judge entered judgment on 4 October 1983, requiring plaintiff to pay a distributive award to defendant and enjoining plaintiff from transferring or encumbering certain stock until the award was paid. Plaintiff appeals the judgment.

Purser, Cheshire, Manning & Parker, by Barbara A. Smith, for plaintiff appellant.

Tuggle Duggins Meschan & Elrod, by David F. Meschan and Henry B. Mangum, Jr., for defendant appellee.

ARNOLD, Judge.

The plaintiff contends that the trial court erred in finding and concluding that plaintiff's stock in Jefferson Jazz, Inc., and his real property in Cabarrus County are marital property within the meaning of the Equitable Distribution Act. The plaintiff argues that such property was acquired after the separation of the parties, and that therefore under G.S. 50-20(b)(1), as amended in 1983, it is not "marital property."

[1] We first deal with the legal question of the application of G.S. 50-20(b)(1) to this case. The Equitable Distribution Act went into effect on 1 October 1981. Sess. Laws 1981 c. 815 s. 7. In the original text of the statute, "marital property" was defined as:

> [A]ll 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. 50-20(b)(1) (1981 Cum. Supp.).

Because the phrase "in the course of the marriage" was vague, *see* Sharp, Equitable Distribution of Property in North Carolina: A Preliminary Analysis, 61 N.C. L.R. 247, 251-52 (1983) (discussing problems in interpreting this section), the legislature amended the definition of "marital property" to read:

> "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 . . . .

G.S. 50-20(b)(1) (1983 Cum. Supp.) (emphasis added).

The statute adding the language "and before the date of the separation of the parties" provided that the amendment should be effective 1 August 1983, and that it was applicable to actions pending in the District Court Division at that time. Sess. Laws 1983 c. 640 s. 3.

The present action commenced in July 1982 and did not reach trial until 27 September 1983. The judgment of equitable distribution was entered 4 October 1983. This case was pending on 1 August 1983, and under the terms of the 1983 legislation the

amended version of the definition of "marital property" should apply to it.

Defendant argues, however, that the August 1983 amendment is unconstitutional to the extent it retrospectively excludes certain property from being marital property in actions filed before the effective date of the amendment. Defendant argues that G.S. 50-20(k), which says that "[t]he rights of the parties to an equitable distribution of marital property are a species of common ownership, the rights of the respective parties vesting at the time of the filing of the divorce action," vests in her rights to particular marital property acquired after the date of separation, which cannot be removed by subsequent statutes with retroactive effect.

We cannot agree that G.S. 50-20(k) created substantive rights in any party to particular marital property which that party argues comes within the meaning of "acquired . . . during the course of the marriage." The legislature's intent in subsection k was to create *a right to equitable distribution* of the marital property, which had not existed up to that time, and to make that right vest at the time of filing for divorce. Subsection k did not create any vested rights in *particular marital property*; it created a right to the equitable distribution of that property, whatever a court should determine that property is.

Given the ambiguity in the phrase "in the course of the marriage" in the 1981 statute, the defendant had no reason to rely on the statute as establishing any particular point as the cut-off date for valuation of the marital property. The legislature clarified the meaning of the statute on 1 August 1983, well before the trial of the present case, which occurred 27 September 1983. If the plaintiff purchased the Jefferson Jazz stock and the Cabarrus County property with money earned or acquired after the separation date, they are not marital property.

[2] We now consider the evidence before the trial judge and his classification of the parties' property. We note, however, that the source of much difficulty in this case is plaintiff's refusal to cooperate in the effort at the trial level to determine what is the parties' marital property. He failed to respond to two court-ordered discovery requests, and he failed to participate at trial. The only evidence before the trial judge was supplied by defendant.

This evidence indicated, and the trial court so found, that the parties separated on or about 1 July 1975. The evidence indicated also, and the trial judge found, that the plaintiff acquired an interest in certain real property in Cabarrus County on 30 October 1981. The trial judge concluded that this property was acquired "during the marriage of plaintiff and defendant." In that it was acquired after the parties' separation, however, the property is not marital property. This assumes, of course, that the property was not acquired through the exchange of marital funds or property.

On the basis of financial statements submitted by the defendant, the trial judge also concluded that plaintiff acquired a 50% interest in a company called Jefferson Jazz, Inc. The trial judge concluded that this interest also was marital property. The defendant's testimony shows that she did not know when plaintiff started Jefferson Jazz, but that plaintiff had been talking about the company for four years prior to trial, and that he acquired the interest prior to the parties' divorce. The plaintiff has submitted no evidence whatsoever as to when he acquired the interest in Jefferson Jazz. Yet, he argues that defendant's testimony indicates that plaintiff acquired Jefferson Jazz stock no more than four years prior to trial, in 1979, which was approximately four years after the parties' separation. We find defendant's testimony, however, inconclusive on the question of exactly when plaintiff acquired Jefferson Jazz.

The record and the trial judge's findings indicate that the trial judge concluded that the Jefferson Jazz interest was marital property because the parties acquired it prior to their divorce. Under the statute as amended, this reasoning was clearly erroneous. The trial judge should have asked whether the property was acquired before or after the parties' separation. As noted above, the evidence in the record is inconclusive on this question. The lack of information in the record concerning the origins of Jefferson Jazz is largely the result of plaintiff's refusal to respond to defendant's discovery requests and failure to appear at trial.

Because the trial judge failed to apply the amended version of the statute to the facts before him and because the evidence is insufficient to support his judgment, we remand for retrial in accordance with this opinion. If the plaintiff continues to obstruct

the resolution of this case, the trial judge should utilize statutory provisions for punishing such misconduct. *See* G.S. 1A-1, Rule 37(b) of the Rules of Civil Procedure; G.S. 5A-11 *et seq.* (1981); *see also Wade v. Wade*, slip op. No. 8415DC52 at 5-6 (N.C. App. February 5, 1985).

The trial court entered an order of preliminary injunction on 2 September 1982 to restrain plaintiff from dissipating the alleged marital property until an equitable distribution of the property could be made. The Equitable Distribution Act authorizes such an order. G.S. 50-20(i). Given plaintiff's conduct, continuance of this order during retrial would not be error.

Since we have ordered a retrial, we do not deem it necessary to address plaintiff's other contentions.

Vacated and remanded.

Judges WELLS and BECTON concur.

STATE OF NORTH CAROLINA v. JERRY SIMMS HALL

No. 848SC453

(Filed 19 February 1985)

1. Criminal Law § 84— evidence allegedly unlawfully seized—no basis for suppression

The trial court did not err in denying defendant's pretrial motion to suppress evidence discovered in a search of the area in which he was arrested, since defendant's motion alleged no legal basis for suppression and was unsupported by affidavits.

2. Narcotics § 4.3— possession of heroin—sufficiency of evidence

In a prosecution of defendant for possession of heroin, evidence was sufficient to be submitted to the jury where it was ample to raise the inference that defendant possessed a bottle containing heroin which he threw into an alleyway when he observed the presence of police officers.

3. Narcotics § 4.5; Criminal Law § 112.4— circumstantial evidence—request for instructions properly denied

The trial court did not err in refusing to give defendant's requested instructions on circumstantial evidence where the State offered eyewitness testimony that defendant was in actual possession of a bottle resembling one containing heroin found in an alleyway.

4. Criminal Law § 122.2— failure of jury to reach verdict—further instructions proper

Where the jury announced its inability to reach a verdict after considering the case for less than an hour, the trial court did not err in giving additional clarifying instructions on the role of the jury, sending the jury back to deliberate further, and denying defendant's motion to declare a mistrial.

APPEAL by defendant from *Peel, Judge*. Judgment entered 27 October 1983 in Superior Court, WAYNE County. Heard in the Court of Appeals 4 February 1985.

Defendant was charged in a proper bill of indictment with possession of a controlled substance, heroin, with intent to sell and deliver. The matter came on for trial on 20 September 1983, and the jury returned a verdict of guilty of the lesser included offense of possession of a controlled substance, heroin. The court entered judgment on the verdict and sentenced defendant to the presumptive term of two years in prison. Defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

Duke and Brown, by John E. Duke, for defendant, appellant.

HEDRICK, Chief Judge.

[1] In his first assignment of error, defendant challenges the court's denial of his pre-trial motion to suppress evidence discovered in a search of the area in which defendant was arrested. N.C. Gen. Stat. Sec. 15A-977 in pertinent part provides:

> (a) A motion to suppress evidence in superior court . . . must state the grounds upon which it is made. The motion must be accompanied by an affidavit containing facts supporting the motion.
>
> . . .
>
> (c) The judge may summarily deny the motion to suppress evidence if:
>
> (1) The motion does not allege a legal basis for the motion; or
>
> (2) The affidavit does not as a matter of law support the grounds alleged.

In the instant case, the motion to suppress filed by defendant contained the following allegations concerning the challenged search:

> NOW COMES the defendant, Jerry Simms Hall, and moves to suppress the following:
>
> . . .
>
> 2. Any evidence obtained as a result of a search without a search warrant.
>
> As grounds for said motion to suppress, the defendant respectfully shows . . . that no evidence was obtained from the defendant; that the defendant had no controlled substance in his possession nor in his control at the time of his arrest.
>
> WHEREFORE, the defendant moves that said evidence be suppressed, as the same was in violation of Article IV . . . and Article XIV, of the amendment to the Constitution of the United States, and that this verified Motion be accepted in support of said Motion to Suppress.

Defendant filed no affidavit in support of his motion.

While the record in the instant case reveals that the trial judge conducted a lengthy hearing on defendant's motion to suppress, making detailed findings of fact, we think it clear that the court could have summarily denied defendant's motion, which alleges no legal basis for suppression and which is unsupported by affidavits. Indeed, our examination of the motion filed by defendant reveals that the stated "grounds" for suppression are so vague as to be no grounds at all. We hold that defendant, by his failure to comply with the statutory requirements set out in G.S. 15A-977, has waived his right to contest on appeal the admission of evidence seized in the challenged search. *State v. Holloway*, 311 N.C. 573, 319 S.E. 2d 261 (1984). The assignment of error is overruled.

Defendant's second assignment of error is set out in his brief as follows: "The trial court committed reversible error in improperly allowing testimony by Chemist Evans identifying Exhibit 9 on the grounds that the State failed to properly prove a chain of custody for Exhibit 9 and its contents." This assignment

of error is based on Exception No. 2, set out in the transcript as follows:

> MR. COPELAND: Your Honor, at this time I move to introduce state's Exhibits 1 through 9 into evidence.
>
> MR. DUKE: To which we object.
>
> Exception #2.

Following defendant's objection, the trial court considered the State's motion as to each individual exhibit, and admitted each of the exhibits into evidence.

Rule 10, North Carolina Rules of Appellate Procedure, in pertinent part provides:

> (a) *Function in Limiting Scope of Review.* Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal in accordance with this Rule 10. No exception not so set out may be made the basis of an assignment of error. . . .
>
> (b) *Exceptions.*
>
> (1) . . . Each exception shall be set out immediately following the record of judicial action to which it is addressed and shall identify the action, without any statement of grounds or argumentation, by any clear means of reference.

In the instant case, we are unable to identify the judicial action that defendant wishes to challenge on appeal. Contrary to the requirements of Rule 10(b)(1), Exception No. 2 is not set out "immediately following the record of judicial action to which it is addressed," but instead appears immediately after defendant's objection to the State's motion. Furthermore, even if we were to assume that defendant intended to except to the court's admission into evidence of the exhibits, such exception would not support defendant's assignment of error, which concerns admission of testimony by "Chemist Evans." Indeed, the testimony of Mr. Evans appears in the transcript some one hundred pages before defendant's noted exception. Because we cannot identify the judicial action defendant has attempted to challenge, we are unable to consider the merits of this assignment of error.

[2] Defendant next contends the court erred "in failing to dismiss the charges . . . due to the insufficiency of evidence." Evidence adduced at trial, considered in the light most favorable to the State, tended to show the following: On 6 May 1983 Goldsboro police officers went to a Goldsboro poolroom; the officers were looking for defendant. When they arrived at the scene, officers observed the defendant on the sidewalk outside the building. When defendant saw the officers, he threw a "small round object" "of grayish-whitish color" "[s]haped like an Anacin bottle" over a fence into an alley. One of the officers climbed over the fence into the alley to look for the object. The alleyway had "small" grass in some areas and was bare in others. The officer "combed the whole area" and found a small white bottle. No items of similar appearance were found in the alleyway. The bottle was found to contain eight tinfoil packets, which contained white powder. Chemical analysis of the powder revealed that the substance was heroin.

Defendant contends that the above evidence is insufficient to show "that he was ever in possession of any heroin." We do not agree. Evidence introduced by the State was ample to raise an inference that defendant possessed a bottle containing heroin which he threw into an alleyway when he observed the presence of police officers. The assignment of error is without merit.

[3] Defendant next assigns error to the court's refusal to give requested instructions on circumstantial evidence. The instruction requested by defendant in pertinent part provides:

> There is no eyewitness testimony or direct evidence that the defendant committed the crime charged in this case. The State contends that the circumstances in evidence, taken together, establish the guilt of the defendant. In other words, the State relies upon what is known as circumstantial evidence.

We think the court was correct in refusing to give the requested instruction. The State offered eyewitness testimony that defendant was in actual possession of a bottle resembling that found in the alleyway. The requested instruction is proper only in cases in which the State offers no direct evidence. *See State v. Bates*, 309 N.C. 528, 308 S.E. 2d 258 (1983).

[4] Defendant finally assigns as error the court's refusal "to declare a mistrial upon the jury announcing that they could not agree upon a verdict." The record reveals that after the jury had considered the case for less than an hour, it returned to the courtroom and the following exchange occurred:

> FOREMAN: We're at an impasse and we do not know how to proceed any further.
>
> COURT: Is it some question of procedure, or is it—
>
> FOREMAN: We cannot reach a verdict on the—a hung jury would be the way to put it, we cannot reach a verdict unanimously of any of these three verdicts.
>
> COURT: You are not able to arrive at a verdict, you say?
>
> FOREMAN: That's correct.

The court then gave additional clarifying instructions on the role of the jury in accordance with N.C. Gen. Stat. Sec. 15A-1235(b) and on the requirement that any verdict rendered must be unanimous. After the court's instructions the following dialogue occurred:

> FOREMAN: May I ask a question?
>
> COURT: Yes, sir.
>
> FOREMAN: We must reach a unanimous verdict of one of these three?
>
> COURT: No, no, in order to arrive at a verdict it must be unanimous, before you can arrive at any verdict it must be unanimous, but I'm not ordering, saying that you have to agree—I have tried to explain it otherwise.
>
> FOREMAN: I realize you're not telling us we have to reach a verdict. My question is for us to reach a verdict in our own minds, it must be one of these three verdicts and it must be unanimous?
>
> COURT: Yes, sir, any verdict must be unanimous. There must be a meeting of the minds before you can arrive at any verdict in this case, yes, sir.

The jury then resumed their deliberations, at which time defendant asked that the court act immediately to declare a mistrial if the jury, upon being called back to the courtroom, had not reached a verdict. Judge Peel denied defendant's request.

N.C. Gen. Stat. Sec. 15A-1235(c) provides in pertinent part:

> If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b).

In the instant case the court's actions were expressly sanctioned by the above-quoted statute. Furthermore, it is well settled that the decision of the trial judge to declare or to refuse to declare a mistrial pursuant to the provisions of G.S. 15A-1235(d) is reviewable only for abuse of discretion. *State v. Wall*, 304 N.C. 609, 286 S.E. 2d 68 (1982). The record in this case contains no indication that Judge Peel abused his discretion, nor does defendant make such a contention in his brief. The assignment of error is without merit.

We hold defendant had a fair trial free from prejudicial error.

No error.

Judges JOHNSON and COZORT concur.

STATE OF NORTH CAROLINA v. PAMELA M. HORTON

No. 8418SC355

(Filed 19 February 1985)

1. **False Pretense § 3— defendant's driver's license—admissibility for identification**

In a prosecution of defendant for obtaining property by false pretenses, the trial court did not err in ordering defendant's attorney to give defendant's driver's license to the prosecutor who then gave it to the State's witness, a sales clerk, who identified the license as the one presented to her by defendant at the time of the alleged offense.

2. False Pretense § 3.1— goods purchased with checks—subsequent false report that checks were stolen—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for obtaining property by false pretenses where it tended to show that defendant presented two checks to merchants in exchange for merchandise, and she subsequently falsely reported the checks as having been stolen so that the checks were dishonored and the merchants received no money.

3. False Pretense § 3; Criminal Law §§ 58, 99.6— handwriting expert—questions by court proper

In a prosecution of defendant for obtaining property by false pretenses where the evidence tended to show that defendant presented checks to two merchants in exchange for merchandise and subsequently falsely reported the checks as having been stolen, the trial court did not err in asking defendant's handwriting expert whether both checks were written by the same person.

APPEAL by defendant from *Wood, Judge.* Judgment entered on 30 September 1983, Superior Court, GUILFORD County. Heard in the Court of Appeals on 9 January 1985.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Philip A. Telfer for the State.

Assistant Public Defender Frederick G. Lind for defendant appellant.

COZORT, Judge.

The jury convicted the defendant of two counts of obtaining property by false pretenses. During the cross-examination of a State's witness, the trial court ordered the defendant, over her objection, to give to the witness the defendant's driver's license which was being used to cross-examine the witness about her identification of the defendant. The defendant also objected to the trial court asking the defendant's expert handwriting witness whether he had compared the handwriting on the check mentioned in the first count of the indictment with the handwriting on the check in the second count. The defendant further assigned as error the denial of her motions to dismiss the charges on the basis of insufficiency of the evidence. We find no error.

The State's evidence showed the following:

Karen Young was employed as a sales clerk in the children's department at Belk's in Friendly Shopping Center in Greensboro.

On 5 August 1982 she was working the night shift, from 5:00 p.m. to 9:00 p.m. On that night the defendant came to her department, selected a few items of little boys' clothing, and paid for them with a check to Belk's for $79.82. In the course of accepting the check for payment, Ms. Young placed a check mark beside the defendant's phone number and driver's license number which were printed on the check, underlined her driver's license number, and wrote the defendant's Belk's charge number on the back of the check.

Edna Blackwelder was employed at Ivey's in Greensboro as a saleslady in the boys' department. On 18 August 1982 she was working the 12:40 p.m. to 9:30 p.m. shift. Between 8:00 and 9:00 that evening, the defendant came to her department, selected boys' shirts and pants, and paid for them with a check to Ivey's for $140.88. In the course of accepting the check for payment, Ms. Blackwelder compared the defendant to the picture on her driver's license, checked her driver's license number and phone number on the front of the check, wrote the expiration date of the driver's license on the check, and wrote her Belk's charge number on the back of the check.

Both checks were drawn on the Wachovia Bank in Winston-Salem. Shortly after the two checks were written, the defendant reported to the Wachovia Bank that the two checks were forgeries. The checks were not honored by Wachovia, and Belk's and Ivey's sustained losses of the amounts of the checks.

The defendant's evidence was that she was at the North Carolina Fitness Center in Winston-Salem on 5 August 1982 and 18 August 1982. She testified that she did not go to Greensboro on either night in question, nor did she write either check.

[1] The defendant first contends that the trial court erred by ordering the defendant's attorney to give the defendant's driver's license to the prosecutor who then gave it to State's witness, Ms. Blackwelder, who identified the license as the one presented to her by the defendant at Ivey's on 18 August. The State obtained the license during the defendant's cross-examination of Ms. Blackwelder, who had been recalled to the stand to clarify her testimony about looking at the defendant's driver's license when she took the check from the defendant. On cross-examination, the defendant's attorney, while holding the defendant's driver's license

in his hand, asked Ms. Blackwelder to describe the picture on the license. The State objected, whereupon the trial court excused the jury and conducted a voir dire examination. The trial court admitted the license into evidence and then allowed the State's witness to testify on redirect examination before the jury that the driver's license was the one defendant presented to her on 18 August 1982 with the check.

In her brief the defendant has offered no authority to support her contention that the trial court erred by requiring her to give the State's witness her license. The defendant has also failed to show that if this action was error how it was prejudicial. "A ruling of the trial court on an evidentiary point is presumptively correct, and counsel asserting prejudicial error must demonstrate that the particular ruling was in fact incorrect." *State v. Milby*, 302 N.C. 137, 141, 273 S.E. 2d 716, 719 (1981). Even assuming *arguendo* that the trial court committed error, we hold it did not constitute prejudicial error because the defendant has failed to carry the burden of showing that a different result would have been reached at the trial had the error not been committed. G.S. 15A-1443(a). Even without the use of the license, Ms. Blackwelder made a positive identification of the defendant, which she maintained through a strenuous cross-examination. She testified that she remembered the defendant because the defendant had an Ace bandage on her arm on 18 August 1982. She also testified that she had waited on the defendant several times prior to 18 August. Because the defendant has failed to show that any prejudicial error resulted by the trial court's actions, this assignment of error is overruled.

[2] The defendant next challenges the sufficiency of the evidence to prove all of the elements of the offense of obtaining property by false pretenses. The defendant argues that there was no evidence presented that a misrepresentation was made to either Belk's or Ivey's. Defendant's argument is without merit. G.S. 14-100 provides that the "false pretense" element may be "of a future fulfillment or event." When a person presents a check to a merchant in exchange for merchandise, he is representing that the amount of money specified on the check will be given to the merchant when that check is presented to the drawer's bank. If the drawer then commits some act in the future, such as falsely reporting that the check was stolen, which causes the check to be

dishonored and the merchant to receive no money for the merchandise, he has made a misrepresentation as contemplated under G.S. 14-100. In this case, there was ample evidence from which the jury could conclude that the defendant falsely reported the checks as having been stolen after having obtained merchandise in exchange for the checks. We hold that the trial court properly denied the defendant's motions to dismiss.

[3] We next consider whether the trial judge erred by asking the defendant's expert handwriting witness whether both checks were written by the same person. The defendant claims that his questions were an improper expression of an opinion by a trial judge. The judge's questions came after the witness had been examined by the defendant's attorney and cross-examined by the State's attorney. On direct examination for the defendant, the expert testified that he had compared the two questioned checks with known handwriting exemplars from the defendant. Neither the defendant nor the State asked the expert witness if he had an opinion as to whether the two checks were written by the same person. After the State completed its cross-examination, the following exchange between the court and the expert witness occurred:

> THE COURT: Let me ask you one question. Did you compare State's Exhibit 1 and State's Exhibit 2 for signature—I mean State's Exhibit 3. Did you compare the signature on each of those?
>
> THE WITNESS: Yes, I did to the first submission of known standards only. The second submission of known standards—
>
> THE COURT: Did you compare 1 with 3?
>
> THE WITNESS: Oh, I see. The comparison—
>
> THE COURT: Were they made by the same person or did you form an opinion about that?
>
> THE WITNESS: Yes, that was among the first of the examinations that would be performed. Yes. There is every indication that they would have been made from one origin.
>
> THE COURT: So you were of the opinion that State's 1 and State's 3 were made by the same person?

THE WITNESS: That is correct.

THE COURT: All right, sir.

As the witness stated, comparing the two questioned documents with each other would be "among the first of the examinations that would be performed." The trial judge was merely directing "questions to the witness in an effort to elicit overlooked pertinent facts." *State v. Brown*, 59 N.C. App. 411, 416, 296 S.E. 2d 839, 843 (1982), *cert. denied*, 310 N.C. 155, 311 S.E. 2d 294 (1984). We hold his questions did not constitute an expression of his opinion.

No error.

Judges WEBB and EAGLES concur.

GROVER NELSON HILL, EMPLOYEE-PLAINTIFF, APPELLEE v. BIO-GRO SYSTEMS, EMPLOYER; AND AETNA INSURANCE COMPANY, CARRIER, DEFENDANTS, APPELLANTS

No. 8410IC544

(Filed 19 February 1985)

1. Master and Servant § 55.3— Industrial Commission's findings of injury—supported by evidence

The evidence, though conflicting, supported the Industrial Commission's finding that plaintiff had sustained an injury to his foot by accident arising out of his employment where the evidence showed that plaintiff was employed as a truck driver, that he worked 13¾ hours in sub-freezing temperatures, that he caught his boot on a clearance light in the step of the truck cab, that he "twisted" his boot with his hands to get it free, that he did not feel any pain until the next morning, and that a doctor diagnosed plaintiff as having a comminuted fracture of the heel bone. Plaintiff's doctor testified that in his opinion the fracture was caused when plaintiff caught his foot on the truck step and twisted it, that he would not expect someone moving their foot back and forth to exert enough force to cause a fracture, that plaintiff could do more trauma to his foot than others due to a diabetic condition and resulting loss of sensation in his foot, and that it was possible for plaintiff to have injured his foot when he "wrenched" it free.

2. Master and Servant § 90— Industrial Commission findings as to employer's actual notice of injury—evidence sufficient

There was ample evidence to support the Industrial Commission's findings that defendant had actual knowledge of plaintiff's injury within a week and was not prejudiced by lack of formal written notice in that plaintiff told his supervisor about the accident before he was aware of his injury, that his wife called the project manager and told him that plaintiff had injured his foot after he became aware of his injury, that plaintiff's supervisor told him that an accident report would be sent and that his medical bills would be covered, and that plaintiff had no further contact with the supervisor or plant manager after the supervisor told plaintiff that Bio-Gro Systems had lost the contract and terminated plaintiff's employment. G.S. 97-22.

APPEAL by defendants from the North Carolina Industrial Commission. Opinion and award entered 20 March 1984. Heard in the Court of Appeals 15 January 1985.

Plaintiff instituted this proceeding seeking compensation for an accidental injury to his left foot allegedly sustained while working as a truck driver for the defendant, Bio-Gro Systems, on 8 January 1981. The parties stipulated that an employment relationship existed between the plaintiff employee and the defendant employer and that on the date of the alleged accidental injury the parties were subject to and bound by the provisions of the Workers' Compensation Act. After a hearing, Deputy Commissioner Lawrence B. Shuping, Jr. found that the plaintiff had

> sustained an accident arising out of and in the course of his employment; however, such accident did not result in the injury, and more particularly the fracture of his left os calcis, for which the claimant hereby seeks compensation, in that such accident did not result in sufficient trauma to produce such an injury.

Deputy Commissioner Shuping denied the plaintiff's claim on 6 August 1982 and plaintiff appealed to the Full Commission.

The Full Commission, with Chairman Stephenson dissenting, reversed the decision of the deputy commissioner, and found that the plaintiff had sustained an injury by accident arising out of and in the course of his employment and that plaintiff was entitled to compensation for temporary total disability. From the opinion and award of the Full Commission, the defendants appealed to this Court.

Pfefferkorn, Cooley, Pishko & Elliot, P.A., by David C. Pishko, for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice, by Richard T. Rice, for defendants appellants.

MARTIN, Judge.

The questions before us on this appeal are whether the Commission erred in finding that plaintiff sustained injury as a result of the job related accident which occurred on 8 January 1981, and whether the Commission erred in its determination that the failure of the plaintiff to give written notice of the accident as required by G.S. 97-22, resulted in no prejudice to defendant employer. We find the evidence, though conflicting, sufficient to support the contested findings of fact and that the findings reasonably support the conclusions of law. We therefore affirm the Commission's award.

The applicable scope of appellate review on appeal from an award of the Industrial Commission is limited to a determination of whether there was any competent evidence to support the Commission's findings and whether such findings support its legal conclusions. *McLean v. Roadway Express*, 307 N.C. 99, 296 S.E. 2d 456 (1982); *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981). Findings of fact made by the Commission are conclusive on appeal when supported by competent evidence. This is so even though there is evidence to support findings to the contrary. *McLean, supra; Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981).

Defendants challenge the Commission's finding that:

> 7. Plaintiff suffered an injury by accident arising out of and in the course of his employment on January 8, 1981. This accident occurred when plaintiff, upon exiting his cab, got his foot caught on a broken light on the cab step and had to use his hands to wrench it free. As a result of this accident, plaintiff sustained a fractured os calcis (heel bone). Plaintiff was not immediately aware of injury and suffered no pain until he arose the following morning. Nerve damage to his foot due to diabetes caused plaintiff to have a loss of sensation in this foot which meant he could experience more trauma to it,

without realizing it, than a person not suffering from such affliction. This lack of sensation would have been even greater at the time of the accident due to the plaintiff's exposure to the outside temperature which was below the freezing mark, and which caused plaintiff's body to be nearly frozen.

[1] The evidence before the Commission discloses that the plaintiff was employed as a truck driver for Bio-Gro Systems. He worked for approximately 13¾ hours on 8 January 1981 in subfreezing temperatures. At the end of his work day, as he started to exit the cab of the truck, he caught the toe of his boot on a clearance light in the step of the truck cab. He "twisted" his boot with his hands to get it free. He did not feel any pain at that time, but upon awakening the next morning, his left foot was swollen and painful. After several days, he sought medical treatment from his family doctor, who diagnosed his injury as a strain. When it did not improve, he sought treatment from Dr. Jemison on 17 March 1981. Dr. Jemison testified that the plaintiff was diabetic and, as a result, had decreased sensation in his foot and was more susceptible to infection. He diagnosed the plaintiff as having a comminuted fracture of the left os calcis (heel bone) and cellulitis (an inflammation of the tissue around the fracture). The plaintiff later developed complications requiring hospitalization, surgery and an extended recuperative period. Dr. Jemison testified that in his opinion the fracture was caused when plaintiff caught his foot on the truck step and "twisted it." In later testimony, upon examination by defendants' counsel, Dr. Jemison testified that if someone caught their toe and, in attempting to free the toe, moved their foot back and forth with their hands, he would not expect the movement to exert enough force to cause a fracture. He testified, however, that due to the plaintiff's diabetic condition and resulting lack of sensation in his foot, he could do more trauma to it, without realizing it, than a person without that condition. Dr. Jemison then proceeded, on redirect examination, to state that it was possible for plaintiff to have injured his foot when he "wrenched" it free.

Defendants contend that Dr. Jemison's opinion that the injury occurred when the plaintiff "twisted" his foot is rendered incompetent because the hypothetical question posed by plaintiff's counsel assumed facts not in evidence, i.e., that the plaintiff had "twisted" his foot. A close reading of the transcript reveals that

plaintiff testified ". . . when I got my foot hung, I twisted my boot like this to get out." Defendants' counsel later asked, "when you say 'twisted,' talking about wiggling your foot back and forth?" Plaintiff answered "Right." The hypothetical question posed by plaintiff's counsel, in which he asked the doctor to assume that plaintiff had "twisted" his foot was supported by the plaintiff's own testimony. The doctor's response that, in his opinion, the twisting was the cause of the injury was competent. When he later testified that he would not expect that a movement of the foot back and forth with one's hands would produce sufficient trauma to cause a fracture, he did not withdraw his earlier opinion; in fact, he subsequently reiterated his earlier opinion, that a twisting motion can produce the type of injury which plaintiff sustained.

If the evidence, viewed in the light most favorable to the complainant, tends directly or by reasonable inference to support the Commission's findings, these findings are conclusive on appeal even though there may be evidence to support findings to the contrary. *Click v. Freight Carriers*, 300 N.C. 164, 265 S.E. 2d 389 (1980). Viewing the expert testimony of Dr. Jemison and the lay testimony of plaintiff that he developed the swelling and pain in his foot within a few hours of the accident, we believe that there was competent evidence in the record to support the Commission's finding that the plaintiff sustained the injury to his foot by reason of the accident on 8 January 1981, which arose out of his employment with Bio-Gro Systems.

[2] Defendants also contend that the Commission erred in finding that Bio-Gro Systems had actual knowledge of plaintiff's injury within a week of the accident and in its conclusion that Bio-Gro Systems, therefore, had not been prejudiced by lack of formal written notice. Again, we find ample competent evidence to support the Commission's findings. Plaintiff testified that he told his supervisor about catching his foot on the light shortly after the accident occurred, but before he had suffered any pain and therefore was unaware of his injury. On the morning following the accident, plaintiff's wife called his place of employment. Bio-Gro Systems' project manager admitted that plaintiff's wife had called him and advised him that the plaintiff had hurt his foot and would not be in that day. On the Wednesday following the accident, plaintiff called his supervisor to ask about returning to

work. The supervisor told him to stay out until the following Monday to give his foot a chance to heal. When he returned to work the following Monday, plaintiff asked his supervisor to send an accident report. His supervisor told him that he would get around to it and not to worry about the doctor bills, that the company had insurance to cover it.

G.S. 97-22, in pertinent part, provides:

> Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, . . . but no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

The evidence, when viewed in the light most favorable to the plaintiff, shows that the plaintiff told his supervisor about the accident. After the plaintiff became aware that he had been injured, his wife called the project manager and told him that the plaintiff had injured his foot. The supervisor told plaintiff that an accident report would be sent and that his medical bills would be covered. The supervisor then terminated the plaintiff's employment, telling him that Bio-Gro Systems had lost the contract. Plaintiff had no further contact with the supervisor or plant manager. This evidence is sufficient to support the Commission's finding that the employer had actual notice of the injury by accident. The finding is sufficient to support the conclusion that no prejudice resulted to Bio-Gro Systems by the failure of plaintiff to give a formal written notice of the accident injury.

Defendants' assignments of error are overruled and the opinion and award of the Industrial Commission is affirmed.

Affirmed.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. BRUCE LEE OLIVER

No. 841SC326

(Filed 19 February 1985)

1. **Criminal Law § 162— failure to include excluded evidence in record**

Defendant could not complain that the trial court erred in excluding a portion of his testimony as hearsay where defendant failed properly to preserve the proffered testimony in the record.

2. **Criminal Law § 163; Narcotics § 4.5— two offenses—order of consideration by jury—instructions improper—failure to request proper instruction**

Though the trial court erred in instructing the jury first to consider the offense of possession of more than one gram of cocaine and if it found defendant guilty of that offense, second, to consider the charge of possession with intent to manufacture, rather than in the reverse order, defendant was not prejudiced where he declined the opportunity to request additions or suggest corrections to the charge both before and after the jury was instructed; moreover, the error was not fundamental and did not have a probable impact on the jury's finding of guilt so as to require a new trial for defendant. App. Rule *10*(b)(2).

3. **Narcotics § 5— possession with intent to sell cocaine—possession of cocaine—punishment for both improper**

Defendant could not be sentenced both for possession of cocaine and for possession with intent to manufacture, sell, and deliver the same cocaine.

APPEAL by defendant from *Phillips, Judge.* Judgment entered 14 October 1983 in Superior Court, DARE County. Heard in the Court of Appeals 8 January 1985.

Defendant was arrested in the home of co-defendant during a search pursuant to a valid warrant. He was charged with felonious possession with intent to manufacture, sell, and deliver cocaine and felonious possession of more than one gram of cocaine.

The evidence for the State tended to show the following:

On 3 April 1983 officers entered the home of co-defendant where an officer saw defendant run down a hallway with a plate in his hand. Defendant threw the plate in the air, it landed on a bed, and a white powdery substance—later identified as cocaine—fell on the bed. Items found in co-defendant's kitchen and seized pursuant to the search warrant included baggies containing cocaine, a set of Hause triple beam scales, a weighing plate, and two

small measuring cups. Items seized from co-defendant's bedroom included a sifter, a plastic straw, a razor blade, four bags of white powder identified as cocaine, and co-defendant's business records.

None of the items seized belonged to defendant. However, his latent fingerprints were found on a plate, an outside corner of a plastic bag, an inside corner of a plastic bag, and the set of scales.

The evidence for defendant tended to show the following:

Defendant met co-defendant in January or February 1983 when he entered the County to sell some of his property there. At the time of arrest he was in the area on business and was staying in the guest room of co-defendant. Defendant saw no controlled substances at the home of co-defendant until he awakened at about 2:15 the morning of the arrest. At that time he noted the items subsequently identified at trial; he was surprised and shocked at the presence of drugs and drug paraphernalia at co-defendant's home. Out of curiosity he examined some of the items in the home, but did not bag, package, or repackage any of the substances. After the police knocked at the door, he carried a plate down the hall in response to gestures or words by co-defendant.

No drugs were found on defendant's person or in his clothing or car. Defendant testified that he does not use drugs.

From a judgment of imprisonment entered upon verdicts of guilty on both counts, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Wilson Hayman, for the State.

Lee & Finch, by Gerald Bruce Lee, and Wishart, Norris, Henninger and Pittman, P.A., by Diana Lee Evans, for defendant appellant.

WHICHARD, Judge.

Defendant assigns three errors: the exclusion of a portion of his testimony as hearsay; the failure of the court properly to instruct the jury of the charges against him in the alternative; and the imposition of two sentences based on convictions of possession of the same contraband.

I.

[1] The evidentiary ruling to which defendant excepts occurred in the following testimony:

> A. . . .[Co-defendant] came up to me and leaned down and said "I think—
>
> Mr. Williams: Objection
>
> The Court: Sustained
>
> Q. What was [sic] her actions?
>
> A. Her actions were that she wanted to clean—
>
> Mr. Williams: Objection
>
> The Court: Sustained
>
> A. Her actions were to come to the counter and start picking everything up.

The testimony continued:

> Q. And what, if anything, did you do at that time?
>
> A. At that point, she was picking things up off the counter and she went down the hallway and I was sitting there watching T.V. I'm a guest in her home and at that point I had stood up and there were two plates on the end of the counter, and I picked them up and I walked down the hallway.

Defendant contends that: where the court sustained the objection against him he would have testified that co-defendant gestured to him to pick up the plates containing the cocaine; this testimony would have indicated co-defendant's intent to control and possess the cocaine; and from this testimony the jury "could have found [defendant] was merely at the wrong place at the wrong time, and . . . had no intention to possess or manufacture the controlled substance which he was observed carrying."

Defendant's failure properly to preserve the proffered testimony in the record, however, is dispositive of his exception. "Where the record fails to show what the answer would have been had the witness been permitted to answer, the exclusion of such testimony cannot be held prejudicial." *State v. Miller*, 288

N.C. 582, 593, 220 S.E. 2d 326, 335 (1975). We are satisfied, moreover, that even if defendant had been permitted to answer as he here contends he would have, there is no reasonable possibility that the jury would have reached a different result. *See* G.S. 15A-1443. The testimony immediately following that objected to, *supra*, and other testimony repeated throughout the record, gave the jury ample opportunity to find that defendant "was merely at the wrong place at the wrong time." *See, e.g., State v. McCoy*, 303 N.C. 1, 27, 277 S.E. 2d 515, 533-34 (1981).

II.

[2] Defendant was charged with possession with intent to manufacture, sell, and deliver cocaine, G.S. 90-95(a)(1), and possession of more than one gram of cocaine, G.S. 90-95(d)(4), stemming from the seizure of 6.36 grams of cocaine and assorted paraphernalia at co-defendant's residence. Defendant assigns error to the order in which the jury was instructed to consider the offenses for verdict.

In *State v. McGill*, 296 N.C. 564, 251 S.E. 2d 616 (1979), our Supreme Court defined the correct procedure by which to charge a jury in the present situation: the court is to instruct the jury first to consider the offense of possession with intent to manufacture, sell, or deliver the controlled substance; if and only if the jury finds defendant not guilty of that offense is it to consider the charge of possession of more than one gram. *Id.* at 569, 251 S.E. 2d at 619-20. In this case the court instructed the jury first to consider the offense of possession of more than one gram and if it found defendant guilty of that offense, second, to consider the charge of possession with intent to manufacture. This instruction was erroneous.

Rule 10(b)(2) of the Rules of Appellate Procedure provides:

> No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict . . . provided, that opportunity was given to the party to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury . . . .

Defendant declined the opportunity to request additions or suggest corrections to the charge both before and after the jury was

instructed. No exception to the charge appears in the record; in its absence defendant urges us to apply the plain error rule adopted in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

To mitigate the potential harshness of Rule 10(b)(2), the plain error rule allows the appellate court to cure errors or defects affecting substantial rights which were not brought to the attention of the court below. *See State v. Black*, 308 N.C. 736, 740, 303 S.E. 2d 804, 806-07 (1983). The rule, however, "is always to be applied cautiously and only in the exceptional case where . . . the claimed error is a *fundamental* error . . . . *Odom*, 307 N.C. at 660, 300 S.E. 2d at 378, quoting *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982). In the case of erroneous jury instructions, plain error will be found only "where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.' " *Id.*

After a careful review of the record, we cannot say the court's failure to instruct as per *McGill*, 296 N.C. 564, 251 S.E. 2d 616, had a probable impact on the jury's findings. *See, e.g., State v. Brown*, 312 N.C. 237, 321 S.E. 2d 856 (1984) (jury instructions which permitted conviction upon theory not supported by indictment for first degree kidnapping had probable impact on verdict and error was plain). Defendant concedes that the court properly instructed the jury concerning the elements of the two offenses and was correct in sending both charges to the jury. We thus do not believe this is the "exceptional" case in which the error was "fundamental" and had a "probable impact" on the jury's finding of guilt. *Odom*, 307 N.C. 655, 300 S.E. 2d 375.

III.

[3] Defendant contends the court erred in sentencing him both to two years for possession of cocaine and to three years for possession with intent to manufacture, sell, and deliver the same cocaine. We agree. Defendant cannot be punished for both offenses based on possession of the same contraband. *McGill*, 296 N.C. at 568, 251 S.E. 2d at 619. *See also State v. Pagon*, 64 N.C. App. 295, 299, 307 S.E. 2d 381, 384 (1983). "Multiple punishment is one facet of the prohibition against double jeopardy. (Citations omitted.) That rule applies '[w]here two or more offenses of the same nature are by statute carved out of the same transaction

and are properly the subject of a single investigation.' (Citations omitted.)." *McGill,* 296 N.C. at 568, 251 S.E. 2d at 619.

The jury here found the presence of all the elements of the charge of possession with intent to manufacture. Defendant does not contend that the evidence was insufficient to support that finding. We therefore, pursuant to *McGill,* sustain the conviction and sentence on the greater charge and arrest judgment on the lesser.

As to the charge of felonious possession of cocaine with intent to manufacture, sell, and deliver, no error.

As to the charge of felonious possession of more than one gram of cocaine, judgment arrested.

Chief Judge HEDRICK and Judge PARKER concur.

SPERRY CORPORATION v. JANE PATTERSON AND GLENN JERNIGAN

No. 8410SC461

(Filed 19 February 1985)

1. **Unfair Competition § 1— Chapt. 75—no cause of action against State or its representative**

The consumer protection and anti-trust laws of Chapter 75 of the General Statutes do not create a cause of action against the State because the State is not a "person, firm, or corporation" within the meaning of G.S. 75-16; moreover, defendant Patterson acted as a representative of the State in awarding State contracts, and a G.S. 75-1.1 claim will not lie against her in her individual capacity regardless of whether she exceeded her statutory authority. G.S. 1A-1, Rule 12(b)(6).

2. **State § 4.2— sovereign immunity—allegations that official exceeded authority —denial of motion to dismiss proper**

The defense of sovereign immunity did not apply and defendant's motion to dismiss was properly denied where plaintiff's complaint raised factual issues as to whether defendant Patterson exceeded her authority and violated G.S. 143-52 by a pattern of awarding State computer contracts to one company, by deciding to award the contracts in question to plaintiff's competitor before bid invitations ever issued, and by restricting bid invitations so that only plaintiff's competitor could comply. Defendant's evidence contradicting plaintiff's contentions showed a factual dispute, but did not show as a matter of law

that defendant Patterson acted within her authority. G.S. 143-52, N.C. Rule of App. Proc. 28(a).

APPEAL by plaintiff and defendants from *Bailey, Judge.* Order entered 1 March 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 7 January 1985.

Plaintiff is an unsuccessful bidder on State contracts for computer hardware and software. Its complaint alleges that defendant Patterson, then Secretary of the Department of Administration, intentionally set bid specifications so restrictively that only one manufacturer could meet them, thereby rendering the bidding noncompetitive in violation of G.S. 143-52. Plaintiff claimed that defendants' actions constituted an unfair and deceptive trade practice under G.S. 75-1.1. It asked the trial court to issue a preliminary injunction and to set aside the contracts.

A hearing was held on plaintiff's motion for a preliminary injunction and on defendants' motions to dismiss pursuant to G.S. 1A-1, Rules 12(b)(1) and (2), 12(b)(6), 12(h)(3), and 21. The trial court denied plaintiff's motion for preliminary injunction. It further denied defendants' motions to dismiss with respect to the first and third claims, which asked to enjoin and set aside the contracts, on the grounds that sovereign immunity did not bar these claims. However, the trial court dismissed the second claim, which was brought under G.S. 75-1.1 and related statutes, on the grounds that G.S. 75-1.1 does not apply to the State. All parties appealed.

Morgan, Bryan, Jones & Johnson, by Robert B. Morgan, James M. Johnson and John M. Phelps, II, for plaintiff appellant and appellee.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney Generals H. Al Cole, Jr., and T. Buie Costen, Assistant Attorney Generals Fred R. Gamin and R. Andy Giles, Jr., and Associate Attorney General Victor H. E. Morgan, Jr., for defendant appellant and appellee Jane Patterson.

Chief Counsel T. S. Whitaker and Staff Attorney Donald R. Teeter for defendant appellant and appellee Glenn Jernigan.

WEBB, Judge.

At the outset we note that the judgment of the Superior Court did not dispose of all claims and is interlocutory. In our discretion we shall dispose of the appeal.

The complaint alleges violations of G.S. 143-52 by defendant Patterson; it fails to allege any actions by defendant Jernigan that could possibly be a violation of that statute or otherwise give rise to a cause of action against him. Thus, the case must be remanded for dismissal of all claims against defendant Jernigan pursuant to his G.S. 1A-1, Rule 12(b)(6) motion.

[1] Plaintiff contends the trial court erred in dismissing its claim under G.S. 75-1.1 for lack of jurisdiction. Although plaintiff argues that sovereign immunity should not bar its G.S. 75-1.1 claim, we perceive another basis for affirming the trial court's dismissal of this claim. The consumer protection and antitrust laws of Chapter 75 of the General Statutes do not create a cause of action against the State, regardless of whether sovereign immunity may exist. G.S. 75-16 authorizes a civil action by a person or business who has been injured in violation of Chapter 75 against the "person, firm, or corporation" causing the injury. The State of North Carolina is not a "person, firm, or corporation" within the meaning of G.S. 75-16, so plaintiff has not stated a claim against the State for which relief can be granted. "When the defendants act in their official capacity, it is the State acting." *Microfilm Corp. v. Turner*, 7 N.C. App. 258, 263, 172 S.E. 2d 259, 263, *cert. denied*, 276 N.C. 497 (1970). Thus, the G.S. 75-1.1 claim against defendants in their official capacity must be dismissed pursuant to G.S. 1A-1, Rule 12(b)(6).

Nor does a G.S. 75-1.1 claim lie against defendant Patterson in her individual capacity. Whether or not defendant Patterson exceeded her statutory authority, she acted as a representative of the State when dealing with plaintiff. The subject of this action relates to her acts in awarding State contracts. Plaintiff has alleged the violation of statutory duties by defendant Patterson, but it has not alleged any fraudulent, corrupt, or otherwise tortious conduct on her part. In this context plaintiff's complaint fails to state a claim for which relief can be granted under G.S. 1A-1, Rule 12(b)(6). The whole thrust of G.S. 75-1.1 as applied by North Carolina courts has been to afford protection from unethi-

cal acts by businesses or business persons, not to allow claims against state employees purchasing or leasing equipment for the State.

> In an area of law such as this, we would be remiss if we failed to consider also the overall purpose for which this statute was enacted. The commentators agree that state statutes such as ours were enacted to supplement federal legislation, so that *local business interests* could not proceed with impunity, secure in the knowledge that the dimensions of their transgression would not merit federal action.

Marshall v. Miller, 302 N.C. 539, 549, 276 S.E. 2d 397, 403 (1981) (emphasis added).

[2] Defendants contend the trial court erred in not dismissing the first and third claims, in which plaintiff sought to enjoin performance of the contracts and set aside the contracts due to defendant Patterson's alleged violation of G.S. 143-52, on the grounds that sovereign immunity barred the claims. They maintain that they acted in their capacity as representatives of the State and therefore are entitled to the defense of sovereign immunity as set forth in *Electric Co. v. Turner*, 275 N.C. 493, 168 S.E. 2d 385 (1969). *Electric Co.* involved a suit by an unsuccessful bidder against the state officials responsible for awarding state contracts. The Supreme Court held that plaintiff's claim was barred by sovereign immunity since "[e]vidence is lacking that the State officers acted either corruptly, or in violation of law, or in excess of authority." *Id.* at 497, 168 S.E. 2d at 388. The present case must be distinguished. Plaintiff's complaint raises factual issues as to whether defendant Patterson exceeded her authority and violated G.S. 143-52 by a pattern of awarding state computer contracts to one company, by deciding to award the contracts in question to plaintiff's competitor before bid invitations ever issued, and by restricting bid specifications so that only plaintiff's competitor could comply with them. This complaint falls within the rule summarized in *Lewis v. White*, 287 N.C. 625, 216 S.E. 2d 134 (1975), that when the pleadings allege that state officials have acted in excess of their authority or in violation of the law to the injury of plaintiff, then the state officials are not entitled to a dismissal based on sovereign immunity. *Lewis*, at 643-44, 216 S.E. 2d at 146, quotes *Teer v. Jordan*, 232 N.C. 48, 51, 59 S.E. 2d 359, 362 (1950), for the rule that,

"While the activities of governmental agencies engaged in public service imposed by law ought not to be stayed or hindered merely at the suit of an individual who does not agree with the policy or discretion of those charged with responsibility, the right of a citizen and taxpayer to maintain an action in the courts to restrain the unlawful use of public funds to his injury cannot be denied."

Defendants argue that the constitutional doctrine of separation of powers is the source of a sovereign immunity defense for state officials acting within the discretionary limits of their authority. However, as stated above, plaintiff has overcome the obstacle of sovereign immunity through its allegations that defendant Patterson did not act within her discretion but instead exceeded her authority. Even though she had authority under G.S. 143-52 to set bidding specifications and rules, she did not have the authority to subvert the statutory competitive bidding process by making it noncompetitive. This holds true even if defendant Patterson could have entered into contracts under G.S. 143-53(5) without competitive bidding since she in fact availed herself of the competitive bidding process under G.S. 143-52.

Defendants further argue that the defense of sovereign immunity raises an issue of subject matter jurisdiction, and therefore this Court may look beyond the mere allegations of the complaint. *Eller v. Coca-Cola Co.*, 53 N.C. App. 500, 281 S.E. 2d 81 (1981) and *Tart v. Walker*, 38 N.C. App. 500, 248 S.E. 2d 736 (1978), cited by defendants, hold that courts may consider matters outside the pleadings in determining subject matter jurisdiction. Our Supreme Court has expressly declined to decide whether sovereign immunity relates to subject matter jurisdiction or personal jurisdiction, *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327-28, 293 S.E. 2d 182, 184 (1982), but in either event we have reviewed the entire record, not just the pleadings.

The record matters argued by defendants provide a persuasive defense of their actions but fall short of irrefutably establishing that defendant Patterson acted completely within her statutory authority. Defendants point out that the items described in the bid invitations were representative or illustrative, not binding. They contend the bid specifications were restricted only to the extent necessary to insure that the new equipment

would be compatible with the existing central system. Defendants note that there were several competitors bidding on the contracts that plaintiff failed to win, and that similar contracts in the past had been awarded to several different vendors. This evidence tends to contradict plaintiff's allegations and affidavits to the effect that defendant Patterson was predisposed to buy IBM products and structured the bid invitations so as to give an unfair advantage to IBM. In contradicting plaintiff's contentions, defendants have, at this stage of the proceedings, shown a factual dispute. They have not shown as a matter of law that defendant Patterson acted within her authority. Thus we cannot hold as a matter of law that defendant Patterson is entitled to sovereign immunity. As stated in *Lewis, supra*, at 645, 216 S.E. 2d at 147, "When given the opportunity to present its evidence in support of its allegations, plaintiff may or may not 'get to first base,' but it is entitled to its turn at bat. . . ."

Plaintiff has failed to argue any error in the denial of its motion for a preliminary injunction, so that issue has been abandoned and will not be reviewed by this Court. N.C. Rule of App. Proc. 28(a).

We affirm the denial of the motions to dismiss the first and third claims except as to the defendant Jernigan. We affirm the dismissal of the plaintiff's second claim.

Reversed in part; affirmed in part.

Judges WHICHARD and MARTIN concur.

LARRY WARREN GIBBY v. JACK MURPHY, ROBERT ANDERSON, AND ORKIN EXTERMINATING CO., INC.

No. 8427SC366

(Filed 19 February 1985)

1. **Libel and Slander § 5.4— slander—false accusation of embezzlement—denial of directed verdict proper**

Defendant's motion for a directed verdict in an action for slander was properly denied where plaintiff's evidence tended to show that defendants falsely accused plaintiff of being charged with crimes of embezzlement.

2. Libel and Slander §§ 6, 10.1— libel—false accusation of embezzlement—no privilege

The trial court erred by directing verdict for Orkin in an action for libel in which plaintiff offered evidence showing that an agent of Orkin took a letter written to plaintiff by defendant Murphy which accused plaintiff of embezzlement and fraud and published the letter to a customer's accountant, who in turn relayed it to her attorney. Orkin did not have a qualified privilege to publish the letter because it released to persons who were not proper parties accusations that plaintiff had committed a crime involving moral turpitude. However, there was no evidence of Murphy's involvement in the publication, and directed verdict in his favor was proper.

3. Libel and Slander § 18— punitive damages—no evidence of actual malice —directed verdict proper

The court did not err by directing a verdict against plaintiff on his claims for punitive damages in a defamation action where there was no evidence from which the jury might have concluded that any of the allegedly defamatory statements were made with actual malice.

APPEAL by defendants Robert Anderson and Orkin Exterminating Co., Inc., and cross-appeal by plaintiff from *Sitton, Judge*. Judgment entered 14 November 1983 in Superior Court, GASTON County. Heard in the Court of Appeals 29 November 1984.

This is a civil action wherein the plaintiff sued defendants Orkin Exterminating Company (hereinafter Orkin) and Jack Murphy for libel. He also sued Orkin and Robert Anderson for slander. Under each cause of action he sought punitive and actual damages.

Plaintiff offered evidence at trial which tended to show the following. Plaintiff was employed by defendant Orkin as a salesman of exterminating contracts. During the course of his employment, plaintiff made a sales call on Mrs. Clara C. Stroup. During the sales call, Mrs. Stroup bought an exterminating contract, and according to Gibby, a contract to have her house insulated by his stepfather. Mrs. Stroup gave plaintiff one check, payable to the order of Larry Gibby, for the sum of $3,849. Gibby cashed the check, and paid $1,428 to the defendant Orkin, and $2,421 to his stepfather for the insulation work.

On 1 January 1982, approximately a month after selling Mrs. Stroup the contracts, Gibby went to Hawaii for twelve days. On 18 January 1982, he returned to work. On approximately 27 Jan-

uary 1982, Jack Murphy, the Orkin District Office Manager, received a call from the Gastonia office informing him that Mrs. Stroup had called to complain that she felt she had been overcharged for the termite extermination. Murphy checked out the complaint, and after visiting her, he informed her that she would be paid for any overcharges.

On 28 January 1982, Murphy wrote Gibby a letter regarding the Stroup contract which in pertinent part stated:

> I don't have to tell you the seriousness of this misappropriation of Company Funds, as well as fraudulent tactics with Mrs. Stroup. Gibby I want the following:
>
> 1— The return of the $2421.00 to Orkin in Gastonia—the difference between $3849.00 and $1428.00. . . .
>
> 2— The return of any other monies taken from Orkin returned to the Orkin Branch in Gastonia.

This letter was delivered to Gibby by an Orkin employee. Later in the day, Gibby's employment with Orkin was terminated.

Shortly after he received the letter, Gibby went to visit Mrs. Stroup. After determining that she did not want the insulation work, he returned the $2,421 to her attorney. On 2 February 1982, a copy of the 28 January 1982 letter was delivered, by an Orkin employee, to Mrs. Stroup's accountant, who turned it over to her attorney.

After plaintiff was terminated, he sought employment from Steel Specialty located in Charlotte, North Carolina. Gibby was interviewed by Frank Elmore, an acquaintance from high school. After he told Mr. Elmore that he had recently been employed by Orkin, Elmore called Orkin's Gastonia office. Elmore was referred to Mr. Anderson, the office manager. Elmore testified that Mr. Anderson told him, "Larry was no longer employed by Orkin, that they had a warrant outstanding for him for fraudulent misuse of money and told me that he wouldn't recommend Larry for any employment and I asked him again about the warrant and he stated that there was a warrant out for his arrest at that time for embezzlement and fraudulent misuse of money." Based at least in part upon this statement, which was false, Elmore refused to hire Gibby. Gibby was unable to obtain steady employment until February 1983.

At the close of plaintiff's evidence, the trial court directed a verdict against him on the libel cause of action because it found that any libelous actions of the defendants were covered by qualified privilege. The court also directed a verdict against plaintiff as to the issue of punitive damages on the slander issue.

Defendants offered no evidence. The jury found that Gibby had been slandered by Andrew's statement and concluded that he was entitled to recover $7,500 from Orkin and Anderson. From a judgment entered on the verdict, Anderson and Orkin appealed. From the judgment directing a verdict against him on the issues of libel and punitive damages, plaintiff cross-appealed.

Lloyd T. Kelso for plaintiff appellee and cross-appellant.

Robert N. Burris for defendant appellants and cross-appellees.

ARNOLD, Judge.

Defendants' Appeal

[1] The gravamen of the defendants' appeal is that the trial court erred by denying their motion for a directed verdict as to the issue of slander. They base their argument upon the contentions that there was insufficient evidence of publication of any slanderous statement, and that there was insufficient evidence of damages. Defendants also contend the court erred by misstating the evidence in its summary to the jury.

Slander, oral defamatory utterances, may be actionable *per se*. Statements that are slanderous *per se* may form the basis of an action because in such cases malice and damages are presumed as a matter of law. Among statements which are slanderous *per se* are accusation of crimes or offenses involving moral turpitude, defamatory statements about a person with respect to his trade or profession, and imputation that a person has a loathesome disease. *Penner v. Elliott*, 225 N.C. 33, 33 S.E. 2d 124 (1945); *Williams v. Freight Lines and Willard v. Freight Lines*, 10 N.C. App. 384, 179 S.E. 2d 319 (1971).

The plaintiff offered evidence which tended to show that defendant Orkin, by and through its agent defendant Anderson, falsely accused him of being charged with the crimes of embezzle-

ment. This evidence is sufficient, if believed by a jury, to show slander *per se*. Therefore, the trial court properly denied the defendants' motion for a directed verdict. Since damages are presumed in slander *per se* the defendants' contentions that it was improper to allow an award of damages because of lack of evidence is also without merit.

Finally, as to defendants' argument that the trial court improperly summarized the evidence for the jury, we find no error. We have carefully reviewed the court's summarization and find it to be substantially correct, and in compliance with Rule 51 of the North Carolina Rules of Civil Procedure.

As to the defendants' appeal, we find no error in the trial court's judgment.

Plaintiff's Cross-Appeal

[2] The questions presented by plaintiff's appeal are whether the trial court erred by directing a verdict against the plaintiff as to the issues of libel, and whether it erred by directing a verdict against the plaintiff on the issues of punitive damages as to both of his causes of action.

With regard to the issue of libel, the plaintiff offered evidence, which when taken as true and in the light most favorable to him, showed the following. An agent of Orkin took a letter, written by defendant Murphy, accusing Gibby of being guilty of the crimes of embezzlement of company funds and fraud and published it to Mrs. Stroup's accountant who in turn relayed it to her attorney. This letter tended to subject Gibby to ridicule, public hatred, contempt and disgrace. The allegations found in the 28 January 1982 letter were libel *per se*, if a jury found them to be false. *See Arnold v. Sharpe*, 296 N.C. 533, 251 S.E. 2d 452 (1979). The question then becomes whether Orkin had a qualified privilege to publish the letter to Mrs. Stroup's accountant and attorney.

> A qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the

> occasion and duty, right, or interest. The essential elements thereof are of good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty.

Stewart v. Check Corp., 279 N.C. 278, 285, 182 S.E. 2d 410, 415 (1971), *quoting* 50 Am. Jur. 2d *Libel and Slander* § 195 (1970). The publication to Mrs. Stroup's accountant and attorney of the accusation that Gibby had on more than one occasion embezzled company funds and had defrauded Mrs. Stroup was not privileged, in its entirety, because it released to persons who were not proper parties accusations that Gibby had committed a crime involving moral turpitude. The trial court erred, therefore, in directing a verdict in the favor of Orkin. Plaintiff has failed, however, to offer any evidence of Jack Murphy's involvement in the publication of the libelous statements, thus, the court properly directed a verdict in his favor.

[3] Finally, we must determine whether the court erred by directing a verdict against the plaintiff on his claims for punitive damages. To recover punitive damages a private figure must prove "actual malice" on the part of the defendants. Actual malice may be proven by showing that the defendants published the defamatory material with knowledge that it was false, with reckless disregard to the truth, or with a high degree of awareness of its probable falsity. *Cochran v. Piedmont Publishing Co.*, 62 N.C. App. 548, 302 S.E. 2d 903, *disc. rev. denied*, 309 N.C. 819, 310 S.E. 2d 348 (1983), and *cert. denied*, --- U.S. ---, 83 L.Ed. 2d 30, 105 S.Ct. 83 (1984). Our examination of the record reveals no evidence from which the jury might have concluded that any of the allegedly defamatory statements were made with actual malice. The trial court properly directed a verdict against the plaintiff as to the issue of punitive damages.

The disposition of this appeal is as follows:

Defendants' appeal: No error.

Plaintiff's cross-appeal: Affirmed in part, reversed in part, and remanded for a new trial on the issue of whether Orkin Exterminating Company libeled the plaintiff.

Judges WELLS and BECTON concur.

BRAD RAGAN, INC., D/B/A CAROLINA TIRE COMPANY v. CALLICUTT ENTERPRISES, INC., AND BOBBY RAY LEWIS

No. 8419DC533

(Filed 19 February 1985)

1. **Contracts § 25.1— agreement to pay debt—sufficiency of complaint**

Where plaintiff's complaint alleged that plaintiff sold tires to defendant Callicutt on credit, defendant Callicutt sold trucks on which the tires were mounted to defendant Lewis, and Lewis orally promised that he would pay plaintiff for the tires, plaintiff's complaint sufficiently alleged that the promise sued upon was made to Callicutt, and gave defendant Lewis fair notice of the claim against him and the grounds on which it rested.

2. **Contracts § 25.1— contract for benefit of third party—action not barred by statute of frauds**

Plaintiff's claim against defendant Lewis to recover for the cost of tires sold to defendant Callicutt was not barred by the statute of frauds, G.S. 22-1, since a promise, as in this case, to the debtor to pay the debtor's debts, in contrast to a promise to the creditor to pay debts owed by another, is not contemplated by the statute of frauds.

3. **Contracts § 25.1— contract for benefit of third party—sufficiency of complaint**

Plaintiff's complaint adequately stated a claim based on third-party beneficiary contract doctrine where it alleged that defendant Lewis promised defendant Callicutt that he would make payments to plaintiff for tires sold by plaintiff to Callicutt.

APPEAL by plaintiff from *Horton, Judge*. Judgment entered 2 March 1984 in District Court, CABARRUS County. Heard in the Court of Appeals 15 January 1985.

Griggs, Scarbrough & Rogers, by James E. Scarbrough, for plaintiff appellant.

Robert M. Critz for defendant appellee.

WHICHARD, Judge.

Plaintiff appeals from a judgment dismissing its complaint for failure to state a claim upon which relief can be granted, G.S. 1A-1, Rule 12(b)(6). We reverse.

Plaintiff sold tires to defendant Callicutt (Callicutt) on credit. Callicutt sold trucks on which the tires were mounted to defendant Lewis (defendant). Plaintiff contends that, in return for the sale of the trucks and tires, defendant Lewis orally promised Callicutt that he would pay plaintiff for the tires. Callicutt has filed for bankruptcy and plaintiff has taken no further action against it.

Defendant contends: that the complaint fails to serve adequate notice of the claim as required by G.S. 1A-1, Rule 8(a)(1); that the agreement sued upon is barred by the statute of frauds, G.S. 22-1; and that the complaint does not state a claim based on third-party beneficiary contract doctrine. We disagree with each contention.

The general rule is that a complaint should not be dismissed for failure to state a claim unless it appears to a certainty that plaintiff can prove no set of facts which would entitle him or her to relief. *Sutton v. Duke*, 277 N.C. 94, 102-03, 176 S.E. 2d 161, 166 (1970).

> A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant sufficient notice of the nature and basis of plaintiffs' claim to enable him to answer and prepare for trial.

Cassels v. Motor Co., 10 N.C. App. 51, 55, 178 S.E. 2d 12, 15 (1970); *see also Leasing Corp. v. Miller*, 45 N.C. App. 400, 403-04, 263 S.E. 2d 313, 316, *disc. rev. denied*, 300 N.C. 374, 267 S.E. 2d 685 (1980).

[1] Defendant contends that the complaint is not sufficiently particular in that it fails to allege to whom the promise sued upon was made. The complaint in pertinent part states:

> 6. That Plaintiff is informed, believes and alleges that Defendant Callicutt sold the tires to Defendant Lewis and informed Defendant Lewis that purchase money was owed to Plaintiff on the tires. Plaintiff is also informed, believes and

> alleges that Defendant Lewis orally promised to make payment to Plaintiff for the tires.

Taken in context we believe the agreement is adequately alleged to have been between defendant and Callicutt.

Sutton, 277 N.C. 94, 176 S.E. 2d 161, provides a standard for measuring sufficiency of pleadings under G.S. 1A-1, Rule 8(a)(1):

> A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial.

Sutton, 277 N.C. at 104, 176 S.E. 2d at 167. We hold that, judged by this standard, plaintiff's complaint satisfies the requirements of Rule 8(a)(1) in that it gives defendant fair notice of the claim against him and the grounds on which it rests. Defendant can, through pretrial discovery, ascertain more precisely the details of the claim asserted.

[2] Defendant contends that plaintiff's claim is barred by G.S. 22-1, which states, "[no] action shall be brought . . . to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing . . . ."

The classic instance of a promise within the provisions of this section is the promise made to a creditor to gain credit for another: "If he does not pay you, I will." This is a collateral promise and must be in writing. *Goldsmith v. Erwin*, 183 F. 2d 432, 436 (4th Cir. 1950) *citing Farmers Federation, Inc. v. Morris*, 223 N.C. 467, 468, 27 S.E. 2d 80, 81 (1943).

The purpose of G.S. 22-1 is to protect the promisor from the promisee.

> There is a temptation for a promisee, in a case where the real debtor has proved insolvent or unable to pay, to enlarge the scope of the promise. . . . Moreover, . . . it is so obviously just that a promisor receiving none of the benefits for

> which the debt was incurred should be bound only by the exact terms of his promise.

72 Am. Jur. 2d, *Statute of Frauds,* Sec. 179 at 709-10 (1974).

However, "[if] the promise to assume the obligation of the debtor is made to a person other than the one presently entitled to enforce the liability . . ., such promise is not one to answer for the debt of another" and is not within the statute of frauds. *Id.* Sec. 187 at 715. "A promise . . . made to the debtor for an adequate consideration, to discharge the debt, is not regarded as a promise to answer for the debt of another within the meaning of the statute . . . ." *Id.* Sec. 209 at 737.

Thus, for defendant to fall within the protection of the statute, he would have to have promised plaintiff, the creditor, that he would answer for the debt of Callicutt. A promise, as here, to the debtor to pay the debtor's debts—in contrast to a promise to the creditor to pay debts owed by another—is not contemplated by the statute of frauds.

If the facts are as plaintiff alleges, as upon a motion to dismiss we must take them to be, *Smith v. Ford Motor Co.,* 289 N.C. 71, 80, 221 S.E. 2d 282, 288 (1976), defendant agreed with Callicutt to purchase trucks and tires and to pay for the tires directly to plaintiff. Defendant's promise "is to pay the debt, not of another person, but of the *very person* to whom the promise is made, and it is well settled that such a promise does not fall within the operation of . . . the statute." *Rice v. Carter,* 33 N.C. 298 (1850) (where plaintiff sold land to defendant in exchange for defendant's verbal promise to pay certain persons to whom plaintiff was indebted, held not a promise to pay the debt of another). A purchaser of property who agrees, in payment of its price, to discharge a debt due by the seller, is not protected by the statute of frauds. *Satterfield v. Kindley,* 144 N.C. 455, 459-60, 57 S.E. 145, 146 (1907) (a deed to defendants in consideration of their paying the vendor's debts not within the statute of frauds). The sale of trucks and tires here is analogous to the sale of a partnership, a business interest, or a stock of goods upon an agreement to take the goods and pay the debts. For a purchaser who takes the goods under such an agreement the statute of frauds is no defense. *See id.* at 460, 57 S.E. at 147.

[3] Defendant also contends that plaintiff has failed to state a claim as a third-party beneficiary of the contract between defendant and Callicutt. It is well settled that a stranger to a binding contract made for his or her benefit may sue to enforce it. *Trust Co. v. Processing Co.*, 242 N.C. 370, 379, 88 S.E. 2d 233, 239 (1955). The third-party need not be the sole beneficiary of the contract. *Id.* Nor need the third-party have known of the contract at the time it was made. 17A C.J.S. *Contracts* Sec. 519(4) at 980 (1963).

A claim based on third-party beneficiary contract doctrine must satisfy the requirements of the substantive laws which give rise to the pleadings. *Leasing Corp.*, 45 N.C. App. at 405, 263 S.E. 2d at 317. To withstand a motion to dismiss for failure to state a claim, plaintiff's allegations must show the existence of a valid and enforceable contract between two other persons entered into for plaintiff's direct benefit. *Id.* at 405-06, 263 S.E. 2d at 317. In *Leasing Corp.*, 45 N.C. App. 400, 263 S.E. 2d 313, the Court found that plaintiff's complaint lacked these essential allegations and thus failed to state a claim under the doctrine. That is not the case here. Plaintiff alleges an oral promise by defendant to "make payments to Plaintiff for the tires." We have held that plaintiff's complaint complies with the requirements of Rule 8(a)(1). Under the concept of notice pleading previously discussed, we also hold that the complaint adequately states a claim based on third-party beneficiary contract doctrine.

For the foregoing reasons, defendant's motion to dismiss was improperly granted.

Reversed.

Chief Judge HEDRICK and Judge PARKER concur.

MERLE PHILLIPS v. THE BOLING COMPANY AND RELIANCE INSURANCE COMPANY

No. 8410IC526

(Filed 19 February 1985)

Master and Servant § 55.1— workers' compensation—back injury—no accident

Evidence was sufficient to support the Industrial Commission's conclusion that a back injury sustained by plaintiff was not the result of an accident arising out of and in the scope of his employment where the evidence tended to show that plaintiff was working as a supervisor in more than one area and that his job involved lifting; on the date in question, repair of a fan was part of his job description; plaintiff had the assistance of a full maintenance crew and one helper at the time of the incident complained of; plaintiff was not shown to be in an awkward position nor did any unusual event take place at the time; there was nothing unusual about the weight he was lifting; plaintiff felt pain only after he put the fan shaft down and had taken a few steps; and plaintiff had prior back problems which could have been the cause of the difficulty complained of.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and Award by Full Commission filed 15 December 1983. Heard in the Court of Appeals 14 January 1985.

This is a workers' compensation claim in which plaintiff-employee, Merle Phillips, seeks workers' compensation benefits for an injury allegedly suffered on 5 November 1982 in an accident arising out of and in the scope of his employment by defendant, The Boling Company (Boling).

Plaintiff, a thirty-four year old married male, was employed by Boling, a furniture manufacturer, as an electrical supervisor. Plaintiff had been previously employed by Boling as an electrician for a six year period, but plaintiff accepted a position as a boiler inspector with another company for approximately two years, returning to the employment of Boling sometime in 1979.

As an electrical supervisor, plaintiff was responsible for all of the electrical equipment as well as boiler systems, dust systems and air compressors in Boling's three plants.

Approximately one year prior to 5 November 1982, plaintiff injured his back working with heavy sheets of steel in constructing a vender for Boling. Since that incident, plaintiff has contin-

ued to experience back discomfort when performing heavy work assignments and when bending over for a period of time.

On 25 October 1982, plaintiff and other employees of Boling were outside one of Boling's three plants securing a plastic cover over a pile of wood shavings while it was raining. Plaintiff was carrying two tires with which he intended to anchor the plastic cover when he slipped and fell experiencing pain in his lower back. Since that incident, plaintiff has continued to experience some discomfort in his lower back.

Sometime during the morning of 5 November 1982, a large electric fan that was essential to the operation of one of Boling's plants developed trouble due either to bent blades or worn out bearings. It was necessary to repair the fan immediately or close the plant. A decision was made to shut off the fan and attempt to repair it during the lunch hour (12:00 noon to 1:00 p.m.). A number of employees, including plaintiff, were assigned to the repair task.

When the fan was stopped, some of the employees removed it from its housing. Plaintiff then picked up the fan shaft, which contained two bearings and weighed between 45 and 60 pounds, and placed it on the floor with a bending over and swinging movement. Plaintiff then stood up, took a couple of steps and felt severe pain in his lower back.

On 27 April 1983, Deputy Commissioner John Charles Rush, filed an opinion concluding that plaintiff did not sustain an injury by accident arising out of and in the scope of his employment on 5 November 1982. Plaintiff appealed to the full Commission which affirmed and adopted the opinion and award filed by the Deputy Commissioner on 15 December 1983. Plaintiff appeals.

Van Camp, Gill and Crumpler, by Sally H. Scherer, for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Dan M. Hartzog, for defendant-appellee.

EAGLES, Judge.

Plaintiff's sole assignment of error on appeal is whether the full Commission erred in finding that the deputy commissioner was justified in concluding that the evidence supported a finding

that the incident in question was not an accident arising out of and in the scope of plaintiff's employment. We find no error.

Plaintiff does not contend that the findings and conclusions of the full Commission as adopted from the opinion and award of the deputy commissioner are not supported by competent evidence in the record so as to make those findings and conclusions erroneous and contrary to law. Plaintiff has not assigned as error any particular finding of fact and has not proposed a suggestion for required additional or different findings of fact. Rule 10(b)(2), Rules of Appellate Procedure. The only exception filed by plaintiff-employee here is to the judgment of the full Commission in "finding that the hearing examiner was justified in concluding that the evidence supported a finding that the incident in question was not an accident." This is a broadside exception and does not present for review the sufficiency of the evidence to support any particular finding of fact. *Mayhew Electric Co. v. Carras*, 29 N.C. App. 105, 223 S.E. 2d 536 (1976); *Hatchell v. Cooper*, 266 N.C. 345, 146 S.E. 2d 62 (1966).

Findings of fact made by the Commission are conclusive on appeal when supported by competent evidence, even though there is evidence to support a contrary finding of fact. *Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822 (1982). Plaintiff's arguments on appeal tend to show that there is evidence in the record which could support findings of fact contrary to those reached by the full Commission. However, absent a showing that the facts and conclusions found by the full Commission are not supported by competent evidence, plaintiff may not prevail on appeal.

The full Commission's opinion and award states, in pertinent part

> In the Commission's opinion, Deputy Commissioner Rush made the correct decision, based upon the evidence and the applicable law. Therefore the Commission AFFIRMS and ADOPTS the opinion and award filed in this case on April 27, 1983.

The opinion and award of the deputy commissioner concluded, in pertinent part

The plaintiff did not, at the time complained of, sustain an injury by accident and is, therefore, not entitled to the benefits of the Worker's Compensation Act. G.S. 97-2(6).

This conclusion was based on findings of fact adduced from evidence which tended to show that plaintiff was working as a supervisor in more than one area and that his job involved lifting. On the date in question, the fan repair was part of his job description. Plaintiff had the assistance of a full maintenance crew and one helper at the time of the incident complained of. Plaintiff was not shown to be in an awkward position and no other unusual event took place at that time. There was nothing unusual about the weight he was lifting and according to plaintiff's own testimony, he had lifted heavier objects in the past. Plaintiff felt pain only after he put the fan shaft down and had taken a few steps. In addition, plaintiff had prior back problems which could have been the cause of the difficulty complained of. We note that there is no claim here that the 25 October 1982 incident, in which plaintiff slipped and fell while covering wood shavings, was an accident arising out of and in the scope of his employment.

We hold that there is competent evidence which tends to show that the task of lifting the fan shaft was a part of plaintiff's job duties which supports the opinion and award of the full Commission.

Because there is no exception to any particular finding of fact and since the findings of the Industrial Commission are supported by evidence in the record, we are bound by the findings of fact of the Industrial Commission. They are not subject to review in this appeal. *Blalock v. Roberts Co.*, 12 N.C. App. 499, 183 S.E. 2d 827 (1971). The opinion and award of the full Industrial Commission is therefore

Affirmed.

Judges WEBB and COZORT concur.

JAMES THOMAS GIBSON, EMPLOYEE, PLAINTIFF v. LITTLE COTTON MFG. COMPANY, EMPLOYER, AND HOME INDEMNITY COMPANY, CARRIER, DEFENDANTS

No. 8410IC535

(Filed 19 February 1985)

1. **Master and Servant § 68— byssinosis—standard for compensation**

The Industrial Commission correctly found that plaintiff's disability was caused by his exposure to cotton dust, and that plaintiff's exposure significantly contributed to or was a causal factor of his chronic obstructive lung disease. Apportionment between causal factors is no longer the standard for disability compensation. G.S. 97-53(13).

2. **Master and Servant § 69.1— byssinosis—findings as to degree of disability**

The Industrial Commission erred by merely finding that plaintiff has an overall impairment of a certain percentage. The Commission must also ascertain the percentage of plaintiff's inability to work caused by his occupational disease, and must weigh and consider plaintiff's age, education, experience and health and how these factors have affected plaintiff's ability to earn wages in the same or other employment.

APPEAL by plaintiff from opinion and award of the North Carolina Industrial Commission filed 14 December 1983. Heard in the Court of Appeals 15 January 1985.

Plaintiff sought compensation for total disability caused by his chronic obstructive pulmonary disease. The facts found show that plaintiff was born 19 September 1915, completed the seventh grade, started smoking at fourteen, and began working in cotton mills when he was fifteen. With the exception of a three-year period, he worked continuously in cotton textile mills from 1930 through 1971. While working in these mills he was exposed to varying amounts of respirable cotton dust, depending on the amount of cotton being processed.

After 1940, plaintiff began to experience shortness of breath and coughing. These symptoms were at their worst on Mondays after a return to work. Plaintiff's symptoms worsened through the years, but the coughing improved a little when plaintiff quit smoking in 1964.

Plaintiff did not work from 1971 to 1974, except for approximately six months in an all-synthetics operation. He started working for the defendant Little Cotton Manufacturing Company

in February 1974. He worked as an overseer in the card room where he was exposed to 100 percent cotton. He left in April 1975 after a disagreement with his supervisor. This was his last exposure to cotton dust, and his symptoms of chest tightness, wheezing, shortness of breath and a daily cough worsened during his employment at Little Cotton.

Plaintiff was last employed in the textile industry from June 1976 to January 1977 in the card room at Richmond Yarns where he was exposed to 100 percent synthetics. Plaintiff then elected to take Social Security retirement and work sporadically at odd jobs. His pulmonary symptoms continued to worsen during the time period following his employment at Little Cotton and he is now required to take prescribed drugs to alleviate his breathing difficulties.

The Full Commission affirmed the opinion and award of Deputy Commissioner Stephens in which she found:

> Both his smoking history and his exposure to cotton dust were significant etiologic factors in the development of his lung disease. His continued exposure to cotton dust after he stopped smoking was a significant factor in the progression of his disease, and a portion of his lung disease which was caused by his smoking habit was aggravated and accelerated by his exposure to cotton dust.

She further found that plaintiff suffers permanently from a 35 percent respiratory impairment, that 25 percent of this impairment was due to plaintiff's lengthy exposure to cotton dust, and the remainder was due to cigarette smoking. The Deputy Commissioner thus concluded that as a result of this occupational disease plaintiff was partially disabled, plaintiff had lost 25 percent of his wage earning capacity, and defendant owed plaintiff for 25 percent permanent partial disability.

Charles R. Hassell, Jr. for plaintiff appellant.

Hedrick, Eatman, Gardner, Feerick & Kincheloe, by John F. Morris and Edward L. Eatman, Jr., for defendant appellees.

MARTIN, Judge.

The only questions before us on appeal are whether the Industrial Commission erred in apportioning plaintiff's 35 percent

disability after finding that cotton dust significantly contributed to plaintiff's disease and in failing to consider whether plaintiff's work experience, age, education, and health entitled him to full compensation.

[1] The Commission correctly made a finding that plaintiff's disability was caused by his exposure to cotton dust, and that plaintiff's exposure significantly contributed to or was a causal factor of his chronic obstructive lung disease; however, it incorrectly apportioned plaintiff's disability by finding that 25 percent of his 35 percent disability was due to cotton exposure. *See, Adkins v. Fieldcrest Mills, Inc.*, 71 N.C. App. 621, 322 S.E. 2d 642 (1984). This finding, that exposure to cotton dust significantly contributed to this disease, is all that is required because apportionment between causal factors is no longer the standard for disability compensation in these cases. *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983). The North Carolina Supreme Court in *Rutledge*, decided subsequent to the Deputy Commissioner's opinion and award in this case, stated the legal standard to determine whether a claimant suffering from chronic obstructive lung disease has a compensable occupational disease under G.S. 97-53(13):

> [T]he occupation in question [must have] exposed the worker to a greater risk of contracting this disease than members of the public generally, and provided the worker's exposure to cotton dust *significantly contributed to, or was a significant causal factor in*, the disease's development. This is so even if other non-work-related factors also make significant contributions, or were significant causal factors. (Emphasis supplied.)

308 N.C. at 101, 301 S.E. 2d at 369, 370. We thus affirm the Commission's finding that plaintiff's cotton dust exposure was significant in the causation, acceleration and aggravation of his occupational disease, but reverse that portion of the Commission's opinion and award apportioning plaintiff's disability.

[2] The Commission's findings are insufficient with regard to whether plaintiff is partially or totally disabled. Loss of earning capacity is the criterion by which disability is measured. *Dail v. Kellex Corp.*, 233 N.C. 446, 64 S.E. 2d 438 (1951). The percentage of impairment and percentage of disability are thus not necessarily identical. *Parrish v. Burlington Industries, Inc.*, 71 N.C. App.

196, 199, 321 S.E. 2d 492, 495 (1984). In this case, the Commission adopted the Deputy Commissioner's opinion and award which contained only the following with regard to plaintiff's earning capacity:

> As a result of his chronic obstructive lung disease, plaintiff has a Class III, or 35 percent, respiratory impairment which is permanent. His respiratory impairment is thus moderate in degree and is sufficiently severe to prevent him from performing manual labor. However, he is capable of performing moderate activity, although he should not be exposed to noxious substances including cotton dust. Plaintiff therefore has a permanent, partial incapacity to work and earn wages in the same or any other employment as a result of his respiratory impairment.

Merely finding, as the Commission does here, that plaintiff has an overall impairment of a certain percentage does not resolve the dispositive issue of plaintiff's incapacity to earn wages, however, since the Commission must also ascertain the percentage of plaintiff's inability to work caused by his occupational disease and not merely the percentage of impairment. *Parrish v. Burlington Industries, Inc., supra.* We have also recently held that the Commission must additionally weigh and consider plaintiff's age, education, experience and health and how these factors have affected plaintiff's ability to earn wages in the same or any other employment. *Armstrong v. Cone Mills Corp.*, 71 N.C. App. ---, 323 S.E. 2d 48 (1984). A claimant, though physically capable, may be unsuited for employment due to characteristics peculiar to him. *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978).

Since it is not evident from the record that the Commission considered these factors before determining disability, merely finding that plaintiff's impairment and activity capability were moderate, but precluded manual labor, we remand this case to the Commission for further findings with regard to plaintiff's earning capacity. Since the Commission has already found that plaintiff should no longer be exposed to cotton dust or other noxious substances, the Commission's inquiry should be directed to the plaintiff's ability to earn wages in any other employment, considering his age, education, experience, health and other charac-

teristics which may render him suited or unsuited for employment. Based on these findings, the Commission will then conclude whether plaintiff's disability is partial or total.

Reversed and remanded.

Judges ARNOLD and WELLS concur.

CHAMPION INTERNATIONAL CORPORATION v. UNION NATIONAL BANK

No. 846SC393

(Filed 19 February 1985)

Uniform Commercial Code § 36— payment of certificates of deposit purchased with embezzled funds

A bank was not discharged after paying three certificates of deposit where the certificates stated that they were payable to ". . . registered holders upon surrender of this certificate properly endorsed" and the S.B.I. confiscated the certificates in connection with an investigation of fraud and embezzlement by the purchaser and notified the bank. The purchaser of the certificates was not in possession and therefore not a "holder," the bank violated its contract and G.S. 25-3-413 by paying out to him, and the bank was not discharged under G.S. 25-3-603(1). Furthermore, the embezzled company could redeem the certificates as a "registered holder" under a court order awarding it the proceeds payable under the certificates as the equitable owner. G.S. 25-1-201(20), G.S. 25-3-804.

APPEAL by defendant from *Brown, Judge.* Judgment rendered 9 January 1984 in Superior Court, HALIFAX County. Heard in the Court of Appeals 3 December 1984.

Between 24 May 1979 and 14 February 1980, an employee of plaintiff Champion International Corporation (Champion), bought three money market certificates of deposit from the defendant Union National Bank (the Bank). These certificates had values of $10,000, $30,942.41, and $20,000. The employee had purchased these certificates with money embezzled from Champion.

The employee created a fictitious company, Northstate Logging Company, in order to secrete assets from and defraud Champion. On 29 February 1980, the North Carolina State Bureau of Investigation (SBI) served on the Bank an Order for Examination

and Reproduction of Bank Records of Northstate Logging Company.

On 6 March 1980, the SBI seized a briefcase belonging to the employee, containing the three certificates of deposit. The plaintiff fired the employee on 15 March 1980. The SBI informed the Bank that it had confiscated the certificates of deposit and that the employee had been fired by Champion. An employee of the Bank acknowledged that he was aware as of 19 August 1980, that the SBI had confiscated the certificates.

On 19 August, the Bank cashed the $20,000 certificate at the request of the employee of Champion and credited the principal sum plus interest to Northstate Logging Company's checking account. On 15 September and 20 November, the Bank cashed the $30,942.41 and $10,000 certificates respectively, again at the employee's request. The Bank agreed to release the principal and interest represented by the certificates upon the employee providing bonds that the certificates had been lost or stolen.

Champion filed suit against its employee in Wake County Superior Court on 20 November 1980. On 28 December 1981, judgment was entered in favor of Champion.

Champion brought this action against the Bank and after discovery moved for partial summary judgment as to the three certificates of deposit. The Bank also asked for summary judgment. The trial court granted Champion's motion and denied the Bank's motion.

Royster, Royster & Cross, by T. S. Royster, Jr., for defendant appellant.

Bailey, Dixon, Wooten, McDonald & Fountain, by David M. Britt, Wright T. Dixon, Jr., and Gary K. Joyner, for plaintiff appellee.

ARNOLD, Judge.

The question presented by this appeal is whether the Bank improperly cashed three certificates of deposit to the registered holder when it had notice that the State Bureau of Investigation (SBI) had confiscated the actual certificates in connection with an investigation of fraud and embezzlement of Champion by an employee.

The Bank argues that Article 3 of the UCC applies to the certificates and suggests that its handling of the certificates was correct. Assuming Article 3 does apply, we find, however, that it does not sanction the Bank's cashing of the certificates.

The certificates all stated that they are payable to ". . . registered holders upon surrender of this certificate properly endorsed." Under G.S. 25-3-413, the maker of the instrument, in this case the Bank, "engages that he will pay the instrument according to its tenor at the time of his engagement. . . ." A "holder" is a person "*who is in possession* of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank." G.S. 25-1-201(20) (emphasis added).

Champion's employee was not in possession of the certificates at the time he sought payment for them. He was therefore not a "holder," and the Bank violated its contract and G.S. 25-3-413 by paying out to him.

The Bank claims that its liability under the certificates was discharged pursuant to G.S. 25-3-603(1), by payment to the employee, and by failure of Champion to supply an indemnity bond or to obtain a court order enjoining payment. Yet, G.S. 25-3-603(1) predicates discharge on "payment or satisfaction to the holder." As noted above, Dewey was not in possession and therefore was not a holder.

The Bank is still liable on the certificates, and Champion may redeem them given that it is a "registered holder." Prior to the summary judgment against the Bank, the SBI for Champion was in possession of the certificates. It was not a "holder," however, because the certificates had not been issued or endorsed to it, or to its order, or in blank. The trial court's order of 9 January 1984, however, awarded Champion the amounts payable under the certificates because Champion was the equitable owner. The trial court's order, we find, effectively discharges the Bank of its liability under the certificates once it pays the award to Champion.

When payment was demanded by the employee, who did not have the certificates, and the Bank had actual knowledge that the SBI had confiscated the certificates in connection with a fraud in-

vestigation, the Bank should have held the funds until ownership of the certificates had been determined by a court of law. The employee's only recourse at that stage would have been to proceed according to G.S. 25-3-804, even though it is doubtful whether he would have succeeded since he was not the true owner of the certificates.

If the Bank determined that under the circumstances it should pay the employee, then it did so at its own risk, and should have required an indemnity bond of some sort in the event of other claims. The Bank did require a "lost securities bond," and we take that as evidencing the Bank's recognition that it might be liable when the certificates were presented by another.

The Bank has no defense against the judgment on the grounds of the Uniform Commercial Code.

Affirmed.

Judges WELLS and EAGLES concur.

STATE OF NORTH CAROLINA v. ROBERT KEITH SHOWN

No. 8418SC463

(Filed 19 February 1985)

1. Criminal Law § 99.4— court's statement to defendant—no expression of opinion

The trial court did not express an opinion to the jury on the credibility of defendant's testimony when the court stated to defendant, "Son, I want you to be able to tell your story, but don't go into anything she may have told you at this time," since, by using the word, "story," the judge did not imply that defendant's testimony was a lie or falsehood, but instead used the word in its more common sense of an account or narration of a series of events.

2. Criminal Law § 169.7— evidence excluded—similar evidence subsequently admitted

Defendant could not complain that the trial court erred in excluding his testimony as to his "mental state" at the time he gave an inculpatory statement to two store security officers in response to questioning about the crime with which he was charged, since the evidence excluded was substantially admitted elsewhere in defendant's testimony.

3. Criminal Law § 48.1; Constitutional Law § 74— evidence of post-arrest silence—error not prejudicial

There was no reasonable possibility that evidence as to defendant's post-arrest silence might have contributed to his conviction, and the trial court's error in admitting such evidence therefore was not prejudicial to defendant.

APPEAL by defendant from *Preston, Judge.* Judgment entered 5 January 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 4 February 1985.

Defendant was charged in a proper bill of indictment with two counts of embezzlement. At trial the State elected to proceed on only the second count. The jury found defendant guilty as charged, and the court entered judgment on the verdict sentencing him to six years in prison. Defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.

Frederick G. Lind, Assistant Public Defender, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first assigns error to a statement made to defendant by the trial judge; defendant contends that the judge "express[ed] an opinion to the jury on the credibility of the defendant's testimony." The challenged statement is set out in the following excerpt from the trial transcript:

> Mr. Lind: Then what happened?
>
> Defendant: I finished eating. She took a break—
>
> Mr. Panosh: Object to what she said.
>
> The Court: Son, I want you to be able to tell your story, but don't go into anything she may have told you at this time.
>
> Defendant: Okay.
>
> Mr. Lind: Go ahead. What happened next?

Defendant's argument on appeal is, in essence, that by use of the word "story," the trial judge implied that "defendant's testimony is a lie or falsehood." We think it clear from an examination of

the entire sentence in context that Judge Preston used the word "story" in its more common sense of an account or narration of a series of events. We do not believe this statement could have had a prejudicial impact on the jury. *Cf. State v. Staley*, 292 N.C. 160, 232 S.E. 2d 680 (1977).

[2] Defendant next contends the court erred in excluding his testimony as to his "mental state" at the time he gave an inculpatory statement to two store security officers in response to questioning about the crime with which he was charged. At trial defendant sought to impeach this statement by demonstrating that it was made in response to "duress and coercion." In support of this contention, defendant sought to testify that, at the time he made the statement, he was "nervous," "fearful of bodily harm," and "angry." Defendant argues that this was crucial to his explanation of his reasons for making the incriminating statement ultimately introduced in the State's case in chief.

Assuming *arguendo* that the court erred in excluding defendant's proferred testimony, we think any such error was harmless. The record contains testimony by the defendant, admitted without objection, that he was "very nervous and . . . had broke out in a sweat" and that he did not believe he would be allowed to leave the room at the time he gave the statement. Defendant also testified that he was "in a state of shock," that he was "angry," and that he was "afraid" during most of the time during which he was questioned. We agree with the State that the evidence excluded was substantially admitted elsewhere in defendant's testimony, and that defendant thus suffered no harm from any error made by the trial court.

[3] Defendant's final assignment of error challenges the court's ruling allowing the prosecutor to cross-examine defendant about his silence following arrest. This assignment of error is based on an exception to the following ruling by the trial judge:

> Q. And when you got into the police car, then did you tell the police officers that you didn't do it; the only reason you admitted to it inside was because you were afraid?
>
> A. No, sir.
>
> Q. You didn't?

A. I didn't—I had very little conversation with the police officers.

Q. Well, wouldn't that have been a good time to clear yourself if you felt that you were innocent?

MR. LIND: Objection.

THE COURT: Overruled.

THE WITNESS: No, sir.

MR. LIND: Move to strike.

THE COURT: Not allowed.

THE WITNESS: It would have done no good. They had what they wanted.

Defendant contends that the State's question about his silence, which, the record shows, occurred after defendant was advised by one of the officers of his constitutional rights, amounted to a deprivation of due process, citing *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976). We agree that the court erred in overruling defendant's objection to the State's question and denying defendant's motion to strike his answer to the challenged question. We now consider whether the court's error requires that defendant's conviction be reversed.

In *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972), our Supreme Court discussed the harmless error standard as it applies to errors affecting a constitutional right:

> Every violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824, 24 A.L.R. 3d 1065 (1967); *Harrington v. California*, 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969). Unless there is a reasonable possibility that the evidence complained of might have contributed to the conviction, its admission is harmless. *Fahy v. Connecticut*, 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963).

Id. at 280, 185 S.E. 2d at 682. We believe the evidence of defendant's guilt in the instant case was so overwhelming as to render the court's error in allowing the challenged question harmless beyond a reasonable doubt. In addition to defendant's signed statement admitting his culpability, the State introduced evidence by a store security officer who testified that he saw defendant, a store employee, remove bills from a cash register and place them in his left front pants pocket. An audit of the register, taken after defendant left the register, revealed a cash shortage of $90.99. Defendant was stopped for questioning prior to leaving the store and was found to possess $77.00 in cash. In light of the considerable evidence introduced by the State, we believe there is no reasonable possibility that the evidence as to defendant's post-arrest silence might have contributed to his conviction. We hold defendant had a fair trial free from prejudicial error.

No error.

Judges JOHNSON and COZORT concur.

STATE OF NORTH CAROLINA v. RUBEN PAYNE AND TILDA PAYNE

No. 8424SC434

(Filed 19 February 1985)

Narcotics § 4.1— manufacturing marijuana—evidence *insufficient*

Defendants' motions to dismiss charges of manufacturing marijuana should have been granted where the evidence, in the light most favorable to the state, showed that marijuana was found growing on land belonging to the mother of defendant-husband, the defendants had recently begun part-time occupancy of a rundown house located on that land but not within sight of the marijuana fields, there was a series of paths and roads through this area, the fields were from two hundred and fifty to a thousand feet from the house, beer cans, cigarette packs, and a bag of fertilizer of the type used by defendant-husband were found in the fields, the electric service to the house occupied by defendants was issued several weeks earlier in defendant-wife's name, a "residue" of marijuana was found in the unlighted attic of the house, which was not used as a living area, and the S.B.I. neither investigated other houses surrounding the fields nor maintained surveillance of the fields or of vehicles residents of the area saw traveling on roads leading to the fields.

APPEAL by defendants from *Saunders, Judge.* Judgment entered 19 January 1984 in Superior Court, MADISON County. Heard in the Court of Appeals 17 January 1985.

Defendants, husband and wife, were charged with manufacturing marijuana. The State's evidence tended to show the following:

On 11 August 1983 an aerial survey by the State Bureau of Investigation (S.B.I.) revealed several marijuana fields in rural Madison County. An S.B.I. team investigated that area and discovered eight cultivated marijuana fields containing more than two thousand plants. The marijuana was growing on land owned by the mother of defendant-husband. These fields were not visible from the nearby house defendants sometimes occupied while tending a tobacco field and garden. The marijuana was located from two hundred and fifty feet to over one thousand feet from the house, and there were several paths and roads winding through the land surrounding these fields.

S.B.I. agents found empty Miller beer cans in several of the fields, along with two empty Winston cigarette packs and an empty fertilizer sack. An agent testified that defendant-husband smoked a Winston cigarette and drank Miller beer from a can obtained from his refrigerator in the agent's presence. The agent also observed a sack of fertilizer of the type seen in the fields on the porch of the house where defendants were staying. A "residue" of marijuana, less than one-eighth of an ounce, was scattered on the floor of the unlighted attic of the house. The attic was not used as a living area.

The only evidence against defendant-wife was that the electric service for the house, which had been connected a few weeks earlier, was in her name, and that she and defendant-husband occupied the house on a part-time basis.

From judgments entered upon verdicts of guilty, defendants appeal.

Attorney General Edmisten, by Assistant Attorney General James E. Magner, Jr., for the State.

Frank G. Queen, Reid G. Brown, and Clarence W. Fowler for defendant appellants.

WHICHARD, Judge.

Defendants contend the court erred in denying their motions to dismiss. We agree.

Upon a motion to dismiss the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it. *State v. Finney*, 290 N.C. 755, 757, 228 S.E. 2d 433, 434 (1976). To withstand the motion, however, there must be substantial evidence of all material elements of the offense. The rule is the same whether the evidence is circumstantial, direct, or a combination. *State v. Stephens*, 244 N.C. 380, 383, 93 S.E. 2d 431, 433 (1956).

Our Supreme Court has considered the sufficiency of evidence to overcome a motion to dismiss in several controlled substance cases. For example:

In *State v. Allen*, 279 N.C. 406, 183 S.E. 2d 680 (1971), the Court held the evidence sufficient where heroin was found in the bedroom of a house with the public utilities listed in defendant's name and there were in that bedroom papers bearing defendant's name. Also, a sixteen-year-old boy had obtained heroin from the house pursuant to defendant's instructions and had sold it at defendant's direction.

In *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972), defendant had been seen on numerous occasions in and around a pig shed containing marijuana, located some twenty yards from his residence, and marijuana seeds were found in his bedroom. The Court held this evidence sufficient to support a reasonable inference that the defendant exercised custody and control over the shed and the marijuana.

In *State v. Minor*, 290 N.C. 68, 224 S.E. 2d 180 (1976), however, the Court held the evidence insufficient. The evidence there tended to show that marijuana was found growing one hundred feet away from a house where defendant was assisting a friend in preparing a garden. The field could not be seen from the house and was accessible by three different paths. The defendant was riding in an automobile with his friend when marijuana was found on the floorboard and in the trunk. The Court stated, "The most the State has shown is that defendant had been in an area where he could have committed the crimes charged. Beyond that

we must sail in a sea of conjecture and surmise. This we are not permitted to do." *Minor* at 75, 224 S.E. 2d at 185.

The present case most nearly resembles *Minor*, and we find *Minor* controlling. The evidence, in the light most favorable to the State, shows that marijuana was found growing on land belonging to the mother of defendant-husband. The defendants recently had begun part-time occupancy of a run-down house located on that land but not within sight of the marijuana fields. There was a series of paths and roads through this area and the fields were from two hundred and fifty to a thousand feet from the house. The only evidence that could link defendant-husband to the fields consisted of beer cans and cigarette packs of the brands he used and a bag of fertilizer of the type he used. The only evidence that could link defendant-wife to the fields was that electric service to the house she and defendant-husband occupied was issued several weeks earlier in her name. A "residue" of marijuana also was found in the unlighted attic of the house. Defendants did not use the attic as a living area.

The S.B.I. neither investigated other houses surrounding these fields nor maintained surveillance of the fields or of the vehicles residents of the area saw travelling on roads leading to the fields.

The foregoing evidence is insufficient to establish actual or constructive possession of the fields by either defendant. It raises only suspicion or conjecture, and "[i]f the evidence is sufficient only to raise a suspicion or conjecture as to . . . the identity of . . . defendant[s] as the perpetrator[s] [of the offense], the motion [to dismiss] should be allowed." *State v. Powell*, 299 N.C. 95, 98, 261 S.E. 2d 114, 117 (1980).

Reversed.

Chief Judge HEDRICK and Judge PARKER concur.

PRUE W. MARTIN v. MITCHELL ALLEN MARTIN AND KATHY MARTIN

No. 8427SC498

(Filed 19 February 1985)

Trusts § 19— constructive trust—no evidence of misrepresentation—summary judgment for defendant proper

Summary judgment was properly granted for defendants in an action to impose a constructive trust on land conveyed by plaintiff to her son where neither the pleadings nor the affidavits alleged a single statement or promise by the son that could be said to have misrepresented his intentions or fraudulently induced plaintiff to convey the property to him.

APPEAL by plaintiff from *Owens, Judge.* Judgment entered 29 February 1984 in Superior Court, GASTON County. Heard in the Court of Appeals 10 January 1985.

This is a civil action wherein plaintiff seeks to impose a constructive trust on land conveyed by plaintiff to her son, the defendant.

On 29 November 1983 plaintiff filed a complaint in which she made the following allegations: plaintiff and her husband acquired title to the land in question in 1944 as tenants by the entirety. Upon the death of her husband, plaintiff became the sole owner of the property. On 19 June 1980, plaintiff signed a deed conveying the property to Mitchell Allen Martin, the defendant. Mr. Martin paid no consideration for the property. Plaintiff's complaint contained the following pertinent allegations:

> 8. That said property was conveyed by plaintiff, Prue W. Martin to Mitchell Allen Martin to be held in trust for the said Prue W. Martin.
>
> . . .
>
> 11. That the defendant Mitchell Allen Martin has paid nothing for said property, and that the Deed was signed with the intent that the property would be held in trust and returned to the plaintiff upon demand.
>
> 12. That the plaintiff has demanded that the defendant return said property to her by transferring the same to her by Deed, but that the defendants have refused.

> 13. That the defendant as trustee has violated his fiduciary duty to the plaintiff by refusing to reconvey said property to her.

Based on these allegations plaintiff asked that the court impose a constructive trust on the property held by defendant and his wife as tenants by the entirety. On 16 December 1983 defendants filed an answer in which they admitted that plaintiff conveyed the property to Mr. Martin and that Mr. Martin paid no consideration for the land and denied the remaining material allegations of plaintiff's complaint. On 16 December 1983 defendants filed a motion for summary judgment, which motion was granted by the court on 29 February 1984. Plaintiff appealed.

Childers, Fowler & Childers, by Max L. Childers and David C. Childers, for plaintiff, appellant.

Kemp A. Michael for defendants, appellees.

HEDRICK, Chief Judge.

Plaintiff assigns error to the order granting summary judgment for defendants, contending that there exist "genuine issues of material fact as to the intentions and motives of the parties."

The general rule, set out in *Gaylord v. Gaylord,* 150 N.C. 222, 227, 63 S.E. 1028, 1031 (1909), provides:

> [E]xcept in cases of fraud, mistake or undue influence, a parol trust, to arise by reason of the contract or agreement of the parties thereto, will not be set up or engrafted in favor of the grantor upon a written deed conveying to the grantee the absolute title, and giving clear indication on the face of the instrument that such a title was intended to pass.

See also Willetts v. Willetts, 254 N.C. 136, 118 S.E. 2d 548 (1961); *Best v. Perry,* 41 N.C. App. 107, 254 S.E. 2d 281 (1979).

Plaintiff contends that the holding in *Gaylord* does not bar her claims against defendants because "[t]he situation reflected by record raises a question of fraud or undue influence." Plaintiff's argument relies heavily on *Ferguson v. Ferguson,* 55 N.C. App. 341, 285 S.E. 2d 288, *disc. rev. denied,* 306 N.C. 383, 294 S.E. 2d 207 (1982), in which this Court upheld the denial of the

defendants' motion for summary judgment on facts similar to those of the instant case. In *Ferguson* the plaintiff alleged that her son "agreed to put the . . . land in his name and hold it for Plaintiff, so she would qualify for government aid during a serious illness and so her property would be preserved for all of her children." Plaintiff subsequently conveyed the property to her son and his wife, the defendants. Defendants furnished no consideration for the conveyance. Plaintiff's complaint alleged that defendants procured title by misrepresentation and fraudulent statements of intent. On these facts this Court said:

> *[I]f defendants in this case made a promissory representation, intending at that time not to comply with the promise but rather to induce the plaintiff to act, such misrepresentation is fraudulent and will support the imposition of a constructive trust. . . . In this case, plaintiff clearly alleged that there existed an oral agreement between the parties prior to the legal conveyance of the land and further alleged that the defendants made promissory representations merely to mislead her while having no intention of complying with their promises . . . . In this case, the plaintiff alleged that the defendants never intended to fulfill their oral agreement when they induced her to convey the land to them. Because genuine issues of material fact concerning fraud were present, summary judgment was properly denied.*

Id. at 345-46, 285 S.E. 2d at 291-92.

We now examine the pleadings and affidavits in the instant case, in light of this Court's discussion in *Ferguson.* Plaintiff's complaint contains no allegation that defendant Mitchell Martin made any promise or other statement for the purpose of inducing plaintiff to convey her property to him; while Paragraph 11 of the complaint states that "the Deed was signed with the intent that the property would be held in trust and returned to the plaintiff upon demand," this allegation goes only to plaintiff's intent, and makes no reference to any action or intention of defendant. Affidavits filed by plaintiff in opposition to defendants' motion for summary judgment are equally silent as to statements made by defendant Mitchell Allen Martin inducing conveyance of the property. In her affidavit Gail Lyles, plaintiff's daughter, states that she suggested to plaintiff that plaintiff "put [the property] in

Allen's [the defendant] name since he is living there." Ms. Lyles goes on to say, "I called Allen and told him the situation and he understood what the situation was and he agreed to hold the property in his name and I called the lawyer, and I went over with my mother and we put the property in Allen's name." The affidavit filed by plaintiff states in pertinent part:

> Gail suggested that I put it in Allen's name because he was living there, and I agreed. The sole purpose for putting it into Allen's name was for him to hold the property for me, I certainly had no intention of deeding all the property to him . . . . Allen was living on the premises and when Gail suggested that I put it in his name, I agreed, and she called Allen and asked if it was alright to place it in his name and he agreed. I am sure he understood that the property was being placed in his name merely so that I could continue receiving the SSI check . . . . Allen paid me no money and merely agreed to have the property placed in his name . . . . I expected that I could have the deed changed back any time that I asked him to and I am sure that that is what he understood.

We think this evidentiary forecast falls far short of demonstrating a genuine issue of material fact concerning fraud. Plaintiff has nowhere alleged a single statement or promise by defendant that could be said to have misrepresented his intentions or fraudulently induced plaintiff to convey the property to him. Summary judgment for defendants is

Affirmed.

Judges WHICHARD and PARKER concur.

THE NORTHWESTERN BANK v. JACK W. WESTON, JR.

No. 8427DC307

(Filed 19 February 1985)

Mortgages and Deeds of Trust § 32.1— deficiency action by second mortgagee purchasing at first mortgage foreclosure

G.S. 45-21.36 did not apply to plaintiff's deficiency action on a second mortgage where plaintiff had purchased defendant's house for less than the appraised value at a foreclosure sale held by the first mortgagee. G.S. 45-21.36 was designed to provide protection from mortgagees which purchase at sales they have initiated, not second mortgagees who come to sales as "other purchasers" and who have no duty to bid fair market value or to notify the mortgagor of their bid.

APPEAL by defendant from *Bowen, Judge.* Judgment entered 28 October 1983 in District Court, CLEVELAND County. Heard in the Court of Appeals 27 November 1984.

The defendant, Jack W. Weston, Jr., borrowed $20,000 from the Cleveland Federal Savings and Loan Association (the Savings and Loan) and as security conveyed title to his residence in Cleveland County. He gave a note and a deed of trust to the Savings and Loan. The defendant later borrowed $10,000 from the plaintiff, Northwestern Bank (the Bank), again conveying title to his residence and making a note and a deed of trust (the second deed of trust).

The defendant defaulted on his obligation to the Savings and Loan, which foreclosed on the first deed of trust securing the loan. He also defaulted on the $10,000 loan from plaintiff, making only five interest payments, totaling $583.01.

On 30 March 1982, the Savings and Loan held a mortgage foreclosure sale on the first deed of trust. A representative of the plaintiff Bank bid $26,000 on the defendant's home. This was the highest and only bid. Of that amount, $19,620.27 went to the Savings and Loan to satisfy the first note and deed of trust, and $1,668.42 was applied to the costs of the foreclosure sale. The remaining $4,711.31 received for the house was applied to the $10,000 the defendant owed the Bank.

The plaintiff Bank then brought suit to recover the $5,288.69 that the defendant still owed under his second promissory note.

The Bank claimed in addition to the principal amount, $1,053.61 in interest and $951.00 in attorneys fees.

The defendant answered the complaint by alleging that the plaintiff Bank bid less than the fair market value of the house at the foreclosure sale, and that it is now therefore estopped to claim that defendant is indebted to it for the deficiency. At trial, defendant invoked G.S. 45-21.36.

The trial judge granted a directed verdict against defendant on the promissory note and ordered defendant to pay $7,427.42 in principal and interest to the Bank. Defendant appeals.

James H. Toms and Ervin W. Bazzle for defendant appellant.

Hamrick, Mauney, Flowers, Martin & Deaton, by Thomas W. Martin, Jr., for plaintiff appellee.

ARNOLD, Judge.

The first issue presented by this appeal is whether G.S. 45-21.36 furnishes a defense against the plaintiff Bank's suit on a promissory note given by defendant. Plaintiff is the holder of the note and of a deed of trust given on defendant's home, which secures the note. The deed of trust is the second deed of trust defendant has given on his property. Plaintiff purchased defendant's property at a foreclosure sale held pursuant to the power of sale of the first mortgage on defendant's property, after defendant's default. Defendant is also in default on the note and deed of trust given for a loan from plaintiff.

When plaintiff, the holder of the second deed of trust, purchased defendant's house at the foreclosure sale held by the first mortgagee, it bid $26,000, somewhat less than $32,000, the amount at which plaintiff's appraiser valued the house at the time of the sale. The $26,000 paid at the sale was applied to the costs of the sale, to the first mortgage, and then to the amount defendant owed plaintiff under the second deed of trust. Yet, this amount did not cover the entire amount owed, and plaintiff now sues on the promissory note to recover the difference. Plaintiff resold defendant's house and recovered $27,500.

Defendant says that because plaintiff did not bid the higher amount, $32,000, he (defendant) should have a defense against

plaintiff's suit under G.S. 45-21.36, and a directed verdict accordingly should not have been granted. Were plaintiff the first mortgagee, who had invoked the power of sale, G.S. 45-21.36 would undoubtedly apply. Yet, plaintiff is the holder of the second deed of trust, and under the terms of the statute does not have the same duties as one who buys at his own sale.

G.S. 45-21.36 provides, in pertinent part:

> When any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part: Provided, this section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust or other instrument.
> . . .

The statute does not say that it applies to *any* mortgagee or to *a* mortgagee who holds *an* obligation secured by the property for sale. Rather, it applies to *the* mortgagee, payee or other holder, who holds "*the obligation thereby secured,*" *i.e.*, the obligation secured by the property for sale, and under which the sale is held. The use of the specific article "the" indicates that the statute is designed to protect mortgagors from mortgagees who purchase at sales they have conducted or initiated pursuant to the power of sale in their mortgage contracts with the mortgagors.

Second mortgagees come to these sales as "other purchasers," whose rights, under the express terms of the statute shall not be affected. Defendant thus does not have a defense under the statute against plaintiff, and the directed verdict was properly granted.

Defendant argues further that, apart from the statute, under equitable principles of fairness, the trial judge should have allowed the jury to determine whether the plaintiff bank breached a duty of good faith to defendant by purchasing the house at less than its fair value, and by not notifying the defendant that it would bid less than the $32,000. While we agree that as a mortgagee the plaintiff had a general duty to act in the interests of its mortgagor, we find no authority suggesting that the second mortgagee must attempt to bid a "fair market value" or give the mortgagor notice of its bid at a public sale under the first mortgage.

The second mortgagee has no duty or obligation even to bid at the sale. Under statute, he receives no personal notice that the foreclosure sale is to take place. He has no say in when the sale takes place. He must compete with other bidders.

After carefully reviewing this matter we reject defendant's extraordinary argument. It appears that plaintiff came to the foreclosure sale as any other third party.

Directed verdict is

Affirmed.

Judges WELLS and BECTON concur.

ODESSA FORBIS, PLAINTIFF-APPELLANT v. WESLEYAN NURSING HOME, INC., AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, DEFENDANTS-APPELLEES

No. 8426SC557

(Filed 19 February 1985)

Master and Servant § 108.1— unemployment compensation—misconduct of employee

Evidence was sufficient to support a decision by the Employment Security Commission that plaintiff was disqualified for unemployment compensation because she was discharged for misconduct connected with her work where the evidence tended to show that plaintiff was a laundry worker for defendant nursing home and that she stole a patient's clock. G.S. 96-14(2).

APPEAL by claimant from *Grist, Judge.* Judgment entered 27 February 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 January 1985.

Legal Services of Southern Piedmont, Inc., by Marshall A. Swann, for claimant appellant.

Donald R. Teeter for defendant appellee Employment Security Commission.

No brief filed for defendant appellee Wesleyan Nursing Home.

WHICHARD, Judge.

Claimant, a laundry worker for defendant nursing home, appeals from the judgment affirming the decision by defendant Employment Security Commission that she is disqualified for unemployment compensation because she was discharged for misconduct connected with her work. She contends the pertinent findings are not supported by competent evidence, and that the conclusion of law that she was discharged for misconduct connected with her work was therefore erroneous. We affirm.

The Commission made the following pertinent findings of fact:

2. The claimant was discharged . . . for theft [of] patient property.

3. . . . [A] patient accused the claimant of taking the patient's clock.

4. Upon being confronted with the patient's accusation, the claimant produced the missing clock from her pocket and admitted taking it.

These findings are supported by the following competent evidence:

A witness for the employer testified that on the occasion in question she was paged to the employer's front office. She found claimant there with the director of nurses. The director stated that she caught claimant stealing a patient's clock. Claimant started to cry and said, "[P]lease don't fire me. I've never done anything like this before. I don't know what made me do it." This witness further testified: "[T]he patient . . . confirm[ed] what we are saying as far as the employee taking it. . . . [S]he could describe her from head to toe."

Because the foregoing evidence supports the above findings, the findings are conclusive on appeal. G.S. 96-15(i); *Yelverton v. Furniture Industries*, 51 N.C. App. 215, 218, 275 S.E. 2d 553, 555 (1981). *See also* G.S. 96-4(m). The sole remaining question is whether these findings sustain the conclusion that claimant was disqualified for benefits by virtue of G.S. 96-14 (Cum. Supp. 1981), which provides, in pertinent part:

An individual shall be disqualified for benefits:

> . . . .
>
> (2) . . . if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because [s]he was discharged for misconduct connected with [her] work. Misconduct connected with the work is defined as conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of [the] employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to [the] employer.

See also (re: definition of misconduct) *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 375, 289 S.E. 2d 357, 358-59 (1982);

Yelverton, 51 N.C. App. at 218-19, 275 S.E. 2d at 555; *In re Collingsworth*, 17 N.C. App. 340, 343-44, 194 S.E. 2d 210, 212-13 (1973) (quoting *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 296 N.W. 636, 640 (1941)).

That theft by a nursing home employee from a patient in the home constitutes willful or wanton disregard of the employer's interest, in disregard of standards of behavior which the employer has the right to expect of the employee, cannot be gainsaid. The findings therefore support the conclusion that "misconduct connected with [her] work" occasioned claimant's discharge, and her disqualification for benefits accordingly was appropriate.

Claimant argues that the judgment should be reversed because the Commission received hearsay evidence in the form of a written statement prepared by the employer's director of nurses, who was not present to testify. The Commission, however, is not bound by common law or statutory rules of evidence. G.S. 96-15(f). Further, the statement was corroborative of competent evidence presented, and the competent evidence alone sufficed to support the Commission's findings. We thus find this argument without merit.

Claimant also argues that the Commission erred or abused its discretion in finding her version of the facts, which suggested that the incident resulted from accident or mistake, "inherently incredible," when the Appeals Referee, who heard the evidence, had found in her favor. The Commission, however, is empowered to "affirm, modify, or set aside any decision of an appeals referee on the basis of the evidence previously submitted . . . ." G.S. 96-15(e). The evidence here fully justified a finding that claimant's version of the facts was "inherently incredible," and the Commission neither erred nor abused its discretion in so finding.

Affirmed.

Chief Judge HEDRICK and Judge PARKER concur.

TINA S. CARTRETTE v. CHARLES R. CARTRETTE

No. 8427DC469

(Filed 19 February 1985)

Social Security and Public Welfare § 2; Divorce and Alimony § 24.5— receipt of AFDC—changed circumstance—modification of child support

Where the parties had entered into a consent judgment wherein each party obtained custody of one child and neither was required to make support payments to the other, the subsequent receipt of Aid to Families with Dependent Children was a sufficient change of circumstances to permit a modification of the consent judgment. The motion in the cause filed by the Department of Social Services should not have been dismissed. G.S. 50-13.7(a), G.S. 110-137.

APPEAL by Gaston County from *Ramseur, Judge.* Order entered 12 December 1983 in GASTON County, District Court. Heard in the Court of Appeals 8 January 1985.

Catherine C. Stevens for Gaston County Department of Social Services, movant appellant.

Frank Patton Cooke for defendant appellee.

COZORT, Judge.

The essential question for our determination is whether the receipt of public assistance alone on behalf of a minor child is a sufficient change of circumstances to justify the modification of a previous consent judgment which had established each parent's obligation of support. We hold that it is and reverse the order of the trial court.

The Cartrettes are parents of two children. They separated in 1981 and entered into a consent judgment on 18 June 1982 wherein each parent obtained custody of one child and became responsible for the support and maintenance of the child in his or her care. According to the consent judgment, neither party was required to make support payments to the other.

On 1 August 1982, Tina S. Cartrette began receiving $176.00 per month public assistance in the form of Aid to Families with Dependent Children (AFDC) on behalf of Christina Michelle Cartrette, the minor child in her custody. The Gaston County Department of Social Services filed a motion in the cause on 10 January

1983 to modify the consent judgment to require the respondent, Charles R. Cartrette, to provide support for Christina. The trial court denied the motion on the basis that the receipt of public assistance alone for Christina was not a sufficient change in circumstances to justify modifying the consent judgment. The Gaston County Department of Social Services appealed from this order.

In *Cox v. Cox*, 44 N.C. App. 339, 341, 260 S.E. 2d 812, 813 (1979), this Court stated the following:

> Under the law of North Carolina, when the people, through the state, provide support for minor children by AFDC, there arises a debt owed to the state by any parent obligated to support such minor children. N.C. Gen. Stat. 110-135. The county attorney shall represent the state in proceedings to collect such debts. N.C. Gen. Stat. 110-135. The recipient of such public assistance for minor children shall be deemed to have made an assignment to the state of the right to any child support, up to the amount of public assistance received. The state is subrogated to the right of the person having custody of such children to recover any payments ordered by the courts of this state. N.C. Gen. Stat. 110-137.

Although the trial court correctly concluded in this case that the 18 June 1982 consent judgment "was, for all intents and purposes, an order of support for a minor child, or children" which could be modified upon a showing of changed circumstances, we hold the trial court erred in its conclusion that the "payment of public assistance, standing alone, is not a showing of changed circumstances."

We do not find persuasive the respondent's contention that *Cox* does not apply because he is not a "responsible parent" for Christina Michelle Cartrette under the consent judgment executed by both parents on 18 June 1982. To the contrary, the law provides for the modification of child support orders, upon a showing of changed circumstances, to provide for the financial support of dependent children. A parent cannot contract away his or her obligation to support dependent children, nor can a parent by contract diminish the rights of the State or a county under G.S. 110-135, *et seq.* Thus, we hold, as stated in *Cox*, that the receipt of public assistance alone is a change of circumstances suf-

ficient to justify a modification of the order. *Id.* at 342, 260 S.E. 2d at 814. By virtue of the assignment under G.S. 110-137, the State through the Gaston County Department of Social Services was an "interested" entity under G.S. 50-13.7(a) and could properly move in the cause to modify the consent judgment.

Therefore, the trial court improperly dismissed the Gaston County Department of Social Services' motion in the cause. We reverse the order of the trial court and remand the case for a determination by the trial court of the amount, not to exceed $176.00 per month, the respondent must pay towards Christina Michelle Cartrette's support.

Reversed and remanded.

Judges ARNOLD and WELLS concur.

WILLIAM C. PALMER v. R. W. WILKINS, JR., COMMISSIONER OF NORTH CAROLINA DIVISION OF MOTOR VEHICLES

No. 8425SC604

(Filed 19 February 1985)

Automobiles § 2.3— suspension of driver's license—no appeal

G.S. 20-25 creates no right to appeal a driver's license suspension under G.S. 20-4.20(b) for failure to comply with a citation issued in another state.

APPEAL by the State from *Sitton, Judge.* Judgment entered 6 March 1984 in CALDWELL County Superior Court. Heard in the Court of Appeals 6 February 1985.

Respondent Department of Motor Vehicles (hereinafter the DMV) received a notice from the South Carolina Department of Motor Vehicles that petitioner Palmer had received a citation for speeding (70 m.p.h. in a 55 m.p.h. zone) there. The DMV thereupon issued an order, pursuant to N.C. Gen. Stat. § 20-4.20(b) (1983), suspending petitioner's driver's license pending proof that he had complied with the South Carolina citation. Petitioner requested and received a hearing, at which he stated that he had not been in South Carolina, had no intention of going there, and that the

DMV therefore could not do anything about the matter. The hearing officer concluded from the correct information regarding petitioner on the citation and the fact that the car involved was titled to petitioner's wife that petitioner was indeed the person named in the citation, and placed the suspension back in effect.

Petitioner then petitioned the Superior Court of Caldwell County for injunctive relief on the ground that the DMV's action was arbitrary and unconstitutional. Temporary injunctions were issued. The DMV answered and moved to dismiss for lack of subject matter jurisdiction.

At hearing, the trial court denied the DMV's motion to dismiss and found certain uncontested facts. These facts were that petitioner held a valid North Carolina license, that conviction under the citation would not have resulted in suspension under either North Carolina or South Carolina law, and that petitioner was not entitled to a hearing before any DMV official prior to suspension, but that the DMV had granted one in its discretion. The trial court concluded that G.S. § 20-4.20(b) was unconstitutional as written and applied, and that petitioner had been denied his rights to due process and equal protection under the law. The trial court therefore vacated the suspension and permanently enjoined the DMV from reinstating it. The DMV appealed.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Jean A. Benoy and Assistant Attorney General Alfred N. Salley, for the State.

Wilson and Palmer, P.A., by W. C. Palmer, for petitioner.

WELLS, Judge.

The first question presented is whether the trial court had subject matter jurisdiction of petitioner's appeal from the Commissioner's order. Petitioner's license was suspended pursuant to the provision of G.S. § 20-4.20(b), which provides:

> (b) When the licensing authority of a reciprocating state reports that a person holding a North Carolina license has failed to comply with a citation issued in such state, the Commissioner shall forthwith suspend such person's license. The order of suspension shall indicate the reason for the order, and shall notify the person that his license shall remain

> suspended until he has furnished evidence satisfactory to the Commissioner that he has complied with the terms of the citation which was the basis for the suspension order by appearing before the tribunal to which he was cited and complying with any order entered by said tribunal.

Petitioner commenced this action in superior court pursuant to N.C. Gen. Stat. § 20-25 (1983):

> Any person denied a license or whose license has been canceled, suspended or revoked by the Division, *except where such cancellation is mandatory under the provisions of this Article*, shall have a right to file a petition within 30 days thereafter for a hearing in the matter in the superior court of the county wherein such person shall reside, or to the resident judge of the district or judge holding the court of that district, or special or emergency judge holding a court in such district in which the violation was committed, and such court or judge is hereby vested with jurisdiction and it shall be its or his duty to set the matter for hearing upon 30 days' written notice to the Division, and thereupon to take testimony and examine into the facts of the case, and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation or revocation of license *under the provisions of this Article.* [Emphasis added.]

Relying on the emphasized language, the DMV contends that since suspension under G.S. § 20-4.20(b) is mandatory, petitioner had no right to invoke the jurisdiction of the superior court. G.S. § 20-25 appears in Article 2 of Chapter 20, however, while G.S. § 20-4.20 appears in Article 1B. Therefore the exception does not apply. The last phrase of the section clearly empowers courts only to decide whether suspension under Article 2 is appropriate, not to review suspensions under Article 1B. We conclude that G.S. § 20-25 creates no right to appeal a suspension under G.S. § 20-4.20(b). The General Assembly simply has not provided for appeals from suspension under G.S. § 20-4.20(b), and under those circumstances, harsh as the result may seem, we must hold that the trial court was without subject matter jurisdiction to entertain petitioner's appeal from the Commissioner's order. Accordingly, the trial court's order must be and is

Vacated.

Judges WHICHARD and BECTON concur.

STATE OF NORTH CAROLINA v. STANLEY LEON PRESTON

No. 8412SC404

(Filed 19 February 1985)

Obstructing Justice § 1— failure of indictment to charge felony

While the indictment in this case gave defendant adequate notice of the conduct which gave rise to the common law charge of obstruction of justice and was sufficient to constitute a bar to subsequent prosecution for the same offense, it failed to charge the essential elements of deceit and intent to defraud which were necessary to elevate the misdemeanor offense of obstruction of justice to a felony.

APPEAL by defendant from *Preston, Judge.* Judgment entered 23 February 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 15 January 1985.

The defendant was tried upon a true bill of indictment which alleged

> that on or about the 8th day of August, 1983, in the county named above the defendant named above unlawfully, willfully and feloniously did obstruct justice by providing the sum of Two Hundred Forty-Five Dollars ($245.00) in United States Currency to Christine Richardson for the purpose of paying fine and court costs in the criminal cases entitled *State of North Carolina versus Goldie McDougal,* 83CR29348 and 83CR29349. The defendant acted with the knowledge that the defendant named therein, "Goldie McDougal" was an alias name for Christine Richardson and that Karen Chevelle Thompson was posing as "Goldie McDougal" at the request of Christine Richardson who had been charged as the defendant under the name of "Goldie McDougal" in 83CR29348 and 83CR29349.

The defendant entered a plea of not guilty; the jury returned a verdict finding the defendant "Guilty of obstructing justice by

deceite [sic]." The court sentenced the defendant as a Class H felon, pursuant to G.S. 14-3(b), and imposed the presumptive term of three years imprisonment. Defendant appealed.

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

Paul E. Eaglin for defendant appellant.

MARTIN, Judge.

Is the indictment sufficient to support the verdict of "Guilty of obstruction of justice by deceit" and the judgment entered thereon sentencing the defendant as a felon? We hold that it is not and vacate the judgment.

Briefly stated, the facts which give rise to this unusual case are as follows: Christine Richardson was well known in the Criminal District Court in Cumberland County, having made frequent appearances there. On 9 July 1983 she was arrested and charged with two counts of possession of stolen goods. At the time of her arrest, she used a fictitious name, "Goldie McDougal." Her trial date in District Court was set for 8 August 1983. On 9 August Christine Richardson, fearing recognition by the judge and assistant district attorney when her cases were called, persuaded Karen Thompson to pose as "Goldie McDougal," to answer when the cases were called, and to enter pleas of guilty. Richardson and the defendant, Preston, who was Richardson's boyfriend, employed John Pechman, an attorney, to represent Thompson (posing as "Goldie McDougal") at sentencing. Pechman was unaware that Thompson was an impostor. A judgment was entered imposing a fine and court costs upon "Goldie McDougal" and the defendant provided the money for the payment of the fine and costs. The scheme was uncovered when one of the victims, who was present in court, advised the assistant district attorney that the person who had answered and pleaded guilty was not the same "Goldie McDougal" as the person who had been arrested and charged on 9 July.

The defendant was indicted and tried in the Superior Court for obstruction of justice, in violation of the common law. At common law, obstruction of justice was a misdemeanor. Perkins on Criminal Law, 2nd Edition 1969, pp. 494-495. G.S. 14-3(b) provides:

> If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony.

At the trial, the court submitted the case to the jury upon the possible verdicts of "Guilty of obstructing justice by deceit" or "Not Guilty" and instructed the jury that among the elements which the State was required to prove beyond a reasonable doubt were that the defendant knew that Karen Thompson had posed as Christine Richardson, alias Goldie McDougal, and pleaded guilty to the charges and that the defendant's act of providing the money for the payment of fine and costs to Karen Thompson, coupled with his knowledge that she had posed as Christine Richardson, *"was calculated and intended by the defendant to deceive and to defraud the Court."*

The requirements for an indictment are the same, whether the crime charged be statutory or common law. The indictment must allege all essential elements of the offense to be charged in order that the defendant may be adequately informed of the offense with which he is charged; that he have a reasonable opportunity to prepare his defense; that he may be protected from twice being put in jeopardy for the same offense; and that the court, in the event of conviction, may proceed to judgment according to law. *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983); *State v. Greer*, 238 N.C. 325, 77 S.E. 2d 917 (1953). While the indictment in the case *sub judice* gives the defendant adequate notice of the conduct which gives rise to the common law charge of obstruction of justice and is sufficient to constitute a bar to subsequent prosecution for the same offense, it fails to charge the essential elements of deceit and intent to defraud which are necessary to elevate the misdemeanor offense of obstruction of justice to a felony. See *State v. Jarvis*, 50 N.C. App. 679, 274 S.E. 2d 852 (1981). The indictment was, therefore, insufficient to support the judgment convicting the defendant of a Class H felony. At most, the indictment would support the conviction of the misdemeanor of common law obstruction of justice.

G.S. 7A-272 provides that the District Court "has exclusive, original jurisdiction for the trial of criminal actions . . . below the

grade of felony . . . ." We are therefore compelled to hold that the Superior Court of Cumberland County was without jurisdiction and the judgment must be vacated.

Vacated.

Judges ARNOLD and WELLS concur.

G. REID DUSENBERRY, III v. SUE BROWN DUSENBERRY (NOW FOWLER)

No. 8415DC636

(Filed 19 February 1985)

Divorce and Alimony § 30— equitable distribution—fault-based findings inappropriate

Findings in an equitable distribution action regarding an adulterous affair by the wife were irrelevant and inappropriate to the award of marital property. G.S. 50-20, 21.

APPEAL by defendant from *Allen, Judge.* Order entered 19 April 1984 in District Court, ALAMANCE County. Heard in the Court of Appeals 8 February 1985.

Holt, Spencer & Longest, by James C. Spencer, Jr., and Hunter, Wharton & Howell, by John V. Hunter, III, for plaintiff appellee.

Boyce, Mitchell, Burns & Smith, P.A., by Carole S. Gailor, for defendant appellant.

WHICHARD, Judge.

This is an equitable distribution action pursuant to G.S. 50-20, 21, in which the court concluded as a matter of law that an equal division of the marital property was not equitable. It did so based in part upon findings that defendant-wife "began having an adulterous affair . . . and began neglecting the plaintiff and their three minor children" and that this conduct "was a major reason for the break-up of this marriage . . . and . . . was the only serious and significant mistreatment of either party by the other party during the course of this marriage." It concluded that con-

sideration of "the relative fault of the parties leading to the disintegration of their marriage . . . [was] just and proper."

Subsequent to entry of this order, this Court held that fault is not a relevant or appropriate consideration in determining an equitable distribution of marital property. *Hinton v. Hinton*, 70 N.C. App. 665, 321 S.E. 2d 161 (1984); *see also Wade v. Wade*, 72 N.C. App. 372, 325 S.E. 2d 260 (1985); *Smith v. Smith*, 71 N.C. App. 242, 322 S.E. 2d 393 (1984). The award here is clearly grounded upon fault-based findings regarding an adulterous affair on the part of defendant-wife. Because the court considered this irrelevant and inappropriate matter in awarding the marital property, the order must be vacated and the cause remanded for a new order based solely upon relevant and appropriate findings.

Vacated and remanded.

Judges WELLS and BECTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 FEBRUARY 1985

Case	County	Disposition
CAVENAUGH v. CAVENAUGH No. 843DC580	Carteret (82CVD761)	Affirmed
COLLINS v. COLLINS No. 8315DC989	Alamance (82CVD904)	Affirmed
DAY v. COOK No. 8423SC765	Wilkes (83CVS159)	Affirmed
GARNER v. PARKS No. 8419DC595	Randolph (83CVD774)	Vacated and Remanded
IN RE CAVEAT TO WILL OF COX No. 8422SC702	Davidson (82SP334)	Dismissed
IN RE GREENE No. 8421DC833	Forsyth (83J417)	Affirmed
IN RE SHAW No. 8421DC410	Forsyth (83J319)	Dismissed
IN RE SILVER No. 8429DC757	McDowell (84SP44)	Affirmed
MEDLEY v. MEDLEY No. 8418DC697	Guilford (74CVD12970)	Affirmed
MIMS v. MIMS No. 8310SC1230	Wake (83CVS3457)	Reversed and Remanded
STATE v. BROWN No. 8416SC213	Robeson (83CR4604) (83CR4607) (83CR4618) (83CR4621)	No Error
STATE v. BURGESS No. 845DC373	Pender (83CVD283)	Affirmed
STATE v. COWARD No. 843SC804	Pitt (83CRS10871) (83CRS10872) (83CRS11629)	No Error
STATE v. GRAHAM No. 8421SC503	Forsyth (83CRS38414) (83CRS38415)	No Error
STATE v. HINTON No. 844SC714	Onslow (83CRS11078)	No Error

STATE v. HOLLINGSWORTH No. 8412SC825	Cumberland (83CRS43904)	No Error
STATE v. JACKSON No. 8416SC685	Robeson (83CRS18437)	No Error
STATE v. LAWSON No. 848SC817	Wayne (83CRS15944)	No Error
STATE v. LEVERETT No. 8418SC334	Guilford (82CRS15969)	No Error
STATE v. MAYE No. 848DC896	Lenoir (84J23)	Affirmed
STATE v. MEDLIN No. 8410SC509	Wake (83CRS18347(a))	No Error
STATE v. MOORE No. 844SC769	Onslow (83CRS15292)	Affirmed
STATE v. NOLLEY No. 8426SC676	Mecklenburg (83CRS48866)	Affirmed
STATE v. RASCOE No. 846SC517	Bertie (82CRS3050)	No Error
STATE v. REID No. 8419SC659	Cabarrus (83CRS11715) (83CRS11716)	No Error
STATE v. RICKS No. 847SC515	Nash (83CRS11740)	No Error
STATE v. SAMPSON No. 8416SC663	Robeson (83CRS9804) (83CRS9805) (83CRS10659)	No Error as to Robert Sampson and Bobby Lowery; Remanded for new sentencing hearing as to Romulus Sampson.
STATE v. SIMMS No. 848SC727	Wayne (83CRS16799)	No Error
STATE v. TYLER No. 8416SC803	Robeson (82CRS20367) (82CRS20368) (82CRS20369) (82CRS20370)	Affirmed
STATE v. WILKES No. 8419SC348	Cabarrus (83CRS9036)	No Error

STATE v. WOODS No. 8422SC331	Davidson (83CRS11507) (83CRS11508)	Affirmed
STRICKLAND v. DUNN No. 8414DC673	Durham (80CVS2062)	Affirmed
STROTHER v. MAC'S CONCRETE No. 8412DC843	Hoke (83CVD243)	Affirmed
STURDIVANT v. STURDIVANT No. 8420DC466	Union (83CVD0726)	Vacated and Remanded
WINSLOW OIL CO. v. COMMUNITY GAS No. 841SC38	Perquimans (81CVS104)	No Error

BARBARA SIMMONS IPOCK, GUARDIAN AD LITEM FOR JUDITH I. HILL AND TIMOTHY W. HILL, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR TIMOTHY JASON HILL, A MINOR v. SAMUEL J. GILMORE

No. 838SC1282

(Filed 5 March 1985)

1. **Torts § 6.1 — satisfaction of judgment against joint tort-feasors — claim against third tort-feasor for same injury barred — claim for additional injury not barred**

Satisfaction of a judgment against two joint tort-feasors, a nurse anesthetist and a hospital, for plaintiff's hypoxic brain damage barred plaintiff from seeking further damages against defendant third joint tort-feasor, an obstetrician-gynecologist, for the brain damage. However, satisfaction of the judgment did not bar plaintiff's claim against defendant obstetrician-gynecologist for separate and distinct injuries resulting from his negligent performance of surgery removing all of plaintiff's reproductive organs without plaintiff's informed consent, and plaintiff's complaint was sufficient to give defendant notice of such claim. G.S. 1B-3(e).

2. **Physicians, Surgeons, and Allied Professions § 17.1; Rules of Civil Procedure § 56 — medical malpractice — summary judgment — refusal to continue ruling until filing of affidavit — abuse of discretion — summary judgment improper**

In a medical malpractice case in which plaintiff alleged that defendant negligently performed a total abdominal hysterectomy and bilateral salpingo-oophorectomy on her when she had consented only to a laparoscopy, the trial court abused its discretion in the denial of plaintiff's Rule 56(f) motion to continue a ruling on defendant's summary judgment motion until an expert's signed affidavit could be filed or to allow the late filing of the expert's signed affidavit, and summary judgment was improperly entered for defendant, where: plaintiff filed an unsigned affidavit by the expert; plaintiff's attorney filed an affidavit detailing his difficulty in finding an expert in gynecology who would testify for plaintiff and explaining that he had received the expert's opinion only four days prior to the hearing, that the expert left the next morning to attend a professional meeting in New Orleans and was unable to sign the affidavit prior to the hearing, and that the expert had approved the language of the affidavit by telephone; the signed affidavit was filed before the court actually ruled on the summary judgment motion; and the affidavit established genuine issues of material fact on the issue of negligent performance and issues of whether consent by plaintiff's husband to the expanded surgery was valid and whether a reasonable person, under all the surrounding circumstances, would have undergone the expanded surgery if she had been properly informed of the risks by defendant. G.S. 90-21.13(a)(1) and (3).

APPEAL by plaintiff from *Llewellyn, Judge.* Orders entered 17 November 1982 *nunc pro tunc* 1 November 1982 in Superior Court, LENOIR County. Heard in the Court of Appeals 25 September 1984.

Boyce, Mitchell, Burns & Smith, P.A. by Robert E. Smith, and McCain & Essen, by Grover C. McCain, Jr. and Jeff Erick Essen, for plaintiff appellants.

LeRoy, Wells, Shaw, Hornthal & Riley, by L. P. Hornthal, Jr., for defendant appellee.

BECTON, Judge.

On 18 February 1981, after admission to Lenoir Memorial Hospital for a laparoscopy—an elective permanent sterilization procedure under complete anesthesia—scheduled for 19 February 1981, plaintiff, Judith Hill, signed a written consent form authorizing the defendant, Dr. Samuel J. Gilmore, "to perform the following operation and/or operations—Laparoscopy with Fulguration of Tubes or Application of Hulka Clips." A laparoscopy is commonly referred to as "band-aid surgery": one or two 1/4 to 1/2 inch abdominal incisions are made; the fallopian tubes are visualized through a lapar scope inserted in the incision; the tubes are sealed with either electric current (fulguration) or clips (Hulka clips); and the patient is released from the hospital the same day.

On 19 February 1981, after Mrs. Hill was completely anesthetized, the defendant Gilmore expanded the surgery to perform a complete abdominal hysterectomy and a bilateral salpingo-oophorectomy, removing all of Mrs. Hill's reproductive organs. Post-operatively, Mrs. Hill was noted to be confused and to have no need for pain medications despite the extreme surgery. She was subsequently diagnosed as suffering from hypoxic brain damage (brain damage caused by a lack of oxygen to the brain) incurred either during or immediately following the surgery performed by defendant Gilmore.

On 11 January 1982, plaintiff, Mrs. Hill, through her guardian ad litem, Barbara Ipock, plaintiff, Timothy W. Hill, her husband, and plaintiff, Timothy Jason Hill, her child, through his guardian ad litem, instituted this medical negligence action against defendant Gilmore, an obstetrician-gynecologist, and several other defendants, including an anesthesiologist, a nurse anesthetist and Lenoir Memorial Hospital, Inc., to recover damages for Mrs. Hill's injuries and her family members' loss of consortium. In her Complaint, Mrs. Hill alleged that (1) Defendant Gilmore negligently performed a total abdominal hysterectomy and bilateral salpingo-

oophorectomy on her; (2) he did not obtain her informed consent to a total abdominal hysterectomy and salpingo-oophorectomy; (3) he did not properly monitor and supervise her respirations and cardiac output during the surgical procedures; and (4) he was negligent in his post-operative care of her. She further alleged that:

> 9. As a direct and proximate result of the negligence of the defendants, Judith I. Hill has been caused to become brain damaged, comatose and to receive a continuing and prolonged course of resuscitative and rehabilitative hospitalization and therapy.
>
> 10. As a direct and proximate result of the negligence of the defendant, Judith I. Hill, because of her damaged brain, is severely limited in her motor activities, cannot walk without assistance, cannot talk intelligibly and cannot care for herself in any material respects.
>
> 11. As a direct and proximate result of the negligence of the defendants, Judith I. Hill has been caused to incur medical expenses, loss of wages, pain, suffering and extreme mental anguish.

In his Answer, filed 11 February 1982, defendant Gilmore denied the material allegations of the Complaint. On 5 April 1982 defendant Gilmore filed a motion for summary judgment. However, because discovery had not been completed in the matter, the trial court granted plaintiffs' Rule 56(f) motion for a continuance of the hearing until 1 November 1982. By that time plaintiffs had filed answers to interrogatories and, on the day of the hearing, plaintiffs filed a second Rule 56(f) motion. This time plaintiffs asked the trial court

> for an order either allowing the late filing of the affidavit of Dr. Robert L. Anderson, one of the expert witnesses for plaintiff in this action, or to continue the ruling on defendant Gilmore's motion for summary judgment until such time that Dr. Anderson's affidavit can be filed with the court for the court's consideration of it.

In support of plaintiffs' motion, plaintiffs' attorney filed his own affidavit explaining why the accompanying affidavit of Dr. Anderson, a physician board-certified in obstetrics and gynecology and

an associate professor at the Eastern Virginia Medical School in Norfolk, Virginia, was unsigned.

After hearing arguments at the summary judgment hearing on 1 November 1982, the trial judge took all motions argued under advisement. While the trial court was still considering its ruling on the motions, plaintiffs filed a signed affidavit of Dr. Anderson, identical to the previously submitted unsigned affidavit. Notwithstanding, on 17 November 1982, the trial court entered an order denying plaintiffs' Rule 56(f) motion and also entered an order allowing defendant Gilmore's motion for summary judgment.

Prior to the trial all the remaining defendants obtained summary judgment on the issue of plaintiff, Timothy Jason Hill's loss of parental consortium. During the trial one defendant, the anesthesiologist, settled with the remaining plaintiffs, Mr. and Mrs. Hill. A jury found against the remaining two defendants, the nurse anesthetist and Lenoir Memorial Hospital and awarded Mrs. Hill $600,000 for her injuries and Mr. Hill $100,000 for his loss of consortium. In its judgment dated 28 September 1983 the trial court reduced Mrs. Hill's award $100,000, presumably to reflect the earlier settlement. On 6 October 1983 the judgment was satisfied. On 6 October 1983 the trial court entered a court approved judgment of settlement on Timothy Jason Hill's claim for a loss of parental consortium against the nurse anesthetist and Lenoir Memorial. The defendant nurse and hospital wished to avoid an appeal. The judgment for $2,850 was satisfied the same day, 6 October 1983.

Plaintiffs appeal from the trial court's grant of defendant Gilmore's motion for summary judgment.

I

[1] Defendant Gilmore contends that the 6 October 1983 satisfaction of the 28 September and 6 October 1983 judgments against the two other remaining defendants have rendered this appeal moot. He relies on the statutory language of N.C. Gen. Stat. Sec. 1B-3(e) (1983), which provides, in pertinent part:

> The recovery of judgment against one tort-feasor for the injury or wrongful death does not of itself discharge the other tort-feasors from liability to the claimant. The satisfac-

> tion of the judgment discharges the other tort-feasors from liability to the claimant for the *same injury* or wrongful death, but does not impair any right of contribution.

(Emphasis added.) G.S. Sec. 1B-3(e) codifies the common-law rule applicable to joint tort-feasors. Although an injured party may pursue and obtain judgments against all joint tort-feasors for a single injury, he may have only one satisfaction. *Bowen v. Iowa Nat'l Mut. Ins. Co.*, 270 N.C. 486, 155 S.E. 2d 238 (1967). "[J]oint tort-feasors are persons who act together in committing the wrong, or persons who, independently and without concert of action or unity of purpose, commit separate acts which concur as to time and place and unite in proximately causing the injury." *Simpson v. Plyler*, 258 N.C. 390, 393, 128 S.E. 2d 843, 845 (1963). The focus is on the indivisibility of the injury, *see Phillips v. Hassett Mining Co.*, 244 N.C. 17, 92 S.E. 2d 429 (1956), which renders apportionment of damages among the individual tort-feasors impossible. *Prosser & Keeton on the Law of Torts* Sec. 52, at 347 (W. Keeton ed. 5th ed. 1984) (hereinafter *Prosser*).

To determine whether this appeal is indeed moot, we must first determine which of Mrs. Hill's injuries were compensated by the 6 October 1983 satisfaction. The issues submitted to the jury, resulting in the 28 September 1983 judgment, involved the nurse anesthetist's negligent anesthetic care and Lenoir Memorial Hospital's liability as his employer. From the allegations in the Complaint, it is clear that the nurse anesthetist's negligent anesthetic care is only proximately related to Mrs. Hill's hypoxic brain damage. Although the plaintiffs argue in their reply brief that the brain damage caused by defendant Gilmore is not the "same injury" as the brain damage caused by the other defendants, we are not persuaded. The majority of plaintiffs' allegations of negligence against the various defendants are so similar as to render the brain damage indivisible. As to defendant Gilmore, the plaintiffs allege:

> c. He failed to properly monitor and supervise the respirations and cardiac output of Judith I. Hill during his surgical procedures;
>
> d. He failed to properly treat Judith I. Hill post-operatively for her hypoxic brain damage and to require defendant Muther to treat his patient for hypoxic brain damage rather

than a 'conversion reaction,' although he had reasonable knowledge to know that a 'conversion reaction' was an entirely unreasonable diagnosis of Judith I. Hill's postoperative condition.

e. He failed to properly supervise and monitor the actions of defendants Dean and Walker in their maintenance of Judith I. Hill's respirations and cardiac output during his surgical procedures.

f. He failed to record and chart in his patient's hospital record the pertinent events concerning Judith I. Hill's respiratory or cardio-respiratory arrest.

g. He failed to properly evaluate, preoperatively, Judith I. Hill's physical ability to withstand major operative procedures.

As to the other defendants, the plaintiffs allege:

a. They failed to properly maintain an open airway, respirations and cardiac output of Judith I. Hill during her surgical procedures on February 19, 1981.

b. They failed to properly administer preoperative, operative and postoperative medications to Judith I. Hill for, during and after her surgery.

c. They failed to properly resuscitate, treat and monitor the hypoxic and post-hypoxic conditions following the arrest of Judith I. Hill while in the operating room.

d. They failed to perform a proper preanesthetic evaluation of Judith I. Hill and, in particular, failed to insist on electrolytes and a C.B.C.

We conclude that the 6 October 1983 satisfaction bars plaintiffs from seeking further damages for Mrs. Hill's brain damage.

The survival of the plaintiffs' cause of action against defendant Gilmore now depends on whether their Complaint sufficiently alleges only a single injury, the brain damage caused by the defendants as joint tort-feasors, or, in addition, separate and distinct injuries caused by the defendant Gilmore alone. *See Prosser, supra,* Sec. 52, at 348. That is, in addition to plaintiff's hypoxic brain damage claim, did plaintiffs also seek to recover damages

resulting from defendant Gilmore's negligent performance of additional surgery on her, which was done without her consent?

Under the "notice theory of pleading" a complainant must state a claim sufficient to enable the adverse party to understand the nature of the claim, to answer, and to prepare for trial. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970); *Redevelopment Comm'n v. Grimes*, 277 N.C. 634, 178 S.E. 2d 345 (1971); N.C. Gen. Stat. Sec. 1A-1, Rule 8(a) (1983). In their claim for relief, the plaintiffs develop Mrs. Hill's brain damage in great detail:

> 9. As a direct and proximate result of the negligence of the defendants, Judith I. Hill has been caused to become brain damaged, comatose and to receive a continuing and prolonged course of resuscitative and rehabilitative hospitalization and therapy.
>
> 10. As a direct and proximate result of the negligence of the defendants, Judith I. Hill, because of her damaged brain, is severely limited in her motor activities, cannot walk without assistance, cannot talk intelligibly and cannot care for herself in any material respects.

However, we find that the allegations against Dr. Gilmore, discussed *supra*, and the claim for relief:

> 11. As a direct and proximate result of the negligence of the defendants, Judith I. Hill has been caused to incur medical expenses, loss of wages, pain, suffering and extreme mental anguish.

were sufficient to put defendant Gilmore on notice of separate and distinct injuries resulting from his negligent performance of a total abdominal hysterectomy and bilateral salpingo-oophorectomy and his failure to obtain Mrs. Hill's informed consent. Therefore, the appeal is not moot, and the plaintiffs are able to proceed with their case.[1]

1. Since the trial court ruled that the defendant Gilmore was not negligent, we therefore decline to rule on the child's substantive claim for loss of parental consortium. We do note, for the trial court's benefit that in other suits involving an indirect impact on children, our appellate courts have declined to recognize a cause of action for loss of parental consortium. *See Henson v. Thomas*, 231 N.C. 173, 56 S.E. 2d 432 (1949); *Azzolino v. Dingfelder*, 71 N.C. App. 289, 322 S.E. 2d 567 (1984). However, arguably in this case, the impact on the child is directly foreseeable.

II

[2] On appeal the plaintiffs bring forward four assignments of error dealing with the sufficiency of the evidence of informed consent and lack of negligence and the trial court's denial of the plaintiffs' Rule 56(f) motion. We need only address the Rule 56(f) argument. As stated by the plaintiffs in their brief:

> The trial court committed error by denying plaintiffs' Rule 56(f) motion when the plaintiffs filed an unsigned affidavit from Dr. Robert Anderson (sufficient to rebut defendant's motion) along with a signed affidavit of plaintiffs' counsel stating that he had read the contents of the unsigned affidavit to Dr. Anderson over the telephone, that Dr. Anderson had approved the language of the affidavit and had agreed to act as plaintiffs' expert witness at trial, that Dr. Anderson had been out of town and thus had been unable to sign the affidavit prior to the hearing and when, further, the signed affidavit of Dr. Anderson was filed with the court prior to the actual ruling on the motion.

We agree that on the facts of this case the trial court abused its discretion in denying the plaintiffs' Rule 56(f) motion. Further, we find Dr. Anderson's affidavit sufficient to oppose defendant Gilmore's motion for summary judgment. We therefore vacate and remand for further proceedings consistent with this decision.

A.

Summary judgment should be granted when the movant establishes that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Gore v. Hill*, 52 N.C. App. 620, 279 S.E. 2d 102, *disc. rev. denied*, 303 N.C. 710, --- S.E. 2d --- (1981); N.C. Gen. Stat. Sec. 1A-1, Rule 56(c)(1983). However, summary judgment is a drastic remedy to be implemented with caution, especially in negligence cases. *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1979).

Subdivision (f) of Rule 56 is "an additional safeguard against an improvident or premature grant of summary judgment . . . . Consistent with this purpose, courts have stated that technical rulings have no place under the subdivision and that it should be applied with a spirit of liberality." 10A C. Wright, A. Miller & M.

Kane, *Federal Practice and Procedure* Sec. 2740, at 532 (2d ed. 1983). N.C. Gen. Stat. Sec. 1A-1, Rule 56(f) (1983) grants the trial court the discretion to "refuse the application for judgment or . . . order a continuance to permit affidavits to be obtained . . ." if it "appear[s] from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavits facts essential to justify his opposition . . . ." In applying Rule 56(f) liberally, the federal courts have focused on the visible efforts of the party opposing summary judgment: Has he been diligent and acted in good faith or has he been lazy or dilatory? *See* 10A C. Wright, *supra*, Sec. 2740. The record nowhere suggests that plaintiffs' counsel in this case had been dilatory. As plaintiffs put it in their brief:

> This was a medically complex case in which the hospital records had been altered and the brain-damaged patient had been misdiagnosed as a psychiatric case; thus, plaintiffs were attempting to locate expert witnesses not only in obstetrics and gynecology, but also in neurology, anesthesiology and document alteration. (Note that plaintiffs had already filed signed affidavits from a neurologist, Dr. Roses, and an anesthesiologist, Dr. Collins, to support their position that Judith Hill suffered from hypoxic brain damage as a result of events occurring during the surgery performed by Dr. Gilmore.) Under these circumstances, it was an abuse of discretion for the trial court to deny plaintiffs' Rule 56(f) motion which simply asked for time to obtain a signature on an already-approved affidavit.

Sufficient time for the completion of discovery is one major goal of Rule 56(f). *Id.*

> Another illustrative situation to which Rule 56(f) may apply is where the opposing party has not been able to locate a witness, or having located him has been unable to secure an affidavit from him and has not had time to take his deposition and such witness has knowledge of material facts which would defeat or aid in defeating the motion for summary judgment. The opposing party should detail the above situation by his own affidavit. The Court may then, in the exercise of a sound discretion, grant or deny a continuance or make some other just disposition of the motion for summary judg-

> ment, depending on whether it believes the affidavit has merit.

6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* Sec. 56.24, at 1436 (2d ed. 1982).

Ideally a Rule 56(f) affidavit should be served prior to the day of the hearing, *see Millsaps v. Wilkes Contracting Co.*, 14 N.C. App. 321, 188 S.E. 2d 663, *cert. denied*, 281 N.C. 623, 190 S.E. 2d 466 (1972); G.S. Sec. 1A-1, Rule 56(c) (1983); however, a trial court may consider a Rule 56(f) affidavit received the day of the hearing. 6 J. Moore, *supra*, at 1422 n. 4.

B.

We begin with a summary of the events of 18 and 19 February 1981. On 18 February 1981 Mrs. Hill signed a form entitled *Consent to Operation*, authorizing

> Dr. Gilmore to perform the following operation and/or operations Laparoscopy with Fulguration of Tubes or Application of Hulka Clips.
>
> 2. The operation is to include whatever procedures are required in attempting to accomplish such purpose. If any conditions are revealed at the time of the operation that were not recognized before and which call for procedures in addition to those originally contemplated, I authorize the performance of such procedures.
>
> 3. The above named surgery is considered necessary. Its advantages and possible complications, if any, . . . were explained to me by Dr. Gilmore.

The following day, 19 February 1981, Mrs. Hill underwent the proposed laparoscopy. According to Dr. Gilmore's affidavit, "[w]idespread adhesions completely obscured the patient's pelvic organs and rendered it impossible to complete the sterilization of the patient as originally proposed." Dr. Gilmore decided to proceed with a bilateral partial salpingectomy through a "small low transverse" abdominal incision. However, after making the incision, he

> discovered that the tubes and ovaries were completely bound down bilaterally by adhesions; that there was a cystic mass

> on the left; and that there was a considerable amount of chronic infection. As a result of these discoveries, it was manifest that the proposed bilateral partial salpingectomy could not be safely completed; that a total abdominal hysterectomy, bilateral salpingo-oophorectomy [removal of the uterus, both ovaries and both fallopian tubes] was clearly in the patient's best interest; and that, . . . to delay the performance of this procedure posed serious medical risks to the patient.

At this point, Dr. Gilmore had a conversation with Mr. Hill, obtained consent from him, and proceeded with the total abdominal hysterectomy and bilateral salpingo-oophorectomy, removing all of Mrs. Hill's reproductive organs. Plaintiffs, of course, contend that this major incision and major surgery constituted unnecessary surgery and was performed even though there was no emergency.

In support of his motion for summary judgment defendant Gilmore filed his own affidavit and the affidavit of his co-surgeon, Dr. Rudolph I. Mintz, who joined him after the initially attempted laparoscopy. Both doctors stated that Dr. Gilmore had not been negligent in his performance of the surgical procedures (the abdominal hysterectomy and bilateral salpingo-oophorectomy). Further, the doctors stated that the obtaining of "the patient's consent" was "in accordance with the standards of practice among obstetrical and gynecological specialists and surgeons with similar training and experience in Lenoir County and all other similar communities with which I am familiar." Finally, Dr. Mintz stated:

> a reasonable person, under all the surrounding circumstances of the patient in this case would have undergone a complete hysterectomy, with bilateral salpingo-oophorectomy, had she been advised of the proposed procedure and of the usual and most frequent risks and hazards inherent therein which are recognized and followed by other obstetrical and gynecological surgeons and specialists in Lenoir County and other similar communities with which I am familiar. There were far more serious risks to the patient in not going forward with the surgery, including the risk of having stirred up quiescent infection which might have endangered the patient's life, as well as uncertainty as to whether the cystic mass contained a malignancy.

The substance of the doctors' affidavits tracks the language of N.C. Gen. Stat. Sec. 90-21.13(a)(1) and (3) (1981). The informed consent statute provides, in pertinent part:

> (a) No recovery shall be allowed against any health care provider upon the grounds that the health care treatment was rendered without the informed consent of the patient or the patient's spouse, parent, guardian, nearest relative or other person authorized to give consent for the patient where:
>
> (1) The action of the health care provider in obtaining the consent of the patient or other person authorized to give consent for the patient was in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities; and
>
> (2) A reasonable person from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities; or
>
> (3) A reasonable person, under all the surrounding circumstances, would have undergone such treatment or procedure had he been advised by the health care provider in accordance with the provisions of subdivisions (1) and (2) of this subsection.
>
> (b) A consent which is evidenced in writing and which meets the foregoing standards, and which is signed by the patient or other authorized person, shall be presumed to be a valid consent. This presumption, however, may be subject to rebuttal only upon proof that such consent was obtained by fraud, deception or misrepresentation of a material fact.
>
> (c) A valid consent is one which is given by a person who under all the surrounding circumstances is mentally and physically competent to give consent.

G.S. Sec. 90-21.13 (1981). The signed consent form is only presumed valid if it meets the standards of (a). G.S. Sec. 90-21.13(b)

(1981); *Estrada v. Jaques*, 70 N.C. App. 627, 321 S.E. 2d 240 (1984). In moving for summary judgment, the defendant Gilmore tried to establish, as a matter of law, that the informed consent was obtained in accordance with the professional standards of practice in the community, G.S. Sec. 90-21.13(a)(1) (1981) and that a reasonable person, under all the surrounding circumstances, would have undergone the total abdominal hysterectomy and bilateral salpingo-oophorectomy, if she had been advised in accordance with the provisions of (a)(1) and (2), G.S. Sec. 90-21.13(a)(3) (1981).

Dr. Anderson's affidavit in opposition to defendant Gilmore's motion for summary judgment establishes genuine issues of material fact on both the negligent performance and the informed consent issues. First, Dr. Anderson stated that, in his opinion, the care rendered by Dr. Gilmore did not comply with the appropriate standard of care. Second, he stated that Mrs. Hill's 18 February 1981 consent did not authorize a total hysterectomy. Finally, he stated that there was "no medical or surgical necessity" to proceed with a total abdominal hysterectomy after failing to complete the laparoscopy without first obtaining Mrs. Hill's informed consent.

Implicit in Dr. Anderson's statements is defendant Gilmore's failure to meet the burden of proof under G.S. Sec. 90-21.13(a)(1) and (3) (1981). Dr. Anderson alleges that Mrs. Hill's initial signed consent to a laparoscopy did not authorize anything beyond the laparoscopy, including the bilateral partial salpingectomy. Reviewing the terms of the signed consent, we believe that the language does not conclusively authorize a total abdominal hysterectomy. It refers to the laparoscopy as the proposed operation and authorizes the defendant Gilmore to perform "whatever procedures are required in attempting to accomplish such purpose," arguably the laparoscopy. Even assuming that Mrs. Hill would have undergone the laparoscopy if she had known that the bilateral partial salpingectomy were a known risk, there is no authorization for expanding the surgery to a total abdominal hysterectomy. Therefore, unless defendant Gilmore obtained a valid consent from Mr. Hill, his expansion of the surgery to a total abdominal hysterectomy was unauthorized. Under G.S. Sec. 90-21.13(c) (1981), "a valid consent is one which is given by a person who under all the surrounding circumstances is mentally and physically competent to give consent." A husband is not his wife's

authorized agent simply by virtue of the marital relationship. *Dubose Steel, Inc. v. Faircloth*, 59 N.C. App. 722, 298 S.E. 2d 60 (1982). However, in an emergency, a spouse may have the capacity to consent to lifesaving surgery. *Prosser, supra*, Sec. 18, at 115 & n. 26. Dr. Anderson's affidavit establishes a material issue as to whether Mr. Hill's consent "under all the surrounding circumstances" was valid, considering that there was no emergency. And, in addition, Dr. Anderson's affidavit establishes a material issue as to whether "a reasonable person, under all the surrounding circumstances, would have undergone such treatment . . .", G.S. Sec. 90-21.13(a)(3) (1981), if, as alleged by Dr. Anderson, the total abdominal hysterectomy was unnecessary surgery.

C.

Returning to the plaintiffs' Rule 56(f) motion, we summarize the plaintiffs' attorney's explanation in his own affidavit for Dr. Anderson's unsigned affidavit. Plaintiffs' attorney detailed his difficulty in finding a gynecologist who would testify for plaintiff and emphasized that he had only received Dr. Anderson's opinion four days prior to the hearing. Dr. Anderson left the next morning from his home in Norfolk, Virginia, for a professional meeting in New Orleans, and was therefore unable to sign the affidavit prior to the hearing. Given the fact that plaintiffs had indeed located a witness capable of defeating the defendant Gilmore's motion for summary judgment and had done all but have the affidavit signed, we believe that the trial court abused its discretion in denying the plaintiffs' Rule 56(f) motion. Moreover, based on our analysis of Dr. Anderson's affidavit, we conclude that defendant Gilmore's motion for summary judgment should have been denied. We, therefore, vacate and remand for further proceedings consistent with this decision.

Vacated and remanded.

Chief Judge HEDRICK and Judge PHILLIPS concur.

BOBBIE L. MORRISON v. DR. W. K. STALLWORTH

No. 8426SC640

(Filed 5 March 1985)

1. **Physicians, Surgeons and Allied Professions § 20.2— medical malpractice—instruction on guarantee**

The trial court in a medical malpractice case erred in instructing the jury that a doctor in obstetrics and gynecology does not ordinarily guarantee or insure the success of his breast examination and diagnosis where no issue concerning a guarantee was raised.

2. **Physicians, Surgeons and Allied Professions § 20.2; Trial § 36.1— medical malpractice—instructions—expression of opinion on credibility of witness**

The trial judge in a medical malpractice case improperly expressed an opinion on the credibility of a plastic surgeon who testified as an expert for plaintiff concerning defendant's evaluation of plaintiff for breast cancer relative to the applicable standard of care when he summarized the testimony of all other experts at length but mentioned only that the plastic surgeon had "explained biopsy," and when he instructed the jury during the plastic surgeon's testimony to keep in mind that defendant was an obstetrician and gynecologist and that defendant and the witness did not possess expertise in the same field.

3. **Physicians, Surgeons and Allied Professions § 20.2— medical malpractice—instruction negating plaintiff's evidence**

The trial court's instruction in a medical malpractice case that plaintiff had to show that defendant "failed to feel or otherwise palpate a breast mass" and failed to conduct further investigation improperly negated plaintiff's expert testimony presented on the theory that aggressive examination and mammography was required under the applicable standard of care regardless of whether a mass was felt or was otherwise actually present.

4. **Physicians, Surgeons and Allied Professions § 20.2— medical malpractice—failure to diagnose—issue in terms of "injury"**

In a medical malpractice case based on alleged negligence by defendant in failing to diagnose plaintiff's breast cancer so that it grew to a more advanced stage, the trial court's framing of the single negligence issue in terms of plaintiff's "injury" rather than in language proposed by plaintiff concerning whether plaintiff was "damaged or injured" could have misled the jury into thinking that their decision was whether defendant's alleged negligence caused the cancer, not whether the delay in diagnosis caused avoidable additional damage from an otherwise unavoidable disease.

5. **Physicians, Surgeons and Allied Professions § 20.2— medical malpractice—instruction on degree of skill**

The trial court did not err in instructing that a medical malpractice defendant was not held to a standard of "absolute accuracy" or "utmost degree of skill."

6. Evidence § 29.2— medical pamphlet—use in examining witnesses—refusal to permit use by jury—instruction required

The trial court properly denied the jury's request to use a medical pamphlet which plaintiff had employed in her examination of expert witnesses where the pamphlet was not introduced into evidence and portions of it were not read into evidence, G.S. 8-40.1, but the trial court should have instructed that expert testimony elicited in response to questions referring to the pamphlet was evidence to be considered by the jury.

7. Evidence § 29.2— movie as authoritative text—failure to meet burden of proof

The plaintiff in a medical malpractice case failed to meet her burden of justifying admission of a film on the early detection of cancer as a "reliable and authoritative text" under G.S. 8-40.1 where plaintiff did not explain to the court how the film would be presented and how her experts would help the jury to understand it, and plaintiff did not explain how defendant's experts would have a chance, as they would with printed text, to explain or rebut her experts' testimony. G.S. 8C-1, Rule 803(18).

8. Physicians, Surgeons and Allied Professions § 21— medical malpractice—failure to diagnose—shortened life expectancy as element of damages

Shortened life expectancy was a compensable element of damages in a medical malpractice case based on alleged negligence by defendant in failing to diagnose plaintiff's breast cancer so that it grew to a more advanced stage, and the trial court erred in excluding evidence relevant thereto and in refusing to instruct on such element of damages.

9. Physicians, Surgeons and Allied Professions §§ 15.2, 21— medical malpractice —recovery for disfigurement—competency of plastic surgeon to testify

In a medical malpractice case based on negligence by defendant in failing to diagnose plaintiff's breast cancer, plaintiff could recover damages for disfigurement allegedly caused when the cancer spread into plaintiff's chest and the degenerative effects of required radiation therapy hindered efforts at reconstructive surgery after a radical mastectomy was performed, but plaintiff could not recover for both disfigurement and reconstructive surgery. Furthermore, a plastic surgeon was competent to relate defendant's alleged negligence resulting in radiation therapy to the extent of plaintiff's disfigurement.

APPEAL by plaintiff from *Burroughs, Judge*. Judgment entered 7 December 1983 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 8 February 1985.

Plaintiff, Bobbie Morrison, appealed from a jury verdict finding no liability in this medical malpractice action. Defendant Dr. W. K. Stallworth had served plaintiff for a number of years as her obstetrician/gynecologist when, in March 1977, she came to him with a breast complaint. Plaintiff was 45 years old at the time. According to plaintiff, defendant examined her and told her that the lump she claimed she felt was just a swollen milk gland,

and not to worry; defendant's records showed a negative examination. Plaintiff saw defendant for a follow-up six weeks later with the same result. Plaintiff underwent a hysterectomy two weeks later, with defendant performing the operation. She consulted him post-operatively through the summer, but apparently did not tell him about her continued pain in her breast. Finally, in October 1977, plaintiff consulted another doctor who found a suspicious lesion in the breast. Biopsy indicated that the lesion was cancerous and a radical mastectomy was performed. Since the cancer had spread to lymph nodes in adjacent areas of plaintiff's chest, she received a course of cobalt radiation therapy. She then had several reconstructive operations. Since the mastectomy and radiation, no new tumors have developed.

The theory of the complaint, advanced by plaintiff at trial, was not that defendant had caused the cancer, but that he failed to adequately respond to and diagnose plaintiff's condition. His assurance that it was "just a swollen milk gland" delayed the eventual detection and treatment of the cancer. This allowed the cancer to metastasize, or spread, more than it otherwise would have, and thus caused plaintiff to undergo radical surgical procedures and radiation therapy which shortened her life expectancy. Defendant countered with evidence showing that full examinations were conducted with no results, and that plaintiff never described any symptomatology to him which would suggest more aggressive treatment. In addition, defendant presented evidence that a radical mastectomy would have been the indicated treatment in 1977 in any event.

The controversy between experts at trial centered on the use of mammograms, or breast x-rays, for the early detection of cancer: plaintiff's experts contended that standard medical practice required mammography for patients in plaintiff's age group who complained of soreness and lumps, even if no lump could be found. Defendant's expert evidence showed that in 1977 mammography was not indicated unless some lump or other suspicious circumstance could be found. The expert testimony also conflicted on the necessary aggressiveness of diagnostic and follow-up procedures and the likely rate of spread of the cancer.

The jury considered one negligence issue: "Was Mrs. Morrison's injury proximately caused by the negligence of the De-

fendant Dr. W. K. Stallworth?" They answered "No," and therefore did not reach the separate damages issue. From judgment entered accordingly, taxing the costs (including expert witness fees) to her, plaintiff appealed.

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

Golding, Crews, Meekins, Gordon & Gray, by John G. Golding and James P. Crews, for defendant.

WELLS, Judge.

Plaintiff raises numerous assignments of error, attacking in particular the instructions to the jury. Plaintiff contends that *Wall v. Stout*, 310 N.C. 184, 311 S.E. 2d 571 (1984), requires reversal in this case. There the supreme court held that the jury instructions, in their totality, were "so emphatically favorable" to the physician-defendant as to require a new trial. While the instructions given in the present case do not reach quite the same level of favor, in conjunction with other errors we conclude that they sufficiently prejudiced plaintiff to require a new trial.

[1] The court here twice instructed the jury to the effect that "[a] medical doctor in obstetrics and gynecology does not ordinarily [guarantee or] insure the success of his breast examination and diagnosis." This instruction was explicitly disapproved in *Wall* except for those cases where an issue concerning a guarantee has been raised. And, as in *Wall*, the error in giving an irrelevant exculpatory instruction was compounded by repetition. Defendant contends that plaintiff's theory of the case, that defendant assured her the lump was nothing to worry about, did involve such a guarantee. Such logic would apply in virtually every malpractice case, however, and render the holding in *Wall* meaningless. We hold that under *Wall* the instruction should be given only when some explicit guarantee is involved.

Just as in *Wall*, the court below also instructed the jury three times that the law does not presume negligence from the mere fact of injury. As noted there, the pattern instructions only call for this instruction once, and its needless repetition unduly tended to emphasize a principle of law exculpatory to defendant in this case.

[2] Plaintiff also contends that the trial court erred in summarizing the evidence, by devoting too much attention to defendant's case and emphasizing and omitting various particulars. It is clear that there is no requirement that summations of the evidence be equal in length. *Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978). Yet in summarizing the evidence, the court must take care not to express or imply an opinion. *Belk v. Schweizer*, 268 N.C. 50, 149 S.E. 2d 565 (1966). Plaintiff presented two experts, Drs. Day and Barwick. Dr. Barwick testified that he had general training in surgery, including evaluation of breast disease, and that in connection with his plastic surgery practice he evaluated substantial numbers of women for breast disease. He then proceeded to give his opinion on the critical issue, concerning defendant's evaluation of plaintiff relative to the applicable standard of care. On this record, Dr. Barwick clearly qualified to give such expert testimony. *Lowery v. Newton*, 52 N.C. App. 234, 278 S.E. 2d 566, *disc. rev. denied*, 303 N.C. 711, *reconsideration denied*, 304 N.C. 195, 291 S.E. 2d 148 (1981). Although the court summarized the testimony of all the other experts at length, the sole mention given Dr. Barwick was that he "explained biopsy." In connection with the court's remarks during Dr. Barwick's testimony discussed below, this tended to indicate to the jury that the court either found Dr. Barwick's testimony not competent on the issue or found it lacking in credibility or significance.

Plaintiff presented Dr. Day as the first of her two expert witnesses. He testified on his experience with developing programs for early detection of breast and other cancer. He continued by stating that the techniques for detecting breast cancer are easily taught and that any licensed physician should be able to perform a standard competent examination. Dr. Barwick later testified about his training and practice. After Dr. Barwick's further testimony about plastic surgery, the following ensued:

> Q. Dr. Barwick, were you familiar with the standards of evaluating women who had breast lumps in 1977 in communities similar to Charlotte, North Carolina?
>
> MR. GOLDING: Objection.
>
> THE COURT: Overruled. Members of the jury, this witness is going to be asked a series of questions. You must remember

> he is speaking from the field of plastic surgery and general surgery. You must keep in mind that Dr. Stallworth is an obstetric [sic] and gynecologist. You must keep in mind that these two men do not possess expertise in the same fields. This witness will be testifying in the area of plastic and general surgery. Go ahead and ask him the question.

The court cautioned the jury twice more to remember these instructions, before allowing Dr. Barwick to answer follow-up questions. At the next break, plaintiff requested the court to withdraw the instruction and the court agreed the instruction was error. However, the court simply gave a general weight and credibility instruction. The *sua sponte* instructions clearly and erroneously tended to undermine Dr. Barwick's testimony on the key issue. This court has expressly rejected the notion that a doctor's actions may be evaluated only by members of his own medical specialty. *Lowery v. Newton, supra.* If anything, Dr. Barwick was competent to testify to the minimum standard of care, *Id.*, and defendant, holding himself out as a specialist, would be held to a higher standard. *Koury v. Follo*, 272 N.C. 366, 158 S.E. 2d 548 (1968). Although the court did not unequivocally undermine Dr. Barwick's testimony, *see In re Will of Holcomb*, 244 N.C. 391, 93 S.E. 2d 454 (1956), its *sua sponte* instructions and omission of Dr. Barwick's testimony from its evidentiary summary clearly prejudiced plaintiff. This is particularly true in light of the critical role of expert testimony in malpractice cases.

[3] Plaintiff also contends that the court further erred in giving the four-part burden of proof charge disapproved in *Wall.* While the burden of proof instruction was essentially in the form disapproved, the specific error in *Wall* did not occur. Rather, the court deleted the redundant first element, substituting instead an instruction that plaintiff had to show that defendant "failed to feel or otherwise palpate a breast mass" and failed to conduct further investigation. Unfortunately, this instruction tended to negate much of plaintiff's expert testimony, which was presented in large part on the theory that aggressive examination and mammography was required under the applicable standard of care regardless of whether a mass was felt or otherwise actually present.

[4] Finally, the court framed the single negligence issue simply in terms of "Mrs. Morrison's injury." Plaintiff contends that this

phrasing, as opposed to her proposed phrasing "damaged or injured," tended to mislead the jury into thinking their decision was as to whether or not the alleged negligence caused the cancer, not as to whether or not the delay in diagnosis caused *avoidable* additional damage from an otherwise *unavoidable* disease. We agree, particularly in light of the fact that the court repeatedly used the word injury in its instructions without ever defining what exactly plaintiff's contended injury was. In the context of this case, this clearly tended to mislead. We are aware that the form and phraseology of the issues lie in the discretion of the court. *First Nat'l Bank of Catawba Co. v. Burwell*, 65 N.C. App. 590, 310 S.E. 2d 47 (1983). The issues should nevertheless embrace the real matters in dispute. *Greene v. Greene*, 217 N.C. 649, 9 S.E. 2d 413 (1940). Considered in light of the charge and the trial as a whole, the negligence issue clearly was lacking in clarity.

Like the court in *Wall*, we conclude that the individual errors discussed above do not individually require a new trial, but taken together do constitute sufficient prejudice to require a new trial.

[5] Because the questions may arise again on remand, we also address plaintiff's remaining assignments of error. Plaintiff objects to an instruction that defendant was not held to a standard of "absolute accuracy" or "utmost degree of skill." This instruction was expressly approved in *Wall* as a correct statement of the law. It was not unduly repeated here. We discern no error.

Plaintiff also assigns error to the denial of her request to submit several special procedural instructions. The court was required to instruct only on the substantial issues in the action. *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971). Plaintiff's proposed instructions, while they may have been procedurally helpful to the jury in its deliberations, did not add any substantive matter or essential legal principles, and therefore no prejudicial error occurred. *Tan v. Tan*, 49 N.C. App. 516, 272 S.E. 2d 11 (1980), *disc. rev. denied*, 302 N.C. 402, 279 S.E. 2d 356 (1981).

[6] At one point during its deliberations, the jury returned and asked to "use" a medical pamphlet plaintiff had employed in her examination and particularly to review the information on symptoms of breast cancer. The court denied their request, stating that the book was not introduced into evidence and therefore the jury could not look at it. Under N.C. Gen. Stat. § 8-40.1 (1981),

such materials are admissible as exhibits only if agreed to by counsel. Defense counsel expressly refused to agree to introduction as an exhibit. The statute also allows portions of such materials to be read into evidence, but no such reading took place. Only the titles of two tables, and not the tables themselves, were specifically mentioned. Instead, the pamphlet was referred to only generally. The pamphlet was thus never introduced into evidence by either means contemplated by the statute, and the court's instruction was technically correct. The jury could have been misled to infer, however, that they should not consider testimony based on the pamphlet. For purposes of clarity, should the issue arise on retrial, we thus believe the jury should receive additional instruction that expert testimony elicited in response to questions referring to the pamphlet is evidence to be considered by them.

[7] Plaintiff sought unsuccessfully to show the jury an American Cancer Society film, on the early detection of cancer, under the same statute. Plaintiff attempted to show it to the jury as a "reliable and authoritative text." Accepting this argument as applicable, it is not clear to us whether showing the film would constitute use as an exhibit or "reading" as that term is used in the statute. Plaintiff did not explain to the court how the film would be presented and how her experts would help the jury understand it. *See* N.C. Gen. Stat. § 8C-1, Rule of Evidence 803(18), Commentary (Cum. Supp. 1983) (necessity of expert assistance to avoid misinformation under similar rule). Nor did she explain how defendant's experts would have a chance, as they would with printed texts, to explain or rebut her experts' testimony. We believe that plaintiff failed to meet her burden of justifying admission. She never moved to introduce the film as substantive or illustrative evidence, *see* N.C. Gen. Stat. § 8-97 (1981), nor has she shown what if any relevant information was thus kept from the jury. *See Josey v. Josey*, 272 N.C. 138, 157 S.E. 2d 674 (1967) (necessity of inclusion in record on appeal); *see also Tart v. McGann*, 697 F. 2d 75 (2d Cir. 1982).

[8] We now come to assignments of error regarding damages. Plaintiff requested instructions on damages for shortened life expectancy and for the mental suffering associated therewith, which the court refused to give. The instructions were premised on evidence, excluded in large part, that related the various medically-

defined stages of breast cancer to statistical survival rates, broken down by the stage at which the cancer was detected. Plaintiff's theory was that defendant's negligence in failing to diagnose plaintiff's cancer allowed it to grow from the beginning stage to a more advanced stage, at which statistically more women reported spread of the cancer into areas of the chest adjacent to the breast. Thus, according to plaintiff's evidence, her chances of surviving ten years decreased from 75% to 34% and of surviving 20 years from 62% to 24%. This decrease in life expectancy also caused economic and mental damage.

We find little North Carolina law directly on point. Traditionally, American courts have refused to allow recovery of damages in personal injury cases on the basis of shortened life expectancy *per se*. *See Downie v. United States Lines Co.*, 359 F. 2d 344 (3d Cir.) (contrasting "American" and "English" rules), *cert. denied*, 385 U.S. 897 (1966); 22 Am. Jur. 2d *Damages* § 121 (1965). Generally, courts have considered such damages improper because of the extreme difficulty of developing a satisfactory rule for measuring them. *Id.* At the same time, however, American courts have allowed claims for the loss of such associated elements of damages as loss of wages or ability to engage in avocations, *Downie v. United States Lines Co., supra*, loss of "life's pleasures," *Tyminski v. United States*, 481 F. 2d 257 (3d Cir. 1973), and the mental anguish associated with the knowledge of loss. *Downie v. United States Lines Co., supra.* This American rule has not been with judicial criticism. *See Downie v. United States Lines Co., supra* (Kalodner, C.J., dissenting); *DePass v. United States*, 721 F. 2d 203 (7th Cir. 1983) (Posner, J., dissenting).

The North Carolina cases have stated the broad general rule that in personal injury cases "the plaintiff is entitled to recover the present worth of all damages naturally and proximately resulting from defendant's tort." *King v. Britt*, 267 N.C. 594, 148 S.E. 2d 594 (1966). The court went on in *King* to list damages which might be recovered, cautioning however that they did not state the entire rule. *King* suggests that *any* damages shown by substantial evidence, or properly inferable therefrom, may be submitted to the jury. *See* R. Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C. L. Rev. 435 (1980) (liberal allowance of damages). The general rule is simply that these damages must be

shown to be probable, not merely possible, consequences of the injury. *Fisher v. Rogers*, 251 N.C. 610, 112 S.E. 2d 76 (1960). We conclude that shortened life expectancy is a compensable element of damage. The trial court therefore erred in excluding evidence relevant thereto and in refusing to instruct on this element of damages, as plaintiff requested.

Our result is reinforced by a recent and similar Massachusetts case. *Glicklich v. Spievack*, 16 Mass. App. 488, 452 N.E. 2d 287, *rev. denied*, 390 Mass. 1103, 454 N.E. 2d 1276 (1983). There the jury awarded damages for shortened life expectancy based on negligent diagnosis which caused a delay of six months in detection of breast cancer. Because of the delay, the prognosis for recovery worsened as the cancer developed; the plaintiff's evidence showed that her ten year survival expectancy was reduced from 94% to 50%. The court upheld the damage award. *See also Slater v. Baker*, 301 N.W. 2d 315 (Minn. 1981) (appeal on evidentiary ruling, but noting sufficient medical evidence to prove shortened life expectancy in breast cancer case).

[9] Plaintiff's other contested theory of damages proceeded from her evidence that the delay in diagnosis probably caused the cancer to spread into her chest, avoidably requiring radiation therapy. The degenerative effects of the radiation on the skin and tissue thus substantially hindered efforts at reconstructive surgery, causing disfigurement over and above that plaintiff would have suffered otherwise. North Carolina recognizes disfigurement as a proper element of damages in a personal injury case. *See Goble v. Helms*, 64 N.C. App. 439, 307 S.E. 2d 807 (1983), *disc. rev. denied*, 310 N.C. 625, 315 S.E. 2d 690 (1984). Although we find no North Carolina authority, the modern rule appears to allow medical expenses for plastic surgery resulting from negligently inflicted injury. Annot., 88 A.L.R. 3d 117 (1978). Courts have universally held, however, that there can be no double recovery: a plaintiff cannot recover both for disfigurement and reconstruction. *Id.* Plaintiff's evidence suggested one general disfigurement, and her plastic surgery evidence was related to the extent (including correctability) thereof, not to any aggravation of a pre-existing condition. As noted above, the error, if any, in instructing the jury lay in not defining for them the nature of the "injury" they had to find to award damages.

Dr. Barwick was clearly competent to testify on the disfigurement issue. His testimony clearly related the alleged negligence (resulting in radiation therapy) to the extent of plaintiff's disfigurement. Therefore it was error for the trial court to exclude his testimony on this subject.

Plaintiff also contends that the course of the trial, as evidenced by the cumulation of rulings and instructions, reflected prejudicial bias on the part of the trial judge. Plaintiff bears a heavy burden in advancing such a contention, and our review of the record does not support it. *See Spencer v. Spencer*, 70 N.C. App. 159, 319 S.E. 2d 636 (1984). Our disposition of the case makes this argument irrelevant in any event.

For the reasons stated, there must be a

New trial.

Judges WHICHARD and BECTON concur.

STATE OF NORTH CAROLINA v. KIM RILEY McGILL

No. 8416SC441

(Filed 5 March 1985)

1. **Automobiles and Other Vehicles § 113— involuntary manslaughter—intoxicated driver—necessity for violation of rule of the road**

Evidence of driving while impaired, standing alone, will not support a conviction of involuntary manslaughter. Rather, the State must also show that the impaired driver violated some rule of the road and that this violation was a proximate cause of the accident.

2. **Automobiles and Other Vehicles § 113.1— involuntary manslaughter—sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction of involuntary manslaughter where it tended to show that defendant's car struck the victims' car from the left rear with enough force to flip the victims' car and throw it into a ditch; the road was straight and clear where the accident occurred; the victims' car was traveling along with its lights on; the two victims died as a result of the accident; and defendant had an odor of alcohol about him after the accident and registered .19 on a breathalyzer test two hours later.

3. Automobiles and Other Vehicles § 114— involuntary manslaughter—intoxicated driver—necessity for violation of rule of the road—failure to instruct

The trial court in an involuntary manslaughter prosecution erred in refusing to instruct the jury that, in addition to proof of driving under the influence as a proximate cause of decedent's death, the State must also prove that defendant's violation of some rule of the road was a proximate cause of the death.

4. Criminal Law § 163— request for instructions—appellate review—absence of objection to instructions

Defendant's assignment of error to the trial court's instructions was properly before the appellate court where the trial court denied defendant's timely written request for instructions although defendant failed to object to the instructions as given. G.S. 1A-1, Rule 46(b); App. Rule 10(b)(2).

5. Automobiles and Other Vehicles § 110— driving while license revoked—transporting open liquor—insufficient to convict of involuntary manslaughter

Defendant's convictions of driving while his license was revoked and transporting liquor with the seal broken did not support his manslaughter convictions.

Judge EAGLES dissenting.

APPEAL by defendant from *Lane, Judge.* Judgment entered 4 November 1983 in ROBESON County Superior Court. Heard in the Court of Appeals 17 January 1985.

Defendant was tried on criminal charges arising out of a nighttime two-car accident. The state's evidence showed that a police officer arrived at the scene of the accident and found defendant and a passenger standing in the road next to defendant's car. The other car lay overturned and on fire in the ditch; its two occupants died as a result of the accident. The officer noticed a strong odor of alcohol about defendant, who appeared shaky on his feet. In the officer's opinion, defendant was under the influence of alcohol; approximately two hours later he registered 0.19 on a breathalyzer test. After being informed of his rights, defendant stated that he came around a curve and did not see any lights ahead, then suddenly he saw the other car stopped in the middle of the road with the lights out. The officer found a bottle of whiskey, with the seal broken, in defendant's car.

Accident scene investigation indicated that the road ran straight for 450 feet from the end of the curve to the point of impact, and that defendant's car, traveling at about 55 m.p.h. when he applied his brakes, skidded 48 feet before the collision. Inspec-

tion of the victims' car showed that the light switch and the ignition were both in the "on" position and that the transmission was in "drive." The state also introduced defendant's driving record, which showed that his license had been permanently revoked upon a record of, *inter alia*, five convictions of driving under the influence ("DUI").

Defendant testified that he came around a sharp curve and saw the other car parked in the road. He slammed on the brakes and attempted to swerve but struck the other car, flipping it into the ditch. He and his passenger tried to get the people out of the other car, but it exploded and burned and they could not get near. Defendant did not believe the liquor he had consumed had caused the accident.

The jury found defendant guilty of driving while license permanently revoked, driving under the influence of alcoholic beverages, transporting liquor with the seal broken, and two counts of involuntary manslaughter. Defendant received sentences totalling ten years; he appealed.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Charles J. Murray, for the State.

Robert D. Jacobson for defendant.

WELLS, Judge.

Defendant first assigns error to the denial of various motions challenging the sufficiency of the evidence. He directs his attack to the issue of causation. We note first that the state produced ample evidence to support the jury's verdict on the DUI charge. *State v. Scott*, 71 N.C. App. 570, 322 S.E. 2d 613 (1984). Defendant's challenge to the driving while license permanently revoked charge is frivolous, and he does not contest the transporting conviction. The real challenge is to the manslaughter convictions.

Once the state proved the DUI offense, it then bore the burden of establishing that the violation proximately caused the deaths:

> [T]he act of the accused need not be the immediate cause of death. He is legally accountable if the direct cause is the natural result of the criminal act. [Citations omitted.] There

> may be more than one proximate cause and criminal responsibility arises when the act complained of caused or directly contributed to the death. [Citations omitted.]

State v. Mitchell, 62 N.C. App. 21, 302 S.E. 2d 265 (1983) (quoting *State v. Cummings,* 301 N.C. 374, 271 S.E. 2d 277 (1980)). In *Mitchell,* we rejected the defendant's contention that intervening negligence on the part of the treating physician absolved him of criminal liability: when the injury inflicted by accused is *a contributing cause* of death, the accused must bear criminal responsibility unless it can be shown that intervening acts of others were the sole cause of death. *Id.* Accordingly, the state need not, as defendant appears to contend, exclude every other possible cause of death. Language in *State v. Stewardson,* 32 N.C. App. 344, 232 S.E. 2d 308, *disc. rev. denied,* 292 N.C. 643, 235 S.E. 2d 64 (1977), to the effect that the violation "must" have caused the accident and death, when read in context, simply is a paraphrase of the general rule: the state must produce sufficient evidence to allow the jury to find that defendant's acts were a proximate cause of death.

[1] More problematic is defendant's contention that the state failed to show sufficient causal connection between his intoxication and the accident. While it is undoubtedly negligent to drive while under the influence, that negligence must be causally connected to the accident by evidence of violation of some rule of the road or other faulty driving, to establish liability. *Atkins v. Moye,* 277 N.C. 179, 176 S.E. 2d 789 (1970); *Rhyne v. O'Brien,* 54 N.C. App. 621, 284 S.E. 2d 122 (1981); *State v. Hewitt,* 263 N.C. 759, 140 S.E. 2d 241 (1965); *State v. Lowery,* 223 N.C. 598, 27 S.E. 2d 638 (1943).[1] An intoxicated driver driving at normal speed on his side of the road obviously would not ordinarily be deemed negligent for involvement in a collision with an approaching car that suddenly swerved over the center line into his or her path. *Atkins v. Moye, supra. Evidence of driving while intoxicated,*

1. While it is unusual to rely on civil cases to support principles of criminal law, in this limited area the civil standard of negligence law clearly is relevant. Generally, a stronger showing is required to prove culpable criminal negligence than a civil tort. *State v. Everhart,* 291 N.C. 700, 231 S.E. 2d 604 (1977); *State v. Cope,* 204 N.C. 28, 167 S.E. 456 (1933).

standing alone, will not support an involuntary manslaughter conviction. State v. Lowery, supra.[2]

[2] The fact that the only other witnesses to the accident perished at the scene did not prevent the state from proving its case. Circumstantial and expert evidence may suffice. The state introduced evidence which, taken most favorably to the state, tended to show that the road was straight and clear, that the victims' car was traveling along it with lights on, and that defendant's car struck it from the left rear with enough force to flip the victims' car and throw it into the ditch. This evidence clearly sufficed, taken in the light most favorable to the state, to show numerous violations of the applicable rules of the road. N.C. Gen. Stat. § 20-140(a) (Cum. Supp. 1981) (reckless driving); N.C. Gen. Stat. § 20-141(a) (1978) (imprudent speed) or G.S. § 20-141(m) (failure to reduce speed to avoid colliding with another vehicle); N.C. Gen. Stat. § 20-152(a) (1978) (following too closely). While the state did not show that alcohol generally impairs reaction time and driving ability, such facts clearly lie within common knowledge of jurors. *See State v. Cole*, 270 N.C. 382, 154 S.E. 2d 506 (1967). The evidence thus was sufficient to support convictions of manslaughter, on the theory that defendant, because of his intoxication, could not avoid the collision and thus caused the fatal collision. Defendant's various motions going to the sufficiency of the evidence were therefore correctly denied.

[3] While the evidence was sufficient, however, it did not compel the jury's verdict. Defendant's assignment of error to the jury instructions therefore is well taken. Defendant requested an instruction substantially in accordance with the law as we have described it, *i.e.*, that the state must show a causal connection between the intoxication and the accident through a violation of one of the rules of the road. The court refused, stating that viola-

2. We are aware of cases apparently supporting, *sub silentio*, a contrary rule. *See State v. Mitchell, supra; State v. Packer*, 61 N.C. App. 481, 301 S.E. 2d 110 (1983); *State v. Whitaker*, 43 N.C. App. 600, 259 S.E. 2d 316 (1979); *see also State v. Atkins*, 58 N.C. App. 146, 292 S.E. 2d 744 (*dicta*), *disc. rev. denied and appeal dismissed*, 306 N.C. 744, 295 S.E. 2d 480 (1982). In none of them was this particular question raised by the parties, however, and we accordingly did not reach it. A review of the facts in those cases also indicates that the violations of the rules of the road were much more readily apparent than here.

tion of a safety statute, including the DUI statute, would support conviction. As noted above, this was error.

[4] In *State v. Lowery, supra,* a drunk-driving manslaughter case, our supreme court held that in order to convict for manslaughter in such a case, it was not sufficient merely to show that the defendant was intoxicated at the time of the collision, but that the evidence must also show reckless driving or other misconduct on the part of the defendant resulting from the intoxication which shows a proximate causal relation between the breach of the drunk-driving statute and the death of the victim. The rule set out in *Lowery* was re-stated in *Atkins v. Moye, supra,* as follows:

> Unquestionably a motorist is guilty of negligence if he operates a motor vehicle on the highway while under the influence of intoxicating liquor. Such conduct, however, will not constitute . . . actionable negligence . . . unless—like any other negligence—it is causally related to the accident. . . . Mere proof that a motorist involved in a collision was under the influence of an intoxicant at the time does not establish a causal relation between his condition and the collision. His condition must have caused him to violate a rule of the road and to operate his vehicle in a manner which was a proximate cause of the collision. [Citations omitted.]

This court most recently followed and applied this rule in *Rhyne v. O'Brien, supra.* We reject the state's argument that defendant's assignment is not properly before us because he failed to object to the instructions as given. *See* Rule 10(b)(2) of the Rules of Appellate Procedure. Defendant timely submitted written instructions and the court denied his request after argument on record. This sufficed to bring the question forward. *See* N.C. Gen. Stat. § 1A-1, Rule 46(b) of the Rules of Civil Procedure.

[5] We also note that by the reasoning applied above, defendant's convictions of driving while license revoked and transporting liquor with the seal broken cannot support the manslaughter convictions. *See also Hoke v. Greyhound Corp.,* 227 N.C. 412, 42 S.E. 2d 593 (1947) (underage driver; breach of care in operation still must be shown).

In his dissent, Judge Eagles takes the position that our decision in this case should be controlled by this court's opinion in

State v. Johnson, 72 N.C. App. 512, 325 S.E. 2d 253 (1985).

Johnson relies upon *State v. McKenzie*, 292 N.C. 170, 232 S.E. 2d 424 (1977) as support for this rule. We believe that this reliance is misplaced. In *McKenzie* our supreme court held that the following evidence was sufficient to permit a jury to find that defendant was guilty of criminal negligence:

> Defendant was driving at night on a two-lane stretch of road which continued straight ahead of him for several hundred feet. Deceased was riding a bicycle on the road in defendant's lane of travel. The bike was equipped with a headlight and rear reflectors. Although no witness knew whether the headlight was operating at the time, one witness did observe the glow of the rear reflector shortly before the accident. The night was clear and dry and defendant's car was in excellent condition. Defendant admitted having consumed four beers. Witnesses smelled alcohol on his breath and a breathalyzer test yielded a result of .10 percent blood alcohol by weight. Witnesses testified that he was unsteady on his feet after the accident, was emotionally distraught and leaned on his car. Swerve marks at the scene indicated a path of travel leading from the right to the left lane and back again. There were 66 feet of tire marks and gouge marks. Defendant testified he did not have time to apply his brakes before the accident because he failed to see deceased until he was within 6 feet of him, his attention having been directed at two passing cars, but that he did swerve his car. He did not stop for about 500 feet after the accident, having 'frozen' at the wheel. The accident apparently took place approximately at the driveway of the home of Lloyd Chriscoe, uncle of the deceased. Bloodstains were found 231 feet to the north and the bicycle was found 562 feet to the north of the home. The speed limit was 55 mph, and defendant stated to an officer at the scene that he was traveling 'not more than 5 to 10 miles of the speed limit.' Defendant admitted several previous motor vehicle violation convictions, including reckless driving, speeding, and driving under the influence.

Id. In *McKenzie* there was ample evidence from which a jury could find that defendant's intoxication was the proximate cause

of the accident in that it caused him to fail to keep a proper lookout and caused him to fail to keep his automobile under the proper control. Furthermore, from this evidence the jury could have inferred that defendant was speeding, and that this caused the accident. We do not agree that *McKenzie* supports the proposition that all the state is required to prove in order to obtain a conviction for involuntary manslaughter, for a death arising out of an automobile accident, is that defendant was driving under the influence at the time the accident occurred.

We are persuaded that under North Carolina law, as it is now constituted, while it is clear that driving while impaired, *see* N.C. Gen. Stat. § 20-138.1 (1983), is culpable negligence, in order to convict an impaired driver of involuntary manslaughter based upon his impairment, the state must show that while driving impaired defendant violated some other rule of the road, and that this violation was the proximate cause of the accident.

Our decision on the jury instruction issue renders defendant's remaining assignment of error moot. Defendant having shown neither prejudicial effect on, nor error in, his misdemeanor convictions, they are affirmed. As to the manslaughter convictions, however, there must be a new trial.

As to the misdemeanor cases, No. 83CRS6781, No. 83CRS6782, and No. 83CRS6788

No error.

As to the manslaughter cases, No. 83CRS8683 and No. 83CRS8684

New trial.

Judge ARNOLD concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I respectfully dissent. In *State v. Charles Johnson*, No. 8416SC429, filed 5 February 1985, for reasons ably stated by Judge Webb, we held that "driving under the influence of alcohol

constitutes a thoughtless disregard of consequences or a heedless indifference of the safety and rights of others" and is culpable negligence. *Johnson* stands for the practical proposition that once the State has shown culpable negligence by proof of driving under the influence and has established that the defendant's culpable negligence proximately caused the death of another, no other proof of a violation of a safety statute or a rule of the road is necessary to support a conviction of involuntary manslaughter. Based on our holding in *Johnson,* I would vote that the trial court did not err in refusing to instruct that in addition to proof of driving under the influence as proximate cause of the decedent's death, the State must also prove violation of a rule of the road or violation of another safety statute in order to establish proximate cause.

STATE OF NORTH CAROLINA v. VANESSA ANN EVANS

No. 8414SC713

(Filed 5 March 1985)

1. **Prostitution § 1— loitering for the purpose of prostitution statute—not unconstitutionally vague or overbroad**

The *loitering for the purpose of prostitution* statute, G.S. 14-204.1, is not unconstitutionally vague since persons of ordinary intelligence would readily understand what illegal conduct is prohibited by the statute. Nor is the statute unconstitutionally overbroad since it requires proof of specific criminal intent.

2. **Prostitution § 1— loitering for purpose of prostitution—statute not unconstitutionally applied**

The loitering for the purpose of prostitution statute was not unconstitutional as applied because only female prostitutes and not their male customers were arrested since (1) defendant presented no evidence that customers did any of the repeated acts made punishable by the statute, and (2) it is well within the power of the legislature to punish the provider of sexual services and not the customer.

3. **Prostitution § 1— loitering for purpose of prostitution—statute not enforced unfairly in favor of male prostitutes**

Defendant failed to show that enforcement of the loitering for the purpose of prostitution statute unfairly discriminated in favor of male prostitutes, particularly male homosexuals, where defendant showed only that the police arrested a group of males at the time they arrested defendant and that a felony crime against nature charge against one male homosexual was dismissed, but

defendant failed to show that there was any pattern of discrimination in charging and prosecuting these cases. Furthermore, the statute empowers the police to arrest persons loitering for purposes of violating prostitution or crime against nature statutes, and the police indicated that they intended to continue arresting and charging violators regardless of sex or sexual orientation.

4. Prostitution § 2— testimony of prior conviction or reputation—validity of statute

The statute permitting the admission of testimony of a prior conviction or of defendant's reputation in a prostitution related case, G.S. 14-206, does not remove the presumption of innocence and deprive a defendant of due process when the statute is interpreted to permit only relevant evidence. In this prosecution for loitering for the purpose of prostitution, testimony by police officers that defendant was a "known prostitute" and had prior convictions for prostitution was relevant to prove criminal intent and was thus admissible under G.S. 14-206.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 12 March 1984 in DURHAM County Superior Court. Heard in the Court of Appeals 15 February 1985.

Defendant was arrested for loitering for the purpose of prostitution, and appealed her conviction in district court to superior court. The state's evidence tended to show that Durham police had received numerous complaints about robbery, drug dealing and prostitution in a commercial area of the city. Police undertook covert and overt surveillance of the area and documented the results. Their evidence indicated that defendant, who was well known to the officers, frequently flagged down cars and talked to their occupants. On several occasions defendant walked to her apartment nearby, and the driver would follow and enter, leaving shortly thereafter. Police talked to defendant on numerous occasions, and she made statements to the effect that they were interfering with "her business." On the night specified in the warrant, police observed defendant flag down several cars and one of the drivers she talked to followed her home.

The state also introduced evidence that defendant had two prior arrests for prostitution and that she was a "known prostitute." The commercial area under surveillance was frequented by other known prostitutes, and police observed defendant in their company on numerous occasions. The house defendant lived in was known as a place where prostitutes lived. Defendant's arrest was part of a group of approximately twenty vice-related arrests

of males and females. Police admitted that they did not arrest the identified drivers.

Defendant's evidence tended to show that the five-block area where her activities were documented was her residential neighborhood. The people there knew all about the "covert" operation, but had to talk to the officers to avoid harassment. They frequently joked with them. Defendant was in the area just "hanging around" with her friends. She denied involvement in, or knowledge of, prostitution; she was studying to be a beautician and working for her aunt.

The jury returned a verdict of guilty of loitering for the purpose of prostitution. Defendant received a six month sentence, work release recommended. She appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Walter M. Smith, for the State.

Gulley, Eakes and Volland, by Jane Elizabeth Volland, for defendant.

WELLS, Judge.

At trial defendant raised numerous constitutional objections to the loitering for prostitution statutes. N.C. Gen. Stat. §§ 14-204.1, -206 (1981 and Cum. Supp. 1983).[1] These questions are therefore properly before this court. *State v. Hunter*, 305 N.C. 106, 286 S.E. 2d 535 (1982). Defendant brings forward no other assignments.

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1. G.S. § 14-204.1 reads in full:

§ 14-204.1. *Loitering for the purpose of engaging in prostitution offense.*

(a) For the purposes of this section, "public place" means any street, sidewalk, bridge, alley or alleyway, plaza, park, driveway, parking lot or transportation facility, or the doorways and entrance ways to any building which fronts on any of those places, or a motor vehicle in or on any of those places.

(b) If a person remains or wanders about in a public place and (1) repeatedly beckons to, stops, or attempts to stop passers-by, or repeatedly attempts to engage passers-by in conversation; or (2) repeatedly stops or attempts to stop motor vehicles; or (3) repeatedly interferes with the free passage of other persons for the purpose of violating any subdivision of G.S. 14-204 or G.S. 14-177, that person is guilty of a misdemeanor and, upon conviction, shall be punished as for a violation of G.S. 14-204.

As the party challenging the constitutionality of the statutes, defendant bears a heavy burden. We presume that the statutes are constitutional, and resolve all doubts in favor of their constitutionality. *In re Housing Bonds*, 307 N.C. 52, 296 S.E. 2d 281 (1982); *In re Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978). The applicable principles of construction are set out at length in *Banks* and need not be repeated here.

[1] Defendant attacks G.S. § 14-204.1 as violative of due process on vagueness and overbreadth grounds. A criminal statute is void for vagueness if it fails to provide fair notice of the conduct prohibited. *In re Banks, supra; State v. Elam*, 302 N.C. 157, 273 S.E. 2d 661 (1981). No more than a reasonable degree of certainty is required, nor is it necessary that the statute describe exactly the point beyond which conduct becomes criminal. *In re Banks, supra; see Boyce Motor Lines v. United States*, 342 U.S. 337 (1952). None of the words in G.S. § 14-204.1 are difficult to understand. The key element is intent: that the loitering be "for the purpose of violating any subdivision of G.S. 14-204 or G.S. 14-177." G.S. § 14-204.1(b): (Engaging in prostitution or committing the crime against nature). The two other statutes referred to have been upheld against similar challenges and both proscribe conduct which has long been recognized as criminal. *See State v. Demott*, 26 N.C. App. 14, 214 S.E. 2d 781 (1975); *State v. Poe*, 40 N.C. App. 385, 252 S.E. 2d 843 (1979), *appeal dismissed*, 445 U.S. 947 (1980). Persons of ordinary intelligence would readily understand what illegal conduct was prohibited by G.S. § 14-204.1; therefore it is not unconstitutionally vague. *Id.; compare State v. Sanders*, 37 N.C. App. 53, 245 S.E. 2d 397 (1978) ("immoral purposes" too broad).

The real thrust of defendant's attack on the statute as written goes to its breadth. A statute may not control activity constitutionally subject to state regulation by sweeping unnecessarily broadly into areas of protected freedoms. *Zwickler v. Koota*, 389 U.S. 241 (1967). Mere presence in a public place cannot constitute a crime. *See Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965). It is equally clear that some of the statutorily denounced acts, *e.g.*, engaging passers-by in conversation, would not by themselves ordinarily be constitutionally punishable. *Id.* The statute, however, does not stop there. Instead, it requires proof of specific criminal intent, the missing element in unconstitutional "status" offenses such as simple loitering. *See Wheeler v. Goodman*, 306 F. Supp.

58 (W.D.N.C. 1969) (declaring vagrancy statute unconstitutional), *vacated on procedural grounds*, 401 U.S. 987 (1971); *see also Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (*dicta* suggesting that intent element would save vagrancy ordinance); *Screws v. United States*, 325 U.S. 91 (1945) (specific intent requirement makes otherwise overbroad statute constitutional).

American courts have overwhelmingly upheld enactments such as G.S. § 14-204.1 which include an element of criminal intent. *See* Annot., 77 A.L.R. 3d 519, § 4 (1977); Annot., 25 A.L.R. 3d 836, § 3 (Cum. Supp. 1984). Two cases from the Washington Supreme Court illustrate precisely the rationale applied. In *City of Seattle v. Drew*, 70 Wash. 2d 405, 423 P. 522 (1967), the court struck down an ordinance which criminalized "wandering abroad" without "satisfactory account." The City then amended the ordinance, adding the requirement that the loitering be "under circumstances manifesting" unlawful purpose. The court upheld the amended ordinance. *City of Seattle v. Jones*, 79 Wash. 2d 626, 488 P. 2d 750 (1971). The United States Supreme Court has approved a similar holding by dismissing for want of a substantial federal question. *Matter of D.*, 27 Or. App. 861, 557 P. 2d 687 (1976) ("under circumstances manifesting" unlawful purpose) *appeal dismissed sub nom. D. v. Juvenile Dept. of Multnomah County*, 434 U.S. 914 (1977); *see Eaton v. Price*, 360 U.S. 246 (1959) (per curiam) (dismissal for want of substantial federal question is dismissal on merits). Our statute is functionally equivalent to these enactments, since intent or purpose ordinarily must be shown by circumstantial evidence. Accordingly, we hold that the statute is not void for overbreadth.

Defendant challenges the statute as applied, on the grounds that police arrested (1) only female prostitutes and not their male customers, and (2) only female prostitutes, as opposed to male, particularly male homosexual, prostitutes. We note that all the statutes in question are facially gender neutral. We also note that the loitering statute under attack does proscribe loitering for the purpose of violating the crime against nature statute, and therefore covers all possible sexual combinations. *State v. Richardson*, 307 N.C. 692, 300 S.E. 2d 379 (1983), construed only the prostitution statutes, G.S. §§ 14-203, -204, and did not address crime

against nature. It therefore does not affect our consideration of this question.

Again, defendant must make a strong showing to succeed on these grounds. She must demonstrate not only the existence of a pattern of discrimination in the exercise of police or prosecutional discretion, but that such discrimination was intentional and deliberate, not based on any justifiable standard. *State v. Spicer*, 299 N.C. 309, 261 S.E. 2d 863 (1980); *Oyler v. Boles*, 368 U.S. 448 (1962).

[2] The first ground alleged is easily disposed of. Defendant was convicted of loitering for purposes of prostitution, not soliciting. She presented no evidence that *customers* did any of the *repeated* acts made punishable by the statute. Even if she had, it is well within the power of the legislature to punish the prostitute and provider of sexual services and not the customer. Our laws forbidding the dissemination, but not the possession, of pornographic material provide an apt analogy. N.C. Gen. Stat. § 14-190.1 *et seq.* (1981). It is the organized and repeated provision of such services, not their use by unorganized and casual individuals, that constitutes the most readily eradicable social evil. *People v. Superior Court, County of Alameda*, 56 Cal. App. 3d 608, 128 Cal. Rptr. 519 (1976), on which defendant relies, was overruled on precisely the same logic by the Supreme Court of California in *People v. Superior Court of Alameda County*, 19 Cal. 3d 338, 562 P. 2d 1315, 138 Cal. Rptr. 66 (1977) (discussing "pyramid" nature of vice trade) (writ of prohibition issued to block mandate of Court of Appeals). We have found no case authority for a contrary view. *See* 63A Am. Jur. 2d *Prostitution* § 5 (1984).

[3] Defendant's second argument is that the enforcement unfairly discriminates in favor of male prostitutes, particularly male homosexuals. The police did arrest a group of males (seven to ten in number) at the time they arrested defendant. This group included at least one male homosexual, but the court dismissed charges against him. The record does not reflect the charges against the other males or their disposition. Nor does it indicate precisely why the charges against the one identified male were dismissed: it appears that the state proceeded against him on fel-

ony crime against nature charges but could not prove penetration.[2]

Defendant has failed to carry her burden, since she has failed to make the necessary initial showing that there was any pattern of discrimination in charging and prosecuting these cases. *See State v. Spicer, supra.* At best, she has shown only that one person was unsuccessfully prosecuted on *felony* charges, which did not include misdemeanor loitering as a lesser included offense available when the state failed to prove penetration. On the other hand, the police indicated that they intended to continue arresting and charging violators regardless of sex or sexual orientation.

[4] Finally, defendant contends that evidence introduced under G.S. § 14-206 deprived her of due process of law. That statute allows admission of testimony "of a prior conviction" or concerning the defendant's reputation in prostitution related cases. Six police officers testified for the state; each identified defendant as a "known prostitute" and several testified to her prior convictions for prostitution. This evidence, contends defendant, unfairly removed the presumption of innocence.

Defendant does not contend that the legislature lacked the power to prescribe rules of evidence, nor would such a contention have merit. *State v. Barrett,* 138 N.C. 630, 50 S.E. 506 (1905) (legislature may constitutionally make otherwise innocent act, possession of quart of liquor, prima facie evidence of intent). In evidentiary matters, due process only requires some rational connection between proof and the ultimate issue, and that a defendant have a reasonable opportunity to submit all relevant facts in defense to the jury. *See Mobile, J & K.C.R. Co. v. Turnipseed,* 219 U.S. 35 (1910). While the United States Supreme Court has cautioned that courts must remain alert to attempts to dilute the presumption of innocence, *Estelle v. Williams,* 425 U.S. 501, *reh'g denied,* 426 U.S. 954 (1976), it also has refused to disapprove admission of a twenty-seven year old conviction on different charges

2. Charges should not necessarily have been dismissed under G.S. § 14-204.1. As noted above, G.S. § 14-204.1 clearly empowers police to arrest persons loitering for purposes of violating G.S. § 14-177. The title of G.S. § 14-204.1 might suggest a conflict to be construed in favor of defendants, *see State v. Richardson, supra,* but the language of the statute is clear and controls over the title. *State v. Cronin,* 299 N.C. 229, 262 S.E. 2d 277 (1980).

as evidence of reputation. *Michelson v. United States,* 335 U.S. 469 (1948).

Under North Carolina common law, evidence of other crimes is generally inadmissible, subject to certain well-defined exceptions. *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954). Such evidence, if proffered, must be strictly scrutinized to ensure its relevance. *Id.* Similarly, reputation evidence must be allowed in with care to avoid confusion. *See* 1 H. Brandis, N.C. Evidence § 110 (1982); *compare* N.C. Gen. Stat. § 8C-1, Rule of Evidence 405, Commentary (Cum. Supp. 1983). We believe that G.S. § 14-206 represents a legitimate legislative decision to broaden these rules somewhat. The statute does not of course relieve the state of its burden of coming forward and proving its case beyond a reasonable doubt. Nor does the statute provide an "open door" for *any* evidence of other crimes or reputation; we do not believe the legislature intended thereby to remove entirely the trial judge's discretion to exclude irrelevant evidence. Evidence proffered on the state's case in chief under G.S. § 14-206 must remain relevant to the issues at hand.

In the present case, the police fully and accurately documented the overt acts necessary to support a conviction. The evidence proffered under G.S. § 14-206 thus came in to prove criminal intent. Although defendant had other prior convictions for property crime, the state brought out only her prior convictions for prostitution in its case in chief. The reputation testimony was limited solely to defendant's reputation for prostitution. While the reputation evidence may have been unnecessarily cumulative, defendant does not so contend, nor would such a contention likely prevail. *See State v. Stegmann,* 286 N.C. 638, 213 S.E. 2d 262 (1975), *death penalty vacated,* 428 U.S. 902 (1976). We conclude that the evidence offered under G.S. § 14-206 was properly limited to the purposes of the statute and thus properly admitted. *See State v. Willis,* 309 N.C. 451, 306 S.E. 2d 779 (1983) (similar result in drug case). We further hold that defendant has shown no deprivation of due process.

Defendant has failed to demonstrate constitutional or other prejudicial error. Her conviction therefore must stand.

No error.

Judges WHICHARD and BECTON concur.

LUCILLE B. TUNNELL, JOHN M. BERRY, JR., HENRY CLAY BERRY, MERLIN S. BERRY, VELMA A. BERRY, LANDRETH W. BERRY, KAY BERRY YOUNG, FRANCES C. BARBOUR, MRS. EDWARD W. CAHOON, EVELYN ANN CROLEY, PHILLIP S. HARRIS, ELIZABETH C. LA VOY, NICHOLAS D. HARRIS, MARIETTA C. HEOBEAT, CLARY WESTON, WADE SWINDELL, ELLA S. BERRY, NELL GRACE BERRY, REUBEN W. BERRY, JR., WILLIAM C. BERRY, LEONA BERRY LUPTON, CARLOS BERRY, JR., SAMUEL G. JONES, JR., WILLIAM C. JONES, MARY RUTH JONES SCOTT, CHARLES A. JONES, HOWARD E. JONES, THAD BROWN, MARY ANNA BROWN WILKINSON, JOHN KENNETH BROWN, ALEXANDER B. BERRY, III, TIMOTHY B. BERRY, ELVA ANNE BERRY YATES, HAZEL BERRY BAKER, FRANCES BERRY CAVINESS, SUSAN SWINDELL WENRICH, MARK EDWARD SWINDELL, DALLAS N. BERRY, SR., JAMES F. BERRY, EVELYN BERRY PARRY ELLIS, MARGARET T. PITTMAN, SHIRLEY BERRY PHILLIPS, RICHARD DUANE BERRY, CHARLES HENRY HALL, C. TIMOTHY SMITH, EUNICE S. DARDEN, NELLIE B. OUTLAND, JAMES E. BRIDGMAN, SANDRA B. PARTIN, IRENE B. LASSITER, HARVEY D. WILLIAMS, JR., MICHAEL V. HOLTON, JACK M. HOLTON, WILBUR CLAY HOLDERBY, HILDAH JONES MURRAY, Z. VANCE JONES, JR., GEORGIA E. HARRIS, JEAN HARRIS POTTER, DOROTHY HARRIS IRELAND, MYRA HARRIS MAYO, JAMES T. HARRIS, RUBY HARRIS WILLIAMS, DORA HARRIS CLAYTON, RICHARD BERRY HARRIS, JR., ELLA LOUISE HARRIS, NANCY J. MUSSEL, BETSY J. NUGENT, MIKE E. JONES, JR., POLLY ANN BERRY CUTRELL, METRAH WARREN WILLIAMS, CLARENCE SPENCER HOLTON, JR., MARY ANN J. BEARD, LEWIS B. JONES, VIRGINIA JONES McKIE, JOSEPH SWINDELL CREDLE, MELINDA CREDLE EASTON, MARJORIE ANN WILLIAMS, GLENN W. HOLDERBY, HAL FORD HOLTON, JOHN B. McGOWAN, MARY KATHERYN McGOWAN, DORMAN J. McGOWAN, JAMES A. McGOWAN, JR., LINDA McGOWAN McQUEEN, RICHARD BERRY, AND LESLIE JONES, JR., HILDA J. MURRAY v. MRS. JOB BERRY, W. GRATZ SPENCER AND WIFE, MARGARET M. SPENCER, MORRIS BERRY, ROY CAHOON, WILLIAM CLIFF CAHOON, HIATT B. CAHOON AND WIFE, NORMA EARLE S. CAHOON, RICHARD DICKS, CHARLES DICKS, DORTHY DICKS RADCLIFFE, MILLICENT HARRIS LUPTON, MYRA H. YOUNGS, BOBBY BERRY, ALEXANDER BERRY CREDLE, GEORGE V. CREDLE, III, CHARLES BERRY, GUI V. HARRIS, MRS. JAMES BARNES, LEE WILLIAMS, FANNIE CAHOON BOOMER, METTA McGOWAN, DAVID McGOWAN, SCOTT HOLTON, MRS. ATRIL LILLY, MRS. DORCUS E. CLARKE, MRS. JEAN ROSS, CAROLYN JONES, SELBY JONES, RUTH HOLTON DALE, CECIL

RUBEN HARRIS, AND EASTWOOD HUBERT, AND ANY OTHER PER STIRPES ISSUE OF JOHN BERRY

No. 842SC536

(Filed 5 March 1985)

1. Wills §§ 33.1, 35.2— contingent devisee—words of purchase—time of vesting —effect of quitclaim deed

In an action to construe an 1899 will in which the testator devised real and personal property to his son with the following clause, "Further if my son Job dies without leaving children the property herein given to him must be divided equally amongst his brothers and sisters or their heirs," the words "brothers and sisters or their heirs" were words of purchase rather than limitation, and the word "heirs" refers only to those persons "who can answer the roll immediately upon the happening of the contingency . . . ." Thus, the takers under the contingent devise were the heirs of Job's brothers and sisters who were alive when Job died in 1979 without children, and a 1941 quitclaim deed by those persons who would have taken had Job died at that time was not effective to extinguish the rights of their descendants.

2. Wills § 69; Estoppel § 2— quitclaim deed by contingent devisees—estoppel as to those signing

A 1941 quitclaim deed by those persons who would have taken at that time under a contingent devise estopped those who executed it and who were still alive from pursuing their claim when the contingency occurred in 1979 because the 1941 quitclaim deed evidenced an intent by the grantors to convey and an expectation that the grantee was going to receive certain benefits.

APPEAL by the plaintiffs from *Stevens, Judge.* Judgment entered 20 January 1984 in Superior Court, HYDE County. Heard in the Court of Appeals 15 January 1985.

This is a civil declaratory judgment action to construe the will of John Berry. Berry died testate about 1899 survived by a wife and ten children. In his will he devised certain real and personal property to his son Job. The will also contained the following clause: "Further if my son Job dies without leaving children the property herein given to him must be divided equally amongst his brothers and sisters or their heirs." By early 1941, all but one of Job's brothers and sisters had died. In 1941, Job's surviving brother and the issue of his other eight brothers and sisters executed a quitclaim deed conveying all their right, title, and interest in the subject property to Job. In February 1979, Job died testate, without ever having children. In his will Job devised

the subject property to his widow for life with a remainder to Walton Spencer. The plaintiffs, who are the lineal descendants of Job's brothers and sisters, filed this action seeking to have the court to construe the will of John Berry and determine their interest in the lands devised to Job Berry.

On 14 November 1983, Judge Stevens sitting without a jury, heard the case in Hyde County Superior Court. On 20 January 1984, he entered a judgment which in pertinent part provided:

FINDINGS OF FACT

. . . .

SECOND: That by deed dated January 20, 1941, as recorded in Book 58, page 424, Public Registry of Hyde County, John H. C. Berry, the only surviving child of John Berry except his brother, Job Berry, together with the surviving children of the other eight deceased children of John Berry, executed a deed conveying and quit-claiming all of their right, title and interest in and to the lands devised by John Berry in his will to Job Berry, his son.

THIRD: That Job Berry died in 1979 leaving a will duly probated in the office of the Clerk of the Superior Court of Hyde County, wherein the lands in controversy were devised to his widow, Maude Elizabeth Swindell Berry, for her life with remainder over to Walton Gratz Spencer in fee simple.

FOURTH: That plaintiffs contend, among other things, that the family of John Berry, as it existed as of the death of Job Berry in 1979, took said lands by purchase under the will of John Berry, when his son, Job Berry, "died without children." On the other hand, the defendants contend, among other things, that the deed to Job Berry purported to bar the interest of each heir of John Berry named therein, including the heirs of such persons, and in addition, purported to bar any further or future claim against this land by such heirs who are, as defendants say and contend, estopped to claim such interest.

. . . .

CONCLUSIONS OF LAW

FIRST: That the words, "brothers and sisters or their heirs", as set forth in the will of John Berry, are words of limitation rather than words of purchase, serving only to preserve the ancestral shares of such "brothers and sisters". That the interest so created being executory in nature, and although a future interest, is fully transferrable as the beneficiaries were ascertainable at the time they executed the deed to Job Berry in 1941.

AND SECOND: That, moreover, said deed, in the manner and form in which it was drafted and executed to Job Berry, effectively divest, (H. L. S. III) bars and legally estops all of the individuals who signed the deed, including also all of those individuals who assert or claim an interest in the property, either through, by or under them, be they heirs or survivors, from acquiring any rights of possession, claim of title or interest in and to the lands described in the said deed, whatsoever.

It is, therefore, CONSIDERED, ORDERED, ADJUDGED, and DECREED that Job Berry's devise by will of the said lands in controversy to his widow, Maude Elizabeth Swindell Berry, for life with remainder over to Walton Gratz Spencer was absolute and in fee simple, subject only to claims of adverse possession, if any there be.

. . . .

From this judgment, the plaintiff appealed.

Rodman, Rodman, Holscher & Francisco, by Edward N. Rodman, and Davis & Davis, by George Thomas Davis, Jr., for plaintiff appellants.

Wilkinson & Vosburgh, by James R. Vosburgh, for defendant appellees.

ARNOLD, Judge.

[1] The first issue presented by this appeal is whether the trial court erred by concluding that the words "brothers and sisters or their heirs" in the will of John Berry were words of limitation rather than words of purchase, and that as such they served only to preserve the ancestral shares of the "brothers and sisters."

Words of purchase in wills are those words which designate the persons to whom an estate in land is granted, while words of limitation are those which define the quantum of interest given and fixes the time for the commencement of the estate. The word "heirs" may be used as either a word of purchase or a word of limitation. Although the word "heirs" is primarily used as a word of limitation, when it is used to designate beneficiaries who are to take an estate it is a word of purchase. J. Grimes, *5B Thompson on Real Property* § 2621 pp. 2-3 (1978 Replacement Volume). When a transfer is made to "A and his heirs" the words "and his heirs" are words of limitation and mean that "A" has an estate that is potentially infinite in duration or, put another way, an estate in fee simple. T. Bergin and P. Haskell, *Preface To Estates in Land and Future Interest*, p. 30 (1984). However, in a transfer to "A or his heirs" the words "or his heirs" are words of purchase which designate alternative takers to "A." Grimes, *supra*, § 2622 p. 11. Thus, the trial court erred in concluding that "brothers and sisters or their heirs" were words in limitation which served only to preserve the ancestral shares of the brothers and sisters.

Having determined that "brothers and sisters or their heirs" are words of purchase, the next question presented is what meaning should we ascribe to the word "heirs." The term "heirs" is generally interpreted to mean those persons who come within the intestate succession statute and who are living at the date of the testator's death. However, this general rule is subject to exceptions. *See generally* T. Bergin and P. Haskell, *supra*, pp. 230-232. Our Supreme Court recognized such an exception in *Mercer v. Downs*, 191 N.C. 203, 131 S.E. 575 (1926), where the testator left certain property to his wife for life with a remainder to the testator's "surviving children or their heirs." The court held that: "The language 'our surviving children or their heirs' indicates that the death of the life tenant and not the death of the devisor was the time fixed for the ascertainment of the remaindermen." *Id.* at 206, 131 S.E. at 577. In *Lawson v. Lawson*, 267 N.C. 643, 645, 148 S.E. 2d 546, 548 (1966), the Supreme Court further held that when interests were contingent, that only those persons " 'who can answer the roll immediately upon the happening of the [contingency] acquire any estate in the properties granted.' (Citation omitted.)" The position adopted in *Lawson* is a minority rule which has in some instances had as its effect the disinheritance of

whole lines of a testator's intended takers. *See* T. Bergin and P. Haskell, *supra*, p. 131. While we feel that *Lawson* is in need of further review, nevertheless we are bound by it. Finally, in *Hutchinson v. Lucas*, 181 N.C. 53, 54-55, 106 S.E. 150, 151 (1921), the court stated that "when the holders of a contingent estate are specified and known they may assign and convey it and can make a deed which will conclude all claiming under them, . . . yet 'where the heirs, issue or children are so designated as to take by purchase under the terms of the will, there is no estoppel or rebuttal, as they do not take from their ancestor by descent, but directly from the devisor as purchasers.' "

Applying these principles to the case *sub judice* we conclude that the takers under the contingent devise to Job's brothers and sisters or their heirs were the heirs of Job's brothers and sisters who were alive when Job died without leaving any children. Since these takers were not ascertainable until Job died in 1979 without leaving any children, the 1941 quitclaim deed by those persons who would have taken had Job died at that time was not effective to extinguish the rights of their descendants.

[2] Finally, we must determine whether the 1941 quitclaim deed served to estop those persons who executed it in 1941 and who were still alive when Job died in 1979. "In North Carolina, whether a quitclaim deed . . . creates an estoppel depends upon its language, . . . and there is substantial authority in this jurisdiction for the position that the principle of estoppel will apply when the deed shows that the grantor intended to convey and the grantee expected to acquire a particular estate. . . . (Citations omitted.)" *Realty Co. v. Wysor*, 272 N.C. 172, 178-79, 158 S.E. 2d 7, 12 (1967). The 1941 quitclaim deed evidenced an intent by the grantors to convey and an expectation that the grantee was going to receive certain interests. Thus, those persons who are the heirs of Job's brothers and sisters and who signed the 1941 deed are estopped from pursuing their claim to the property.

For the foregoing reasoning, the judgment of the trial court is reversed and the case is remanded for the entry of a judgment determining the ownership in the property in accordance with the guidelines set forth in this opinion.

Reversed and remanded.

Judges WELLS and MARTIN concur.

VIRGINIA M. FARR v. THE BOARD OF ADJUSTMENT OF THE CITY OF ROCKY MOUNT, NORTH CAROLINA

No. 847SC10

(Filed 5 March 1985)

Municipal Corporations §§ 30.3; 30.15— zoning ordinance—occupancy of accessory building—failure to show ordinance violated—unconstitutionality of ordinance

Neither the trial court's findings nor the record as a whole supported the conclusion that petitioner is violating the zoning ordinance of the City of Rocky Mount by permitting her son and his family to occupy a small dwelling house behind her dwelling house since the house was built while a prior zoning ordinance was in effect, and the record fails to show whether the building is being occupied as a prior nonconforming use. Moreover, if the ordinance were interpreted as contended by respondent to prevent petitioner's son and his family from occupying the small house and to authorize a domestic employee and his family to live there, the ordinance would be unconstitutional as not being rationally related to a purpose the enacting body was authorized to address.

Chief Judge HEDRICK dissenting.

APPEAL by petitioner from *Lewis, John B., Jr., Judge.* Judgment entered 8 August 1983 in Superior Court, NASH County. Heard in the Court of Appeals 16 October 1984.

Petitioner, a widow, seeks reversal of a decision by respondent Board of Adjustment that her use of certain property is in violation of a City of Rocky Mount zoning ordinance. The record shows the following:

On 28 May 1982, after her husband's death, petitioner purchased a lot on West Haven Boulevard in Rocky Mount that had two houses on it, one somewhat larger than the other. The larger structure fronts on the street, the smaller one is behind it in the backyard, and each is a self-contained dwelling house, with a living room, a kitchen, a bathroom, an air conditioning-heating system, and at least one bedroom. Since purchasing the property petitioner has lived in the larger house and permitted her son, his

wife, and their two children to live in the smaller one. On 6 December 1982, the Supervisor of Inspections for the City of Rocky Mount issued to petitioner a "Notice of Violation of Zoning Ordinance," which alleged that "[a]n accessory building located on your property is being occupied as a residence," in violation of Section VII.A of the zoning ordinance of the City of Rocky Mount, and directed her to "correct the violation" on or before 8 January 1983. More specifically the Supervisor of Inspections advised petitioner that under the zoning ordinance the smaller house, as an "accessory building" in an R-10 zone, could be occupied only by domestic employees employed on the premises and their immediate families, and the use of the building by her son and his family was therefore unlawful. This determination was appealed by the petitioner to the City's Board of Adjustment, which upheld it. Petitioner then obtained a writ of certiorari from the Superior Court and the Board's decision was first reviewed by Judge Donald Smith, who remanded the matter to the Board for additional findings of fact and conclusions of law. After reconsidering the matter the Board found facts essentially as stated above, and again concluded that the use of the house by petitioner's son and his family violated the zoning ordinance. This decision was reviewed and affirmed by Judge John B. Lewis, Jr.

Fitch and Butterfield, by G. K. Butterfield, Jr., for petitioner appellant.

Dill, Exum, Fountain & Hoyle, by William S. Hoyle, for respondent appellee.

PHILLIPS, Judge.

Our review of zoning board of adjustment decisions is limited to questions of law and legal inference; we may not consider questions of fact. G.S. 160A-388(e); *Coastal Ready-Mix Concrete Co. v. Board of Commissioners of the Town of Nags Head,* 299 N.C. 620, 265 S.E. 2d 379, *reh. denied,* 300 N.C. 562, 270 S.E. 2d 106 (1980). A Board's findings of fact if supported by competent evidence are conclusive on appeal. *In re Campsites Unlimited,* 287 N.C. 493, 215 S.E. 2d 73 (1975). The Board's findings of fact in this case are so supported, but neither the findings nor the record as a whole support the conclusion that petitioner is violating the zoning law of the City of Rocky Mount by permitting her son and his family to occupy the dwelling house involved.

In the first place, the record that respondent Board certified to the court, all that we have to go by in determining the validity of its action, is quite incomplete. It contains only selected parts of the zoning ordinance petitioner is allegedly violating and no part of the earlier ordinance that was in effect when the house involved was built, or at least when the City gave the former owner a permit to build it. For the record shows that the house was built under a permit issued by the City of Rocky Mount on 24 April 1975, whereas the zoning ordinance petitioner is charged with violating was not enacted until several months later and did not become effective until 1 January 1976. Too, while the building permit shows that the lot was then classified R-15 (it is now classified R-10), the record does not tell us what that classification entailed; it merely shows that the former owner was authorized to construct an "accessory building." But what an "accessory building" under the former ordinance was and what use it was limited to we do not know. It is self-evident, though, that the house was built for human habitation and the record does establish that it was so used for several years before petitioner bought it; but whether those that used it were required to be domestic employees of the former owner we do not know and refuse to surmise that they were. It is rudimentary learning, though, that a later enacted zoning ordinance does not affect the use of existing buildings or those that are being constructed under a lawful permit. *Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E. 2d 904, 49 A.L.R. 3d 1 (1969). Thus if the house when it was built or started could be lawfully occupied by the owner's child and his family, and nothing in the record suggests that it could not, the limitation later enacted would have no application. In all events we cannot conclude from this record that petitioner is in violation of the City zoning ordinance by permitting her son and his family to occupy the dwelling house involved, and therefore vacate the judgment appealed from.

In the second place, if we interpreted the zoning ordinance excerpts brought forward to prevent petitioner's son and his family from occupying the house situated in her backyard, but to authorize a domestic employee and his family to live there, as the respondent contends that we should, we would be obliged to hold that the ordinance is unconstitutional. This is because an inherent requisite of all legislation is that it be rationally related to a pur-

pose that the enacting body is authorized to address and if there is a rational relation between prohibiting a property owner's child from living in a dwelling house on her property that is zoned for residential purposes and any object of the police power, which is the basis for all zoning legislation, it is not apparent to us. Nor have we found any court decision involving similar circumstances that so holds. Certainly the ordinance cannot promote low density occupancy of the lots involved, a proper object of residential zoning, as it permits an extra family to live on each lot classified R-10 and limits only the status of the extra occupants. In this instance, it is not as if family residential property was being used for another purpose, say as a nursing or retirement home, as in *In re Appeal of McGinnis*, 68 Pa. Commw. 57, 448 A. 2d 108 (1982), *cert. denied*, 461 U.S. 944 (1983); the property here is being used for the residential purposes that the ordinance requires. Nor is it as if those using the house were different in status or class from other occupants of that area, as in the case of *New York v. Renaisance*, 36 N.Y. 2d 65, 324 N.E. 2d 355 (1975), where it was fallaciously contended that unrelated narcotic addicts under rehabilitation were "family" members within the meaning of the local ordinance; the user here, along with his family, is the actual child of the owner.

The judgment appealed from is therefore vacated and the matter remanded to the Superior Court for appropriate disposition in accord with this opinion.

Vacated and remanded.

Judge BECTON concurs.

Chief Judge HEDRICK dissents.

Chief Judge HEDRICK dissenting.

The majority opinion, among other things, states that the Board's findings of fact in this case are supported by competent evidence and are thus conclusive on appeal. If I divine correctly, the majority holds that the whole record and the findings made by the Board of Adjustment do not support the Board's conclusion that the petitioner, by allowing her son and his family to reside in the accessory building on petitioner's residential lot, is

violating the zoning ordinance that forbids such occupancy in an R-10 zoning district. The majority seems to say that the petitioner is permitted, under the ordinance, to allow her son and his family to live in the accessory building because it is a prior nonconforming use. I arrive at this conclusion because of several statements in the majority opinion, including the following: "Thus if the house when it was built or started could be lawfully occupied by the owner's child and his family, and nothing in the record suggests that it could not, the limitation later enacted would have no application." If this is indeed the justification for the majority holding, it was not suggested by the petitioner and, as the majority states, it is not apparent from the record. Certainly the Board of Adjustment had no burden to negate the possibility that the building was being occupied as a prior nonconforming use where no such contention was made by the petitioner.

The majority's ultimate decision seems to be based on the suggestion that the ordinance in question is unconstitutional because it is not "rationally related to a purpose that the enacting body is authorized to address." In my opinion the ordinance in question is constitutional.

In sum, I believe the decision of the Board of Adjustment, reviewed in accordance with the standards set out in *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 265 S.E. 2d 379 (1980), was properly affirmed by the superior court.

JACK R. SHUFFLER v. BLUE RIDGE RADIOLOGY ASSOCIATES, P.A., AND PHILIP T. HOWERTON, M.D.

No. 8425SC597

(Filed 5 March 1985)

1. Physicians, Surgeons and Allied Professions § 11.1— negligent reading of x-rays—standard of practice established by defendant's testimony

In a medical malpractice action for the negligent reading of x-rays, defendant's own testimony that the standard of practice among radiologists with similar background and training in Morganton on 1 January 1980 required him to inform the physician requesting x-rays that there had been difficulty in obtaining the x-rays and that they were limited in scope was sufficient to establish the standard of care by which his actions would be judged. G.S. 9-21.12.

2. **Physicians, Surgeons and Allied Professions § 17.2— negligent reading of x-rays—evidence sufficient**

Directed verdict should not have been entered for defendants where the evidence, in the light most favorable to plaintiff, showed that defendant did not inform the treating physician that x-rays were not a complete picture of plaintiff's cervical or thoracic spine, that defendant's failure to inform the treating physicians was a proximate cause of the delay in detection of the fracture in plaintiff's spine, and that plaintiff was damaged by the delay.

3. **Physicians, Surgeons and Allied Professions § 11.1— negligent reading of x-rays—expert testimony excluded—no familiarity with standard of practice in community**

There was no error in the exclusion of deposition testimony as to the standards of practice among radiologists and in radiology departments of duly licensed hospitals where there was no evidence that the witness was familiar with the standards of practice among radiologists in Morganton or similar communities, or with the standards of practice in radiology departments of licensed hospitals in Morganton or similar communities. G.S. 90-21.12.

APPEAL by plaintiff from *Howell, Judge.* Order entered 15 February 1984 in Superior Court, BURKE County. Heard in the Court of Appeals 6 February 1985.

This is a medical malpractice action in which plaintiff alleged that defendant Howerton, a radiologist, was negligent in reading x-rays of plaintiff's cervical and thoracic spine. Plaintiff alleged that as a result of Howerton's negligence proper diagnosis and treatment of his injury was substantially delayed, thereby causing him great pain, permanent injury and substantial medical expense. Plaintiff also seeks to hold liable Howerton's employer, defendant Blue Ridge Radiology Associates, P.A., under the theory of respondeat superior.

At the close of plaintiff's evidence the court allowed defendants' motion for a directed verdict. Plaintiff appeals.

McMurray and McMurray, by John H. McMurray, for plaintiff appellant.

Dameron and Burgin, by Charles E. Burgin, for defendant appellees.

WHICHARD, Judge.

Plaintiff contends the court erred in granting defendants' motion for a directed verdict. To withstand defendants' motion,

plaintiff had to offer evidence establishing the following: (1) the standard of care applicable to Howerton; (2) breach of the standard of care; (3) proximate causation; and (4) damages. *See Lowery v. Newton*, 52 N.C. App. 234, 237, 278 S.E. 2d 566, 570 (1981). If plaintiff failed to present sufficient evidence to establish any one of these elements, defendants were entitled to a directed verdict. *Id.* In considering a defendant's motion for a directed verdict, the plaintiff's evidence must be taken as true and considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom. *Clark v. Bodycombe*, 289 N.C. 246, 250, 221 S.E. 2d 506, 509 (1976).

The evidence in the light most favorable to plaintiff tends to show the following:

On 1 January 1980 plaintiff fell from a truck and was injured. He was taken to Grace Hospital in Morganton and was examined by Dr. Scott, an emergency room physician. Because plaintiff was in considerable pain, Dr. Scott sent him to the radiology department for x-rays of his chest, left shoulder, cervical spine, and thoracic spine. The x-rays were taken by the hospital's technologists and were interpreted by defendant Howerton. Howerton was a radiologist employed by defendant Blue Ridge Radiology Associates, P.A., a professional association of radiologists who provided services to Grace Hospital. The x-rays of plaintiff's spine showed no identifiable fractures; however, the x-rays were incomplete in that they did not show all of plaintiff's last cervical vertebra, identified as C7, or all of his first thoracic vertebra, identified as T1. The C7-T1 level of plaintiff's spine was not completely shown on the x-rays because it was obscured by plaintiff's shoulders. A complete picture of this level of plaintiff's spine could have been obtained by manipulating plaintiff's arms, if possible, into a certain position. Howerton testified that the technologist was apparently unable to manipulate plaintiff's arms into the necessary position and therefore a complete picture of this area of plaintiff's spine was not obtained.

Howerton prepared a written report in which he indicated that the x-rays showed no identifiable fractures of plaintiff's cervical or thoracic spine. The report did not mention that there was difficulty in obtaining the x-rays or that the x-rays were incomplete; however, Howerton testified that he verbally informed

Dr. Scott that there had been difficulty in obtaining the x-rays. Howerton testified that he was familiar with the standards of practice among radiologists with similar training and experience in Morganton or similar communities on 1 January 1980, and that if a physician requested x-rays of a patient's thoracic and cervical spine, and complete x-rays showing the C7 area of the cervical spine could not be obtained, the standard required the interpreting radiologist so to inform the requesting physician, either verbally or by written report. He further testified that in his opinion he acted in accordance with that standard in interpreting plaintiff's x-rays and in advising Dr. Scott of their limited scope.

Dr. Scott testified that it was not reported to him that there was any difficulty in obtaining plaintiff's x-rays or that the x-rays were limited in nature, and that he did not recall conferring with Howerton at any time about the x-rays. After Dr. Scott received the written report on the x-rays, he still felt it necessary to admit plaintiff to the hospital. Plaintiff was referred to a general surgeon, Dr. Lee, who was thereafter plaintiff's attending physician. Dr. Scott informed Dr. Lee that plaintiff's x-rays were normal. Either that day or the next Dr. Lee saw Howerton's report on the x-rays and interpreted it as referring to a complete study. He testified that he did not have a conversation with Howerton about plaintiff. When pressed further, he stated that he did not recall whether Howerton had ever told him that the x-rays were a limited study and that C7 was not visualized on the x-rays. He stated that he relied in part on Howerton's report in diagnosing plaintiff's condition, and that had he been told that C7 was not fully visualized on the x-rays, he would have reordered x-rays. Howerton testified that he may have mentioned to Dr. Lee that the x-rays were an incomplete study.

Plaintiff was admitted to the hospital on 1 January 1980 and remained there for twelve days. On 5 January 1980 Dr. Lee sent plaintiff for more shoulder x-rays because he continued to complain of shoulder pain. Again, Dr. Lee did not order more cervical spine x-rays because he presumed the initial x-rays were a complete study. After plaintiff was released from the hospital he continued to have severe pain and his wife noticed a big knot on the back of his neck. He went back to see Dr. Lee who then ordered further thoracic and cervical spine x-rays. The additional x-rays were taken on 23 January 1980 and revealed that plaintiff had a

fracture-dislocation at the C7-T1 level of his spine. Plaintiff immediately went to a hospital in Winston-Salem where he was examined by a neurosurgeon, Dr. McWhorter. As a temporary measure Dr. McWhorter placed plaintiff in a traction device, thereby relieving his pain. Subsequently, plaintiff's condition was corrected as much as possible by surgery.

While the evidence does not show that plaintiff suffered any permanent injury as a result of the delay in proper diagnosis and treatment, it does show that he was in substantial pain from 1 January 1980 until 23 January 1980 and that he could have been relieved of the pain much earlier had the fracture in his spine been detected promptly. The evidence also tends to show that plaintiff could have avoided part of his medical bills had the fracture been detected promptly.

[1] Because plaintiff's claims arise out of the furnishing of medical care, defendants can be liable for damages only if it is shown by the greater weight of the evidence that the care provided by Howerton did not accord with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action. *See* G.S. 90-21.12. We find Howerton's own testimony sufficient to establish that the standards of practice among radiologists with similar training and experience in Morganton on 1 January 1980 required that Howerton inform the physician requesting the x-rays, either verbally or by written report, that there had been difficulty in obtaining the x-rays and that therefore the x-rays were limited in scope. Thus, Howerton's own testimony established the standard of care by which his actions are to be judged.

[2] Dr. Scott's testimony which indicates that Howerton did not inform him of the limited scope of the x-rays, and the evidence showing that Howerton's written report did not contain this critical information, taken together as true, establish Howerton's breach of the standard of care. The evidence presented was also sufficient to establish that Howerton's failure to inform Dr. Scott or Dr. Lee that the x-rays were not a complete picture of plaintiff's cervical or thoracic spine was a proximate cause of the delay in detection of the fracture in plaintiff's spine, and that plaintiff

was damaged by such delay. Further, since the evidence tends to show that Howerton was an employee of defendant Blue Ridge Radiology Associates, P.A., and was acting in the course of his employment and in furtherance of the association's business when the negligence occurred, it is sufficient to support application of respondeat superior to hold Blue Ridge Radiology Associates, P.A., liable for such negligence. *See Smith v. Moore*, 220 N.C. 165, 167, 16 S.E. 2d 701, 702 (1941).

We conclude that the evidence, in the light most favorable to plaintiff, was sufficient to establish each element of plaintiff's claims and therefore to withstand defendants' motion for a directed verdict. Accordingly, the order allowing a directed verdict for defendants is reversed.

[3] In determining the sufficiency of the evidence we did not consider those portions of Dr. McWhorter's deposition which were excluded because we believe they were excluded properly. The court refused to allow plaintiff to read into evidence Dr. McWhorter's testimony concerning (1) the standards of practice among radiologists and in radiology departments of duly licensed hospitals and (2) whether the actions of Howerton and the radiology department at Grace Hospital accorded with those standards. Plaintiff contends that was error. Although evidence was presented establishing Dr. McWhorter's qualification as a medical expert specializing in neurosurgery, no evidence was presented to show that he was familiar with the standards of practice among radiologists in Morganton or similar communities, or with the standards of practice in radiology departments of licensed hospitals in Morganton or similar communities. Evidence establishing Dr. McWhorter's familiarity with and knowledge of those standards was necessary to qualify him to testify on those subjects. *See* G.S. 90-21.12. Since Dr. McWhorter's qualification to testify as to the standards of practice among radiologists in Morganton or similar communities at the time in question was not established, the exclusion of his testimony was proper.

Reversed.

Judges WELLS and BECTON concur.

STATE OF NORTH CAROLINA v. VIRGIL BRUCE ROBINSON

No. 8425SC485

(Filed 5 March 1985)

1. Criminal Law § 138— course of conduct aggravating factor—insufficient evidence

In sentencing defendant for felonious attempt to burn a dwelling and felonious burning of personal property, the preponderance of the evidence did not support the trial court's finding as an aggravating factor that the two offenses were part of a "course of conduct" during which defendant had previously burned a barn where defendant admitted to an S.B.I. agent that he set fires in a dwelling and a shed but denied that he had burned the barn, the agent testified that he was unable to determine the cause of the barn fire, and the evidence tended to show that the barn burning was accidental. G.S. 15A-1340.4(a), (b).

2. Criminal Law § 138— mitigating circumstance—voluntary acknowledgment of wrongdoing—finding required

The trial court erred in failing to find as a mitigating factor that prior to arrest or at an early stage of the criminal process the defendant voluntarily acknowledged wrongdoing in connection with the offenses to a law enforcement officer, G.S. 15A-1340.4(a)(2)(l), where the evidence showed that defendant was interviewed by an S.B.I. agent who informed him that he was not under arrest but was free to leave, and defendant voluntarily admitted in some detail that he intentionally set two fires for which he was convicted.

3. Criminal Law § 138— mitigating factor—mental condition reducing culpability—insufficient evidence

The evidence did not require the trial court to find as a mitigating factor that defendant was suffering from a mental condition that significantly reduced his culpability for the offense, G.S. 15A-1340.4(a)(2)(d), where it tended to show that defendant suffers from a personality disorder and has a history of mental instability, and that a psychiatric report prepared in connection with this case concluded that defendant did not have a mental defect or disorder which would have prevented him from distinguishing right from wrong with respect to the current charges.

4. Criminal Law § 138— mitigating factor—absence of criminal convictions—statement by prosecutor

The trial court was required to find as a mitigating factor that defendant had no record of criminal convictions based upon a statement by the prosecutor that "we do not have any record in this case of prior convictions of the defendant."

APPEAL by defendant from *Ferrell, Judge*. Judgment entered 13 December 1983 in Superior Court, CATAWBA County. Heard in the Court of Appeals 5 February 1985.

On 17 August 1983, 21 August 1983 and 19 September 1983, fires occurred on the Virgil Robinson farm in Catawba County. They were investigated by North Carolina State Bureau of Investigation Agent David Campbell.

On 17 August a barn was burned and totally destroyed. Agent Campbell did not determine the cause of fire in that building.

On 21 August, fire occurred in the home of Virgil and Catherine Robinson, defendant's parents. The fire was in a closet beneath a stairwell, and charred the floor of the closet and items within the closet. Agent Campbell testified that because the closet door was closed the fire did not spread to the rest of the house.

On 19 September, a shed containing tools and other personal property was burned.

On 21 September 1983 Agent Campbell interviewed defendant at the Catawba County Fire Marshall's office. Agent Campbell informed defendant he was not under arrest and that he was free to leave the Fire Marshall's office at any time. Defendant chose not to remain silent, but voluntarily admitted that he intentionally set the fire in his parents' residence on 21 August 1983 and in the shed or outbuilding on 19 September 1983. Defendant denied setting fire to the barn on 17 August 1983.

The defendant was charged with first degree arson for the burning of his parents' home on 21 August 1983 and with burning of an outbuilding on 19 September 1983. Pursuant to a plea bargain arrangement, he pled guilty to felonious attempted burning of a dwelling and felonious burning of personal property, each having a presumptive term of 3 years.

The trial judge sentenced defendant to ten years in prison, after finding as an aggravating factor that "this offense was part of a course of conduct where an outbuilding was set on fire and burned by the defendant a few days early to the commission of these offenses." The trial judge declined to find any mitigating factors.

Defendant appeals as of right this imposition of a sentence in excess of the presumptive sentence.

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

Samuel P. Moose for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that the trial judge erred in finding as a factor in aggravation that "this offense was part of a course of conduct where an outbuilding was set on fire and burned by the defendant a few days early to the commission of these offenses." Defendant argues that this factor was not supported by a preponderance of the evidence. We agree.

Under the Fair Sentencing Act, if after considering the statutory aggravating and mitigating factors and any other factors proved by a preponderance of the evidence and reasonably related to the purposes of sentencing, the trial judge imposes a prison term for a felony that differs from the presumptive term, he must list in the record each factor in aggravation or mitigation that is proved by a preponderance of the evidence. G.S. 15A-1340.4(a), (b). If the trial judge lists an aggravating factor as supporting a sentence in excess of the presumptive term, then this must be supported by a preponderance of the evidence.

In the present case the trial judge increased defendant's sentence beyond the presumptive because he engaged in a "course of conduct." The trial judge described this "course of conduct" as "where an outbuilding was set on fire and burned by defendant a few days early to the commission of these offenses." By "these offenses" the trial judge apparently referred to those to which the defendant pled guilty, and by the outbuilding burned a few days prior to the commission of "these offenses" the judge apparently meant the barn burned on 17 August 1983.

Our review of the record indicates that the evidence does not show by a preponderance that defendant engaged in a course of conduct whereby he set the barn on fire, and then the house and shed. Special Agent David Campbell of the State Bureau of Investigation (S.B.I.) testified that he was not able to determine what caused the fire in the barn. In his pre-arrest interview with Agent Campbell, defendant stated that he did not set the barn on

fire, and that he got the idea of burning the house and shed from seeing the barn burn. At another point he said he may have been indirectly responsible: "In a way I set the barn on fire too. There were cigarettes and matches in the couch. We burned some trash earlier that day and it may have caught from that." He later said, "I did not burn the barn. Dad was burning trash that day." The evidence tends to show that the barn burning was accidental. A "course of conduct" in which defendant burned the barn and then set fires in the house and shed was therefore not proved by a preponderance of the evidence.

Given this error in the finding in aggravation, and the imposition of a sentence beyond the presumptive term, this case must be remanded for a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E. 2d 689, 701 (1983).

While under *Ahearn* the trial judge's error in the finding of an aggravating factor is sufficient to require a new sentencing hearing, in the interests of judicial efficiency and as an aid in resentencing we will also address defendant's contentions as to the trial judge's failure to find any mitigating factors. The trial judge has a responsibility, when he gives a sentence other than the presumptive term, to consider each *statutory* factor in light of the evidence presented. The failure of the defendant to request that he consider a particular statutory factor or to give evidence in the sentencing phase in support of that factor does not remove the judge's duty under the Act to consider each factor. If the State presents evidence proving by a preponderance a mitigating statutory factor, then it makes no difference that defendant's counsel has presented no additional evidence or has not requested the judge to consider that factor. If the trial judge wishes to pass a sentence other than the presumptive then he *must* consider and find that factor.

[2] In the present case, we agree that the trial judge erred in failing to find the statutory mitigating factor set out in G.S. 15A-1340.4(a)(2)(l): that prior to 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. We make this conclusion even though the defendant presented no evidence and did not request that this factor be found.

The State's evidence showed that on 21 September 1983 S.B.I. Agent Campbell interviewed defendant at the Catawba County Fire Marshall's office. Agent Campbell informed the defendant that he was not under arrest but that he was free to leave the Fire Marshall's office. Defendant chose not to exercise his right to remain silent, but voluntarily admitted in some detail that he intentionally set fire to the house and the shed. The State thus presented uncontradicted and credible evidence, *see State v. Jones*, 309 N.C. 214, 218-19, 306 S.E. 2d 451, 454-55 (1983), that defendant voluntarily acknowledged wrongdoing to a law enforcement officer prior to arrest. Statutory factor G.S. 15A-1340.4 (a)(2)(l) was obviously supported by a preponderance of the evidence and the trial judge's failure to find it was plain error.

[3] As to statutory factor G.S. 15A-1340.4(a)(2)(d), that defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense, the evidence is not so clear. While there was evidence that defendant suffers from a personality disorder and has a history of mental instability, still, the psychiatric report prepared following defendant's examination at Dorothea Dix Hospital, in connection with this case, concludes that defendant did not have a mental defect or disorder which would have prevented him from distinguishing right from wrong with respect to the current charges. The trial judge did not err in declining to find factor 15A-1340.4(a)(2)(d).

[4] Finally, the trial judge did err in failing to find G.S. 15A-1340.4(a)(2)(a), that the defendant has no record of criminal convictions or a record consisting solely of misdemeanors punishable by not more than sixty days imprisonment. The assistant district attorney stated to the trial judge that "*we do not have any record in this case of prior convictions of the defendant.* Only things we have in the (sic) regard is worthless checks that he made the statement to Officer Campbell about." (Emphasis added.) The district attorney did more than merely say that he did not seek an aggravating factor as to prior convictions; rather, he declared that the State had found no record of prior convictions. This statement by the *prosecuting attorney* was as good evidence as any to prove the fact *of an absence of a record of prior convictions. See State v. Albert, Dearen & Mills*, No. 524A83, slip op. at 16 (N.C. January 8, 1985). *State v. Nichols*, 66 N.C. App. 318, 311

S.E. 2d 38, *disc. rev. denied,* 311 N.C. 406, 319 S.E. 2d 278 (1984), which involved a statement by a defense attorney, is distinguishable. The assistant district attorney's statement was competent to prove the mitigating factor, and it was credible and uncontradicted, *State v. Jones*, 309 N.C. 214, 218-19, 306 S.E. 2d 451, 454-55 (1983).

These two errors by the trial judge in finding mitigating factors also would be grounds for ordering resentencing.

We remand for a new sentencing hearing in accordance with this opinion.

Remanded for new sentencing hearing.

Judges EAGLES and PARKER concur.

IN THE MATTER OF THE SPECIAL ASSESSMENT OF $32,218.23 AGAINST PROPERTY ON STADIUM DRIVE (PLAT BOOK 16-114) OWNED BY BILL R. DUNN

No. 8414SC480

(Filed 5 March 1985)

Municipal Corporations § 25— assessment for street improvements—appeal to superior court—scope of review

There is no right to a trial de novo or a jury trial in an appeal to superior court from a city council's assessment for street improvements. Original jurisdiction to determine questions of fact involved in assessment proceedings is derived from the General Assembly and vested in the city council; the right of appeal to the courts is created and governed by statute and the superior court may not determine de novo questions which are within the original jurisdiction of the city council. G.S. 160A-230; G.S. 160A-218; G.S. 160A-226; North Carolina Constitution Art. II, § 23.

APPEAL by plaintiff from *Barnette, Judge.* Judgment entered 16 December 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 9 January 1985.

This is a civil action in which plaintiff Bill R. Dunn seeks review of a special assessment levied on his property by the city council of defendant City of Durham.

Dunn owns property abutting Stadium Drive in the City of Durham. In April of 1980, the Durham City Council adopted a preliminary resolution providing for certain improvements along Stadium Drive, including installation of water lines, grading, curbing, guttering and paving. The preliminary resolution also indicated that the costs of these improvements were to be paid by assessments to affected properties, which included Dunn's property. After a public hearing on the proposed improvements and assessment, the proposed improvements were approved.

Pursuant to procedures prescribed by Article 10 of Chapter 160A of the General Statutes and Section 77 of the Durham City Charter (City Code), Dunn was assessed $32,218.23 for the improvements. Dunn was present at the hearings held before the city council for determining the specific amount of the assessments. He argued before the council that his property did not abut Stadium Drive and did not benefit from the improvements and that no assessment should be made with respect to his property. Nevertheless the council voted on 4 January 1983 to confirm the assessment. This action was reaffirmed on 17 January 1983.

By letter to the Durham City Clerk, dated 11 January 1983, Dunn gave notice of appeal to superior court from the council's action. In that letter, Dunn sought a reconsideration of the assessment on the grounds that (1) the street improvements did not abut his property; (2) the improvements did not benefit his property; and (3) the improvements were made solely to allow for development of an apartment complex on the other side of Stadium Drive from his land. Dunn also requested a trial by jury and asked that costs of the action be paid by the City.

A copy of this letter was mailed to the Clerk of Durham County Superior Court who filed it as a complaint and assigned it a civil case docket number. The City filed an answer pleading compliance with the applicable statutes and city code sections and asserting that the decision of the council was supported by adequate findings of fact made after careful deliberation.

After a hearing on 28 November 1983, the court entered an order indicating the issues that it would consider. These issues essentially involved whether the City had complied with applicable statutes and ordinances, whether it had abused its discretion and whether it had afforded Dunn due process. The court

also set out the procedure to be followed when the matter was heard, directed the City to compile a record, and denied Dunn's request for a jury trial.

The matter was heard before the judge on 15 and 16 December 1983. During the hearing and despite numerous admonitions from the court, Dunn, appearing *pro se*, continually attempted to present evidence and testimony and discuss matters outside the issues noted in the court's earlier order. Essentially, Dunn was attempting to present the matter as if in a *de novo* trial though the court was sitting in its appellate capacity.

The court found that the City had complied with the applicable procedures in assessing Dunn's property, that the council did not abuse its discretion, and that Dunn received due process. From a judgment confirming the assessment, Dunn appealed.

DeBank, McDaniel, Heidgard, Holbrook and Anderson, by L. Bruce McDaniel, for plaintiff-appellant.

Deputy Attorney Brenda M. Foreman for defendant-appellee City of Durham.

EAGLES, Judge.

On appeal, Dunn does not contend that the City failed to follow proper procedure in making the assessment. Rather, raising what appears to be an issue of first impression, he contends that he was entitled to a *de novo* trial before a jury on his appeal from the city council to the superior court and that the court erred in denying his request. We disagree.

G.S. 160A-230 provides as follows:

> If the owner of, or any person interested in, any lot or parcel of land against which an assessment is made is dissatisfied with the amount of the assessment, he may, within 10 days after the confirmation of the assessment roll, file a notice of appeal to the appropriate division of the General Court of Justice. He shall then have 20 days after the confirmation of the assessment roll to serve on the council or the city clerk a statement of facts upon which the appeal is based. *The appeal shall be tried like other actions at law.*

[Emphasis added.] Section 77(18) of the Durham City Code provides for appeal in a nearly identical manner but specifies that "[t]he appeal shall be tried in the Superior Court of Durham County as other actions at law." Dunn argues that the emphasized language entitles him to a *de novo* trial, "since" as he asserts without authority, "any other action at law in Superior Court would entitle [him] to such a new trial, *de novo*."

Our research has disclosed no case specifically interpreting the language on which Dunn relies. *Atlantic Coast Line R.R. v. Ahoskie*, 192 N.C. 258, 134 S.E. 653 (1936), cited by Dunn, does not, in our view, support his contention. In that case, our Supreme Court held that an aggrieved property owner's due process rights were protected by his right to appeal an assessment confirmation to superior court. We note that the right to appeal from assessment proceedings in that case was conferred by a 1915 statute whose wording is not significantly different from G.S. 160A-230, the present statute. *See* Cons. Stat. Section 2714 (c. 56, s. 9, 1915). Other cases decided under former versions of the statute are to the same effect. *See, e.g. Asheboro v. Miller*, 220 N.C. 298, 17 S.E. 2d 105 (1941); *Leak v. Wadesboro*, 186 N.C. 683, 121 S.E. 12 (1923); *Gunter v. Sanford*, 186 N.C. 452, 120 S.E. 41 (1923).

These cases and the statute itself speak of an *appeal* to the courts but say nothing of a trial *de novo*. Unless specifically stated otherwise, appeals to the district or superior court from administrative decision-making bodies invoke the appellate jurisdiction of those courts and not their original jurisdiction. *See, e.g.*, G.S. 96-15(h) (Cum. Supp. 1983) (appeal from decisions of the Employment Security Commission); G.S. 150A-46 through 150A-51 (appeal from decisions of agencies governed by Administrative Procedure Act); G.S. 153A-345(e) (appeal from decisions of county boards of adjustment); G.S. 160A-38, 160A-50 (appeal from municipal annexation proceedings); G.S. 160A-388 (appeal from municipal zoning boards of adjustment). *Compare* G.S. 7A-250(c) (appeals from county game commissions heard *de novo* in district court); G.S. 7A-271 (appeals from criminal actions in district court heard *de novo* in superior court).

Under the North Carolina Constitution, the power to tax is vested in the General Assembly. N.C. Const. Art. II, Sec. 23. This

power includes the power to provide for the improvement of municipal streets and to assess abutting property benefitted by improvements for the cost. *Gunter v. Sanford, supra.* Pursuant to G.S. 160A-216, this power is delegated to municipalities. *See also* G.S. 153A-185 (delegating same power to counties). Article 10 of G.S. Chapter 160A outlines the procedure to be followed by municipalities in levying special assessments. It specifically provides that the decisions of the city council as to the method of assessment and the total cost of an improvement are final and conclusive and not subject to further review or challenge. G.S. 160A-218, 160A-226. This includes decisions as to whether and how much a property is benefitted by the improvements. G.S. 160A-218(3).

Original jurisdiction to determine questions of fact involved in assessment proceedings is derived from the General Assembly and vested in the city council. Since a property owner's right of appeal from the city council to the courts is created and governed by statute, G.S. 160A-230, the jurisdiction acquired is derivative. *Atlantic Coastline R.R. v. Ahoskie*, 207 N.C. 154, 176 S.E. 264 (1934). On appeal to the courts, the owner of assessed property has no right to be heard there on the question of whether the lands are benefitted or not, *Gunter v. Sanford, supra,* but only on the validity of the assessment, its proper apportionment and other questions of law. *Id.; Raleigh v. Mercer*, 271 N.C. 114, 155 S.E. 2d 551 (1967) (decided under former statute 160-245). It is clear then, that the superior court may not determine *de novo* the questions which are within the original jurisdiction of the city council. The questions that Dunn attempted to argue on his appeal to superior court are clearly questions of fact with respect to which the city council's determination was final and conclusive. He was not entitled to a trial *de novo* and, therefore, not entitled to a jury trial. The superior court properly denied his request. This assignment of error is without merit.

Though it is not necessary to the resolution of this appeal, we note that the language of G.S. 160A-230 upon which Dunn relies, providing that appeals "shall be tried as other actions at law," serves merely to distinguish those actions from special proceedings for purposes of determining the applicable procedural rules. *See* G.S. 1-1 through G.S. 1-5.

Because all of Dunn's remaining arguments and assignments of error depend on our finding merit in his first contention, we need not consider them. Dunn did except to and assign as error entry of the superior court's judgment confirming the decision of the Durham City Council. That exception presents the general question of whether the court's conclusions of law are supported by its findings of fact. *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E. 2d 102 (1975). Dunn makes no argument relating to that question except in the context of facts he contends the court should have found from evidence he would have presented had he received a *de novo* trial. Nevertheless we have reviewed the record and conclude that the judgment of the superior court is supported by its findings. Accordingly, judgment is

Affirmed.

Judges WEBB and COZORT concur.

STATE OF NORTH CAROLINA v. RANDY DEAN CURTIS

No. 8425SC523

(Filed 5 March 1985)

1. Automobiles and Other Vehicles § 3.1— driving while license revoked—stipulation—sufficiency to show revocation and notice

Defendant's stipulation that "this is a certified and sealed record from the N. C. Division of Motor Vehicles, and . . . that there was a permanent revocation effective November 24, 1982; and that it also shows a mail date of suspension January 17, 1983" constituted sufficient evidence of both revocation and notice of revocation to support defendant's conviction of driving while his license was revoked. G.S. 20-28(b); G.S. 20-48.

2. Automobiles and Other Vehicles § 3.5— driving while license revoked—jury argument—rebuttable presumption of receipt of notice of revocation

In a prosecution of defendant for driving while his license was revoked, the trial court did not err in permitting the prosecutor to argue to the jury that the State's evidence of the mailing of the revocation of defendant's license created a presumption that the notice was received by defendant and that there was no evidence to the contrary.

APPEAL by defendant from *Howell, Judge.* Judgment entered 26 January 1984 in Superior Court, CALDWELL County. Heard in the Court of Appeals on 6 February 1985.

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

Appellate Defender Adam Stein by Assistant Appellate Defender Robin E. Hudson for defendant appellant.

COZORT, Judge.

The defendant was convicted of (1) operating a motor vehicle on a public highway while his operator's license was permanently revoked and (2) exceeding the posted speed limit. He does not challenge his conviction of the latter. As to the former, he raises several issues on appeal, most of which relate to the sufficiency of a stipulation about the defendant's driving record. The defendant contends that the following stipulation was insufficient evidence of revocation and notice of revocation to support his conviction: "[W]e will stipulate that this is a certified and sealed record from the N. C. Division of Motor Vehicles, and . . . that there was a permanent revocation effective November 24, 1982; and that it also shows a mail date of suspension January 17, 1983." We disagree with the defendant and hold that the defendant's trial was free of prejudicial error.

Officer Gary Clark of the Lenoir Police Department was the sole witness at trial. He testified that on 29 June 1983, he observed the defendant driving a burgundy Toyota on Dellwood Drive, a public street in Lenoir. Officer Clark requested and received from the North Carolina Division of Motor Vehicles (DMV) a certified copy of the driving record of the defendant which showed that the defendant's license was permanently revoked on 24 November 1982, with the suspension letter being mailed on 17 January 1983.

Prior to Officer Clark taking the stand, the defendant's attorney stated to the court: "I anticipate the State will be attempting to introduce into evidence a master check. I will move to resist except . . . that which shows his license was in revocation. The rest of it I contend was inadmissible." When Officer Clark testified that the suspension letter was mailed 17 January 1983, the following transpired:

Q. MR. MCKINNEY [State's attorney]: I understand the defendant will stipulate that the record so reflects that, is that correct?

MR. LACKEY [Defendant's attorney]: Your Honor, we will stipulate that this is a certified and sealed record from the N. C. Division of Motor Vehicles, and we will further stipulate that that record reflects that the defendant's license was suspended—excuse me—that there was a permanent revocation effective November 24, 1982; and that it also shows a mail date of suspension January 17, 1983.

THE COURT: Let the record show that.

Q. Officer, do the records reflect at anytime that the defendant's driving privileges had been reinstated?

A. No, sir.

MR. MCKINNEY: Your Honor, we move to introduce the record for that purpose to show the drivers license was permanently revoked.

THE COURT: Let the record show that that portion of the record is admitted.

The defendant contends that his conviction should be reversed for the following reasons: (1) the defendant's stipulation was not specific enough to show knowledge of the revocation; (2) the defendant's use of the words "mail date of suspension January 17, 1983" was not sufficient evidence that the revocation was mailed to the defendant in accordance with G.S. 20-48; (3) the DMV record was introduced only for the purpose of showing revocation and not that the defendant had received notice of the revocation; (4) the State improperly argued to the jury that defendant had the burden of rebutting the presumption of receipt arising from the evidence of mailing; and (5) the trial court committed prejudicial error by instructing the jury that the revocation had been "mailed to him."

The defendant was convicted of G.S. 20-28(b) which 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 . . . . For purposes of a *conviction* for driving while license is suspended or revoked,

mailing of the notice under G.S. 20-48 raises only a prima facie presumption that defendant received the notice and thereby acquired knowledge of the suspension or revocation. [Citations omitted.] Thus, defendant is not by this statute denied the right to rebut this presumption." *State v. Atwood*, 290 N.C. 266, 271, 225 S.E. 2d 543, 545-46 (1976). The State satisfies its burden of proof of a G.S. 20-28 violation when, "nothing else appearing, it has offered evidence of compliance with the notice requirements of G.S. 20-48 because of the presumption that he received notice and had such knowledge." *State v. Chester*, 30 N.C. App. 224, 227, 226 S.E. 2d 524, 526 (1976). G.S. 20-48(a) provides that "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."

The 17 January 1983 letter of notice of revocation began with this language: "Effective 12:01 A.M. November 24, 1982 your North Carolina driving privilege is permanently revoked for a third, or subsequent, conviction of driving under the influence of alcoholic beverages or drugs—G.S. 20-17(2) and 20-19(e)." The letter is addressed to Randy D. Curtis at 604 Broadway St. SW in Lenoir. That is the same address which appears on the 29 June 1983 citation charging the defendant with the offense in question here. The letter was properly certified and sealed.

We hold initially that the 17 January 1983 notice of revocation would have met the requirements of G.S. 20-48 if it had been introduced in its entirety. We now consider whether the stipulation below should be accorded the same conclusion.

[1] The defendant contends that the stipulation was not specific enough to properly authenticate the necessary underlying facts. He cites *State v. Powell*, 254 N.C. 231, 235, 118 S.E. 2d 617, 620 (1961), where the Supreme Court stated: "An unilateral statement by the solicitor may not be considered as evidence. Silence will not be construed as assent thereto unless the solicitor specifies that assent has been given. The court inadvertently fell into error by not insisting upon a full, complete, definite and solemn admission and stipulation." This case is distinguishable from *Powell*

Here the defendant, rather than remaining silent, stipulated that "there was a permanent revocation" and a "mail date." After the judge's charge to the jury, the defendant attempted to clarify his stipulation by stating: "I would request that the record reflect I did in no way stipulate—requested to clarify the instruction that I did not stipulate to the truth or accuracy of the record but *just that that is just what the record shows.*" (Emphasis added.) We hold that, in spite of his later efforts to retreat from his stipulation, the defendant's stipulation was sufficiently definite and specific to meet the requirements of G.S. 20-48. Therefore, we hold the use of the words "mail date" in the stipulation was sufficient evidence that the revocation was mailed to the defendant in accordance with G.S. 20-48. And, we reject the defendant's contention that the records were received by the judge to show revocation only and could not be considered as evidence of the mailing of the notice of the revocation.

[2] We next consider the defendant's contention that the trial court erred by allowing the State to argue to the jury over defendant's objection that the defendant had the burden of rebutting the presumption of receipt arising from the evidence of mailing. We find no merit in that argument. The State's evidence of the mailing of the notice of revocation, received in the form of the stipulation by the defendant, raises a presumption that the defendant received the notice, a presumption the defendant has the right to rebut. *See State v. Atwood, supra.* In other words, after the defendant stipulated to the DMV revocation and date of mailing, he was free to offer evidence that he never received the notice and had no knowledge of the revocation. He elected to present no evidence. It was not error for the trial court to allow the State to inform the jury that the evidence created a presumption that the notice was received and that there was no evidence to the contrary. The State's comments did not amount to the State telling the jury the defendant had the burden of proof, as the defendant has argued in his brief. Nor was it an improper comment on the defendant's failure to testify. The jury was still free to find that the defendant did not receive the notice. The court properly instructed the jury that "[p]roof beyond a reasonable doubt that the State complied with these 3 requirements of notice permits but does not compel you to find that the defendant received the notice and thereby acquired knowledge of his perma-

nent revocation." The defendant's assignment of error is overruled.

The defendant's final assignment of error is that the court erred by substantially misstating the facts during its instructions to the jury by stating that the notice of the revocation "had been mailed" to the defendant. We have held that the defendant's stipulation to the "mail date of suspension" put into evidence the mailing of the notice of revocation to the defendant. Thus the judge's statement that the notice "had been mailed" was a proper summary of the evidence. There was no error in the judge's instructions.

All of the defendant's assignments of error have been reviewed and we find no error.

No error.

Chief Judge HEDRICK and Judge JOHNSON concur.

RALEIGH G. KNIGHT, DOROTHY M. KNIGHT, DEAN H. WEBER, DOROTHY J. WEBER, WALTER BAKER, BARBARA BAKER, SARAH BOOKE, EDWARD W. MANNING, MARY W. MANNING, WILLIAM J. FARROW, LOUISE I. FARROW, RAY L. JERNIGAN, SARAH M. JERNIGAN, RALPH F. BAREFOOT, FRANCES M. BAREFOOT, WILLIAM JUDSON MOORE, PAULINE MOORE, SARAH C. GRAY, DAVID PRIVETTE, SANDRA PRIVETTE, JAMES M. GOODRUM, LEE IDA SHERRON, LESTER ROBINSON, WILLIAM P. BEAL, JAMES BRIDGERS, CHRISTINE BRIDGERS, JAMES MATTHEWS, JUDY MATTHEWS, NORA PETERSON, LILLIAN MATTHEWS, HARRY THOMAS, JUDY THOMAS, NORMAN R. SPENCER, RUBY A. COTTLE, META M. GREET, EMMETT H. HALE, JUANITA C. HALE, WILLIAM R. BYRD, EMILY R. BYRD, RUSH D. LAFON, GENEVA B. LAFON, PAUL W. HUNGERFORD, SR., LEAH H. HUNGERFORD, JOHN R. NETTLES, DARLA B. NETTLES, TRAVERSE F. WOOSTER, MARIE E. WOOSTER, A. H. BISHOP, BONNIE BISHOP, R. H. SHEPHERD, JR., EDNA SHEPHERD, HARRIET SCHWARZENBACK, CARLSON ROWE, VITA ROWE, CHRISTINE BURTON, ALBERT R. COOKE, MABLE T. COOKE, GEORGE GILGO, EVELYN GILGO, HARRY KROKER, THELMA K. CANADY, LACY C. WOODCOCK, HATTIE LEE RIVENBARK, DEWEY L. BORDEAUX, RUTH SEEGER, BETTY INGRAM, JACK HART, THELMA H. BAGWELL, MARVIN BEALE, RUBY Q. BEALE, ELINOR HAINES, W. E. BLACKBURN, INEZ BLAKE, NELLIE W. REAVES, MARGARET COOPER, NANCY BOWDEN, ROBIN BOREMAN, S. A. BABSON, BONNA BELL, JUANITA WALSH, GEORGE CURTIS, JAMES McGOWAN, ODILE McGOWAN, GUY BRAXTON, FLORENCE BRAXTON, BRUCE BENOIT, MARION BENOIT, DAVID WITTMER, CONNIE WITTMER, COLON KENNETH, JESSIE JOHNSON, ADA HOBBS, CARL WELKER, FREDERICK WILLIAM DORTCH, JR., ROBERT A. HODGES, CLARA M. HODGES v. CITY OF WILMINGTON

No. 845SC381

(Filed 5 March 1985)

1. Municipal Corporations § 2.6— provision of services to annexed area

In an action challenging an annexation ordinance, the City was not required to extend services in the annexed area as a condition precedent to annexation; moreover, evidence was presented that the City had taken steps to implement its plans, including the purchase of a fire tanker and pumper, the inclusion of funds in the budget for capital expenditures for water and sewer in the annexed area, and the letting of contracts leading towards the construction of water and sewer lines. Petitioners did not present any evidence that funding for fire protection was inadequate, a deed restriction cited by petitioners limiting the use of property on which a fire station had been proposed had expired, and petitioners did not show that the planned addition of three police officers would be inadequate or that they would be injured by the addition of only three additional personnel. G.S. 160A-47.

2. Municipal Corporations § 2.3— annexation—topographic features as boundaries —use of creek impractical

In an action challenging an annexation, petitioners failed to show noncompliance with G.S. 160A-48(e), which requires the use of natural topographic features wherever practical in setting boundaries, where petitioners did not show that it would have been practical for the boundary lines to follow a creek, and where the court found that the use of the creek as a boundary would require an additional sewage pumping station and use of additional resources.

3. Municipal Corporations § 2- annexation statutes—constitutional

G.S. 160A-56, which exempts certain counties from Part 3 of Chapter 160A, does not violate the equal protection clause of Section 19, Art. I of the North Carolina Constitution.

APPEAL by petitioners from *Cornelius, Judge.* Judgment entered 24 August 1983 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 30 November 1984.

On 23 November 1982, the City Council of the City of Wilmington (hereinafter the "City") adopted a resolution expressing its intent to annex an area consisting of 1,043 acres commonly known as "Area B." Pursuant to G.S. 160A-47, the City prepared a report setting forth its plans to provide certain services, including fire and police protection, to Area B. On 21 February 1983, the City enacted an annexation ordinance, to become effective 1 January 1984, which added Area B to the corporate limits of the City. Within thirty days after the enactment of the ordinance, petitioners brought this action in New Hanover Superior Court challenging the ordinance. Following a trial without a jury, Judge Cornelius made findings of fact and conclusions of law and affirmed the ordinance. Petitioners appeal.

Burney, Burney, Barefoot, Bain & Crouch, by Auley M. Crouch, III, for petitioner appellants.

Thomas C. Pollard, City Attorney, and Anthony Fox, Assistant City Attorney, for respondent appellee City of Wilmington.

JOHNSON, Judge.

The questions presented by this appeal concern the adequacy of the City's plans for extending fire and police protection into the annexed area, the establishment of a new boundary line, and

the constitutionality of G.S. 160A-56. For the following reasons, we affirm the judgment of the New Hanover Superior Court.

Under G.S. 160A-50(f), a party challenging an annexation action of a governing body must show (1) that the statutory procedure was not followed, or (2) that the provisions of G.S. 160A-47 were not met, or (3) that the provisions of G.S. 160A-48 were not met. *In re Ordinance of Annexation No. 1977-4*, 296 N.C. 1, 249 S.E. 2d 698 (1978). The party challenging the ordinance has the burden of showing error. *Id.*

[1] Petitioners first challenge the adequacy of the City's plans to provide fire and police protection under G.S. 160A-47. They contend that the City's plans do not support a conclusion that the City has "committed" itself to providing fire and police protection to the annexed area on a nondiscriminating level. They appear to argue that the City must have taken steps to implement plans. Such is not the law. As the Supreme Court stated in *In re Annexation Ordinance Adopted by the City of New Bern*, 278 N.C. 641, 647, 180 S.E. 2d 851, 855 (1971), "the question whether the municipality is then providing services pursuant to the plan of annexation is not before the court" and the "extension of services into an annexed area in accordance with the promulgated plan is not a condition precedent to annexation." If the service plans have not been implemented within the statutory period, an aggrieved party may seek a writ of mandamus under G.S. 160A-49(h). *Id.* Regardless, evidence was presented that the City had already taken steps to implement its plans, including the purchase of a fire tanker and pumper for extending fire protection services into the annexed area, the inclusion of funds in the 1983-84 budget of the City for capital expenditures for water and sewer in the annexed area, and the letting of contracts leading towards the construction of water and sewer lines into the area.

In support of their arguments that the City has made inadequate commitments, petitioners cite, with regards to fire protection: (1) the annexation report's proposal to construct a fire station adjacent to the clubhouse of the Wilmington Municipal Golf Course, which is located in the annexed area, despite a deed restriction limiting the use of the property to use as a golf course; (2) allegedly inadequate funding for the acquisition of land and furnishing of fire protection; (3) the lack of provisions for a tem-

porary fire station; and (4) the expected average response time of four minutes within the annexed area exceeded the average response time elsewhere in the City of 3.1 minutes. We deal with each of these seriatim: (1) The deed restriction to which petitioners refer had expired by its own terms. (2) Petitioners did not present any evidence that the funding was inadequate. (3) The trial court's findings of fact, which we find to be supported by competent evidence and therefore binding, *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E. 2d 189 (1980), indicate that the City has already purchased a tanker truck and pumper for the area, and that the tanker truck would be used until water distribution lines and hydrants are installed. A similar plan was upheld by the Supreme Court in *Dunn v. City of Charlotte*, 284 N.C. 542, 201 S.E. 2d 873 (1974). (4) We rejected a similar contention in *In re Durham Annexation Ordinance*, 66 N.C. App. 472, 311 S.E. 2d 898, *disc. rev. denied*, 310 N.C. 744, 315 S.E. 2d 701 (1984). The reasoning applied in that case applies with equal force to the present case.

With regard to police protection, petitioners submit that the addition of only three additional police officers to the police department to help serve the 2,700 residents of the annexed area, when the City presently had 2.11 full time police officers per 1,000 inhabitants, did not constitute an adequate commitment to provide police protection. We disagree. Several plans have been approved by appellate courts in which the plans made no provisions for the hiring of additional personnel. *See In re City of Durham Annexation Ordinance*, 69 N.C. App. 77, 316 S.E. 2d 649, *disc. rev. denied*, 312 N.C. 493, 322 S.E. 2d 553 (1984); *In re Annexation Ordinance Adopted by the City of Jacksonville*, 255 N.C. 633, 122 S.E. 2d 690 (1961); *Williams v. Town of Grifton*, 19 N.C. App. 462, 199 S.E. 2d 288 (1973). Petitioners have failed to show that the addition of three personnel would be inadequate or that they would be injured by the addition of only three additional personnel. *See In re City of Durham Annexation Ordinance*, 69 N.C. App. 77, 316 S.E. 2d 649, *disc. rev. denied*, 312 N.C. 493, 322 S.E. 2d 553 (1984). We therefore conclude that petitioners have failed to show that the City has not complied with G.S. 160A-47.

[2] Petitioners' next contention is that the City failed to comply with G.S. 160A-48(e) when it fixed the southern boundary of the

annexation to run along Greenville Loop Road rather than farther south along Hewlett's Creek. G.S. 160A-48(e) provides:

> In fixing new municipal boundaries, a municipal governing board shall, wherever practical, use natural topographic features such as ridge lines and streams and creeks as boundaries, and if a street is used as a boundary, include within the municipality land on both sides of the street and such outside boundary may not extend more than 200 feet beyond the right-of-way of the street.

Thus, in order to show non-compliance with G.S. 160A-48(e), petitioners have to show that (1) the boundary chosen does not follow natural topographic features and (2) it would have been practical for the boundary to follow such natural topographic features. *Greene v. Town of Valdese*, 306 N.C. 79, 291 S.E. 2d 630 (1982); *Garland v. City of Asheville*, 63 N.C. App. 490, 305 S.E. 2d 66, *disc. rev. denied*, 309 N.C. 632, 308 S.E. 2d 715 (1983). There was a conflict in the evidence as to whether Greenville Loop Road followed a natural topographic feature. Nevertheless, petitioners have failed to show that it would be practical for the boundary lines to follow Hewlett's Creek. The evidence showed, and the trial court found, that the use of Hewlett's Creek as a boundary would have required the addition of a new sewage pumping station, and the use of additional resources. *See Garland v. City of Asheville, supra; see also* Report of the Municipal Government Study Commission (1959).

[3] Petitioners' remaining contention is that G.S. 160A-56, which exempted certain counties from Part 3 of Chapter 160A,[1] violates the equal protection clause of Section 19, Article I of the North Carolina Constitution. We rejected an identical contention in *Campbell v. City of Greensboro*, 70 N.C. App. 252, 319 S.E. 2d 323, *disc. rev. denied*, 312 N.C. 492, 322 S.E. 2d 553 (1984).

For the foregoing reasons, the judgment of the superior court is

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1. G.S. 160A-56 was repealed by 1983 Session Laws, c. 636, s. 27, effective to all annexations where resolutions of intent were adopted on or after 29 June 1983. 1983 Sess. Laws, c. 636, s. 38.

Affirmed.

Judges WHICHARD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. SALVATORE MONTALBANO

No. 8426SC372

(Filed 5 March 1985)

1. *Criminal Law* § 148.1 — *denial of motion to dismiss for double jeopardy*—interlocutory appeal—substantial right involved

Defendant was entitled to pursue an appeal based on the denial of his motion to dismiss for double jeopardy even though it was interlocutory because it concerned a substantial right, that of the defendant not to be put on trial twice for the same offense. G.S. 1-277, G.S. 7A-27.

2. Constitutional Law § 34— double jeopardy—prior mistrial

Defendant's motion for dismissal based on double jeopardy was properly denied where the judge in his first trial had declared a mistrial after personally observing a police officer in conversation with two jurors, where the police officer was the chief investigator of the case and had assisted the district attorney in court, and where some of the victims of defendant's alleged crime were colleagues of the police officer. The trial judge acted reasonably and within his discretion in declaring a mistrial sua sponte to implement the important state policies of preserving the impartiality of the jury and assuring the credibility of the jury verdict.

APPEAL by defendant from *Grist, Judge.* Order entered 12 March 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 January 1985.

Defendant was charged with four counts of assault with a deadly weapon on an officer and two counts of assault with a deadly weapon with intent to kill. On 4 October 1983 a jury of twelve, plus one alternate, was empaneled and the presentation of evidence began.

On the morning of 6 October 1983, the trial judge, Judge Charles C. Lamm, observed Investigator Steve Harkness of the Mecklenburg County Police Department in conversation with one or two jurors at a coffee shop before trial. Since Officer Harkness was assisting the District Attorney in handling the case, the trial

judge conducted a hearing out of the presence of the jury to determine what had been said.

After the hearing, the trial judge declared a mistrial. On 5 March 1984, defendant filed a motion to dismiss on double jeopardy grounds. On 7 March 1984, after a hearing, Judge William T. Grist denied defendant's motion. Defendant appeals this order.

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

Paul Kaplan; and J. Tony Serra and Denise Anton, by Denise Anton, for defendant appellant.

ARNOLD, Judge.

[1] At issue in this appeal are the questions (1) whether defendant will be subjected to double jeopardy on retrial, when during his first trial on the same charges the court declared a mistrial, and (2) whether, in view of the necessity for the mistrial and the public interest in completed trials, the retrial should be barred, or not. Although this appeal is interlocutory, it potentially concerns a "substantial right," that of the defendant not to be put to trial twice for the same offense. *See State v. Jones*, 67 N.C. App. 413, 417-18, 313 S.E. 2d 264, 267-68 (1984) (Johnson, J., dissenting). Under our statutes, G.S. 1-277 and G.S. 7A-27, defendant accordingly may pursue this appeal.

[2] We now consider defendant's double jeopardy claim. Jeopardy "attaches" when a defendant in a criminal prosecution is put on trial on a valid indictment or information, before a court of competent jurisdiction, after arraignment, after plea, and when a competent jury has been empaneled and sworn. *State v. Shuler*, 293 N.C. 34, 42, 235 S.E. 2d 226, 231 (1977). In the present case, the jury had been empaneled, and the third day of testimony was about to begin. Jeopardy technically had attached. Yet, our conclusion that jeopardy had attached, in a case where mistrial is declared prior to the verdict, only "begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." *Illinois v. Somerville*, 410 U.S. 458, 467, 93 S.Ct. 1066, 1072, 35 L.Ed. 2d 425, 433 (1973).

A second trial after the first has ended by an order of mistrial is not precluded by a plea of former jeopardy where the

mistrial was declared, *even over defendant's objections*, due to a "physical necessity" or "the necessity of doing justice." *Shuler*, 293 N.C. at 42-43, 235 S.E. 2d at 231. The standard employed in our state is consistent with that established by the Supreme Court in *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824):

> [T]he law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, *taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.* They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. . . .

Perez, 22 U.S. (9 Wheat.) at 580, 6 L.Ed. at 165 (emphasis added).

More recently, the Supreme Court has stated that in scrutinizing the trial judge's actions, and determining double jeopardy claims, an appellate court should not overlook the public interest in completed trials: "[t]he interests of the public in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction, need not be forsaken by the formulation or application of rigid rules that necessarily preclude the vindication of that interest." *Somerville*, 410 U.S. at 463, 93 S.Ct. at 1070, 35 L.Ed. 2d at 430.

The appellate court's evaluation of a double jeopardy claim must involve a balancing of interests:

> [W]here the declaration of a mistrial implements a reasonable state policy and aborts a proceeding that at best would have produced a verdict that could have been upset at will by one of the parties, the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice. *Wade v. Hunter, supra.*

Somerville, 410 U.S. at 471, 93 S.Ct. at 1074, 35 L.Ed. 2d at 435.

The trial court in the present case observed an improper conversation between one or two jurors and a police officer, Steve

Harkness, of the Mecklenburg County Police Department. In its order of mistrial the court made the following findings of fact, in pertinent part:

> 2. . . . that from the testimony of Officer Harkness outside the presence of the jury the conversation concerned nothing about the case being tried except an inquiry by Juror Number 4 as to whether or not she might be off next week and as to whether or not the case might continue through the weekend, to which Officer Harkness replied he thought the trial could go today and possibly tomorrow, and that if it was not finished Friday that it would probably be recessed for the weekend and continue on Monday.
>
> . . . .
>
> 4. That at the time Officer Harkness was aware of the Court's previous cautionary instructions. . . .
>
> 5. That Officer Harkness is an investigator for the Mecklenburg County Police Department and has been present in court seated with the district attorney and assisting the district attorney throughout the trial of this matter, and was the chief investigator of the matters being tried.
>
> 6. That this case involves charges against the defendant among which charges two Mecklenburg County police officers are the alleged victims of the defendant's alleged criminal assaults.
>
> 7. That Officer Harkness felt at the time he did not intentionally violate the court's cautionary instructions and does not feel at this time he has violated these instructions.

The trial judge then concluded that Officer Harkness, whether intentionally or not, violated the court's cautionary instructions, which had been given repeatedly. The judge concluded further that:

> 2. . . . [D]ue to the Court's personal observation of the events which are the subject of this inquiry and the Court's findings of fact based on its personal observation appearing above, the credibility of the Court has been put at issue in this case.

> 3. That due to the involvement with two jurors an improper element has been placed into the case which the Court feels affects the ability of the two jurors to do their duty as fair and impartial jurors; and the Court further feels that there is a reasonable probability that the parties in this case can no longer receive a fair and impartial trial.

After concluding his order, the trial judge then observed that he had:

> [N]o reason to doubt what Officer Harkness said about his conversation with the juror and the events that took place but due to the Court's personal observation of the events that took place my credibility has been placed at issue, and for that reason and because of the repeated instructions by the Court and due to the fact that what Mr. Harkness did and the members of that department are alleged victims in this matter, and due to the fact that as I understand it Mr. Harkness is the chief investigator regarding this matter, the Court has no alternative but to declare a mistrial.

Thus, because the police officer was the chief investigator of the case and had assisted the district attorney in court, because some of the victims of the defendant's alleged crime were colleagues of the police officer, because two jurors were involved in the conversation, and because the judge had personally observed the conversation, the trial judge concluded that his credibility and the impartiality of the jury would be in question if the trial proceeded.

The trial judge was faced with multiple sources of suspicion. In these circumstances, the trial judge acted reasonably and within his discretion in declaring a mistrial *sua sponte* to implement the important state policies of preserving the impartiality of the jury and assuring the credibility of the jury verdict, *cf. State v. Mettrick*, 305 N.C. 383, 385, 289 S.E. 2d 354, 356 (1982) (discussing the need for public confidence in the jury verdict in cases where police officers who are state witnesses have contact with jury members as jury custodians). The trial judge sought to protect the defendant, and to see that the "ends of public justice" would not be defeated. He did not abuse his discretion.

The record contains no evidence of bad faith or irregularity on the part of the prosecution or the trial judge. The mistrial

clearly was not manufactured to harass the defendant or to deprive him of trial before a particular jury, thus giving the State a more favorable opportunity to convict, *see Shuler*, 293 N.C. at 46, 235 S.E. 2d at 233, *citing United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed. 2d 267 (1976); *Illinois v. Somerville*, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed. 2d 425 (1973). *See also Gori v. United States*, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed. 2d 901 (1961); *State v. Simpson*, 303 N.C. 439, 447, 279 S.E. 2d 542, 547 (1981). ("Absent oppressive practices by the State, . . . the public's interest in a final adjudication of guilt or innocence outweighs the defendant's right to be free from further judicial scrutiny after a mistrial is declared.")

The public interest in a completed trial of the defendant, resulting in either acquittal or conviction, runs strong in this case, especially given the reasonableness of the trial judge's action. It outweighs the defendant's right to proceed to verdict before the first jury empaneled in this case. We affirm the denial of the defendant's motion for dismissal of the charges against him on double jeopardy grounds.

Affirmed.

Judges WELLS and PARKER concur.

STATE OF NORTH CAROLINA v. JACK THEODORE MOOSE

No. 8419SC370

(Filed 5 March 1985)

1. **Criminal Law § 76.7— voluntariness of confession—sufficiency of evidence and findings**

The evidence and findings supported the trial court's determination that defendant's confession was made voluntarily after defendant had been warned of his constitutional rights and had signed a waiver of rights form.

2. **Robbery § 4.5— aiding and abetting in armed robbery—sufficiency of evidence**

The State's evidence was sufficient to support conviction of defendant for armed robbery as an aider and abettor where it tended to show that defendant and a companion entered a store, the companion pulled out a gun and held it in the owner's face, the owner gave them the money which was in the cash regis-

ter and his wallet, and defendant picked up the wallet and money and then left the store with his companion.

APPEAL by defendant from *Helms, Judge*. Judgment entered 15 November 1983 in Superior Court, ROWAN County. Heard in the Court of Appeals 10 January 1985.

Defendant was charged on an indictment, proper in form, with armed robbery. At trial the State presented evidence which tended to show that at 11:00 p.m. on 1 February 1983, defendant and another man, Jerry, entered Livengood Country Store. Luther Harkey, one of the owners of the store, testified that defendant took a soft drink, went to the checkout counter, and reached into his pocket. Jerry, standing nearby, turned around and pointed a loaded revolver in Harkey's face and told Harkey to open the cash register and empty its contents into a paper bag. The cash register contained approximately forty dollars. Defendant took the bag of money and Harkey's wallet, and the two men left the store.

After his arrest 3 February 1983 on a warrant for a probation violation, defendant, while in custody, signed a confession which was admitted into evidence. As to what happened in the store, defendant's confession varied from Harkey's testimony only in that defendant said Jerry took Harkey's wallet and carried the money from the store.

The jury returned a verdict of guilty of robbery with a firearm. From the verdict and judgment imposing a sentence of fourteen years in prison, defendant appeals.

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

J. H. Rennick for the defendant appellant.

PARKER, Judge.

[1] In defendant's first assignment of error he contends that the trial court erred in admitting his confession and waiver of rights form into evidence. At trial defendant testified that he had confessed but that the statement read by Officer Sides of the Rowan County Sheriff's Department was false, and that before he signed he had not read his confession. Defendant's trial testimony dif-

fered from his confession in that he testified that after the robbery Jerry pointed the gun at him and told him to go to the car. When they reached the car, defendant gave Boogie, the driver, and Jerry the jacket he had borrowed and all the money in his pocket. On rebuttal Deputy Sheriff John Noble testified for the State that he was present when defendant made the statement read into evidence, that Officer Sides read the statement back to defendant, and then defendant read the statement himself.

The North Carolina rule for determining the admissibility of a confession is the totality of circumstances test of voluntariness, which includes all circumstances material to a determination of whether defendant made a knowing, intelligent and valid waiver of the right to counsel and the right to silence. *State v. Lang*, 309 N.C. 512, 308 S.E. 2d 317 (1983); *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983). A finding by the trial judge that the accused freely and voluntarily made an inculpatory statement will not be disturbed on appeal when the finding is supported by competent evidence, even when there is conflicting evidence. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976).

At the voir dire hearing to determine the admissibility of defendant's confession, the State's evidence tended to show that on 4 February 1983 Officer Sides advised defendant of his constitutional rights; defendant said he understood his rights and signed the waiver of rights form; defendant was not promised anything, nor threatened, nor told that there were other charges against him; defendant was coherent and did not appear sleepy or confused; he neither requested an attorney, nor asked that the questioning be stopped. Defendant, on voir dire, testified that he was arrested for probation violation; he spent the night in jail; he was told that there was enough evidence to convict him of two armed robberies and possibly accessory to murder; and he was told his rights which he fully understood. He was nervous, and he confessed.

The judge made the following findings:

> That the defendant was arrested on the night of February 3, 1983, on a probation violation from the State of Texas and taken to the Rowan County jail. The next morning he was questioned by Police Officer Glenn Sides at approximately 10:40 a.m. Prior to talking with the defendant on

> February 4, 1983, Officer Sides advised the defendant of each of his constitutional rights regarding self-incrimination. That the defendant indicated that he understood his rights. He signed a waiver of his rights in the presence of Officer Sides.
>
> Officer Sides talked with the defendant for approximately 30 minutes, and that the defendant was approximately 25 years of age on that date. That the defendant did not appear to be sleepy or confused to Officer Sides, and, on the contrary, appeared to be coherent. That he never at any time requested any attorney and that he never at any time asked to be permitted to stop answering questions.
>
> That no promises or offers of reward of inducement were made by any law enforcement officers for the defendant to make a statement. There was *no threat . . . [to] induce* the defendant to make a statement by law enforcement officers.
>
> That after being read his rights and signing a waiver of his rights, the defendant gave a statement to Officer Glenn Sides, which he signed . . . .

The trial judge concluded:

> [T]hat none of the constitutional rights, either federal or state, of the defendant were violated by his questioning, detention, or confession . . . .
>
> That the statement made by the defendant to Officer Sides on February 4, 1983, was freely, voluntarily, and understandingly [sic]. That the defendant was in full understanding of his constitutional rights to remain silent and right to counsel and all other rights, and that he freely, knowingly, intelligently, and voluntarily waived each of those rights and made the statement to the officers as above mentioned.

These findings, which are supported by the evidence, are binding on this Court. *State v. Harris, supra.* We hold that defendant's confession was voluntary and properly admitted into evidence.

Defendant's next assignment of error is that the trial judge erred in sustaining objections to three questions. As all three

questions were answered, in spite of the objections, defendant cannot show any prejudice and this assignment is overruled.

[2] In his last assignment of error defendant contends that the trial judge erred in denying his motion to dismiss at the close of all the evidence. Upon defendant's motion to dismiss, all the evidence favorable to the State must be considered; such evidence must be deemed true and considered in the light most favorable to the State, and the State is entitled to every inference of fact which may be reasonably deduced therefrom. *State v. Dover*, 308 N.C. 372, 302 S.E. 2d 232 (1983).

Applying this test to the evidence, it is clear that there was ample evidence that defendant aided and abetted in the armed robbery. The elements of armed robbery under G.S. 14-87 are: (1) the unlawful taking or attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; and (3) whereby the life of a person is endangered or threatened. *State v. Beaty*, 306 N.C. 491, 293 S.E. 2d 760 (1982). The evidence viewed in the light most favorable to the State tended to show, in summary, that defendant entered the store with Jerry, Jerry pulled out his gun and held it in Harkey's face, Harkey gave them the money that was in the cash register and his wallet, defendant picked up the wallet and the bag of money, and defendant and Jerry left the store. Clearly this evidence satisfies the elements of armed robbery and is sufficient to withstand defendant's motion to dismiss.

We have carefully examined defendant's assignments of error and find

No error.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. DAVID EUGENE CRAIN

No. 8429SC313

(Filed 5 March 1985)

1. **Robbery § 6.1— two counts—sentences not required to be consecutive**

Where two or more armed robbery offenses are being disposed of in the same sentencing proceeding, the sentences are not required by G.S. 14-87 to be consecutive because defendant is not yet serving a sentence for any of the counts at the time of the sentencing proceeding; the court may impose consecutive sentences, but is not required to do so.

2. **Criminal Law § 23.3— guilty plea—understanding of sentence**

The trial court properly found that defendant entered a guilty plea freely, understandingly and voluntarily, despite defendant's evidence that his plea was based on information from his attorney that he would receive only a 7-year sentence, where defendant signed a plea transcript which detailed the offenses to which he was pleading guilty and the possible sentences he would receive, including the minimum of 14 years per count for armed robbery. G.S. 15A-1022.

3. **Constitutional Law § 48— effective assistance of counsel—failure to subpoena character witnesses**

In a prosecution for armed robbery, defendant received effective assistance of counsel even though his counsel did not subpoena character witnesses in an effort to mitigate the sentence because the presumptive sentence and the mandatory sentence for armed robbery are the same. G.S. 14-87(d).

APPEAL by defendant from *Cornelius, Judge.* Judgment entered 2 January 1984 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 7 January 1985.

This is a criminal case in which the defendant, pursuant to a plea arrangement, pleaded guilty to two counts of armed robbery and one count of common law robbery.

Before accepting defendant's plea, the trial court examined defendant pursuant to G.S. 15A-1022 concerning his guilty plea and the possible sentence he could receive. Defendant then signed a plea transcript indicating *inter alia* that he understood the sentence that could be imposed. The trial court concluded that the plea was entered into freely, understandingly and voluntarily, and accepted the guilty plea. Defendant was sentenced to not less than 14 years for each count of armed robbery to run consecutively and a three year sentence for common law robbery to run con-

currently with the armed robbery sentences. On 4 May 1983 defendant made a motion for appropriate relief which was denied.

In a 28 November 1983 hearing on a second motion for appropriate relief, the State's evidence tended to show that defendant signed a standard plea transcript which included a statement that defendant understood that he could be imprisoned for a maximum of 90 years and a minimum of 14 years and that he understood that his plea bargain called for a sentence of 14 years minimum for each count of armed robbery and three years concurrent for the one count of common law robbery. Defendant's attorney testified that he never told the defendant that he would only receive a sentence of 7 years, but only that he would try to work out a bargain with the district attorney.

On the issue of effectiveness of counsel, defendant's attorney testified that he offered no character witnesses because he knew that the defendant would have to receive the statutory minimum sentence because it was also the presumptive sentence for the crimes to which defendant pleaded guilty.

Defendant testified that his attorney informed him that he would only get 7 years for all three counts of robbery, that he was confused when answering the judge's questions when reviewing the plea transcript, and that he believed that if he cooperated with the district attorney, he would only get 7 years. Defendant testified that his attorney had only talked to him two or three times and that the attorney failed to call any character witnesses in order to try to reduce his sentence. Defendant's pastor testified that after talking to defendant's attorney he was under the impression that the sentence would run concurrently.

From denial of his motions for appropriate relief, defendant appeals.

Attorney General Edmisten by Assistant Attorney General Nonnie F. Midgette, for the State.

Randy D. Duncan, for the defendant-appellant.

EAGLES, Judge.

I

Defendant first assigns as error the trial court's imposition of consecutive 14 year sentences. Defendant argues that the trial court erred in determining that the language of G.S. 14-87, which states that "sentences imposed pursuant to this section shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder," removes from the trial court any discretion as to whether the sentences for armed robberies tried or disposed of at the same time should be consecutive. Defendant urges that the language "any sentence being served" means a prison term actually in effect pursuant to a judgment and order of commitment at the time defendants are being sentenced under this statute. Here, defendant had no prior convictions and at the time of this court appearance was not serving a sentence.

[1] We hold that, where two or more armed robbery offenses are being disposed of in the same sentencing proceeding, the sentences are not required by G.S. 14-87 to be consecutive to one another because the defendant is not yet serving a sentence for any of the counts at the time of the sentencing proceeding. The sentencing court may impose consecutive sentences, but it is not *required* to do so. For this reason, the consecutive sentence imposed in 82CRS0288 is vacated and remanded for the trial court's determination, in its discretion, on whether to impose consecutive or concurrent sentences.

II

[2] Defendant next assigns as error, the trial court's holding that defendant's guilty plea was entered freely, understandingly and voluntarily. We find no error.

Defendant's evidence tended to show that his attorney informed him that he would only receive a 7 year sentence. Defendant also contends that he entered his plea of guilty based on his understanding of the information that he received from his attorney. The State's evidence from the plea transcript, the court's questions to defendant and the testimony of defendant's attorney all tend to support the State's contention that defendant was properly and adequately informed of the consequence of his plea

and that he entered into the plea arrangement freely, knowingly and voluntarily.

In *State v. Thompson*, 16 N.C. App. 62, 190 S.E. 2d 877, *cert. denied*, 282 N.C. 155, 191 S.E. 2d 604 (1972), we held that evidence that the defendant signed a plea transcript and the judge made careful inquiry of the defendant regarding his plea, is sufficient to show that the plea was entered into freely, understandingly and voluntarily. *See also State v. Hunter*, 11 N.C. App. 573, 181 S.E. 2d 752, *affirmed*, 279 N.C. 498, 183 S.E. 2d 665 (1971); *cert. denied, Hunter v. North Carolina*, 405 U.S. 975 (1972). Here defendant signed a plea transcript which detailed the offenses to which he was pleading guilty, and the possible sentences he could receive, including the minimum of 14 years per count of armed robbery. Based on the evidence before the trial court, we hold that there was no error in the acceptance of the plea tendered by defendant and that defendant tendered his guilty plea freely, voluntarily and understandingly.

III

[3] Defendant's last assignment of error concerns the trial court's findings that defendant received effective assistance of counsel. Defendant contends that his counsel was inadequate. We disagree.

Defendant argues that effective assistance of counsel requires that his counsel should have subpoenaed character witnesses in an effort to mitigate the sentence. G.S. 14-87(d) provides for a presumptive sentence of 14 years and a minimum sentence of 14 years. *State v. Yarborough*, 64 N.C. App. 500, 307 S.E. 2d 794 (1983). Since the minimum sentence and the presumptive sentence under G.S. 14-87(d) is 14 years, the court may impose that sentence without making any findings of mitigating or aggravating factors. *State v. Horne*, 59 N.C. App. 576, 583-84, 297 S.E. 2d 788, 793 (1982). The trial court found no aggravating factors. Because the law provides that 14 years is the mandatory minimum sentence, the sentence could not be less than 14 years for each count of armed robbery, notwithstanding the persuasiveness of any evidence in mitigation. For this reason, there is no basis for complaint about counsel's services based on his failure to present character witnesses.

We note that for a defendant to receive a new trial based on ineffective assistance of counsel, defendant must show: (1) that his counsel's performance was defective and (2) his defective performance prejudiced the defendant. *Strickland v. Washington*, --- U.S. ---, 104 S.Ct. 2052, *reh. denied*, --- U.S. ---, 104 S.Ct. 3562 (1984). The proper standard for evaluating counsel's performance is a rule of reasonableness based on the totality of the circumstances. Under this standard defendant must show that a different result at trial could occur. Defendant has not met this burden.

For the reason stated, we vacate the consecutive sentence imposed in 82CRS0288 and remand for resentencing in accordance with this opinion.

In all other respects, we affirm the trial court.

Affirmed as to 82CRS0287 and 82CRS0289; vacated and remanded as to 82CRS0288.

Judges WEBB and COZORT concur.

STATE OF NORTH CAROLINA v. CONNIE LEE RAYE

No. 848SC528

(Filed 5 March 1985)

1. **Incest § 1— sexual advances to sister of prosecutrix**

In a prosecution for incest, testimony by the sister of the prosecutrix concerning defendant's sexual advances to her was competent to show intent as well as the unnatural lust of defendant.

2. **Criminal Law § 96— withdrawal of evidence—error cured**

Error in the admission of incompetent evidence was cured when the trial court withdrew the evidence from the jury's consideration with appropriate instructions.

3. **Criminal Law § 50.1; Rape and Allied Offenses § 4— sexual fantasies of children—opinion testimony by pediatrician**

A physician who had practiced pediatrics for fifteen years was properly permitted to state his opinion that children don't fantasize to the extent of lying about sexual abuse.

4. Rape and Allied Offenses § 5— unsupported testimony of prosecutrix—sufficiency for conviction

The unsupported testimony of the prosecutrix that vaginal penetration had occurred was sufficient to support defendant's conviction of second-degree rape.

APPEAL by defendant from *Barefoot, Judge.* Judgments entered 11 January 1984 in Superior Court, WAYNE County. Heard in the Court of Appeals 6 February 1985.

Defendant was charged in proper bills of indictment with incest, second degree rape and second degree sexual offense. At trial the State offered evidence tending to show the following:

On or about 11 March 1983, defendant entered his stepdaughter's bedroom and, according to her testimony, had sexual contact with her against her will. On another occasion near the same date defendant entered his stepdaughter's bedroom and carried her from her bed to the living room floor where he had intercourse with her against her will. On a third occasion defendant took his stepdaughter from the home in a car ostensibly to visit her grandmother (defendant's mother). On the way he stopped the car and told the stepdaughter to get into the back seat where he proceeded to have intercourse with her against her will. The stepdaughter, prosecutrix, testified about a number of similar incidents which occurred over a period of time. She said that defendant had threatened her "during these times," once with a gun. Her testimony was corroborated by an older sister who also testified about defendant's sexual advances toward her.

The jury returned a verdict of guilty as to all counts for which the court sentenced defendant to twenty years for the second degree rape and twelve years for the second degree sexual offense, sentences to run concurrently, and four and one-half years for incest, sentence to begin at the expiration of the twenty year sentence. From this judgment defendant appealed.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General T. Buie Costen, for the State.

Jordan & Braswell, by Louis Jordan, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant's first and second assignments of error relate to testimony by State's witnesses as to sexual misconduct by defendant other than the charged offenses. The first challenged testimony was admitted when the older sister of the prosecutrix testified in corroboration of her sister, the alleged victim. After she gave testimony concerning the incidents for which defendant was charged, the State asked the older sister, ". . . what, if anything, did your father do to you sexually." The older sister testified about several times when her stepfather had made sexual advances to her.

Although evidence of other wrongdoing by defendant is not admissible to show character or disposition to commit the charged offense, such evidence is admissible if it tends to prove any fact relevant to the charged offense. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). Our courts have been liberal in allowing evidence of similar sex offenses, especially when the sex impulse manifested is of an unusual or unnatural character. 1 H. Brandis, *Brandis on North Carolina Evidence* Sec. 92 (2d rev. ed. 1982). In trials for incest it is competent for the State to offer evidence of a defendant's advances to a daughter not involved in the charged offenses for the purpose of showing intent as well as the unnatural lust of the defendant. *State v. Edwards*, 224 N.C. 527, 31 S.E. 2d 516 (1944). In the instant case, testimony of the older sister was offered in corroboration of the prosecutrix. Although some of the older sister's testimony related to her stepfather's sexual advances to her, rather than to the prosecutrix, in a trial for incest such testimony is allowed.

[2] Challenged testimony was also presented at trial when Eleanor Raynor, who works for Protective Services for Children, Department of Social Services, testified in corroboration of the prosecutrix's testimony. In answer to a question Ms. Raynor said: "That when she [the prosecutrix] was about seven years old that her father had had sexual relations with her then and he had went to jail behind this." The court allowed defendant's objection and motion to strike this testimony. The court then instructed the jury not to consider the objectionable testimony.

Where objectionable evidence is withdrawn and the jury instructed not to consider it we assume that jurors are people of

character and sufficient intelligence to fully understand and comply with the court's instructions. *State v. Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977). When incompetent evidence is withdrawn from the jury's consideration by appropriate instructions from the trial judge, any error in admission of the evidence is ordinarily cured. *State v. Hawley*, 54 N.C. App. 293, 283 S.E. 2d 387 (1981), *disc. rev. denied*, 305 N.C. 305, 291 S.E. 2d 152 (1982). In the present case, although the testimony concerning the prior incarceration may not have been admissible, the trial judge's prompt action effectively cured any possible prejudice growing out of the jury hearing this testimony.

[3] Next defendant asserts that the trial court improperly allowed Dr. Ponzi, defendant's witness, to testify about children's propensity to fantasize about sexual abuse. The defendant argues that although the court properly admitted Dr. Ponzi as an expert in pediatrics, he was not an expert in psychiatry and therefore could not testify as to the likelihood of children fantasizing about sexual abuse. At trial Dr. Ponzi, who had done a history and physical on the prosecutrix at the request of the Department of Social Services, testified that he was able to determine that she had been sexually abused. The basis for this determination, he said, was her history and not any physical manifestations of abuse. On cross-examination of Dr. Ponzi, the following interchange took place:

> Q. Are you saying from your practice in your particular profession children don't fantasize?
>
> A. [Dr. Ponzi:] Not to that extent. . . . I do not believe children will lie concerning sexual abuse. . . . I don't believe they make up stories along those lines.

Ordinarily the trial court has discretion to determine whether a witness is sufficiently qualified to be an expert. *In re Peirce*, 53 N.C. App. 373, 281 S.E. 2d 198 (1981). To be an expert it is enough that through study or experience he has acquired expertise such that he 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, 247 S.E. 2d 905 (1978). Here, Dr. Ponzi stated that he had practiced pediatrics for a period of fifteen years. The experience Dr. Ponzi acquired as a pediatrician gave him qualifications superior to those of the jury to determine whether or not a child would

fantasize concerning sexual abuse. *See In re Peirce*, 53 N.C. App. 373, 384, 281 S.E. 2d 198, 205 (1981); *State v. Woods*, 286 N.C. 612, 213 S.E. 2d 214 (1975), *death penalty vacated sub nom. North Carolina v. Woods*, 428 U.S. 903, 49 L.Ed. 2d 1208, 96 S.Ct. 3207 (1976). Therefore we hold this assignment of error is without merit.

[4] In his final argument defendant contends that there was insufficient evidence to submit the case to the jury on the charge of second degree rape because the State presented no evidence of vaginal penetration other than the testimony of the prosecutrix. Our examination of the record reveals that the prosecutrix testified several times during direct examination that vaginal penetration had occurred. Dr. Ponzi was unable to corroborate penetration because he examined the girl several weeks after the last alleged incident.

In a prosecution for rape, the unsupported testimony of the prosecutrix is sufficient to require submission of the case to the jury. *State v. Bailey*, 36 N.C. App. 728, 245 S.E. 2d 97 (1978). The prosecutrix's testimony without other evidence is sufficient to support a finding by the jury that there was penetration. *State v. Ashford*, 301 N.C. 512, 272 S.E. 2d 126 (1980). In this case the testimony of the prosecutrix without more was sufficient to support the jury verdict.

No error.

Judge JOHNSON concurs in the result.

Judge COZORT concurs.

STATE OF NORTH CAROLINA v. NELSON EDWARD CLARK

No. 8427SC364

(Filed 5 March 1985)

1. Criminal Law § 91— Speedy Trial Act—delay caused by cancellation of term of court excluded

There was no violation of the Speedy Trial Act where defendant's first trial resulted in a mistrial on 26 July 1983, his case was scheduled for retrial

on 31 August 1983, a personal tragedy involving the judge scheduled to preside resulted in cancelling that term, and the next term commenced 3 October 1983, but defendant's case was not reached until 7 December 1983. The legislative intent was that the State should not be prejudiced in Speedy Trial Act computations by the cancellation of a term of court due to extraordinary circumstances involving the judge scheduled to preside, so that the period between 31 August and 3 October was properly excluded and defendant was retried within the 120 days allowed by the law in effect at the time of the mistrial. G.S. 15A-701(a1)(4) (1981 Cum. Supp.); G.S. 15A-701(b)(8).

2. **Constitutional Law § 52— constitutional right to speedy trial—no violation**

Defendant was not denied his Sixth Amendment right to a speedy trial where defendant's retrial was 134 days after an initial mistrial because defendant did not meet his burden of showing that the delay was due to the State's wilfulness or neglect, the record reveals no assertion by defendant of his right to a speedy trial prior to his motion to dismiss, and defendant has shown no prejudice from the delay.

3. **Automobiles and Other Vehicles § 127.2— driving under the influence—identification of defendant as driver—evidence sufficient**

Defendant's motion to dismiss the charge of driving under the influence was properly denied where the evidence showed that a witness observed an automobile "weaving backwards and forwards" on a roadway and eventually going into a ditch; the witness described the driver as wearing a large black or brown broad-rimmed hat; a deputy who arrived fifteen to thirty minutes later observed the automobile in the ditch with defendant sitting behind the steering wheel; defendant was wearing a "brownish" broad-rimmed cowboy-style hat, had a strong odor of alcohol about him, slurred speech, was "a little bit rowdy" and unsteady on his feet; defendant had, in the deputy's opinion, consumed a sufficient amount of alcoholic beverages to impair his driving; defendant's subsequent breathalyzer reading was .21; the deputy found several empty beer cans and a soft drink bottle with the odor of alcohol about it in the car and a six-pack in the front seat; defendant was the only person in the vehicle or at the scene when the deputy arrived; only the driver's door was open; and the only way to get out of the car from the front seat was by the driver's side.

4. **Criminal Law § 124.1— verdict sheet resubmitted—no prejudice**

Defendant was not prejudiced by proceedings regarding the verdict where the verdict sheet originally showed the number "12" after the question of whether defendant was guilty, the court returned the sheet to the jury with instructions to answer the items yes or no, guilty or not guilty, the jury returned the verdict sheet with the word guilty following the question, and the jurors unanimously affirmed their finding when polled. G.S. 15A-1238.

APPEAL by defendant from *Saunders, Judge.* Judgment entered 7 December 1983 in Superior Court, LINCOLN County. Heard in the Court of Appeals 10 January 1985.

Defendant appeals from a judgment of imprisonment entered upon his conviction of driving under the influence, second offense.

Attorney General Edmisten, by Assistant Attorney General W. Dale Talbert, for the State.

Robert C. Powell for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court erred in denying his motion to dismiss for violation of the Speedy Trial Act, G.S. 15A-701 *et seq.* The pertinent facts are as follows:

Defendant's first trial on this charge resulted in the declaration of a mistrial on 26 July 1983. The case was scheduled for retrial on 31 August 1983. That term was cancelled, however, due to a personal tragedy involving the judge scheduled to preside. The next term commenced on 3 October 1983. The case was not reached at that term or at the next, which commenced on 7 November 1983. It was ultimately tried at the next term thereafter, which commenced on 7 December 1983.

The law in effect at the time of the mistrial allowed the State 120 days in which to retry defendant. G.S. 15A-701(a1)(4) (1981 Cum. Supp.); *State v. Jones,* 70 N.C. App. 467, 320 S.E. 2d 26 (1984). Defendant's contention that the State had only ninety days to retry him is incorrect. The retrial here commenced 134 days after the declaration of mistrial. The State thus had the burden of establishing that at least fourteen of those 134 days were excludable. *Jones,* 70 N.C. App. at 469, 320 S.E. 2d at 27, citing *State v. Edwards,* 49 N.C. App. 426, 427, 271 S.E. 2d 533, 534 (1980), *appeal dismissed,* 301 N.C. 724, 276 S.E. 2d 289 (1981).

G.S. 15A-701(b)(8) provides that in counties not conclusively presumed to be unable to meet the requirements of the Speedy Trial Act due to the limited number of court sessions, "determination shall be made in each case whether the applicable time limit . . . cannot reasonably be met due to the limited number of court sessions scheduled . . . ." We find this provision applicable to the facts presented. It indicates a legislative intent that the State should not be prejudiced in Speedy Trial Act computations by the cancellation of a term of court due to extraordinary circumstances involving the judge scheduled to preside. We thus hold that the

trial court properly excluded the period between 31 August 1983, the date the cancelled term was to commence, and 3 October 1983, the date the next succeeding term commenced. With this exclusion, defendant was retried within the requisite 120 day period.

[2] Defendant contends that even if his statutory right to a speedy trial was not violated, he was denied his right to a speedy trial under the Sixth Amendment to the United States Constitution. The factors to be assessed in determining whether a defendant has been deprived of the constitutional right to a speedy trial are: (1) length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant from the delay. *Barker v. Wingo*, 407 U.S. 514, 530, 33 L.Ed. 2d 101, 117, 92 S.Ct. 2182, 2192 (1972); *see also State v. Hill*, 287 N.C. 207, 211-13, 214 S.E. 2d 67, 71 (1975).

The length of delay here, 134 days, standing alone, is not sufficient to be unreasonable or prejudicial. *See State v. Hartman*, 49 N.C. App. 83, 86, 270 S.E. 2d 609, 612 (1980). The reason for the delay is not clear from the record. The defendant, however, has the burden of showing that the delay was due to the State's wilfulness or neglect. *State v. Spencer*, 281 N.C. 121, 124, 187 S.E. 2d 779, 781 (1972); *State v. Johnson*, 275 N.C. 264, 269, 167 S.E. 2d 274, 278 (1969). That burden has not been met. The record reveals no assertion by defendant of his right to a speedy trial prior to his motion to dismiss. Finally, defendant has shown no prejudice from the delay. We thus find no basis for concluding that defendant's Sixth Amendment right to a speedy trial was denied.

[3] Defendant contends the court erred in denying his motion to dismiss. He argues that the evidence was insufficient to identify him as the driver when the automobile was being operated or to prove that he drove it while intoxicated.

Upon a motion to dismiss, the evidence must be considered in the light most favorable to the State, giving it the benefit of every reasonable inference to be drawn. When there is sufficient evidence, direct or circumstantial, from which the jury could find that the defendant committed the offense charged, the motion should be denied. *State v. Finney*, 290 N.C. 755, 757, 228 S.E. 2d 433, 434 (1976).

> 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. (Citation 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, in the light most favorable to the State, showed the following:

A witness observed an automobile "weaving backwards and forwards" on the roadway and eventually going off the roadway into a ditch. The witness described the driver as wearing a large black or brown broad-rimmed hat. He did not see anyone else in the vehicle.

A sheriff's deputy arrived at the scene fifteen to thirty minutes later and observed the automobile in the ditch. He saw defendant sitting behind the steering wheel and asked him to step out. Defendant was wearing a "brownish" broad-rimmed cowboy-style hat. He had a strong odor of alcohol about him. His speech was slurred, he was "a little bit rowdy," and he was unsteady on his feet. In the deputy's opinion defendant had consumed a considerable amount of alcoholic beverages, sufficient to impair his driving abilities. Defendant's subsequent breathalyzer reading was .21.

The deputy found several empty beer cans in the car. He also found a soft drink bottle with the odor of alcohol about it. A six-pack of beer was in the front seat.

Defendant was the only person in the vehicle when the deputy arrived. No one else was at the scene. Defendant was sitting behind the steering wheel on the driver's side. The driver's door was open; all other doors were closed. The only way anyone in the front seat could get out of the car was on the driver's side.

The foregoing evidence clearly permits a reasonable inference that defendant was driving the automobile when it was being operated and that he was intoxicated at the time. *Compare Snead*, 295 N.C. 615, 247 S.E. 2d 893; *State v. Cummings*, 267 N.C.

300, 148 S.E. 2d 97 (1966). The court thus properly denied the motion to dismiss.

[4] Defendant contends the court erred in taking an improper verdict. The verdict sheet originally showed the number "12" after the question "Is [defendant] guilty of driving while under the influence of an alcoholic beverage?" The court returned the sheet to the jury with instructions to answer the issues " 'yes', or 'no', 'guilty', or 'not guilty', depending on what the verdict is . . . ." The jury then returned the sheet with the word "guilty" following the above question.

We find no error in the procedure followed. The court merely required that the verdict sheet properly reflect the jury's finding. Moreover, defendant admits that the clerk subsequently polled the jury, *see* G.S. 15A-1238, and that the jurors unanimously affirmed their finding that defendant was guilty of driving under the influence of an alcoholic beverage. It is thus clear that defendant was not prejudiced by the proceedings regarding the verdict.

We have examined defendant's contentions regarding the court's evidentiary rulings and instructions to the jury and have found no prejudicial error warranting a new trial. We conclude that defendant had a fair trial, free from prejudicial error.

No error.

Chief Judge HEDRICK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. ARTHUR WILLIAMS

No. 845SC318

(Filed 5 March 1985)

Criminal Law § 138— second-degree murder—time to deliberate and premeditate —improper aggravating factor

The trial court erred in finding as an aggravating factor in sentencing defendant for second-degree murder that "defendant did have time to deliberate and premeditate" the killing. G.S. 15A-1340.4(a).

APPEAL by defendant from *Reid, Judge*. Judgment entered 7 December 1983 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 8 January 1985.

Defendant was charged with first degree murder and pled guilty to the charge of second degree murder. He appeals pursuant to G.S. 15A-1444(a1) arguing that his sentence, which exceeded the presumptive term set by G.S. 15A-1340.4, is not proper because the aggravating factor found was not supported by the evidence introduced at the sentencing hearing.

The State presented the following evidence in the sentencing hearing. Lindsey Dinkins testified that on 21 August 1983 he went to defendant's house with Murphy, the deceased, and Stephen Nix. They drove to defendant's house in Dinkins' van. Dinkins was driving the van, Murphy was in the passenger seat in front, and Nix was in the back. Defendant had Murphy's car keys because he was supposed to do some work on Murphy's car, and Murphy wanted to get his keys back. They parked on the street in front of defendant's house. Nix got out of the van and went inside the house. Defendant then came out of the house and walked up to the van. Murphy said to him, "Arthur, give me my keys." The defendant replied, "Man, the way I have been working—" and Murphy interrupted, "Give me my keys." According to Dinkins, defendant started to say something else and Murphy said, "I don't want to hear it." Murphy repeated, "I want my keys." Then defendant ran into the house and ran out with a gun. He came over to the van and cursed at Murphy. Dinkins got out of the van and walked away. He heard a noise, walked back to the van and saw Murphy, still in the van, with blood on him. Dinkins called out to defendant, "Arthur, get this man some help."

Dinkins further testified that he was not aware of any argument between defendant and Murphy before that incident.

Detective R. A. Henderson of the Wilmington Police Department testified as follows. He examined Murphy after the shooting occurred. Murphy had a burned down cigarette between two fingers in his left hand and a white tissue or handkerchief in his right hand between the thumb and palm. Henderson read the first statement that defendant made at the police department, in which he claimed that he was not involved in the incident. He also read defendant's second statement, made one day later. In that state-

ment defendant said that when he came up to the van to give Murphy his keys, Murphy started cursing at him and then put his hand in his pocket. Murphy knocked the keys from defendant's hand and shoved defendant. Defendant stated,

> "Murphy then got over me with something apparently in his hand. I then went into my house, returned with a shotgun. Murphy had got back in the van. I walked to the door of the van and asked him not to do this to me because I do not bother anybody. I stay at home and tend to my business. Murphy then grabbed the barrel of the gun and tried to take it out of my hand. The gun went off. He lent back in the chair. I told my wife to call the police and rescue squad. I was not aware of the gun being loaded."

The State also moved to introduce into evidence the autopsy report which, according to the State, showed that the cause of Murphy's death was a single gunshot wound to the head and that his blood alcohol level was 0.17.

Defendant's evidence consisted of numerous character witnesses who testified favorably as to his character and reputation in the community.

At the close of the sentencing hearing, the trial judge found the following nonstatutory aggravating factor pursuant to G.S. 15A-1340.4(a):

> 27. Additional written findings of factors in aggravation: The defendant did have time to deliberate and premeditate in the obtaining and use of the Deadly Weapon which caused the Killing which constituted this crime.

The trial judge found the following statutory mitigating factors:

> 1. The defendant has no record of criminal convictions.
>
> . . . .
>
> 26. The defendant has been honorably discharged from the United States armed services.
>
> 27. The defendant has been a person of good character or has a good reputation in the community in which he lives.

The judge concluded that the factor in aggravation outweighed the factors in mitigation and imposed a sentence of

twenty-five years, a term in excess of the presumptive sentence of fifteen years for second degree murder, as specified in G.S. 15A-1340.4(f)(1).

Attorney General Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

William Joseph Boney, Jr., for defendant appellant.

PARKER, Judge.

Although not presented as an assignment of error, we will exercise our discretion under Rule 2, Rules of Appellate Procedure, to examine whether the aggravating factor found by the trial judge, that "[d]efendant did have time to deliberate and premeditate in the obtaining and use of the Deadly Weapon which caused the Killing which constituted this crime" was a proper aggravating factor pursuant to G.S. 15A-1340.4(a).

General Statutes 15A-1340.4(a) provides that a judge "may consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing. . . ." A determination by the preponderance of the evidence in the sentencing hearing that a defendant premeditated and deliberated in a killing can be an aggravating factor to be used in sentencing a defendant who pleads guilty to second degree murder. *State v. Melton,* 307 N.C. 370, 298 S.E. 2d 673 (1983).

In the present case the judge's only finding in aggravation that "defendant did *have time* to deliberate and premeditate in the obtaining and use of the Deadly Weapon which caused the Killing which constituted this crime" (our emphasis), does not increase defendant's culpability, because defendant could have had time to deliberate and premeditate in the killing, but still could have killed the victim without deliberation and premeditation. The finding that he had time to deliberate and premeditate does not mean that he actually premeditated and deliberated in the killing. As this finding does not increase defendant's culpability, it is not reasonably related to the purposes of sentencing and is not a proper aggravating factor under G.S. 15A-1340.4(a).

On resentencing, in order to find premeditation and deliberation as an aggravating factor, the trial judge must consider the

evidence and determine whether, by the preponderance of the evidence, the defendant (i) had the specific intent to kill the victim before the actual killing, *State v. Misenheimer*, 304 N.C. 108, 282 S.E. 2d 791 (1981); and (ii) executed that intent in a cool state of blood in furtherance of a fixed design to gratify a feeling of revenge or to accomplish an unlawful purpose, and not under the influence of a violent passion suddenly aroused by sufficient provocation. *State v. Marshall*, 304 N.C. 167, 282 S.E. 2d 422 (1981); *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769, *cert. denied*, 368 U.S. 851, 82 S.Ct. 85, 7 L.Ed. 2d 49 (1961). Under the holding in *Melton*, if the trial judge makes an actual finding of premeditation and deliberation, supported by the preponderance of the evidence, this finding may properly be weighed as an aggravating factor for purposes of sentencing in this case.

The weighing of aggravating and mitigating factors is within the sound discretion of the trial judge. *State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658, *review denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982). In the present case, however, where the aggravating factor was incorrect, the trial judge could not have properly balanced the aggravating and mitigating factors, and the case must be remanded for resentencing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983); *State v. Gaynor*, 61 N.C. App. 128, 300 S.E. 2d 260 (1983).

For the reason stated defendant's sentence must be vacated, and the case remanded for resentencing.

Vacated and remanded.

Chief Judge HEDRICK and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. WILLIAM A. PERGERSON

No. 8410SC328

(Filed 5 March 1985)

Criminal Law § 16.1 — joinder of misdemeanor and felony proper — dismissal of felony — jurisdiction of misdemeanor remains in superior court

The felony of larceny of a motor vehicle and the misdemeanor of unauthorized use of a motor vehicle were properly joined, and the superior

court had jurisdiction over the misdemeanor after the felony was dismissed, where there was evidence that a 1972 Lincoln Continental owned by the father of a friend with whom defendant often stayed was seen spinning out of control by a patrolman, who gave chase; that the driver of the Lincoln, wearing clothes similar to those worn by defendant at a party earlier in the evening, got out of the car and ran after the car struck a utility pole; that the officer identified defendant as the driver of the Lincoln; and that defendant did not have permission to drive the car. The two offenses were clearly based on the same act or transaction. G.S. 7A-271(a)(3); G.S. 15A-926(a).

Chief Judge HEDRICK concurring.

APPEAL by defendant from *Brewer, Judge*. Judgment entered 5 January 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 8 January 1985.

Defendant was indicted and pled not guilty to larceny of an automobile having a value of $2,900 and unlawful operation of that same automobile. Upon State's motion, the two offenses were joined for trial in superior court. At the close of State's evidence, the larceny charge was dismissed for insufficient evidence. At the close of all evidence defendant moved to dismiss the charge of unauthorized operation of a motor vehicle for lack of jurisdiction. The motion was denied. The jury returned a verdict of guilty, and defendant received a one year sentence.

The issue before this court is whether the superior court lacked jurisdiction to try the misdemeanor charge once the felony charge had been dismissed.

Attorney General Edmisten by Associate Attorney General Barbara P. Riley for the State.

Appellate Defender Adam Stein by James R. Glover for defendant appellant.

PARKER, Judge.

General Statute 7A-271 provides, in pertinent part:

> (a) The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this Article, except that the superior court has jurisdiction to try a misdemeanor:
>
> . . . .

(3) Which may be properly consolidated for trial with a felony under G.S. 15A-926. . . .

Defendant's two offenses were joined for trial pursuant to G.S. 15A-926(a) which provides for joinder "when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." A ruling on a motion to consolidate will not be disturbed on appeal absent an abuse of discretion. *State v. Corbett*, 309 N.C. 382, 307 S.E. 2d 139 (1983); *State v. Hardy*, 67 N.C. App. 122, 312 S.E. 2d 699 (1984).

The State's evidence tended to show that on 6 March 1983, Marion Williams owned a 1972 brown Lincoln Continental which he had loaned to his daughter, Elizabeth Choplin. Williams had not given defendant permission to drive the car. The Lincoln would start without an ignition key, just by turning the ignition switch.

The evening of 5 March 1983, Elizabeth Choplin was with defendant at a party at her neighbor's house. Defendant was wearing a yellow T-shirt with holes, blue jeans, tennis shoes and a baseball cap. Choplin left the party and went home with her husband and defendant. Defendant often stayed at the Choplin's house. The Lincoln was parked on the street, and Elizabeth Choplin did not give defendant permission to drive the car.

At approximately 12:30 a.m. on 6 March 1983, Patrolman Curtis Womble saw a brown Lincoln Continental spinning out of control on Glenwood Avenue. Patrolman Womble turned on his siren and the driver of the Lincoln sped up. The Lincoln turned down Cleveland Street, then turned down a gravel alley, skidded, hit some bushes and trees, and struck a utility pole. The driver, a white male wearing white shoes, blue jeans, a yellow T-shirt with holes, and a red baseball cap, got out of the car and ran. Womble pursued him unsuccessfully for several minutes and then returned to his patrol car and reported the Lincoln's license number. Womble then went to Elizabeth Choplin's house on Cleveland Street. He testified that when he saw Donald Choplin, Elizabeth Choplin's husband, he knew that Choplin was not the driver of the Lincoln because "he was too short, too fat, and his hair wasn't

long enough." Womble identified defendant as the driver of the Lincoln.

Defendant testified on his own behalf that he had four mixed drinks and left the party at 8:00 p.m. He called his grandfather and rode his bicycle to his grandfather's house. He spent the night at his grandfather's and returned to the Choplin's at 8:00 a.m. the following morning. Defendant denied driving the Lincoln.

Testimony by defendant's grandfather, Leroy Choplin, corroborated defendant's testimony.

We find that joinder pursuant to G.S. 15A-926(a) was appropriate because the two offenses in this case both related to the same 1972 Lincoln Continental which the evidence tended to show defendant was driving. Clearly the two offenses, larceny and unauthorized use of a motor vehicle, were "based on the same act or transaction."

Defendant admits that after joinder the superior court properly had jurisdiction pursuant to G.S. 7A-271(a)(3), but argues that the felony charge was a sham, manufactured only to create original jurisdiction in the superior court. Essentially, defendant is saying that the two offenses should not have been joined for trial under G.S. 15A-926(a), and the misdemeanor charge should have been heard in district court. Defendant, however, has presented no evidence to support his contention that the felony charge was a sham or to show that the grand jury proceedings were not conducted in good faith. Defendant has shown no prejudice arising from the consolidation or abuse of discretion by the trial judge. The two offenses were properly joined under G.S. 15A-926(a), and the superior court had jurisdiction over the misdemeanor charge under G.S. 7A-271(a)(3). *See State v. Fearing*, 304 N.C. 471, 284 S.E. 2d 487 (1981).

No error.

Judge WHICHARD concurs.

Chief Judge HEDRICK concurs in result.

Chief Judge HEDRICK concurring.

Defendant's one assignment of error is set out in the record as follows:

> The defendant assigns as error the following:
>
> 1. Entry of judgment, granting the State's motion to consolidate the two charges and denial of the defendant's motion to dismiss the charge of unauthorized use of a motor vehicle; on the ground that this offense was a misdemeanor over which the District Court had exclusive jurisdiction and that the charge was improperly brought in Superior Court by being combined with a felony charge which the State did not and could not prove.

In his brief defendant argues that, while the charges on which he was tried arose out of the same transaction, the felony charge was "a sham," serving only to "manufactur[e]" original jurisdiction over the misdemeanor charge in the superior court.

Defendant was charged in a proper bill of indictment with felonious larceny of an automobile belonging to M. E. Williams. He was found guilty of unauthorized use of the same motor vehicle in violation of G.S. 14-72.2, a misdemeanor. The offense of unauthorized use of a motor vehicle is a lesser included offense of felonious larceny of a motor vehicle. *State v. Coward*, 54 N.C. App. 488, 283 S.E. 2d 536 (1981); *State v. Ross*, 46 N.C. App. 338, 264 S.E. 2d 742 (1980).

The question of the consolidation of a misdemeanor offense and a felony which were "part of the same act or transaction" so as to give the superior court original jurisdiction over the misdemeanor was first raised by the State's gratuitous motion to join the charges in the present case and is discussed by both the State and the defendant in their briefs as well as by the majority opinion. I believe the question to be meaningless in the context of this case. The short answer to defendant's contention that the superior court lacked jurisdiction to try defendant for the misdemeanor offense is that the superior court has exclusive original jurisdiction to try all felonies and any lesser included offenses of the particular felony charged. G.S. 7A-271(a)(1). In the instant case, where defendant was charged with felonious larceny of an automobile belonging to M. E. Williams, the superior court had

exclusive, original jurisdiction to try the defendant for that offense and for the lesser included offense of the misdemeanor described in G.S. 14-72.2.

I agree with the majority that the defendant had a fair trial free of prejudicial error.

PENN COMPRESSION MOULDING, INC. v. MAR-BAL, INC.

No. 8411SC149

(Filed 5 March 1985)

Contracts § 4.2— contract for commissions on referred business—insufficient consideration

The trial court erred in granting summary judgment for plaintiff in an action to recover commissions under an alleged contract where defendant had to promise to pay a commission on business referred by plaintiff in order to force plaintiff to pay its overdue account. There was no valid enforceable contract due to a lack of legally sufficient consideration, and defendant was entitled to judgment as a matter of law.

Judge PHILLIPS dissenting.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 8 November 1983 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 26 October 1984.

This is an action to recover commissions pursuant to an alleged contract between plaintiff and defendant. From the granting of plaintiff's motion for summary judgment and the entry of judgment for plaintiff, defendant appeals.

Mast, Tew, Armstrong & Morris, P.A., by George B. Mast and L. Lamar Armstrong, Jr., for plaintiff appellee.

Narron, O'Hale, Whittington and Woodruff, P.A., by Gordon C. Woodruff and John P. O'Hale, for defendant appellant.

JOHNSON, Judge.

The issue presented by this appeal is whether the trial court erred in granting summary judgment for plaintiff. For the following reasons, we hold the court erred in granting summary judgment for plaintiff.

In ruling upon a motion for summary judgment, the court must determine from the materials before it whether a genuine issue of material fact exists, and if not, whether a party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c); *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The materials before the trial court in the present case showed the following:

Plaintiff and defendant were business competitors in the manufacturing of insulators. From at least May 1977 until December 1978, plaintiff purchased a line of insulators which it was not producing from defendant. In August 1977, plaintiff approached defendant about a job for Cutler-Hammer, Inc. which plaintiff was unable to perform and asked defendant if defendant could perform it. Defendant proceeded to manufacture these insulators for Cutler-Hammer, Inc. Somewhere along the way, plaintiff and defendant had a disagreement and plaintiff discontinued purchasing insulators from defendant.

In a letter dated 26 October 1978, plaintiff, through its president, R. S. Robinson, wrote defendant a letter to the attention of Mr. Jim Balough, defendant's president, confirming a telephone conversation that they had had earlier. In this letter, Robinson expressed his dismay over the cancellation of an order placed with plaintiff by Cutler-Hammer and the transfer of that business to defendant. Robinson also indicated in the letter that Robinson and Balough had discussed a sales commission during the telephone conversation. Balough had offered to pay a 5% commission but Robinson objected, demanding a 10% commission on sales to Cutler-Hammer. According to the letter, Balough agreed to consider a 10% commission and to advise Robinson further.

By letter dated 5 December 1978, defendant, through Balough, demanded payment from plaintiff for all overdue invoices from plaintiff, in the total amount of $13,568.25. The letter reads in pertinent part as follows:

> Please submit the total amount due $13,568.25, by December 15, 1978. If a check is not received for the total amount due by December 22, 1978, I will then turn this case over to my Law Firm and Collection Agency. However, if total payment arrives as mentioned above, I will then start paying Penn Compression a 7% commission or $.0924 per part for the

> Cutler-Hammer Plug-In Insulators. As of now, I have orders for *60,000 parts of which I have already shipped 22,298* pieces. This amounts to $2,060.33 in commission for you. I will mail you a check for the above amount as soon as I received (sic) payment from Cutler-Hammer, Inc.

In response to defendant's letter, Robinson wrote a letter dated 14 December 1978 in which he referred to a telephone conversation with Balough on 16 November 1978, in which they agreed to pay the invoices when an agreement on the commissions for Cutler-Hammer could be reached. Plaintiff, through Robinson, accepted defendant's offer of a 7% commission. Robinson also enclosed a check in the amount of $11,507.92, which represented payment on defendant's invoices ($13,568.25) less a 7% commission on $29,433.36 ($2,060.33), the price of goods shipped to Cutler-Hammer by defendant. The letter also contained the following statement:

> By endorsement of this check the following is agreed upon:
>
> (1) Commission at the rate of 7% will be paid to Penn Compression Moulding, Inc. on all business received by Mar-Bal from Cutler-Hammer for Plug-In Insulators part number 56-3989.
>
> (2) The above commission to be paid within 60 days of invoice. . . .

On the back of the check, plaintiff typed the following notation: "Endorsement of this check signifies agreement to terms of letter dated Dec. 14, 1978."

Defendant endorsed and negotiated the check sometime before the end of 1978.

Plaintiff alleged in its complaint that the parties entered into a contract for the payment of commissions on all business placed with defendant by Cutler-Hammer for a certain insulator. It sought to recover commissions due on all of these insulators sold to Cutler-Hammer by defendant. Defendant denied the existence of a contract for the payment of commissions in its answer.

In order for a contract to be enforceable, it must be supported by consideration. *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972). Such considera-

tion to support a contract has been defined as some benefit or advantage to the promisor or some loss or detriment to the promisee. *Carolina Helicopter Corp., v. Cutter Realty Co.*, 263 N.C. 139, 139 S.E. 2d 362 (1964). Generally, a promise to perform a preexisting obligation is not sufficient consideration in exchange for a promise by the adverse party. *Anthony Tile and Marble Co. v. H. L. Coble Construction Co.*, 16 N.C. App. 740, 193 S.E. 2d 338 (1972). In the case *sub judice*, it is undisputed that plaintiff owed defendant $13,568.25 for goods it had received from defendant. The forecast of evidence tends to show that in order for defendant to force plaintiff to pay its overdue account, defendant had to promise to pay a commission of 7% on business plaintiff referred to defendant. In exchange for this promise to pay a commission, plaintiff, however, incurred no loss or detriment. It was already under an obligation to pay defendant on its overdue account.

Plaintiff contends that its forbearance from pursuing its claim for a commission of 10% constituted sufficient consideration for the alleged contract to pay it commissions. This contention is without merit. There is no evidence that plaintiff had a legal right to any commission. There is no evidence that defendant ever authorized Robinson or plaintiff to act as its sales agent, or that defendant solicited plaintiff's help in procuring the business of Cutler-Hammer.

Due to the lack of legally sufficient consideration, there was no valid enforceable contract requiring defendant to pay plaintiff a commission. There being no genuine issue of material fact as to the lack of consideration, defendant was entitled to judgment as a matter of law. The trial court's judgment must therefore be reversed and the cause remanded for the entry of a judgment in accordance with this opinion.

Reversed and remanded.

Judge WHICHARD concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion, the majority has gone too far and I can go only part of the way with them. I agree that the trial court erred

in rendering summary judgment for the plaintiff, but I disagree that plaintiff's claim should be dismissed as a matter of law. The evidence, I think, raises issues of fact for the jury, including what the parties agreed to, if anything, and whether such agreement was supported by a consideration.

VERNON, VERNON, WOOTEN, BROWN & ANDREWS, P. A. v. ERNEST MILLER

No. 8415DC632

(Filed 5 March 1985)

1. **Appeal and Error § 24— one issue—summary judgment—exceptions and assignments of error not required**

   Exceptions and specific assignments of error were not required where the sole issue presented in the brief was whether the trial court erred in granting summary judgment in favor of plaintiff.

2. **Attorneys at Law § 7.1— actions to collect attorneys' fee—summary judgment for plaintiff improper**

   Summary judgment should not have been granted for plaintiff attorneys in an action to collect legal fees where defendant agreed to pay plaintiff $700 to examine the title to real estate, render a title opinion and obtain title insurance, plus an additional amount based upon hourly charges for other services, but the positions of the parties varied materially as to the services each contemplated would be covered by each phase of the fee agreement and consequently as to the amount due plaintiff pursuant to the hourly charge provision.

APPEAL by defendant from *Allen, J.B., Judge.* Judgment entered 27 March 1984 in District Court, ALAMANCE County. Heard in the Court of Appeals 7 February 1985.

The plaintiff, a professional association of attorneys, brought this suit to enforce an alleged contract for fees for legal services rendered to defendant in connection with a real estate transaction involving the purchase by defendant of a damsite in Randolph County. In its complaint, plaintiff alleged that the parties agreed that plaintiff would render a title opinion and "take all actions necessary to obtain title insurance for the real property" for a fixed fee of $700.00; and that in addition, plaintiff would perform other legal services "required in assisting the parties to structure the transaction and preparing all documents relating to the sale"

for an additional fee based upon an hourly rate for attorney time and staff time. Plaintiff alleged that it performed all of the legal services required for consummation of the transaction and presented defendant with a statement for $700.00 for the title examination, which defendant paid, and a statement for $2500.00 for all other legal services rendered in consummating the transaction, which defendant refused to pay. Defendant answered, admitting that he agreed to pay $700.00 for services to be rendered by plaintiff, but denying that he had agreed to pay any additional amounts, and alleging that the additional charges were not reasonable.

In the course of discovery, defendant admitted that plaintiff had performed a number of services in addition to a title examination and obtaining title insurance; however, defendant continued to deny that these services had been authorized or that he had agreed to pay an additional amount for the services. Defendant admitted that his brother, Rodney Miller, who was acting as his attorney-in-fact pursuant to a power of attorney prepared by plaintiff, had received a letter from plaintiff setting forth plaintiff's understanding of the fee arrangement.

Plaintiff moved for summary judgment on the grounds that no genuine issue of material fact existed as to defendant's liability to pay the additional fee or as to the amount due. In support of the motion, plaintiff filed, among other affidavits, an affidavit of Jeffrey A. Andrews, the attorney in plaintiff's office with whom defendant had dealt. Mr. Andrews stated that he had told defendant that his fee for rendering a title opinion and obtaining title insurance would be $700.00 and that, in addition, a purchase agreement, deed and other documents would be necessary to complete the transaction and that he would perform these legal services at an hourly rate. He stated that he prepared numerous documents and conducted two closings, as desired by the parties to the transaction. Attached to the affidavit was an itemized description of the services rendered.

The defendant filed affidavits stating, for the first time, that he and Mr. Andrews had agreed that plaintiff would be paid for "extra documents" at an hourly rate but that he did not understand that "extra documents" included the documents necessary to transfer the property. He further stated that it was his under-

standing that the additional fees would range between $700.00 to $800.00 and that "all work necessary to clear the title would be included in the flat fee quote concerning the title examination and obtaining title insurance." He stated that much of the work charged for by plaintiff on an hourly basis was actually performed in order to "clear the title" and to prepare a title opinion and should have been included within the $700.00 fixed fee.

The trial court entered summary judgment for plaintiff in the amount sought in the complaint. Defendant appealed.

Vernon, Vernon, Wooten, Brown & Andrews, P.A., by Jeffrey A. Andrews, for plaintiff appellee.

Mary K. Nicholson, for defendant appellant.

MARTIN, Judge.

[1] We observe first that defendant did not set out, in the record on appeal, any exceptions or specific assignments of error as required by Rule 10(a) of the Rules of Appellate Procedure. We conclude, however, that none is required where, as here, the sole question presented in defendant's brief is whether the trial court erred in granting summary judgment in favor of the plaintiff. The appeal from the judgment is itself an exception thereto. *See West v. Slick*, 60 N.C. App. 345, 299 S.E. 2d 657 (1983), *rev'd on other grounds*, 313 N.C. 33, 326 S.E. 2d 601 (1985). Our review is limited to whether, on the face of the record proper, summary judgment was appropriately entered. Because the record discloses that there exists genuine issues of material fact, we hold that summary judgment was erroneous and remand this case to the trial court.

[2] G.S. 1A-1, Rule 56(c) provides that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." The rule authorizes the court to determine whether a genuine issue of fact exists, but does not authorize the court to resolve an issue of fact. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980); *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). The trial judge does not sit as a fact finder. *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). The party moving for summary judgment has the burden of showing the lack of any triable issue of fact; his papers are carefully scrutinized and all inferences are resolved against him. *Kidd v. Early, supra.* Facts asserted by the party answering a summary judgment motion must be accepted as true. *Railway Co. v. Werner Industries*, 286 N.C. 89, 209 S.E. 2d 734 (1974). If the evidentiary materials filed by the parties indicate that a genuine issue of material fact does exist, the motion for summary judgment must be denied.

Applying the foregoing principles to the record properly before us, we examine the propriety of summary judgment for the plaintiff. Though initially denied by defendant, there appears to be no genuine issue of fact that defendant agreed to pay plaintiff $700.00 to examine title to the real estate, render a title opinion and obtain title insurance, and to pay plaintiff an additional amount, based upon hourly charges, for other services rendered by plaintiff in order to consummate the transaction. The evidentiary materials submitted at the hearing disclose, however, that the positions of the parties vary materially as to what services each contemplated would be covered by each phase of the fee agreement, and consequently, as to the amount due plaintiff pursuant to the "hourly charge" provision. The burden of proof in this case is upon the plaintiff to establish the terms of the fee agreement and that the fee charged is reasonable for the services rendered. *See Randolph v. Schuyler*, 284 N.C. 496, 201 S.E. 2d 833 (1974). Although Mr. Andrews' letter to the defendant setting forth Andrews' understanding of the fee arrangement is certainly evidence of the terms of the agreement, it is only some evidence of the terms of the oral contract and does not resolve all of the ambiguities raised by defendant's affidavits. Plaintiff also submitted its time records to substantiate the hours for which it charged. While these records furnish evidence that plaintiff expended the claimed hours in rendering the services, they do not conclusively show that none of the claimed hours were actually spent in order to "clear the title," prepare a title opinion and obtain title insurance and therefore included in the $700.00 "flat fee." The defendant asserts otherwise, raising an issue as to the reasonableness of the hourly charges. The affidavits are conflict-

ing and raise issues of credibility sufficient to defeat the plaintiff's motion for summary judgment and require a trial.

For the reasons stated, the entry of summary judgment in favor of the plaintiff is

Reversed.

Judges WEBB and PHILLIPS concur.

FRANK B. GODFREY, JOE N. SUTTON, O. FRED HOWEY AND BILLIPS HOOD v. THE ZONING BOARD OF ADJUSTMENT OF UNION COUNTY, NORTH CAROLINA

No. 8420SC275

(Filed 5 March 1985)

Municipal Corporations § 30.15— zoning ordinance—building pursuant to amendment later held invalid—nonconforming use

A landowner who constructed a grain storage facility valued at $400,000 on his property in good faith reliance upon a zoning ordinance amendment which was subsequently invalidated by the Court of Appeals as being spot zoning acquired a vested right to continue using the facility as a nonconforming use.

APPEAL by petitioners from *Walker, Hal H., Judge.* Judgment entered 16 November 1983 in Superior Court, UNION County. Heard in the Court of Appeals 16 November 1984.

Petitioners appeal from a judgment of the Superior Court upholding an order of the Zoning Board of Adjustment of Union County which allowed the continuation of use of a structure as a nonconforming use.

Joe P. McCollum, Jr., for petitioner appellants.

Love & Milliken, by John R. Milliken, for respondent appellee.

JOHNSON, Judge.

The issue on this appeal is whether a structure constructed after the effective date of a zoning ordinance amendment which

was subsequently invalidated by this Court should be allowed to remain or continue as a nonconforming use. Under the facts of this case, we hold it should.

On 23 November 1980, the Union County Board of Commissioners, upon the petition of Dennis Rape, the owner at that time of the tract which is the subject of this appeal, amended its zoning ordinance to rezone the tract from R-20 to H-I, heavy industrial. Pursuant to this rezoning, Rape obtained a building permit and constructed a grain storage and transfer facility valued at approximately $400,000. In December 1980, petitioners filed a petition in Union County Superior Court seeking to have the rezoning declared null and void. This Court eventually affirmed the judgment of the Union County Superior Court which invalidated the zoning ordinance amendment as being spot zoning. *See Godfrey v. Union County Board of Commissioners*, 61 N.C. App. 100, 300 S.E. 2d 273 (1983). The grain storage facility had been in operation for almost two years at the time this Court's opinion was filed, 1 March 1983.

Gro-More of Monroe, Inc. ("Gro-More"), the current owner of the property, through Dennis Rape, its president, subsequently on 6 June 1983, filed with the Zoning Board of Adjustment of Union County a petition seeking to continue its business as a nonconforming use pursuant to the Union County Zoning Ordinance. The Board of Adjustment concluded that the structure qualified as a nonconforming situation within the meaning of the Union County Zoning Ordinance and allowed Gro-More to continue its use of the facility. Petitioners then filed a petition for writ of certiorari with the Union County Superior Court seeking review of the Board of Adjustment's decision. The Superior Court reviewed the record and the arguments of the parties and found no error in the Board's decision or proceedings.

The Board of Adjustment allowed the structure to remain in use pursuant to sec. 70.2 of the Union County Zoning Ordinance, which provides: "Nonconforming situations that were otherwise lawful on the effective date of this ordinance may be continued." A nonconforming situation is defined in sec. 70.1(1) of the ordinance as:

> A situation that occurs when, on the effective date of this ordinance or any amendment to it, an existing lot or structure

> or use of an existing lot or structure does not conform to one or more of the regulations applicable to the district in which the lot or structure is located.

Petitioners argue that since the grain storage facility was not in existence at the time of the effective date of the ordinance, which became effective 2 June 1975, it could not be a nonconforming situation within the meaning of sec. 70.1(1) of the ordinance. They therefore contend that the Board erred in allowing the situation to continue as a nonconforming situation.

Although petitioners' argument is technically correct, we hold under the facts of this case that the Board properly allowed a continuance of the facility as a nonconforming situation. In the usual case involving a nonconforming use, the nonconforming situation arises because of the subsequent enactment of an ordinance. In the present case, however, the situation was made nonconforming by the subsequent judicial invalidation of an ordinance amendment pursuant to which the landowner completed construction of a large structure.

Nonconforming situations are often allowed to continue because the landowner has acquired a vested right to continue the use of his property commenced prior to the effective date of an ordinance which makes such use nonconforming. *See* 1 R. Anderson, American Law of Zoning, sec. 6.06 (1976); 8A E. McQuillin, The Law of Municipal Corporations, sec. 25.181 (3d ed. 1976). The nonconforming situation usually presented in the North Carolina case reporters is one in which a landowner has commenced construction pursuant to a building permit which is subsequently revoked by the enactment of an ordinance. *See In re Campsites Unlimited*, 287 N.C. 493, 215 S.E. 2d 73 (1975). In such instances, the permit holder acquires a vested right to continue his use of the property as a nonconforming use if, in bona fide reliance upon the permit, he commences construction and incurs substantial expense in the process. *Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E. 2d 904 (1969). The permit holder acquires such a right whether the revocation of the permit "be by the enactment of a zoning ordinance *or otherwise*." *Id.* at 54, 170 S.E. 2d at 909 (emphasis added).

In the case *sub judice*, the landowner, unlike the landowner in *Atkins v. Zoning Board of Adjustment of Union County*, 53

N.C. App. 723, 281 S.E. 2d 756 (1981), obtained an amendment to the zoning ordinance and thereafter secured a building permit. In good faith reliance upon the zoning amendment and the building permit, he incurred great expense in constructing a large facility valued at $400,000. By virtue of *Town of Hillsborough v. Smith, supra,* and its progeny, the landowner acquired a vested right to continue using the facility. As Justice Rodman wrote in *Warner v. W & O, Inc.*, 263 N.C. 37, 43, 138 S.E. 2d 782, 786-87 (1964): "The law accords protection to nonconforming users who, relying on the authorization given them, have made substantial expenditures in an honest belief that the project would not violate declared public policy."

The petitioners could have protected their interests in the present case by obtaining an injunction at the time they filed the petition for writ of certiorari. At the same time, the landowner's interest could have been protected by means of a bond.

Affirmed.

Judges WHICHARD and PHILLIPS concur.

IN THE MATTER OF: ANGELA GLENN

No. 8427DC505

(Filed 5 March 1985)

Infants § 18— delinquency based on misdemeanor larceny—insufficient evidence

In a juvenile delinquency proceeding based upon misdemeanor larceny, the evidence was inadequate to withstand respondent's motion to dismiss where the evidence showed only that a classmate of respondent removed a diamond ring to wash her hands in shop class on a Thursday, respondent had momentary custody of the ring, and the ring was not in respondent's possession or in the shop class on the following Tuesday. G.S. 7A-517(12); G.S. 14-72(a).

APPEAL by juvenile from *Ramseur, Judge* (adjudication) and *Bulwinkle, Judge* (disposition). Adjudication and disposition orders entered 15 December 1983 and 20 February 1984 respectively in District Court, GASTON County. Heard in the Court of Appeals 6 February 1985.

A juvenile petition alleged that respondent is a delinquent juvenile as defined by G.S. 7A-517(12) in that on or about 10 November 1983 she "did unlawfully and willfully steal, take and carry away one (1) diamond cluster ring, the personal property of Lou Ann Goforth, with the intent to permanently deprive the owner of the use thereof," in violation of G.S. 14-72(a). The value of the property was alleged as $238.16.

Evidence presented by the State at the adjudication hearing tended to show the following:

Lou Ann Goforth and respondent attended the same junior high school and were classmates in a shop class. Goforth normally wears a diamond ring to school. On 10 November 1983, a Thursday, Goforth was cleaning her hands in shop class. She let respondent see her ring and respondent was holding the ring when Goforth finished washing her hands. They were not alone in the room. The bell rang and everyone left. Goforth first became aware the ring was missing when she got in her car to leave school. She did not return to the room to look for the ring. She did not look for it the following day, a teacher workday, or over the weekend. The following Monday respondent was absent. Goforth questioned respondent on Tuesday and respondent told her she did not have the ring.

Due to a defect in the tape recording, the evidence is unclear as to the number of students in the shop class, when Goforth spoke to someone in authority about the ring, and whether she visited respondent's home concerning the ring.

Respondent testified that she looked at the ring, which was similar to a ring belonging to her aunt, but did not touch it or take it. She further testified that she was at home sick on the following Monday.

The court adjudicated respondent delinquent and placed her on probation for a year. Respondent appeals.

Attorney General Edmisten, by Assistant Attorney General Steven Mansfield Shaber, for the State.

Rebecca Kay Killian, Assistant Public Defender, for juvenile appellant.

WHICHARD, Judge.

Respondent contends the court erred in denying her motion to dismiss for insufficiency of the evidence to sustain an adjudication of delinquency. We agree.

The juvenile petition charged respondent with violation of G.S. 14-72(a), misdemeanor larceny. To sustain an adjudication of delinquency under this section the State must show a wrongful taking and carrying away of the personal property of another without her consent and with intent to permanently deprive the owner. *State v. Bowers*, 273 N.C. 652, 655, 161 S.E. 2d 11, 14 (1968). Larceny involves a trespass, either actual or constructive. *Id.* Custody is not a bar to the elements of trespass or intent to deprive. One with custody may commit larceny where she subsequently forms the intent to, and does, convert such property. 50 Am. Jur. 2d *Larceny* Sec. 89 at 264 (1970). *See State v. Tilley*, 239 N.C. 245, 249, 79 S.E. 2d 473, 476 (1954). The trespass in that case is at the time of conversion. 50 Am. Jur. 2d *Larceny* Sec. 89 at 263.

With certain exceptions the North Carolina Juvenile Code gives respondent "all rights afforded adult offenders." G.S. 7A-631; *In re Meaut*, 51 N.C. App. 153, 155, 275 S.E. 2d 200, 201 (1981). Respondent thus is entitled to have the evidence evaluated by the same standard that governs a criminal proceeding against an adult. *Id.*, 275 S.E. 2d at 201-02.

When a defendant moves for dismissal, the court is to determine whether there is substantial evidence of each element of the offense charged and of the identity of defendant as the perpetrator. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E. 2d 649, 651 (1982). Substantial evidence is evidence a reasonable person might accept as adequate to support a conclusion. *Id.* at 66, 296 S.E. 2d at 652. "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion to dismiss should be allowed. (Citation omitted.) This is true even though the suspicion so aroused by the evidence is strong." *Id.*

Applying these principles to the evidence, viewed in the light most favorable to the State, we conclude that the evidence raises a suspicion of respondent's guilt, but nothing more. Goforth testi-

fied that she "didn't see [respondent] put [the ring] in her pocket or anything like that." Rather, she stated,

> I had [the ring] in my hand and [respondent] was saying she had a ring something like it. She started looking at it and the bell rang and we all left. . . . I just didn't think of [the ring]; I was in a hurry when I left. I didn't go back into the room and look for the ring. . . . I didn't go back during teacher's workday to look for it. . . . I never saw [respondent] wear a ring like mine.

This evidence shows only that Goforth removed the ring to wash her hands in shop class on a Thursday, respondent had momentary custody of the ring, and the ring was not in respondent's possession or in the shop class on the following Tuesday. While custody does not bar a finding of the wrongful taking and carrying away necessary to prove larceny, *see* 50 Am. Jur. 2d *Larceny* Sec. 89 at 263, custody is not in itself evidence of any element of the crime. It is not enough to defeat the motion for dismissal for the evidence to establish that respondent had an opportunity to commit the crime charged. *State v. Cutler*, 271 N.C. 379, 383, 156 S.E. 2d 679, 682 (1967); *State v. White*, 293 N.C. 91, 96, 235 S.E. 2d 55, 59 (1977). The evidence here shows only that respondent had an opportunity to commit the crime. It is thus inadequate to withstand the motion to dismiss.

The adjudication and disposition orders are therefore vacated and the cause is remanded for entry of a judgment of dismissal.

Vacated and remanded.

Judges BECTON and EAGLES concur.

STATE OF NORTH CAROLINA v. TYRONE ISOM

No. 8419SC682

(Filed 5 March 1985)

Criminal Law § 138— same evidence supporting two aggravating factors

The trial court's finding as an aggravating factor for armed robbery and burglary that the victim was old and blind included implicit findings that the victim's age and condition rendered him helpless and defenseless and that defendant took advantage of this condition to perpetrate the crimes, and the trial court improperly used the same evidence to support two aggravating factors where the court also found that defendant inflicted injury upon his blind victim who was defenseless in excess of the amount necessary to prove the offenses. G.S. 15A-1340.4(a)(1).

APPEAL by defendant from *Davis, James C., Judge.* Judgments entered 16 March 1984 in Superior Court, CABARRUS County. Heard in the Court of Appeals 14 February 1985.

Defendant was convicted of robbery with a dangerous weapon and first degree burglary. This Court in an opinion published at 65 N.C. App. 223, 309 S.E. 2d 283 (1983), found no error in defendant's trial but remanded the case for resentencing. At the resentencing hearing the court reviewed the transcript of trial which revealed the following facts. On 7 July 1982, Elton Allison, a sixty-eight year old blind man who was somewhat hard of hearing was asleep on his couch. About three o'clock a.m. he was awakened by an individual who had entered his residence when the individual began striking him about the head with a pool cue, which Allison used as a walking stick. During the assault Allison's wallet containing twenty dollars was taken. A neighbor who heard Allison's screams and went to his residence observed the defendant in the residence. A short time later defendant was arrested, and a search of his person revealed that he had Allison's billfold in his possession.

Defendant testifying in his own defense contended that he and Allison had been arguing, and that he only struck Allison after Allison had started an altercation. On cross-examination defendant admitted that he knew Allison was blind. He also testified that he had several prior criminal convictions. At the first sentencing hearing defendant also testified that he had consumed substantial amounts of alcohol and various controlled substances.

At the resentencing hearing no evidence was presented, but the transcript of the prior trial was considered by the consent of the parties. In each case the court found as factors in aggravation that (a) the victim was very old and blind, (b) the defendant had a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement, and (c) that the defendant inflicted bodily injury upon his blind victim who was both helpless and defenseless in excess of the minimum amount necessary to prove the offense. The court declined to find any mitigating factors. After determining that the aggravating factors outweighed the mitigating factors the court sentenced defendant to two consecutive forty year prison terms. From the judgments, defendant appealed.

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

Steven A. Grossman for defendant appellant.

ARNOLD, Judge.

Defendant contends the court erred by finding that his victim was very old, by finding that his victim was helpless and defenseless, by finding that defendant inflicted bodily injury upon his blind victim who was both helpless and defenseless, and by refusing to find as a factor in mitigation that defendant suffered from a mental or physical condition, to wit: intoxication, which while insufficient to constitute a defense was sufficient to reduce his culpability. Believing that the trial court's finding that "the defendant inflicted bodily injury upon his blind victim who was hopeless and defenseless" was cumulative to its finding that "the victim was very old and blind," we reverse and remand for a new sentencing hearing.

G.S. 15A-1340.4(a)(1) provides that the same evidence may not be used to support more than one aggravating factor. In *State v. Monk*, 63 N.C. App. 512, 523, 305 S.E. 2d 755, 762 (1983), Judge Johnson writing for this Court stated that "[t]he age of the victim may not be used as an aggravating factor unless it appears that the defendant took advantage of the victim's relative helplessness to commit the crime or that the harm was worse because of the age or condition of the victim." The court by finding that the victim was very old and blind was implicitly finding that his age and

condition rendered him helpless and defenseless, and that the defendant took advantage of this condition to perpetrate the crime. Thus, the court's finding of the non-statutory factor that the defendant inflicted injury, upon his blind victim who was helpless and defenseless, in excess of the amount necessary to prove the offense was supported by the same evidence used to support the statutory finding that the victim was old and blind and as such was a violation of G.S. 15A-1340.4(a)(1). This error compels us to remand defendant's case for a new sentencing hearing.

We have carefully considered defendant's contentions that the evidence did not support a finding that the victim was very old, that the evidence did not support a finding that the victim was helpless and defenseless, and his argument that the court should have found as a factor in mitigation that he suffered from a mental or physical condition insufficient to constitute a defense but which reduced his culpability. We find each of these assignments of error to be without merit.

As this is the second time that this case has been remanded for resentencing because of the trial court's finding of improper non-statutory aggravating factors, we feel it appropriate to once again remind our trial courts of our concern regarding their finding of non-statutory aggravating factors. In *State v. Baucom*, 66 N.C. App. 298, 301-302, 311 S.E. 2d 73, 75 (1984), we stated:

> In light of the increasing number of cases that have been remanded because of erroneous findings of non-statutory factors in aggravation, this Court deems it appropriate to remind trial judges that only one factor in aggravation is necessary to support a sentence greater than the presumptive term. The trial judge must determine that this factor is proved by a preponderance of the evidence and outweighs any mitigating factors. G.S. 15A-1340.4(b). "The balance struck by the trial judge will not be disturbed if there is support in the record for his determination. [Citations omitted.]" *State v. Davis*, 58 N.C. App. 330, 333-34, 293 S.E. 2d 658, 661, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982). With these rules in mind the trial judge may wish to exercise restraint when considering non-statutory aggravating factors after having found statutory factors. This prudent course of

conduct would lessen the chance of having the case remanded for resentencing.

Because of error in the finding of the non-statutory aggravating factor found by the trial judge, the case is

Remanded for resentencing.

Judges EAGLES and PARKER concur.

HAZEL L. CARPENTER, EMPLOYEE v. INDUSTRIAL PIPING COMPANY, EMPLOYER, AND UNITED STATES FIDELITY & GUARANTY COMPANY, CARRIER, DEFENDANTS

No. 8410IC587

(Filed 5 March 1985)

Master and Servant § 69.1 — maximum improvement — stabilization rather than temporary improvement

There was competent evidence to support the Industrial Commission's findings that plaintiff had reached maximum improvement on 19 November 1981 and that his condition on 28 January 1981 had only temporarily improved where plaintiff suffered back and leg pain due to a twisting motion which caused a vertebra to slip forward and pinch a nerve, and where plaintiff had suffered since 1946 from spondylolisthesis, a lower back problem involving forward displacement of a vertebra upon the one below from which temporary relief is common when the vertebra slips into a less painful position. G.S. 97-31.

APPEAL by defendants from the North Carolina Industrial Commission. Opinion and award of the Full Commission filed 11 January 1984. Heard in the Court of Appeals 5 February 1985.

Plaintiff worked as a pipefitter for defendant Industrial Piping Company. On 16 October 1980 plaintiff injured his back while helping to move a heavy (150-200 pound) ladder at work. Plaintiff was treated initially by Dr. Land, who referred him to Dr. Charles Heinig, an orthopedist. Plaintiff was first seen by Dr. Heinig on 28 January 1981.

Dr. Heinig's examination revealed that plaintiff suffers from spondylolisthesis, a congenital deformity of the spine. Plaintiff

has suffered episodes of back pain since 26 May 1946. He often gained relief from pain when his wife manipulated his spine so that he experienced a sensation of something snapping back into place. Although plaintiff suffered pain after the 16 October 1980 accident, he felt something "snap into place" shortly before his first appointment with Dr. Heinig. Plaintiff thus was in fairly good condition at the time he first saw Dr. Heinig.

Yet, the relief was short-lived, and the back pain returned and has persisted to the present. Plaintiff returned to Dr. Heinig on 19 November 1981, 28 December 1981, and 25 February 1982. During his 19 November visit plaintiff complained of pain in his back and right leg. He was unable to return to work as a pipefitter. His condition did not change between his 19 November 1981 and 25 February 1982 appointments.

Deputy Commissioner Linda Stephens concluded that plaintiff reached maximum medical improvement on 28 January 1981, and made an award accordingly. Plaintiff appealed to the Full Commission, which concluded that plaintiff reached maximum medical improvement as of 19 November 1981 and adjusted plaintiff's award. The defendants now appeal from the Full Commission's order, contending that the Deputy Commissioner's determination was correct.

Myers, Ray, Myers, Hulse & Brown, by R. Lee Myers, for defendant appellants.

Jean P. Werner and Brenton D. Adams for plaintiff appellee.

ARNOLD, Judge.

Defendants contend that the Full Commission erred in finding that plaintiff reached maximum medical improvement on 19 November 1981, the date of his second appointment with Dr. Heinig. They argue that as of 28 January 1981, the date plaintiff first saw Dr. Heinig, the period of healing for plaintiff's injury was over and Dr. Heinig could do and did no more for plaintiff in the way of treatment. The Full Commission found, however, that on 28 January plaintiff was experiencing temporary relief of his symptoms and that thereafter his condition deteriorated. They found further that plaintiff's condition did not stabilize until the Fall of 1981.

Plaintiff seeks to recover under G.S. 97-31. That section provides for compensation of temporary disability during the healing period of the injury and for permanent disability at the end of the healing period, when maximum recovery has been achieved. The "healing period" of the injury "is the time when the claimant is unable to work because of his injury, is submitting to treatment, which may include an operation or operations, or is convalescing." *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 288-89, 229 S.E. 2d 325, 328 (1976), *disc. rev. denied*, 292 N.C. 467, 234 S.E. 2d 2 (1977). "This period of temporary total disability contemplates that eventually there will be either complete recovery, or an impaired bodily condition which is stabilized." *Crawley*, 31 N.C. App. at 289, 229 S.E. 2d at 328. The "healing period" ends when, "after a course of treatment and observation, the injury is discovered to be permanent and that fact is duly established." *Crawley*, 31 N.C. App. at 289, 229 S.E. 2d at 329.

The point at which the injury has stabilized is often called "maximum medical improvement," although that term is not found in the statute itself. This term creates confusion, especially in cases like the present. It connotes that a claimant is only temporarily totally disabled and his body healing when his condition is steadily improving, and/or he is receiving medical treatment. Yet, recovery from injuries often entails a healing period of alternating improvement and deterioration. In these cases, the healing period is over when the impaired bodily condition is stabilized, or determined to be permanent, and not at one of the temporary high points. Moreover, in many cases the body is able to heal itself, and during convalescence doctors refrain from active treatment with surgery or drugs. Thus, the absence of such medical treatment does not mean that the injury has completely improved or that the impaired bodily condition has stabilized.

In the present case, the plaintiff had suffered since 1946 from spondylolisthesis, a lower back problem which involves forward displacement of a vertebra upon the one below. This causes an unstable arrangement in the spine and the vertebra will slide slightly back and forth or snap out of place. Sometimes relief is experienced when the vertebra moves back into place.

The Full Commission found that plaintiff's injury on 16 October 1980 "materially aggravated and accelerated plaintiff's pre-

existing spondylolisthesis in such fashion and to such a degree as to produce the back and leg pain from which plaintiff suffers." Dr. Heinig's testimony supports this finding in that Dr. Heinig stated the plaintiff experienced back and leg pain after 16 October 1980, which prevented him from working, and which would prevent him from returning to work until he had a surgical fusion of the vertebrae. He attributed this pain to plaintiff's twisting motion on 16 October, which caused a vertebra to slip forward and pinch a nerve.

Dr. Heinig testified further that although when he saw plaintiff on 28 January 1981 he thought plaintiff would be able to return to work, he felt that now plaintiff's disability is permanent: ". . . he does have a permanent disability based on a combination of things and I really don't anticipate he is going to improve or worsen a great deal either. I think the situation is relatively static at this point." Asked when plaintiff reached "maximum improvement" he stated, "Actually from November of 1981, until the last visit of February of '82, you know, I have seen no changes in his situation." Dr. Heinig's testimony suggested that plaintiff's improved condition on 28 January 1981 was temporary relief common in persons with spondylolisthesis, which occurs when the vertebra slips into a less painful position.

The Full Commission thus had competent evidence before it to support its findings that plaintiff reached maximum improvement on 19 November 1981 and that his condition on 28 January 1981 had only temporarily improved. These findings are therefore binding on appeal, even though there may be evidence to support a contrary finding. *Schofield v. Tea Co.*, 32 N.C. App. 508, 514, 232 S.E. 2d 874, 878, *disc. rev. denied*, 292 N.C. 641, 235 S.E. 2d 62 (1977).

Affirmed.

Judges EAGLES and PARKER concur.

MICHAEL C. GADDY v. CRANSTON PRINT WORKS COMPANY AND THE TRAVELERS INSURANCE COMPANY

No. 8410IC210

(Filed 5 March 1985)

Master and Servant § 55.3— back injury while filling in for absent employee—accidental

The Full Commission properly concluded that plaintiff was injured by accident where the findings, amply supported by the evidence, were that plaintiff injured his back while filling in for an absent employee whose job involved heavy lifting not required by plaintiff's regular job and while lifting an object which was even heavier than usual. G.S. 97-2(6).

APPEAL by defendants from the opinion and award of the North Carolina Industrial Commission filed 5 December 1983. Heard in the Court of Appeals 14 November 1984.

Plaintiff's claim for workers' compensation was denied by the Deputy Commissioner, who found that he was not injured by accident in the course of his employment. On appeal the Full Commission reversed and awarded plaintiff compensation with one member dissenting. The evidence before the Commission tended to show the following:

Plaintiff was employed by Cranston Mills as a "greytender," but on 12 February 1981 he was filling in for an absent employee in the "jack room." Work in the "jack room" involved taking mantles from a mantle rack, carrying them on a buggy to a machine that printed cloth, and placing them in the machine. A mantle in textile parlance is a metal tube designed to fit in the core of a roller used in printing cloth. The mantles involved weighed up to 250 pounds, and plaintiff's task was to help lift and push each mantle into the roller until the end slipped into the "keyway" of the roller and then place the paper inside the roller and push the mantle the rest of the way inside. According to plaintiff, while placing a mantle in a roller, it struck a burr or rough spot, causing the mantle to suddenly stop as he was lifting and pushing it, and he felt a sharp pain in his back. His co-worker, noticing plaintiff's pain, took the mantle from him and plaintiff immediately reported his injury and was taken to the hospital. Eventually, after a myelogram and other treatment, plaintiff was diagnosed as having a ruptured intervertebral disc and surgery was done on 9 March 1982.

The evidence also tended to show that: Plaintiff had worked for absent "jack room" employees about five times before then and before working there the first time as a substitute received one day's training, whereas employees regularly assigned to the "jack room" were trained for a week or two before beginning their duties. On the occasion involved plaintiff had handled about ten mantles and the mantle plaintiff was handling when he was injured was larger and heavier than the others. The "jack room" operator plaintiff was working with testified that plaintiff's inexperience made his own work more difficult.

The Deputy Commissioner's decision disallowing the claim was based on findings that the mantle involved did not strike a burr as plaintiff contended, but was handled in the usual way, from which it was concluded that no accident within the purview of G.S. 97-2(6) had occurred. The Full Commission's decision that plaintiff was injured by accident within the purview of the Act was based on findings that lifting and handling the mantles which caused him to be injured was not plaintiff's usual work.

Jackson, Jackson & Bennington, by Frank B. Jackson, for plaintiff appellee.

Roberts, Cogburn, McClure & Williams, by Isaac N. Northup, Jr., for defendant appellants.

PHILLIPS, Judge.

Though defendants' appeal is from a decision of the Full Commission, the theme mostly advanced in their brief is that the findings of fact made by the Deputy Commissioner should have been adopted and confirmed by the Full Commission. But since the Full Commission can reject, modify, or adopt a Deputy Commissioner's findings as they see fit, *Watkins v. City of Wilmington,* 290 N.C. 276, 225 S.E. 2d 577 (1976), our only task is to determine whether the findings of fact that the Full Commission made are erroneous. That other findings could have been made from the evidence presented is irrelevant. *Searcy v. Branson,* 253 N.C. 64, 116 S.E. 2d 175 (1960).

The only exceptions to the decision and award of the Full Commission that appellants have brought forward for our consideration, other than formal exceptions unsupported by either argument or authorities, are to the following findings:

> [P]laintiff's normal work routine was interrupted, introducing "unusual conditions likely to result in unexpected consequences."
>
> Plaintiff's normal work routine was a "graytender" working with machines which print cloth.
>
> His regular job did not entail the heavy lifting required of him in the "jack room," where he suffered his back injury while filling in for an absent employee.
>
> [T]he mantle plaintiff and the "jack room" operator were lifting when the injury occurred was heavier than usual.

Since these findings are amply supported by the evidence previously recited, the exceptions must be and are overruled. *Cole v. Guilford County*, 259 N.C. 724, 131 S.E. 2d 308 (1963).

When one is injured while performing his customary duties in the usual way, it is not an accident under G.S. 97-2(6). *Turner v. Burke Hosiery Mills*, 251 N.C. 325, 111 S.E. 2d 185 (1959). But performing another's regular job and lifting an unusually large and heavy object even for that job, as occurred here, is not the same thing as performing one's own customary duties in the usual way. In *Gladson v. Piedmont Stores*, 57 N.C. App. 579, 292 S.E. 2d 18, *disc. rev. denied*, 306 N.C. 556, 294 S.E. 2d 370 (1982), where an employee lifted a crate heavier than usual, it was held that there was an interruption of plaintiff's regular work routine and she was thus injured by accident arising out of and in the course of her employment. "The elements of an 'accident' are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences." (Citations omitted.) *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 26, 264 S.E. 2d 360, 363 (1980).

No error therein having been shown, the decision and award appealed from is therefore affirmed.

Affirmed.

Judges WHICHARD and JOHNSON concur.

J. H. FERGUSON, ADMR. CTA OF THE ESTATE OF GEORGE WASHINGTON CROOM v. GEORGE FRANKLIN CROOM, LILLIAN CROOM NICHOLS, KATHRYN CROOM TURNER, ERNEST EDWARD CROOM, KIMBERLY JOYCE CROOM AND LILLIAN MARLENE NICHOLS NUNALEE

No. 845SC698

(Filed 5 March 1985)

1. Appeal and Error § 25— cross-assignments of error—attack on judgment—dismissed

Where one of several defendants appealed and assigned error, but filed an appellee's brief and attempted to cross-assign error, her brief was not properly before the court because she was attempting to overturn the court's judgment rather than support it, and her brief was dismissed. N. C. Rules of Appellate Procedure 10(d), 13(c).

2. Descent and Distribution § 1.1— property outside will—disinherited children—intestate succession

In an action in which the administrator CTA sought to determine who was to share in certain assets not devised by a will which lacked a residuary clause, the trial court erred by excluding two children because the will evidenced an intent that they should be disinherited. G.S. 29-8 creates a mandatory plan for disposing of a decedent's property which does not pass by will through intestate succession without regard to the intent expressed by a testator in a will. G.S. 29-8; G.S. 29-16.

APPEAL by defendants Kathryn Croom Turner, Ernest Edward Croom, and Kimberly Joyce Croom by her Guardian Ad Litem, from *Llewellyn, Judge*. Judgment entered 20 April 1984 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 14 February 1985.

On 25 October 1983, J. H. Ferguson, Administrator CTA of the will of George Washington Croom, brought this declaratory judgment action seeking a determination as to the interest of Croom's heirs in certain assets of the estate. On 21 June 1983, George Washington Croom died testate. In his will Croom left various bequests of real and personal property to his children and a grandchild. In Item Eight of his will Croom stated "I leave nothing whatsoever to my daughter Kathryn Elizabeth Turner, and my son Ernest Edward Croom." At his death, Croom also left three optional share certificates in Carolina Savings & Loan Association issued to George W. Croom or Kimberly Joyce Croom, the deceased's minor daughter. Each of these certificates

had attached to it an "Agreement Concerning Stock in Carolina Savings and Loan Association" which purported to create a joint account with a right of survivorship. Two of these agreements were signed by George Croom only and the third agreement was not signed at all. None of these certificates were specifically devised by Croom's will and the will contained no residuary clause. The plaintiff by this action seeks a determination as to who is entitled to share in these assets.

The cause was heard at the 9 April 1984 term of New Hanover County Superior Court by Judge Llewellyn sitting without a jury. On 20 April 1984, the trial court entered an order in which it concluded that the optional share certificates did not satisfy the statutory requirements necessary to pass by joint survivorship and, thus, became part of the Croom estate. The court then ruled that since there was no residuary clause the proceeds of the share certificates were to be distributed by the laws of intestate succession, except that Kathryn Elizabeth Turner and Ernest Edward Croom were to take nothing because the testator had evidenced, by his will, an intent to disinherit them. Kimberly Joyce Croom appealed excepting to that portion of the judgment in which the court found that share certificates failed to pass by right of survivorship, and Kathryn Elizabeth Turner and Ernest Edward Croom appealed excepting from that portion of the judgment in which the court found that they were to be excluded from taking under the laws of intestate succession.

Ferguson & Baker, by Jeffery R. Baker, for plaintiff appellee.

Legal Services of the Lower Cape Fear, by James J. Wall, for defendant appellant Kimberly Joyce Croom.

Hewlett & Collins, by Addison Hewlett, Jr. and John Collins, for defendant appellants Ernest Edward Croom and Kathryn Elizabeth Turner.

ARNOLD, Judge.

[1] The record indicates that Kimberly Joyce Croom appealed from the court's judgment and assigned error. However, no appellant's brief was filed in support of Kimberly's appeal. Instead, counsel filed an appellee's brief and attempted, pursuant to Rule 10(d) of the Rules of Appellate Procedure, to cross-assign as error Kimberly's exceptions noted at the time of her appeal.

Rule 10(d) of the Rules of Appellate Procedure permits an appellee to cross-assign as error any actions of the trial court which deprive the appellee of an alternative basis in law for supporting the judgment from which appeal has been taken. Since Kimberly in her appellee's brief is attempting to overturn the court's judgment rather than support it, her cross-appellee's brief is not properly before the court. Rule 13(c) of the Rules of Appellate Procedure states that "[i]f an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed . . . on the court's own initiative." Pursuant to the provisions of Rule 13(c) the appeal of Kimberly Joyce Croom is hereby dismissed.

[2] By their appeal, Ernest Edward Croom and Kathryn Elizabeth Turner contend the court erred by concluding that they were not to share in the property which passed by partial intestacy because the deceased's will evidenced an intent that they should be disinherited. We agree, therefore, we reverse.

G.S. 29-8 states: "If part but not all of the estate of a decedent is validly disposed of by his will, the part not disposed of by such will *shall* descend and *be distributed as intestate property.*" (Emphasis added.) G.S. 29-8 creates a mandatory plan for disposing of a decedent's property which does not pass by will. It directs that the property pass by intestate succession without regard to the intent expressed by a testator in a will. The statute, which was adopted in 1959, was a codification of our common law. *See Dunlap v. Ingram*, 57 N.C. 178 (4 Jones Eq.) (1858) (where our Supreme Court held that property not disposed of by will passes as directed by the law regardless of attempts by the testator to disinherit the lawful takers). The rule adopted by G.S. 29-8 is also in accordance with the rule followed by a majority of our sister states. *See* Annot., 100 A.L.R. 2d 325 (1965).

Under the Intestate Succession Act each of testator's children is entitled to take an equal share of the property not disposed of by his will. G.S. 29-16. Thus, the trial court erred in excluding Kathryn Elizabeth Turner and Ernest Edward Croom from taking a share of the intestate property. The judgment of the court is reversed and the case is remanded for the entry of judgment consistent with this opinion.

Reversed.

Judges EAGLES and PARKER concur.

SOUTHLAND ASSOCIATES REALTORS, INC. v. ALAN N. MINER AND AMY J. ELDRIDGE

No. 8410SC674

(Filed 5 March 1985)

1. **Appeal and Error § 68— previous Court of Appeals' reversal of summary judgment—statement that no binding contract existed—not law of the case**

Where the Court of Appeals had previously reversed a summary judgment for plaintiff in an action to collect a realtor's commission, a statement in the opinion that there was no binding contract was not necessary to the holding that an unresolved issue of fact existed, the "law of the case" doctrine did not apply, and defendants' Rule 12(b)(6) motion to dismiss was properly denied.

2. **Brokers and Factors § 6— right to real estate commission—judgment for plaintiff affirmed**

In an action to recover a realtor's commission, judgment for plaintiff by a court sitting without a jury was affirmed where the evidence showed that defendants had agreed by virtue of a listing agreement to give plaintiff the exclusive right to sell their property; the listing agreement did not contain the specific terms upon which plaintiff would sell the property, but defendants verbally agreed that the property would be sold by the buyers assuming the existing loan; the assumability of the loan was a factor in agreeing upon the asking price of the property; the existing note and deed of trust were assumed by subsequent buyers; defendants testified that they were willing for the prospective buyer to assume the existing loan; plaintiff procured an offer to purchase for the full price asked by defendants; the prospective purchaser testified that his intent was to assume the existing mortgage and that he was ready, willing and able to purchase the property; defendants refused the offer, stating that they no longer wished to sell the property; and the court found facts resolving in plaintiff's favor the issue of whether plaintiff had produced a purchaser who was ready, willing and able to purchase defendants' property in accordance with the terms in the listing agreement.

APPEAL by defendants from *Lee, Judge.* Judgment entered 30 January 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 12 February 1985.

This is a civil action in which plaintiff, a real estate broker, seeks to recover a commission for having procured a purchaser

for defendants' property. This case was initially before this court in 1983 upon defendants' appeal from summary judgment in favor of the plaintiff. We concluded that there were unresolved issues of material fact and reversed the entry of summary judgment. *Southland Assoc. Realtors v. Miner*, 65 N.C. App. 126, 308 S.E. 2d 773 (1983). The defendants then moved, pursuant to G.S. 1A-1, Rule 12(b)(6), to dismiss the action for failure of the complaint to state a claim for relief, contending that this court's opinion had decided the issue of liability against plaintiff. The trial court denied the motion and the case proceeded to trial without a jury. After trial, the court made findings of fact, conclusions of law and entered judgment in favor of the plaintiff in the amount of $8,094.00. Defendants appealed to this court.

Lawrence & Evans, by Gary S. Lawrence, for plaintiff appellee.

Harrell, Titus & Hassell, by Robert A. Hassell, for defendant appellants.

MARTIN, Judge.

[1] In this appeal defendants contend that the Court of Appeals' prior decision reversing summary judgment for plaintiff finally adjudicated the contractual issue between the parties, and therefore defendants' motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6) should have been allowed. Our interpretation of the former decision results in a different conclusion and we affirm the entry of judgment in plaintiff's favor.

Upon the prior appeal of this case, this court, in reversing summary judgment in favor of plaintiff, declared there were the following unresolved issues of material fact:

> In the case on appeal, the only term expressed in the contract between plaintiff and defendants is the cash price. There is no evidence that the Colemans ever made an offer to pay cash for the property, but instead sought to assume defendant's mortgage. There is no evidence that this mortgage was assumable or that defendants would have even agreed to an assumption. As a result there is insufficient evidence that the Colemans were either financially able to purchase the property or able to purchase the property under terms agreed to by the sellers.

Southland Assoc. Realtors v. Miner, supra at 129, 308 S.E. 2d at 775. The court went on to say that "since the terms of the sale appear never to have been fixed, there was no binding contract between the parties and defendants could freely terminate the negotiations without liability to plaintiff." *Id.* Upon this last statement, defendants contend that, under the "law of the case" doctrine, no binding contract existed; hence, no claim for relief existed. Generally,

> when an appellate court decides a question and remands the case for further proceedings, the questions determined by the appellate court become the law of the case, both in subsequent proceedings in the trial court, and on appeal. [Citation omitted.] The doctrine of law of the case does not apply to dicta, but only to points actually presented and necessary to the determination of the case. [Citation omitted.]

Waters v. Phosphate Corp., 61 N.C. App. 79, 84, 300 S.E. 2d 415, 418 (1983), *modified on other grounds*, 310 N.C. 438, 312 S.E. 2d 428 (1984).

The sole question before this court upon the prior appeal was whether the pleadings, admissions and affidavits contained in the record proper affirmatively showed that there were no genuine issues of material fact so that plaintiff would be entitled, on the facts established, to judgment in its favor as a matter of law. This court held that the plaintiff had not adequately carried its summary judgment burden, stating that "there was an unresolved issue of material fact" as to the assumability of the defendants' mortgage and, consequently, as to the financial ability of the prospective purchasers to consummate the transaction. The case was not before the court for a decision on the merits; the statement upon which the defendants rely was based upon limited evidence within the record on appeal, was not necessary to the holding that an unresolved issue of fact existed, and was not binding on the subsequent proceedings in the trial court. *See Waters v. Phosphate Corp., supra.* The prior appeal establishes only that plaintiff was not entitled to summary judgment; it did not establish that plaintiff was not entitled to present its evidence with regard to the disputed issues. The "law of the case" doctrine does not apply. *See Edwards v. Northwestern Bank,* 53 N.C. App. 492, 281 S.E. 2d 86, *disc. rev. denied,* 304 N.C. 389, 285 S.E. 2d 831

(1981). Therefore, the trial court properly denied defendants' Rule 12(b)(6) motion to dismiss.

[2] At the time of the prior decision, the record contained no evidence to establish that the listing agreement between plaintiff and defendant included within its terms that defendants' property could be sold by means of an assumption of the existing loan. At the trial on the merits, however, the evidence disclosed the following: Defendants agreed by virtue of a listing agreement executed on 4 November 1981 to give plaintiff the exclusive right to sell their property for a period of 90 days at the asking price of $134,900.00. The listing agreement did not contain the specific terms upon which the defendants would sell their property; however, the defendants verbally agreed with Pat Wiles, plaintiff's agent, that the property could be sold by the buyers assuming the existing loan. Pat Wiles testified that prior to listing the house, the assumability of defendants' loan was discussed as a factor considered by the parties in agreeing upon the asking price of the property. The existing note and deed of trust on defendants' property could have been assumed by subsequent buyers. Both defendants testified that they were willing for the prospective buyer to assume the existing loan. Plaintiff procured an offer to purchase for the full price asked by defendants. Defendants refused to accept the offer, stating that they no longer wished to sell the property. The prospective purchaser, Mr. Coleman, testified that an attractive feature to him and his wife in making their offer to purchase defendants' property was the assumability of the existing loan. It was their intent to assume the existing mortgage and pay the balance of the purchase price to the defendants. Mr. Coleman further testified that he was ready, willing and able to purchase defendants' property.

Upon this evidence, the trial court found facts resolving, in the plaintiff's favor, the issue as to whether plaintiff had produced a purchaser who was ready, willing and able to purchase defendants' property in accordance with the terms agreed upon in the listing agreement. Under North Carolina law, *see Sparks v. Purser*, 258 N.C. 55, 127 S.E. 2d 765 (1962), plaintiff was entitled to recover a commission. Accordingly, the judgment of the trial court is

Affirmed.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. ROBERT CHARLES MALONE

No. 8421SC391

(Filed 5 March 1985)

1. **Criminal Law § 138— escape—aggravating factor—use of underlying conviction improper**

When sentencing a defendant for felonious escape, the trial court improperly used as an aggravating factor the conviction for which defendant was in custody when he escaped. Evidence of the underlying plea or conviction was necessary to prove the offense. G.S. 15A-1340.4(a)(1)(o).

2. **Criminal Law § 138— aggravating factor—great monetary loss—collision between pursuing cars—improperly considered**

The trial court improperly found as an aggravating factor that defendant's offense involved damage causing great monetary loss based on a collision between a Department of Correction van and a Sheriff's car while both were chasing defendant. This factor was intended to apply only when the defendant himself inflicts damage causing great monetary loss or when the loss is directly occasioned by defendant's acts, not when some unforeseen consequence directly occasioned by actors other than the defendant occurs. G.S. 15A-1340.4 (a)(1)(m).

APPEAL by defendant from *Lane, Judge*. Judgment entered 13 December 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 15 January 1985.

Defendant pled guilty to felonious escape and was sentenced to two years imprisonment, one year in excess of the presumptive term. He appeals from the sentence pursuant to G.S. 15A-1444(a1).

Attorney General Edmisten, by Assistant Attorney General Douglas A. Johnston, for the State.

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

WHICHARD, Judge.

[1] The court found as an aggravating factor that defendant had a prior conviction punishable by more than sixty days' confinement. G.S. 15A-1340.4(a)(1)(o). It indicated that the conviction for auto larceny, for which defendant was serving time when he escaped, was the basis of the finding. Defendant contends that use of the conviction for which he was serving time when he escaped to aggravate his sentence for the escape is prohibited by the provision that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation." G.S. 15A-1340.4(a)(1). We are constrained to agree.

Defendant pled guilty to a violation of G.S. 148-45(b)(1) (Cum. Supp. 1983), which provides:

> Any person in the custody of the Department of Correction, in any of the classifications hereinafter set forth, who shall escape . . . from the State prison system, shall . . . be punished as a Class J felon.
>
> (1) A prisoner serving a sentence imposed upon conviction of a felony.

This Court has stated that to sustain a conviction for escape the State must prove that the defendant was in lawful custody and was serving a sentence imposed upon a plea of guilty, a plea of *nolo contendere*, or a conviction for a felony. *State v. Ledford*, 9 N.C. App. 245, 246-47, 175 S.E. 2d 605, 606 (1970). The elements of felonious escape thus are (1) lawful custody, (2) while serving a sentence imposed upon a plea of guilty, a plea of *nolo contendere*, or a conviction for a felony, and (3) escape from such custody. *See State v. McCloud*, 11 N.C. App. 425, 181 S.E. 2d 204 (1971); N.C.P.I.—Crim. 280.20.

To prove the second of the foregoing elements, the State must offer evidence of the felony conviction or plea for which defendant was in lawful custody when he escaped. The provision that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation," G.S. 15A-1340.4 (a)(1), proscribes further use of that evidence to prove the statutory aggravating factor that defendant had prior convictions, G.S. 15A-1340.4(a)(1)(o). The legislature, in setting the presumptive sentence for escape, presumably took into account that evidence

of an underlying plea or conviction would be necessary to prove the offense.

We thus hold that use of the conviction for which defendant was in lawful custody when he escaped as an aggravating factor to enhance his sentence for the escape was improper.

[2] The court also found as an aggravating factor that the offense involved damage causing great monetary loss. G.S. 15A-1340.4(a)(1)(m). The basis for this finding was evidence that a Department of Correction van collided with a Sheriff's Department car while both were chasing defendant, causing damage of approximately one thousand dollars to the van and two thousand dollars to the car.

We do not believe this evidence supports a finding of this statutory factor in aggravation. The factor was intended to apply only when the defendant himself inflicts damage causing great monetary loss, or the loss is directly occasioned by defendant's acts, not when some unforeseen consequence directly occasioned by actors other than the defendant occurs. The court thus erred in finding this factor.

While the court stated subsequent to the sentencing hearing that it would amend its order to eliminate this factor, but would impose the same sentence, the felony judgment findings in the record contain this factor. The case in any event must be remanded for resentencing; upon remand, this factor should not be considered or found.

Remanded for resentencing.

Chief Judge HEDRICK and Judge PARKER concur.

SHERRI R. SNIDER v. ANNE HOPKINS

No. 8426DC661

(Filed 5 March 1985)

Contracts § 21— babysitting agreement—sufficiency of performance

Directed verdict was properly entered for plaintiff in an action on a worthless check where plaintiff had agreed to babysit for defendant's ten-year-old son, Ben, Thursday through Sunday; defendant had left a note indicating that Ben was to have a friend spend Friday night with him and suggesting that Ben would like pancakes and sausage for breakfast on Saturday and Sunday; Ben spent Friday evening with his friend's family at plaintiff's request; plaintiff did not feed Ben dinner on Friday night; plaintiff did not get up until noon on Saturday and Sunday, by which time Ben had fixed cereal for breakfast; and defendant had stopped payment on the check to plaintiff. Plaintiff's failure to serve Ben one dinner, to serve him the suggested menu for breakfast, and leaving him with a neighbor on Friday evening as opposed to letting the neighbor's child spend Friday night with Ben, do not constitute a substantial breach of the babysitting agreement.

Chief Judge HEDRICK dissenting.

APPEAL by defendant from *L. Stanley Brown, Judge.* Judgment entered 2 March 1984 in District Court, MECKLENBURG County. Heard in the Court of Appeals 4 February 1985.

No brief filed for plaintiff appellee.

Casstevens, Hanner & Gunter, by W. David Thurman, Jr. and Nelson M. Casstevens, Jr., for defendant appellant.

BECTON, Judge.

Defendant is appealing from a directed verdict and judgment entered in plaintiff's favor. Plaintiff initiated this action in small claims court suing defendant on a worthless check for $90. Plaintiff alleged that she and defendant had verbally agreed to a fee of $90 in return for babysitting defendant's ten-year-old son from 7 October to 10 October 1982. The magistrate entered judgment in plaintiff's favor and defendant appealed to district court.

Defendant thereafter filed answer admitting that she had delivered a $90 check to plaintiff. She alleged that she stopped payment upon learning that plaintiff had breached the babysitting contract. She specifically alleged that plaintiff had breached the agreement by failing to babysit and be a companion for her son as

agreed upon; and that plaintiff had assigned her responsibilities of providing companionship to the child to others without the knowledge or consent of defendant.

At the conclusion of the jury trial, plaintiff moved for a directed verdict. The trial court allowed the motion and entered judgment in plaintiff's favor. The court concluded that the contractual obligations imposed upon plaintiff were to provide for the supervision, safety and welfare of defendant's child from 7 October through 10 October 1982; and that plaintiff did not materially or substantially breach such obligation. The court awarded plaintiff $90 plus interest.

Defendant argues that the trial court erroneously entered directed verdict in plaintiff's favor, since material issues of fact existed as to whether plaintiff performed her duties under the babysitting contract. We disagree. Even when the evidence is considered in the light most favorable to defendant, no such evidence of a substantial breach is shown.

Evidence for the defendant tended to show that plaintiff and defendant had an oral agreement whereby plaintiff agreed to babysit for defendant's ten-year-old son Thursday through Sunday in return for $90. Defendant left plaintiff a note indicating that her son Ben was to have a friend spend the night with him on Friday. The note asked plaintiff to "help Ben remember to water [the] outside plants?" and stated: "I'm sure he would like pancakes & sausage [for breakfast on] Sat. & Sun. . . ." The evidence further showed that plaintiff called the mother of Ben's friend and asked if Ben could spend Friday evening with her, so that plaintiff could have dinner with her family. The friend's mother agreed, but asked plaintiff to pick Ben up no later than 9:00 p.m. Plaintiff agreed to this, but did not return for Ben until 10:30 p.m. There was also evidence that plaintiff did not get up until noon on Saturday and Sunday; and that by that time Ben had already fixed cereal for breakfast. Ben testified that plaintiff did not feed him dinner Friday night, but defendant did not find out about that until two months after she stopped payment on the check. Plaintiff testified that she took Ben to her family's house on Saturday where they stayed past 9:00 p.m.; and that on Sunday she and Ben accompanied plaintiff's family and other families on a

picnic to King's Mountain, approximately 40 miles outside of Charlotte.

When considering a motion for a directed verdict, the court is required to view the evidence in the light most favorable to the non-movant, to resolve any inconsistencies in the non-movant's favor and to grant the motion only if the evidence is insufficient as a matter of law to support a verdict for the non-movant. *Freeman v. Development Co.*, 25 N.C. App. 56, 212 S.E. 2d 190 (1975). Here, the evidence was insufficient to support a verdict for defendant. Plaintiff's failure to serve Ben one dinner and to serve him the suggested menu of sausage and pancakes for breakfast, and her act of leaving Ben with a neighbor on Friday evening as opposed to letting the neighbor's child spend Friday night with Ben, do not constitute a substantial breach of the babysitting agreement.

Because plaintiff fulfilled her contractual obligation to provide for the supervision, safety and welfare of Ben, the directed verdict and judgment in plaintiff's favor is

Affirmed.

Judge EAGLES concurs.

Chief Judge HEDRICK dissents.

Chief Judge HEDRICK dissenting.

In my opinion, the evidence raises a factual issue which can only be determined by a jury as to whether the plaintiff breached her contract with the defendant. I vote to reverse the directed verdict for plaintiff and to remand the case for a new trial.

STATE OF NORTH CAROLINA v. PAT WELLS

No. 844SC542

(Filed 5 March 1985)

Criminal Law § 40.2— denial of continuance to obtain transcript of first trial—improper

The trial court erred by denying defendant's motion for a continuance so that he could obtain a transcript of his first trial, which ended with a deadlocked jury, when the court did not find that the transcript was necessary for the preparation of an effective defense or that an alternative device was available, and where the court denied the motion in part upon an erroneous belief that the State was not required to furnish the indigent defendant with a transcript.

APPEAL by defendant from *Llewellyn, Judge.* Judgments entered 8 December 1983 in Superior Court, ONSLOW County. Heard in the Court of Appeals 7 February 1985.

Defendant was charged in proper bills of indictment with two counts of assault with a deadly weapon upon a fireman and two counts of assault with a deadly weapon upon a law enforcement officer. Defendant was brought to trial during the 28 November 1983 session of Onslow County Superior Court. On 1 December 1983, Judge Lane declared a mistrial because the jury was deadlocked. The trial was rescheduled for 5 December 1983, over defendant's objection. Defendant then filed a written motion to continue so that he could obtain a transcript of the first trial. In the motion defendant alleges that the transcript was necessary to adequately prepare his defense. According to an affidavit in the record, filed by defendant's trial counsel, the trial judge inquired whether the indigent defendant was able to pay for the transcript. When he received a negative response, he orally stated that the State was under no obligation to provide defendant the transcript, and he further stated that to deny defendant the transcript would not prejudice him. Thereupon, he denied defendant's motion.

Defendant was convicted of three counts of misdemeanor assault with a deadly weapon and one count of felonious assault with a deadly weapon upon a law enforcement officer. From judgments entered upon the verdict, 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 Malcolm Ray Hunter, Jr., for defendant appellant.

ARNOLD, Judge.

Defendant contends the court erred in denying his motion to continue, because the ruling denied him the opportunity to obtain a transcript of his first trial in violation of his right to equal protection under the law. We agree, and award defendant a new trial.

Ordinarily a motion to continue is addressed to the sound discretion of the trial court, and its ruling will not be disturbed absent an abuse of discretion. If the motion is based on a right guaranteed by the federal and state constitutions, however, the issue is one of law, not discretion, and is reviewable on appeal. *State v. Davis*, 61 N.C. App. 522, 300 S.E. 2d 861 (1983). The issue presented here is one of law because the State must, as a matter of equal protection, provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal. *Britt v. North Carolina*, 404 U.S. 226, 30 L.Ed. 2d 400, 92 S.Ct. 431 (1971). *Britt* does not require that a free transcript of a prior trial must always be provided, however, when the trial court acts in such a manner so as to deny an indigent defendant a transcript it must determine (1) whether the transcript is necessary for the preparation of an effective defense and (2) whether there are alternative devices available to the defendant which are substantially equivalent to a transcript. *State v. Rankin*, 306 N.C. 712, 295 S.E. 2d 416 (1982). Neither the record nor the transcript of the trial contains any indication that the trial court found the transcript was not necessary for the preparation of an effective defense, or that an alternative device was available which was the substantial equivalent to a transcript. In fact, the record tends to show that the trial court denied the motion based, at least in part, upon an erroneous belief that since defendant was indigent and could not pay for a transcript, the State was not required to furnish him one, and, therefore, there was no reason to grant a continuance. Based upon the record before us, we are compelled to find the court rul-

ing denying defendant a continuance without the findings required by our Supreme Court in *Rankin, supra*, was a violation of defendant's equal protection rights under the Fourteenth Amendment to the Constitution. We, therefore, award defendant a new trial.

Having determined that defendant is entitled to a new trial, we deem it unnecessary to discuss the other issues raised by this appeal.

New trial.

Judges EAGLES and PARKER concur.

KENNETH WAYNE HEAVNER v. BRENDA HARRIS HEAVNER

No. 8427DC501

(Filed 5 March 1985)

1. **Appeal and Error § 6.9— order requiring blood grouping test—interlocutory appeal—treated as petition for certiorari**

   An order requiring a blood grouping test was an interlocutory order which was not appealable, but which was treated by the Court of Appeals as a petition for certiorari. G.S. 1-277; G.S. 7A-27.

2. **Bastards § 5.1— blood test—prior guilty plea to nonsupport—allegation of paternity in complaint**

   The trial court erred by ordering a blood grouping test where plaintiff had previously pled guilty to criminal nonsupport and had alleged in the complaint that the child was born of his marriage to defendant. G.S. 8-50.1(b); G.S. 14-322.

APPEAL by defendant from *Bulwinkle, Judge*. Order entered 9 March 1984 in District Court, GASTON County. Heard in the Court of Appeals upon writ of certiorari 10 January 1985.

Plaintiff filed suit for absolute divorce from defendant on 1 June 1971. In his complaint plaintiff alleged, in pertinent part:

> I. That plaintiff and defendant have both resided in Lincoln County, North Carolina for more than one year next preceding the institution of this action for divorce.

II. That plaintiff and defendant were united in marriage on or about the 30th day of August, 1966 at El Paso, Texas; that two children were born to the marriage union, to wit: ROBERT VON HEAVNER, age 4 years, and JEFFREY WAYNE HEAVNER about one year old.

The divorce was granted on 13 July 1971.

In 1970 plaintiff pled not guilty and was found guilty of inadequate support of Robert Von Heavner (Robert), and pled guilty to nonsupport of Jeffrey Wayne Heavner (Jeffrey). He was ordered to pay a total of $80.00 every two weeks for support of his minor children.

On 11 July 1977 plaintiff filed a complaint for custody of Robert. Defendant filed an answer and counterclaim on 12 September 1977 seeking legal custody of the two children and additional child support. On 16 September 1977 plaintiff moved for a blood grouping test to determine the parentage of Jeffrey. No further action was taken, and on 1 May 1979 the case was removed from the active trial docket.

On 13 January 1984 defendant again moved for legal custody of the two children and additional child support. Plaintiff alleged that he was not the father of Jeffrey, and asked the court to order a blood grouping test. The test was ordered by the court on 20 February 1984. Defendant appeals from this order and from the denial of her motion for a new hearing.

Lloyd T. Kelso for defendant appellant.

Basil L. Whitener and Anne M. Lamm for plaintiff appellee.

PARKER, Judge.

[1] No appeal lies from an interlocutory order or ruling of a trial judge unless the order or ruling deprives the appellant of a substantial right which he would lose if the order or ruling is not reviewed before the final judgment. *Blackwelder v. State of North Carolina Department of Human Resources*, 60 N.C. App. 331, 299 S.E. 2d 777 (1983); G.S. 1-277; G.S. 7A-27. An order is interlocutory if it does not determine the issues, but directs some further proceeding preliminary to the final decree. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978).

Judge Bulwinkle's order requiring plaintiff, defendant and Jeffrey to submit to a blood grouping test is an interlocutory order and is not appealable as it does not affect a substantial right. *Davie County Department of Social Services v. Jones*, 62 N.C. App. 142, 301 S.E. 2d 926 (1983). We elect, however, to treat this appeal as a petition for certiorari, allow it, and pass upon the merits. *See Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983); *Patrick v. Hurdle*, 16 N.C. App. 28, 190 S.E. 2d 871, *cert. denied* 282 N.C. 304, 192 S.E. 2d 195 (1972).

[2] General Statute 8-50.1(b) allows the trial court to order a blood grouping test in any civil action in which the question of parentage arises. Defendant argues that as the question of parentage had already been decided, the trial court erred in ordering the blood grouping test. We agree. Plaintiff's guilty plea to the criminal charge of nonsupport of Jeffrey, under G.S. 14-322, is an evidentiary admission of paternity. *Wilkes County v. Gentry*, 311 N.C. 580, 319 S.E. 2d 224 (1984). *See* McCormick on Evidence § 265 (2nd ed. 1972). Additionally, plaintiff is barred from raising the issue of paternity by his own allegation in the complaint that Jeffrey was born of his marriage to defendant. *Withrow v. Webb*, 53 N.C. App. 67, 280 S.E. 2d 22 (1981). *See Sutton v. Sutton*, 56 N.C. App. 740, 289 S.E. 2d 618 (1982). As the parentage of Jeffrey is not at issue the trial court erred in ordering a blood test pursuant to G.S. 8-50.1, and this order is

Vacated.

Judges ARNOLD and WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 MARCH 1985

Case	County	Disposition
BRITT v. WILCOX No. 8416DC882	Robeson (83CVD1678)	Affirmed
FINCHEM v. RACEWAY USED AUTO PARTS No. 844DC611	Onslow (84CVD283)	Vacated and Remanded
FORSYTH CO. BD. OF SOCIAL SERV. v. DIV. OF SOCIAL SERV. No. 8321SC1164	Forsyth (82CVS7201)	Affirmed
INGLE v. ALLEN No. 8410SC690	Wake (80CVS3593)	Affirmed
IN RE COBLE No. 8415DC236	Alamance (83J8)	Affirmed
IN RE ELLIS No. 8410DC588	Wake (84SP111)	Affirmed
KNAPP v. CAPITAL TECHNOLOGY No. 8420SC683	Union (81CVS1110)	Affirmed
LEDFORD v. N.C. DEPT. OF TRANSPORTATION No. 8410IC570	Industrial Commission (TA7987) (TA7988)	Affirmed
MANN v. DOCKERY No. 841SC805	Dare (83CVS219)	Dismissed
RICE v. ONSLOW CO. BD. OF COMM. No. 844SC564	Onslow (83CVS669)	Dismissed
STATE v. ALLISON No. 8427SC405	Gaston (83CRS15226)	No Error
STATE v. CANANDY No. 847SC802	Edgecombe (83CRS9437)	Affirmed
STATE v. CANTRELL No. 8428SC472	Buncombe (82CRS9559)	Affirmed
STATE v. CASHWELL No. 8422SC900	Davie (84CRS0593)	No Error
STATE v. GONZALEZ & WOODS No. 8419SC379	Montgomery (81CRS7260) (81CRS7261) (81CRS7342) (81CRS7343)	Affirmed

STATE v. HARRIS No. 8421SC643	*Forsyth* (83CRS38585) (83CRS38586)	*No Error*
STATE v. JOHNSON No. 8414SC425	Durham (83CRS21124)	No Error
STATE v. LANCE No. 8428SC622	Buncombe (83CRS16063)	No Error
STATE v. LINDSAY No. 8428SC504	Buncombe (83CRS23349) (83CRS23350) (83CRS23351) (83CRS23352)	Affirmed
STATE v. McEACHIRN No. 8418SC222	Guilford (82CRS53506)	No Error
STATE v. MESSER No. 8411SC703	Johnston (82CRS933)	Affirmed
STATE v. ROBINSON No. 8412SC838	Cumberland (82CRS36823)	Affirmed
STATE v. SMITH No. 8413SC646	Columbus (83CRS6977) (83CRS6978) (83CRS6979) (83CRS6980) (83CRS6981)	No Error
STATE v. TATE No. 8419SC519	Rowan (83CRS10822)	No Error in part; Remanded in part.
STATE v. YORK No. 8421SC816	Forsyth (83CRS15086)	Affirmed
THOMAS v. THOMAS No. 8419DC500	Rowan (83CVD435)	Appeal Dismissed

SHERI ELIZABETH PANGBURN v. DR. M. SAAD AND DR. E. V. MAYNARD

No. 844SC266

(Filed 5 March 1985)

1. **Physicians, Surgeons and Allied Professions § 11 — wrongful release of mental patient — not based on malpractice — physician-patient privity not required**

An action for injuries suffered by a third party resulting from the wrongful release of a mental patient is not a medical malpractice case, and physician-patient privity is not required.

2. **Constitutional Law § 20 — immunity of staff members at state hospital — no equal protection violation**

G.S. 122-24 (1981), which provides personal immunity for staff members of state hospitals, does not violate the equal protection clause of Art. I, Sec. 19 of the North Carolina Constitution because no suspect class or fundamental right is involved, and because a rational basis is served in that psychiatrists are exposed to unique risks when they decide to release a patient and, absent immunity, would be reluctant to accept lower-paying state jobs and disinclined to release patients.

3. **Insane Persons § 11; Courts § 1 — personal immunity of state hospital staff members — limited to ordinary negligence — no violation of open courts**

G.S. 122-24, which grants personal immunity to staff members at state hospitals, does not leave the injured plaintiff without a remedy in violation of the open courts provision of Art. I, Sec. 18 of the North Carolina Constitution because it was intended to create a qualified immunity extending only to ordinary negligent acts, and does not protect a tort-feasor from personal liability for gross negligence and intentional torts. G.S. 97-10.1 (1979).

4. **Insane Persons § 11 — wrongful discharge of mental patient — allegations sufficient**

Plaintiff's complaint stated a claim upon which relief could be granted and should not have been dismissed where she alleged that her brother had been under psychiatric care since childhood and had a history of emotional disorders and violent behavior which included attacks on family members, including plaintiff; that he had been committed to Cherry Hospital on at least seven occasions since 1979 and that defendant was aware of his psychiatric, mental and emotional history; that he was involuntarily committed to Cherry Hospital based on the recommendation of defendant, who had found him to be suicidal, dangerous to himself and others, and to have threatened harm to himself and others; that plaintiff's parents had met with defendant and objected to their son's release, telling defendant that they and their children were afraid to have him in the home; and that plaintiff was attacked and stabbed by her brother the same night he was released. G.S. 122-24 (1981).

Judge WELLS concurring.

APPEAL by plaintiff from *Bruce, Judge*. Judgment entered 1 December 1983 in Superior Court, ONSLOW County. Heard in the Court of Appeals 15 November 1984.

Ellis, Hooper, Warlick, Waters & Morgan, by William J. Morgan, for plaintiff appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James D. Blount, Jr., and Jodee Sparkman King, for defendant appellee Saad.

BECTON, Judge.

I

Plaintiff brought this action for compensatory and punitive damages for personal injuries suffered as a result of the wrongful release of her brother, Daniel Olin Pangburn, from Cherry Hospital in Goldsboro, North Carolina, by defendant, Dr. M. Saad, a staff psychiatrist at the hospital. Plaintiff alleges that her brother was discharged by defendant and sent home on 26 March 1982, and that less than 16 hours later, he stabbed her approximately 20 times with a kitchen knife, inflicting "serious, disfiguring and life-threatening wounds." Dr. Saad made a Rule 12(b)(6) motion to dismiss for failure to state a cause of action, which motion was granted by the trial court. Plaintiff appeals.

Plaintiff asks this Court to recognize a cause of action for injuries resulting from the wrongful release of a mental patient. She also asserts that N.C. Gen. Stat. Sec. 122-24 (1981), which allegedly confers immunity on Dr. Saad, as a State hospital medical staff member, for his decision to release Daniel Pangburn, is unconstitutional and thus presents no barrier to recognition of a cause of action. Defendant argues that plaintiff's action is barred because this is a medical malpractice action and there is no privity between plaintiff and Dr. Saad. Further, defendant contends that even if this Court recognizes a cause of action for wrongful release of a mental patient, G.S. Sec. 122-24 (1981) provides defendant with absolute immunity from personal liability.

We hold that plaintiff has stated a claim for relief against Dr. Saad, based on his wrongful release of her brother, and we further hold that G.S. Sec. 122-24 (1981) affords only a qualified immunity, immunizing physicians only from liability for their or-

dinary negligent acts but not from liability for their "wilful, wanton or recklessly" negligent acts or their intentional acts. As plaintiff has sufficiently alleged a cause of action against Dr. Saad for his decision to release Daniel Pangburn, the order of the trial court must be reversed.

II

[1] The initial barrier posed by defendant Saad to recognition of plaintiff's cause of action is that there is no physician-patient privity between plaintiff and Dr. Saad. Defendant contends that such privity is an absolute prerequisite to a medical malpractice action. However, we are not faced with a medical malpractice action. The Supreme Court of Georgia rejected this exact argument on a wrongful death claim brought against the State: "[T]his is not a malpractice case; it is an ordinary negligence case in which privity has never been an essential element." *Bradley Center, Inc. v. Wessner*, 250 Ga. 199, 203, 296 S.E. 2d 693, 696-7 (1982). That court distinguished a negligent release situation from so-called "classic medical malpractice actions," noting that the legal duty involved with the former arose out of the general duty one owes to all the world not to subject it to an unreasonable risk of harm. The Georgia Court quoted with approval the lower court's definition of the legal duty involved in negligent release cases:

> '[W]here the course of treatment of a mental patient involves an exercise of "control" over [the patient] by a physician who knows or should know that the patient is likely to cause bodily harm to others, an independent duty arises from that relationship and falls upon the physician to exercise that control with such reasonable care as to prevent harm to others at the hands of the patient.'

Id. at 201, 296 S.E. 2d at 695-6 (quoting *Bradley Center, Inc. v. Wessner*, 161 Ga. App. 576, 581, 287 S.E. 2d 716, 721 (1982)).

Addressing a factually comparable claim, the Fourth Circuit has said: "Apparently, no Virginia case deals with a claim similar to [plaintiff's], so we must resort to the general principles of the Virginia law of torts." *Semler v. Psychiatric Institute*, 538 F. 2d 121, 124 (4th Cir.), *cert. denied*, 429 U.S. 827, --- L.Ed. 2d ---, 97 S.Ct. 83 (1976). We likewise apply North Carolina tort principles, and find that plaintiff states a claim for actionable negligence,

namely, that defendant breached a duty that he owed to plaintiff, and that she was injured as a proximate cause of that breach, it being reasonably foreseeable that her injuries would result from the breach. *See Ashe v. Acme Builders, Inc.*, 267 N.C. 384, 148 S.E. 2d 244 (1966) (for elements of negligence); *Bradley Center, Inc. v. Wessner.*

III

As we find that a cause of action exists, we must next examine the impact of G.S. Sec. 122-24 (1981), which provides:

> No administrator, chief of medical services, or any staff member under the supervision and direction of the administrator or chief of medical services of any State hospital shall be personally liable for any act or thing done under or in pursuance of any of the provisions of this Chapter.

Dr. Saad stated in his affidavit that he was a staff psychiatrist under the supervision and direction of the Administrator or Chief of Medical Services of Cherry Hospital. The release of Daniel Pangburn, an involuntarily committed patient, was apparently accomplished under G.S. Sec. 122-58.13 (1981). Clearly, then, the provisions of G.S. Sec. 122-24 (1981) seem to immunize defendant from liability, and the only reported cases found construing G.S. Sec. 122-24 (19) and its predecessor support this conclusion.

In *Bollinger v. Rader*, 151 N.C. 383, 66 S.E. 314 (1909), plaintiff sued the superintendent and directors of a state mental hospital for damages caused by the negligent release of a violent patient who murdered plaintiff's intestate six months after he was discharged. The Supreme Court, relying on the predecessor to G.S. Sec. 122-24, held that plaintiff had not stated a cause of action. In *Susan B. v. Planavsky*, 60 N.C. App. 77, 298 S.E. 2d 397 (1982), *disc. rev. denied*, 307 N.C. 702, 301 S.E. 2d 388 (1983), this Court held that money damages for personal liability could not be recovered in a suit brought against a staff doctor at a state mental hospital for infringement of the plaintiff-patient's right to seek a private mental health evaluation. Neither *Bollinger* nor *Susan B.* contains a constitutional challenge to the statute.

IV

A.

[2] We next address plaintiff's constitutional challenge. Plaintiff attacks the constitutionality of G.S. Sec. 122-24 (1981) on two separate grounds: (a) that it violates the equal protection clause of Art. I, Sec. 19 of the North Carolina Constitution, and (b) that it violates the "open courts" provision found in Art. I, Sec. 18 of the North Carolina Constitution.

The statute does not violate our equal protection clause. The classification drawn in G.S. Sec. 122-24 (1981) distinguishes staff members of a State mental hospital from staff members of non-included hospitals, or possibly from all other State employees. As no suspect class or fundamental right is involved, the lower tier of equal protection analysis, the "rational basis" test, is employed. This test requires that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate government interest. *Abbott v. Town of Highlands*, 52 N.C. App. 69, 277 S.E. 2d 820, *appeal dismissed and disc. rev. denied*, 303 N.C. 710, 283 S.E. 2d 136 (1981); *see Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983) (legislative classifications presumed valid). Although no North Carolina case discusses the policy considerations undergirding the statute, it is self-evident that psychiatrists are exposed to unique risks when they decide to release a patient. Also, absent immunity, psychiatrists would be more reluctant to accept lower-paying state jobs, and disinclined to release patients once they accepted such jobs. In our opinion, these considerations easily justify the statutory classification.

B.

[3] Article I, Sec. 18 of our Constitution provides, *inter alia*, that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law. . . ." Plaintiff argues that if she is barred from bringing suit against Dr. Saad, she is denied a remedy for her injury. What plaintiff ignores, and what was emphasized in the *Lamb* Court's discussion of Art. I, Sec. 18, is the prerequisite of legislative recognition of a particular cause of action:

> [T]he remedy constitutionally guaranteed must be one that is legally cognizable. The legislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not.

308 N.C. at 444, 302 S.E. 2d at 882. The Supreme Court further noted that " '[s]o long as an act is not forbidden, the wisdom of the enactment is exclusively a legislative judgment.' " *Id.* at 433, 302 S.E. 2d at 876 (quoting *Mitchell v. Industrial Dev. Financing Auth.*, 273 N.C. 137, 144, 159 S.E. 2d 745, 750 (1968)).

Lamb, then, ostensibly supports the constitutionality of G.S. Sec. 122-24 under Art. I, Sec. 18. However, there is language in *Lamb* which questions its constitutionality:

> We refrain from holding, as our Court of Appeals did [in the *Lamb* decision] and as other courts have done, that the legislature may constitutionally abolish altogether a common law cause of action. Neither do we mean to say that it cannot. The question is not before us.

308 N.C. at 444, 302 S.E. 2d at 882.

Lamb is not the first occasion on which the Supreme Court has declined to consider the constitutional question. In *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 284 S.E. 2d 188 (1981), this Court confronted the constitutional issue by stating: "G.S. Sec. 1-50(6), because it would absolutely abolish rights to seek redress for injuries, on its face violates article I, section 18." 54 N.C. App. at 593, 284 S.E. 2d at 191. On review, the Supreme Court, however, declared that the plaintiff had no standing to raise the constitutional issue, and declined to address it on the merits. *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E. 2d 415 (1982). Therefore, because the differing constructions of Art. I, Sec. 18 adopted by the Court of Appeals in *Lamb* and *Bolick* have not been reconciled by our Supreme Court, whether the General Assembly may abolish a common law cause of action altogether is still unresolved. *But see Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904) (court indicated in dicta that a statute disallowing recovery of any damages in libel action would have violated "open courts" provision).

The plaintiff in this case alleges that she was injured by the negligent or intentional act of a state employee, a cause of action

cognizable at common law. *Wirth v. Bracey*, 258 N.C. 505, 128 S.E. 2d 810 (1963). However, it does not appear that plaintiff is in fact wholly without a remedy for her injury. *See Stewart v. Houk*, 127 Or. 589, 271 P. 998, *reh'g denied*, 127 Or. 597, 272 P. 893 (1928) (legislature may modify the remedy, the form of procedure, and attach conditions precedent to the exercise of the right). Both parties concede in their briefs that plaintiff has a remedy under the State Tort Claims Act, as codified at N.C. Gen. Stat. Sec. 143-291 *et seq.* (1983). The Tort Claims Act permits a cause of action against the State for injuries arising out of the negligent acts of a State employee, while the employee was acting within the scope of employment. G.S. Sec. 143-291 (1983). Recovery for a claim brought under the Act is limited to $100,000. *Id.* However, injuries *intentionally* inflicted by State employees are not compensable under the Act. *Davis v. State Highway Comm'n*, 271 N.C. 405, 156 S.E. 2d 685 (1967). Therefore, if defendant acted negligently, we agree that a claim lies under the Act.

If G.S. Sec. 122-24 (1981) confers absolute immunity on those it protects, it becomes obvious that an injured person can sue neither the State nor the individual physician when a physician acts maliciously, corruptly, or in bad faith in releasing a mental patient. We thus reach the question of whether the legislature intended to include intentional torts within the scope of the immunity provided by the statute. Since we find no discussion of the policy behind G.S. Sec. 122-24 codified in the statute, or embodied in case law, we look to analogous North Carolina authority and authority from other jurisdictions. Turning first to North Carolina authority, we find a compelling analogy in the judicial interpretation of the exclusive remedy provision of North Carolina's Workers' Compensation Act, as codified at N.C. Gen. Stat. Sec. 97-1 *et seq.* (1979). In *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E. 2d 748 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E. 2d 364 (1982), this Court held that although the exclusive remedy provision, G.S. Sec. 97-10.1, precluded bringing a common-law action against a negligent employee, the employee who intentionally inflicted an injury could be sued. The policy reasons are clearly stated:

> We . . . conclude that an intentional tort is not the type of 'industrial accident' to which our legislature intended to give a co-employee immunity. To hold otherwise is to remove responsibility from the co-employee for his intentional con-

> duct. [Citation omitted.] Why should he be concerned about the consequences of his acts if the cost of any intentionally-inflicted injury will be absorbed by the industry?

Andrews v. Peters, 55 N.C. App. at 127, 284 S.E. 2d at 750. We emphasize that the statutory language construed by the *Andrews* Court is conceptually similar to that of G.S. Sec. 122-24 (1981) insofar as it purports to grant absolute immunity.

The holding in *Andrews* has recently been expanded. Despite authority to the contrary and the lack of an express statutory provision, our Supreme Court held that "the Workers' Compensation Act does not shield a co-employee from common law liability for willful, wanton and reckless negligence." *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E. 2d 244 (1985). The Court reasoned that "[i]t would be a travesty of justice and logic to permit a worker to injure a co-employee through such conduct, and then compel the injured co-employee to accept moderate benefits under the Act." *Id.* at 12.

By its seeming grant of absolute immunity, G.S. Sec. 122-24 (1981) is unlike other North Carolina statutes of its genre. These other statutes generally grant a qualified, rather than an absolute, immunity, and thus do not extend the immunity to situations in which the otherwise protected person has acted in bad faith, unreasonably, or maliciously. *See, e.g.*, N.C. Gen. Stat. Sec. 166A-14 (1982) (Emergency Management Act; no liability for employee's actions "except in cases of willful misconduct, gross negligence or bad faith"); N.C. Gen. Stat. Sec. 90-48.8 (1981) (members of dental peer review committee not liable for actions if not malicious and reasonable belief action warranted); N.C. Gen. Stat. Sec. 7A-550 (1981) (persons reporting child abuse); N.C. Gen. Stat. Sec. 90-171.47 (Supp. 1983) (persons reporting misconduct of nurses). Even N.C. Gen. Stat. Sec. 122-58.8A (Supp. 1983) (effective 1 January 1984), a newly-enacted statute providing immunity to both public and private mental health facilities, and their staffs, for actions connected with outpatient commitment, only grants immunity when the facility, physicians and staff "follow accepted professional judgment, practice and standards in the management, supervision and treatment of the respondent."

Turning next to the law of other jurisdictions, we find that:

> It is generally recognized that public officers and employees would be unduly hampered, deterred and intimidated in the discharge of their duties, if those who acted improperly, or even exceeded the authority given them, were not protected to some reasonable degree by being relieved from private liability. Accordingly, the rationale for official immunity is the promotion of fearless, vigorous, and effective administration of policies of government. The threat of suit could also deter competent people from taking office.

63A Am. Jur. 2d *Public Officers and Employees* Sec. 358 at 924-5 (1984), and cases therein cited. Although the modern trend has been to grant more and more immunity to public officials, *id.*, there has been a marked restriction on the circumstances in which *absolute* immunity is available. *See Davis v. Knud-Hansen Memorial Hospital*, 635 F. 2d 179 (3d Cir. 1980). While judges and legislators have historically enjoyed absolute immunity, 63A Am. Jur. 2d, *supra; see Jones v. Perrigan*, 459 F. 2d 81 (6th Cir. 1972), the same has not been true for state officials and employees. The rationale given is that courts must strike a balance between the need to free the particular state official or employee to perform his or her functions without the vexation of defending lawsuits arising from their performance, against the right of an aggrieved party to seek redress. 63A Am. Jur. 2d, *supra.*

These general policy considerations are particularly well-suited to actions against a state psychiatrist (or a state hospital) for the release of a patient. Significantly, the various policy reasons for immunity apply exclusively to ordinary negligence actions; they have no relevance to grossly negligent and intentional acts. In determining whether state mental hospitals may be held liable for the negligent release of patients, an Ohio Court discussed policy considerations which are also pertinent to the liability of the individual physician:

> Both private and public hospitals are faced with the extremely difficult task of balancing the interests of a patient who would benefit from permanent or periodic release, the interest of society in treating mental illness and returning the patient to a normal, productive life, and the interests of society in keeping a dangerous, mentally ill person off the streets. The uncertainties inherent in analyzing and treating

> the human mind, let alone the decision of when a person is 'cured' and no longer a danger, renders the decisions of skilled doctors highly discretionary and subject to rebuke only for the most flagrant, capricious, and arbitrary abuse.

Leverett v. State, 61 Ohio App. 2d 35, 40, 399 N.E. 2d 106, 110 (1978).

In *Bellavance v. State*, 390 So. 2d 422 (Fla. Dist. Ct. App. 1980), *reh'g denied*, 399 So. 2d 1145 (Fla. 1981), a Florida court reasoned that although the State's standards for releasing mental patients are discretionary and thus immune from review, the subsequent ministerial action of the release itself was not so protected. The Court made the following policy analysis:

> There is a vital public interest in securing the earliest possible release and subsequent return to society of a person afflicted with mental illness, and it may well be argued that to subject the State to liability for the negligent release of these people will have a chilling effect upon . . . [that goal]. However, this potential chilling effect is significantly mitigated by . . . Section 768.28(9):
>
> > 'No officer, employee, or agent of the state or its subdivisions shall be held personally liable in tort for a final judgment which has been rendered against him for any injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function, *unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.*'
>
> Clearly, it is only under a most exacting standard that State employees may be subjected to ultimate personal liability.
>
> We also doubt that the potential liability of the State itself will be a significant inhibitor to the exercise of professional judgment by the personnel involved. Indeed, some inhibiting effect may well be healthy, for it should not be forgotten that the State's employees serve the needs of society as a whole as well as the needs of individual persons. Further, we cannot envisage any remedy, other than a tort suit for damages, to which the [plaintiffs] can resort.

Id. at 424-5. *See also St. George v. State*, 283 A.D. 245, 127 N.Y.S. 2d 147, *aff'd*, 308 N.Y. 681, 124 N.E. 2d 320 (1954) (doctors not legally responsible in damages for honest error of professional judgment, otherwise the result would be reluctance to release and the unnecessary confinement of person who would benefit by the release); *McDowell v. County of Alameda*, 88 Cal. App. 3d 321, 151 Cal. Rptr. 779 (1979) (although California statute provides absolute immunity to State psychiatrists for decisions whether to discharge mental patient, California recognizes that these physicians have a duty to warn intended victim).

In both the *Bellavance* and *Leverett* cases, *supra*, the applicable statutes granted only a qualified immunity to the individual physicians. This appears consonant with the trend, noted above, limiting the extension of absolute immunity. *See* 42 Pa. Cons. Stat. Ann. Sec. 8522 (Purdon 1982) (abolishing sovereign immunity as a bar to an action arising out of a negligent act, including acts of "health care employees of Commonwealth agency medical facilities or institutions . . ."). The Ohio statute relied on in *Leverett*, and the court's commentary thereon, is instructive:

> Persons acting reasonably and in good faith, either upon actual knowledge or information thought by them to be reliable, who procedurally or physically assisted in the hospitalization or discharge of a person pursuant to this chapter, do not come within any criminal provisions, and are free from any liability to the person hospitalized or to any other person.

Ohio Rev. Code Ann. Sec. 5122.34 (Page 1977). The *Leverett* Court explained:

> [T]he General Assembly intended for doctors practicing in mental hospitals to be free from liability for the discharge of patients if such discharge is reasonable and in good faith. Conversely, such an expressed intention necessarily implies that doctors could be liable at some time, presumably when they act unreasonably or in bad faith.

61 Ohio App. 2d at 42, 399 N.E. 2d at 111.

Therefore, the case law from other jurisdictions is replete with justifications for extending a qualified immunity to state psychiatrists for the negligent release of a patient. Our research

has failed to disclose a single cogent reason for shielding the grossly negligent or intentional wrongdoer from the consequences of his or her acts. We reiterate that G.S. Sec. 122-24 (1981) is an anomaly among North Carolina statutes granting immunity, and further note that a judicial limitation has been placed on the facially absolute statutory immunity granted under the Workers' Compensation Act, G.S. Sec. 97-10.1 (1979), to achieve the perceived legislative intent under analogous circumstances. *See Andrews v. Peters.* We therefore conclude that G.S. Sec. 122-24 was intended to create a qualified immunity for those state employees it protects, extending only to their ordinary negligent acts. It does not, however, protect a tortfeasor from personal liability for gross negligence and intentional torts. G.S. Sec. 122-24 does not, then, abolish a cause of action and leave the injured plaintiff without her remedy, but only defines the circumstances in which relief will be available. The statute, as construed, is thus constitutional and does not violate the "open courts" provision of Art. I, Section 18.

V

[4] In conclusion, if plaintiff has stated a claim against Dr. Saad for his grossly negligent or intentional acts, it will withstand dismissal, since it will fall outside the statutory protection of G.S. Sec. 122-24 (1981).

The pertinent allegations of the Complaint are as follows: Daniel Pangburn has been under psychiatric care since childhood and has a history of emotional disorders and violent behavior which has included attacks on family members, including the plaintiff. Daniel has been committed to Cherry Hospital on at least seven occasions since 1979, and defendant is aware of Daniel's psychiatric, mental and emotional history. On 25 February 1982, a petition was filed in Onslow County Superior Court for the involuntary commitment of Daniel Pangburn. He was examined by defendant, who found him to be suicidal, dangerous to himself and others, and to have threatened physical harm to his family and others. Based on the recommendation of Dr. Saad, on 3 March, 1982, Daniel Pangburn was involuntarily committed to Cherry Hospital for 90 days. On the morning of 26 March 1982, the parents of Daniel Pangburn met with defendant and objected to defendant's decision to release their son. The

Pangburns told Dr. Saad that they and their children were afraid to have Daniel in the home and that they wished to have him placed in a chronic care unit. Daniel Pangburn was released in the late morning of 26 March 1982, and that same night he attacked and stabbed his sister, the plaintiff.

A Complaint will not be dismissed unless it appears that plaintiff is not entitled to relief under any state of facts that could be presented in support of the claim. *Andreson v. Eastern Realty Co.*, 60 N.C. App. 418, 298 S.E. 2d 764 (1983). Taking, as we must, the allegations of the Complaint as true, *id.*, we are satisfied that plaintiff's Complaint sufficiently charges both "wilful, wanton or reckless" negligence and intentional wrongdoing. We note that the Complaint specifically alleges that "the conduct and behavior of defendants was not only negligent in that it failed to comply with the applicable standard of care but also grossly negligent and wanton . . . so as to subject these defendants to punitive damages." *See Pleasant v. Johnson*; *Braswell v. N.C. A & T Univ.*, 5 N.C. App. 1, 8, 168 S.E. 2d 24, 28 (1969) ("Wantonness . . . connotes intentional wrongdoing."). Therefore, the trial court's order dismissing the action for failure to state a claim upon which relief may be granted must be reversed, and the cause remanded for further proceedings.

Reversed and remanded.

Judges ARNOLD and WELLS concur.

Judge WELLS concurring.

I believe that this case should be decided under rules of law applying to public officers generally, it being my position that the immunity statute at issue in this case codifies those rules as applicable to physicians employed at state hospitals.

Public officers acting within the scope of their authority are not answerable for ordinary negligence, but may be held liable if they act maliciously or corruptly.

> A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another. . . . 'An act is wanton when it is done of

> wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.' . . .

In re Grad v. Kaasa, 312 N.C. 310, 321 S.E. 2d 888 (1984) (quoting *Givens v. Sellars*, 273 N.C. 44, 159 S.E. 2d 530 (1968)).

In her complaint, plaintiff alleges facts and circumstances showing that plaintiff's family, including herself, were in great fear of harm from plaintiff's brother, who was in defendant's care; and that these fears were clearly and forcefully expressed to defendant, while the family was imploring defendant not to release Daniel Pangburn from Cherry Hospital.

Plaintiff alleges that defendant, though aware of Daniel's violent and dangerous propensities and aware of his family's fear of him, "persisted in releasing Daniel Olin Pangburn and thus exhibited gross negligence and wanton conduct." These allegations were sufficient to state a claim for relief against defendant, sufficient, at the pleadings level to overcome defendant's immunity.

THE NORTH CAROLINA STATE BAR v. WILLIAM M. SHEFFIELD, ATTORNEY

No. 8410NCSB477

(Filed 5 March 1985)

1. **Attorneys at Law § 12— disciplinary proceedings—standard of proof—standard of judicial review**

 The standard of proof in attorney discipline and disbarment proceedings is one of clear, cogent and convincing evidence, and the standard for judicial review of such cases is the whole record test.

2. **Attorneys at Law § 12— attorney disciplinary proceeding—evidence sufficient to support finding**

 The evidence in an attorney disciplinary hearing was sufficient to support the Hearing Committee's finding that defendant paid $1,804.40 from a trust account to a specified person on his client's behalf for private investigative services in connection with a criminal trial.

3. **Attorneys at Law § 12— attorney disciplinary hearing—failure to keep records —evidence sufficient to support finding**

 The evidence in an attorney disciplinary hearing was sufficient to support the Hearing Committee's finding that defendant did not keep records from which he could determine at any one time what amount in his trust account belonged to any particular client and that he did not maintain a running balance of the proceeds due the client who filed a grievance against him.

4. **Attorneys at Law § 12— attorney disciplinary hearing—failure to account for settlement proceeds—evidence sufficient to support finding**

The evidence in an attorney disciplinary hearing was sufficient to support a finding by the Hearing Committee that defendant attorney never rendered to his client an accounting of the disbursement of the proceeds of the settlement of a personal injury claim on behalf of the client. None of the three occasions when defendant allegedly discussed finances with the client could properly be considered as an accounting.

5. **Attorneys at Law § 12— attorney disciplinary hearing—acceptance of employment—absence of withdrawal—evidence sufficient to support findings**

The evidence in an attorney disciplinary hearing supported findings by the Hearing Committee that defendant accepted employment in a wrongful death case and that he never withdrew where it tended to show: defendant already represented the client in murder and personal injury cases; the client's father delivered the wrongful death complaint to defendant and defendant told him that the complaint could be worried about later; defendant did not advise the client that he would not represent him in the wrongful death case; defendant wrote the client a letter advising him against filing a counterclaim in the wrongful death action and encouraging him to file for bankruptcy; defendant wrote the client a second letter stating that "I do not see that I can handle this for you for a number of reasons" and asking the client to "come by the office some time this week or next so we can discuss this"; and defendant received two letters from opposing counsel in the wrongful death case, one suggesting that he file an answer and the second inquiring whether defendant represented the client in the case, but defendant never responded to either letter.

6. **Attorneys at Law § 3— attorney-client relationship by implication**

The relationship of attorney and client may be implied by the conduct of the parties and is not dependent on the payment of a fee or the execution of a formal contract.

7. **Attorneys at Law § 6— absence of effective withdrawal from case**

Assuming that defendant attorney had a duty to withdraw from representation of a client in a wrongful death case once the client revealed his intention to commit perjury, defendant did not effectively withdraw from the case where he failed to follow the procedure contained in DR 2-109(A)(2).

8. **Attorneys at Law § 12— attorney disciplinary hearing—failure to maintain records and account for client funds—conclusions supported by findings and evidence**

A conclusion in an attorney disciplinary proceeding by the Hearing Committee that defendant attorney failed to maintain complete records of funds received on a client's behalf and to render appropriate accountings to the client in violation of DR 9-102(B)(3) was supported by evidence and findings that defendant failed to maintain records from which he could determine at any one time what amount in his trust account belonged to a particular client, that defendant did not maintain a running balance of the proceeds due the client and did not render the client an accounting of these proceeds, and the only

trust accout records defendant maintained were check stubs, cancelled checks, and bank statements.

9. Attorneys at Law § 12— attorney disciplinary proceeding—failure to respond to notice of grievance and subpoena—sufficiency of findings and evidence

A conclusion by the Hearing Committee in an attorney disciplinary proceeding that defendant failed to respond to a letter of notice of a grievance and a subpoena in violation of G.S. 84-28(b)(3) and engaged in conduct adversely reflecting upon his fitness to practice law in violation of DR 1-102(A)(6) was supported by findings and a stipulation that defendant failed to respond to either the letter or subpoena, there being no requirement that such failure be willful or intentional.

10. Attorneys at Law § 11— attorney disciplinary hearing—exclusion of character testimony

The Hearing Committee in an attorney disciplinary proceeding did not err in excluding testimony offered to prove character, habit and customary professional practices of defendant attorney since the Committee was to determine whether defendant had committed specific acts, not whether he was generally fit to practice law, and his character was not at issue. Also, testimony by defendant's former law partner concerning defendant's ability as a courtroom lawyer was properly excluded on the ground of remoteness where the witness in 1978 had moved away from the city in which defendant practiced.

11. Attorneys at Law § 11— attorney disciplinary hearing—exclusion of affidavit of unavailable witness

The Hearing Committee in an attorney disciplinary hearing did not err in excluding the affidavit of an unavailable witness offered to impeach the credibility of the client who filed the grievance against defendant since the affidavit of an unavailable witness is not automatically admissible into evidence; defendant never attempted to have the witness's deposition taken so that the State Bar would have an opportunity to cross-examine him; and the affidavit was for corroborative purposes only.

12. Attorneys at Law § 11— attorney disciplinary hearing—impeachment testimony—exclusion not prejudicial error

Defendant attorney was not prejudiced by the Hearing Committee's erroneous exclusion of an officer's testimony that the client who filed the grievance against defendant had a criminal record and was under investigation for illegal drug activities where it was already before the Committee that the client had been tried for second-degree murder, and a second witness thereafter testified concerning the client's involvement with drug activities.

APPEAL by defendant from the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar. Order entered 17 October 1983. Heard in the Court of Appeals 9 January 1985.

David R. Johnson for plaintiff appellee North Carolina State Bar.

Gary K. Berman for defendant appellant.

BECTON, Judge.

I

On 4 May 1983, plaintiff, The North Carolina State Bar, filed a Complaint against defendant, William M. Sheffield, a practicing attorney, based upon the grievance of Billy Wayne Fowler, a former client of defendant. A hearing was held before a Hearing Committee of the Disciplinary Hearing Commission of the State Bar on 15, 16 and 22 September 1983. Based upon its findings of fact and conclusions of law, the Committee entered an order of discipline, suspending defendant from the practice of law for a period of three years. Defendant appealed, arguing that certain findings of fact were not supported by clear, cogent and convincing evidence; that certain conclusions of law were not properly supported by the findings; that it was error to exclude certain evidence offered by defendant; and that it was error for the Commission to conclude that defendant had violated any Disciplinary Rules of the Code of Professional Responsibility, and to enter an order imposing discipline. We have carefully examined the record of the proceeding below, and the orders based thereon, and find them free from error. We therefore affirm.

II

Factual Background

Defendant was admitted to the bar in North Carolina in September 1972, and at all times pertinent to this action maintained a law office in Durham, North Carolina. Three separate lawsuits involving Billy Wayne Fowler (Fowler) are connected with the grievance Fowler ultimately filed against defendant. The first lawsuit arose from a 19 June 1979 automobile accident in which Fowler was injured. Shortly thereafter, defendant was offered employment in that case by Fowler's father. Defendant accepted on a contingency fee basis, and in August 1979 notified the other driver's insurance carrier that he was representing Fowler. Fowler and his father both periodically brought bills arising from the accident to the defendant.

On 19 June 1980, while settlement negotiations in the personal injury suit were still ongoing, Fowler was arrested and charged with the murder of Tony Holland and assault with a deadly weapon with intent to kill inflicting serious injury on Terry Holland. Fowler's father immediately contacted defendant about representing his son on the criminal charges. Defendant accepted the employment and subsequently requested and received two separate payments of $1,000 each from Fowler's father on 23 June and 3 July 1980. Although Fowler denies ever discussing fees for the criminal case with the defendant, the defendant testified, and the Committee found as a fact, that the defendant and Fowler agreed that defendant would represent him on the criminal charges for a fee of $25,000. The criminal case was tried in February 1981. Defendant appeared as counsel for Fowler, who was acquitted of all charges against him.

On or about 13 August 1980, defendant and the insurance company had agreed to settle the personal injury claim for $40,000. Defendant delivered a draft to Fowler at the Orange County jail on 15 August 1980. Fowler executed a release, endorsed the draft, and returned the documents to defendant, who deposited the draft that same day in a checking account labelled a "trust account." Between 15 August and 29 October 1980, the date of the next deposit, defendant wrote four checks from the account totalling $9,371.34, which he noted were for payment of fees from Fowler, numerous checks to pay business and personal obligations totalling in excess of $21,000, and a check for $1,000, of which approximately $25 was used for Fowler's benefit.

On 28 October 1980, a complaint in a wrongful death action was filed against Fowler by Patricia Holland, Tony Holland's widow and the administratrix of his estate. The Complaint was delivered to defendant's office by Fowler's father. Defendant did not respond to subsequent inquiries from opposing counsel as to whether he represented Fowler in this matter. No responsive pleading was ever filed and a default judgment for $200,000 was ultimately entered against Fowler.

On 24 August 1982, Fowler filed a grievance against the defendant with the Grievance Committee of the North Carolina State Bar concerning defendant's handling of funds in the personal injury case and his representation in the wrongful death ac-

tion. On 5 October 1982, defendant received that Committee's Letter of Notice, giving him 15 days to respond to the grievance filed against him; however, defendant never responded to this letter. On 23 March 1983, defendant was served with a subpoena by the Committee requiring him to appear and produce his records with regard to his representation of Fowler. The subpoena directed his appearance on 6 April 1983. The parties stipulated that defendant failed to appear in response to the subpoena or make any other response to the Committee prior to 6 April 1983. This action was filed by the State Bar on 4 May 1983.

III

[1] Defendant's central argument on this appeal is that six of the Committee's findings of fact were not supported by clear, cogent and convincing evidence drawn from the whole record. The standard of proof in attorney discipline and disbarment proceedings is one of "clear, cogent and convincing" evidence. Rules of the North Carolina State Bar, Art. IX, Sec. 14(18). *See In re Palmer*, 296 N.C. 638, 252 S.E. 2d 784 (1979) (adopting standard). Clear, cogent and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt. *In re Montgomery*, 311 N.C. 101, 316 S.E. 2d 246 (1984). It has been defined as "evidence which should fully convince." *Williams v. Blue Ridge Bldg. & Loan Ass'n*, 207 N.C. 362, 177 S.E. 176 (1934).

The standard for judicial review of attorney discipline cases is the "whole record" test. *N.C. State Bar v. DuMont*, 304 N.C. 627, 286 S.E. 2d 89 (1982). This test requires the reviewing court to

> consider the evidence which in and of itself justifies or supports the administrative findings and . . . also [to] take into account the contradictory evidence or evidence from which conflicting inferences can be drawn. . . . Under the whole record test there must be substantial evidence to support the findings, conclusions and result. . . . The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion.

Id. at 643, 286 S.E. 2d at 98-9 (citations omitted). *See Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 233 S.E. 2d 538 (1977)

(reviewing court cannot substitute its judgment for that of the agency as between two reasonably conflicting views, although court could justifiably reach a different result). Applying the "whole record" test to the contested findings of fact, we find each of them supported by clear, cogent and convincing evidence.

Before discussing the individual findings, defendant contrasts at length his own credibility as opposed to Billy Fowler's credibility in an effort to discredit Fowler's testimony. Defendant argues that because each disputed finding is supported exclusively by Fowler's testimony, and because Fowler is an inherently incredible witness, the findings could not have been supported by clear, cogent and convincing evidence. The underlying premise of defendant's argument, that Fowler's testimony alone is the basis for the findings, is faulty. First, other evidence supports each of the findings. Second, defendant's argument mistakenly assumes that the credibility of witnesses is a matter properly before this Court. Our review is concerned only with the sufficiency of the evidence, not the credibility of witnesses. *See State ex rel. Comm'r of Ins. v. Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547, *reh'g denied*, 301 N.C. 107, 273 S.E. 2d 300 (1980) (credibility of witnesses and probative value of particular testimony are for administrative body to determine).

[2] We turn to the individual findings. Defendant first contends that the Committee erred in finding that defendant paid $1,804.40 from the trust account to John Myers on Fowler's behalf for private investigative services in connection with the criminal trial. Although appellant stipulated to this finding before trial, he seems to suggest it is deceptive because Myers was paid a total sum greater than $1,804.40. The uncontroverted evidence is that Myers received $1,804.40 *from the trust account*. Plainly, the finding is neither false nor deceptive, as it expressly relates to an amount paid Myers from the trust account, and not from other sources.

[3] The Committee found that:

> The Defendant did not keep records from which he could determine at any one time what amount in his trust account belonged to any particular client. The Defendant did not maintain a running balance of the proceeds due Fowler.

Not only is this finding supported by competent evidence, nothing in the record supports a contrary conclusion. Defendant stipulated to the following:

> The only trust account records maintained by the defendant were the check stubs, cancelled checks, and bank statements. The defendant did list fees and expenses on the file folder of the client's file but *did not maintain any ledgers or other records showing a running balance of an individual client's funds*. (Emphasis added.)

Defendant's argument does not even address the substance of the challenged finding. Defendant asserts that at the time of the deposit of the $40,000 settlement proceeds in defendant's trust account, Billy Fowler owed him a $13,333.33 contingency fee in the personal injury case, and a $25,000 fee for representing Fowler on the criminal charges. Defendant maintains that, based on these figures, it was "obvious" what the balance due Fowler was at any given time. This contention is hollow. Whether determining the balance was a simple or complex calculation, the undisputed evidence is that no records indicating the balance due were ever kept.

[4] The Committee also found that defendant never rendered an accounting of the disbursement of the settlement proceeds. While Billy Fowler denied ever having received such an accounting, the defendant points to three occasions when he discussed finances with Fowler as proof that he rendered an accounting. He testified that in August 1980, when he brought the insurance settlement draft to Fowler, he discussed with Fowler "what we had gotten, and where it was going and how much was left." Defendant introduced the voucher portion of the insurance draft into evidence. A handwritten calculation on the voucher shows the total amount of proceeds, less defendant's fees for the personal injury and criminal cases, and a remaining amount of $1,666.67. Defendant testified these notations were made during his conversation with Fowler.

Defendant further testified to a "fairly simple accounting" given Fowler in December 1980, when defendant claimed he agreed to represent Billy Fowler's brother Danny. Defendant testified that this accounting disclosed a balance of less than $1,000. Finally, defendant stated that during jury deliberations at

Fowler's criminal trial in February 1981, he and Fowler went over some figures in writing. None of the three alleged accountings ever considered the $2,000 paid to defendant by Billy Fowler's father for investigative work. In our view, none of these three transactions between defendant and Fowler can be considered an accounting, and the Committee did not err, based on the whole record, in finding that defendant had never rendered an accounting.

[5] The defendant next challenges two related findings of fact. The first finding recites that in November 1980, the defendant accepted the Complaint in the wrongful death action delivered to him by Billy Fowler's father, and that

> defendant did not advise either Fowler's father or Fowler that he would not represent him in the civil action at that time or prior to the criminal trial. Defendant accepted employment in the civil wrongful death action and the relationship of attorney and client was established between the defendant and Billy Wayne Fowler with respect to the defense of such action.

The second finding reiterates that defendant did not advise Fowler that he would not represent him, and adds that defendant did not respond to the inquiries of opposing counsel regarding the case, and that "Fowler believed the Defendant was handling the civil action appropriately."

Defendant admits that the wrongful death complaint was left at his office by Billy Fowler's father in November 1980, and that he told the elder Fowler that the Complaint could be worried about later. Although defendant testified otherwise, Billy Wayne Fowler stated that defendant never notified him he was not handling the action, and that about a week after his acquittal on the murder charges, Fowler asked the defendant "how everything was coming along" and the defendant responded that "everything was going beautifully."

Defendant maintains that a few days after the acquittal, Fowler informed him that he intended to perjure himself in connection with the wrongful death case, and for that reason, defendant testified that he told Fowler at least twice he would not represent him, and sent him two letters to the same effect. De-

fendant's position seems to be either that he never accepted employment in this case, or that in any event he withdrew upon discovering his client's intention to commit perjury. We find ample evidence to support both that defendant accepted employment in the wrongful death case, and that he never withdrew.

[6] As to whether defendant accepted employment, we observe that the relation of attorney and client may be implied from the conduct of the parties, and is not dependent on the payment of a fee, nor upon the execution of a formal contract. *E. F. Hutton & Co. v. Brown*, 305 F. Supp. 371 (S.D. Tex. 1969). The dispositive question, then, is not, as defendant suggests, whether there was an express verbal agreement between the parties, or whether the attorney-client relationship in the wrongful death case was established in the same manner as in the earlier cases defendant handled for Fowler, but, rather, whether defendant's conduct was such that an attorney-client relationship could reasonably be inferred. The elder Fowler's delivery of the Complaint to defendant's office, in light of the fact that defendant was already representing Billy Fowler on other matters and that he never told Billy Fowler he would not be representing him in the wrongful death case, is some evidence of an attorney-client relationship. At least one court has reached this conclusion on markedly similar facts. *Rice v. Forestier*, 415 S.W. 2d 711 (Tex. Civ. App. 1967) (where citations left at attorney's office by client, and attorney never declined to represent client, attorney had duty to inform client he was not going to file an answer), and, in this case, there is even more evidence supporting the Committee's finding of an attorney-client relationship.

The two letters written by defendant to Fowler further indicate that defendant accepted employment, and no indication that he declined it. The first letter advises Fowler against filing a counterclaim in the wrongful death action, and also encourages him to file for bankruptcy. *See Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W. 2d 686 (Minn. 1980) (rendering of legal advice establishes attorney-client relationship). *Accord Hunt v. Disciplinary Bd. of the Ala. State Bar*, 381 So. 2d 52 (Ala. 1980). The second letter, dated 23 March 1981, states in reference to the lawsuit that "I do not see that I can handle this for you for a number of reasons," and adds, "[p]lease come by the office sometime this week or next so we can discuss this." At best, this

letter bespeaks a somewhat equivocal intention on defendant's part to end his involvement with the lawsuit. It is not the legal equivalent of withdrawing from representation. *See* Code of Professional Responsibility of the N. C. State Bar, DR 2-109(A)(2) (procedure for withdrawal).

Furthermore, it is established by uncontroverted evidence and defendant's own admissions that he received two letters from opposing counsel in the lawsuit dated 16 March 1981 and 26 May 1981. The first letter informed defendant of the trial date and then requested he file an answer. Defendant never responded. The second letter simply requests: "Please let me know whether you represent Billy Wayne Fowler in connection with this." Defendant never replied to this letter, either. Thus, even taking into account defendant's testimony that he told Fowler he would not represent him in this matter, the whole record contains substantial evidence supporting each aspect of the two challenged findings.

IV

[7] Defendant next assigns error to three conclusions of law made by the Committee in that they were supported by neither findings nor evidence. The first of the challenged conclusions reads:

> By failing to file a responsive pleading or otherwise take action on behalf of Fowler in the civil wrongful death action, the Defendant has neglected a legal matter entrusted to him and has intentionally failed to carry out a contract of employment in violation of Disciplinary Rules 6-101(A)(3) and 7-101 (A)(2) of the Code of Professional Responsibility of The North Carolina State Bar.

Defendant's position that this conclusion is erroneous is premised on his earlier argument that he never entered into a contract of employment. We have discussed how an attorney-client relationship was established between defendant and Billy Wayne Fowler as to this wrongful death case. Defendant nevertheless contends that, even if there were a valid contract of employment, he was ethically constrained from carrying it out once Fowler revealed his intention to commit perjury. DR 7-102. Assuming defendant had a duty to withdraw, we have already

reviewed the pertinent facts at length, *supra*, and are satisfied that defendant never actually withdrew from the case. DR 2-109 (A)(2) contains the procedure by which an attorney may withdraw from a case. This procedure was not followed by the defendant.

[8] The Committee next concluded that the defendant failed to maintain complete records of the funds received on Fowler's behalf and render appropriate accountings to Fowler in violation of Disciplinary Rule 9-102(B)(3). This conclusion of law is based on findings that the defendant failed to maintain records from which he could determine at any one time what amount in his trust account belonged to a particular client, that defendant did not maintain a running balance of the proceeds due Fowler, and that he did not render Fowler an accounting of these proceeds. As discussed earlier, all these findings were supported by sufficient evidence. Defendant stipulated that the only trust account records he maintained were check stubs, cancelled checks, and bank statements. The minimal record-keeping requirements of Disciplinary Rule 9-102(B)(3) concerning receipt and disbursement of funds include keeping a running balance of the funds kept in a trust account for a particular person. This conclusion is thus fully substantiated by findings based on sufficient evidence.

[9] The final conclusion of law to which defendant assigns error states:

> By failing to respond to both the Letter of Notice and the subpoena the Defendant has failed to respond to a formal inquiry of The North Carolina State Bar in violation of N.C. G.S. Sec. 84-28(b)(3) and has engaged in conduct adversely reflecting upon his fitness to practice law in violation of Disciplinary Rule 1-102(A)(6) of the Code of Professional Responsibility of The North Carolina State Bar.

Defendant stipulated that he failed to respond to either the letter or subpoena, which stipulations were embodied, nearly verbatim, in the Committee's findings. Defendant testified that he did not read the letter, and was somehow unaware of the return date on the subpoena. He argues that his failure to respond was not willful, but excusable, and that therefore the Committee's conclusion is erroneous. This argument is meritless. Defendant stipulated to his failure to respond. There is no requirement of either N.C. Gen. Stat. Sec. 84-28(b)(3) (1981) or Disciplinary Rule

1-102(A)(6) that such failure be willful or intentional. This conclusion is entirely accurate.

V

[10] The defendant next makes several assignments of error concerned with the Committee's exclusion of certain testimonial and affidavit evidence. Defendant first argues that it was error to exclude the testimony of five witnesses, including defendant himself, on the theory that the proffered testimony was admissible to prove character, habit and customary professional practices of the defendant. Defendant initially observes that the rules of evidence are relaxed in a disciplinary hearing, modeled as it is after a non-jury trial in a civil case. Rules of the North Carolina State Bar, Art. IX, Sec. 14(12); *In re Elkins*, 308 N.C. 317, 302 S.E. 2d 215, *cert. denied*, --- U.S. ---, 78 L.Ed. 2d 685, 104 S.Ct. 490 (1983) (administrative proceedings generally). He then argues that since the Committee was charged with determining his fitness to practice law, his character was at issue, and as the standard for admissibility of evidence in these proceedings is lenient, the testimony should have been admitted.

Once again, defendant proceeds from a flawed premise. The Committee was to determine whether defendant had committed the specific acts alleged in the Complaint, not whether he was generally fit to practice law. Thus, his character was not at issue. Furthermore, three of the witnesses were asked about defendant's withdrawal from representing clients in other situations. Whether defendant would have been justified in withdrawing from the wrongful death case is irrelevant; the salient point is that he never withdrew. Also, these witnesses *were* permitted to state their opinion as to defendant's character and reputation. Similarly, although defendant was not allowed to testify about any specific case from which he withdrew, he was allowed to testify generally as to how he handled these situations. Finally, a former law partner of defendant was not allowed to testify on the subject of defendant's ability as a courtroom lawyer. As this witness moved away from Durham in 1978, the Committee properly excluded this testimony as being too remote to bear upon the incidents in question. Furthermore, defendant's counsel failed to preserve this testimony for purposes of appellate review.

Defendant also submits that it was reversible error to exclude from evidence four affidavits offered by defendant. We disagree. Three of the affidavits were offered to show the good character of defendant, the fourth, by Hudson, to impeach the credibility of Billy Fowler. Affidavits are generally inadmissible as evidence during trial, as they are an inherently weak method of proof, prepared without notice and without opportunity for cross examination. *In re Griffin*, 6 N.C. App. 375, 170 S.E. 2d 84 (1969). Even if affidavit evidence was somehow appropriate in these proceedings, the three character affidavits were not admissible as the defendant's character was not at issue. Significantly, the Committee, in ruling that these affidavits were not admissible on the question of misconduct, stated that if the question of discipline were reached, it would be willing to consider character affidavits. *See* Rules of the North Carolina State Bar, Art. IX, Sec. 14 (19). The affidavits, however, were never resubmitted.

[11] As to Hudson's affidavit, defendant argues that as he was an unavailable witness, his affidavit should have been admitted. Not only is the affidavit of an unavailable witness not automatically admissible into evidence, we note that defendant never attempted to have Hudson's deposition taken, which would have provided the State Bar with an opportunity to cross-examine. Finally, defendant concedes Hudson's affidavit was for corroborative purposes only. For all the foregoing reasons, it was not error to exclude it.

[12] Finally, an objection was sustained to a question put to Durham police officer Nicholas Then concerning Billy Fowler's reputation. Officer Then testified out of the Committee's hearing that Fowler had a criminal record and was under investigation for illegal drug activities. Defendant contends that it was reversible error to exclude this testimony. Although this objection should probably have been overruled, as character testimony concerning a person's reputation is admissible to impeach a witness, we do not believe the defendant was prejudiced by the failure to overrule the objection. It was already before the Committee that Fowler had been tried for second degree murder, and another witness testified later on in the hearing concerning Fowler's involvement with drug activities.

VI

Based on the foregoing, we summarily reject defendant's final two arguments that the Committee erred in its conclusion that the defendant's conduct violated disciplinary rules and that it erred in entering an order imposing discipline. Defendant received a fair hearing, free from error. We accordingly

Affirm.

Judges JOHNSON and COZORT concur.

LINDA JACKSON, ADMINISTRATRIX OF THE ESTATE OF MARY MAGDALENE JACKSON v. THE HOUSING AUTHORITY OF THE CITY OF HIGH POINT

No. 8318SC1118

(Filed 5 March 1985)

1. **Landlord and Tenant § 8.3; Negligence § 50.1— wrongful death of tenant—ordinary negligence—directed verdict for defendant improper**

In an action arising from the death of a tenant in one of defendant's apartments, the court erred by directing a verdict against defendant on her ordinary negligence claim at the close of all the evidence. Defendant was engaged in a proprietary activity; the evidence viewed favorably for plaintiff was sufficient to support an inference that decedent's death proximately resulted from defendant's failure to exercise due care in preventing a heating flue from becoming clogged by dead birds and other debris; and the evidence tended to show that defendant's failure to maintain the heater flue in a safe condition violated G.S. 160A-425 and Section 9-1-79 of the High Point Ordinances, which would be negligence per se, and G.S. 42-42, which would be evidence of negligence.

2. **Landlord and Tenant § 8.3; Negligence § 50.1— wrongful death of tenant—punitive damages—directed verdict for defendant improper**

In an action arising from the death of a tenant in one of defendant's apartments, the trial court erred by dismissing plaintiff's claim for punitive damages on the pleadings and directing a verdict against plaintiff on the claim of "malicious, wilful, or wanton injury, or gross negligence." Punitive damages are generally recoverable in an appropriate wrongful death case, and no proviso in our Wrongful Death Act or elsewhere in the General Statutes especially exempts municipalities from such liability. G.S. 28A-18-2(b)(5).

3. **Landlord and Tenant § 8.3; Negligence § 50.1— wrongful death of tenant—implied warranty of habitability—directed verdict for defendant improper**

In an action arising from the death of a tenant in one of defendant's apartments, the trial court erred by directing a verdict for defendant on plaintiff's

claim for breach of the implied warranty of habitability. A landlord impliedly warrants to his tenant that leased or rented residential premises are fit for human habitation, at least to the extent of being free from observable conditions that render the premises unsafe or unsanitary. G.S. 42-38 *et seq.*

4. **Appeal and Error § 24— wrongful death of tenant—breach of contract—issue not available on appeal**

In an action for the wrongful death of a tenant in which the court did not mention plaintiff's claim for breach of contract in any of its directed verdict entries, plaintiff could not assert its claim on appeal because she did not question the court about the breach of contract claim, make it the point of a specific exception or seek any post-trial relief relative to it. Rule 10(a), N.C. Rules of Appellate Procedure.

5. **Negligence § 50.1; Landlord and Tenant § 8.3— wrongful death of tenant—strict liability—directed verdict for defendant proper**

In an action arising from the death of a tenant in one of defendant's apartments, possibly caused by a blocked heater flue, directed verdict for defendant was proper on plaintiff's strict liability claim because violations of G.S. 42-38 *et seq.* are but evidence of negligence, and heating an apartment house with gas is not an ultrahazardous activity for which the owner is strictly liable without cause.

Judge WEBB dissenting.

APPEAL by plaintiff from *Washington, Judge.* Judgment entered 23 November 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 23 August 1984.

This action is for the wrongful death of Mary Magdalene Jackson, who died from carbon monoxide poisoning on 19 February 1978 while residing in the Clara Cox Apartments, a low-income housing project that the defendant had owned and operated for several years. Mary Magdalene Jackson had rented and occupied an apartment in the project since 1973, and the carbon monoxide that killed her, so the complaint alleged, was funneled into her apartment from a natural gas heater whose flue was clogged by a dead pigeon and other debris.

The defendant's liability is predicated on several different grounds asserted in five causes of action set forth in the complaint as amended. In the first cause, based on negligence, it is alleged that defendant carelessly failed to maintain the heater and flue in a proper and safe manner. In the second cause, based on strict liability, it is alleged that (a) defendant violated certain safety warranties in the lease agreement, and (b) the gas heater

was inherently dangerous. In the third cause, based on breach of contract, it is alleged that defendant's failure to maintain the heater in a safe condition violated their lease agreement. In the fourth and fifth causes, each of which is based on both breach of warranty and strict liability, it is alleged that the heater was not fit for its intended purpose. In each of the five causes of action, based on allegations that defendant's neglect, breach or other default was either gross, wanton, wilful, or intentional, it is claimed that punitive, as well as compensatory, damages should be awarded. In answering the complaint defendant admitted the landlord-tenant relationship and the intestate's death, but denied the other material allegations and asserted in defense that Mary Magdalene Jackson was contributorily negligent in operating the heater. Prior to trial, pursuant to the provisions of Rule 12(b)(6) of the N.C. Rules of Civil Procedure, the court entered an order dismissing all of plaintiff's claims for punitive damages. At trial at the close of plaintiff's evidence a directed verdict was entered against all of plaintiff's causes of action except the one based on ordinary negligence; and at the close of all the evidence that claim was dismissed, as well.

Briefly summarized, plaintiff's evidence tended to show that: Mrs. Jackson was asphyxiated in her apartment by carbon monoxide poisoning on 19 February 1978. Her body, laying on the bed, was found that day by her granddaughter-in-law. At that time Mrs. Jackson's bed was not wet and though it was a cold day the windows in the apartment were in normal condition and no water was running down them. Shortly after Mrs. Jackson's death was discovered officials of the defendant Authority, the City of High Point, and the natural gas supplier dismantled the chimney flue to Mrs. Jackson's heater and found a dead pigeon, a bird's nest, and other debris blocking the chimney pipe. Expert witnesses testified that such debris could cause carbon monoxide fumes generated by a natural gas heater to back up into the heated structure and that carbon monoxide can be lethal and is most difficult to detect, since it is both odorless and colorless. A police officer who participated in the initial investigation testified that after being in Mrs. Jackson's apartment for about two hours, he experienced symptoms of carbon monoxide poisoning. More than a year before Mrs. Jackson's death three other residents of the Clara Cox Apartments died of carbon monoxide poisoning when the chimney

flue for their apartment gas heater became clogged by a dead bird and other debris. This incident and its cause was immediately learned of by defendant's officials, who had all the heating systems in the apartment project inspected by the City of High Point's mechanical inspector. During the course of that inspection dead pigeons, nests, and other debris were discovered in other chimney flues and the inspector recommended, among other things, that defendant cap or screen the chimney tops to prevent such blockages in the future. Defendant's work order dated 1 February 1978, one of plaintiff's exhibits, indicates that Mrs. Jackson's heater was discharging smoke and soot into the apartment due to a blocked air vent; and while the exhibit does not positively state that the vent was opened, it indicates that the work requested was done. The cross-examination of one of defendant's witnesses revealed that the chimneys of the Clara Cox Apartments were capped after Mrs. Jackson's death, and that the caps used were available before she died.

Defendant's evidence, in addition to showing many of the basic facts as plaintiff's evidence, tended to show the following: Though an inspection of the apartment after Mrs. Jackson's death revealed that the chimney was blocked, the heater was operating properly and burning cleanly. An expert witness testified that a properly operating gas furnace of the type involved produces little or no carbon monoxide and that a blocked chimney flue would not affect its operation. The investigating police officer testified that when he entered the apartment, immediately after being notified of Mrs. Jackson's death, the temperature was extremely high, all four eyes of the gas-fueled cooking stove were on, and the gas-fueled oven was also on and its door was open. Defendant's employees inspected the apartments semi-annually and handled interim calls for maintenance or service as they were received. The heaters were cleaned and prepared for winter use in the fall. Following the 1977 spring inspection it was recommended that the vent pipes be replaced with piping of a higher grade and insulating mats be installed under each heater. These changes were made in due course, and those made in Mrs. Jackson's apartment were inspected and found to be satisfactory. On 10 January 1978, a semi-annual inspection of Mrs. Jackson's apartment was done and a visual examination of her heater revealed no apparent problem. Mrs. Jackson's heater was last inspected on

14 February 1978 after the insulating mat was installed. The fuel supply line was also checked for leaks at that time, but none were found.

Kennedy, Kennedy, Kennedy and Kennedy, by Annie Brown Kennedy, Harvey L. Kennedy, and Harold L. Kennedy, III, for plaintiff appellant.

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

PHILLIPS, Judge.

[1] Plaintiff first contends that the trial court erred in directing a verdict against her on the ordinary negligence claim at the close of all the evidence. We agree. In directing a verdict on this claim the court did not specify what the perceived weakness in plaintiff's case was and we will briefly address the possibilities that the record suggests. Certainly the claim is not barred because of defendant's status as an arm of the City of High Point in operating a low income housing project; such activities are proprietary, rather than governmental, and municipalities are legally accountable therefor on the same basis as other defendants. *Sides v. Cabarrus Memorial Hospital, Inc.*, 287 N.C. 14, 213 S.E. 2d 297 (1975); *Carter v. City of Greensboro*, 249 N.C. 328, 106 S.E. 2d 564 (1959). Nor was the claim dismissable because evidence of defendant's negligence was lacking. Defendant clearly had a duty to maintain the flue of the gas heater in Mrs. Jackson's apartment in a safe condition, and viewed favorably for the plaintiff, as the law requires, the evidence in our opinion was sufficient to support the inference that decedent's death proximately resulted from the defendant's failure to exercise due care in preventing the flue from becoming clogged by dead birds and other debris. The evidence shows that though defendant became aware of this lethal hazard to its tenants more than a year earlier when three other tenants died from carbon monoxide poisoning due to a heater flue becoming clogged by dead birds and other debris, it nevertheless took no steps to prevent the flue in Mrs. Jackson's apartment from being clogged by the same means. Nor was the claim dismissable on the grounds of Mrs. Jackson's contributory negligence; while the evidence tends to support defendant's claim that she was contributorily negligent, that is not the only reasonable inference

that can be drawn from it, and the issue is thus one of fact for the jury. *Lenz v. Ridgewood Associates*, 55 N.C. App. 115, 284 S.E. 2d 702 (1981), *disc. rev. denied*, 305 N.C. 300, 290 S.E. 2d 702 (1982). But contrary to plaintiff's contention the evidence presented does not give rise to the doctrine of *res ipsa loquitur* for several reasons. *See, McPherson v. High Point Memorial Hospital, Inc.*, 43 N.C. App. 164, 258 S.E. 2d 410 (1979).

Defendant's negligence is also inferable on the grounds that the evidence presented tends to show that its failure to maintain the heater flue in a safe condition violated certain statutes and a local ordinance pertaining to the maintenance of housing that is rented to others. A statute or ordinance designed for the protection of the public is a "safety" enactment and its violation constitutes negligence *per se*, unless the legislative body provides otherwise; and where a statute or ordinance is not a "safety" enactment but sets a standard of conduct, its violation may be evidence of negligence. *Gore v. Ball, Inc.*, 279 N.C. 192, 182 S.E. 2d 389 (1971).

One statute that defendant may have violated, according to the evidence, is G.S. 42-42, which is part of the Residential Rental Agreements Act, and in pertinent part provides as follows:

(a) The landlord shall:

(2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;

. . . .

(4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by him provided that notification of needed repairs is made to the landlord in writing by the tenant except in emergency situations.

Whether this is a "safety statute," as it certainly appears to be, need not be discussed, since the General Assembly expressly provided in G.S. 42-44(d) that violations of it are not negligence *per se*; but as this Court has held, violations of G.S. 42-42 are evidence of negligence. *Brooks v. Francis*, 57 N.C. App. 556, 291 S.E. 2d 889 (1982).

Another statute defendant may have violated, according to the evidence, is G.S. 160A-425, a part of Part 5, Article 19 of Chapter 160A, which makes it the responsibility of municipalities to inspect buildings within their boundaries for hazardous conditions and makes it the responsibility of the owners of inspected buildings to eliminate the hazards reported to them. The statute reads as follows:

> When a local inspector finds any defects in a building, or finds that the building has not been constructed in accordance with the applicable State and local laws, or that a building because of its condition *is dangerous* or contains fire hazardous conditions, it shall be his duty to notify the owner or occupant of the building of its defects, hazardous conditions, or failure to comply with law. *The owner or occupant shall each immediately remedy the defects, hazardous conditions, or violations of law in the property he owns.* (Emphasis supplied.)

Since the obvious purpose of this statute is to protect the lives and limbs of occupants of the buildings affected, and the legislature has not provided otherwise, violations of it are negligence *per se. See, Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 88 S.E. 2d 333 (1955). The evidence presented in this case tends to show that defendant violated this statute by failing to take effective measures to prevent the flue in Mrs. Jackson's apartment from becoming clogged after the City's inspector notified it more than a year earlier that a similar flue in another apartment had become clogged with dead birds and other debris and caused the deaths of three tenants.

Still another enactment that defendant may have violated according to the evidence is Section 9-1-79 of the High Point Ordinances, which in pertinent part provides as follows:

> The following shall constitute the minimum standards and requirements for residential buildings and shall be pertinent in determining fitness for human habitation.
>
> . . . .
>
> (5) Heating requirements.
>
> a. Every building and every dwelling unit shall be weatherproof and capable of being adequately heated. The heating

equipment in every dwelling unit shall be maintained in a safe workable condition.

b. Heating system, if provided, shall be properly installed and maintained in safe working condition.

Clearly, this ordinance is also designed to promote the safety of the general public and a violation of it is negligence *per se. Bell v. Page*, 271 N.C. 396, 156 S.E. 2d 711 (1967). Whether the defendant violated any of these enactments is, of course, for a jury to say; but if a jury should find that defendant violated either the above ordinance or G.S. 160A-425, its negligence would be established, subject of course to it also being found that Mrs. Jackson's death proximately resulted from the violation. A violation of G.S. 42-42, however, if such should be found, would only be evidence of negligence.

[2] The court dismissed plaintiff's claim for punitive damages on the pleadings and later directed a verdict against plaintiff on the claim of "malicious, wilful or wanton injury, or gross negligence." The directed verdict would seem to be redundant, but plaintiff contends both actions by the court were error and we will discuss them together. The question presented, one of first impression in this state so far as our research discloses, is whether punitive damages can be recovered from a municipal corporation in a wrongful death case. It is our opinion that such damages are recoverable in an appropriate case and that the court erred in its rulings to the contrary.

It is true, though, that traditionally municipal corporations have been exonerated from liability for punitive damages in personal injury cases on the grounds of public policy. 18 McQuillin *Municipal Corporations* Sec. 53.18a (3d ed. 1977 & Supp. 1983); Annotation, 1 A.L.R. 4th 448 (1980). And with regard thereto, our Supreme Court has said:

> We believe that public policy considerations mitigating against allowing assessment of punitive damages are compelling and are applicable to the actions of municipal corporations without regard to whether the function is governmental or proprietary. We hold that in the absence of statutory provisions to the contrary, municipal corporations are immune from punitive damages.

Long v. City of Charlotte, 306 N.C. 187, 208, 293 S.E. 2d 101, 114-115 (1982). But, of course, municipal immunity is rooted in the common law, Comment, *Local Government Sovereign Immunity: The Need for Reform*, 18 Wake Forest L. Rev. 43 (1982), whereas the right to sue for wrongful death in this state did not exist at common law and was created by statute. *Stetson v. Easterling*, 274 N.C. 152, 161 S.E. 2d 531 (1968). As to the damages that may be recovered in a wrongful death action, G.S. 28A-18-2 provides, in pertinent part:

> (b) Damages recoverable for death by wrongful act include:
>
> > . . . .
> >
> > (5) Such *punitive damages* as the decedent could have recovered had he survived, *and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence* . . . (Emphasis supplied.)

Thus, that in this state punitive damages are generally recoverable in an appropriate wrongful death case is plain. It is also plain that no proviso in our Wrongful Death Act or elsewhere in the General Statutes specially exempts municipalities from such liability. This leads us inevitably to the conclusion that punitive damages are recoverable from municipalities in wrongful death cases on the same basis as from other tort feasors. The plain, positive provisions of the statute contain no basis for supposing that the legislature intended to exempt municipalities therefrom. Furthermore, if the statutory language was thought to be ambiguous and it was deemed appropriate to determine what the legislature's intentions were, we would hesitate to conclude that it intended to deny occupants of city-operated public housing, who are mostly poor and disadvantaged, the same recovery that is available to those renting from private landlords. Such a policy would be grossly discriminatory on its face, *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 50 L.Ed. 2d 450, 97 S.Ct. 555 (1977); *Housing for All Under Law*, 1978 A.B.A. Advisory Commission on Housing and Urb. Growth Rep. 142-43; 415-416 (R. Fishman ed.), and should not be attributed to the General Assembly without good reason, which their enactments do not contain. As the Iowa Supreme Court observed in a similar case, if the legislature had intended to exempt municipal corpora-

tions from liability for punitive damages in wrongful death cases it could have easily done so. *Young v. City of Des Moines*, 262 N.W. 2d 612, 1 A.L.R. 4th 431 (Iowa 1978).

[3] We turn now to plaintiff's contentions that the trial court erroneously directed a verdict for defendant on the breach of implied warranty, breach of contract, and strict liability claims. We find merit in plaintiff's contention regarding the implied warranty of habitability claim. *Javins v. First National Realty Corp.*, 428 F. 2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925, 27 L.Ed. 2d 185, 91 S.Ct. 186 (1970), cited by plaintiff, stands for the proposition that a landlord impliedly warrants to his tenant that leased or rented residential premises are fit for human habitation, at least to the extent of being free from observable conditions that render the premises unsafe or unsanitary. *Javins* further requires that applicable housing codes be read into the housing contract or lease agreement and made part of the implied warranty. But resort to federal law is unnecessary. Our Residential Rental Agreements Act, G.S. 42-38 *et seq.*, codifies the essential points in *Javins. See*, G.S. 42-42. Thus, to the extent that any implied warranty may be said to exist, it is co-extensive with the Residential Rental Agreements Act; and as discussed above, violations of the Act, while not negligence *per se*, are evidence of negligence. *Brooks v. Francis*, 57 N.C. App. 556, 291 S.E. 2d 889 (1982).

[4] With respect to the breach of contract claim plaintiff argues only that the trial court never disposed of it, and it is true that this claim was not mentioned by the court in any of its directed verdict entries. Nevertheless, this argument is without merit. As defendant points out, the record and transcript show that after the court entered the partial directed verdict at the close of plaintiff's evidence the trial proceeded on the negligence issue alone, and plaintiff failed to either question the court about the contract claim or make it the point of a specific exception or seek any post-trial relief relative to it. Having failed to call this alleged error to the court's attention, it may not be asserted now. Rule 10(a), N.C. Rules of Appellate Procedure.

[5] With respect to the directed verdict on the strict liability claim, plaintiff argues that defendant is strictly liable because (1) it violated the implied warranties of habitability and fitness for a particular purpose; and (2) the maintenance of the gas heater was

an ultrahazardous activity. This argument is without merit. A landlord's liability in this state for breach of warranty to his tenant is not governed by the doctrine of strict liability, but by the Residential Rental Agreements Act, G.S. 42-38 *et seq.*, violations of which are but evidence of negligence, as heretofore noted. Nor is heating an apartment house or other dwelling with gas, an activity safely engaged in by millions for generations, an ultrahazardous activity such as blasting with high explosives, for which the owner is strictly liable without regard to fault. *Trull v. Carolina-Virginia Well Co.*, 264 N.C. 687, 142 S.E. 2d 622 (1965).

Plaintiff also contends that the trial court erred in refusing to allow two of her witnesses to testify as experts on certain issues. Since these questions are not essential to a disposition of the appeal and may not arise at the next trial we shall not discuss them. We do commend to the trial court, however, our opinion in the recent case of *Powell v. Parker*, 62 N.C. App. 465, 303 S.E. 2d 226, *disc. rev. denied*, 309 N.C. 322, 307 S.E. 2d 166 (1983). In that case, similar questions relating to the qualifications of expert witnesses and the use of hypothetical testimony were considered. We also point out that the hypothetical question is no longer required for expert testimony in this state. G.S. 8-58.12.

Pointing out that the compensatory damages issue, which the trial court did not rule on in dismissing the various claims, could involve some very difficult problems, indeed, plaintiff asks that we expedite the re-trial by ruling on these questions now. Though plaintiff's concern is not without basis we nevertheless decline the invitation. Our role is to review rulings made by trial courts, rather than chart the course of trials yet to be conducted; too, the effort could be wasted since it is uncertain how the next trial will develop.

As to the dismissal of plaintiff's claim based on negligence—reversed.

As to the dismissal of plaintiff's claim for punitive damages—reversed.

As to the dismissal of plaintiff's claim based on implied warranty—reversed.

As to the dismissal of plaintiff's claim based on strict liability—affirmed.

As to the dismissal of plaintiff's claim based on contract—affirmed.

Reversed in part; affirmed in part; new trial.

Judge JOHNSON concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from that part of the majority opinion which holds it was error to dismiss plaintiff's claim for punitive damages. I do not believe we have to decide whether punitive damages may be had in a wrongful death claim against a municipal corporation. We do not reach that question because there is not sufficient evidence for the jury to find maliciousness, wilfulness, wantonness or gross negligence. Without this evidence the question of punitive damages does not arise. I concur in the rest of the opinion.

JEANNE S. HARBACH AND HUSBAND, DR. FRANCIS HARBACH v. LAIN AND KEONIG, INC., JOHN KOENIG, CLARENCE HEMMINGER, VIP REAL ESTATE, INC., MONIKA PERRY, AND ROXANNE CHAMNESS

No. 834SC1194

(Filed 5 March 1985)

1. Appeal and Error § 59— denial of summary judgment motion—failure of record to show evidence

An assignment of error to the denial of a motion for summary judgment is overruled where the record does not show what evidence, if any, was presented to the court in support of the motion.

2. Fraud §§ 5.1, 12— *fraud in sale of house*—sufficiency of evidence

Plaintiffs' evidence was sufficient for the jury in an action against defendant real estate agents for fraud in the sale of a house to plaintiffs by falsely representing that the house had a sprinkler system in every room. The evidence did not establish that it was unreasonable for plaintiffs to rely on such representations where it tended to show that plaintiffs were told by the seller that button-like objects in the ceilings were part of the sprinkler system when in fact they were part of a smoke alarm system.

APPEAL by defendants Lain and Koenig, Inc. and Clarence Hemminger from *Tillery, Judge*. Judgment entered 1 July 1983 in Superior Court, SAMPSON County. Heard in the Court of Appeals 30 August 1984.

Plaintiffs, wife and husband, sued the several defendants for fraudulently inducing them to buy a house that allegedly was not as they represented it to be. At trial, following a verdict by the jury, plaintiffs obtained judgment against defendants Lain and Koenig, Inc., a Fayetteville real estate agency, and Clarence Hemminger, who was admittedly their agent and employee, for compensatory damages in the amount of $30,000 and punitive damages in the amount of $25,000. The jury found that Hemminger misrepresented the property to plaintiffs and that the latter were deceived to their detriment thereby. But plaintiffs' claims against defendant Monika Perry, also a Fayetteville real estate agent, and defendant VIP Real Estate, Inc., the concern that she was employed by, were dismissed, the former by a directed verdict at the end of plaintiffs' evidence, the latter by judgment on the pleadings; and plaintiffs' claim against defendant John Koenig, the president and controlling stockholder of Lain and Koenig, Inc., was disallowed by the jury. Before trial, judgment by default was entered against defendant Roxanne Chamness, the owner and seller of the property that plaintiffs purchased. The only judgment contested by this appeal, however, is the one against the appellants Lain and Koenig, Inc. and their agent Clarence Hemminger. At trial only the plaintiffs presented evidence, though defendants Monika Perry and John Koenig both testified as adverse witnesses pursuant to their call, and plaintiffs' evidence, when viewed favorably, tends to show the following:

During the fall of 1979, plaintiffs, then respectively 61 and 76 years old, were interested in buying a home in the country near Fayetteville, and they engaged Fayetteville real estate agent Monika Perry, who operated VIP Real Estate, Inc., to help them. After Ms. Perry had shown several places to plaintiffs without arousing their interest, she saw an advertisement or entry about a place that she thought might appeal to them. The entry was in the Fayetteville area Multiple Listing book, which contained similar entries for virtually all the properties that the real estate agents of that area then had listing agreements for, and it concerned a house and 4.77 acres of land owned by the defendant

Roxanne Chamness that the appellants, as listing agents, were trying to sell and had been for several weeks. The entry was made up, placed, and paid for by the appellants, and according to it the property was for sale at a price of $89,000. The entry gave the lot size and described the house as being a brick veneered residential structure approximately five and a half years old, with 3,000 square feet of floor space, central air conditioning and gas heat, carpet and hardwood floors, screens, storm windows, and storm doors. The entry also contained the following statement:

> REMARKS/SPECIAL FEATURES: This is a beautiful home and setting. Sprinkler system in each room, nice tree-shaded pond, automatic intercom system throughout home, built-in master control panel for stereo, AM/FM, turntable, 8 track tape system, central burglar alarm system with control panel in kitchen, 2 built-in china cabinets in dining room. One year BPP Warranty ERA.

After showing this multiple listing entry to the Harbachs and discussing it with them, Ms. Perry took them to see the property described, but no one was there, and after a brief look around, they left. A few days later they went back when the owner, Ms. Chamness, was there and stayed about two hours looking at and talking about the property with Ms. Chamness. In touring the house, Ms. Chamness stood in the door of one of the bedrooms so as to block their view and entry. When asked about the advertised sprinkler system, Ms. Chamness stated that some button-like devices on the ceilings were part of it, but she refused to show them how to operate the system, saying that to do so would ruin her furniture. The sprinkler system was important to the Harbachs, since the house was in a rural area not served by a municipal fire department. Much of the kitchen floor was covered with throw rugs, but in one uncovered place the linoleum was damaged. Ms. Chamness told them it occurred when the freezer was installed and the linoleum would be repaired before the house was sold. She also told them that the burglar alarm system was out of order, but would be fixed before the house was sold, and that some storm windows, which were down, would be put back in place. Shortly after the second visit to the property Mrs. Harbach asked Ms. Perry about the roof, and Ms. Perry then called defendant Hemminger, the listing agent, who told her it was a commercial roof that would outlast a standard roof.

After thinking about the matter for awhile the Harbachs, aided by Ms. Perry, drew up an offer to purchase the place and submitted it to Hemminger. The price offered was $82,000, which they were prepared to pay by assuming the outstanding mortgage balance of $47,015.25 and delivering the remaining $34,984.75 in cash. The Harbachs' offer also contained the following conditions:

> All electrical & plumbing to be in good working order at time of possession. Fireplace equipment in both fireplaces, refrigerator-freezer in kitchen to remain. All items listed in listing agreement to remain. Home to have 1 year warranty paid by seller. Must have legal right of way.

With some minor changes irrelevant to this appeal the plaintiffs' offer was accepted by Ms. Chamness on 25 October 1979. After then, but before closing, Mrs. Harbach went to the house to measure for some rugs, but was unable to measure the bedroom that they had not been permitted to enter during their prior visit, because Ms. Chamness told her that a friend was sleeping in the room and could not be disturbed.

The closing was first scheduled for 20 November 1979, but defendant Hemminger asked Ms. Perry about changing the arrangements to accommodate Ms. Chamness, who was moving out on 8 November 1979 and needed money for the move. Hemminger suggested that a "pre-closing" be held the day Ms. Chamness moved, though the house could not be inspected until after the move. He proposed that at the pre-closing: All the necessary papers be signed, but held by him until all the contract terms were complied with; that plaintiffs accept the house subject to a later inspection and it complying with the contract terms; and that plaintiffs pay the purchase price cash balance, which he would hold in escrow until the repairs needed to comply with the contract terms were accomplished, except for $5,000 which would be given to Ms. Chamness to cover her moving expenses. The Harbachs accepted this proposal and the "pre-closing" was accomplished on 8 November 1979.

Immediately after the "pre-closing," Ms. Chamness moved out and the Harbachs began preparing to move in. In doing so they found several defects that had not been discovered earlier. There were holes in the kitchen and utility room linoleum that

had been covered with rugs before; some window screens and storm windows were still missing; neither the burglar alarm nor the stereo system worked; and in the bedroom that the Harbachs and Ms. Perry had never been permitted to enter or look into they found evidence of water damage from a roof leak. Upon the Harbachs advising Ms. Perry of these problems, Ms. Perry reminded Hemminger that the escrow funds were not to be disbursed until the necessary repairs were made. Thereafter, certain repairs were made—the storm windows and screens were mounted, the stereo system, intercom and burglar alarm were fixed, a minor termite infestation was treated, and the water damage in the bedroom was repaired. But in investigating the leaking roof, it was discovered that the roof was badly deteriorated and had to be replaced, which was ultimately done at a cost of $14,275. It was also discovered that the house had neither a sprinkler system nor a well to supply it, and that to obtain them would cost an estimated $29,904; and that the ceiling buttons which had been pointed out to them as being part of the sprinkler system were part of a smoke alarm system. Ms. Perry talked with both Clarence Hemminger and John Koenig about paying for the roof and other repairs out of the escrow funds, but received no satisfaction from either, and Koenig suggested that he and Ms. Perry look after themselves, "the important people involved," and let the buyers and seller settle the dispute. In March 1980 the escrow funds were finally disbursed by appellants. From these funds, they paid Monika Perry the commission due her for participating in the sale, paid Roxanne Chamness the remainder of the house purchase price, but gave nothing to the plaintiffs because of the defects referred to above.

In suing the several defendants, plaintiffs alleged, in substance, that the representations made in the advertisement by the appellants about the sprinkler system were fraudulently made and that the other defendants knowingly participated therein. In their answer defendants Monika Perry and VIP Real Estate, Inc. admitted that Ms. Perry had acted as the selling agent in the transaction, but denied knowledge of the misrepresentations or any other wrongdoing. In their answer defendants John Koenig, Clarence Hemminger, and Lain and Koenig, Inc. denied the material allegations of the complaint. Defendant Roxanne Chamness was not to be found and though served by publication filed no

answer, and default judgment was entered. During the pendency of the case many other allegations and motions were ruled on by the court that require no discussion, since they are irrelevant to the appeal before us.

Holland & Poole, by B. L. Poole, for plaintiff appellees.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Richard M. Wiggins and E. R. Zumwalt, III, for defendant appellants Lain and Koenig, Inc. and Clarence Hemminger.

PHILLIPS, Judge.

[1] The first error assigned by defendant appellants is the denial of their motion for summary judgment. This assignment is overruled without discussion because the record does not show what evidence, if any, was presented to the court in support of the motion. Though the motion states that it is supported by "depositions, answers to interrogatories and admissions of fact, together with the affidavits attached hereto," no such documents are in the record before us; thus we have no basis for concluding that the evidence presented established that no material issue of material fact existed, as the motion alleges. It was incumbent on the appellants to show that their motion had merit; this they have failed to do. Rule 56, N.C. Rules of Civil Procedure; *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972).

[2] The next two errors assigned by the appellants are the denial of their motions for a directed verdict and for judgment notwithstanding the verdict. These two assignments, in effect, raise but one question—whether the evidence was sufficient to establish plaintiffs' claim that they were damaged by the fraud of the appellants—and we will discuss them together. *See Harvey v. Norfolk Southern Railway*, 60 N.C. App. 554, 299 S.E. 2d 664 (1983). When the evidence recited above is viewed in the light most favorable for the plaintiffs, as the law requires, *Wallace v. Evans*, 60 N.C. App. 145, 298 S.E. 2d 193 (1982), it is plainly sufficient, we think, to establish that plaintiffs were damaged by the actionable fraud of the appellants, and these assignments are overruled.

It is axiomatic in our law that for a plaintiff to prevail in a case of actionable fraud he must show: (1) That the defendant

made a false representation to him as to an existing or past fact which was material to the transaction involved; (2) that defendant either knew the representation was false when it was made or made it recklessly without knowing whether it was true or not; (3) the representation was made with the intention that plaintiff should rely on it; and (4) plaintiff did reasonably rely upon it; and (5) was damaged thereby. *Johnson v. Phoenix Mutual Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). In this case plaintiffs have shown by detailed categorical evidence that appellants falsely represented that the house they were selling them had a facility of great utility and value which it did not have, namely, a sprinkler system in every room, and plaintiffs were substantially damaged by the absence of this costly asset; thus the elements of falsity, materiality and damage, which are not mentioned in appellants' brief, require no further discussion.

The elements of fraud that appellants contend were insufficiently proved in the trial below are those that concern their own mental state and plaintiffs' reliance. They argue that no evidence was presented which tends to show either that they knew that their representation about the house having a sprinkler system in every room was false or that they made the representation recklessly or that they intended for plaintiffs to rely on it and be deceived by it. While it is true that the evidence does not affirmatively show that appellants *knew* that their representation about the sprinkler system was false, it also shows that though the house had no sprinkler system they nevertheless positively represented that it did in selling the house for $30,000 more than it was worth. Falsehoods are usually told for a purpose and that appellants went to the trouble to write one out and use it in the setting that existed warrants the inference that the representation was recklessly made without regard for its truth and with the intention of deceiving plaintiffs by it. *Zager v. Setzer*, 242 N.C. 493, 88 S.E. 2d 94 (1955). And, of course, the inference that appellants meant to deceive the plaintiffs from the outset is further supported by appellants' later conduct in distributing the "pre-closing" escrow funds to the fraudulent seller after promising to use them to pay for any defects discovered or repairs needed.

As to the element of reliance, appellants argue that the evidence shows that plaintiffs did not rely upon their false representation, and if they did it was unreasonable for them to do so.

In support of this argument appellants point to plaintiffs' visits to the premises, their inquiry of Ms. Chamness concerning the button-like objects on the ceilings and her response that they were part of the sprinkler system. But this evidence does not necessarily mean, as appellants argue, that plaintiffs relied on Ms. Chamness or their own observations, or that their failure to notice that the house had no sprinkler system was unreasonable and due to their own inattention. The evidence plainly shows that plaintiffs were first attracted to the property by the appellants' representations about it, and that those representations were apparently based on their own expert and superior knowledge as real estate agents. Under the circumstances recorded, who, if anybody, the plaintiffs relied upon in buying the property, and whether they acted reasonably were questions of fact for the jury, rather than questions of law for the court. Certainly, we cannot state as a matter of law that the evidence shows that plaintiffs did not rely on the appellants' written declaration that the house had a sprinkler system. Nor, in our opinion, does the evidence unerringly show that plaintiffs had no right to rely on appellants' representation because they should have observed that the house had no sprinkler system. Plaintiffs' own real estate agent, Monika Perry, much more experienced in such matters than plaintiffs were, inspected the premises and was also deceived. We do not believe that the law required plaintiffs to be more knowledgeable or discerning.

Appellants cite as dispositive on the question of reliance several decisions of our Supreme Court and this Court in each of which a buyer of real estate was denied redress even though the owner or agent had materially misrepresented the extent or condition of the property involved. But in each of the cases relied upon, the buyer's evidence clearly established that he did not rely upon the false representations, whereas plaintiffs' evidence made no such showing. For example: In *Russo v. Mountain High, Inc.*, 38 N.C. App. 159, 247 S.E. 2d 654 (1978), where the tract bought contained only 1,589.49 acres instead of the 4,271.4 represented, the evidence showed that plaintiff was truthfully told by the agent that the acreage representation was based upon *his* file and that this second-hand information was acceptable to plaintiff. In *Harding v. Southern Loan & Insurance Co.*, 218 N.C. 129, 10 S.E. 2d 599 (1940), the evidence showed that plaintiff knew that the

representations of defendant's agent as to the condition of the hotel being sold were based upon statements and reports that the agent had received from a contractor and others. And in both *Peyton v. Griffin*, 195 N.C. 685, 143 S.E. 525 (1928) and *Tarlton v. Keith*, 250 N.C. 298, 108 S.E. 2d 621 (1959), the evidence showed that each buyer knew that the boundary lines that were incorrectly pointed out to him by the agent had been pointed out to the agent by the owner and that the agent did not purport to know for a fact where the lines were. But the evidence in this case does not purport to show that appellants either obtained their information about the sprinkler system from someone else or that they notified plaintiffs that was the case.

The appellants' other assignments of error, supported by neither argument nor citations of authority, are likewise without merit, in our opinion.

No error.

Judges WEBB and JOHNSON concur.

LYNN STONE FULTON v. CHARLES E. VICKERY, THOMAS A. FULTON, JR., AND UNIVERSAL LIFE CHURCH, INC.

No. 8415SC575

(Filed 5 March 1985)

1. **Marriage § 2— ceremony performed by a Universal Life Church minister—validating statute**

In an action arising from a marriage performed by a minister of the Universal Life Church, Inc., plaintiff's contention that the validating statute, G.S. 51-1.1 (1984), was inapplicable by its reference to the "Universal Life Church" rather than the "Universal Life Church, Inc." was without merit. Courts are permitted to supply obvious omissions to a statute in order to carry out legislative intent.

2. **Constitutional Law § 23.1— statutory validation of marriage by a Universal Life Church minister—prior action for fraud—no taking of property**

G.S. 51-1.1 (1984), which validates marriages performed by ministers of the Universal Life Church, did not deprive plaintiff of property without due process of law where she had initiated a lawsuit for fraud and misrepresentation based on a marriage performed by a Universal Life Church minister prior to the time the curative statute was passed.

3. **Marriage § 2— ceremony by Universal Life Church minister—no cause of action for fraud—validating statute**

Plaintiff did not have a cause of action for negligence, misrepresentation or fraud in that her marriage ceremony was performed by a Universal Life Church minister because G.S. 51-1.1 (1984) validated the marriage unless it had been invalidated by a court of competent jurisdiction. A summary judgment for defendant in plaintiff's original action to enforce a separation agreement was not an invalidation of the marriage under the terms of G.S. 51-1.1; furthermore, the findings required by G.S. 50-10 (1984) for divorce or annulment were not made.

4. **Fraud § 4— marriage by Universal Life Church minister—no knowledge of falsity of representations**

Summary judgment was properly entered on a claim for negligence and fraud arising from a marriage by a Universal Life Church minister where plaintiff produced no evidence that either defendant knew of the falsity of any representations that were made, or made them in either a negligent or culpably ignorant fashion. Defendants are not chargeable with knowledge of cases decided after the date of the marriage which hold that a marriage ceremony performed by a person ordained by the Universal Life Church are without legal effect.

5. **Limitation of Actions §§ 4.2, 8.2— marriage by Universal Life Church minister—fraud and negligence—action accrued at wedding**

Plaintiff's claim for fraud and negligence arising from a marriage performed by a Universal Life Church minister was barred by the three year statute of limitations for both claims because plaintiff's cause of action accrued at the time of the wedding since her marriage was incomplete and subject to being declared void. G.S. 1-52(5) (1983); G.S. 1-52(9) (1983).

APPEAL by plaintiff from *Russell G. Walker, Jr., Judge.* Order entered 3 April 1984 in Superior Court, ORANGE County. Heard in the Court of Appeals 18 January 1985.

Cheshire & Parker, by Lucius M. Cheshire and D. Michael Parker, for plaintiff appellant.

Winston, Blue & Rooks, by J. William Blue, Jr., for defendant appellee Thomas A. Fulton, Jr.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Michael K. Curtis, for defendant appellee Universal Life Church, Inc.

BECTON, Judge.

I

This appeal arises from a civil action filed by plaintiff, Lynn Stone Fulton, alleging that defendants had negligently and/or fraudulently induced her to enter into a void marriage with defendant Thomas Fulton. She prayed for both compensatory and punitive damages, and further prayed that a deed executed to the defendant Fulton be set aside. Defendant Vickery was never served with the Complaint and is thus not involved with this appeal. In their Answers, defendant Fulton and defendant Universal Life Church, Inc. (Church) denied the material allegations of the Complaint, pleaded the statute of limitations as an affirmative defense, pleaded N.C. Gen. Stat. Sec. 51-1.1 (1984) as a bar to plaintiff's claims, and also contended that to allow plaintiff damages from them would violate the First and Fourteenth Amendments of the United States Constitution. Both defendants moved for summary judgment, which motions were granted. Plaintiff appeals.

A defendant will prevail on a motion for summary judgment if it can demonstrate that (1) an essential element of plaintiff's claim is nonexistent; (2) through discovery plaintiff could not present enough evidence to support an essential element of the claim, or (3) plaintiff could not surmount an affirmative defense which would bar the claim. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982). Applying the law to the facts before us, we find that (1) G.S. Sec. 51-1.1 (1984) validated the marriage in question so that the essential element of an invalid marriage was nonexistent; (2) even if the marriage had been invalid, plaintiff could not produce sufficient evidence to support either her fraud or negligence claims; and (3) even if plaintiff could produce sufficient evidence, the applicable statutes of limitations bar her claims. We therefore affirm the trial court's entry of summary judgment.

II

Factual Background

On 7 June 1972, plaintiff Lynn Stone Fulton was married to defendant Thomas Fulton. The ceremony was performed by defendant Charles E. Vickery, an attorney and minister in the de-

fendant Universal Life Church, Inc. Vickery's credentials as minister in the Church were evidenced by a certificate he obtained by sending his name, address, and a sum of money to Church headquarters. Plaintiff and defendant Fulton lived together until 29 May 1979, at which time they entered into a separation agreement. The separation agreement recited that "the parties were married to each other on 7 June 1972 in Chapel Hill, North Carolina," and provided, *inter alia,* that the plaintiff would deed defendant Fulton her interest in their residence, and that he, in turn, would pay plaintiff the value of this interest.

In March 1980, plaintiff filed suit against defendant to enforce the separation agreement. On 2 December 1980, while this original action was pending, the North Carolina Supreme Court handed down *State v. Lynch,* 301 N.C. 479, 272 S.E. 2d 349 (1980). This opinion reversed a Court of Appeals decision and held that a marriage ceremony performed by a person ordained by the Universal Life Church was not a valid ceremony of marriage for purposes of a bigamy prosecution.

Defendant Fulton thereupon filed an Amended Answer and subsequently moved for summary judgment on the grounds that a valid marriage was a condition precedent to a binding separation agreement, and that the parties had never been lawfully married to one another as their marriage ceremony had been performed by a minister of the Universal Life Church. Summary judgment was granted by Judge James H. Pou Bailey on 10 June 1981. Plaintiff appealed from that order. On 3 July 1981, the North Carolina General Assembly passed an act which validated marriages performed by Universal Life ministers prior to that date, unless they had already been invalidated by a court of competent jurisdiction. This "curative statute" is currently codified at G.S. Sec. 51-1.1 (1984). On 14 July 1981, plaintiff withdrew her appeal from the order granting summary judgment. Plaintiff filed another action, apparently similar to the instant one, on 22 June 1981, upon which she took a voluntary dismissal without prejudice. This action was refiled as the instant case on 11 January 1983.

III

[1] Both defendants argue that G.S. Sec. 51-1.1 (1984) validated the marriage between defendant and plaintiff, and that plaintiff is

thus precluded from bringing an action predicated upon an invalid marriage. We agree. The text of G.S. Sec. 51-1.1 (1984) follows:

> Any marriages performed by ministers of the Universal Life Church prior to July 3, 1981, are validated, unless they have been invalidated by a court of competent jurisdiction, provided that all other requirements of law have been met and the marriages would have been valid if performed by an official authorized by law to perform wedding ceremonies.

Plaintiff, however, advances several arguments to rebut the contention that her marriage is validated by the statute. First, she contends that by its reference to the "Universal Life Church" rather than the "Universal Life Church, Inc.," the statute is inapplicable here. This suggestion is without merit. Courts are permitted to supply obvious omissions to a statute in order to carry out legislative intent. *Abernethy v. Bd. of Comm'rs of Pitt County*, 169 N.C. 631, 86 S.E. 577 (1915).

[2] Plaintiff next contends that to validate her marriage would deprive her of property without due process of law since, at the time the curative statute was passed, she had already instituted this lawsuit. This contention is also without merit. First, the statute does not exempt cases pending in litigation at the time of its enactment. More importantly, the statute does not deprive appellant in any way; it simply gives her the same protection of the law available to all other married women. *See In re Heath*, 292 N.C. 369, 233 S.E. 2d 889 (1977) (for proceeding to survive repeal of underlying statute authorizing proceeding or creating cause of action, there must be a saving clause in repealing act).

[3] Finally, plaintiff argues that the order which granted summary judgment in favor of defendant Fulton in plaintiff's original suit to enforce the separation agreement, is an invalidation of the marriage by a court of competent jurisdiction, and the curative statute, by its own terms, is inapplicable. We again disagree. An order granting summary judgment in an action to enforce a separation agreement cannot be deemed the equivalent of a judicial determination that the marriage was invalid. First, there is no evidence that Judge Bailey's order expressly declared that the marriage was invalid. Second, although matters determined by summary judgment are considered final determinations on the merits and thus *res judicata* in subsequent actions, *T. A. Loving*

Co. v. Latham, 15 N.C. App. 441, 190 S.E. 2d 248 (1972), this doctrine is only applicable when there is an identity of parties, subject matter, and of issues. *Kleibor v. Rogers*, 265 N.C. 304, 144 S.E. 2d 27 (1965). The only identity that exists between the original action and the present one is that of parties.

Finally, our General Statutes contain the exclusive means by which a divorce or annulment must be obtained. Not only was no such statutory procedure ever utilized by either party, the method by which divorce or annulment is obtained, and that by which a summary judgment is granted, are dissimilar.

N.C. Gen. Stat. Sec. 50-10 (1984) provides that, in an action for divorce or annulment, the material facts in every complaint must be found by a judge or a jury. *See Wicker v. Wicker*, 255 N.C. 723, 122 S.E. 2d 703 (1961). The trial court in the original action did not make such findings of fact. *See also* N.C. Gen. Stat. Sec. 50-4 (1984). ("What marriages may be declared void on application of either party"); *Lea v. Lea*, 104 N.C. 603, 10 S.E. 488 (1899) (action brought under current G.S. Sec. 50-4 (1984) is, procedurally speaking, an action for divorce).

If Judge Bailey's order can be said to invalidate the marriage, it does so by implication only. We know of no authority supporting the termination of a marriage by such indirect means, and we would hardly encourage the dissolution of marriages outside statutory formalities.

As the marriage between plaintiff and defendant Fulton was never invalidated, then G.S. Sec. 51-1.1 (1984) applies to validate the marriage. The net effect of the statute is to render the marriage valid from its inception, as the marriage in question was voidable, rather than void. While a voidable marriage is valid for all civil purposes until annulled by a competent tribunal, in a direct proceeding, a void marriage is a nullity and may be impeached at any time. *Geitner v. Townsend*, 67 N.C. App. 159, 312 S.E. 2d 236, *disc. rev. denied*, 310 N.C. 744, 315 S.E. 2d 702 (1984). In North Carolina, only bigamous marriages have thus far been declared absolutely void. 1 R. Lee, *North Carolina Family Law* Sec. 18 (4th ed. 1979); *Redfern v. Redfern*, 49 N.C. App. 94, 270 S.E. 2d 606 (1980). All other marriages are voidable. *See, e.g.*, *Ivery v. Ivery*, 258 N.C. 721, 129 S.E. 2d 457 (1963) (despite statutory language, marriage involving underage party is merely

voidable, not void, and may be ratified). As the curative statute validated the marriage from its inception, and as the marriage was never terminated by divorce, annulment, or by any sort of judicial decree, the marriage between plaintiff and defendant Fulton was never invalid at any time. *A fortiori*, the plaintiff has no cause of action that she was induced to enter into an invalid marriage by negligent misrepresentation or fraud, as the essential element of an invalid marriage is missing.

IV

[4] Even if the marriage was invalid at any time, thus arguably creating a cause of action for injuries suffered while the marriage was invalid, summary judgment was nonetheless properly entered, as plaintiff did not produce sufficient evidence to support at least one essential element of each of her claims.

The tort of negligent misrepresentation occurs when in the course of a business or other transaction in which an individual has a pecuniary interest, he or she supplies false information for the guidance of others in a business transaction, without exercising reasonable care in obtaining or communicating the information. *See Howell v. Fisher*, 49 N.C. App. 488, 272 S.E. 2d 19 (1980), *disc. rev. denied*, 302 N.C. 218, 277 S.E. 2d 69 (1981). For actionable fraud to exist, the defendant must have known the representation to be false when making it, or the defendant must have made the representation recklessly without any knowledge of its truth and as a positive assertion. *Odom v. Little Rock & I-85 Corp.*, 299 N.C. 86, 261 S.E. 2d 99 (1980) (representation must have been known to be false or made in "culpable ignorance" of its truth). This determination of truth or falsity must be made at the time of the representation. *Childress v. Nordman*, 238 N.C. 708, 78 S.E. 2d 757 (1953).

Plaintiff produced no evidence that, at the time of plaintiff's marriage to Fulton, either Vickery or Fulton knew of the falsity of any representations that were made, or made them in either a negligent or culpably ignorant fashion. The uncontroverted evidence is that Charles Vickery examined the legal requirements to perform a wedding ceremony found in the North Carolina General Statutes, *see* G.S. Sec. 51-1 (1984), and advised the couple in reliance thereon. The evidence also shows that before the ceremony the couple had blood tests and obtained a marriage license,

and afterwards conducted their lives as that of a lawfully married couple, *e.g.*, by owning real property together as tenants by the entireties, and by filing joint income tax returns. Plaintiff cites several cases for the proposition that defendants knew a marriage ceremony performed by a Universal Life Church minister was without legal effect; however, as these cases were decided *after* 7 June 1972, we fail to see how defendants could be chargeable with knowledge of them before they were rendered.

Charles Vickery's conclusion that he was an "ordained" or "authorized" minister entitled to perform marriage ceremonies under G.S. Sec. 51-1 (1984), was the conclusion reached by the trial judge and two judges of this Court in *State v. Lynch.* Their conclusion is consistent with the law in at least one state. *See Universal Life Church, Inc. v. United States of America,* 372 F. Supp. 770 (E.D. Cal. 1974) (recognizing the church as tax-exempt religious organization). Therefore, when Charles Vickery married Tom Fulton to Lynn Stone in 1972, it was not unreasonable for him to conclude that he was authorized to do so. There is no evidence that defendant Fulton had any information different from or in addition to that which was communicated to him and to the plaintiff by Vickery. Any representations by defendant Fulton or by defendant Church through its agent Charles Vickery were neither false nor made in a negligent or culpably ignorant fashion. *See Hodges v. Carter,* 239 N.C. 517, 80 S.E. 2d 144 (1954) (attorney who acts in good faith and in an honest belief that advice and acts are well-founded and in best interest of a client is not answerable for a mere error of judgment or for mistake in point of law which has not been settled by court of last resort in his or her state and on which reasonable doubt may be entertained by well-informed lawyers).

V

[5] Finally, even if the plaintiff was capable of producing sufficient evidence, her claims are barred by the applicable statutes of limitations. Each claim has a three-year statute of limitations. N.C. Gen. Stat. Sec. 1-52(9) (1983) (fraud); N.C. Gen. Stat. Sec. 1-52(5) (1983) (negligence).

In a negligence claim, the statute of limitations begins to run when the plaintiff's right to maintain an action accrues, and a cause of action accrues when the wrong is complete. *Bolick v.*

American Barmag Corp., 54 N.C. App. 589, 284 S.E. 2d 188, *modified and aff'd*, 306 N.C. 364, 293 S.E. 2d 415 (1982). In a case of fraud, the statute runs from the discovery of the fraud or from when it should have been discovered by the exercise of reasonable care. *Hood ex rel. Bank v. Paddison*, 206 N.C. 631, 175 S.E. 105 (1934). Defendants submit that if plaintiff sustained any injury, it occurred or was discoverable at the time of the marriage in June 1972, and thus the Complaint, filed in January 1983, was filed long after both three-year statutes had run. Defendants argue that as the plaintiff alleges she suffered injury from entering into an invalid marriage, the wrong was "complete" when the marriage ceremony was performed. *See Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E. 2d 873 (1970) (cause of action accrues when wrong complete, even though injured party unaware that wrong committed).

Plaintiff argues that as to her negligent misrepresentation claim, no injury was suffered, and as to her fraud claim, the facts constituting the fraud were not discoverable, until the issuance of Judge Bailey's order, and that therefore, the statutes had not yet expired when the Complaint was filed. Not only is this argument inconsistent with plaintiff's argument that she suffered injury throughout the duration of her marriage as a consequence of its invalidity, the memorandum order relied on by plaintiff filed in *Lynch v. Universal Life Church, Inc.*, No. C-81-458-WS (M.D.N.C. 1984) was subsequently vacated. We agree with Judge Hiram Ward's reasoning in the subsequent opinion as quoted in the brief of defendant Church that as a cause of action accrues when the wrong is complete and the aggrieved party becomes entitled to maintain a cause of action, the harmful consequences of defendant's alleged negligence existed at the time of the wedding since plaintiff's marriage was incomplete and subject to being declared void.

VI

We conclude that an invalid marriage, an essential element of both of plaintiff's claims, is nonexistent. In any event, the evidence supported neither the fraud nor negligence claims, and the applicable statute of limitations had expired. The trial court thus correctly entered summary judgment in this case.

Affirmed.

Judges JOHNSON and MARTIN concur.

STATE OF NORTH CAROLINA v. LLOYD S. HEATH AND PHILLIP N. SUTTON

No. 848SC644

(Filed 5 March 1985)

1. **Searches and Seizures § 20— search warrant—probable cause—information properly considered by magistrate**

A magistrate issuing a search warrant can base a finding of probable cause only on statements of fact confirmed by oath or affirmation of the party making the statement, or on information which the magistrate records or contemporaneously summarizes in the record. G.S. 15A-244; G.S. 15A-245(a).

2. **Searches and Seizures § 26— search warrant—insufficient information for probable cause**

Information which the magistrate could properly consider under G.S. 15A-244 did not provide a substantial basis for concluding that probable cause existed for issuance of a warrant to search defendants' apartment for narcotics where the only information presented upon oath or affirmation was an officer's affidavit based on tips from informants received by other officers; the affiant did not personally verify the tips; corroborative police surveillance was undertaken by two other officers who did not appear before the magistrate or make sworn statements which he could consider; a statement in the application that the affiant "has received information from concerned citizens" was untrue; and the reference to "concerned citizens" did not meet the applicable standards for veracity and basis of knowledge, and this deficiency was not compensated for by other reliable information.

APPEAL by the State from *Small, Judge.* Order entered 16 April 1984 in Superior Court, LENOIR County. Heard in the Court of Appeals 13 February 1985.

On 13 April 1983 Capt. Brooks of the Kinston Police Department received a phone call from the manager of Will-O-Wisp Apartments complaining of unusual traffic in and out of one apartment. The manager stated that she had been told there were drugs in the apartment. Officer Simms conducted a surveillance of the apartment the same day and Officer Webb continued the surveillance the following day. On 15 April 1983 Dispatcher Cahoon

received an anonymous tip in which the caller stated she "went over there [i.e. to defendant Heath's apartment] one time . . . . He had all kinds of speed, he had acid, he had marijuana . . . ." On the basis of the two phone calls and police surveillance, Lt. Ingram obtained a warrant to search the apartment. The search revealed a variety of containers and substances which the officers believed to be illegal drugs.

Defendants were charged with conspiracy, possession with intent to sell and deliver a controlled substance, and keeping and maintaining a place for the use of controlled substances. Defendants moved to suppress the evidence seized in the search on the ground that the search warrant was invalid. The court granted the motion. Pursuant to G.S. 15A-979(c) and 15A-1445(b), the State appeals.

Attorney General Edmisten, by Special Deputy Attorney General Charles J. Murray, for the State, appellant.

Marcus, Whitley & Coley, by William C. Coley, III, for defendant appellee Heath.

Bob D. Worthington for defendant appellee Sutton.

WHICHARD, Judge.

The trial court made findings of fact which we summarize as follows:

1. Ingram swore to the search warrant application. With the application he presented two unsworn statements, one by Cahoon and one by Simms and Webb jointly.

2. The combined knowledge of Ingram, Cahoon, Simms, Webb, and Brooks was sufficient to establish probable cause upon application properly made. The officers, however, failed to follow the procedure prescribed in G.S. Ch. 15A, Art. 11.

3. Cahoon's statement erroneously summarized the tip he received due to his failure to review the transcript of the tape of the phone call. In finding probable cause, the magistrate had no authority to consider the unsworn written statements of Cahoon, Simms, and Webb.

4. Without more, the affidavit of Ingram consisted of conclusions unsupported by information sufficient to establish their credibility.

The scope of our review is to determine whether these findings are supported by competent evidence and whether they support the conclusion of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E. 2d 618, 619 (1982). "[T]he duty of a reviewing court [the trial court, initially] is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Illinois v. Gates*, 462 U.S. 213, 238-9, 103 S.Ct. 2317, 2332, 76 L.Ed. 2d 527, 548 (1983), citing *Jones v. United States*, 362 U.S. 257, 4 L.Ed. 2d 697, 80 S.Ct. 725 (1960). The trial court here concluded as a matter of law that the warrant was not based upon probable cause. The issue is whether the court properly granted defendants' motion to suppress on that basis. We hold that it did.

In resolving that issue first we determine whether information presented to the magistrate complies with G.S. 15A-244. *See State v. Arrington*, 311 N.C. 633, 636, 319 S.E. 2d 254, 256 (1984). Only information that so complies may support a magistrate's decision that probable cause exists to issue a search warrant. Second, we examine the information properly available to the magistrate to see whether it provides a sufficient basis for finding probable cause and issuing a search warrant. We examine that information under the "totality of circumstances" test reaffirmed by the Supreme Court of the United States in *Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527, and adopted by our Supreme Court in *Arrington*, 311 N.C. at 643, 319 S.E. 2d at 261, for resolving questions arising under Article 1, Section 20 of the Constitution of North Carolina with regard to the sufficiency of probable cause to support the issuance of a search warrant.

[1] Under our statutes a magistrate issuing a warrant can base a finding of probable cause only on statements of fact confirmed by oath or affirmation of the party making the statement, or on information which the magistrate records or contemporaneously summarizes in the record. G.S. 15A-244; G.S. 15A-245(a). The necessity of a sworn statement is consistent with existing case law. *See, e.g., Gates*, 462 U.S. at 238, 103 S.Ct. at 2332, 76 L.Ed. 2d at 548 ("The task of the issuing magistrate is simply to make a practical, common-sense decision . . . given all the circumstances set forth in the *affidavit* before him . . . .") (emphasis supplied).

G.S. 15A-244 prescribes:

> Each application for a search warrant must be made in writing upon oath or affirmation. All applications must contain:
>
> . . . .
>
> (3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause . . . .

If someone other than the affiant has pertinent information, the issuing official may examine that person "on oath . . ., but information other than that contained in the affidavit may not be considered . . . in determining . . . probable cause . . . unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant . . . ." G.S. 15A-245(a).

[2] Here the magistrate did not personally examine Cahoon, Webb, or Simms on oath. He made no record or contemporaneous summary of information he received in addition to the information contained in Ingram's affidavit. Neither Cahoon's summary of the phone call he received nor Webb's and Simms' report of their surveillance activities was under oath. Cahoon testified as follows:

> Q. Now, on the evening of April 15, did you accompany Lieutenant Ingram to the Magistrate's Office to get a warrant?
>
> A. No, Sir, I did not.
>
> Q. Did you ever appear before the Magistrate that day?
>
> A. No, Sir.
>
> Q. Did you sign this statement in the presence of a Notary?
>
> A. No, Sir.
>
> Q. In the presence of anyone that is authorize[d]?
>
> A. No, Sir.
>
> Q. Were you under oath at the time you signed it?

A. No, Sir[.]

Q. Were you under oath at the time you gave the information to Lt. or Captain Brooks?

A. No, Sir[.]

. . . .

Q. Mr. Cahoon, in the morning hours of April 15, 1983 when you received this [phone call] and subsequently when you wrote your summary, you did not have any indication at all that the summary would be used in the application for a Search Warrant, did you?

A. No, Sir.

Thus, under our statutory requirements the issuance of the warrant must rest solely upon the affidavit of Ingram, since it was the only evidence presented upon oath or affirmation. That affidavit reads:

> The affiant has received information from concerned citizens who state that in the past week and the past 48 hours, they have seen and know that drugs are being sold at Apt 3219-OE Will-O-Wisp Apartment and the concerned citizens want to remain anonymous. The concerned citizens reported that there is a large amount of traffic goin[g] and coming from the apartment and that the visitors stay only a few minutes at each and one given time. The Kinston Police Department and Narcotics Division and Officers assigned have obtained a surveillance of said apartment and the action of the stated traffic are in affidavit [sic] attached.
>
> This pattern which has been observed on the surveillance is similar to other drug traffic areas and relative offenses which drug arrest[s] have been made. The person described by the concerned citizens is known as Lynwood James Heath.

The court reviewed the sufficiency of the affidavit and found that without the unsworn statements of the other officers, which the magistrate and the court had no authority to consider, the facts in the affidavit amounted to unsupported conclusions. Having carefully examined the affidavit within the guidelines adopted

in *Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527, and *Arrington*, 311 N.C. 633, 319 S.E. 2d 254, we agree.

In *Gates* the police department received an anonymous letter setting out in detail the criminal activity of defendants husband and wife. See *Gates*, 462 U.S. at 225, 103 S.Ct. at 2325, 76 L.Ed. 2d at 540. The affiant personally verified the information contained in the letter before applying for a warrant and swore to information about which he had personal knowledge. Here, by contrast, the affiant did not personally verify the informants' tips. Corroborative police surveillance was undertaken by Simms and Webb who did not appear before the magistrate or make sworn statements which he could consider. While the warrant application, *supra*, states, "The affiant has received information from concerned citizens . . .," Ingram's testimony indicates otherwise:

> Q. [A]s far as you knew, based on all the information that you had from the 13th through the 15th at the time you got the warrant, how many concerned citizens had stated that they had seen and knew that drugs were being sold at 3219-OE apartment?
>
> A. To me, not any.
>
> . . . .
>
> Q. From your personal knowledge, you didn't know that drugs were being sold?
>
> A. Personal knowledge, no, sir.

In addition, the reference to "concerned citizens" does not meet the standards for veracity and basis of knowledge still relevant under *Gates. See Arrington*, 311 N.C. at 638, 319 S.E. 2d at 257. Under the totality of circumstances test, *Gates* states that an informant's veracity or reliability and his or her basis of knowledge are not to be accorded independent status. *Gates*, 462 U.S. at 230, 103 S.Ct. at 2329, 76 L.Ed. 2d at 545. Rather, a deficiency in one area may be compensated for by a strong showing in another. *Id.* As illustration, the Court cites particular combinations of reliability: an informant who fails to set forth the basis of his or her knowledge, but is known for unusually reliable predictions of certain criminal activity; an unquestionably honest citizen who reports activity which if fabricated would subject him or her

to criminal liability; an informant with doubtful motive but who provides explicit and detailed description from first-hand observation. *Id.* at 233-34, 103 S.Ct. at 2329-30, 76 L.Ed. 2d at 545.

The *Gates* standard is not satisfied, however, by a mere conclusory statement that " 'affiants have received reliable information from a credible person . . . .' " *Id.* at 239, 103 S.Ct. at 2332, 76 L.Ed. 2d at 549, citing *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964). The reference to "concerned citizens" in the affidavit here is no less conclusory than the statement, *supra*, the Court in *Gates* rejects. Ingram testified as follows:

> Q. Did you have any reason to believe the female who made the call on 4/15/83 was reliable?
>
> A. Me personally?
>
> Q. Yes Sir.
>
> A. No Sir.
>
> Q. Did you have any reason to believe [the apartment manager] was reliable?
>
> A. As me talking to her, no sir.
>
> Q. And without the officers['] investigation you had no reason to believe that the information [from] the girl on the phone on the 15th was truthful, did you?
>
> A. No Sir.

This deficiency is not compensated for by other reliable information. On the contrary—the affidavit states "that in the past week and the past 48 hours [concerned citizens] have seen and know that drugs are being sold at" defendant Heath's apartment. The court found, however, and the evidence supports the finding, that this conclusion was based upon an erroneous summary by Cahoon of the tip he received due to his failure to "tak[e] the time to check his recollection of the evidence with a recording that had been made." According to the transcript of the tape of the phone call, the informant did not mention a forty-eight hour time frame or state that drugs were being sold. Rather, she said, "I know where there's a place in Kinston and a lot of drugs in there . . . I went over there one time but I didn't know it was that kind of place . . . ."

After reviewing these circumstances and the record as a whole we find the court's findings of fact supported by competent evidence and its conclusion of law properly based upon and consistent with those findings. In addition, we find no constitutional error in the court's conclusion that the search warrant was not based on probable cause. We therefore hold that the information which the magistrate could consider under G.S. 15A-244 did not provide a substantial basis for concluding that probable cause existed and that the motion to suppress was properly granted.

Affirmed.

Judges WELLS and BECTON concur.

STATE OF NORTH CAROLINA v. BILLY RAY WILSON

No. 844SC368

(Filed 5 March 1985)

1. Assault and Battery § 13; Criminal Law § 50— assault with a deadly weapon — testimony not opinion

In a prosecution for kidnapping and assault with a deadly weapon with intent to kill inflicting serious injury, testimony by the victim that defendant was holding his shotgun and "putting the shells in it evidently" was properly admitted. The testimony was to the fact that defendant was putting the shells into the shotgun; the use of the word "evidently" was simply a manner of speaking.

2. Criminal Law § 102.5— felonious assault — prosecutor's comment — no merit

In a prosecution for felonious assault and kidnapping, there was no error in not granting defendant's motion to strike and for a mistrial after the State asked the victim to point out the person who shot her twice in the back ". . . and did this awful thing to you." While the question may have been improper, no response was made, there was no testimony to strike, and no prejudice resulted to defendant, particularly in view of the medical evidence concerning the victim's condition.

3. Criminal Law § 102.5— felonious assault — prosecutor's comment — no prejudice

In a prosecution for felonious assault and kidnapping, there was no prejudice in a comment by the prosecutor during defendant's testimony where defendant's objection was sustained and the jury was instructed to disregard the comment.

4. **Kidnapping § 1.2— evidence sufficient for jury**

There was no error in denying defendant's motion to dismiss the charge of kidnapping where the evidence tended to show that defendant arrived uninvited at the victim's house at 3:30 a.m., grabbed her arm and said he wanted to go around the corner to talk to her; that she saw he was holding a shotgun; and that he pulled her by the arm, shoved her into his car, put his shotgun in the back seat, drove to Onslow Wholesale, parked the car, loaded the gun, and shot the victim in the hip when she started running. G.S. 14-39(a).

5. **Criminal Law § 122.1— refusal of jury's request for clarification of testimony— no abuse of discretion**

In a prosecution for kidnapping and assault with a deadly weapon with intent to kill inflicting serious injury, there was no abuse of discretion in the trial court's refusal of the jury's request for clarification of the victim's testimony as to when she first saw the shotgun. The testimony was not crucial because there was ample additional evidence from which the jury could infer that the victim was intimidated by the gun throughout the ordeal. G.S. 15A-1233.

6. **Kidnapping § 1.3; Criminal Law § 113.2— specific intent as element of kidnapping—intoxication by drugs—no instruction—no error**

There was no error, and hence the plain error rule was not applied, in a prosecution for kidnapping and felonious assault where the court did not instruct the jury as to intoxication by drugs or specific intent as an element of kidnapping. No instructions on specific intent were required for the charge of kidnapping because kidnapping is not a specific intent crime, and there was no evidence that defendant was in any way impaired as a result of smoking marijuana. Rule 10(b)(2), North Carolina Rules of Appellate Procedure.

7. **Criminal Law § 138— presumptive sentence—mitigating and aggravating findings not required**

There was no error in the trial court's failure to consider mitigating factors where defendant did not object at the sentencing hearing, failed to tender any proposed findings to the trial judge, and received the presumptive term on each charge. G.S. 15A-1340.4(a).

APPEAL by defendant from *Bruce, Judge.* Judgment entered 17 November 1983 in Superior Court, ONSLOW County. Heard in the Court of Appeals 10 January 1985.

Defendant was indicted and tried for (i) assault with a deadly weapon with intent to kill inflicting serious injury and (ii) kidnapping. At trial the State offered evidence which tended to show the following. The victim, Dora Fields (Fields), had dated defendant for two and a half years. Approximately two weeks prior to 21 May 1983 she had told defendant she did not want to see him any more. She did not see him again until 3:30 a.m. 21 May 1983

when she went onto her porch barefooted to take out the garbage and saw him standing in the yard. Defendant said he wanted to talk to her. When she hesitated, he grabbed her arm and said, "[L]et's go around the corner." She saw that he had a shotgun, and she was scared. Defendant pulled her to his car, pushed her inside, and threw his shotgun on the back seat. Then defendant drove to Onslow Wholesale. Fields begged him to take her home, but he refused. He parked his car and told Fields to get out. Then he said, while he was loading his shotgun, "If I can't have you, nobody else can." When Fields started to run away, defendant shot her in the hip. She fell; defendant dragged her into a ditch and shot her in the back. Defendant got back into his car and drove away. Later, a police officer arrived and took Fields to Onslow Memorial Hospital.

Dr. Robert Wilfong testified that he initially saw Fields in the emergency room. She had gunshot wounds: one shot had been fired from about six feet; the second was fired at much closer range and had damaged Fields' spinal cord, leaving her permanently paralyzed from the waist down.

Defendant, testifying on his own behalf, said that he arrived at Fields' house at 2:00 a.m. on 21 May 1983, after drinking half a pint of liquor. He and Fields drove to Burger King to get something to eat, but discovered that they did not have any money, so they left. As they were driving back to Fields' house, defendant stopped at Onslow Wholesale. They both got out of the car. Defendant told Fields to open the trunk and give him his bottle of whiskey, and she did. He asked her for a cigarette, and she offered him a marijuana cigarette. He smoked three or four puffs. Then Fields asked defendant why he had a gun in the trunk. She held the barrel of the gun, he reached for it, and it went off. Defendant went home, and then went to the magistrate's house and told him that he thought somebody was shot. Defendant said that he did not understand how Fields was shot twice.

Several witnesses testified as to defendant's good character and reputation in the community.

The jury returned a verdict finding defendant guilty of first degree kidnapping and assault with a deadly weapon with intent to kill inflicting serious injury. He was sentenced to the presumptive term for both charges.

Attorney General Edmisten by Assistant Attorney General Tiare B. Smiley for the State.

Popkin and Coxe, P.A. by L. Robert Coxe III and Jeffrey S. Fulk for defendant appellant.

PARKER, Judge.

[1] In his first assignment of error defendant contends that the trial court erred in allowing into evidence Fields' statement that defendant was holding his shotgun and "putting the shells in it evidently" because the statement was an opinion or a conclusion. As a general rule, a witness may not give opinion evidence when the underlying facts are such that the witness can adequately describe the facts for the jury, and the witness is no better qualified than the jury to draw inferences and conclusions. *State v. Porter*, 303 N.C. 680, 281 S.E. 2d 377 (1981). Fields, however, was not giving an opinion; she was describing the facts for the jury. She subsequently testified that she saw two or three shells in defendant's hands, and she demonstrated how defendant was holding the shotgun and how he was putting the shells into the chamber. Fields' use of the word "evidently" was simply her manner of speaking. Her testimony was to the fact that he was putting the shells into the shotgun. This was neither an opinion nor a conclusion. Defendant's assignment of error is without merit.

[2] In his second assignment of error defendant alleges that he was denied a fair trial because of prosecutorial misconduct. First, defendant contends that the trial judge erred in not granting his motion to strike after the following question by the State: "Dora, would you at this time point out for the Jury the person who shot you two times in the back and did this awful thing to you?" Defendant objected and moved to strike. The objection was sustained and the State rephrased the question omitting the objectionable phrase. Defendant argues that his motion to strike should have been granted and a mistrial declared. We do not agree. A motion to strike is a remedy to be used when a witness' answer is objectionable. 1 Brandis on North Carolina Evidence § 27 (2d ed. 1982). *See State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983). Here, only the question itself was objectionable, no response was made, and there was no testimony to strike. While the question may have been improper, no prejudice resulted to

defendant, particularly in view of the medical evidence concerning Fields' condition.

[3] Next, defendant argues that the following comment made by the State was prejudicial.

> Q: . . . Explain to the jury, Mr. Wilson, how in the world Exhibit No. 5 for the State got on the driveway of Onslow Wholesale.
>
> A: I don't know.
>
> Q: I didn't think you did.
>
> Mr. Bailey: Objection. Motion to strike.
>
> The Court: Sustained. Ladies and gentlemen, don't consider the editorial comments.

As defendant's objection was sustained, and the judge instructed the jury to disregard the comment, we do not find that defendant was prejudiced.

Defendant argues that he was prejudiced by two other allegedly improper questions made by the State, but as he did not object at trial his exceptions are not preserved for appellate review. Rule 10(b), Rules of Appellate Procedure.

[4] In his third assignment of error defendant contends that the trial court erred in failing to grant his motion to dismiss at the close of State's evidence and at the close of all evidence. When defendant elected to present evidence after the denial of his motion to dismiss at close of State's evidence, he waived his motion to dismiss at the close of State's evidence. *State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622 (1982); G.S. 15-173. We will, therefore, only consider his motion to dismiss at the close of all evidence.

Defendant contends that there was insufficient evidence to sustain a conviction for kidnapping because there was no evidence of confinement or restraint without consent. Upon defendant's motion to dismiss, all the evidence favorable to the State must be considered, deemed true, and considered in the light most favorable to the State, and the State is entitled to every inference of fact which may be reasonably deduced therefrom. *State v. Dover*, 308 N.C. 372, 302 S.E. 2d 232 (1983). The evidence is sufficient to withstand defendant's motion to dismiss if, when viewed

in the light most favorable to the State, there is substantial evidence of all essential elements of the offense. *State v. Brackett*, 306 N.C. 138, 291 S.E. 2d 660 (1982). The offense of kidnapping contains the following elements:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restraining [sic] or removed. . . .

G.S. 14-39(a). *See State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). The State need prove only one purpose to sustain its burden of proof as to that element of the crime. *State v. Sellars*, 52 N.C. App. 380, 278 S.E. 2d 907, *review denied*, 304 N.C. 200, 285 S.E. 2d 108 (1981). Defendant argues that there was insufficient evidence of restraint and lack of consent because Fields agreed to accompany him to his car before she saw his shotgun. We do not agree. As this court held in *State v. McRae*, 58 N.C. App. 225, 292 S.E. 2d 778 (1982), a jury can reasonably infer restraint from evidence that the victim remained in the car because she feared for her safety; the State does not have to prove use of actual physical force. *See also State v. Bruce*, 268 N.C. 174, 150 S.E. 2d 216 (1966). In the present case the evidence, viewed in the light most favorable to the State, tended to show that defendant, uninvited, arrived at Fields' house at 3:30 a.m.; he grabbed her arm and said he wanted to go around the corner to talk to her; she saw he was holding a shotgun; he pulled her by the arm, and shoved her into his car; he put his shotgun in the back seat, drove to Onslow Wholesale, parked the car, loaded the gun, and, when Fields started running, he shot her in the hip. We find that this evidence is sufficient to establish all the elements of kidnapping and defendant's motion to dismiss was properly denied.

[5] In his next assignment of error, defendant contends that the trial court committed prejudicial error in refusing the jury's request to clarify Fields' testimony as to when she first saw the shotgun. Defendant failed to object to the judge's refusal; we shall, nevertheless, review this assignment of error. The decision to grant or refuse a request by the jury, after beginning its deliberations, for a restatement of the evidence, lies within the discretion of the trial court. *State v. Lang*, 301 N.C. 508, 272 S.E. 2d 123 (1980); G.S. 15A-1233. We do not find that the trial judge abused his discretion. The testimony in question was, essentially, whether Fields said that she saw the gun before or after she went around the corner of the house with defendant. Whether she saw the gun before or after they turned the corner is not, as defendant contends, crucial, because there is ample additional evidence from which the jury could infer that Fields was intimidated by the gun throughout the ordeal. Defendant's assignment of error is without merit.

Defendant next assigns as error the trial court's permitting the prosecutor to withdraw his objection to a question propounded by defendant's counsel on direct examination after the trial judge had sustained the prosecutor's objection. This assignment of error is without merit.

[6] In his next assignment of error, defendant contends that the trial court erred in failing to properly instruct the jury as to intoxication by drugs with respect to specific intent and as to specific intent as an element of kidnapping. Before the charge to the jury, counsel for the defendant requested the court to instruct with respect to specific intent on the charge of assault with a deadly weapon with intent to kill inflicting serious injury, and the defense of intoxication with respect to the intent to kill. Counsel for defendant neither requested an instruction on intoxication by drugs, nor an instruction on specific intent with respect to the kidnapping charge. At the conclusion of the jury instructions the trial judge asked both parties if they had any additional requests or any objections. Counsel for the defense had none. As defendant failed to object to the instructions, he is precluded by Rule 10(b)(2), Rules of Appellate Procedure, from assigning as error any portion of the jury charge. *State v. Bennett*, 308 N.C. 530, 302 S.E. 2d 786 (1983). Defendant argues that if he is precluded by Rule 10(b)(2), we should nonetheless review his argument under

the plain error rule adopted by our Supreme Court in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). The plain error rule permits review of a very narrow range of errors notwithstanding defendant's failure to object to the jury instructions at trial, but the rule is only applied when, after reviewing the entire record, the reviewing court finds error which rises to the level of plain error. *State v. Moore*, 311 N.C. 442, 319 S.E. 2d 150 (1984). A review of the record in the instant case shows no error by the trial judge. Hence, we do not apply the plain error rule.

The trial judge properly instructed the jury as to specific intent on the assault with a deadly weapon with intent to kill inflicting serious injury charge. As kidnapping is not a specific intent crime, no instructions on specific intent were required for the charge. The trial judge also properly instructed the jury on voluntary intoxication as a defense to the element of intent. At trial defendant alleged that he was intoxicated as a result of drinking whiskey; he never alleged that he was in any way intoxicated or impaired from smoking marijuana, only that he had taken three or four puffs of a marijuana cigarette. To require an instruction on intoxication by the trial judge, there must be evidence that defendant was intoxicated to such an extent that he was utterly incapable of forming a specific intent to kill. *State v. Medley*, 295 N.C. 75, 243 S.E. 2d 374 (1978); Wharton's Criminal Law § 108 (14th ed. 1979). There was no evidence that defendant was in any way impaired as a result of smoking marijuana; therefore, the trial judge did not err in failing to charge the jury as to intoxication by drugs.

[7] In his last assignment of error defendant contends that the trial judge violated the Fair Sentencing Act. Defendant argues that the trial judge failed to consider two mitigating factors: (i) evidence of his good character and reputation and (ii) the absence of prior convictions. We note that defendant did not object at the sentencing hearing and he failed to tender any proposed findings to the trial judge. Moreover, defendant received the presumptive term on each charge, and the trial judge under G.S. 15A-1340.4(a) was not required to find aggravating and mitigating factors. *See State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983). This assignment of error is overruled.

Having carefully considered all defendant's assignments of error, we find

No error.

Chief Judge HEDRICK and Judge WHICHARD concur.

CLAUDETTE M. MAYO v. DEBRA ANN S. MAYO

No. 8422SC311

(Filed 5 March 1985)

1. Rules of Civil Procedure § 41— motion for directed verdict in non-jury case—treated as motion for involuntary dismissal—waived by evidence

In an action tried without a jury to determine the sole surviving heir of a man who had married both plaintiff and defendant, defendant's motion for a directed verdict was treated on appeal as a motion for involuntary dismissal under Rule 41(b); however, because defendant presented evidence after she made her motion, she waived her right to have reviewed on appeal the question of whether her motion was erroneously denied.

2. Marriage § 6— multiple marriages—presumption that second marriage valid—conclusion that presumption overcome—supported by findings and evidence

When two marriages to the same person are shown, the second marriage is presumed to be valid, and the burden of proof is on the party asserting its illegality. The conclusion of the trial court, sitting without a jury, that plaintiff had met that burden was supported by findings and evidence that plaintiff and Danny Lee Mayo were married on 30 August 1974, but that Danny Lee Mayo abandoned plaintiff in late 1974 and had no contact with plaintiff after 1976; that Danny Lee Mayo married Donnette Marie Walsh on November 20, 1975; that Danny Lee Mayo met defendant in September 1976 and became engaged shortly thereafter; that defendant learned of the marriage to Donnette Marie Walsh and accompanied Danny to court to get a divorce from Donnette on November 22, 1976; that defendant knew before 28 June 1977 that plaintiff and Danny Lee Mayo had lived together, with plaintiff bearing Danny Lee Mayo a child and that both the child and plaintiff carried Danny Lee Mayo's surname; that Danny Lee Mayo told defendant that he and plaintiff had never been married and defendant never investigated the possibility that plaintiff and Danny Lee Mayo had been married; and that, by the time of her marriage in 1977, it was clear that defendant had extremely strong reasons to think that plaintiff and Danny Lee Mayo were married.

3. Marriage § 4— multiple marriages—award of estate to first wife—supported by evidence

In an action to determine the sole heir of Danny Lee Mayo, who had married both plaintiff and defendant, the trial court's finding that Danny Lee Mayo was the sole owner of personal property amounting to $15,432.55, and the award of that amount to plaintiff as the first wife minus a down payment on a tractor-trailer made by defendant, was supported by ample and competent evidence and was therefore affirmed.

APPEAL by defendant from *Morgan, Judge.* Judgment entered 5 December 1983 in Superior Court, IREDELL County. Heard in the Court of Appeals 28 November 1984.

Plaintiff, Claudette Mayo (Claudette) filed this action to have herself declared the sole surviving heir of Danny Lee Mayo. Danny Mayo married Claudette on 30 August 1974. One child, Alea Marie Mayo, was born of that marriage. Danny Mayo and Claudette lived together as husband and wife until the first part of 1975. Pursuant to a decree entered in the State of Texas on 18 May 1976 terminating the parental rights of Claudette and Danny Mayo, Claudette's parents adopted the child, Alea. Claudette never filed for a divorce from Danny Mayo, but also was never served with divorce papers from Danny Mayo.

On 20 November 1975, Danny Mayo married Donnette Marie Walsh (Donnette). He subsequently obtained a divorce from Donnette on 22 November 1976 in Jackson County, Missouri.

Danny Mayo then married the defendant in this action, Debra Ann S. Mayo (Debra). Debra was present and witnessed Danny Mayo's divorce from Donnette and she was also aware that Danny Mayo had previously had a child by Claudette. After their marriage, Debra and Danny Mayo bought a home in Iredell County. They subsequently acquired another home in Florida and a farm in Alexander County. The three property acquisitions were titled in both their names, as tenants by the entirety. In the spring of 1979, they purchased a GMC tractor-trailer which was titled in Danny's name alone. Debra and Danny Mayo took truck driving training and the two operated the tractor-trailer as a truck driving team.

Danny died intestate on 18 April 1981, whereupon Debra qualified as administratrix of the estate. She ultimately distributed $15,432.55 in cash and the real property to herself as Danny's

only heir. Claudette then filed this action seeking judgment against Debra for the $15,432.55 and the real property, also to be declared the sole surviving heir of Danny Mayo.

The suit was heard before the trial judge sitting without a jury. The trial judge, after hearing all the evidence and making findings of fact and conclusions of law, entered judgment. The trial court entered judgment for the plaintiff, Claudette, as the surviving widow, thus she was entitled to recover from the defendant, Debra, the sum of $11,632.55 with interest at the legal rate of 8% from 21 December 1981. The Court adjudged the real property to be that of the defendant, Debra, by virtue of constructive and resulting trust. Plaintiff and defendant appeal from the judgment.

Sowers, Avery & Crosswhite, by Isaac T. Avery, Jr. and William E. Crosswhite, for plaintiff appellee.

Homesley, Jones, Gaines & Fields, by Edmund L. Gaines, for defendant appellant.

JOHNSON, Judge.

Defendant assigns as error the trial court's denial of her motion for directed verdict and its finding that defendant was not legally married to Danny Lee Mayo. Before determining whether the trial court's denial of the motion was correct, we must examine the procedural aspect of defendant's motion.

[1] Directed verdicts are appropriate only in jury cases. G.S. 1A-1, Rule 50; *Bryant v. Kelly,* 279 N.C. 123, 181 S.E. 2d 438 (1971). This case was tried without a jury. In nonjury civil cases the appropriate motion by which a defendant may test the sufficiency of the plaintiff's evidence to show a right to relief is a motion for involuntary dismissal under Rule 41(b). G.S. 1A-1, Rule 41(b); *Higgins v. Builders and Finance, Inc.,* 20 N.C. App. 1, 200 S.E. 2d 397 (1973). The distinction is more than one of mere nomenclature, as a different test is to be applied to determine the sufficiency of the evidence to withstand the motion when the case is tried before the court and jury than when the court alone is finder of facts. *Neff v. Coach Co.,* 16 N.C. App. 466, 192 S.E. 2d 587 (1972). Though defendant's motion was not properly made, we shall treat it as having been a motion for involuntary dismissal

under Rule 41(b) and shall pass on the merits of the questions which defendant seeks to raise by this appeal. *Id.*

Defendant made her motion at the close of plaintiff's evidence, at which time the trial court denied the motion. Defendant then presented evidence of her own to the court. By doing so, she waived the right to have reviewed on appeal the question whether her motion made at the close of plaintiff's evidence was erroneously denied. *Redevelopment Comm. v. Unco, Inc.*, 23 N.C. App. 574, 209 S.E. 2d 841 (1974), *cert. denied*, 286 N.C. 415, 211 S.E. 2d 795 (1975). "In the case of a motion to dismiss, the trial judge may decline to render judgment until all the evidence is in. In our view, this is the better practice, 'except in the clearest cases.'" *Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976). In light of these principles, defendant's assignment of error is without merit.

[2] Defendant next contends that plaintiff did not sustain her burden of proof by overcoming the presumption that the second marriage of Danny Mayo to defendant was valid.

> The decided weight of authority . . . is that when two marriages of the same person are shown, the second marriage is presumed to be valid; that such presumption is stronger than or overcomes the presumption of the continuance of the first marriage, so that a person who attacks a second marriage has the burden of producing evidence of its invalidity. When both parties to the first marriage are shown to be living at the time of the second marriage, it is presumed in favor of the second marriage that the first was dissolved by divorce.

Denson v. Grading Co., 28 N.C. App. 129, 131, 220 S.E. 2d 217, 219 (1975).

For this Court to determine if from all the evidence presented plaintiff overcame the presumption, not only must we state the presumption, we must articulate the law as to the burden of proof each party must carry. The law of burden of proof of a second marriage is set forth as follows:

> A second or subsequent marriage is presumed legal until the contrary be proved, and he who asserts its illegality must prove it. In such case the presumption of innocence and morality prevail over the presumption of the continuance of

> the first or former marriage. . . . (I)t is always for the jury where the demand is for an affirmative finding in favor of the party having the burden, even though the evidence may be uncontradicted. . . . Moreover, proof of the second marriage adduced by the defendant, if sufficient to establish it before the jury, raises a presumption of its validity, upon which property rights growing out of its validity must be based.

Denson v. Grading Co., supra, at 132, 220 S.E. 2d at 219-20.

The evidence presented by Debra revealed that she and Danny Mayo were legally married in Banff, Alberta Province, Canada on 28 June 1977, which was his second marriage. This evidence was sufficient to invoke the presumption that the second marriage was legal. The burden then shifted to Claudette, his first wife, to produce evidence to show the invalidity of the second marriage.

The issue then becomes whether there was sufficient evidence presented to overcome the presumption that the second marriage was legal. This action was tried before the judge sitting without a jury. "In an action tried before the judge without a jury, the court's findings of fact have the force and effect of a jury verdict. Thus, it is the function of the trial judge to pass on the credibility of the witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence. Therefore, the findings of the trial court are conclusive on appeal if supported by competent evidence even though the evidence might sustain a finding to the contrary." *Hoover v. Kleer-Pak,* 33 N.C. App. 661, 666, 236 S.E. 2d 386, 389, *disc. review denied,* 293 N.C. 360, 237 S.E. 2d 848 (1977). When the trial judge sits as the trier of facts, his judgment will not be disturbed on the theory that the evidence did not support his findings of fact if there is any evidence to support the judgment. *Whitaker, supra.*

The trial judge made extensive findings of fact from the evidence presented by both parties. The trial judge found that plaintiff and Danny Lee Mayo were married on 30 August 1974, but that in late 1974 Danny Lee Mayo abandoned the plaintiff. The last contact which the plaintiff had with Danny Lee Mayo was in 1976. Since that time, plaintiff has had no personal, telephonic or correspondence contact with Danny Lee Mayo and

did not discover his whereabouts until 1982, over a year after his death.

Danny Lee Mayo married Donnette Marie Walsh on November 20, 1975 in Jackson County, Missouri. Danny Lee Mayo met the defendant in September, 1976 and shortly thereafter they announced their plans for engagement and made arrangements to begin wedding plans. The trial judge further found that by becoming engaged, Danny Lee Mayo impliedly represented to defendant that he was single or divorced and thus capable of contracting for marriage. Defendant learned of Danny Lee Mayo's marriage to Donnette Marie Walsh. Upon obtaining that knowledge, she accompanied him to court to get a divorce from Donnette which was granted on November 22, 1976.

The trial judge also found that before 28 June 1977, defendant knew that plaintiff and Danny Lee Mayo had lived together. She also knew that from that union the plaintiff bore Danny Lee Mayo a child and that the child and the plaintiff carried Danny Lee Mayo's surname. Danny Lee Mayo told the defendant that they were not married and also told the defendant that they were never married. The defendant told the plaintiff that Danny Lee Mayo stated that the plaintiff and Danny Lee Mayo were never "legally married." Danny Lee Mayo talked a great deal about his child and indicated the child was a very big part of Danny Lee Mayo, meaning the child was important to him. Danny Lee Mayo knew the address of his minor child in Texas in August, 1975, at a time when the child was living with her grandmother and step-grandfather, now her adoptive parents. Defendant made no investigation of the possibility that Danny Lee Mayo might have married the plaintiff, instead she relied on the statement of Danny Lee Mayo that he and plaintiff had never been legally married. Danny Lee Mayo and the defendant participated in a marriage ceremony on June 28, 1977. Plaintiff did not herself seek or obtain a divorce from Danny Lee Mayo nor was she served with any divorce papers from him. Danny Lee Mayo's statement that he was never legally married to the plaintiff is "proof" that he never obtained a divorce.

The trial court found further that defendant and Danny Lee Mayo had photo albums of the child, but it was not clear whether plaintiff was included in these pictures. It was clear that there

was a relationship between Danny Lee Mayo and the plaintiff from approximately March, 1973, when the child was probably conceived, until late 1974. By the time of her marriage to Danny Lee Mayo in 1977, the defendant had extremely strong reasons to think that the plaintiff and Danny Lee Mayo were indeed married. In April, 1981, the defendant provided information for the obituary of Danny Lee Mayo in the local paper in Statesville, North Carolina, that Alea Marie Mayo was the daughter of Danny Lee Mayo by a previous marriage. Defendant's reasons for stating the information in that light was to avoid embarrassment.

We find first that the trial judge applied the correct burden of proof as to the presumption of the second marriage. We have reviewed the entire record and find that there is competent evidence in the record to support the trial judge's findings of fact. Therefore, these findings of fact are conclusive and binding on this Court. After finding these facts, it was for the trial judge sitting without a jury to weigh the evidence and render judgment. The trial judge concluded, from these findings, that the plaintiff had overcome the presumption of the validity of the second marriage. The findings of fact may be open to different interpretations and conclusions, but the trial judge interpreted and concluded that the burden of proof plaintiff needed to establish to overcome the presumption of validity of the second marriage was met. We will not disturb that decision, since there are facts which logically lead to that conclusion. We do not second guess the jury's verdict, nor will we second guess the weight the trial judge gave the findings in rendering his judgment.

[3] Defendant, in her second assignment of error, contends the trial court erred in awarding plaintiff the amount of $11,632.55, which represented the net personal estate of Danny Mayo minus $3,800.00 that the trial court deducted as an equitable adjustment of the down payment made by defendant on the truck-tractor. The trial judge made the finding that defendant, by sworn report, stated that Danny Lee Mayo was the sole owner of the personal property consisting of: (1) one-half of certain state and federal income tax returns; (2) one-half of two bank accounts, one in North Carolina and one in Florida; and (3) a full interest in a motorcycle and full interest in several vehicles including the 1979 GMC truck-tractor. The trial judge further found that the personal property amounted to $15,432.55 but deducted $3,800.00 which the court

found defendant made as a down payment on the tractor-trailer. The court found that Danny Mayo was the sole owner of this property by virtue of outright gift, by acquisition or accumulation. We find that there is ample and competent evidence in the record to sustain the trial judge's findings of fact, therefore we must affirm the decision of the trial judge. *Hoover v. Kleer-Pak, supra.*

As to plaintiff's cross-appeal that the trial court erred in holding that the defendant is the sole owner of the real property of Danny Mayo, by virtue of constructive or resulting trusts, both parties waived this appeal in oral argument.

The judgment of the trial court is

Affirmed.

Judges WHICHARD and PHILLIPS concur.

JAMES WILLIAM BELASCO AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 8420SC279

(Filed 5 March 1985)

Insurance § 87.3— omnibus clause—loan of car by permittee

Summary judgment should not have been entered for defendant, and plaintiffs were entitled to judgment as a matter of law, where defendant insured a vehicle owned by Charlie Thomas, who loaned the vehicle to his daughter with instructions not to let anyone else drive it, and the daughter loaned the vehicle to Carl Hinson, who became involved in an accident with plaintiff Belasco and was found negligent. A person is in lawful possession of a vehicle under an omnibus clause if he is given possession of the automobile by the automobile's owner or owner's permittee under a good faith belief that giving possession of the vehicle to the third party would not be in violation of any law or contractual obligation. G.S. 20-279.21(b)(2); G.S. 14-72.2.

APPEAL by plaintiffs from *Rousseau, Judge.* Order entered 14 February 1984 in Superior Court, UNION County. Heard in the Court of Appeals 16 November 1984.

Griffin, Caldwell, Helder & Steelman, by Sanford L. Steelman, Jr. and Thomas J. Caldwell, for plaintiff appellants.

Taylor and Bower, by George C. Bower, Jr., for defendant appellee.

JOHNSON, Judge.

This appeal concerns the question of whether a third party, operating a motor vehicle with the permission of one given possession of the motor vehicle by the owner of the vehicle with specific instructions not to allow a third person to operate the vehicle, was in lawful possession of the vehicle within the meaning of G.S. 20-279.21(b)(2). The trial court, in granting summary judgment for defendant, held that the third party did not have lawful possession of the vehicle; therefore, defendant was not liable under the owner's automobile liability insurance policy. For the following reasons, we reverse.

The following facts are undisputed:

Defendant issued an automobile insurance policy to Charlie Dodd Thomas which covered a 1973 Volkswagen automobile Thomas owned. The policy provided that it was subject to the provisions of Chapter 20 of the North Carolina General Statutes. Approximately one week prior to 18 July 1980, Thomas loaned the vehicle to his daughter, Kathy Nelson, and orally instructed her not to let anyone else drive it. On 18 July 1980, Carl Hinson borrowed the automobile from Nelson to go visit relatives in Lancaster, South Carolina. En route back to Matthews, North Carolina from Lancaster, Hinson was involved in a traffic accident in the vehicle, colliding with a vehicle owned and occupied by plaintiff James William Belasco. At the date of the accident, defendant's policy was in full force and effect. In May of 1983, in an action entitled *James William Belasco v. Carl Dennis Hinson* (81CVS1114), a jury found Hinson to have been negligent in the operation of the vehicle and awarded plaintiff Belasco damages in the amount of $9,500.00 for Belasco's personal injuries and in the amount of $1,094.25 for property damage to Belasco's vehicle. A judgment was rendered accordingly. Plaintiffs then instituted this suit against defendant seeking to enforce the judgment against defendant under the policy. Plaintiffs attached a copy of the judgment to the complaint and incorporated it therein by reference.

Defendant filed an answer in which it admitted all of the allegations of the complaint except for an allegation that Hinson was in lawful possession of the automobile. Both sides moved for summary judgment. The trial court granted defendant's motion.

G.S. 20-279.21(b)(2) provides that an owner's policy of liability insurance

> [s]hall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, *or any other persons in lawful possession*, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle. . . . (emphasis added).

The current statute reflects a 1967 amendment to the statute which added the language in italics. 1967 Sess. Laws, c. 1162, s. 1. The intent of the General Assembly in enacting the 1967 amendment is stated in the preamble to the amendatory act:

> WHEREAS, it is the established public policy of North Carolina to require as a prerequisite to the lawful licensing of a motor vehicle for use upon the public highways that the owner of the vehicle have and maintain in full force and effect a liability insurance policy; and
>
> WHEREAS, the owner of every motor vehicle has the absolute authority under the law to allow or not to allow anyone else to operate his vehicle, but it is a growing custom of our society that persons other than the titled owner operate a motor vehicle, and extend the use for social and non-business use, and for the titled owner to allow, or acquiesce in general use of his vehicle by others either as a fringe benefit or as a means of promoting the pleasure and convenience of loved ones, including friends, and for a titled owner initially to extend permission for the social and non-business use by an employee, friend or member of family who in turn, as a matter of convenience or acquiescence, permits others to operate the vehicle; and
>
> WHEREAS, many innocent and blameless citizens who are victims of serious personal injuries and property loss are unable to receive any compensation whatsoever because of difficulty

> of proof under the terms of liability insurance policies, and it is difficult and often impossible for injured parties and operators to prove that one lawfully in possession of a vehicle had the express or implied permission of the owner to drive on the very trip and occasion of the collision; and
>
> WHEREAS, liability coverage under the laws of North Carolina is provided for an operator of a vehicle who has the 'express or implied permission' of the titled owner but does not extend to persons otherwise lawfully in possession of vehicles with the result that citizens who operate another's vehicle with full reliance upon the existence of liability coverage often find themselves to be victims of large judgments without any coverage whatsoever: . . . . 1967 Sess. Laws, c. 1162.

The 1967 amendment reverted to language similar to that present in the original Motor Vehicle Safety and Responsibility Act of 1947 which insured "any other person in lawful possession" of the vehicle. 1947 Sess. Laws, c. 1006, s. 4(2)(b). The above-quoted language was deleted in 1953. 1953 Sess. Laws, c. 1300, s. 21(b)(2).

Since the 1967 amendment, several cases have dealt with the issue of lawful possession within the context of G.S. 20-279.21 (b)(2). In the first two of these cases, the Court concluded that the operator of the vehicle was not in lawful possession. In *Jernigan v. State Farm Mut. Automobile Ins. Co.*, 16 N.C. App. 46, 190 S.E. 2d 866 (1972), an unlicensed passenger in a parked automobile, at the request of another person to move the automobile out of the way, drove the car without the permission of either the owner of the automobile or the owner's permittee. While moving the automobile, she struck another automobile. In holding the unlicensed operator not to be in lawful possession of the vehicle, this Court stated that permission was an essential element of lawful possession. Having neither the owner's nor permittee's permission to operate the vehicle, the passenger was not in lawful possession.

The next year, in *Iowa National Mut. Ins. Co. v. Broughton*, 283 N.C. 309, 196 S.E. 2d 243 (1973), the Supreme Court was presented with a situation in which the lessee of a rental vehicle, in contravention of the terms of the written rental agreement, permitted a person under the age of 21 to operate the vehicle. The Court noted that a sound policy reason existed for the restriction

in the rental agreement: at the time of the agreement, the age of 21 was fixed by law as the age at which one became legally responsible for one's legal obligations. Since the underage operator did not have the owner's express or implied permission to operate the vehicle, the Court held that he was not in lawful possession. In a concurring opinion, Justice (now Chief Justice) Branch wrote that the Court unnecessarily considered the question of lawful possession under G.S. 20-279.21(b)(2) because G.S. 20-281, which concerned insurance of rental automobiles, dealt more particularly with the situation. G.S. 20-281 did not include as an insured any person in lawful possession.

Later cases, however, have held that the operator was in lawful possession of the vehicle. In *Nationwide Mut. Ins. Co. v. Chantos*, 25 N.C. App. 482, 214 S.E. 2d 438, *cert. denied*, 287 N.C. 465, 215 S.E. 2d 624 (1975), a mother entrusted her automobile to her son, who then gave permission to another minor to operate the automobile. This Court reasoned that since the third person had the son's permission to operate the automobile, the third person had lawful possession.

In *Packer v. Travelers Ins. Co.*, 28 N.C. App. 365, 221 S.E. 2d 707 (1976), an employee had an accident in a company vehicle which he was operating for his personal use after hours without his employer's permission. The employee, with his employer's permission, had driven the vehicle to his home. In holding the evidence supported a finding that the employee was in lawful possession of the vehicle at the time of the accident, the Court quoted the preamble to the 1967 amendment and declared that the General Assembly's intent was to adopt a rule of liberal construction in applying coverage under an omnibus clause.

The most factually similar case to the case *sub judice* is *Engle v. State Farm Mut. Ins. Co.*, 37 N.C. App. 126, 245 S.E. 2d 532, *disc. review denied*, 295 N.C. 645, 248 S.E. 2d 250 (1978), in which a father, the legal owner of the vehicle, gave possession of the vehicle to his son with instructions not to let anyone drive the auto. The son loaned the auto to a third person who was involved in an accident on the way back from Myrtle Beach, South Carolina to Morganton, North Carolina. The father learned on the Friday night immediately preceding the Sunday on which the accident happened that his son had loaned the auto to the third per-

son to drive to Myrtle Beach; the father, however, did not report the incident to the police or attempt to regain possession of the vehicle. In holding the third person to be in lawful possession of the vehicle, the Court cited *Chantos, supra,* as holding that where an original permittee gives another express permission to use the vehicle, the other person is placed in lawful possession under G.S. 20-279.21(b)(2). The Court also cited the preamble of the 1967 amendment as showing a legislative intent to alleviate the necessity of proving that the operator had the express or implied permission of the owner on the very trip and occasion of the collision. Finally, the Court distinguished *Broughton, supra,* by stating *Broughton* concerned a written agreement whereas the case before it concerned oral instructions.

Most recently, in *Stanley v. Nationwide Mut. Ins. Co.,* 71 N.C. App. 266, 321 S.E. 2d 920 (1984), *disc. review denied,* 313 N.C. 174, 326 S.E. 2d 33 (1985), the operator tricked the owner into giving possession of the vehicle to him by displaying an identification card purporting to be an operator's license. We held that the operator was in lawful possession of the vehicle because he had been given possession of the automobile by the lawful owner of the vehicle, although through trick.

In the meantime, however, this Court in *Ford Marketing Corp. v. National Grange Mut. Ins. Co.,* 33 N.C. App. 297, 235 S.E. 2d 82, *disc. review denied,* 293 N.C. 253, 237 S.E. 2d 535 (1977), held that a third party operator of a vehicle who had neither the owner's nor the owner's permittee's express consent to operate the vehicle on the very occasion of the accident was not in lawful possession. In that case, no restrictions had been placed upon the permittee's use of the vehicle by the owner, the permittee had loaned the vehicle to the third party in the past, and the owner had never voiced any objections to the use of the vehicle by the third party. On the occasion of the accident the third party had obtained possession of the vehicle with the permission of the permittee's daughter, who thought her father, who was away, would not mind and who indeed testified that he did not mind. In reaching its result, the Court relied upon a repealed criminal statute, G.S. 20-105, and its replacement, G.S. 14-72.2, which made it a crime for one to operate a vehicle without the owner's consent. Since there was no evidence that the third party operator had the owner's consent, he was not in lawful possession.

At the time *Ford Marketing Corp., supra,* was decided, however, G.S. 14-72.2(a) (Cum. Supp. 1975) provided: "A person is guilty of an offense under this section if, without the consent of the owner, he takes, operates, or exercises control over . . . a motor vehicle . . . of another." G.S. 14-72.2(a) was subsequently amended, effective 1 July 1977, to provide as it does today: "A person is guilty of an offense under this section if, without the express or implied consent of the owner *or person in lawful possession,* he takes or operates an aircraft, motorboat, motor vehicle, or other motor-propelled conveyance of another." 1977 Sess. Laws, c. 919 (emphasis added). Thus, under G.S. 14-72.2(a), as amended, one cannot be prosecuted for unauthorized use of a conveyance if he is operating or using it with the consent of one in lawful possession of the vehicle.

From the foregoing discussion, it is evident that a person is in lawful possession of a vehicle under an omnibus clause if he is given possession of the automobile by the automobile's owner or owner's permittee under a good faith belief that giving possession of the vehicle to the third party would not be in violation of any law or contractual obligation. Applying these principles to the present case, we conclude that Hinson, having been given possession of the vehicle by one in lawful possession, with no notice of restrictions on its use, was in lawful possession. He could not have been prosecuted for unauthorized use of a conveyance under G.S. 14-72.2, nor is there evidence that Hinson had notice that Kathy Nelson violated a contractual obligation with her father by lending the vehicle to him.

There being no genuine issue of material fact, plaintiffs were therefore entitled to judgment as a matter of law. The trial court's order granting summary judgment for defendant is therefore reversed and this cause remanded for the entry of a judgment in accordance with this opinion.

Reversed and remanded.

Judges WHICHARD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. ROBERT J. CASTLEBERRY

No. 8414SC390

(Filed 5 March 1985)

1. **Criminal Law §§ 85, 117.3— State's witnesses—court reading plea agreements to jury—other offenses by defendant—harmless error**

The trial court erred in reading to the jury the text of plea agreements between the State and two witnesses for the State where the agreements mentioned other charges pending against defendant in addition to the charges for which he was being tried and thus tended to impeach defendant's character when defendant's character was not in issue. However, such evidence was not prejudicial to defendant in light of the State's overwhelming evidence of defendant's guilt of the offenses charged.

2. **Criminal Law § 138— improper aggravating factor—offenses committed against deputy clerk**

The trial court erred in finding as a factor in aggravation of two subornation of perjury offenses that the offenses were committed against a deputy clerk of court while engaged in the performance of her official duties, G.S. 15A-1340.4(a)(1)(e), where the deputy clerk was not the victim of either offense and evidence in support of the finding was used to support an element of each offense.

APPEAL by defendant from *Johnson, Judge.* Judgment entered 6 October 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 14 January 1985.

Defendant was indicted on charges of conspiracy to obtain property by false pretenses, obtaining property by false pretenses and two counts of subornation of perjury. A jury found defendant guilty of all four offenses and he received the maximum sentence for each, totaling 33 years.

Only the State presented evidence. Summarized, it tended to show the following:

Barbara Hansen was a licensed notary public who knew defendant. In January of 1983, defendant and Deborah Riggsbee went to Ms. Hansen's home where defendant produced a document which he identified as the will of his brother. Defendant indicated that his brother, E. R. Castleberry, had died earlier without properly executing his will. Defendant was the sole beneficiary under the purported will. He asked Ms. Hansen to notarize Ms. Riggsbee's signature as a witness to the will and to

backdate the notarization by approximately one year, to January 1982. After Ms. Hansen did as defendant directed, defendant applied Ms. Hansen's seal twice more to the document and paid her $100.00, though no fee had been discussed. The document was entered in evidence below but is not before us.

Later in January 1983, defendant asked Ms. Hansen, who lived in Raleigh, to accompany him to Durham for the purpose of proving the will that she had notarized. They met Ms. Riggsbee and went to the office of the Clerk of Superior Court of Durham County, where the will had been submitted to probate. There, before Deputy Clerk Linda Cole, Ms. Riggsbee swore that she had witnessed the will of E. R. Castleberry. Ms. Hansen similarly swore that she witnessed the execution of the will and notarized it. Both women indicated at trial that they were acting pursuant to instructions from defendant.

Other evidence from the State indicated that Ms. Riggsbee was acquainted with E. R. Castleberry prior to his death and that she had met defendant at the funeral. Defendant took her shopping, bought her a coat and made a $220.00 house payment for her because, he indicated, his dead brother would have wanted him to. After the will had been notarized and backdated at Ms. Hansen's house, defendant asked Ms. Riggsbee if she wanted his brother's car.

Ms. Hansen had not known defendant a long time and did not know him well. She testified that on a previous occasion she had notarized for him a document purporting to be the will of John Robertson. Defendant told Ms. Hansen that Robertson was an invalid he and his wife were caring for. Defendant's wife was named as a beneficiary in that will. Though she notarized the document as defendant directed, she had not, in fact, witnessed its execution. Defendant paid her $100.00.

At trial the signature on the will purporting to be that of E. R. Castleberry was compared with other documents known to have been signed by him. In the opinion of an expert witness for the State, the signature on the will could not be identified as that of E. R. Castleberry and showed signs of having been forged.

Ms. Hansen and Ms. Riggsbee both testified for the State. At the close of Ms. Hansen's testimony, she indicated that she had

been charged in connection with the apparent will forgery and admitted that she was testifying pursuant to an agreement with the State concerning those charges. At that point, the court, on its own motion, read the text of Ms. Hansen's agreement with the State to the jury. As read by the court, that agreement provided in part as follows:

> "[T]he State has agreed to charge reductions and sentence concessions in the above-captioned matter," that is, the matter pending against Mrs. Hansen "in consideration for the defendant's truthful testimony in the trial of all pending matters in Durham County and Wake County wherein Robert J. Castleberry is charged in Bills of Indictment involving the deaths and estates of Ernest R. Castleberry, Sr., Ernest R. Castleberry, Jr., and John A. Robertson. Upon the truthful testimony of the defendant, Barbara N. Hansen, as aforesaid, the State will dismiss the felonies of conspiracy to obtain or attempt to obtain property by false pretense . . . and obtaining or attempting to obtain property by false pretense and will accept a plea of guilty to perjury on her oath and affidavit pursuant to law before the Clerk of the Superior Court of Durham County in the matter of the estate of Ernest R. Castleberry, Sr., and will recommend to the Court as part of a plea agreement, that Barbara N. Hansen receive a suspended sentence and be placed on supervised probation."

Defendant immediately moved for a mistrial which was denied by the trial court.

Deborah Riggsbee also admitted on direct examination that she was testifying pursuant to a plea bargain with the State. The trial court read to the jury the text of the agreement, substantially similar to Ms. Hansen's. Defendant again moved for a mistrial which the trial court also denied.

Defendant presented no evidence. The jury returned guilty verdicts on all four charges. Defendant appealed from the judgment imposing sentence on the verdicts.

Attorney General Edmisten, by Assistant Attorney General James Peeler Smith, for the State.

Assistant Appellate Defender David W. Dorey, for defendant-appellant.

EAGLES, Judge.

Defendant noted numerous exceptions and made thirteen assignments of error. However, he brings forward on appeal only two of those assignments. Pursuant to N.C. App. R. 28(b)(5), we deem the remainder of his assignments of error to be abandoned.

[1] Defendant first assigns error to the trial court's denial of his motions for mistrial after the text of the plea agreements between the State and witnesses Hansen and Riggsbee were read to the jury by the court. He argues that this was error because the text of the agreements was highly prejudicial to him. He contends that the jury could have been told of the agreements, if necessary, without being made aware of the nature of the other charges pending against him. Defendant contends that this was prejudicial. He argues that the jury would deduce from the plea agreements that defendant had been charged in connection with the death of the person of whose estate he was the sole beneficiary and therefore would be more inclined to conclude that he had procured the forging of the document by which he was made the sole beneficiary—the essence of the offenses for which he was then on trial.

While we agree that in reading the full text of the agreement the court acted improperly, we find that the error was not prejudicial in this case. As defendant points out, it is error to allow a criminal defendant's character to be impeached by evidence of indictments or other accusations of misconduct because " 'an indictment is a mere accusation and raises no presumption of guilt.' " *State v. Williams*, 279 N.C. 663, 673, 185 S.E. 2d 174, 180 (1971), *quoting People v. Morrison*, 195 N.Y. 116, 117, 88 N.E. 21, 22 (1909); *State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982), *cert. denied*, --- U.S. ---, 104 S.Ct. 1604 (1984).

That error is compounded when a trial judge on his own motion provides impeaching evidence when the defendant's character was not in issue. *See* G.S. 15A-1222; *State v. Miller*, 271

N.C. 646, 157 S.E. 2d 335 (1967) (improper for prosecution to comment on defendant's character when it was not in issue); *State v. Wilhelm*, 59 N.C. App. 298, 296 S.E. 2d 664 (1982), *rev. denied*, 307 N.C. 702, 301 S.E. 2d 395 (1983) (judge may not express opinion).

Here, however, the agreements were read by the trial judge for the purpose of proving that the witnesses were testifying pursuant to agreements with the State. The evidence is admissible for that purpose even though it incidentally tends to impeach defendant's character. *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). *See generally*, Brandis *N.C. Evidence* Section 104 (1982 and Supp. 1983).

If this evidence had been offered by the defendant or by the State, it would not have been error to allow it. Ordinarily it is in the defendant's interest to show that a witness against him is testifying pursuant to an agreement with the State and to disclose the terms of the bargain because such evidence tends to impeach the witness. In some cases the State may wish to make the jury aware of the specific terms of the plea bargain. G.S. 15A-1054 requires the State to disclose to the defendant whether prosecution witnesses are testifying pursuant to an agreement with the State. G.S. 15A-1052 requires the court to disclose to the jury whether a prosecution witness is testifying under immunity. Although G.S. 15A-1054 is the statute applicable here, neither statute requires the court to disclose the specific terms of a plea bargain to the jury. *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977). Our statutes leave that decision to the parties. When the court, acting on its own motion, removes that decision from the parties, there is the potential for prejudicial reversible error to occur.

In some cases, such an error could require a new trial. Here, however, the error is not prejudicial and defendant does not persuasively argue otherwise. The State presented competent, first-hand testimony of two witnesses who participated in and directly observed defendant doing the acts he was accused of. Their testimony was not disputed and contained no substantial internal conflicts. Defendant has not demonstrated that the jury's verdict was influenced by the trial court's error and we cannot perceive, on the facts of this case, how the error could have prejudiced defendant. The trial court's action, if it was error, did not in-

fluence the jury; no prejudice requiring a new trial has been shown. *State v. Murvin,* 304 N.C. 523, 284 S.E. 2d 289 (1981). Defendant's contention is without merit. Though it does not affect our decision on this point, we note that defendant on appeal does not challenge the sufficiency of the evidence to support the jury's verdict.

[2] Defendant next assigns error to the trial court's finding as a factor in aggravation of his punishment that the subornation of perjury offenses were "committed against a present or former . . . clerk or assistant or deputy clerk of court . . . while engaged in the performance of [her] official duties." This is a statutory aggravating factor. G.S. 15A-1340.4(a)(1)(e). Defendant argues that this finding, made as to both of the subornation of perjury charges was erroneous because neither offense was committed against the deputy clerk and because the evidence in support of the finding was used to support an element of the offense. We agree with defendant.

The intended application of this statutory factor, as defendant points out, is apparent from its language: to allow for aggravation of punishment when the victim of a criminal offense was a public official or a private citizen involved in the administration of justice or public safety. While the present offense clearly involved the deputy clerk, she was not the victim of the crime and the aggravating factor found by the court would not apply.

Further, even if that factor could be found to apply on these facts, it would have been error for the court to so find. Proving that an oath was duly administered is necessary for establishing perjury or subornation of perjury. Since the State in this case proved that the deputy clerk administered the oath to Ms. Hansen and Ms. Riggsbee, it could not use the same evidence to prove that defendant had committed the offense against the clerk. *State v. Morris,* 59 N.C. App. 157, 296 S.E. 2d 309 (1982), *rev. denied and appeal dismissed,* 307 N.C. 471, 299 S.E. 2d 227 (1983).

In the guilt phase of defendant's trial we find no error. Since the court erroneously found as an aggravating factor that the offense was committed against the deputy clerk of court, the case must be remanded for resentencing.

No error in the trial; remanded for resentencing.

Judges WEBB and COZORT concur.

DANIEL CONSTRUCTION COMPANY, SHEARON HARRIS PROJECT, NEW HILL, NORTH CAROLINA v. JOHN C. BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA

No. 8310SC1228

(Filed 5 March 1985)

1. **Master and Servant § 114— OSHA violation—failure of employer to require safety-toe shoes—standard of proof—use of industry practice**

The superior court correctly affirmed the Occupational Health and Safety Review Board where the Review Board's decision was supported by substantial evidence that a reasonably prudent employer would have recognized that carrying heavy objects above unprotected feet was hazardous to employees and would have required safety-toe shoes. The practice of the industry was but one circumstance to consider. G.S. 150A-51(5).

2. **Master and Servant § 114— OSHA violation—failure of employer to require safety-toe shoes—expert testimony and site history disregarded**

The superior court correctly affirmed the Occupational Health and Safety Review Board's decision that defendant violated construction safety standards by not requiring safety-toe shoes, despite expert testimony that carrying the heavy objects involved here was not hazardous and despite the fact that no employee at the locations involved here had been injured by dropping such an object on his foot. The circumstances of this case were not such that only experts could make deductions from them; it is a matter of common knowledge that people carrying objects can, and sometimes do, drop them and that an object weighing 350 pounds if dropped on an unprotected foot can seriously injure it.

APPEAL by respondent Daniel Construction Company from *Martin, John C., Judge.* Judgment entered 13 July 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 20 September 1984.

This appeal concerns a decision of the Occupational Safety and Health Review Board of North Carolina (OSHRB), which determined that Daniel Construction Company is in violation of a certain federal construction safety standard, made applicable to North Carolina by the Occupational Safety and Health Act of

1973, G.S. 95-126, *et seq.*, and directed Daniel to thereafter comply with it. Appellant, Daniel Construction Company (Daniel), is constructing an electrical power generating plant for Carolina Power & Light Company at its Shearon Harris facility in New Hill. As the result of an inspection by the North Carolina Department of Labor, Occupational Safety and Health Division (North Carolina OSHA), Daniel was cited for allegedly violating 29 CFR Sec. 1926.28(a) by failing to require employees working in "Laydown Yard Number Three" and the "Ironworker Fabrication Shop" to wear steel-toed shoes. Daniel contested the citation and an evidentiary hearing was held before a hearing examiner of the North Carolina Occupational Safety and Health Review Board. After considering all of the evidence and the briefs of the parties, the hearing examiner vacated the citation on the grounds that complainant failed to prove by "clear, cogent and convincing evidence" that a hazardous condition existed which required the use of steel-toed shoes. North Carolina OSHA appealed to the Review Board, which reversed the hearing examiner and affirmed the citation. Daniel then appealed the decision of the Review Board to the Wake County Superior Court, where an order was entered affirming the decision of the Review Board. Daniel's appeal here is from that order.

The alleged violation, designated "serious," was described as follows:

> Safety toe footwear not being provided for or used by employees lifting, carrying and handling heavy construction materials such as concrete forms and structural steel or metal products in laydown yard number three and iron worker fabrication shop on job site.

The federal safety standard in question, 29 CFR 1926.28(a), provides as follows:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

The hearing examiner found and the Review Board adopted the following findings of fact:

3. During the inspection, the Safety Officer in regard to . . . [the failure of the employees to wear safety toe shoes], observed the following:

a. In Lay Down Yard No. 3, employees of respondent were lifting prefabricated material that varied in size from one-foot square to four feet by eight feet, constructed of three-inch steel channel with two and one-half-inch angle iron frames and covered with three-quarter-inch plywood. The weight of objects being moved by said employees varied from 25 to 350 pounds, and said objects were lifted by hand and carried two to three feet above the employees' toes for distances of 30 feet or more. Six employees were sometimes required to carry the heavier panels.

b. Also in Lay Down Yard No. 3, employees of Respondent were observed carrying strong backs (stiffeners) weighing approximately 12 pounds per foot and varying in length from eight to 20 feet, and being carried by employees either at waist height or on the employees' shoulders.

c. In the Iron-Worker Fabrication Shop, structural steel products were being fabricated and moved by hand and sometimes more than one person was needed to lift the materials. Steel plates one to one and one-half inches thick were being fitted with one and one-half to two-inch bolts approximately 20 inches long, and the plates were moved by three employees, including Foreman Earl Brown, and carried approximately 20 feet.

d. One employee in Lay Down Yard No. 3 was wearing safety toe shoes and no employees in the Iron-Worker Fabrication Shop were wearing safety toe shoes.

e. Safety toe shoes were not required by Respondent to be worn by its employees, either in Lay Down Yard No. 3 or the Iron-Worker Fabrication Shop.

f. Ten employees worked in Lay Down Yard No. 3 and all of said employees carried forms in the course of their employment.

g. 18 to 22 employees worked in the Iron-Worker Fabrication Shop and all of said employees were required to

lift structural steel in the course of their employment on an average day.

h. If the materials being carried by the employees in Lay Down Yard No. 3 and the Iron-Worker Fabrication Shop were dropped on the toes of employees, the type of injury that would likely result would be severe laceration, fracture, or amputation of a toe or foot.

4. Approximately 3,600 employees are employed by Respondent on the job site, and Respondent does not require safety toe shoes. It is up to the individual employee, whether he wants to wear safety toe shoes or not. Respondent does have a payroll deduction plan enabling employees to have the cost of safety toe shoes deducted from their pay. Respondent encourages its employees to wear safety toe shoes. Hard hats are required to be worn in all areas and are issued and paid for by Respondent.

5. Respondent has had only one accident involving injuries to an employee's toe, in which an employee's toe was amputated, but if said employee had been wearing safety toe shoes, his toe still would have been amputated and said accident did not occur in either Lay Down Yard No. 3 or in the Iron-Worker Fabrication Shop.

6. Respondent issued a "Construction Safety Handbook" to its employees which states, "Approved Safety shoes are available at cost on some projects. You are encouraged to wear them at all times."

7. Safety toe shoes were sold on the job site by a vendor and shoes without steel toes were not sold.

8. Many employees wore safety shoes which were not equivalent to safety toe shoes.

In reversing the decision of the hearing examiner, the Review Board noted that recent court decisions, not available to the hearing examiner when his decision was made, have established that the burden of proof in safety standard violation cases is that of the preponderance of the evidence, instead of the clear, cogent and convincing standard used by the hearing examiner, and concluded that OSH had carried the lighter burden. Upon

reviewing the matter, the Superior Court found from the "entire record" that there was substantial evidence to support the decision made.

Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell, for the State.

Thompson, Mann and Hutson, by Carl B. Carruth, pro hac vice, and George J. Oliver, for respondent appellant.

PHILLIPS, Judge.

[1] Though stated differently in the appellant Daniel's brief, the only question presented by this appeal is whether the Superior Court erred in affirming the decision of the Occupational Safety and Health Review Board of North Carolina to the effect that appellant's failure to require its employees to wear safety shoes while carrying heavy objects violated 29 CFR 1926.28(a). As directed by G.S. 95-141, the Board's decision was reviewed by the court in accordance with the provisions of Chapter 150A of the General Statutes. The standard contained therein, which the court correctly followed, in our opinion, was the "entire record" test set forth in G.S. 150A-51(5), which our Supreme Court and this Court have explained many times. *See* the much cited and quoted case of *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). Considering the record as a whole in accord with the principles stated in *Thompson*, we are of the opinion that the Review Board's decision is supported by substantial evidence, as the Superior Court ruled, and therefore affirm the judgment appealed from.

In order to establish that Daniel violated 29 CFR 1926.28(a) as charged in the citation, OSH had to prove that under the circumstances which existed a reasonably prudent employer would have recognized that carrying heavy objects above their unprotected feet was hazardous to the employees doing the carrying and would require them to wear safety toe shoes. *Ray Evers Welding Co. v. OSHRC*, 625 F. 2d 726 (6th Cir. 1980). Though this is but an adaptation of the "reasonable man" standard of the common law, neither this Court nor our Supreme Court, according to our research, has yet stated the factors that may be considered in applying the standard in cases like this. For example, the Fifth Circuit has apparently interpreted 29 CFR 1926.28(a) "to require

only those protective measures which the knowledge and experience of the employer's industry, which the employer is presumed to share, would clearly deem appropriate under the circumstances." *B&B Insulation v. OSHRC*, 583 F. 2d 1364, 1367 (5th Cir. 1978). Under this interpretation, as we read it, each industry is permitted to evaluate the hazards associated with its own operations and determine what, if anything, to do about them. But as applied by the First and Third Circuits, the practice in the industry is but *one* circumstance to consider, along with the other circumstances, in determining whether a practice meets the reasonable man standard. These courts have noted, quite properly we think, that equating the practice of an industry with what is reasonably safe and proper can result in outmoded, unsafe standards being followed to the detriment of workers in that industry. *Voegele v. OSHRC*, 625 F. 2d 1075 (3d Cir. 1980); *General Dynamics v. OSHRC*, 599 F. 2d 453 (1st Cir. 1979). This latter application is much the sounder, we think, and we adopt and employ it in this case.

[2] Daniel contends, however, that regardless of the standard used the evidence fails to show that any employee injuries will be prevented by safety toe shoes; and it stresses as conclusive the opinion testimony of several witnesses, all of whom had some experience in construction work or job safety, to the effect that carrying the heavy objects referred to was not hazardous to the employees involved and safety toe shoes are not needed by them. But the circumstances involved in this case are not such that only experts can make deductions from them. Some things are a matter of common sense and knowledge and in this instance we believe that the Board was at liberty to make its own deductions from the circumstances recorded and that the deductions made were justifiable, notwithstanding the expert testimony to the contrary. From the nature of things the case is largely governed by its own circumstances and the many cases cited by the parties on this issue are of little or no assistance. Things that are obviously so just as a matter of common sense do not require the support of either legal citations or expert testimony.

It is a matter of common knowledge, we believe, that people carrying objects can, and sometimes do, drop them and that an object weighing 350 pounds if dropped on an unprotected foot can seriously injure it. Daniel argues, though, that since no employee

at the locations involved has been injured by dropping such an object on his foot, future injuries of that kind are not reasonably foreseeable and preventive measures are therefore unnecessary. This simply amounts to the claim that there is no good reason to anticipate an accident until at least one has already occurred, which is nonsense. Human error is not a rare phenomenon. A mark of ordinary prudence, we believe, is to anticipate human errors that are likely to injure people, such as dropping heavy objects on themselves, and take reasonable precautions against them before, rather than after, injuries occur. The preventive measure that prudence requires in this instance, as is so often the case, is both simple and inexpensive. According to the evidence safety toe shoes, which are available on the job site at a cost of $32 to $48 a pair, can be obtained by or furnished to each of the thirty-two employees that need them at a total cost of as little as $1,024—a trifling sum when compared to the cost of just one mutilated or amputated foot.

For the reasons stated the judgment appealed from is affirmed.

Affirmed.

Chief Judge HEDRICK and Judge BECTON concur.

STATE OF NORTH CAROLINA v. SAUNDERS H. COX

No. 842SC649

(Filed 5 March 1985)

1. Criminal Law § 83.1— testimony of wife against husband admissible—competent but not compellable

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and first-degree burglary, defendant's wife was competent to testify where defendant was indicted on 3 October 1983, defendant's wife rented the house allegedly burglarized by defendant, defendant's wife was in court on a voluntary basis, and the State relied on her as a prosecuting witness. G.S. 8-57 (Cum. Supp. 1983).

2. **Burglary and Unlawful Breakings § 5.8— residence of estranged wife—evidence of first-degree burglary sufficient**

There was sufficient evidence to submit first-degree burglary to the jury where the evidence, in the light most favorable to the State, tended to show that defendant, his wife, and their daughter lived together in a rented house until 5 July 1982, when defendant moved out of the house; defendant's wife intended the separation to be permanent; defendant continued to visit his daughter after the separation and contributed to the support of his wife and child; defendant called his wife at approximately midnight on 22 July 1983 to ask if he could come to the house and was refused; defendant then asked to speak to his daughter and was told that she was spending the night elsewhere; an argument ensued and defendant's wife hung up; defendant's wife heard a door slam a few minutes later and saw defendant get out of a truck; defendant began to knock on the door and call out his wife's name; defendant's wife told him she would not let him in, told the man with her in the house to go to her daughter's bedroom, and went to her bedroom to call the police; defendant slashed the tires on the other man's truck, then kicked in the door and walked down the hall to the daughter's bedroom, holding a knife and a can of beer; and defendant stabbed the man in the leg, severing an artery and some nerves.

3. **Burglary and Unlawful Breakings § 6.2— assault with a knife—evidence of intent at time of entry sufficient**

There was sufficient evidence that defendant intended to commit an assault with a knife when he gained entry to a house by kicking down a door where the victim testified that defendant's wife first told defendant when he came to the door that "her daughter was not here and that only her and I were there," that defendant then slashed the victim's tires, and that defendant's wife saw defendant with a knife shortly after he gained entry and prior to the moment he confronted the victim.

4. **Burglary and Unlawful Breakings § 5.8— residence of estranged spouse—no property interest in defendant**

Defendant's motion to dismiss a first-degree burglary prosecution was properly denied where the evidence showed that defendant's wife occupied the residence and paid the rent and utilities, that defendant had not resided in the house for a year, and that his wife repeatedly refused to admit him on the night in question. The marital relationship did not create in defendant a property interest in his wife's residence, and neither the absence of a separation agreement nor the presence of defendant's clothing and tools in the house was relevant to defendant's right to enter the house occupied exclusively by his wife and daughter. G.S. 14-51.

5. **Burglary and Unlawful Breakings §§ 6.2, 6.4— instructions on defendant's right to enter premises not required by evidence—failure to define non-felonious upon jury request—no error**

In a prosecution for first-degree burglary and felonious assault, the court did not err in failing to give instructions relating to defendant being on his own premises or having a right to enter the dwelling house because there was no evidence that he was on his own premises or that he had a right to enter

the dwelling house; furthermore, the court did not err by not defining "non-felonious" when requested to do so by the jury because instructions given adequately declared and explained the law arising upon the evidence.

APPEAL by defendant from *Phillips (Herbert O.), Judge.* Judgments entered 3 February 1984 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 13 February 1985.

Defendant was charged in proper bills of indictment with assault with a deadly weapon with intent to kill inflicting serious injury and first degree burglary. He was found guilty of assault with a deadly weapon inflicting serious injury and first degree burglary. From judgments entered on the verdicts sentencing defendant to serve five years in prison for assault with a deadly weapon inflicting serious injury and twenty-five years for first degree burglary, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General William B. Ray, for the State.

Hulse & Hulse, by Herbert B. Hulse, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first assigns error to admission of testimony by defendant's wife "as to confidential communication between him and his wife." N.C. Gen. Stat. Sec. 8-57 (Cum. Supp. 1983) governs the competence and compellability of spouses as witnesses in criminal actions. G.S. 8-57 was rewritten by our Legislature in 1983, and the revised version is applicable in all criminal prosecutions instituted after 1 October 1983. Defendant was indicted for the offenses with which he is charged on 3 October 1983, and the amended version of G.S. 8-57 thus controls our decision as to this assignment of error. The statute in pertinent part provides:

> (b) The spouse of the defendant shall be competent but not compellable to testify for the State against the defendant, except that the spouse of the defendant shall be both competent and compellable [to testify in certain enumerated circumstances].

The record in the instant case discloses that defendant's wife rented the house allegedly burglarized by defendant, and that the State relied on her as a prosecuting witness. The district attorney represented to the court, and the court found as a fact, that Mrs. Cox had "submitted herself as a witness and [was in court] on a voluntary basis." Thus the record shows that Mrs. Cox was not compelled to testify, and the statute declares that she was competent to testify. The assignment of error is without merit.

[2] Defendant assigns error to the court's denial of his motion to dismiss the charge of first degree burglary and to the court's submission of that offense to the jury, alleging insufficiency of the evidence. The evidence introduced at trial, considered in the light most favorable to the State, tends to show the following: Defendant, his wife, and their daughter lived together in a rented house at 1204 W. Fifth Street in Washington, North Carolina, until 5 July 1982, at which time defendant moved out of the house. Mrs. Cox intended the separation to be permanent. Defendant continued to visit his daughter after the separation and contributed to the support of his wife and child. On 22 July 1983 at approximately midnight defendant called Mrs. Cox and asked if he could come to the house, a request Mrs. Cox refused. Defendant then asked if he could speak to his daughter, and was told that the child was spending the night with defendant's sister. An argument ensued, and Mrs. Cox hung up. With Mrs. Cox at this time was Joel Withers. A few minutes later Mrs. Cox heard a door slam, looked out a window, and saw defendant get out of a truck. Defendant began to knock on the door "real hard," and to call out Mrs. Cox's name. Mrs. Cox told defendant she would not open the door and let him in, told Mr. Withers to go to her daughter's room, and then went to her bedroom to call the police. While Mrs. Cox was on the phone defendant slashed the tires on Mr. Withers' truck, which was parked in Mrs. Cox's yard. Defendant then kicked down the door of the residence and walked down the hall to his daughter's room. Mrs. Cox testified that she saw defendant as he walked down the hall, and that defendant was holding a knife and a can of beer. Defendant stabbed Mr. Withers in the leg, severing an artery and some nerves. Mrs. Cox, observing defendant's action, ran to get a gun and shot defendant.

[3] Defendant argues that "there is no evidence to show that at the time he kicked in the door he had an intention to commit an

assault with a deadly weapon with intent to kill inflicting serious injury as alleged in the bill of indictment." We disagree. Mr. Withers testified that Mrs. Cox told defendant when he first came to the door that "her daughter was not here and that only her and I were there." The State's evidence tended to show that defendant then slashed Mr. Withers' tires. Mrs. Cox testified that she saw defendant with a knife shortly after he gained entry, prior to the moment he confronted Mr. Withers in the child's bedroom. This evidence is sufficient to raise an inference that defendant knew of Mr. Withers' presence prior to kicking down the door, and that at the time he gained entry into the house, he intended to commit an assault upon Mr. Withers with a knife.

[4] Defendant contends there is another reason why his motion to dismiss the charge of first degree burglary should have been granted; he argues "the evidence clearly shows that the defendant was entitled to enter his marital domicile even though he had been separated from his wife." We are aware of no case, and defendant cites none, that resolves the issue raised by defendant: Does the marital relationship, in and of itself, constitute a complete defense to the offense of burglary in the first degree? For the reasons outlined below, we hold that it does not.

The offense of burglary is defined in G.S. 14-51, which in turn appears in Subchapter IV: "Offenses Against the Habitation and Other Buildings." Burglary is an offense against property, in contrast to offenses such as homicide, rape, and assault, which have been classified by our Legislature, in Subchapter III, as "Offenses Against the Person." Because the offense is a crime against property, it is incumbent upon the State to prove, as one element of the crime, that the dwelling house wrongfully entered was that "of another." "[O]ne cannot commit the offense of burglary by breaking into one's own house. . . ." *State v. Beaver*, 291 N.C. 137, 141, 229 S.E. 2d 179, 182 (1976). "[I]n burglary cases, we hold that occupation or possession of a dwelling or sleeping apartment is tantamount to ownership." *Id.*

In the instant case, the State offered evidence tending to show that Mrs. Cox occupied the residence located at 1204 W. Fifth Street. Defendant's wife paid the rent and utilities pursuant to her occupation of the house. Mrs. Cox testified that defendant had not resided in the home for more than a year prior to the of-

fense with which he was charged, and that she repeatedly refused to admit him on the night in question. We think this evidence ample to permit an inference that defendant broke and entered the dwelling house of another. We reject defendant's argument that the marital relationship between him and Mrs. Cox necessarily created in defendant a property interest in the residence of Mrs. Cox. Defendant's motion to dismiss was properly denied.

Defendant brings forth and argues numerous other assignments of error based on his contention that his entry into the house occupied by Mrs. Cox was permissible because of the marital relationship. First, defendant challenges the court's exclusion of evidence concerning the status of the marital relationship between him and Mrs. Cox and evidence concerning "the presence of [defendant's] personal effects at the home he had shared with his wife." Our examination of the proffered testimony reveals that this evidence was properly excluded as irrelevant. Contrary to defendant's contentions, neither the absence of a separation agreement nor the presence of his clothing and tools in the house is relevant to defendant's right to enter the home occupied exclusively by Mrs. Cox and the couple's daughter. Such evidence does not tend to show that Mrs. Cox consented to defendant's entry, nor is it relevant to prove that defendant had a property interest in the home. Consequently, we find no merit in these assignments of error.

[5] In related arguments, defendant challenges the court's instructions to the jury. First, he argues that the court erred in denying his request "for an instruction with respect to self defense where the person assaulted is without fault and on his own premises." Next, he contends the court should have instructed, even absent request, "that the defendant's evidence as to this right to enter the dwelling house, if accepted by the jury, would constitute a defense to the charge of first degree burglary." We find both contentions unpersuasive because no evidence was presented that tended to show that defendant was "on his own premises" when he stabbed Mr. Withers, or that tended to show defendant had a "right to enter the dwelling house."

Defendant finally assigns error to the court's refusal to define the term "non-felonious" when asked by the jury to do so. Defendant cites no authority in support of his argument that the

court was required to comply with the jury's request. We have examined the instructions given by the trial judge and find that he adequately declared and explained the law arising upon the evidence. The court instructed the jury on the elements of first degree burglary and on the elements of the lesser included offense of non-felonious breaking or entering, and no objection was raised to these instructions. We think an additional instruction containing a definition of the term "non-felonious" might well have been more confusing than helpful to the jury, and so hold that the court did not err in refusing the jury's request.

We hold defendant had a fair trial, free from prejudicial error.

No error.

Judges JOHNSON and COZORT concur.

PATRICIA MCLEAN DRUMMOND v. EARL CORDELL, D/B/A CORDELL'S BODY SHOP; AND MELODY M. CORDELL

No. 8430SC598

(Filed 5 March 1985)

1. **Judgments § 16— judgment proper on its face—no collateral attack**

A small claims judgment authorizing defendant to sell plaintiff's automobile for storage costs pursuant to G.S. 44A-4 was proper on its face and thus could not be collaterally attacked, and plaintiff has no claim for conversion of the automobile.

2. ***Mechanics' Liens* § 2— sale of automobile for storage costs—non-compliance with statutes—jury question as to actual damages**

The evidence was sufficient to be submitted to the jury on the issue of "actual damages" suffered by plaintiff as a result of defendant's failure to conduct a sale of plaintiff's automobile for storage costs in substantial compliance with G.S. 44A-4(e) where it tended to show that a magistrate's judgment provided that defendant could enforce his lien by public sale as provided in G.S. 44A-4(e); defendant failed to mail notice of the sale to plaintiff as required by G.S. 44A-4(e)(1)a1 and failed to post notice of the sale at the courthouse door as required by G.S. 44A-4(e)(1)b; and only defendant's wife and daughter attended the sale.

3. Mechanics' Liens § 2— failure properly to conduct public sale—measure of damages

The measure of plaintiff's actual damages for defendant's failure to conduct a public sale of plaintiff's automobile for storage costs in accordance with G.S. 44A-4(e) is the difference between the fair market value of the automobile at the time of sale and the amount for which the automobile was actually sold to defendant's daughter. The court will add to the verdict of actual damages the $100 penalty and reasonable attorney fees as provided in G.S. 44A-4(g).

Judge EAGLES dissenting.

APPEAL by defendant from *Downs, Judge*. Judgment entered 13 January 1984 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 24 October 1984. Heard on rehearing in the Court of Appeals 20 February 1985.

The facts of this case are set out in *Drummond v. Cordell,* 72 N.C. App. 262, 324 S.E. 2d 301 (1985). In apt time, plaintiff-appellee, Patricia McLean Drummond, filed a petition to rehear pursuant to Rule 31, Rules of Appellate Procedure. This court granted the petition to rehear.

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 appellant.

HEDRICK, Chief Judge.

The opinion of this Court filed 15 January 1985 is hereby superseded by the following opinion.

[1] We hold the trial court erred in concluding that the small claims judgment was void. That judgment could not be collaterally attacked, and it is proper on its face. *Powell v. Turpin,* 224 N.C. 67, 29 S.E. 2d 26 (1944). Since the small claims judgment was proper, it authorized defendant-lienor to sell the automobile pursuant to G.S. 44A-4. Because the lienor had authority to sell the vehicle to collect storage charges, plaintiff has no claim for conversion, since conversion is "an *unauthorized* assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Gallimore v. Sink,* 27 N.C. App. 65, 67, 218 S.E. 2d 181, 183 (1975) (citations omitted) (emphasis

added). Furthermore, since the small claims judgment is for defendant Earl Cordell's storage bill, Mr. Cordell has no counterclaim in this action for storage.

[2] While we have held that the trial court erred in submitting the issues of conversion and defendant's counterclaim for storage costs to the jury, it does not follow that the trial court should have directed a verdict for the defendant in the present action. It is the duty of the trial judge to submit to the jury such issues as will resolve all factual issues raised by the evidence given in the case. *Wilkinson v. Weyerhaeuser Corp.*, 67 N.C. App. 154, 312 S.E. 2d 531, *disc. rev. denied*, 311 N.C. 310, 317 S.E. 2d 909 (1984). "The court should properly charge the jury on all theories of recovery supported by evidence." *Lail v. Woods*, 36 N.C. App. 590, 591, 244 S.E. 2d 500, 501, *disc. rev. denied*, 295 N.C. 550, 248 S.E. 2d 727 (1978). The evidence in the instant case tends to show that defendant, Mr. Cordell, sold the automobile under the authority of the small claims judgment, which provided that defendant could enforce his lien "by public sale as provided in N.C.G.S. 44A-4(e)." The evidence given in the case tends to show that defendant did not "cause notice to be mailed to the person having legal title to the property if reasonably ascertainable," as is required by G.S. 44A-4(e)(1)al, and that defendant did not "advertise the sale by posting a copy of the notice of sale at the courthouse door in the county where the sale is to be held," as is required by G.S. 44A-4(e)(1)b. The evidence also tends to show that only defendant's wife and daughter attended the sale, and that only defendant's daughter, Melody Cordell, bid on the car.

G.S. 44A-4(g) provides:

> 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.

We believe the evidence introduced at trial is sufficient to raise an inference that defendant Earl Cordell failed to substantially comply with the provisions of G.S. 44A-4(e) in conducting

the sale. This is a factual issue which can be determined only by the jury. We thus hold the court erred in failing to submit this issue to the jury.

[3] If on remand the jury should find from the evidence and by the greater weight thereof that defendant failed to substantially comply with the provisions of G.S. 44A-4(e) in conducting the sale, the jury would then be required to determine what amount, if any, "actual damages" plaintiff suffered as a result of defendant's failure to conduct the sale according to G.S. 44A-4(e). The measure of plaintiff's actual damages would be the difference between the fair market value of the automobile at the time of the sale and the amount for which the car was actually sold to defendant Melody Cordell. Since there is no contention that Ms. Cordell was not a "purchaser for value without constructive notice of a defect in the sale," under G.S. 44A-6, the sale will stand and the purchaser, Ms. Cordell, is entitled to possession of and title to the automobile.

If the jury should answer the first issue affirmatively, the court will add to the verdict of actual damages, if any, the statutory penalty of one hundred dollars and reasonable attorney's fees.

We note that defendant must account for the money paid to him by his daughter as a result of the sale of the car in the manner set out in G.S. 44A-5.

The result is: the judgment of the superior court entered 13 January 1984 is vacated and the cause is remanded to that court for a new trial in accordance with this opinion.

Vacated and remanded.

Judge WEBB concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I dissent from that portion of the majority opinion that reverses the directed verdict for plaintiff on the issue of liability for substantial non-compliance with the provisions of G.S. Chapter

44A. Plaintiffs admitted non-compliance and no evidence to the contrary was offered. I concur in the remand for determination of damages, if any, arising from the failure to substantially comply.

Here, plaintiffs made a request for admissions, in pertinent part, as follows:

> That no notice of the sale of the motor vehicle, the subject of this lawsuit, by Cordell's Body Shop was posted at the courthouse in Buncombe County, North Carolina, as required by N.C.G.S. 44A.
>
> Defendants answered as follows:
>
> Defendants admit that so far as they know, no notice of the sale of the motor vehicle, the subject of this lawsuit, by Cordell's Body Shop, was posted at the courthouse in Buncombe County, North Carolina.

The magistrate's judgment authorized the defendants' lien to be enforced by public sale as provided in G.S. 44A-4. G.S. 44A-4(e)(1) requires in pertinent part that "not less than 20 days prior to sale by a public sale, the lienor shall advertise the sale by posting a copy of the notice of sale at the courthouse door in the county where the sale is to be held." This requirement of notice to the public was not met. Where posting is required, as in G.S. 44A-4(e)(1), a failure to comply with the provisions of a statute requiring posting may constitute an irregularity warranting a setting aside of the sale, particularly where the sale brings an inadequate price. 47 Am. Jur. 2d, Judicial Sales, Section 85 (1969 Cum. Supp.). If a failure to comply with a statute requiring posting of notice of a public sale might warrant setting aside a sale, it is surely a failure to substantially comply with the statutory requirements for a judicial sale when the required notice is not posted. The term "public sale" has been said in effect to require notice to a sufficient number of people to insure competitive bidding and fairness of the sale. *Standley v. Knapp*, 113 Cal. App. 91, 298 P. 109 (1931). Here, the only persons to attend the sale were the lienor's wife and daughter. The daughter bought the 1979 Fiat for $1,000 in July of 1981. The plaintiff testified that she purchased the automobile new in July 1979 for $8,330.

Defendant Earl Cordell admits that he did not comply with G.S. 44A-4(e)(1) regarding notice to be posted at the courthouse

door. That admission necessarily includes that he did not comply with G.S. 44A-4(f) regarding the required contents of the notice of sale to be posted at the courthouse door.

For those reasons, non-compliance with the provisions for the enforcement of a statutory lien pursuant to G.S. 44A-1, et seq. was a proper subject for directed verdict. *N.C.N.B. v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979).

I concur in other respects with the majority but would limit the matters considered on remand to a determination by the jury of the amount of damages, if any, arising from the defendants' substantial non-compliance with Chapter 44A.

STATE OF NORTH CAROLINA v. ROBERT BRUCE MARLOWE

No. 845SC493

(Filed 5 March 1985)

1. Larceny § 9— acquittal of breaking or entering—conviction of felonious larceny

The trial court did not err in entering a judgment for felonious larceny rather than misdemeanor larceny when defendant was acquitted of felonious breaking or entering and the court gave no instructions to the jury on fixing the value of the property stolen where the evidence showed that a second person was involved in the crimes, and the trial court instructed on acting in concert, since the jury could have found that defendant did not act together with the second person to break or enter but did act with him to commit larceny after the breaking or entering.

2. Criminal Law § 163— necessity for objection to charge

By failing to object to the instructions given to the jury, defendant waived his right to assert an assignment of error to the instructions. App. Rule 10(b)(2).

APPEAL by defendant from *Barefoot, Judge*. Judgment entered 9 January 1984, in Superior Court, PENDER County. Heard in the Court of Appeals 11 February 1985.

Attorney General Rufus L. Edmisten by Assistant Attorney General Archie W. Anders for the State.

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

COZORT, Judge.

Defendant was indicted for felonious breaking or entering and felonious larceny pursuant to breaking or entering. The jury acquitted defendant of the breaking or entering charge, but convicted him of felonious larceny. The trial court instructed the jury on the law concerning property taken after a breaking or entering and on "acting with another," but did not instruct the jury that they were to fix the value of the property stolen. The primary question for our consideration is whether the trial court erred in accepting the verdict of guilty of felonious larceny, rather than treating it as a finding of guilty of misdemeanor larceny. We hold there was no error in the trial court's accepting the verdict of guilty of felonious larceny.

The evidence for the State tended to show the following: On 20 July 1983 at about 11:00 p.m., Hunter Tilghman, manager of the Red & White Food Store in Surf City, closed the store, locked the doors and turned on the security lights. Sometime between that time and 1:00 the next morning, Philip Olsinki, who was vacationing at Surf City with his family, walked near the Red & White as he and his daughter returned to their rented house after fishing most of the night at the Surf City Fishing Pier. He noticed a man acting suspiciously in the parking lot. They walked through the parking lot, and the man ran back to the store. Olsinki saw a large, old car parked at the back of the store, eight to ten feet from the back door, where the light was shining through a missing panel at the bottom of the right side door. He saw a second man inside the store handing out goods to the first man. Olsinki and his daughter walked on to their house. He stood outside where he could see the store while his daughter went upstairs to get his pistol and bullets. Olsinki loaded his pistol, got in his car and drove back to the store, while his wife and daughter went to a pay phone to call the police. Upon arriving at the back of the Red & White, Olsinki jumped out of his car and told the two men to stop what they were doing. The man on the inside handing things out ran through the store and escaped out another door. Olsinki held the pistol on the man outside until the police arrived and took custody of the man. Olsinki could not identify the man he captured as the defendant; however, Rick Slater, Captain of the Surf City Police Department, identified defendant as the man Olsinki was holding at gunpoint. Defendant gave his per-

mission for the police to search the car. Merchandise worth $120 was in the back seat and trunk of the car. Inside the store, about $620 worth of merchandise had been loaded into shopping carts. Olsinki never saw defendant enter the store, although he saw him reach through the door with his hands to receive some items from the man inside.

Defendant testified that on 20 July 1983 he was staying with Richard Whitfield and another friend at Whitfield's parents' beach house at Topsail. He had been sleeping while the other two drank beer and played cards. At about midnight, Whitfield awakened him and asked him to take him to the store to get some beer. Defendant drove Whitfield to the Red & White in Surf City. Whitfield told defendant he was going into the store, which was closed, and told defendant to drive around for awhile. Defendant testified that he realized Whitfield was going to break into the store to steal beer. He drove around for twenty minutes and drove to the back of the store, where Whitfield was standing next to the door with the hole in it. He tried to get Whitfield to leave. However, Whitfield asked him to help him get the beer. Defendant said he went along with Whitfield because he was staying at his house. Whitfield had gone back in the store when Olsinki came up and pulled the gun on him.

Defendant presents two assignments of error for our consideration: (1) Did the trial court err in entering a judgment of felonious larceny rather than misdemeanor larceny when the defendant was acquitted of felonious breaking or entering and when the court gave no instructions to the jury on fixing the value of the property stolen? and (2) Did the trial court err in failing to summarize the evidence as a part of its instructions to the jury?

[1] We hold there was no error in the acceptance of the jury verdict of guilty of felonious larceny. It has long been the general rule in this jurisdiction that "where a defendant is tried for breaking or entering and felonious larceny and the jury returns a verdict of not guilty of felonious breaking or entering and guilty of felonious larceny, it is improper for the trial judge to accept the verdict of guilty of felonious larceny unless the jury has been instructed as to its duty to fix the value of the property stolen." *State v. Keeter*, 35 N.C. App. 574, 575, 241 S.E. 2d 708, 709 (1978). *See also State v. Jones*, 275 N.C. 432, 168 S.E. 2d 380 (1969); *State*

v. Hall, 57 N.C. App. 561, 291 S.E. 2d 812 (1982); and *State v. Cornell*, 51 N.C. App. 108, 275 S.E. 2d 857 (1981). This general rule does not apply in the present case.

In *State v. Curry*, 288 N.C. 312, 218 S.E. 2d 374 (1975), the Court held that it was not error for the jury to find the defendant guilty of felonious larceny and not guilty of felonious breaking or entering, even though the trial court did not instruct the jury to fix the value of the property. The court charged the jury in *Curry* on aiding and abetting a felonious breaking or entering and aiding and abetting a felonious larceny after a breaking or entering. In that case, the Court stated that the jury could have found the defendant did aid and abet in committing the larceny after the principals had broken into the building, but did not aid and abet on the breaking or entering.

In *State v. Pearcy*, 50 N.C. App. 210, 211, 272 S.E. 2d 610, 611 (1980), this Court held that the rule in *Curry* "governs when the defendant is tried for acting in concert with others." In the present case the court instructed the jury that they could find the defendant guilty of felonious breaking or entering if they found beyond a reasonable doubt that "either acting by himself or together with another" he broke into and entered the store. It also instructed the jury using almost the exact same language, "acting either by himself or together with another," on the felonious larceny charge. We hold this case is governed by *Curry* and *Pearcy*. The court's instruction below on "acting . . . together with another" is comparable to the "acting in concert" instruction given in *Pearcy*. The jury could have found that defendant Marlowe did not act together with the second man to break or enter the Red & White, but did act together with him to commit larceny after the breaking or entering.

We also note that the U.S. Supreme Court has ruled that inconsistent verdicts in criminal trials need not necessarily be set aside because they can be viewed as a demonstration of the jury's leniency. That Court so ruled in 1932 when it upheld the jury's conviction of maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor, while the jury acquitted the defendant of unlawful possession of intoxicating liquor and unlawful sale of liquor. *Dunn v. U. S.*, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932). This rule was reaffirmed on 10 December

1984 when the U.S. Supreme Court upheld a jury conviction of using the telephone in committing and in causing and facilitating certain felonies. The felonies involved included the conspiracy to possess with intent to distribute cocaine and possession with intent to distribute cocaine. The same jury acquitted defendant of the underlying conspiracy and possession charges. In upholding the conviction, the Supreme Court stated: "The fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable." *United States v. Powell,* 469 U.S. ---, ---, 105 S.Ct. 471, 477, 83 L.Ed. 2d 461, 469 (1984). The rule on inconsistent verdicts established by *Dunn* was recognized by this Court in *State v. Barnes,* 30 N.C. App. 671, 228 S.E. 2d 83 (1976).

[2] Defendant's second contention that the trial court's failure to summarize the evidence constituted reversible error also lacks merit. Defendant concedes in his brief that he failed to object to the instructions given to the jury. Defendant has thus waived his right to assert an assignment of error to the jury instructions, pursuant to Rule 10(b)(2) of the Rules of Appellate Procedure. *State v. Bennett,* 308 N.C. 530, 302 S.E. 2d 786 (1983). Nevertheless, we have reviewed the record and find that the court's charge, though not a model to be followed, was a sufficient statement of the evidence. *State v. Best,* 265 N.C. 477, 144 S.E. 2d 416 (1965). Here, as in *Best,* the evidence was simple, direct, and uncomplicated. Furthermore, defendant denied nothing. This assignment of error is overruled.

No error.

Chief Judge HEDRICK and Judge JOHNSON concur.

LUDIE E. ELLIS (WIDOW), ROSA D. ELLIS (WIDOW), JONAH B. ELLIS, JR. AND WIFE, JOAN ELLIS, GROVER C. ELLIS AND WIFE, MILDRED ELLIS, JOSEPHINE E. HALES AND HUSBAND, JAMES HALES, KATHERINE E. BASS (UNMARRIED), LONNIE O. ELLIS AND WIFE, MARY W. ELLIS, ET AL. v. HAZEL ELLIS POE AND HUSBAND, J. D. POE, PEARL T. ELLIS (WIDOW), JACK DEMPSEY ELLIS AND WIFE, ANNIE M. ELLIS, HAZEL ELLIS JONES (WIDOW), GEORGE D. ELLIS (SINGLE), MARGARET ELLIS (SINGLE), HILDA E. JACOBS AND HUSBAND, WINSTON JACOBS, AND LUETTA T. ELLIS (WIDOW)

No. 8414SC324

(Filed 5 March 1985)

Adverse Possession § 7— presumption of ouster of cotenants

The ouster necessary to establish title by adverse possession was presumed upon respondents' showing that one tenant in common possessed the land in question and took all of the rents and profits from the land for over twenty years without any acknowledgment on his part of title in his cotenants and without any demand having been made upon him for a share of the rents, profits or possession, and petitioners failed to rebut this presumption with evidence of a demand or claim for a share of the rents, profits or possession or an acknowledgment of the cotenancy by the one who had possession within the requisite period of time.

APPEAL by respondents from *Lee, Judge.* Judgment entered 6 December 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 28 November 1984.

On 21 October 1982, petitioners, several of the heirs of Buren Ellis, Sr., filed this special proceeding seeking a partition of the real property of Buren Ellis, Sr., who died intestate on 5 September 1940. Respondents, other heirs of Buren Ellis, Sr., filed a response in which they alleged *inter alia,* that respondent Pearl T. Ellis owned the property by reason of adverse possession of the property for more than twenty years. Respondents also moved for summary judgment. Upon the raising of a defense, the proceeding was transferred to the trial division pursuant to G.S. 1-399. After reviewing the forecasts of evidence, the superior court denied respondents' motion for summary judgment, entered summary judgment for petitioners, and remanded the case to the clerk of superior court for a determination of whether or not a partition should be ordered. Respondents appeal.

Glenn and Bentley, by Robert B. Glenn, Jr. and John E. Markham, Jr., for petitioner appellees.

Clayton, Myrick & McClanahan, by Robert D. McClanahan, for respondent appellants.

JOHNSON, Judge.

The following undisputed facts are gleaned from the petition, response, affidavits, interrogatories, request for admissions and exhibits:

On 5 September 1940, Buren Ellis, Sr. died intestate, survived by eight children, including petitioner Ludie E. Ellis and Napoleon Ellis. At the time of his death, Buren Ellis, Sr. owned a seventy-five acre tract of land located in Mangum Township, Durham County, North Carolina. This tract of land allegedly had been conveyed by deed to Napoleon Ellis by Buren Ellis, Sr. but no deed was ever recorded in the Durham County Registry and no such deed appears in the record before us. Consequently, the land passed to the heirs of Buren Ellis, Sr. by intestate succession.

Prior to and following his father's death, Napoleon Ellis resided on the subject property, along with his brother Buren Ellis, Jr. and his brother Buren's wife, respondent Pearl T. Ellis, until his death on 23 February 1982. Napoleon Ellis died testate, leaving all of his interest in the subject property to Pearl T. Ellis. From at least 1943 until his death, Napoleon Ellis farmed the subject property, paid or caused to be paid all property taxes on the land, kept all of the rents and profits from the land, and made all repairs and improvements on the land. At no time up to the institution of this proceeding were any demands made upon Napoleon Ellis or Pearl T. Ellis for an accounting or a share of the rents or profits.

Until late 1971, the petitioners and respondents thought that Napoleon Ellis owned the property. In that year, however, petitioner Grover Ellis, while conducting a title search preparatory to purchasing a four acre portion of the property from his uncle Napoleon, discovered that the tract had never been conveyed of record to Napoleon. In order to assure clear title to the tract he sought to purchase, Grover obtained the signatures of all of the

cotenants who might claim an interest in the land to a quitclaim deed in which they quitclaimed any interest they had in the four acre tract to Napoleon Ellis. The signers stated in the quitclaim deed that Buren Ellis, Sr. had sold the land to Napoleon but a deed had never been prepared or recorded in the Durham County Registry, that they wanted to correct that "error of omission," and that they claimed no right, title or interest in the land. Napoleon subsequently executed a deed conveying the four acre tract to Grover. Two years later Napoleon conveyed outright, by deed, another four acre tract to Grover. On that occasion, no quitclaim deed from the other cotenants was obtained.

Respondents contend they were entitled to judgment as a matter of law based upon the doctrine of constructive or presumptive ouster, which has been followed by our courts. Under this doctrine, the ouster necessary to establish title by adverse possession is presumed if a tenant in common and those under whom he claims have been in sole and undisturbed possession and use of land for more than twenty years without any acknowledgment on his part of title in his cotenants and without any demand or claim by the other cotenants to rents, profits or possession. J. Webster, Webster's Real Estate Law in North Carolina, sec. 301 (Hetrick rev. ed. 1981); *Brewer v. Brewer*, 238 N.C. 607, 78 S.E. 2d 719 (1953). Once the tenant in common has possessed the land for the requisite twenty year period, the ouster relates back to the initial date of taking of possession. *Collier v. Welker*, 19 N.C. App. 617, 621, 199 S.E. 2d 691, 695 (1973). Moreover, the exclusive possession of the property for the requisite twenty year period supplies all of the elements necessary for supporting a finding of adverse possession, including the elements of notice and hostility. *Id.* The purpose of the doctrine is to prevent stale demands and to protect possessors from the loss of evidence due to lapse of time. *Dobbins v. Dobbins*, 141 N.C. 210, 53 S.E. 870 (1906).

The law, therefore, presumed an ouster upon respondents' showing that Napoleon Ellis possessed the land and took all of the rents and profits from the land for over twenty years without any acknowledgment on his part of title in his cotenants and without any demand having been made upon him for a share of the rents, profits or possession. It was then up to petitioners to rebut this presumption by showing a demand or claim for a share of the

rents, profits or possession or an acknowledgment of the cotenancy by Napoleon. We find no such rebutting evidence within the requisite period of time.

Petitioners submit that Napoleon acknowledged the cotenancy when he joined in the quitclaim deed. The forecast of evidence, however, only indicates that Grover Ellis, on his own initiative, obtained the signatures of all the other cotenants, excluding Napoleon, to the quitclaim deed. The forecast of evidence does not show that Napoleon was made aware of the alleged cotenancy. Indeed, two years later, without seeking the joinder of any cotenants, Napoleon conveyed outright another four acre tract to Grover Ellis. This outright conveyance tends to indicate that he did not acknowledge the cotenancy two years earlier. Hence, unlike *Hi-Fort, Inc. v. Burnette*, 42 N.C. App. 428, 257 S.E. 2d 85 (1979) and *Sheets v. Sheets*, 57 N.C. App. 336, 291 S.E. 2d 300, *disc. rev. denied*, 306 N.C. 559, 294 S.E. 2d 371 (1982), there was no express or active acknowledgment of a cotenancy by the possessor, Napoleon Ellis. Further, the events surrounding execution of these conveyances occurred several years after the requisite twenty year period had expired, and in no event did these actions constitute an acknowledgment of cotenancy by Napoleon Ellis. The ouster thus had already occurred, having taken effect as of the initial date of Napoleon's taking of possession. *Collier v. Welker*, *supra*.

Having made an unrebutted showing of constructive ouster, respondents were entitled to summary judgment. The judgment of the trial court is thus reversed and the cause remanded for the entry of a judgment in accordance with this opinion.

Reversed and remanded.

Judges WHICHARD and EAGLES concur.

STATE OF NORTH CAROLINA v. JERRY LEWIS GRADY

No. 8415SC445

(Filed 5 March 1985)

1. **Searches and Seizures § 8— search pursuant to warrantless arrest—probable cause to arrest**

The trial court properly found probable cause to arrest and denied defendant's motion to suppress evidence seized in a search of his person incident to arrest where the officer had knowledge that defendant had been seen in a business after it closed and had been seen leaving the building, the officer observed that a window appeared to have been kicked in from the outside and that merchandise inside the building had been disturbed, and defendant was found a short distance away. G.S. 15A-401(b)(2).

2. **Corporations § 8; Burglary and Unlawful Breakings § 4— corporate president —authority to control premises**

In a prosecution for felonious breaking or entering and felonious larceny, there was no error in permitting a corporate president and sole stockholder to testify that defendant did not have permission to enter the premises after hours. The president of a corporation may act for the corporation in matters incidental to the business; control of the business premises is a matter incidental to the business in which the corporation is engaged.

3. **Indictment and Warrant § 11.1— breaking or entering—allegation of corporate ownership—testimony by sole stockholder—not a fatal variance**

In a prosecution for felonious breaking or entering and felonious larceny, there was not a fatal variance between the bill of indictment and the evidence as to ownership of the building and personal property where the indictment alleged that defendant broke and entered a building occupied by and took property belonging to Atwater, Inc., d/b/a Village Connection, and Cleveland Atwater testified that he owned the Village Connection. He also testified that he owned the business through Atwater, Inc., of which he was the sole stockholder; at most his testimony created a discrepancy for the jury.

4. **Criminal Law § 89.4— instructions on prior inconsistent statements by police officers**

The trial court properly instructed the jury that prior inconsistent statements by police officers could be considered as bearing on the officers' credibility, but not as substantive evidence.

APPEAL by defendant from *Johnson, E. Lynn, Judge*. Judgment entered 12 January 1984 in Superior Court, ORANGE County. Heard in the Court of Appeals 18 January 1985.

Defendant was charged in a true bill of indictment with felonious breaking or entering and felonious larceny. The bill of

indictment alleged that on 11 August 1983 the defendant "did break and enter a building occupied by Atwater, Inc., d/b/a Village Connection" located in Chapel Hill with the intent to commit the felony of larceny, and that, pursuant to the breaking or entering, defendant stole specified items of personal property "of Atwater, Inc., d/b/a Village Connection." The defendant entered pleas of not guilty. His motion to dismiss the charges at the close of the State's evidence was denied. The defendant offered no evidence and renewed his motion to dismiss, which also was denied. From verdicts of guilty and a judgment consolidating the offenses and imposing an active sentence, the defendant appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney Augusta B. Turner, for the State.

Public Defender J. Kirk Osborn, for defendant appellant.

MARTIN, Judge.

The defendant assigns error to the admission of evidence, the failure of the court to dismiss the charges at the close of the evidence, and the jury instructions. We find no merit in these assignments of error and conclude that the defendant received a fair trial, free from prejudicial error.

[1] Before trial, defendant moved to suppress evidence seized from the defendant during a search of his person at the time of his arrest on 11 August 1983, on the grounds that the arresting officer did not have probable cause to arrest the defendant. At a *voir dire* hearing the evidence showed, and the court found, in summary as follows: The manager of the Village Connection, a lounge and poolroom, returned to the premises after closing with Karen Baldwin in order that Baldwin might use the bathroom. Baldwin observed the defendant in the bathroom. He told her to be quiet and not tell anyone she had seen him. Shortly thereafter, the manager, Lewis Jacobs, observed the defendant exiting the building. When Chapel Hill police officers Frick and Porterfield arrived, Jacobs and Baldwin related this information to them identifying the defendant by name. The officers also observed a window which had previously been covered with plywood. The plywood appeared to have been kicked into the building from the outside. Some of the merchandise from the business was in a plastic bag. As Officer Frick was leaving the business he ob-

served the defendant lying on the ground a short distance away. The defendant was arrested, and pursuant thereto he was searched. Several items of merchandise similar to that found in the plastic bag were removed from his person. The court concluded that Officer Frick had probable cause to arrest the defendant and that none of the defendant's constitutional or statutory rights had been violated by the search. The motion to suppress was denied.

An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a felony. G.S. 15A-401(b)(2). A warrantless arrest is based on probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon. *State v. Mathis*, 295 N.C. 623, 247 S.E. 2d 919 (1978); *State v. Shore*, 285 N.C. 328, 204 S.E. 2d 682 (1974). In this case, the evidence showed and the court found that Officer Frick had knowledge that the defendant had been seen in the building after it had been closed and had been seen leaving the building. He observed that a window appeared to have been kicked in from the outside and that merchandise inside the building had been disturbed. Finally, he found the defendant a short distance away. This evidence was sufficient for the court to conclude that Officer Frick had probable cause to arrest the defendant. A search without a search warrant may be made incident to a lawful arrest; the scope of the search being limited to the arrestee's person and the area within his immediate control. *State v. Hardy*, 299 N.C. 445, 263 S.E. 2d 711 (1980). The search made at the time of the defendant's arrest did not exceed the permissible scope and the evidence seized pursuant to the search was properly admitted.

[2] Defendant's next assignment of error deals with the testimony of Cleveland Atwater. Atwater testified that he was the president and sole stockholder of Atwater, Inc., a corporation which operated the bar and poolroom known as the Village Connection on the date these offenses are alleged to have occurred. He was permitted to testify, over objection, that defendant did not have permission to go into the premises after hours or when the business was closed. Defendant contends that there was insufficient foundation for the admission of this testimony because the State failed to establish that Atwater had authority to act for the

corporation in determining who had, or did not have, permission to enter the premises.

The president of a corporation is the head and general agent of the corporation and may act for the corporation in matters incidental to the business in which the corporation is engaged. *Burlington Industries v. Foil*, 284 N.C. 740, 202 S.E. 2d 591 (1974). Control of the business premises is unquestionably a matter incidental to the business of operating a bar and poolroom. The assignment of error is overruled.

[3] In a related assignment of error, defendant contends that the charges should have been dismissed at the close of the evidence because there was a fatal variance between the bill of indictment and the evidence as to the ownership of the building and personal property. The indictment alleged that the defendant broke and entered a building occupied by Atwater, Inc., d/b/a Village Connection and took various items of personal property owned by Atwater, Inc., d/b/a Village Connection. Defendant contends that the evidence showed that Cleveland Atwater, not Atwater, Inc., was the owner of the business. This contention arises upon Cleveland Atwater's testimony that on the date of the offenses he owned and operated a poolroom and bar called the Village Connection in Chapel Hill. However, he went on to testify, as noted above, that he owned the business through a corporation, Atwater, Inc., of which he was the sole stockholder. Defendant contends that since Atwater failed to affirmatively testify that ownership was in the corporation on the date of the offenses, his testimony that he was the owner on that date is controlling. This contention is also without merit.

A fair reading of Cleveland Atwater's testimony leads only to the conclusion that he, like many sole stockholders of small business corporations, considered the business to be his. His testimony supports a reasonable inference that his ownership of the business on the date of the offenses was through the corporation; at most it creates a discrepancy in the State's case. A motion for dismissal tests the sufficiency of the evidence to sustain a conviction. *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). Contradictions and discrepancies, even in the State's evidence, are matters for the jury and do not warrant nonsuit. *State v. Bolin*, 281 N.C. 415, 189 S.E. 2d 235 (1972). The motion for dismissal was properly denied.

[4] Finally, the defendant contends that the court erred in limiting, by its instructions, the jury's consideration of earlier statements made by two officers at the preliminary hearing which conflicted with the testimony of the officers at the trial. The defendant argues that the instruction was confusing and suggested that the jury could overlook the inconsistencies between the sworn testimony of the officers given on separate occasions. We disagree.

The court instructed the jury as follows:

> Evidence has been received tending to show at an earlier time, the witnesses, Officer Frick and Lieutenant Summey, made a statement which conflicts with their respective testimonies at this trial. You must not consider such earlier statements as evidence of the truth of what was said at the earlier time because it was not made under oath at this trial. If you believe that such earlier statements were made and that they do conflict with the testimony of the witness at this trial, then you may consider this together with all other facts and circumstances bearing upon the witnesses' truthfulness in deciding to believe or disbelieve their respective testimonies at this trial.

Under similar circumstances we approved virtually the same instruction regarding prior inconsistent statements made at a preliminary hearing. *See State v. Terry*, 13 N.C. App. 355, 185 S.E. 2d 426 (1971). The court correctly charged the jury that the witnesses' prior inconsistent statements could be considered as bearing upon the witnesses' credibility, but were not to be considered as substantive evidence. *See* Brandis on North Carolina Evidence, § 46.

No error.

Judges BECTON and JOHNSON concur.

JOSEPH H. L. BOSTON v. JACK H. WEBB; CITY OF WASHINGTON, NORTH CAROLINA

No. 842SC173

(Filed 5 March 1985)

1. Libel and Slander § 14.1— words actionable per se

A city manager's statements in a news release that plaintiff, a former city policeman, was not able to disprove accusations that he had been seen taking a bribe and that plaintiff's polygraph test revealed deception in answering questions about the purported bribe, if found false by a jury, constituted libel per se.

2. Libel and Slander § 14.3— city manager—qualified privilege

A city manager had at most a qualified privilege in making statements in a news release that a former city policeman was not able to disprove accusations that he had been seen taking a bribe and that plaintiff's polygraph test revealed deception.

3. Libel and Slander § 14— sufficiency of complaint in libel action

The trial court erred in dismissing plaintiff former policeman's complaint for failure to state a claim for relief in a libel action against defendant city manager based on statements made by defendant in a press release that plaintiff was not able to disprove accusations that he had been seen taking a bribe and that his polygraph test revealed deception since it cannot be determined from the complaint whether defendant was acting within the scope of his authority as city manager when he published the news release, whether all the matter contained in the news release was privileged, and whether the information in the news release was of sufficient public or social interest so as to entitle defendant to protection against an action for libel.

APPEAL by plaintiff from *Peel, Judge*. Order entered 6 January 1984 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 14 January 1985.

Gaskins, McMullan & Gaskins by Herman E. Gaskins, Jr., for plaintiff appellant.

McMullan & Knott by Lee E. Knott, Jr., for defendant appellee.

COZORT, Judge.

The plaintiff instituted this civil action for defamation, seeking actual and punitive damages. The plaintiff alleged that defendant, Jack H. Webb, acting in his official capacity as City

Manager of the defendant, City of Washington, had issued a false and libelous press release to the news media concerning his termination of employment as a detective sergeant with the Washington Police Department. Both defendants moved to dismiss the complaint pursuant to G.S. 1A-1, Rule 12(b)(6). Their motions were granted. The plaintiff has appealed only the granting of the defendant Webb's Rule 12(b)(6) motion. We reverse.

The plaintiff was a member of the Washington Police Department from April 1976 to July 1983. On 15 July 1983, the plaintiff was discharged from the Department. The plaintiff appealed his termination of employment to the defendant Webb as City Manager on 16 August 1983. Webb upheld the termination.

Following a briefing to the City Council, Webb wrote and published a news release purportedly to explain why the plaintiff had been fired. The news release in pertinent part states:

> After a lengthy period of time, . . . City Manager Jack H. Webb has announced that his decision is to uphold Chief Johnny Rose's decision to dismiss Boston from the Washington Police Department. . . .
>
> Allegations against Boston were received by Chief Rose and Webb from the District Attorney, William Griffin, in the early part of February 1983. This information included the allegations that Boston received a large bribe. In the course of the investigation a citizen, who was not identified, was administered a polygraph examination and proved to be telling the truth in his statement that he observed a person, whose name was not mentioned, giving a large sum of money to Boston. Boston later agreed to take a polygraph test and answer questions concerning this allegation. In the opinion of the polygraph expert, Boston proved to be deceptive in answering the question.
>
> * * * *
>
> This decision [to discharge Boston] was made on the basis that Boston was warned of the allegations, given the opportunity to disprove the allegations and was not able to do so.

According to the complaint, Webb gave this news release to members of the news media, including agents of the Washington

Daily News, WITN television, and WCTI television for dissemination to the public.

The only issue on appeal is whether the trial court properly granted the defendant Webb's G.S. 1A-1, Rule 12(b)(6) motion. The scope of our review of the granting 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). However, if the complaint discloses an unconditional affirmative defense which defeats the claim asserted, it will be dismissed. *Id.* at 102, 176 S.E. 2d at 166.

In his complaint, the plaintiff alleges that "the defendant Jack H. Webb while acting as the servant, agent, and employee of the City of Washington, North Carolina, and while acting within the scope of his employment, did maliciously write and publish to third persons a news release . . . [which] contained false, libelous, and defamatory words concerning the plaintiff." The plaintiff further alleged that the press release was "calculated to induce the reader to believe that the plaintiff had committed some crime" and was "libelous *per se*." As a result of being libeled in this manner, the plaintiff contends that he has been damaged and should be awarded $100,000 in actual damages and $500,000 in punitive damages.

The defendant, on the other hand, contends that the complaint on its face shows that the plaintiff is seeking to hold him liable for actions taken in the performance of his governmental duties. The defendant argues that his Rule 12(b)(6) motion was properly granted because communications to the news media concerning public employees made by employers acting within the scope of their authority are absolutely privileged.

[1] A publication is libelous *per se* if, when considered alone without innuendo, it charges that a person has committed an infamous crime. *Flake v. News Co.*, 212 N.C. 780, 787, 195 S.E. 55, 60 (1938). The news release states that the plaintiff was not able to disprove the accusations that he had been seen taking a large bribe. The release also discloses that Boston's polygraph test revealed he was deceptive in answering questions about the bribe accusation. These statements, if found false by a jury, constituted

libel *per se*. *See Arnold v. Sharpe*, 296 N.C. 533, 251 S.E. 2d 452 (1979). The pertinent question then becomes whether the complaint, by alleging that Webb published the news release while acting within the scope of his authority, contained an insurmountable bar to Boston's cause of action for libel *per se*. We hold that because the plaintiff's claim is not barred, the defendant Webb's Rule 12(b)(6) motion was improperly granted.

[2] Initially, based on the facts before us, we believe at most that Webb was entitled to only a qualified privilege. In North Carolina, an absolute privilege has been limited to "words used in debate in Congress and the State Legislatures, reports of military or other officers to their superiors in the line of their duty, everything said by a judge on the bench, by a witness in the box, and the like." *Ramsey v. Cheek*, 109 N.C. 270, 273-74, 13 S.E. 775, 775 (1891). *See also Jarman v. Offutt*, 239 N.C. 468, 80 S.E. 2d 248 (1954).

> "A qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest."

Stewart v. Check Corp., 279 N.C. 278, 285, 182 S.E. 2d 410, 415 (1971), *quoting* 50 Am. Jur. 2d *Libel and Slander* § 195 (1970). An action involving a qualified privilege may be maintained, if the plaintiff can prove both the falsity of the charge and that it was made with actual malice. *Hartsfield v. Hines*, 200 N.C. 356, 157 S.E. 16 (1931). *See also Smith v. McDonald*, 562 F. Supp. 829 (M.D.N.C. 1983), *affirmed*, 737 F. 2d 427 (1984). Whether the plaintiff can in fact prove the falseness of the allegations and malice has yet to be seen.

[3] In any event, it is too early in the plaintiff's action for us to say to a certainty that the plaintiff is entitled to no relief under any set of facts he might prove in support of his claim. We are unable to determine at this point whether Webb was acting within the scope of his authority as City Manager when he published this news release. Similarly, from only the facts as found in the complaint, we cannot say whether all of the matter contained in

the news release was privileged. Furthermore, we decline to hold, as the defendant urges, that the press release based on the facts before us was issued in the course of a judicial or quasi-judicial proceeding.

Finally, the defense of privilege is based upon the premise that some information, although defamatory, is of sufficient public or social interest to entitle the individual disseminating the information to protection against an action for libel. Whether such communications will be protected generally has been determined by the amount of public interest in the matter communicated. *See* Annot., 52 A.L.R. 3d 739 (1973). We hold that defendant Webb's Rule 12(b)(6) motion was improperly granted precisely because the public's interest in the matter and Webb's right to relay it as he did remains to be determined.

For these reasons, the trial court's granting of the defendant Webb's Rule 12(b)(6) motion is reversed.

Reversed.

Judges WEBB and EAGLES concur.

STATE OF NORTH CAROLINA v. MICHAEL ANDREW BAIN

No. 845SC296

(Filed 5 March 1985)

Automobiles and Other Vehicles § 129 — driving under the influence — necessity for instruction on reckless driving after consuming alcohol

In a prosecution for driving under the influence of intoxicants, the trial court erred in failing to charge on the lesser included offense of careless and reckless driving after consuming alcohol, notwithstanding defendant had taken a breathalyzer test which showed a .19 percent blood alcohol content, where there was evidence that defendant was driving erratically just before he was stopped, and defendant contested the State's evidence that he was under the influence of intoxicants with testimony that he *had not* swerved while driving, that he had not been given performance tests when stopped, that he had not swayed when standing near his car, that he had not lost his balance, and that if given performance tests, he could have done anything the officer wanted him to do.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 28 November 1983 in Superior Court, PENDER County. Heard in the Court of Appeals 6 December 1984.

On 22 July 1983 defendant was charged with driving under the influence of alcohol and driving 50 miles per hour in a 35 miles per hour zone on highway 210 near Surf City by Trooper J. C. Strickland of the North Carolina Highway Patrol. Trooper Strickland observed defendant cross the center line several times, make turns without turn signals, and fail to make complete stops at red lights before making right turns. On stopping defendant, Trooper Strickland also noticed a strong odor of alcohol coming from him and that he was unsteady on his feet. Defendant was taken to the Surf City Police Department where Sergeant Autry of the North Carolina Highway Patrol administered defendant a breathalyzer test, the result of which was a reading of .19% blood alcohol content. Defendant pleaded not guilty and was tried before a jury on 28 and 29 November of 1983 in Superior Court, Pender County. Defendant, appearing *pro se*, admitted he had been drinking but denied he was under the influence, asserting that he should have been given performance tests, that he could "do anything he [the officer] wanted me to do," that his request for a blood test should have been honored, and that his purpose in requesting the test was to have physical evidence that he was not drunk or driving under the influence. In contesting the State's evidence, defendant denied that he had swerved on the highway, that he had been swaying on his feet or that he had lost his balance. The jury was instructed on the crimes of driving under the influence of alcohol and the lesser included offense of operating a motor vehicle with a blood alcohol content of .10% or more. The jury was also instructed on the charge of exceeding the posted speed limit. The trial court indicated that the lesser charge of reckless driving after drinking could not be submitted as a possible verdict because defendant had taken the breathalyzer test. The jury returned a verdict of guilty of driving under the influence of alcohol and not guilty of exceeding the posted speed limit.

From a judgment imposing a sentence of 6 months imprisonment, defendant appeals.

Attorney General Edmisten by Assistant Attorney General Jane P. Gray, for the State.

Beaver, Holt & Richardson by William O. Richardson for the defendant-appellant.

EAGLES, Judge.

Defendant assigns as error the trial court's failure to charge the jury on the lesser included offense of careless and reckless driving after consuming alcohol. We agree that there was error. G.S. 20-140(c) provides:

> (c) Any person who operates a motor vehicle upon a highway or public vehicle area after consuming such quantity of intoxicating liquor as directly and visibly affects his operation of said vehicle, shall be guilty of reckless driving and such offense shall be a lesser included offense of driving under the influence of intoxicating liquor as defined by G.S. 20-130 as amended.

Where there is evidence from which a jury might find the defendant was driving after consuming enough alcohol to directly and visibly affect his operation of his motor vehicle, the trial court *must* instruct on the statutory offense of reckless driving under G.S. 20-140(c) and the failure to do so is prejudicial error. *State v. Pate*, 29 N.C. App. 35, 222 S.E. 2d 741 (1976); *State v. Burris*, 30 N.C. App. 250, 226 S.E. 2d 677 (1976). Here, the State's own evidence tended to show that the trooper had observed defendant in his car cross the center line two or three times, once almost colliding with the trooper's patrol car. The trooper also reported that defendant, when stopped, appeared unsteady on his feet, had red eyes and had an odor of alcohol about his person.

The trial court failed to give the instruction on the lesser included offense of careless and reckless driving after drinking because the trial court believed that defendant's having already taken the breathalyzer test precluded him from being able to charge on careless and reckless driving after drinking. Under G.S. 20-138(a) the breathalyzer test is merely evidence to be considered in determining whether or not a person was under the influence, is not conclusive evidence as to guilt and does not preclude the jury's consideration of the lesser offense of careless

and reckless driving after drinking where, as here, the driving under the influence charge is controverted by defendant's evidence.

The State maintains that "the court is not required to submit to the jury the question of defendant's guilt of a lesser degree of the crime charged . . . when the State's evidence is positive as to each and every element of the charged crime." *State v. Snead*, 295 N.C. 615, 247 S.E. 2d 893 (1978). The facts in *State v. Snead, supra*, however, differ markedly from the present case. In *Snead* the arresting officer came upon the defendant who was milling around his wrecked car. There was no direct evidence that the officer had *observed* the defendant *driving recklessly* after consuming enough liquor to impair his ability to operate his car. In *Snead*, there was no doubt as to his being under the influence of intoxicants at the time of his arrest. Here, the officer observed and testified to defendant's erratic driving just before he was stopped but defendant contested the allegation that he was under the influence of intoxicants.

Justice Bobbitt (later Chief Justice) in *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954) in discussing the need to charge on common law robbery in an armed robbery case, noted:

> The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged.

Id. at 159, 84 S.E. 2d at 547.

Here, while there was sufficient evidence for a jury to find that defendant was operating his motor vehicle recklessly after consuming alcoholic beverages, the issue of defendant being under the influence of intoxicants was disputed with evidence on both sides. Defendant contested the State's evidence of his intoxication with testimony that he had not swerved while driving, that he had not been given performance tests when stopped, that he had not swayed when standing near his car, that he had not

lost his balance, and that if given performance tests he could have done anything the officer wanted him to do. While the State's evidence shows erratic driving and intoxication proven by breathalyzer test results, a jury could have found, based on defendant's evidence, that defendant was guilty of no more than careless and reckless driving after drinking and should have been permitted to consider that possible verdict. Justice Bobbitt stated the rule:

> True, in such cases the State may contend solely for conviction . . . and the defendant may contend solely for complete acquittal, but the trial judge, when there is evidence tending to support a verdict of guilty of an included crime of lesser degree than that charged must instruct the jury that it is permissible for them to reach such a verdict if it accords with their findings.

State v. Hicks, supra at 160, 84 S.E. 2d at 548.

The court's failure to instruct the jury on the lesser included offense of careless and reckless driving after drinking under these circumstances was reversible error.

Our disposition of this case makes it unnecessary to consider defendant's remaining assignments of error.

New trial.

Chief Judge HEDRICK and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. JAMES FOURNIER

No. 843SC537

(Filed 5 March 1985)

Homicide § 30.3— murder prosecution—submission of involuntary manslaughter—prejudicial error

The trial court in a second-degree murder case committed prejudicial error in submitting involuntary manslaughter as a possible verdict where all the evidence showed that defendant intentionally shot the victim with a .22 caliber rifle and defendant contended that he acted in self-defense, and defendant is entitled to be discharged where the jury found defendant guilty of involuntary manslaughter and acquitted defendant of all other degrees of homicide.

APPEAL by defendant from *Strickland, Judge*. Judgment entered 28 March 1980 in Superior Court, CRAVEN County. Heard in the Court of Appeals 7 February 1985.

This is a criminal case in which defendant, James Fournier, was indicted and tried for first degree murder. From a verdict of guilty of involuntary manslaughter and a sentence of imprisonment, defendant appeals.

The essential facts are:

On 20 January 1980, defendant shot and killed Harold Jones, an acquaintance. Evidence at trial tended to show that Jones and Douglas Gaskins, defendant's brother-in-law, arrived together at defendant's trailer home. No one responded to Gaskins' knock or call and Gaskins left Jones inside defendant's trailer while he went across the street to look for defendant.

Defendant testified that he had seen Gaskins and Jones drive up but pretended that he was not home because he was afraid of Jones. Defendant went to lock his door and was surprised to find Jones already inside.

Jones allegedly told defendant that defendant had "sold him a pig in a poke" and that he was going to "burn" defendant, gesturing with his coat as if he had a gun. Defendant ran down the hallway to get his gun and saw Jones then holding a pistol. Defendant fired a shot from his .22 calibre rifle over Jones' head to "scare him." Defendant then directed Jones to drop the pistol and raise his hands. Jones pointed the pistol at defendant and defendant began firing his rifle at Jones.

In response to a call for an ambulance and police, Deputy Sheriff Hamilton, of the Craven County Sheriff's Department, arrived at the trailer park. Defendant then told the deputy, "Mr. Hamilton, I'm the one who shot him. He broke into my trailer with a gun." In checking Jones for vital signs, Deputy Hamilton discovered a .38 calibre pistol lying approximately 3 feet from Jones' body.

SBI Agent Mike Lewis testified as to the location within the trailer of defendant's .22 calibre rifle, the loaded .38 calibre pistol on the floor, ten spent .22 shells and three bullet holes fired from the hallway entrance by the .22 calibre rifle.

No fingerprints were found on the .38 calibre pistol and bloodstains on the pistol were not checked for type.

The .22 calibre rifle was confirmed as the homicide weapon and Dr. Walter Gable described 8 or 9 gunshot wounds in Jones' body and concluded that the fatal wound had penetrated the aorta. Most of the bullets had entered Jones' body from the left side.

Defendant presented evidence of self-defense at trial and testified that he had known Jones for 3 or 4 months, that Jones had pulled a pistol on him in the past and that he had reason to fear Jones because of a dispute over a drug transaction—the "pig in the poke." Defendant denied that he had "planted" the .38 calibre pistol for investigators to find.

The trial court instructed the jury on the possible verdicts of second degree murder, voluntary manslaughter, involuntary manslaughter and not guilty. Instructions were also given as to self-defense. In response to the jury's request for definitions of voluntary and involuntary manslaughter, the trial court briefly repeated the definitions.

The jury returned a verdict of guilty of involuntary manslaughter.

Attorney General Edmisten, by Assistant Attorney General Robert G. Webb, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Malcolm Ray Hunter, Jr., for defendant-appellant.

EAGLES, Judge.

The question presented by this appeal is whether the trial court committed reversible error 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 and defendant discharged.

Involuntary manslaughter has been defined by our Supreme Court as "the unintentional killing of a human being without either express or implied malice (1) by some unlawful act not amounting to a felony or naturally dangerous to human life, or (2) by an act or omission constituting culpable negligence." *State v.*

Wilkerson, 295 N.C. 559, 579, 247 S.E. 2d 905, 916 (1978), *see also*, *State v. Redfern*, 291 N.C. 319, 321, 230 S.E. 2d 152, 153 (1976).

The record before us is absolutely devoid of any evidence that defendant shot Harold Jones "by some unlawful act not amounting to a felony or naturally dangerous to human life." Evidence presented by both the State and defendant tends to show that defendant intentionally shot Jones with a deadly weapon, a .22 calibre rifle, and that the wounds intentionally inflicted caused Jones' death. This was a felonious assault, G.S. 14-32, and was naturally dangerous to human life as is evidenced by Jones' death. Similarly, there is no evidence of "an act or omission constituting culpable negligence" since *the shooting* of Jones was an intentional act allegedly done in self-defense. 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); *State v. Mercado*, 72 N.C. App. 521, 324 S.E. 2d 285, *petition for rev. allowed*, 313 N.C. 607, 330 S.E. 2d 614 (1985); *State v. Crisp*, 64 N.C. App. 493, 307 S.E. 2d 776 (1983); *State v. Martin*, 52 N.C. App. 373, 278 S.E. 2d 305, *rev. denied* 303 N.C. 549, 281 S.E. 2d 399 (1981); *State v. Cason*, 51 N.C. App. 144, 275 S.E. 2d 221 (1981); *State v. Brooks*, 46 N.C. App. 833, 266 S.E. 2d 3 (1980).

The State argues that the submission of a lesser included offense not supported by the evidence is error not prejudicial to the defendant. *State v. Vestal*, 283 N.C. 249, 195 S.E. 2d 297, *cert. denied*, 414 U.S. 874 (1973); *State v. Quick*, 150 N.C. 820, 64 S.E. 168 (1909). The reasoning behind the State's argument is that had the jury not been given the unsupported lesser offense as an alternative, it would have returned a verdict of guilty of a higher offense. *State v. Ray, supra.* The State's argument must fail for the reasons that follow.

Involuntary manslaughter is *not* a lesser included offense of murder or voluntary manslaughter. *State v. Cason, supra; State v. Mercado, supra.* 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.

51 N.C. App. at 146, 275 S.E. 2d at 222.

Finally, we reiterate the admonitions of Judge Webb in *State v. Cason, supra,* and Judge (now Chief Judge) Hedrick in *State v. Crisp, supra:*

> Our trial judges in homicide cases arising out of the alleged intentional use of a deadly weapon would be well-advised not to submit involuntary manslaughter as a possible verdict where there is no evidence to support it. In addition to committing . . . prejudicial error . . . the trial judge who submits involuntary manslaughter under these circumstances makes his duty of declaring and explaining the law arising on the evidence impossible to fulfill; in such a case, the court's instructions can only result in "confusion worse confounded."

64 N.C. App. at 498, 307 S.E. 2d at 780.

We note that N.C.P.I.—Criminal, 206.30 as it relates to second degree murder and lesser homicide offenses contains a cautionary note at footnote 1 which should be a warning adequate to prevent trial courts from submitting instructions on involuntary manslaughter when the evidence does not support the instruction.

Here, 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. The judgment of the superior court in 80CRS715 is reversed, and defendant is hereby ordered discharged.

Reversed.

Judges ARNOLD and PARKER concur.

ABNER CORPORATION AND INDUSTRIAL RISK INSURERS v. CITY ROOFING & SHEETMETAL COMPANY, INC. AND RELIABLE CONSTRUCTION COMPANY, INC.

No. 8426SC513

(Filed 5 March 1985)

1. **Appeal and Error § 6.2— summary judgment for fewer than all defendants— right of immediate appeal**

A summary judgment order entered in favor of one of two defendants affected a "substantial right" and was immediately appealable. G.S. 1-277(a); G.S. 7A-27(d)(1).

2. **Negligence § 2— negligent performance of contract—action by third party**

A tenant in a building could maintain an action against defendant for its negligent performance of a subcontract to replace the building roof even though the tenant was not a party to the general contract or the subcontract.

3. **Negligence § 2— negligent performance of contract—contributory negligence— issues of material fact**

Genuine issues of material fact were presented as to whether defendant negligently performed its subcontract to replace a building roof so as to cause and permit the roof to leak and plaintiff tenant's goods stored in the building to be water damaged and whether plaintiff was contributorily negligent in causing its damages.

APPEAL by plaintiff from *Saunders, Judge.* Order entered 14 September 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 January 1985.

Golding, Crews, Meekins, Gordon & Gray, by Rodney Dean, for plaintiff appellant.

Mraz and Boner, P.A., by Richard D. Boner and John A. Mraz, for defendant appellee, City Roofing & Sheet Metal Company, Inc.

BECTON, Judge.

This is a negligence action. Both defendants, City Roofing & Sheet Metal Company, Inc. (City Roofing) and Reliable Construction Company (Reliable), moved for summary judgment. The trial court granted City Roofing's motion, but denied Reliable's motion. The plaintiff, Abner Corporation (Abner), contends that the trial court erred in entering summary judgment for City Roofing. We agree.

I

In 1981, defendant Reliable contracted with Ashcraft Realty Company (Ashcraft), which is not a party to this action, to renovate a building in Monroe, North Carolina, owned by Ashcraft. In May 1981 Reliable subcontracted with defendant City Roofing to remove and replace the roof of Ashcraft's building. Plaintiff Abner was a tenant in the building at the time.

While the roof work was being done, on 21 May 1981, there was minor leakage in the building. Abner notified both defendants. Shortly thereafter, a representative of City Roofing told Jack Watts, Abner's plant manager, that the roof had been repaired and that Abner could move its goods back into the west side of the building where the minor leakage had occurred. On 28 May 1981, after a heavy rainstorm, Abner noted major leakage. Water coming in around the vents in the roof caused extensive damage to Abner's goods stored in the building.

Abner alleged that in the process of performing roofing work on the building, City Roofing negligently caused and permitted the roof to leak, resulting in water damage to Abner's property stored in the building, as well as the costs associated with the salvage of the property, and delays in the operation of its business. City Roofing denied these allegations.

II

[1] City Roofing has moved to dismiss Abner's appeal on the grounds that it is interlocutory and does not satisfy the criteria set forth in N.C. Gen. Stat. Sec. 1A-1, Rule 54(b) (1983), N.C. Gen. Stat. Sec. 1-277 (1983), and N.C. Gen. Stat. Sec. 7A-27 (1981). Although the trial court, in its 15 September 1983 order, did not certify that "there is no just reason for delay," as required by G.S. Sec. 1A-1, Rule 54(b) (1983), we conclude that Abner is entitled to an immediate appeal because the order affects a "substantial right." G.S. Sec. 1-277(a) (1983); G.S. Sec. 7A-27(d)(1) (1981); *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982) (possibility of inconsistent verdicts and separate trials).

[2] On appeal, City Roofing contends that because Abner was not a party to the general contract or the subcontract, Abner cannot maintain an action against City Roofing for the negligent performance of the subcontract. Although a duty to exercise due

care may arise out of a contractual relation, a complete binding contract between the parties is not a prerequisite to a duty to use due care in one's actions. *Davidson and Jones, Inc. v. County of New Hanover,* 41 N.C. App. 661, 255 S.E. 2d 580, *disc. rev. denied,* 298 N.C. 295, 259 S.E. 2d 911 (1979). "The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence. It is immaterial whether the person acts in his own behalf or under contract with another." *Council v. Dickerson's, Inc.*, 233 N.C. 472, 474-5, 64 S.E. 2d 551, 553 (1951).

Summary judgment is proper only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. Sec. 1A-1, Rule 56 (1983). Summary judgment is a " 'drastic remedy . . . [that] must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue.' " *Wilson Bros. v. Mobil Oil,* 63 N.C. App. 334, 336, 305 S.E. 2d 40, 42, *disc. rev. denied,* 309 N.C. 634, 308 S.E. 2d 718 (1983) (quoting *Kessing v. Nat'l Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971)). It is rarely appropriate in a negligence action because ordinarily it is the duty of the jury to apply the standard of care of a reasonably prudent person. *Bernick v. Jurden.* Summary judgment must be denied when there is any genuine issue as to a material fact. *Dendy v. Watkins,* 288 N.C. 447, 219 S.E. 2d 214 (1975). For purposes of summary judgment, a genuine issue is one which may be maintained by substantial evidence, while a material fact is one which would constitute or would irrevocably establish any material element of a claim or defense. *Bone Int'l, Inc. v. Brooks,* 304 N.C. 371, 283 S.E. 2d 518 (1981).

[3] In the present case, Abner alleged that City Roofing was negligent in the performance of its contract with Reliable. City Roofing, in its Answer, alleged that Abner was contributorily negligent. Abner's affidavit filed in opposition to City Roofing's motion for summary judgment is sufficient to withstand summary judgment on both issues. City Roofing was under a duty to use due care in the performance of its contract to protect Abner's

property from harm. Thus, it is immaterial whether Abner was a party to the contract between City Roofing and Reliable. Whether City Roofing breached the duty to use due care and whether Abner was contributorily negligent are issues for the jury. Therefore, the judgment of the trial court is reversed, and this action is remanded.

Reversed and remanded.

Judges JOHNSON and MARTIN concur.

STATE OF NORTH CAROLINA v. MICHAEL EARL STAMPS

No. 848SC584

(Filed 5 March 1985)

Criminal Law § 138— aggravating factor—prior conviction—crime committed after crime for which defendant sentenced

The trial court could properly find a prior conviction as an aggravating factor at sentencing when the commission of that crime occurred after the commission of the crime for which defendant was being sentenced.

APPEAL by defendant from *Small, Judge.* Judgment entered 7 February 1984 in Superior Court, LENOIR County. Heard in the Court of Appeals 11 February 1985.

Defendant was charged in a proper bill of indictment with second degree murder. The jury in its verdict found defendant guilty of involuntary manslaughter. The trial court found a factor in aggravation and sentenced defendant to nine years imprisonment, a term in excess of the presumptive term. From the sentence imposed defendant appealed.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Alan S. Hirsch, for the State.

Harrison and Heath, by Leland M. Heath, Jr., for defendant, appellant.

HEDRICK, Chief Judge.

The sole question presented by defendant is whether the trial court erred when it found a prior conviction as an aggravating factor at sentencing when the commission of that crime occurred after the commission of the crime for which defendant was being sentenced.

On 13 April 1983, defendant committed the act which was the basis of the manslaughter conviction. Sometime between the commission of the manslaughter and the trial for that offense defendant was arrested, tried and convicted for possession of a controlled substance, a crime which is punishable by more than sixty days. The trial court found the conviction for possession as an aggravating factor at the sentencing for the manslaughter conviction. Defendant argues that because the commission of the crime found in aggravation was subsequent to the commission of the crime for which defendant was sentenced it cannot be considered a prior conviction within the ambit of G.S. 15A-1340.4(a)(1)o. We disagree.

G.S. 15A-1340.4(a)(1)o prescribes that the court find as an aggravating factor at sentencing, "a prior *conviction* . . . for [a] criminal offens[e] punishable by more than 60 days' confinement." (Emphasis added.) The statute excludes only those crimes which are joinable with the crime for which defendant is currently being sentenced. Defendant was convicted of the offense found in aggravation prior to his being sentenced for manslaughter. The conviction found as an aggravating factor was not for an offense joinable with the crime for which defendant was being sentenced. The trial court was clearly within the ambit of the statute when it found the prior conviction as a factor in aggravation.

The sentence imposed by the trial court is affirmed.

Affirmed.

Judges JOHNSON and COZORT concur.

IN THE MATTER OF: THE APPEAL OF R. J. REYNOLDS TOBACCO COMPANY FROM THE DENIALS OF ITS CLAIMS FOR EXEMPTION BY DURHAM COUNTY AND FORSYTH COUNTY FOR 1983

No. 8410PTC481

(Filed 19 March 1985)

1. **Taxation § 9.1— ad valorem taxes—imported tobacco in customs bonded warehouses—no violation of Import-Export clause**

The imposition of a nondiscriminatory ad valorem tax on imported tobacco stored in United States customs bonded warehouses located in Durham and Forsyth Counties is not prohibited by the Import-Export clause, Art. I, § 10, cl. 2, of the U. S. Constitution.

2. **Taxation § 9.1— ad valorem taxes—imported tobacco in customs bonded warehouses—no undue burden on foreign commerce—no federal preemption**

The imposition of a nondiscriminatory ad valorem tax on imported tobacco stored in customs bonded warehouses for domestic use does not place an undue burden on foreign commerce in violation of Art. I, § 8, cl. 3, of the U. S. Constitution. Nor has State property taxation of such tobacco been preempted by federal regulation. Art. VI, cl. 2 of the U. S. Constitution.

3. **Taxation § 9.1— ad valorem taxes—imported tobacco in customs bonded warehouses—no violation of due process**

The imposition of ad valorem taxes on imported tobacco stored in customs bonded warehouses in Durham and Forsyth Counties does not violate the Due Process Clause of the U. S. Constitution since such tobacco receives the same fire and police protection and other services by Durham and Forsyth Counties as domestic tobacco.

4. **Taxation § 25.10— appeal to Property Tax Commission—notice of appeal naming wrong person as clerk**

The Property Tax Commission was not precluded from exercising jurisdiction in an appeal from the Durham County Board of Equalization and Review because appellant's notice of appeal sent to the Clerk of the Board of County Commissioners named the wrong person as Clerk where the notice was received by Durham County and the County was not prejudiced by failure of the notice to name the right person.

APPEAL by R. J. Reynolds Tobacco Company from Final Decision of the Property Tax Commission entered 14 December 1983. Heard in the Court of Appeals 9 January 1985.

Horton, Hendrick & Kummer by Thomas L. Kummer and John A. Cocklereece, Jr., for R. J. Reynolds Tobacco Company, appellant.

Assistant County Attorney S. C. Kitchen for County of Durham, appellee.

P. Eugene Price, Jr., and Jonathan V. Maxwell for Forsyth County and its Affected Municipalities; and John G. Wolfe, III, for Town of Kernersville, appellees.

Assistant City Attorney Henry D. Blinder for City of Durham, Amicus Curiae.

COZORT, Judge.

R. J. Reynolds Tobacco Company appeals from an adverse decision of the Property Tax Commission. Reynolds had argued to the Commission that imported tobacco owned by Reynolds and stored in the United States customs bonded warehouses located in Durham and Forsyth Counties was excluded from ad valorem taxation. The Commission disagreed and denied Reynolds' claims for a property tax exemption. We affirm.

The basic facts are undisputed. R. J. Reynolds Tobacco Company is a New Jersey corporation qualified to do business in North Carolina with its principal offices in Winston-Salem. Reynolds manufactures in Forsyth County finished tobacco products which it sells to wholesale distributors and other authorized purchasers in the United States and abroad. Reynolds uses tobacco grown in the United States and in foreign countries in the manufacture of its tobacco products. In May and June of 1983, Reynolds appeared before the Durham County and the Forsyth County Boards of Equalization and Review, seeking a property tax exemption for imported leaf tobacco stored in customs bonded warehouses located in each county. The total tax involved is over seven million dollars for 1983.

The allegedly "exempt" tobacco had been imported from Bulgaria, Syria, Turkey, Lebanon, and Brazil. The tobacco is shipped by bonded carrier to the United States and unloaded from the carrier at a port of entry where it is placed under customs bond. A "customs bond" is a bond given by the importer at the time the tobacco is physically imported into the United States for the purpose of securing the payment of federal import duties. The tobacco is then transported by rail or truck to a storage facility where it remains under customs bond until it is withdrawn from storage.

The storage facilities used by Reynolds to hold its imported tobacco are United States customs bonded warehouses. The cus-

toms bonded warehouses and the land on which they are situated in Durham and Forsyth Counties are owned by Reynolds which is the sole user of the warehouses. The warehouses themselves and the land underlying them are subject to property taxation in both counties. In all, Reynolds has twenty-six customs bonded warehouses in Durham County and sixty-two customs bonded warehouses in Forsyth County. Imported tobacco is normally held in storage by Reynolds for two years before it is withdrawn and blended with domestically grown tobacco in the manufacturing process. When the imported tobacco is withdrawn from bonded storage for manufacturing, customs duties are paid by Reynolds to the federal government.

Virtually all the imported tobacco stored in these customs bonded warehouses in Durham and Forsyth Counties is used by Reynolds for the domestic manufacture of finished tobacco products. Furthermore, virtually all the tobacco products manufactured by Reynolds from imported tobacco are sold and consumed in the United States.

From the denial of its claims for property tax exemption by the Durham and Forsyth Counties Boards of Equalization and Review, Reynolds appealed to the Property Tax Commission. Prior to a hearing on the matter, Durham County filed a motion to dismiss the appeal from that County's Board on the ground that Reynolds had failed to properly perfect its appeal to the Commission. The denial of this motion is the subject of Durham County's cross-assignment of error.

The Property Tax Commission held that the Durham and Forsyth Counties Boards of Equalization and Review correctly denied Reynolds' claims for exemption from property taxation of imported tobacco stored as of 1 January 1983 in customs bonded warehouses.

I.

The scope of our review on appeal from a decision of the Property Tax Commission is governed by G.S. 105-345.2. *See In re McElwee*, 304 N.C. 68, 283 S.E. 2d 115 (1981). Section (b) of this statute lists six grounds on which an appellate court may reverse, remand, modify, or declare null and void the findings, inferences,

conclusions, or decisions made by the Commission. Although in the record Reynolds has taken other exceptions, for example, to certain findings of fact, it has failed to bring them forward in its brief. Instead, Reynolds has couched its entire appeal on the ground set forth in G.S. 105-345.2(b)(1) that the Commission's conclusions of law are in "violation of constitutional provisions." Basing its argument on three constitutional grounds, Reynolds argues that imposing ad valorem property taxes on imported tobacco stored in United States customs bonded warehouses is unconstitutional. Our review of Reynolds' appeal is confined to this issue.

First, we briefly explain the concept of and purpose behind customs bonded warehouses. In order to encourage merchants here and abroad to use American ports, Congress was willing to waive all duty on goods that were reexported and to defer for a prescribed period the duty on imported goods destined for domestic consumption. *See* 19 U.S.C.A. 1557(a). To carry out this objective, Congress, pursuant to its powers under the Commerce clause, established a comprehensive customs system which created secure and duty-free enclaves or government-supervised bonded warehouses. For a five-year period, imported goods may be stored in the warehouses duty-free. If during this period the goods are withdrawn and reexported, no duty is paid. If the goods are withdrawn for American consumption or stored beyond five years, any duty owed on the goods becomes due. *Xerox Corp. v. County of Harris*, 459 U.S. 145, 103 S.Ct. 523, 74 L.Ed. 2d 323 (1982).

At the outset, we note three cases which guide our determination of the issue presented: *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed. 2d 495, *rehearing denied*, 424 U.S. 935, 96 S.Ct. 1151, 47 L.Ed. 2d 344 (1976); *Xerox v. County of Harris, supra*; and *American Smelting and Refining Co. v. County of Contra Costa*, 271 Cal. App. 2d 437, 77 Cal. Rptr. 570 (1969), *appeal dismissed for want of substantial federal question*, 396 U.S. 273, 90 S.Ct. 553, 24 L.Ed. 2d 462 (1970).

A.

[1] The first ground asserted by Reynolds as a basis for holding unconstitutional the imposition of ad valorem taxes on its im-

ported tobacco in Durham and Forsyth Counties is the Import-Export clause. Article I, § 10, clause 2 of the United States Constitution provides in part that "[n]o state shall, without the consent of congress, lay any imposts or duties on imports or exports." Reynolds maintains that the tobacco involved in this case is still in the import stream of commerce. It argues that because Congress has decided that goods can remain in customs bonded warehouses duty-free for five years, Congress has thereby defined the period during which goods remain in foreign commerce.

This argument is without merit. In *Michelin Tire Corp. v. Wages, supra,* county tax officials assessed Georgia ad valorem property taxes against imported tires and tubes which were included in the corporation's inventory maintained at its wholesale distribution warehouse located in the county. The U.S. Supreme Court held that Georgia's assessment of a nondiscriminatory ad valorem property tax against imported goods that were no longer in import transit did not violate the Import-Export clause, regardless of whether the goods had lost their status as imports by being mingled with other goods of the importer. *Id.* at 279, 96 S.Ct. at 538, 46 L.Ed. 2d at 499-500. This decision expressly overruled *Low v. Austin,* 13 Wall 29, 20 L.Ed. 517 (1872), which had held that the states were prohibited by the Import-Export clause from imposing a nondiscriminatory ad valorem property tax on imported goods until they have lost their character as imports and have become incorporated into the mass of property in the state. *Id.* at 279, 282, 96 S.Ct. at 538, 539, 46 L.Ed. 2d at 500, 501. The *Michelin* decision indicates that "a state or local tax on imported goods is permissible if the goods have lost their status as imports, and that such a tax is also permissible, even if the goods have not lost their status as imports, if the tax is nondiscriminatory." Annot., 46 L.Ed. 2d 955, 967 (1977). The focus of Import-Export clause cases has therefore been changed "from the nature of the goods as imports to the nature of the tax at issue." *Limbach v. Hooven & Allison Co.,* --- U.S. ---, 104 S.Ct. 1837, 1842, 80 L.Ed. 2d 356, 363 (1984). It is unnecessary for this Court to determine whether the imported tobacco involved in this case was "still in the import stream of commerce." Neither party disputes the fact that the property taxes levied by Durham and Forsyth Counties are nondiscriminatory. We hold that the imposition of a nondiscriminatory ad valorem property tax on Reynolds'

imported tobacco located in customs bonded warehouses in Durham and Forsyth Counties is not prohibited by the Import-Export clause of the U.S. Constitution.

Two companion cases, *Youngstown Sheet & Tube Co. v. Bowers and United States Plywood Corp. v. City of Algoma*, 358 U.S. 534, 79 S.Ct. 383, 3 L.Ed. 2d 490 (1959), which did not have the benefit of the *Michelin* rule, saw no justification in allowing imported goods to escape a nondiscriminatory property tax. In *Youngstown*, iron ores were imported from five countries for use along with domestic ores in manufacturing at Youngstown's Ohio plant. United States Plywood imported lumber and veneers for use as needed along with domestic wood in its manufacturing processes. The imported lumber was "green" when received and therefore had to be dried before it could be used. These facts are similar to the undisputed facts in the case *sub judice*. Some of the tobacco imported by Reynolds must be held in storage for aging purposes before it can be used in manufacturing. The remaining imported tobacco has already been aged and is ready to be blended with domestically grown tobacco in the manufacturing operations of Reynolds in Winston-Salem. The Supreme Court concluded with regard to both *Youngstown* and *United States Plywood* as follows:

> The materials here in question were imported to supply, and were essential to supply, the manufacturer's current operating needs. When . . . they were put to that use and indiscriminate portions of the whole were actually being used to supply daily operating needs, they stood in the same relation to the State as like piles of domestic materials . . . that were kept for use and used in the same way. The one was then as fully subject to taxation as the other. In those circumstances, the tax was not on "imports," nor was it a tax on the materials because they had been imported, but because at the time of the assessment they were being used, in every practical sense, for the purposes for which they had been imported. They were therefore subject to taxation just like domestic property that was kept . . . in the same way for the same use. We cannot impute to the Framers of the Constitution a purpose to make such a discrimination in favor of materials imported from other countries as would result if we approved the views pressed upon us by the manufacturers.

Id. at 549-50, 79 S.Ct. at 392, 3 L.Ed. 2d at 500-01.

Furthermore, in *In re Publishing Co.*, 281 N.C. 210, 188 S.E. 2d 310 (1972), the North Carolina Supreme Court similarly held that imported newsprint which was kept on hand for use in connection with the taxpayer's printing operation was subject to property taxation by Buncombe County in the same manner as the domestic newsprint which was kept at the same place, in the same manner, and for the same use. Our Supreme Court concluded that the Import-Export clause did not prohibit the assessment of a nondiscriminatory ad valorem tax on imported newsprint held for use in the taxpayer's manufacturing process. We likewise hold that even though the imported tobacco involved in this case is held in customs bonded warehouses the Import-Export clause confers no immunity to it from nondiscriminatory ad valorem property taxes.

B.

[2] A second argument proposed by Reynolds is that its imported tobacco is exempt from ad valorem property taxation under the Foreign Commerce clause and the Supremacy clause of the United States Constitution.

Article I, § 8, clause 3 of the United States Constitution states that Congress shall have the power "[t]o regulate commerce with foreign nations." Before a state tax can be declared unconstitutional, it must be shown to burden the interstate or foreign commerce involved. *See Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed. 2d 202, *rehearing denied*, 374 U.S. 858, 83 S.Ct. 1861, 10 L.Ed. 2d 1082 (1963). Not every burden is prohibited however, only those which discriminate against the commerce. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565 (1940). *See generally, Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed. 2d 326, *rehearing denied*, 430 U.S. 976, 97 S.Ct. 1669, 52 L.Ed. 2d 3711 (1977). As will be seen, because Reynolds' imported tobacco is not forced to bear a heavier tax burden than its domestic tobacco, local ad valorem property taxation is not a discriminatory or an undue burden on foreign commerce.

The Supremacy clause, Article VI, clause 2 provides that the "[C]onstitution, and the laws of the United States which . . . shall be the supreme law of the land . . . any thing in the [C]onstitution or laws of any state to the contrary notwithstanding."

Essentially, Reynolds' argument with regard to these two clauses is that federal regulation has been so pervasive in this field that it has preempted state action. In *Silkwood v. Kerr-McGee Corp.*, --- U.S. ---, 104 S.Ct. 615, 78 L.Ed. 2d 443, *rehearing denied*, --- U.S. ---, 104 S.Ct. 1430, 79 L.Ed. 2d 754 (1984), the U. S. Supreme Court explained that state law can be preempted in two ways. First, if Congress evidences an intent to occupy a field, any state law falling within that field is preempted. Secondly, if Congress has not entirely displaced state regulation over the matter, state law is still preempted to the extent it actually conflicts with federal law or hinders the accomplishment of the objectives of Congress. *Id.* at ---, 104 S.Ct. at 621, 78 L.Ed. 2d at 452.

In *Xerox Corp. v. County of Harris, supra*, the United States Supreme Court was confronted with the question of whether a state may impose nondiscriminatory ad valorem property taxes on imported goods destined for foreign markets stored under bond in a customs warehouse. Xerox imported and stored copiers previously assembled in Mexico in customs bonded warehouses in Texas. The copiers were not designed or intended for domestic use. All of the copiers were ultimately sold abroad, allowing Xerox to avoid paying any import duties pursuant to 19 U.S.C. § 1557(a).

In determining whether Congress had evidenced an intent to preempt state action in this area, the Supreme Court examined the legislative history and congressional purpose behind the bonded warehousing system. A forerunner of the present statute, 19 U.S.C. § 1557(a), was the Warehousing Act of 1846, 9 Stat. 53. Its objective was to help establish the United States as a center of world commerce. According to the Supreme Court, "[t]he Act stimulated foreign commerce by allowing goods in transit in foreign commerce to remain in secure storage, duty free, *until they resumed their journey in export.*" *Id.* at 150, 103 S.Ct. at 526, 74 L.Ed. 2d at 328. (Emphasis added.) Accordingly, the Supreme Court held that state property taxes on goods awaiting export

stored under bond in a customs warehouse are preempted by Congress's comprehensive regulation of customs duties. The Court reasoned that it would be incompatible with the comprehensive scheme Congress enacted if the states were free to tax such goods while they were lodged temporarily in government-regulated bonded storage in this country.

However, *Xerox* is distinguishable from the case *sub judice* in one crucial respect. It is undisputed by the parties on appeal that virtually all the imported tobacco involved in this case is destined for domestic, rather than foreign, manufacture and consumption. Thus, we are faced with a different question than the U. S. Supreme Court faced in *Xerox*. While the imposition of ad valorem taxes on imported goods stored temporarily in this country prior to reexportation would make the United States a less attractive storage center and in turn contravene congressional objectives, we fail to see how the imposition of property taxes on goods not intended to be reexported would be inconsistent with the central purposes behind the establishment of customs bonded warehouses.

A case which addressed the preemption question in relation to facts similar to the present case was *American Smelting and Refining Co. v. County of Contra Costa, supra.* In *American Smelting*, a California county levied nondiscriminatory property taxes on imported metals stored in customs bonded warehouses for eventual domestic use. The California Court of Appeals sustained the validity of the property tax on the metals held for future domestic use. In a very thorough opinion, the *American Smelting* court reasoned that the "mere incident of the time of payment of the federal duty, as controlled by the taxpayer, does not appear to be a rational criteria upon which to predicate the determination of the local government's right to tax." *Id.* at 469, 77 Cal. Rptr. at 593-94. It further stated that the law and regulations governing customs bonded warehouses do not compel the conclusion that Congress in the exercise of its power to regulate foreign commerce meant to create a warehouse enclave for foreign goods subsequently sold and consumed in domestic commerce. "All that appears is an intent to relieve the processor of the obligation to pay the duty until the refined product is actually consumed or sold in domestic commerce, and the intent to relieve

him of the obligation to pay any duty if the refined product is exported." *Id.* at 470, 77 Cal. Rptr. at 594.

We agree and, like the *American Smelting* court, can find no "congressional intent [in the customs bonded warehouse scheme of legislation] to interfere with the right of the state to tax goods which have been imported for, and have been appropriated to, processing for domestic consumption, and that such right is not foreclosed because the importer-processor has withheld payment of the duty and has given a bond to secure such payment." *Id.* at 481, 77 Cal. Rptr. at 601.

Moreover, both imported and domestic tobacco generally require aging before manufacture. To exempt imported tobacco aging in customs bonded warehouses from property taxation while imposing these taxes on domestically grown tobacco aging in ordinary warehouses would be unfair. As the *American Smelting* court observed:

> [I]t would amount to a bounty to the operator of the tideland smelter processing metal-bearing materials of foreign origin which are destined for domestic consumption, and a discrimination against operators of domestic smelters refining domestic ores which are subject to local taxation.

Id. at 474, 77 Cal. Rptr. at 596-97. Also, since this imported tobacco receives the same local governmental services, such as police and fire protection, as domestic tobacco, local taxpayers would be forced to provide a subsidy in excess of a million dollars to Reynolds for its imported tobacco if exempted from property taxation. The U. S. Supreme Court in *Michelin, supra,* at 289, 96 S.Ct. at 542, 46 L.Ed. 2d at 505, recognized this problem and determined that local property "taxation is the *quid pro quo* for benefits actually conferred by the taxing State. There is no reason why local taxpayers should subsidize the services used by the importer."

Therefore, we must affirm the Property Tax Commission's conclusion that nondiscriminatory ad valorem personal property taxes on imported goods stored under bond in a customs warehouse but not destined for foreign markets are not prohibited. Since such taxation is not inconsistent with *Xerox* or with the purposes behind Congress's comprehensive legislative scheme in-

volving customs bonded warehouses, we hold State property taxation of this tobacco has not been preempted by federal regulation. Also, because this taxation is not a discriminatory burden on commerce, we hold it is similarly not prohibited by the Commerce clause.

C.

[3] As its final constitutional argument against the imposition of ad valorem property taxes on its imported tobacco, Reynolds asserts that due process prohibits state taxation of property which is not within the State's jurisdiction. Reynolds contends that even though its imported tobacco may be physically located in Durham and Forsyth Counties, this tobacco is not subject to the State's jurisdiction until it is withdrawn from the customs bonded warehouse and removed from the control of customs officials.

Ad valorem property taxation is governed by The Machinery Act, G.S. 105-271, *et seq.* G.S. 105-274 provides that all property—real and personal—within the jurisdiction of this State, whether owned by a foreign or domestic corporation is subject to taxation unless specifically excluded or exempted. Under *Xerox, supra,* imported goods destined for foreign markets stored temporarily in customs bonded warehouses have been excluded from local property taxation. As the above discussion reveals, imported goods destined for domestic consumption are not exempt from local property taxation. Also, our research has revealed no North Carolina law excluding the tobacco now in question from taxation. As stated in *Transfer Corp. v. County of Davidson,* 276 N.C. 19, 24-25, 170 S.E. 2d 873, 878 (1969):

> The test of whether a tax law violates due process is "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." *Wisconsin v. J. C. Penney Co.,* 311 U.S. 435, 85 L.Ed. 267, 61 S.Ct. 246, 130 A.L.R. 1229 (1940).

It is undisputed in this case that the imported tobacco stored in Reynolds' customs bonded warehouses receives fire and police protection and other services by Durham and Forsyth Counties.

Therefore, under a Due Process clause analysis, Reynolds' imported tobacco is subject to property taxation just like its domestic tobacco receiving the same services.

Also, even though Reynolds is technically a New Jersey corporation, its tobacco physically located in this State is subject to North Carolina taxation. In *In re Plushbottom and Peabody*, 51 N.C. App. 285, 289, 276 S.E. 2d 505, 508, *disc. rev. denied*, 303 N.C. 314, 281 S.E. 2d 653 (1981), this Court noted that although the situs of personal property for purposes of taxation is ordinarily the domicile of the owner, when

> the owner maintains said property in a jurisdiction other than that of his domicile, in the conduct of his business within such jurisdiction, the *situs* of said property for purposes of taxation is its actual *situs*, and not that of its domicile. [*Citation omitted.*]

The "actual situs" of the imported tobacco in question in this case is its physical location in Durham and Forsyth Counties. It is clear that a local government may tax goods, not otherwise exempted, which are receiving local services and which are physically present within the State. We hold that the imposition of ad valorem property taxes on Reynolds' imported tobacco does not violate the Due Process clause of the U. S. Constitution.

In conclusion, we hold, as reflected by the above discussions, that the imposition of ad valorem property taxes on Reynolds' imported tobacco stored in its Durham and Forsyth Counties customs bonded warehouses is constitutional under the Import-Export clause, Commerce clause, Supremacy clause, and Due Process clause of the U.S. Constitution.

II.

[4] We also note that Durham County cross-assigned as error the Property Tax Commission's denial of its motion to dismiss Reynolds' appeal on the ground that Reynolds failed to comply with G.S. 105-324. This statute specifies that to perfect its appeal, the appellant must file a notice of appeal with the Clerk of the Board of County Commissioners and with the Property Tax Commission. In the present case, Reynolds mailed its notice to S. Bruce Mangum as Clerk of the Board of County Commissioners

instead of Edmund Slade Swindell, Jr., who was in fact the Board of County Commissioners' Clerk.

We hold the Property Tax Commission properly denied Durham County's motion to dismiss. The record reveals that Reynolds properly filed its notice with the Commission. It also mailed the notice to the Durham County attorney, the Durham County Tax Supervisor, and to Mr. S. Bruce Mangum, Clerk to the Durham County Board of Commissioners, Room 206, County Judicial Building, Durham, North Carolina 27701. This notice was received by Durham County. The failure to name the proper person as Clerk of the Board of County Commissioners was a misnomer and did not preclude the Property Tax Commission from exercising jurisdiction over the matter. Also, according to the Commission, Durham County conceded that it had not been prejudiced by Reynolds' failure to directly mail a copy to Edmund Slade Swindell, Jr. We likewise fail to see how Durham County might have been prejudiced. For these reasons and those given by the Commission in its final decision, we affirm the denial of Durham County's motion to dismiss.

The decision of the Property Tax Commission in all respects is

Affirmed.

Judges ARNOLD and EAGLES concur.

STATE OF NORTH CAROLINA v. BRIAN ERIC AIKEN

No. 8419SC586

(Filed 19 March 1985)

1. Constitutional Law § 48— stipulation admitting evidence—defense counsel not ineffective

In a prosecution for second-degree rape, defendant's counsel was not ineffective in entering into a stipulation admitting into evidence the results of the vaginal examination of the victim and in not moving for blood type testing of sperm found during the examination because defendant's defense was based on consent.

2. Constitutional Law § 48— effective assistance of counsel—failure to move to suppress pretrial statement

Defendant's counsel was not ineffective because he failed to move to suppress defendant's pretrial statement to police where defendant's statement was consistent with the defense presented at trial; moreover, no basis for suppressing the statement appears in the record.

3. Constitutional Law § 48; Criminal Law § 73.1— failure to object to hearsay—not prejudicial—not ineffective assistance of counsel

In a prosecution for second-degree rape in which defendant allegedly twice assaulted the victim while she was intoxicated and unconscious in a tent during a party, the failure of defense counsel to object to hearsay testimony that defendant had been told to get out of the tent, that what he had done was wrong, and, after the second incident, that he had been "told before" was not prejudicial or ineffective assistance of counsel. The testimony did not tend to show that defendant was told of the victim's intoxicated and unconscious condition and there was extensive evidence that defendant was aware of the victim's condition. G.S. 15A-1443(a).

4. Constitutional Law § 48— failure to object to improper questions on race—not ineffective assistance of counsel

In a prosecution for second-degree rape, defense counsel was not ineffective in allowing the prosecution to elicit testimony solely to raise the issue of race. Although the issue was entirely irrelevant and eliciting the testimony was improper, defendant and the victim were present in the courtroom and the jury had ample opportunity to observe the race of both; moreover, the failure to object could have been a trial tactic under the defense of consent.

5. Constitutional Law § 48— effective assistance of counsel—length of direct examination

In a prosecution for second-degree rape, defendant's counsel was not ineffective where the direct examination of defendant covered only eight pages of the transcript and the redirect two pages while the cross-examination by the prosecutor covered forty-five pages. Counsel's examination of defendant adequately presented the defense of consent.

6. Constitutional Law § 48— effective assistance of counsel—failure to object to instructions

In a prosecution for second-degree rape, defendant's counsel was not ineffective in that he failed to object to the court's charge on intoxication of the victim.

7. Criminal Law § 87.1— leading questions—proper

In a prosecution for second-degree rape, there was no error in the court allowing the State to ask two of its witnesses leading questions. In both instances, the questions were in response to a witness's answer that he had stated all he remembered and both were proper cases for refreshing a witness's memory.

8. Rape § 4— testimony that victim unconscious—proper

In a prosecution for second-degree rape, the trial court did not err by admitting lay testimony that the victim was unconscious. The State's witness could not testify that the victim was incapable of giving consent or that she was physically helpless, but he could properly give his opinion of the victim's condition.

9. Rape § 6— second-degree rape—instructions proper

In a prosecution for second-degree rape, the trial court did not err by instructing the jury that it could find defendant guilty if the victim was "drunk and, as a result, was so physically unable to resist an act of vaginal intercourse as to be physically helpless." G.S. 14-27.3 contemplates that second-degree rape can occur by the use of force *or* with one who is physically helpless, and does not require that defendant be the one who made the victim mentally incapacitated or physically helpless. G.S. 14-27.1(3).

10. Rape § 6— second-degree rape—instructions not conflicting

In a prosecution for second-degree rape, the court did not give conflicting instructions by instructing the jury that the State must prove that defendant knew or had reason to know the victim was helpless after instructing the jury during the testimony of a witness not to consider what defendant was aware of. The court had merely instructed the jury not to consider that witness's testimony about what defendant was aware of.

11. Criminal Law § 181.3— denial of motion for appropriate relief—not reviewed on appeal—defendant entitled to assert errors on appeal

The summary dismissal of defendant's motion for appropriate relief and the denial of his motion to vacate and reconsider was not reviewed on appeal because defendant was entitled to assert any errors during the appeal. G.S. 15A-1420(c)(6), G.S. 15A-1448(a)(3) and (4), G.S. 15A-1422(e).

APPEAL by defendant from *Helms, Judge*. Judgment entered 26 October 1983 in Superior Court, ROWAN County. Heard in the Court of Appeals 12 February 1985.

This is a criminal action in which defendant was indicted, tried and convicted, for two counts of second degree rape.

The essential facts are:

On 9 and 10 April 1983, some four to five hundred Catawba College students and their guests attended an event known as the Begger's Banquet in a vacant field located in Rowan County. The Begger's Banquet, sponsored off-campus by students, is an event where students set up tents and socialize for a 24 hour period. There is beer and food available and a bonfire.

Defendant, Brian Eric Aiken, and the victim were among the many students and guests in attendance. They were not dating or together for the event, but knew each other as students at Catawba College. According to State's witnesses, the victim consumed beer for a long period and eventually became very intoxicated. She was found by her friends, face down in the mud, beside a tent owned by State's witness Keith Thompson, a Catawba College student. Some of the victim's friends carried her into the tent. The State's evidence tended to show that the victim was "really passed out" and "unconscious and intoxicated."

At some point, victim's friends carried her to some nearby woods so that she could "go to the bathroom." Victim was then carried back to the tent where she was placed, unconscious, behind a divider in the tent. At about this same time, defendant was outside the tent and participated in a discussion with the victim's friends. Keith Thompson testified that defendant was told that the victim was passed out inside the tent. The victim's friends then left her alone in the tent and went to the bonfire.

Both State's witnesses and defendant testified that defendant entered the tent with the victim. The State's evidence tended to show that when the victim's friends returned from the bonfire, they found defendant "laying on top of" the victim in the back half of the tent, behind the divider. Keith Thompson testified that the victim's shirt was unbuttoned and that she was naked from the waist down. There was conflicting evidence that defendant was either "chased out" of the tent or that he "left on his own."

The victim was then left on a lounge chair in the tent by her friends who again went to the bonfire. When the victim's friends later returned, they discovered defendant on the left side of the tent with his pants off. The victim was still on the lounge chair and her pants were off. The victim's friends put her clothing back on "because she wasn't capable of doing it herself" and locked her in a friend's automobile for the remainder of the night.

On 10 April 1983, two of the victim's friends went to her dormitory room on the campus of Catawba College and told her of the events occurring in the tent at the Begger's Banquet, saying that the victim had been "[taken] advantage of." The victim and her friends identified defendant from a picture in the school year book and the victim notified police that she had been raped.

The police investigation was conducted by Lt. John Noble and Det. T. D. Wilhite of the Rowan County Sheriff's Department. The officers interviewed the victim and had her submit to testing at a nearby hospital. This testing revealed the presence of spermatozoa in the victim's vagina.

On returning to her room the victim discovered that defendant had been trying to reach her by telephone. One of the victim's friends, Tammy Kearny, returned defendant's telephone call while pretending to be the victim.

On direct examination, Ms. Kearny testified as to the substance of her conversation with defendant:

> I immediately told [defendant] that I was [the victim] and he started to ask me not to press charges, that he would go to jail. We were talking and I asked him what had happened and he said that, you know, I was drunk and Ed and Keith and those guys told him he could sleep in the tent for the night. He said he walked into the tent and saw [the victim] laying there passed out. He said, "you are a girl and I am a guy and it just happened."

The victim testified that she consumed beer for several hours after arriving at the Begger's Banquet. She testified that she only remembered a light coming on, someone yelling and that she thought it was all a dream. She further testified that she had not given defendant or anyone permission to have sexual intercourse with her.

Lt. Noble and Det. Wilhite interviewed defendant on 10 April 1983 at the Rowan County Sheriff's Department. Defendant gave a written statement describing the events at the Begger's Banquet after being advised of and waiving his rights to silence and to have counsel present. Defendant stated to police that he saw someone carry the victim off to the woods and back to the tent, that "some of the people were talking about how [intoxicated the victim] was" and that he had sex with the victim twice but that she had consented both times. Defendant further stated that after the second episode of sexual intercourse he helped the victim's friends put her clothes back on and that "she was still very drunk."

At trial, defendant presented evidence of consent as a defense to the rape charges, stipulated to the admission of the vaginal test results and did not contest the admission into evidence of his statement to police.

The jury returned a verdict of guilty to both counts of second degree rape and defendant was sentenced to two consecutive six year terms of imprisonment as a committed youthful offender pursuant to G.S. Chapter 148, Article 3B.

Defendant later filed two motions for appropriate relief which were denied. From the judgment and denial of the motions for appropriate relief, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General John R. Corne and Associate Attorney General Gayl M. Manthei, for the State.

Badger, Johnson, Chapman & Michael, by Ronald L. Chapman and Mark A. Michael, for defendant-appellant.

EAGLES, Judge.

I

Defendant first assigns as error that his trial counsel's representation was prejudicially ineffective. We find no error.

[1] Defendant first argues that trial counsel was ineffective in entering into a stipulation admitting into evidence the results of vaginal examination of the victim. We do not agree.

Defendant's defense at trial was based on consent, i.e., that while he did have sexual intercourse with the victim, it was with her permission. In that context test results indicating that the victim did have sexual intercourse could not be prejudicial to defendant. We will not second guess counsel on questions of trial strategy. *State v. James*, 60 N.C. App. 529, 299 S.E. 2d 451 (1983). Defendant's argument that his counsel was ineffective in failing to move for blood type testing of sperm found during vaginal examination of the victim must fail for the same reasons. *Id.*

[2] Defendant next argues that his trial counsel was ineffective because he failed to move to suppress defendant's pretrial statement to police. We do not agree.

Defendant now asserts that, as a practical matter, the suppression of his statement was his sole defense and that failure to pursue a defendant's sole defense is ineffective assistance of counsel. *See Bell v. Georgia*, 554 F. 2d 1360 (5th Cir. 1977); *U.S. v. Easter*, 539 F. 2d 663 (8th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977). While we agree that failure to pursue a defendant's sole defense may be ineffective assistance of counsel, here the sole defense presented by defendant at trial was consent. To move to suppress a voluntary statement that appears to be consistent with the trial strategy chosen by defendant and his counsel would be frivolous. Defense counsel is not required to bring frivolous motions or objections. *State v. Milano*, 297 N.C. 485, 256 S.E. 2d 154 (1979), *overruled on other grounds*, 307 N.C. 628, 300 S.E. 2d 351 (1983). We note in passing that there does not appear in the record any basis upon which defendant's statement could have been suppressed even if the motion to suppress had been made. The admission into evidence of defendant's statement to police is therefore not prejudicial and counsel's failure to move for suppression of the statement is not ineffective assistance of counsel.

[3] Defendant next argues that trial counsel was ineffective by failing to object to impermissible and prejudicial questions asked by the prosecutor. We do not agree.

During the direct examination of State's witness Christopher Houk, the following exchange occurred:

Q: Was Ed Gettis there?

A: Yes, sir.

Q: Did he say anything that you recall?

A: To [defendant]?

Q: Yes.

A: I can't remember actual words. I remember he was really mad, saying something like "he told him before" or something.

This comment to defendant by Ed Gettis, a friend of the victim and a State's witness, was made at the time of the second alleged sexual encounter between defendant and the victim. Defendant argues that this evidence tends to show that Ed Gettis

gave some warning or information to defendant which would inform defendant of the victim's unconscious condition, an element of the crime of second degree rape which the State must prove beyond a reasonable doubt. Defendant asserts that the testimony by Houk concerning the statement of Gettis to defendant is hearsay and not admissible.

"Evidence, oral or written is called hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." *State v. Edwards*, 305 N.C. 378, 381, 289 S.E. 2d 360, 362 (1982). Hearsay has also been defined by our appellate courts as "the assertion of any person, other than that of the witness himself in his present testimony, offered to prove the truth of the matter asserted." *State v. Hampton*, 294 N.C. 242, 246, 239 S.E. 2d 835, 838 (1978). Under either definition, the result is the same. Here, the prosecutor asked Houk the substance of what Gettis said to defendant. This evidence depended upon the competency and credibility of the speaker, Gettis, and it appears to be offered for nothing other than to convey to the jury the substance or truth of the statement. It was error to admit Houk's testimony regarding Gettis' statement to defendant. However, erroneous admissions of hearsay evidence are not always prejudicial. *State v. Sparks*, 297 N.C. 314, 255 S.E. 2d 373 (1970).

Evidence at trial tended to show that Gettis had once told defendant to "get out" of the tent after Gettis had discovered defendant on top of the victim. Further evidence tended to show that Gettis told defendant what he had allegedly done was "not right." When told defendant was in the tent with the victim a second time, Gettis stated to bystanders "not again." Houk's testimony indicating Gettis told defendant, "I told you before" does not tend to show that defendant was told by Gettis of the victim's intoxicated and unconscious condition. Rather, the testimony tends to show that defendant had been told to "get out" of the tent or that what defendant was doing was "not right." Further, there was extensive evidence, including defendant's own statement, that defendant was aware of the victim's condition. G.S. 15A-1443(a) provides:

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when

> there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

We are convinced that, given the facts, circumstances and theory of defense in this case, the result would have been the same if counsel had made timely objection to the testimony in question and the trial court had properly excluded it. Defendant on appeal shows no prejudice. Under these circumstances the failure of trial counsel to object does not rise to the level of ineffective assistance of counsel.

[4] Defendant next argues that trial counsel was ineffective in allowing the prosecutor to elicit testimony from a State's witness solely to raise the issue of race. The basis for this argument is the following testimony of Gettis:

> Q: Did [defendant] say anything about the fact that he was black and that's why you—
>
> A: Yeah, yeah. He mentioned that up at the fire after I got the beer. He said, "If I was white you wouldn't have done that; you're only reacting because I'm black."

Defendant is black. The victim is white. While the issue of race is entirely irrelevant here and the eliciting of the testimony by the prosecutor was clearly improper, we cannot say that defendant was prejudiced by the testimony. Both defendant and victim were present in the courtroom and testified before the jury. The jury had ample opportunity to observe the race of both defendant and the victim. *See, State v. Hall,* 60 N.C. App. 450, 299 S.E. 2d 680 (1983). We also note that under the defense theory of consent, the failure to object to this testimony reasonably could have been a trial tactic advantageous to defendant. Accordingly, counsel's failure to object does not rise to the level of ineffective assistance of counsel.

[5] Defendant next argues that his trial counsel's direct examination of defendant was not reasonably within the range of competency demanded of attorneys in criminal cases. We do not agree.

The basis of defendant's argument is that the direct examination of defendant covered only eight pages of the transcript of trial while the cross examination of defendant by the prosecutor covered forty-five pages of the transcript of trial. The redirect examination of defendant covered two pages. Defendant apparently contends that defense counsel was ineffective as a matter of law because the direct and redirect examinations were brief.

We reject defendant's contention summarily noting that defendant cites no authority for the proposition that a brief examination of the defendant as a witness demonstrates, as a matter of law, that counsel was ineffective. "This failure to provide authority for such an assertion is probably due to the fact there is none." *State v. Weaver*, 306 N.C. 629, 641, 295 S.E. 2d 375, 382 (1982). We have carefully examined the record before us and note that trial counsel's examinations of defendant adequately present the defense theory of consent. Here, too, defendant has shown no prejudice.

[6] Defendant finally assigns as ineffective assistance of counsel the failure of counsel to object to the trial court's charge to the jury regarding the intoxication of the victim. For reasons that are discussed *infra*, we find no error in counsel's failure to object to the trial court's charge to the jury regarding the intoxication of the victim.

> The decisions on what witnesses to call, whether and how to conduct [examinations], what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the attorney after consultation with his client. Trial counsel are necessarily given wide latitude in these matters. Ineffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.

State v. Milano, at 495, 256 S.E. 2d at 160.

Our examination of the record in this case reveals that there is no reasonable probability of a different result had trial counsel performed differently, nor is there a showing of a reasonable possibility of a different result with "effective" assistance. Defendant has failed to show that his "counsel's representation fell

below an objective standard of reasonableness." *Strickland v. Washington*, --- U.S. ---, 104 S.Ct. 2052, 2065, 80 L.Ed. 2d 674, 693 (1984). The record before us indicates that defense counsel at trial cross examined vigorously, made numerous objections which resulted in some favorable rulings, and presented a strong defense of consent. We hold that trial counsel gave defendant "the representation of a skilled, capable, intelligent lawyer who handled his case in the highest traditions of the legal profession." *People v. Eckstrom*, 43 Cal. App. 3d 996, 1003, 118 Cal. Rptr. 391, 395 (1974). That he did not prevail in this case before a jury does not impugn his skill as an advocate or the quality of his representation.

II

[7] Defendant next assigns as error the trial court's allowing leading questions to be asked of a State's witness. We find no error.

Defendant argues that two questions asked by the prosecutor of State's witnesses were impermissible and leading. Without restating the questions and answers, we note that in both instances, the allegedly leading question was in response to a witness's answer that he had stated all he remembered. Both were proper cases for refreshing a witness's memory and allowance of the testimony was in the discretion of the trial court. *State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10, *cert. denied*, 429 U.S. 932 (1976); *State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976).

III

[8] Defendant next assigns as error the trial court's admission into evidence of lay opinion as to the victim's state of unconsciousness. We find no error.

The basis of defendant's argument is that a State's witness was allowed to testify that the victim was, in her opinion, unconscious. Defendant argues that the "legal question, the one on which this whole case turned was whether the prosecuting witness was unconscious at the time of the sexual acts alleged." Defendant's argument is misplaced. Allowing a State's witness to testify as to whether defendant was conscious, unconscious or under the influence of alcohol is permissible opinion testimony from a lay witness. *See* Brandis, North Carolina Evidence, Section

129 (1982 and Cum. Supp.). We note that in *State v. Smith*, 310 N.C. 108, 310 S.E. 2d 320 (1984), our Supreme Court held that a witness could not testify as to whether or not a defendant had the capacity to proceed to trial. The witness could, however, describe defendant's condition. Similarly, the State's witness may not testify that the victim was incapable of giving consent or that she was physically helpless, but he could properly testify as to his opinion of the victim's condition.

IV

[9] Defendant next assigns as error the trial court's instruction to the jury that it could find defendant guilty if it found, among other facts, that the victim was "drunk and, as a result, was so physically unable to resist an act of vaginal intercourse as to be physically helpless." We find no error.

The thrust of defendant's argument is that the jury, under the instructions given, was not asked to consider whether defendant used force against the victim. Defendant cites *State v. Johnston*, 76 N.C. 209 (1877) where Justice Read noted "[r]ape is the carnal knowledge of a female forcibly and against her will." *Id.* at 210.

Defendant here, however, was convicted of the statutory offense of second degree rape, G.S. 14-27.3, which provides:

> (a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse 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 the other person is mentally defective, mentally incapacitated, or physically helpless. [Emphasis added.]

G.S. 14-27.3 contemplates that the crime of second degree rape can occur if there is vaginal intercourse by the use of force *or* with one who is, among other things, physically helpless. "Physically helpless means (i) a victim who is unconscious; or (ii) a

victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act." G.S. 14-27.1(3). G.S. 14-27.3 also does not require that defendant be the one who made the victim mentally incapacitated or physically helpless. Intercourse under these circumstances would have been rape even at common law since the rule was that an unconscious or insensibly drunk victim could not consent to intercourse.

> One of the leading American cases on the law of rape involved unlawful sexual intercourse with a woman "so drunk as to be utterly senseless" . . . [The court held] that unlawful intercourse "with a woman, without her consent, while she was, as [defendant] knew, wholly insensible so as to be incapable of consenting, and with such force as was necessary to accomplish the purpose was rape." It is to be emphasized that this was not a case in which defendant had made the woman drunk but merely one in which he had taken advantage of her helpless condition. *Commonwealth v. Burke*, 105 Mass. 376, 380-1 (1870).

Perkins, *Criminal Law*, p. 163 (2d Ed. 1969).

Here, there was sufficient evidence from which a jury could find that defendant unlawfully had vaginal intercourse with the victim who was physically helpless due to intoxication and that he knew or reasonably should have known the victim's condition. Accordingly, the trial court's instruction as to physical incapacity of the victim due to her intoxication was proper. The physical act of vaginal intercourse with the victim while she is physically helpless is sufficient "force" for the purpose of second degree rape under G.S. 14-27.3.

Defendant also assigns error to the failure of trial counsel to object to the trial court's instruction to the jury concerning intoxication and physical helplessness. We find no error and failure to object is not ineffective assistance of counsel. *State v. Milano, supra; State v. Jones, supra.*

V

[10] Defendant next assigns as error allegedly conflicting instructions to the jury regarding defendant's knowledge of the vic-

tim's condition at the time the alleged acts of vaginal intercourse took place. We find no error.

During direct examination of State's witness Jeffrey Bauer, the following exchange occurred:

> Q: Was [defendant] aware of [victim's] condition?
>
> DEFENSE COUNSEL: OBJECTION, your Honor.
>
> A: I think he was, yeah.
>
> DEFENSE COUNSEL: OBJECTION. No basis.
>
> THE COURT: SUSTAINED. Members of the jury, don't consider what [defendant] was aware of.

Later, in instructing the jury, the trial court gave the following instruction: "Third, the State must prove that the defendant knew or had reason to believe or should have known that [the victim] was physically helpless."

Defendant argues that the evidentiary ruling made by the trial court earlier in the trial was in conflict with the jury charge. We do not agree.

The jury charge was clear and precise, correctly stating the elements of second degree rape. The evidentiary ruling complained of considered the witness's basis to testify about defendant's state of awareness and was correct. Contrary to defendant's argument, the trial court was not ruling that the jury was forbidden to consider defendant's awareness of the victim's condition. Rather, the trial court ruled and instructed the jury not to consider what this witness had testified to concerning what defendant was aware of. The assignment of error is overruled.

VI

[11] Lastly, defendant assigns error to the trial court's denial of his motion for appropriate relief and motion to vacate and reconsider the order of summary dismissal of his motion for appropriate relief. We find no error.

On 7 November 1983, defendant filed a motion for appropriate relief alleging ineffective assistance of counsel based on his failure to move to suppress defendant's statement to police

and to contact and call certain defense witnesses, and alleging unconstitutional makeup of the jury pool, that there was insufficient evidence to support defendant's convictions and that the verdict was contrary to the weight of the evidence.

Defendant filed no supporting affidavit and offered no evidence beyond the bare allegations in the motion for appropriate relief. G.S. 15A-1420(c)(6) requires that "[a] defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears." Since defendant did not comply with G.S. 15A-1420 (c)(6), the trial court's summary denial of the motion for appropriate relief was not error.

On 30 December 1983, defendant filed a "motion to vacate and reconsider the order of summary dismissal of motion for appropriate relief." The order summarily denying the motion for appropriate relief was filed 22 December 1983 so the trial court properly retained jurisdiction to rule upon the 30 December 1983 "motion to vacate and reconsider the order of summary dismissal of motion for appropriate relief," G.S. 15A-1448(a)(3). However, the trial court took no action upon the motion. G.S. 15A-1448(a)(4) provides: "If there has been no ruling by the trial judge on a motion for appropriate relief within 10 days after motion for such relief has been made, the motion shall be deemed denied." We need not review the trial court's denial of defendant's "motion to vacate and reconsider the order of summary dismissal of motion for appropriate relief" because any error could not possibly prejudice defendant since he is entitled to assert those same errors on this appeal. G.S. 15A-1422(e); *State v. Brooks*, 49 N.C. App. 14, 270 S.E. 2d 592 (1980), *rev. denied*, 301 N.C. 723, 276 S.E. 2d 285 (1981).

Defendant's remaining assignments of error are without merit.

For the reasons herein stated, we find,

No error.

Judges ARNOLD and PARKER concur.

STATE OF NORTH CAROLINA v. NIVALDO ROQUE BARRANCO

No. 8421SC623

(Filed 19 March 1985)

1. Constitutional Law § 31— refusal to appoint additional psychiatrist

The trial court did not err in the denial of the Cuban defendant's motion for the appointment, at State expense, of an additional psychiatrist fluent in both Spanish and English to evaluate his capacity to proceed to trial and his criminal responsibility at the time of the alleged offenses after defendant had twice been evaluated by psychiatrists at Dorothea Dix Hospital where defendant showed only that the examination by the first psychiatrist was hindered by the language barrier, but defendant failed to point out any information which could have been made available to a Spanish-speaking psychiatrist which was not made available to the two psychiatrists who evaluated defendant, and defendant did not challenge the competence of either psychiatrist except to the extent that they are not bilingual. G.S. 7A-450(b).

2. Criminal Law § 29— competency to stand trial

The trial court did not err in finding that defendant was competent to proceed to trial where the State relied upon the evaluations of two psychiatrists who concluded that defendant was competent to stand trial, defendant's testimony bore little relationship to his mental capacity at the time of trial, and defendant admitted on cross-examination that he understood the charges against him and was able to talk with his attorney.

3. Criminal Law § 63.1— opinions by psychiatrist—sanity—intoxication—pretense of insanity

A forensic psychiatrist was properly permitted to state his opinions that defendant could distinguish between right and wrong at the time of the crimes, that his intoxication did not negate his ability to form any specific intent, that defendant's suicide gestures were not a serious suicide attempt, and that defendant exaggerated his presentation of himself as being mentally ill in order to avoid prosecution where the psychiatrist's opinions were based upon his personal observations and examinations of defendant and upon observations and tests performed and recorded by others.

4. Criminal Law § 112.6— defense of insanity—insufficient evidence

Defendant's evidence of prior mental hospitalization in Cuba some years before the offenses in question, his suicide attempts while in jail awaiting trial, and the improvement of his mental condition when prescribed an anti-psychotic medication was insufficient to raise an issue of whether defendant, at the time of the offenses charged, knew the nature and quality of his acts or that his acts were wrong so as to require the trial court to instruct on the defense of insanity. Rather, such evidence, when considered with evidence of defendant's intoxication and his actions at the time of the offenses, required only an instruction concerning the effect of his intoxication on the issue of specific intent.

5. **Criminal Law § 138— mitigating factors in sentencing—intoxication as mental condition reducing culpability—failure to find intoxication as physical impairment**

In a sentencing hearing for larceny in which the court found as a mitigating factor that defendant's intoxication was a mental condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense, G.S. 15A-1340.4(a)(2)d, the trial court did not err in failing also to find as a mitigating factor that defendant's intoxication was a physical condition that significantly reduced his culpability for the offense where defendant failed to establish any link between his physical impairment and his culpability for larceny.

6. **Criminal Law § 138— mitigating factors—intoxication not limited mental capacity**

Intoxication does not support a finding of the mitigating factor set forth in G.S. 15A-1340.4(a)(2)e that defendant's "limited mental capacity at the time of commission of the offense significantly reduced his culpability for the offense."

APPEAL by defendant from *Seay, Judge.* Judgment entered 1 February 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 12 February 1985.

Defendant was arrested on 7 September 1983 and charged with robbery with a dangerous weapon and assault with a deadly weapon upon a law enforcement officer as well as several related misdemeanor motor vehicle offenses. He was found to be indigent and counsel was appointed for him. When the case was called for trial in Superior Court, the State elected to proceed only on the felony charges. During jury deliberations, defendant entered a plea of guilty to simple assault, which was accepted by the court in the felonious assault case. In this case, in which defendant was charged with robbery with a dangerous weapon, he was found guilty of larceny from the person. The trial court found one aggravating factor, one mitigating factor, and found that the factor in aggravation outweighed that in mitigation. An active sentence of ten years was imposed. Defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Lennon, for the State.

Jenkins, Lucas, Babb and Rabil, by S. Mark Rabil, for defendant appellant.

MARTIN, Judge.

By this appeal, defendant raises assignments of error relating to the denial of his pre-trial motion for additional psychiatric evaluation, the trial court's determination that he was competent to proceed to trial, the admission of testimony by the State's psychiatric expert, the refusal of the trial court to submit to the jury the issue of defendant's insanity and to the sentence imposed. We find no prejudicial error in any aspect of the defendant's trial and affirm his conviction.

In summary, the State's evidence showed that at approximately 3:30 a.m. on 7 September 1983, William Peterson, Jr., a taxi driver for Blue Bird Cab Company, answered a call at the Black Velvet Lounge, a nightclub in Winston-Salem. The defendant and another man approached the cab; the defendant entered the back seat and the other man sat in the front seat. The front-seat passenger pointed directions to Peterson. When Peterson arrived at the address pointed out by that person, he stopped the cab and turned the interior light on, waiting to be paid. The passenger said "look out" and Peterson turned to see the defendant striking at him with a knife. Peterson jumped out of the cab on the driver's side and the front-seat passenger jumped out the opposite side. The cab began rolling forward and the defendant climbed over the seat, got under the steering wheel and drove away. The defendant was located by police officers who attempted to stop him; however, the defendant drove around one police car and subsequently ran the taxicab into the side of another police car and then struck a bridge abutment. The defendant was injured in the collision. In the opinion of the officers, the defendant was impaired by alcohol.

Defendant testified that he had been in the United States for three years. Before coming to the United States he had been imprisoned in Cuba for refusing military service and refusing to work. He testified that he had also been hospitalized in a mental hospital after attempting suicide following the deaths of his mother and sister. On the evening before this incident, the defendant had been drinking with his friend for several hours at the lounge where Peterson picked them up. When they arrived at defendant's apartment, defendant testified that his friend pulled a knife and defendant grabbed the knife from him. When the driver

and defendant's friend jumped out of the cab, defendant became scared and left with the taxi. He remembers very little, other than crashing into the police car, until waking the next day at the hospital. He testified that he attempted, while in jail, to commit suicide by swallowing aspirin, pins, and paint scraped from his cell because he was depressed. Defendant also offered the testimony of the physician who treated defendant for the injuries sustained in the collision. The physician testified that in his opinion the defendant was intoxicated when he was brought to the hospital and that he was uncooperative during the course of his hospitalization.

In rebuttal, the State offered the testimony of Dr. Rollins who testified that in his opinion the defendant was not suffering from a mental disorder which would render him incapable of distinguishing between right and wrong or of understanding the nature and quality of his act.

[1] Defendant first assigns error to the trial court's denial of his motion for the appointment, at state expense, of a psychiatrist fluent in both the Spanish and English languages to evaluate him as to his capacity to proceed to trial and as to his criminal responsibility at the time of the alleged offenses. The defendant is Cuban and is fluent only in Spanish. He bases his argument upon constitutional and statutory grounds.

Defendant moved, on 14 November 1983, for a mental examination by a psychiatrist, fluent in Spanish and English, to determine his capacity at the time of the alleged offenses, anticipatory to an insanity defense. Pursuant to an order entered by Judge James M. Long, defendant was committed to Dorothea Dix Hospital where he was examined by Dr. Russell G. Brown, a forensic psychiatrist. Dr. Brown is not fluent in Spanish, but arranged for the defendant to be interviewed by a Spanish-speaking physician, Dr. Saldras, and by a Spanish-speaking psychiatrist, Dr. Lara. He also interviewed the defendant but was hindered by the language barrier. Based upon the interviews, observations and other information obtained from various sources, Dr. Brown rendered his opinion that the defendant had an "adequate understanding of the charges . . . and the seriousness of the charges," was able to cooperate with his attorney, "could distinguish between right and wrong at the time of the alleged crime," and was

not psychotic at the time of the hospitalization or at the time of the offenses. Dr. Brown noted that an accurate assessment of the defendant was not possible because of the language barrier.

Because of the difficulty noted by Dr. Brown, Judge Cornelius entered an order on 15 December 1983 providing that the defendant be recommitted to Dorothea Dix Hospital for further evaluation by a psychiatrist fluent in Spanish and English. At the time of this admission, the defendant was interviewed in Spanish by Dr. Lara; however, Dr. Bob Rollins, a forensic psychiatrist, evaluated the defendant. Dr. Rollins, who is not fluent in Spanish, testified that he had a conversation with the defendant but relied mainly on Dr. Lara for detailed conversations with defendant. After observing defendant and conferring with Dr. Lara, Dr. Rollins rendered an opinion that defendant did not have a mental disorder that would render him incapable of proceeding to trial or not responsible for his actions.

Subsequently, on 30 December 1983, defendant gave notice that he intended to raise the defense of insanity and to introduce expert testimony relating to insanity. He moved for the appointment of an additional psychiatrist. This motion was denied by Judge DeRamus on 3 January 1984 and by Judge Seay shortly before the defendant's trial.

The North Carolina Supreme Court has said that there is no violation of an indigent defendant's constitutional rights to due process or equal protection by the trial court's refusal to appoint an additional psychiatric expert where the State has provided competent psychiatric assistance. *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980); *State v. Patterson*, 288 N.C. 553, 220 S.E. 2d 600 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1211, 96 S.Ct. 3211 (1976). The statutory right of an indigent criminal defendant to expert assistance is based upon G.S. 7A-450(b) which requires the State to provide an indigent defendant "with counsel and the other necessary expenses of representation." Our Supreme Court has interpreted that statutory provision for "other necessary expenses of representation" to require expert assistance "only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial." *State v.*

Gray, 292 N.C. 270, 278, 233 S.E. 2d 905, 911 (1977). The decision as to whether such a showing is made depends upon the circumstances of each case, is within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976).

We conclude that the defendant in the case *sub judice* has failed to demonstrate that the appointment of an additional psychiatrist would have materially assisted him, or that he was denied a fair trial by the refusal of the court to grant his request. Defendant has shown only that the examination by Dr. Brown was hindered by the language barrier, but he has failed to point out any information which could have been made available to a Spanish-speaking psychiatrist which was not made available to Dr. Brown or to Dr. Rollins at the time of their respective evaluations. He has not challenged the competence of either psychiatrist except to the extent that they are not bilingual. Thus, his contention "that there may have been a completely different evaluation" as to his capacity and responsibility had his motion for additional psychiatric evaluation been allowed amounts to no more than speculation, much less than a reasonable likelihood. Consequently, we hold that the trial court did not abuse its discretion nor violate any of the defendant's constitutional or statutory rights in denying his motion for appointment of an additional psychiatrist.

[2] Defendant also assigns as error the trial court's determination that he was competent to proceed to trial. He contends that no such determination should have been made without his having been evaluated by a private Spanish-speaking psychiatrist. We have already ruled that his motion for such an evaluation was properly denied.

The test of a defendant's mental capacity to proceed to trial is "whether he has, at the time of trial, the mental capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed." *State v. Cooper*, 286 N.C. 549, 565, 213 S.E. 2d 305, 316 (1975). When the trial judge determines the issue of a defendant's capacity to proceed, his findings of fact, if supported by competent evidence, are conclusive on appeal. *State v. McCoy*, 303 N.C. 1, 277 S.E. 2d 515 (1981); *State v.*

Willard, 292 N.C. 567, 234 S.E. 2d 587 (1977). The defendant has the burden of persuasion that he is without capacity to proceed. *State v. Jacobs*, 51 N.C. App. 324, 276 S.E. 2d 482 (1981).

At the hearing conducted to determine defendant's capacity to proceed, the State relied upon the evaluations of Dr. Brown and Dr. Rollins. The defendant testified in his own behalf and offered the testimony of a jailer tending to show that defendant had swallowed pins or staples and eaten paint while incarcerated pending trial. The defendant's own testimony concerned his imprisonment in Cuba for refusing military service and for refusing to work, his mental hospitalization in Cuba following the deaths of his mother and sister, the circumstances of his coming to the United States, his injuries sustained at the time of his arrest and his apparent suicide attempts while in jail awaiting trial. This testimony bore little relationship to his mental capacity at the time of trial. However, on cross-examination defendant testified that he understood the charges against him and was able to talk with his attorney. The trial court found that "defendant has an adequate understanding of the charges against him and is able to assist in the legal process and cooperate with his attorney." These findings were sufficiently supported by the evidence and are, therefore, conclusive on appeal. The assignment of error relating to defendant's mental capacity to stand trial is overruled.

[3] Defendant's next assignments of error deal with the admission of certain opinion testimony given by Dr. Rollins. Dr. Rollins was permitted to testify over objection, that in his opinion the defendant, on the date of the offenses, "did not have a mental disorder that would keep him from understanding the nature and quality of his act or of distinguishing between right and wrong. I did believe he was intoxicated to a considerable degree." This degree of intoxication, however, did not negate defendant's ability to form any specific intent in Dr. Rollins' opinion. As to defendant's alleged suicide attempts Dr. Rollins opined: ". . . I thought his suicide gestures were in response to the stress of the situation that he found himself in. I did not consider that he was making a serious suicide attempt." He also thought defendant had "exaggerated" his presentation of himself as being mentally ill in order to avoid prosecution.

Defendant argues that these opinions were inadmissible because they were "legal conclusions" and were invasive of the province of the jury. This argument is without merit. Defendant stipulated, and the court ruled, that Dr. Rollins was an expert medical witness in the field of forensic psychiatry. He testified that he based his opinions upon his own conversations with, and observations of, defendant, as well as conversations conducted by Dr. Lara and the results of the initial evaluation by Dr. Brown. The principle is well established that a psychiatrist may testify as to his opinion of a defendant's mental capacity based upon his personal observations and examinations of the defendant as well as upon observations and tests performed and recorded by others. *State v. DeGregory*, 285 N.C. 122, 203 S.E. 2d 794 (1974); *see* Brandis on North Carolina Evidence, § 135. This principle renders admissible, as well, an opinion as to whether or not a defendant is pretending insanity to avoid prosecution. *State v. Pritchett*, 106 N.C. 667, 11 S.E. 357 (1890).

[4] Prior to trial, defendant filed a timely notice of his intention to rely upon the defense of insanity. At the close of the evidence the trial court denied the defendant's request that the jury be instructed on the issue of insanity. A request for instruction on the effect of defendant's voluntary intoxication was granted. Defendant assigns error to the refusal of the court to submit the issue of insanity. We find the assignment to be without merit because there was no evidence presented which would have required an instruction on the defense of insanity.

In North Carolina, the test of insanity as a defense to a criminal prosecution is

> whether defendant, at the time of the alleged act, was laboring under such a defect of reason, from disease or deficiency of mind, as to be incapable of knowing the nature and quality of his act, or if he does know this, was by reason of such a defect of reason incapable of distinguishing between right and wrong in relation to such act.

State v. Vickers, 306 N.C. 90, 94, 291 S.E. 2d 599, 603 (1982). Every person is presumed to be sane and possess a sufficient degree of reason to be responsible for his crimes. *State v. Hicks*, 269 N.C. 762, 153 S.E. 2d 488 (1967). In the absence of evidence to rebut this presumption, there is no requirement that the trial

judge place the issue of insanity before the jury. *State v. Jones*, 293 N.C. 413, 238 S.E. 2d 482 (1977). The burden is on the defendant to prove the defense of insanity to the satisfaction of the jury. *State v. Caldwell*, 293 N.C. 336, 237 S.E. 2d 742 (1977), *cert. denied*, 434 U.S. 1075, 55 L.Ed. 2d 780, 98 S.Ct. 1264 (1978).

Defendant presented no evidence that he did not know the nature and quality of his acts at the time of the offenses. His evidence of prior mental hospitalization in Cuba some years before these offenses, his suicide attempts and the improvement of his mental condition when prescribed an anti-psychotic medication were insufficient to raise the issue of whether or not he knew, on 7 September 1983, the nature and quality of his act or that his act was wrong. *See State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984). This evidence, when considered together with the evidence of his intoxication and his actions at the time of the offenses, justified no more than an instruction concerning the effect of his intoxication on the issue of specific intent. *Id.* Such an instruction was given.

[5] The defendant's final assignment of error relates to the sentencing phase of his trial. The trial court found as a factor in aggravation that the defendant had previously been convicted of criminal offenses punishable by more than sixty days confinement, and found in mitigation that the defendant "was suffering from a mental condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense." The court also found that the factor in aggravation outweighed that in mitigation and sentenced the defendant to the maximum sentence allowed by law for the Class H felony of larceny from the person. The defendant contends that because the evidence showed that he was intoxicated at the time of the offense, the court should have found as a separate mitigating factor that he "was suffering from a physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense." We disagree.

Intoxication is not enumerated as a separate mitigating factor under the provisions of G.S. 15A-1340.4(a)(2). However, we have held that intoxication of a defendant may be appropriately considered in mitigation under the statutory mitigating factor contained in G.S. 15A-1340.4(a)(2)d: "The defendant was suffering

from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense." *State v. Potts*, 65 N.C. App. 101, 308 S.E. 2d 754 (1983), *disc. rev. denied*, 311 N.C. 406, 319 S.E. 2d 278 (1984).

Alcohol intoxication, or drunkenness, exists when there is a material impairment of mental or physical faculties, or both, induced by excessive consumption of alcohol. *See* Black's Law Dictionary, Fifth Edition (1979). Thus, intoxication may constitute a mental condition or a physical condition. The mitigating effect, if any, of intoxication upon an offender's culpability will depend upon the circumstances of each case.

In the case *sub judice*, defendant relied upon the defense of intoxication to negate the element of intent essential to conviction of the offense. Intent is a mental emotion or attitude. *State v. Arnold*, 264 N.C. 348, 141 S.E. 2d 473 (1965). The jury determined the impairment of the defendant's mental faculties by alcohol insufficient to constitute a defense to the element of intent. However, as is evidenced by the finding in mitigation, the court considered the intoxication as a mental condition reducing defendant's culpability.

To the extent that defendant's physical faculties were also impaired by excessive consumption of alcohol, constituting the physical condition of intoxication, defendant has failed to establish any link between his physical impairment and his culpability for stealing the taxi. The burden of proving that the condition reduced his culpability for the offense is upon defendant. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). Evidence that the condition exists, without more, does not mandate its consideration as a mitigating factor. *State v. Salters*, 65 N.C. App. 31, 308 S.E. 2d 512 (1983), *disc. rev. denied*, 310 N.C. 479, 312 S.E. 2d 889 (1984). Thus, we hold that the trial judge was not required to consider the physical condition of intoxication as a mitigating factor in this case.

[6] In his brief, defendant contends that his intoxication gave rise to the additional mitigating factor set forth in G.S. 15A-1340.4(a)(2)e: "The defendant's immaturity or his limited mental capacity at the time of commission of the offense significantly reduced his culpability for the offense." The defendant did not take exception to, nor assign as error, the court's failure to make

this finding; thus he has failed to properly present this issue on appeal. N.C. Rules of Appellate Procedure, Rule 10(a). Nevertheless, we consider the argument and hold that intoxication does not support a finding of this mitigating factor. *See State v. Potts, supra.*

For the reasons stated, we hold that the defendant received a fair trial and sentencing hearing free from prejudicial error.

No error.

Judges WEBB and PHILLIPS concur.

VIRGINIA ELECTIC AND POWER COMPANY v. MARSHALL F. TILLETT, JR. AND WIFE, BLYTHE TILLETT

No. 841SC624

(Filed 19 March 1985)

Eminent Domain § 7— condemnation—action to quiet title heard by consent of parties—improper

Because of the fundamental procedural and substantive differences between civil actions to quiet title and special proceedings to condemn land, parties to a non-adversary condemnation proceeding cannot consent to settle incidental questions of title to land. A quiet title action is by definition an action between two adverse parties, while a condemnation proceeding is a proceeding *in rem* against the property; moreover, a separate procedure is specified by statute for actions by private condemnors, and neither the rules of civil procedure nor the statutes governing special proceedings apply unless specifically noted in the statute. G.S. 1A-1, Rule 15(b); G.S. 1-393; G.S. 40A-1.

APPEAL by respondents from *Watts, Judge.* Judgment entered 24 February 1984 in Superior Court, DARE County. Heard in the Court of Appeals 7 February 1985.

This appeal involves a condemnation proceeding in which petitioner Virginia Electric and Power Co. (VEPCO) seeks an easement for constructing its power lines over certain property in which respondents claim an ownership interest.

In May of 1982 VEPCO began constructing power lines over land that it allegedly had purchased from Estelle B. Tillett in

1981. Respondent objected to VEPCO's actions claiming that he and his immediate family owned part of the land, a 9.565 acre tract. VEPCO's title to the land in question purports to originate with a grant from the State of North Carolina issued in 1928. Respondents claim title to the land through a grant issued by the State in 1896.

VEPCO and respondent engaged in negotiations that resulted in an agreement whereby VEPCO was allowed to proceed with the construction of its power lines while the conflicting claims of ownership were to be settled in legal proceedings. This agreement was signed by Judge Allsbrook as a consent order. In addition to allowing VEPCO to enter on the land, the order contained the following language in one of its numbered provisions:

> The parties acknowledge without prejudice to Respondents' rights to contend otherwise that Petitioner claims fee simple title to all of the land within the boundaries of the 9.565 acre tract of land described in the aforesaid deed to Petitioner recorded in Deed Book 332, page 161, Dare County Registry, subject only to an undivided interest in a portion of said tract owned by the Respondent, Marshall F. Tillett, Jr., and that Petitioner claims said undivided interest to be less than six percent. The descriptive term "easement" applied to the strip of land upon which Petitioner intends to construct facilities shall not prejudice Petitioner's claim of title to all of said 9.565 acre tract subject only to such interest in such portion thereof as may be adjudged in this proceeding to be owned by Respondents.

The "proceeding" referred to in the consent order is the condemnation proceeding filed by VEPCO that is the subject of this appeal and to which the consent order was attached as an exhibit.

The condemnation proceeding was initiated on 20 July 1982 when VEPCO filed a petition in Dare County Superior Court. In the petition, the land sought to be condemned was described as follows:

> [A]n undivided interest owned by Marshall F. Tillett, Jr. in a portion of the 9.565 acre tract of land in Nags Head Township, Dare County. . . . [VEPCO] is informed, believes and alleges that Respondent Marshall F. Tillett, Jr. owns less

than a six per cent undivided interest in a portion of said tract, which portion [VEPCO] is unable to locate.

Included in the petition was the description of the tract as in the 1981 deed from Estelle B. Tillett to VEPCO. By stipulation of the parties in the record, it appears that, contemporaneous with the filing of the petition, a summons was issued and was duly served on respondents. On 29 July 1983, they responded to the petition.

That response describes the nature of the conflicting claims of title and may be summarized as follows:

In 1973, Marshall Tillett, Sr., one of respondent's predecessors in title, filed a boundary line proceeding. The respondents in that earlier action, one of whom was Estelle B. Tillett, denied title in Marshall Tillett, Sr., and filed a counterclaim in which they claimed title for themselves. The proceeding was thereby converted to an action to quiet title. A directed verdict was rendered against petitioner on the principal claim and respondents took a voluntary dismissal of the counterclaim. No appeal was taken. On 3 December 1981, VEPCO acquired from Estelle B. Tillett a deed purporting to convey fee simple title to land that includes the land involved in the 1973 action and to which respondents claim title.

In their response, respondents claim that by filing the petition in condemnation, VEPCO admits that respondents own an interest in the land to which VEPCO claims fee simple title by virtue of the 1981 deed from Estelle B. Tillett. In addition to the 6% interest said to have been admitted by VEPCO, respondents claim an additional 64% interest under a 1982 deed from Marshall F. Tillett, Sr., the petitioner in the 1973 action. Respondents claim that VEPCO's admission of only a 6% interest is based on its contention that respondents did not acquire an interest in the land from Marshall F. Tillett, Sr. Respondents assert that VEPCO, after admitting an ownership interest in respondents, is barred from attempting to assert a superior title to the same land.

In separate counterclaims, respondents claim (1) that the 1981 deed from Estelle B. Tillett to VEPCO that purported to convey a portion of the disputed tract constitutes a cloud on their title and

(2) that they have been damaged by VEPCO's unauthorized entry on their land.

VEPCO filed a responsive pleading in which it denied the material allegations of the response and further asserted that respondents were estopped from asserting any defense inconsistent with the terms of the consent order. Responding to the counterclaims, VEPCO contended that respondents were barred by *res judicata* and collateral estoppel from asserting claims to the disputed land based on any deed from Marshall F. Tillett, Sr. Specifically, VEPCO contended that the 1973 boundary dispute/quiet title action was decided in favor of Estelle B. Tillett, its grantor, and against Marshall F. Tillett, Sr., respondents' grantor, and that that 1973 action was conclusive as to the parties to the present action as to all claims that could have been asserted therein. VEPCO further contended that the consent order estopped respondent from making any claim for damages for trespass by VEPCO.

Thereafter, both parties moved for summary judgment and supported their motions with exhibits, affidavits and responses to discovery. On 28 February 1984, Judge Watts entered summary judgment for VEPCO, making the following pertinent findings of fact:

> Petitioner filed this proceeding pursuant to Chapter 40A of the General Statutes of North Carolina, alleging the right to acquire an easement of right-of-way over certain land in which respondents own an undetermined fractional interest, asking for injunctive relief, and invoking the statutory procedure for the determination of just compensation to which respondents may be entitled for the taking of any property interest of respondents. Simultaneously with the filing of the petition, a Consent Order was entered wherein it was ordered that respondents are enjoined from interfering with petitioner's personnel within the easement of right-of-way described in the petition and providing, further, that in this proceeding the Court would determine what interest respondents own in the 9.565 acre tract of land described in the petition, and providing, also, that commissioners would in due course be appointed to determine just compensation for such property interest of respondents as petitioner acquires as the

> result of this proceeding. By the terms of said Consent Order, as it is construed by this Court, the parties have consented to the Court's determining whether respondents own an interest in any part of the 9.565 acre tract of land described in the petition and, if so, the extent of that interest, and they have consented to a determination by commissioners, pursuant to statutory procedure, of just compensation to which respondents shall be entitled as a result of petitioner's acquiring, in this proceeding, any property interest owned by respondents in any portion of said 9.565 acre tract. The Court has found as a matter of law that respondents have no property interest in any part of said 9.565 acre tract of land and therefore they are not entitled to an award of compensation.

From the entry of judgment for VEPCO, respondents appealed.

Leroy, Wells, Shaw, Hornthal and Riley by Dewey W. Wells and Robert W. Bryant, Jr., for petitioner-appellee.

Shearin and Archbell, by Roy A. Archbell, Jr., for respondent-appellants.

EAGLES, Judge.

Respondents assign error to the entry of summary judgment for petitioners and state their first argument as follows: "Was the trial court precluded from ruling 'as a matter of law' that respondents had no interest in the *locus in quo* when petitioner had judicially admitted that respondents owned an undivided interest in the *locus*?"

This argument is based on the fact that VEPCO on several different occasions admitted that respondents owned some portion of the 9.565 acre tract of land over which VEPCO was seeking an easement by condemnation for the purpose of constructing its power lines. Though the extent of the respondents' interest is not clear, the admissions are uncontradicted matters of record. Citing authority, respondents argue that these admissions are binding on the court and preclude a finding that respondents have no interest in the subject property.

Respondents' second argument hints at a more fundamental error that, in our opinion, controls our disposition of the case. In

this argument, respondents contend that it was error for the court to determine the ownership of the subject property in the context of a condemnation proceeding. We agree with respondents and further hold that the condemnation action should have been dismissed.

This case began as a condemnation proceeding under G.S. Chapter 40A. The judgment from which appeal was taken held that title to the entire tract was in VEPCO, the petitioner-condemnor, and that respondents were owed nothing. How the court, with the apparent consent of the parties, reached the result that it did on the basis of the pleadings that were filed cannot be determined from the record and presents a situation for which our research reveals no precedent.

VEPCO contends that the issue of title to the land was tried by consent of the parties. As authority for this contention, it cites G.S. 1A-1, Rule 15(b), which provides, "when issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." VEPCO argues that the consent order signed by the parties and Judge Allsbrook constitutes express consent to convert the condemnation proceeding to an action to quiet title and that, since respondents offered evidence supporting their claims of title, the issue was tried in any event by implied consent.

The key fallacy in this argument is that the Rules of Civil Procedure do not apply to condemnation proceedings under G.S. Chapter 40A. Under our law, a condemnation proceeding is a "special proceeding." *Collins v. Highway Commission*, 237 N.C. 277, 74 S.E. 2d 709 (1953). Among non-criminal actions, this designation distinguishes condemnation proceedings from ordinary civil actions. *See* G.S. Sections 1-1 through 1-6. Some jurisdictions hold this to be a distinction without a difference. *See, e.g. Avalon East v. Monaghan*, 43 Misc. 2d 401, 251 N.Y.S. 2d 290 (1964) (New York Civil Practice Rules). Our Rules of Civil Procedure for the most part are copies of the corresponding federal rules. However, our Rule 1 differs from the federal rule in a way that is significant here. The federal rule reads in pertinent part:

> Scope of Rules
>
> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admirality.

28 USCA Rule 1 (Supp. 1984). The corresponding North Carolina rule reads in pertinent part:

> Scope of Rules
>
> These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute.

G.S. 1A-1, Rule 1. Even where an action is a special proceeding, the Rules of Civil Procedure are in many cases made applicable by G.S. 1-393, which provides, "The Rules of Civil Procedure and the provisions of this chapter on civil procedure are applicable to special proceedings, except as otherwise provided." Condemnation proceedings by the State, formerly special proceedings, *see Collins v. Highway Comm'n, supra,* have been held to be civil actions to which the Rules of Civil Procedure apply. *Board of Transportation v. Royster,* 40 N.C. App. 1, 251 S.E. 2d 921 (1979); Shuford, N.C. Civil Practice and Procedure, Section 1-5(k) (1981 and Supp. 1983). In actions by private condemnors, however, a separate procedure is specified and that procedure is the exclusive means by which private condemnors may condemn land. G.S. 40A-1. Unless specifically noted, neither the Rules of Civil Procedure nor the statutes governing special proceedings, G.S. 1-393 *et seq.*, apply. *E.g.*, G.S. 40A-22 (summons in condemnation proceedings served on parties as in other special proceedings). Pursuant to this procedure, condemnation proceedings are commenced differently from ordinary civil actions, different documents are required to be filed and served, and the filing deadlines are different. *Compare, e.g.*, G.S. 40A-22 (service of process at least 10 days prior to hearing by court) and G.S. 1A-1, Rule 4 (process must be served within 30 days of issuance of summons).

An action to quiet title is an ordinary civil action. G.S. 41-10. *See, e.g., Boyce v. McMahan,* 22 N.C. App. 254, 206 S.E. 2d 496, *aff'd,* 285 N.C. 730, 208 S.E. 2d 692 (1974). Since no separate procedure is specified, the Rules of Civil Procedure apply. G.S. 1A-1,

Rule 1. A quiet title action is by definition an action between two adverse parties. *Vandiford v. Vandiford*, 241 N.C. 42, 84 S.E. 2d 278 (1954). A condemnation proceeding, on the other hand, is a proceeding *in rem* against the property. *Redevelopment Comm'n v. Hagins*, 258 N.C. 220, 128 S.E. 2d 391 (1962).

We are aware that some special proceedings may be converted to civil actions where the parties by their pleadings raise questions which only a court of law may decide. There, G.S. 1-399 directs the clerk of court to transfer the cause to the civil issue docket for trial as in other civil actions. A pertinent example involves boundary dispute proceedings under G.S. Chapter 38 where a party puts the title to the disputed area in issue. The proceeding is converted to an action to quiet title under G.S. 41-10 and is transferred to the civil docket for trial before a judge. *E.g.*, *Simmons v. Lee*, 230 N.C. 216, 53 S.E. 2d 79 (1949). There is no similar statute for condemnation proceedings and G.S. 1-399 does not apply.

Because condemnation is a special proceeding, the Rules of Civil Procedure do not apply to allow issues outside the pleadings to be tried by consent of the parties. Though it is sometimes possible to convert special proceedings to civil actions, the situations where that is true are limited and are governed by statute. Our research has disclosed no statutory or procedural mechanism by which a condemnation proceeding under G.S. Chapter 40A may be converted to a civil action to quiet title. Nor have we found any precedent in case law. The question remaining is whether this conversion may be accomplished by consent of the parties.

Because of the fundamental procedural and substantive differences between civil actions to quiet title and special proceedings to condemn land, we do not think that parties to a non-adversary condemnation proceeding can consent to settle incidental questions of title to land. The nature of the issues raised simply will not admit of simultaneous resolution. Though we have found no controlling precedent, our reading of applicable statutes and case law supports this view.

It is clear that one cannot condemn that which he owns. Our Supreme Court in *VEPCO v. King*, 259 N.C. 219, 130 S.E. 2d 318 (1963) quoted as "a concise and accurate statement of the law" the following language from an Oklahoma case:

> The institution of the proceeding admits the ownership. The condemnor cannot claim the beneficial ownership of the land and at the time assert that the condemnee claims all or some part of that interest; the proceeding in condemnation cannot be employed as a means to quiet title; and the right to exercise the power of eminent domain is dependent entirely upon the ownership being in someone other than the condemnor; the power to condemn negatives ownership in the condemnor.

Id. at 221, 130 S.E. 2d at 320 *quoting Grand River Dam Authority v. Simpson*, 192 Okla. 338, 340, 136 P. 2d 879, 881 (1943) (citations omitted). Other North Carolina cases as well have held in effect that the only issue that may be determined in a condemnation proceeding is the value of the property interest taken. *E.g., City of Charlotte v. Spratt*, 263 N.C. 656, 140 S.E. 2d 341 (1965). Issues regarding title to the condemned land are collateral issues and are properly the subject of separate proceedings. *Barnes v. Highway Comm'n*, 257 N.C. 507, 126 S.E. 2d 732 (1962). Where conflicting claims of parties are not resolved prior to the condemnation, the law provides a method for determining the proper disposition of the funds paid by the condemnor. *VEPCO v. King, supra*; G.S. 40A-31. That statute does not encompass the situation where, as here, one of the conflicting claimants is the condemnor. *Id.*

That situation was presented in *In Re Simmons*, 5 N.C. App. 81, 167 S.E. 2d 857 (1969), though in a slightly different procedural context. There, the petitioner alleged ownership of a tract of land it sought to condemn. Claiming that petitioner sought not to condemn but to quiet title, the respondents moved to dismiss and the motion was granted. On appeal, this Court upheld the trial court's dismissal of the proceeding, saying that the "best interests of efficient judicial administration would not be served by determining the issue of damages prior to determining the issue of title." *Id.* at 87, 167 S.E. 2d at 861.

In our view, the primary difference between *Simmons* and the present case is that VEPCO here claims that the title issue in this case was tried by consent. Indeed, it appears from the pleadings and consent judgment that the parties tried to obtain judicial resolution of the value of the easement sought by VEPCO as well

as the extent of their ownership interests in the land over which the easement was to run. If the court's judgment had been more favorable to respondents, we doubt that this case would be here. For the reasons stated, a condemnation proceeding may not be converted to an action to quiet title even when the parties to the condemnation action stipulate that it may. Rather, where it appears that a condemnor claims an ownership interest in the property sought to be condemned, the appropriate action for the court would be to dismiss the condemnation proceeding without prejudice, permitting it to be reinstituted, if necessary, when the collateral issues regarding title to the land have been resolved, either by settlement or litigation.

Because the question of title to the disputed tract was never properly before the trial court, we do not consider whether its judgment on that question was correct. Because the other alleged errors assigned by respondents are not likely to occur in whatever subsequent proceedings are had, we do not consider them either. The judgment of the trial court is therefore vacated and the cause remanded with instructions that it be dismissed.

Vacated and remanded.

Judges ARNOLD and PARKER concur.

ROBERT B. HANNA v. CHARLES E. BRADY, E. A. GOODMAN, D/B/A LESSEES OF B. V. HEDRICK GRAVEL AND SAND COMPANY; AND CUMBERLAND SAND AND GRAVEL COMPANY

No. 8420SC306

(Filed 19 March 1985)

1. Rules of Civil Procedure § 59— new trial under Rule 59—discretion of court

A trial judge's discretionary order made pursuant to G.S. 1A-1, Rule 59 for or against a new trial may be reversed only when an abuse of discretion is clearly shown.

2. **Negligence § 27; Nuisance § 2— damages for blasting and nuisance—damages more than three years before complaint—new trial not warranted**

The trial court did not err in refusing to order a new trial of an action to recover damages caused by blasting and nuisance in the operation of a quarry on the ground that testimony was admitted as to damages occurring more than three years prior to the filing of the complaint where such testimony was not objected to at the trial, and any error in the admission of such testimony was cured when the trial judge stated four separate times in his instructions that any evidence of damages occurring more than three years before the date the complaint was filed was for background purposes only and not to be considered in the determination of damages.

3. **Damages § 17— voluntary nonsuit against one defendant—instructions as to damages**

The trial court did not err in failing to instruct the jury not to consider damages caused by a defendant against whom plaintiff took a voluntary dismissal where defendants did not submit proposed instructions on this point, and the court correctly instructed the jury as to what evidence it should consider in determining damages.

4. **Nuisance § 7; Trial § 52.1— nuisance award not excessive**

The trial court did not abuse its discretion in refusing to grant a new trial on the ground that the remitted award of $35,000 for nuisance in the operation of a quarry was excessive where plaintiff presented evidence that his property had a fair market value in 1978 of $20,000 and no value at the time of trial and that noise and dust from defendants' quarrying operation affected plaintiff's normal use of his property and his enjoyment of daily life.

5. **Appeal and Error § 50— instruction on punitive damages—failure to object to instructions**

The trial court did not abuse its discretion in refusing to award a new trial on the ground that the evidence did not support the court's instruction on punitive damages where counsel for defendants made no objection during the judge's charge to the jury, including those portions pertaining to punitive damages. App. Rule 10(b)(2).

6. **Trial § 52.1— excessive verdict—entering remittitur rather than awarding new trial**

The trial court did not abuse its discretion in entering a remittitur rather than awarding a new trial for excessive damages.

7. **Appeal and Error § 50— assignment of error to instructions—effect of failure to request or object to instructions**

Appellants failed to preserve any perceived error in the court's jury instructions for appellate review where the record does not show that counsel for appellants submitted any proposed special instructions in writing, and counsel for appellants did not object to the court's charge to the jury.

8. Appeal and Error § 49.1— failure of record to show excluded evidence

When an objection to a question is sustained, if the record fails to show what the witness would have answered, the propriety of the exclusion will not be reviewed on appeal.

APPEAL by defendants from *Tillery, Judge.* Judgment entered 21 October 1983 in Superior Court, ANSON County. Heard in the Court of Appeals 27 November 1984.

Henry T. Drake for plaintiff appellee.

Taylor and Bower, by H. P. Taylor, Jr., for defendant appellants.

BECTON, Judge.

I

Plaintiff filed suit on 11 May 1979 against B. V. Hedrick Gravel and Sand Company (Hedrick) alleging damages caused by the blasting and the nuisance created by the operation of a quarry located across the street from the plaintiff's residence. Plaintiff prayed for actual and punitive damages, and also for injunctive relief. On 19 August 1982, plaintiff amended his complaint to include the following party defendants: Charles E. Brady, E. A. Goodman, and Alan S. Johnson, Jr. (since deceased), lessees of Hedrick (lessees); Cumberland Sand & Gravel Company (Cumberland); and Dickerson, Inc. (Dickerson).

During trial, plaintiff settled with Dickerson and took a voluntary dismissal with prejudice against that defendant. At the close of the evidence, Hedrick's motion to dismiss was granted, leaving Cumberland and the lessees as party defendants. The jury returned an award of $3800 in damages against Cumberland for the blasting, $50,000 in compensatory damages against the lessees for the creation of a private nuisance, and $5000 in punitive damages against the lessees.

Defendants filed a motion for judgment notwithstanding the verdict and for a new trial. The plaintiff agreed to a remittitur of the nuisance award down to $35,000. The trial court entered a judgment denying the motions for a judgment notwithstanding the verdict and for a new trial; awarding the plaintiff $3800 in damages for the blasting, $35,000 in damages for the nuisance,

and $5000 in punitive damages; and entered an injunction and restraining order enjoining the operation of the quarry in certain respects. Defendants appeal, arguing that the court erred in denying their motion for a new trial, in entering a remittitur, in certain portions of its charge to the jury, and in failing to overrule an objection to a question posed to one of defendants' witnesses. We conclude that no prejudicial error was committed.

II

Factual Background

Plaintiff owns approximately one acre of land along a rural paved road in Anson County, upon which he constructed a residence in 1964. In 1968, B. V. Hedrick Gravel and Sand Company purchased a 30-acre tract of land across the street from plaintiff's property, and leased this property to the lessees, who are the husbands of Hedrick's stockholders. The lessees thereupon began a quarrying operation, specifically, mining gravel and sand, which entailed the blasting, crushing, loading and hauling of rock. Lessees hired Cumberland to do the blasting, which took place on numerous occasions since the quarry began operating in 1968. Lessees also entered into a lease with Dickerson on 30 November 1977, which instrument assigned certain stockpiled stone to Dickerson, in order that Dickerson could remove the stone during the three-year term of the lease.

Plaintiff's evidence, largely presented through the testimony of plaintiff himself and corroborated by other witnesses, tended to show that blasting explosions in 1979, 1980, and 1981 damaged his house, and that the crushing, loading and hauling of rock during 1980 and 1981 went on as long as 18 to 19 hours a day, sometimes as late as eleven o'clock at night. Plaintiff's evidence also tended to show that the two most severe problems caused by the quarrying operation were noise and dust. Plaintiff testified that the level of noise, in part caused by the crushing of stone and "beepers" on the trucks, interfered with his enjoyment of a normal home life, namely, that he was either unable, or barely able, to carry on a conversation, speak over the telephone, or listen to television or radio. He testified that the dust pervaded his house: it settled on the furniture; it made the food served on the table inedible; it caused the air conditioner to malfunction; it

forced him to replace clogged appliances; and it made breathing difficult and unpleasant. He testified that he only saw a wetting device used on Hedrick's property once. Besides the noise and dust, plaintiff stated that lights from the trucks flashed into the house at night, and that loose rock was thrown into his yard from the trucks.

Defendants did not deny the existence of a quarrying operation; rather, their evidence was designed to demonstrate that the noise and dust levels were moderate and in accordance with applicable government standards—in essence, that no nuisance was ever created. Defendants presented evidence that applicable regulations were followed in blasting and that notice had been given to the adjoining property owner; that noises were muffled by the blast; that spotters monitored flying rocks; that water sprayers were used to minimize the dust; that they had never been cited by any governmental agency for excessive dust; and that noise levels did not exceed the federal maximum.

III

Appellants first argue that the trial court erred in denying their motion for a new trial on the grounds that the evidence was insufficient to justify the verdict, N.C. Gen. Stat. Sec. 1A-1, Rule 59(a)(7) (1984), and that the damages were excessive and appeared to have been given under the influence of passion or prejudice. G.S. Sec. 1A-1, Rule 59(a)(6) (1984).

[1] A trial judge's discretionary order made pursuant to Rule 59 for or against a new trial may be reversed only when an abuse of discretion is clearly shown. *Worthington v. Bynum,* 305 N.C. 478, 290 S.E. 2d 599 (1982). *Accord Setzer v. Dunlap,* 23 N.C. App. 362, 208 S.E. 2d 710 (1974) (judge's discretionary order will not be overruled except "in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited."). With reference to Rule 59(a)(6), the Supreme Court in *Worthington* expressly rejected any attempt to formulate a more precise test for defining what constitutes a reversible abuse of discretion, stating that an order made under the discretionary power of Rule 59 shall stand unless the reviewing court "is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." 305 N.C. at 487, 290 S.E. 2d at 605. The manifest abuse of discretion standard has also been ex-

pressly applied to orders made pursuant to Rule 59(a)(7). *See Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977).

[2] Appellants make four specific contentions under the general argument that their motion for a new trial was erroneously denied. The first of these is that the trial court allowed testimony as to damages occurring as far back as 1968, when pursuant to the applicable statute of limitations, only evidence of damages since 19 August 1979, three years prior to the filing of the amended complaint, should have been admitted. (In some places in the record and transcript, 12 August is inadvertently used instead of 19 August.) This contention is without merit. First, much of this contested testimony was never objected to during trial and thus is not subject to appellate review. Second, the trial judge stated at least four separate times in his jury instructions that any evidence of damages occurring before August 1979 was for background purposes only and not to be considered by the jurors in their determination of damages, thus curing any error in the admission of the testimony.

[3] Appellants next argue that a new trial should have been awarded because the trial court failed to instruct the jury that they should not consider damages caused by Dickerson, against whom plaintiff took a voluntary dismissal, and that the award of damages was consequently excessive, based in part as it was upon Dickerson's conduct. We fail to find support in the record for appellants' contention. First, appellants did not submit proposed jury instructions on this point, as required by Rule 51(b) of our Rules of Civil Procedure. Additionally, the trial court correctly instructed the jury as to what evidence they should consider in determining damages. It was therefore implicit in those instructions that any evidence that did not fit the trial court's definition of damages was to be disregarded on that issue.

[4] Appellants' key contention under its argument that a new trial should have been awarded is that the trial court abused its discretion in allowing the remitted award of $35,000 in damages caused by the stone crushing or crushed stone delivery operation. Appellants argue that the evidence adduced at trial demonstrated conclusively only "a minimum" of any such damage between 19 August 1979 and the date of trial.

North Carolina recognizes the recovery of damages for a nuisance. *Pernell v. City of Henderson,* 220 N.C. 79, 16 S.E. 2d 449 (1941). To recover such damages, however, the injury suffered by plaintiff must be "substantial." *Midgett v. State Highway Comm'n,* 265 N.C. 373, 144 S.E. 2d 121 (1965). *See Burris v. Creech,* 220 N.C. 302, 17 S.E. 2d 123 (1941) (no damages recoverable for defendant's erection of spite fence when no evidence that plaintiff had suffered any pecuniary loss or personal discomfort).

The plaintiff's evidence tended to show *inter alia,* that in 1978, his property had a fair market value of $20,000, while at the time of trial it had no value. Plaintiff also put on detailed and ample evidence tending to show that the noise and dust from the quarrying operation affected plaintiff's normal use of his property and his enjoyment of daily life. Upon reviewing the evidence, we cannot say that the trial court's refusal to grant a new trial and its decision to let the $35,000 award stand constituted a reversible abuse of discretion. The type of injuries suffered by the plaintiff—physical pain, annoyance, stress, deprivation of the use and comforts of one's home—are intrinsically "not susceptible of exact pecuniary calculation." *Krulikowski v. Polycast Corp.,* 153 Conn. 661, 220 A. 2d 444 (1966). The determination of such damages is left to the sound judgment and discretion of the trier of fact. *See Krulikowski; Wheat v. Freeman Coal Mining Corp.,* 23 Ill. App. 3d 14, 319 N.E. 2d 290 (1974); *Alonso v. Hills,* 95 Cal. App. 2d 778, 214 P. 2d 50 (1950) (amount of recovery in these matters discretionary, no necessity of specific evidence as to such amount).

Furthermore, as one court stated in analyzing the identical issues of the trial court's refusal to grant a new trial in a nuisance case on the grounds that the verdict was unsupported by the evidence, and so excessive as to reveal bias and prejudice:

> 'When a case comes before . . . [an appellate] court, after the refusal of a new trial by the presiding judge, it comes not only with the presumption in favor of the verdict, but also stamped with the approval of the judge who tried the case . . . .'

Shepherd Constr. Co. v. Vaughn, 88 Ga. App. 285, 294, 76 S.E. 2d 647, 653 (1953) (quoting *Atlantic Greyhound Corp. v. Austin,* 72 Ga. App. 289, 292, 33 S.E. 2d 718, 720-1 (1945)). We are satisfied that the trial court's decision to let the award of $35,000 stand did

not constitute such a manifest abuse of discretion so as to result in a miscarriage of justice.

[5] Appellants' final contention is that it was an abuse of discretion to refuse to award a new trial on the grounds that no evidence substantiated plaintiff's claim for punitive damages, and it was therefore prejudicial error to submit this issue to the jury. Counsel for appellants made no objection whatsoever during the judge's charge to the jury, including those portions pertaining to punitive damages. Rule 10(b)(2) of our Rules of Appellate Procedure requires counsel to lodge an objection to jury instructions before the jury retires, or otherwise waive the right to assign error thereto on appeal. We do not feel that a motion for a new trial made under Rule 59 is intended to serve as a substitute for the obligation of counsel to timely object to the jury instructions. The obvious purpose behind the requirement of a timely objection is to avoid the need to completely retry a case when a judge could merely correct the instructions. Based on these considerations, it was not a reversible abuse of discretion for Judge Tillery to deny the motion for a new trial on that ground.

IV

[6] Appellants' next argument is that the trial court committed reversible error in entering a remittitur rather than awarding a new trial, as even the reduced sum substantially exceeded the amount of damages supported by competent evidence. We have already shown that the amount of damages was substantiated by competent evidence, and that therefore it was not an abuse of discretion on the part of the trial judge to refuse to order a new trial. At this point, appellants have no legal basis on which to object to the remittitur. *See Redev. Comm'n of the City of Durham v. Holman*, 30 N.C. App. 395, 226 S.E. 2d 848, *disc. rev. denied*, 290 N.C. 778, 229 S.E. 2d 33 (1976). In that case, the trial court allowed respondents' motion for a remittitur and refused petitioners' motion for a new trial. This Court affirmed the judgment appealed from, reasoning

> that while the verdict in the instant case exceeded competent evidence, the judgment is based on competent evidence. The voluntary reduction of respondents' recoveries as established by the judgment was not prejudicial to petitioners.

Id. at 397, 226 S.E. 2d at 850. The situation before us is virtually identical to that in *Holman.* We overrule this assignment of error.

V

[7] Appellants next make a constellation of arguments all directed at allegedly prejudicial errors contained in Judge Tillery's charge to the jury: namely, that it was error to fail to instruct the jury that plaintiff had the burden of proof on compensatory damages; that it was error to instruct the jury on punitive damages; that it was error to fail to explain to the jury that any acts committed by Dickerson would not be a basis for punitive damages against the remaining defendants; and that it was error to fail to specify which actions would constitute the basis for an award of punitive damages against a particular defendant.

Rule 51(b) of our Rules of Civil Procedure provides that requests for special instructions must be "in writing, entitled in the cause, and signed by the counsel or party submitting them," otherwise counsel is not entitled to object to the judge's failure to so charge the jury. *See 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) (failure to object to form of issue when submitted constitutes waiver of right to challenge its form).

Rule 10(b)(2) of the Rules of Appellate Procedure states that:

> No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury . . . .

See Rule 10(a) (scope of review limited to properly taken exceptions made the basis of assignments of error). The purpose of Rule 10(b)(2) is to encourage the parties to inform the court of errors in its instructions so that the court can correct the instruction and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial. *State v. Odom,* 307 N.C. 655, 300 S.E. 2d 375 (1983); *see State v. Fennell,* 307 N.C. 258, 297 S.E. 2d 393 (1982) (Rule 10(b)(2) is mandatory). *See also State v. Smith,* 311 N.C. 287, 316 S.E. 2d 73 (1984) (if written request for particular instructions submitted before jury

argument and trial court denies it, no need to repeat objection to preserve exception for appellate review).

In the case before us, the record does not show that counsel for appellants submitted any proposed special instructions in writing. Counsel also did not object to the court's charge to the jury. At the end of his charge, Judge Tillery called counsel for both parties to the bench. The substance of this conference is not contained in the record, but immediately thereafter, Judge Tillery clarified a point of law concerning trespass for the jury. Appellants have failed to preserve any perceived error in the court's jury instructions for appellate review. We thus overrule any assignments of error based upon the jury instructions.

VI

[8] Finally, appellants contend that the court erred in sustaining an objection to a question put to one of appellants' witnesses whether he "would have ignored" any complaint made by plaintiff. When an objection to a question is sustained, if the record fails to show what the witness would have answered, the propriety of the exclusion will not be reviewed on appeal. *E.g., Hyde County Bd. of Educ. v. Mann,* 250 N.C. 493, 109 S.E. 2d 175 (1959). This assignment of error is also without merit, and we overrule it.

VII

In the trial below, we find

No error.

Judges ARNOLD and WELLS concur.

HOMER JEFFERSON SIZEMORE v. JEFFREY EUGENE RAXTER AND DILLARD EUGENE RAXTER

No. 8327SC1197

(Filed 19 March 1985)

1. **Automobiles and Other Vehicles § 83.2— traffic director struck by car—not contributorily negligent as matter of law**

In a personal injury action by a plaintiff who was directing traffic in a Runathon when he was struck by defendant's automobile, the trial court did not err in denying defendant's motion for a directed verdict based on contributory negligence where plaintiff was an experienced traffic director especially trained by law enforcement agencies, was directing traffic on this occasion with the knowledge of law enforcement personnel, was responsible for directing traffic from an outside to an inside lane and for keeping runners in the outside lane, was directing his attention toward the runners at the time the accident happened, had parked his van in the roadway and had placed pylons to direct traffic to the inside lane, and had turned on four-way flashers and a red rotating light on the dashboard.

2. **Automobiles and Other Vehicles § 89.1— traffic director struck by car—last clear chance properly submitted to jury**

In a personal injury action by a plaintiff who was struck by an automobile while directing traffic at a Runathon, the court did not err by submitting the issue of last clear chance to the jury where the accident happened in broad daylight on a clear day; plaintiff's attention was on the runners with his back to the traffic; plaintiff was not aware of defendant's vehicle until he heard it strike two pylons; plaintiff then turned, saw defendant's vehicle, and tried to jump out of the way; defendant could see the van behind which plaintiff was standing 400 yards ahead and merged into the left lane 100 feet in front of the van; there was nothing to prevent defendant from remaining in the left-hand lane; and there was nothing to prevent defendant from seeing plaintiff prior to the first time he saw him.

3. **Automobiles and Other Vehicles § 45.6— traffic director struck by car—photographs of scene properly admitted**

In a personal injury action by a plaintiff who was struck by a car while directing traffic at a Runathon, the court did not err by admitting photographs of the scene taken more than two years after the accident. Plaintiff testified that the photographs were a fair and accurate portrayal of the intersection at the time of the accident, the photographs were received for illustrative purposes only, and defendant did not object to the photographer's testimony as to the distances from which the pictures were taken.

Judge WEBB dissenting.

APPEAL by defendant from *Sitton, Judge.* Judgment entered 28 July 1983 in Superior Court, GASTON County. Heard in the Court of Appeals 30 August 1984.

This is an action for personal injury by the plaintiff who was struck by an automobile driven by the defendant Jeffrey Eugene Raxter. It has previously been in this Court. *See Sizemore v. Raxter*, 58 N.C. App. 236, 293 S.E. 2d 294, *disc. rev. denied*, 306 N.C. 744, 295 S.E. 2d 480 (1982).

On 4 May 1980, a Runathon participated in by about 100 runners was conducted over various public roads and streets in the City of Gastonia. The run, for the benefit of the cerebral palsy fund, was supported by a number of public service organizations and was authorized by city officials. Though the police were briefed in regard to the run, the route was laid out and traffic over it was directed and controlled by plaintiff and other members of the North Carolina Road Rangers, Inc., a club formed to render emergency aid to people in distress on the highway, to assist in conducting parades, runathons, bikeathons, and similar activities. The run, several miles long, started and ended at Ashbrook School, situated on South New Hope Road. In returning to the school, runners ran westward on Titman Road until that road dead ends into South New Hope Road, and then ran northward on South New Hope Road back to the place of beginning. At the place where Titman Road runs into the east side of South New Hope Road, forming a T intersection, South New Hope Road has five lanes, two for southbound traffic, two for northbound traffic, and a turn lane in the center. At the time pertinent to this case plaintiff was directing runathon traffic at this intersection. He arrived there at approximately 3 o'clock that afternoon and parked his van facing south in the northbound curb lane of the New Hope Road. The van was parked from 15 to 20 feet south of the intersection with the two left wheels off the outside northbound traffic lane. The plaintiff placed six pylons, 2½ feet in height, in positions to funnel traffic around the van and into the inside lane of South New Hope Road. The four-way flashers on the van were in operation and a revolving red light was on the dashboard.

The plaintiff positioned himself behind the van in the northbound outside lane of South New Hope Road in order to direct

runners approaching on Titman Road into the northbound lane of South New Hope Road. Some time after the plaintiff had been at the intersection, Jeffrey Eugene Raxter was driving an automobile in a northerly direction on South New Hope Road. As he approached the intersection, he saw the van and slowed down approximately 100 feet from it and moved to the inside lane. He testified that as he passed the van he "started to change lanes, because he saw a car in his rear view mirror coming up behind him pretty fast."

The plaintiff was watching runners approaching the intersection on Titman Road. He did not hear a horn or brakes. He heard the automobile hit a pylon and turned to see the vehicle eight or ten feet from him. He was unable to leave the road in time to avoid the collision. Jeffrey Raxter testified that he did not see the plaintiff until he was 30 feet from him traveling at 30 miles per hour. He applied his brakes but was unable to avoid the accident.

There was some dispute as to where the plaintiff was located at the time the defendant first saw him. The plaintiff testified he was three or four feet from the curb. Jeffrey Raxter testified the plaintiff was five or ten feet from the curb.

The Court submitted to the jury issues as to negligence, contributory negligence and last clear chance. The jury answered "yes" to both negligence issues. It answered the last clear chance issue favorably for the plaintiff and awarded damages. The defendants appealed.

Joseph B. Roberts, III, P.A., by Joseph B. Roberts, III, for plaintiff appellee.

George C. Collie and Charles M. Welling, for defendant appellants.

JOHNSON, Judge.

The issues on this appeal concern (1) the denial of defendant's motion for directed verdict made on the grounds that plaintiff was contributorily negligent as a matter of law; (2) the submission of the issue of last clear chance to the jury; (3) the court's instructions on last clear chance; and (4) the admission of certain photographs into evidence. For the following reasons, we find no error and affirm the judgment of the trial court.

[1] The first issue is whether the court erred in denying defendants' motions for directed verdict. Defendants contend that the evidence showed plaintiff was contributorily negligent as a matter of law because (1) he parked the van in the roadway in violation of G.S. 20-161(a) and 20-162(b), (2) he stood in the roadway in violation of G.S. 20-174.1, and (3) he failed to keep a proper lookout for approaching vehicular traffic on South New Hope Road.

Defendants, however, ignore the special rules of law concerning road workers outlined by the Supreme Court in *Kellogg v. Thomas*, 244 N.C. 722, 94 S.E. 2d 903 (1956). The court stated in *Kellogg v. Thomas, supra* that such a worker

> . . . cannot utterly disregard the matter of his own safety. However, he occupies a different status from an ordinary pedestrian crossing a street, and this status must be considered in determining the degree of care he must exercise for his own safety, and in determining the question of contributory negligence. Because he is not required to neglect his work to escape collision with motorists not exercising reasonable care for his safety, or not obeying statutes regulating in the interests of public safety the operation of motor vehicles, he is not obliged to keep a constant lookout for approaching vehicles, and his failure to do so, does not necessarily constitute contributory negligence as a matter of law. Whether such a worker has exercised reasonable care for his own safety in view of his work and surrounding circumstances is ordinarily for the jury under proper instructions from the court. (Citations omitted.)

244 N.C. at 729, 94 S.E. 2d at 908-909. This rule was subsequently applied to those directing traffic in *Gathings v. Sehorn*, 255 N.C. 503, 121 S.E. 2d 873 (1961). The evidence in the present case shows that plaintiff, who was an experienced traffic director specially trained to direct traffic by law enforcement agencies, was directing traffic on this occasion with the knowledge of law enforcement personnel. He was responsible for diverting traffic from the outside lane of South New Hope Road into the inside lane and for making sure that the runners turned north on South New Hope Road and remained on the outside curb lane of South New Hope Road. At the time the accident happened, his attention

was directed towards keeping the runners in the proper lane. He had parked the van in the roadway and placed pylons in the road to divert traffic into the inside lane of South New Hope Road. He had turned on a red rotating light mounted on the dashboard of the van and the van's four-way flashers. He was standing approximately 30 to 35 feet behind the van to the east of the pylons. Under these circumstances, we cannot say plaintiff was contributorily negligent as a matter of law.

[2] The next issue is whether the court erred in submitting the issue of last clear chance to the jury. In order to invoke the doctrine of last clear chance, and to recover despite his contributory negligence, an injured pedestrian struck by a vehicle must establish the following four elements:

> (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. [Citing 26 cases as authority.]

Clodfelter v. Carroll, 261 N.C. 630, 634-35, 135 S.E. 2d 636, 639 (1964). The "original negligence" of a defendant may be relied upon to activate the doctrine of last clear chance. *Exum v. Boyles*, 272 N.C. 567, 158 S.E. 2d 845 (1968). It depends upon the facts of the particular case whether an issue of last clear chance should be submitted to the jury. *Id.*

We now apply these principles to the evidence in this case. As mentioned earlier, plaintiff's attention was on the runners at the time of the accident, with his back to the traffic on South New Hope Road. Plaintiff testified that he was not aware of defendants' vehicle until he heard two pylons being struck. He then turned and saw defendants' vehicle coming at him. As he

jumped and twisted to avoid the vehicle, he was struck by it. The evidence thus supports a finding that plaintiff negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care.

The accident happened in broad daylight on a clear day. Defendant Jeffrey Raxter testified that he could see the van approximately 400 yards ahead. Plaintiff testified that the van was parked approximately 15 to 20 feet south of the intersection, with the wheels on the driver's side off the pavement and over the curb; that the van was six feet wide; and that he was standing in the intersection three to four feet away from the east curb of South New Hope Road. Jeffrey Raxter also testified that he was traveling approximately 35 miles per hour; that he merged into the left-hand inside lane approximately 100 feet in front of the van; that plaintiff was standing approximately 30 to 35 feet behind the van; that there was nothing to prevent him from remaining in the left-hand lane; and *that there was nothing to prevent him from seeing plaintiff prior to the time he first saw him.* From the foregoing evidence, the jury could find that Jeffrey Raxter knew, *or by the exercise of reasonable care could have discovered* plaintiff's perilous position and his incapacity to escape from it before the endangered plaintiff suffered injury at his hands; that Jeffrey Raxter had the time and means to avoid injury to the plaintiff by exercise of reasonable care after he discovered, *or should have discovered* plaintiff's perilous position and his incapacity to escape from it; and that Jeffrey Raxter negligently failed to use the available time and means to avoid injury to the plaintiff, as there was nothing to prevent him from remaining in the left lane of travel.

Defendants' reliance upon *Watson v. White*, 309 N.C. 498, 308 S.E. 2d 268 (1983), is misplaced. In that case, it was dark, and the earliest the defendant driver could have discovered the plaintiff was when, traveling 40 miles per hour exiting a curve, she was only 75 feet away from the pedestrian.

The third issue is whether the court properly instructed the jury on the doctrine of last clear chance. Defendants concede that the court properly instructed on the law of last clear chance but contend that the court failed to apply the law to the evidence. After a careful review of the charge in its entirety, we hold that

the court did indeed adequately apply the law to the evidence, and that defendants have failed to show prejudicial error. *See, Prevette v. Bullis*, 12 N.C. App. 552, 183 S.E. 2d 810 (1971).

[3] The remaining issue is whether the court erred in admitting into evidence certain photographs depicting the scene of the accident which were taken more than two years after the accident. Defendants contend that an insufficient foundation was laid for the admission of the photographs and that the photographs were improperly considered as substantive evidence. They also contend that the court erred in allowing the photographer to testify as to the distances from the intersection the photographs were snapped. These contentions have no merit. Plaintiff testified that the photographs were a fair and accurate portrayal of the intersection at the time of the accident. The court received the photographs into evidence for illustrative purposes only and instructed the jury that they were to consider the photographs only for the purpose of illustrating and explaining the plaintiff's testimony. *See Coach Co. v. Motor Lines*, 229 N.C. 650, 50 S.E. 2d 909 (1948). Defendants also failed to object to the photographer's testimony as to the distances from which the pictures were taken. Defendants have therefore failed to show prejudicial error.

For the foregoing reasons, we hold the court properly denied defendants' motion for a directed verdict, to set aside the verdict, for judgment notwithstanding the verdict and for a new trial.

No error.

Judge PHILLIPS concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. I believe it was error to submit the issue of last clear chance to the jury. The doctrine of last clear chance is based on the premise that although a plaintiff by his negligence contributes to his injury he should be allowed to recover if the defendant should reasonably avoid the injury after the plaintiff has been negligent. Justice Lake in *Exum v. Boyles*, 272 N.C. 567, 158 S.E. 2d 845 (1968) said, "It will be readily observed that the doc-

trine of last clear chance is not a single rule, but is a series of different rules applicable to different factual situations." I believe we have applied the wrong rule in this case.

The majority states as the first element of the rule it applies as "(1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care." That is not the situation in this case. The plaintiff could have escaped from his position of peril until a very short time before he was hit. He did not do so because he negligently failed to look. This case differs from *Exum* in that the plaintiff in that case was in a position of helpless peril from which he could not escape.

I believe the rule which should be properly applied to this case is stated in the Restatement of the Law Second, Torts 2d sec. 480 which says:

> A plaintiff who, by the exercise of reasonable vigilance could have observed the danger created by the defendant's negligence in time to have avoided harm therefrom, may recover if, but only if, the defendant
>
> (a) knew of the plaintiff's situation, and
>
> (b) realized or had reason to realize that the plaintiff was inattentive to the situation and therefore unlikely to discover his peril in time to avoid harm, and
>
> (c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff.

This rule that if the plaintiff could escape from the position of peril in which his negligence has placed him he may recover only if the defendant knew of his peril applies to the law that if both parties are at fault there may be no recovery. If the defendant discovers the plaintiff's peril in time to avoid the injury and does not do so he is again negligent and recovery should be allowed. In this case there is no evidence that the defendant discovered the plaintiff's peril in time to avoid the collision.

IN THE MATTER OF KATHRYN SUSAN CASTILLO, A MINOR CHILD

No. 8416DC706

(Filed 19 March 1985)

1. **Parent and Child § 1.6— termination of parental rights—consideration of prior adjudication of neglect—prior order finding child no longer neglected**

The trial court could properly consider a prior adjudication of neglect in ruling on a later petition to terminate parental rights on the ground of neglect even though the prior adjudication of neglect had been followed by an order adjudging the child to be no longer neglected. Furthermore, the order adjudging the child to no longer be neglected and returning custody to respondent did not terminate the actions so that the order of neglect could not be used to prove a fact in issue in a proceeding to terminate parental rights. G.S. 7A-664.

2. **Parent and Child § 1.6— termination of parental rights for neglect of child—sufficiency of evidence**

The evidence and findings supported the trial court's order terminating respondent's parental rights for neglect of her child in that she had failed to provide proper care for the child and had repeatedly placed the child in an environment injurious to her welfare.

APPEAL by respondent from *Gardner, Judge.* Order entered 10 February 1984 in District Court, SCOTLAND County. Heard in the Court of Appeals 14 February 1985.

This cause involves a proceeding to terminate parental rights of the respondent appellant, Rebekah Smith, in her minor child. The child's father, Jonathan R. Castillo, Jr., from whom respondent is divorced, has previously executed a release consenting to the placement of the child for adoption. A petition was filed on 30 August 1983 by the Scotland County Department of Social Services seeking the termination of the parental rights of the mother by reason of neglect. The guardian ad litem for the minor child filed a response joining in the petitioner's prayer for relief that parental rights be terminated. The respondent filed a response denying that she had neglected the child within the meaning of G.S. 7A-517(21) and seeking dismissal of the petition. A hearing was held on 19 and 20 December 1983 and an order entered on 10 February 1984 terminating parental rights of the respondent. Respondent appealed.

Johnston & McIlwain, P.A., by Edward H. Johnston, Jr., for petitioner appellee.

Jennings Graham King, for respondent appellant.

Etheridge, Moser and Garner, P.A., by Terry R. Garner, guardian ad litem for Kathryn Susan Castillo.

MARTIN, Judge.

The respondent assigns as error the trial court's determination that her parental rights should be terminated by reason of her neglect of her minor child. She contends that the trial court erred in admitting and considering evidence of a prior adjudication of neglect and that the evidence was insufficient to support the court's findings of fact and conclusions of law that the child was a neglected child within the meaning of G.S. 7A-517(21). We have carefully considered her contentions and find them to be without merit. We therefore affirm the order terminating her parental rights.

Evidence at the lengthy hearing before Judge Gardner revealed that the minor child, Kathryn Susan Castillo, was born 29 January 1978. Subsequently, respondent and the child's father separated and on 19 June 1979 the child's paternal grandfather filed a juvenile petition alleging that the child was neglected. On 10 August 1979 an order was entered in the District Court of Scotland County by Judge B. Craig Ellis adjudicating the child to be a neglected child. Judge Ellis found, inter alia, that the child was not properly cared for in that she was "dirty, nearly filthy, in wet diapers smelling of urine, improperly clothed in the wintertime . . . in her home which had no heat . . . . In addition to this she has not been fed regularly or properly and . . . has just generally been neglected." Judge Ellis further found that respondent and the child's father were separated, that the father had not provided the child with adequate food, care or support, that respondent admitted that she slept regularly with another male to whom she was not married in the house where she resided with the child, and that the mother had not properly fed or clothed the child. He concluded that the child was neglected and he placed her in the custody of the Scotland County Department of Social Services (hereinafter "DSS"). At a review hearing on 14 December 1979 Judge Ellis found that the respondent had been visiting the child and had made efforts to improve the condition and care

of the child. He continued custody in DSS but provided that the child could reside with respondent. Respondent moved to the state of Washington and remained there until July 1980, when she returned to Scotland County and married Thomas Smith. On 21 October 1980 Judge Ellis found that the respondent and Thomas Smith were providing a suitable home for the child, that she was being properly fed, clothed and cared for, and that she was no longer a neglected child. Custody was returned to the respondent.

Early in January 1981 respondent contacted DSS and reported that she and her new husband had separated because she was afraid that he would harm her or the minor child. She reunited with him three weeks later. In April 1981 respondent reported that Thomas Smith had abused the child and requested the assistance of DSS in getting away from him. A social worker observed a bruise on the child's cheek. Respondent took the child and went to Florida but returned in November 1981 and reunited again with Thomas Smith. The social worker referred respondent and her husband to mental health counseling but they failed to keep the appointment. On 12 January 1982, the social worker filed a petition alleging that the child was neglected due to the history of abuse by Thomas Smith and the failure of respondent and Mr. Smith to attend counseling. On 22 March 1980 Judge Ellis continued custody in the respondent on the condition that she and Mr. Smith submit themselves to the Mental Health Clinic for counseling. Shortly thereafter, Mr. Smith assaulted respondent again and respondent left home with the child and went to live with her former husband and his new wife. She returned to Mr. Smith, leaving the child with her former husband, the child's father. The case was returned to court for review on 6 May 1982 and Judge Ellis found that respondent had voluntarily placed the child with the father and that it would be dangerous for the child to live with respondent. He placed custody of the child in the father. Subsequently, due to marital friction between the child's father and his second wife, the father contacted DSS and placed the child in a boarding home. On 3 September 1982 Judge Ellis placed custody of the child in DSS.

The child remained in foster care until 20 May 1983, when DSS was authorized to permit the child to reside with respondent. This change was made upon findings that respondent had at-

tended mental health counseling, was making efforts to provide for the child, had become gainfully employed and that Mr. Smith was no longer a bad influence in the home due to his having received an active prison sentence.

In July 1983 the electricity to the rented mobile home, where respondent was living with the child and her current boyfriend, was disconnected due to nonpayment of the electricity bill. Respondent stopped paying rent and moved out of the mobile home, though she had no permanent housing arranged for herself or the child. She and the child resided for brief periods of time with various persons. Respondent's boyfriend, Mitchell Weatherford, spent the night with her on several occasions during this period. Weatherford also assaulted the respondent in the child's presence on one or more occasions. On the night of 17 August 1983, the minor child, respondent, Weatherford, and another adult male were found by a deputy sheriff sleeping on the floor of a trailer at an elementary school in Laurinburg. Respondent was arrested and the child was taken into protective custody by DSS and placed in foster care. At that time, the child had very little clothing, was dirty and had mosquito bites on her legs. The petition to terminate parental rights was filed shortly after respondent's arrest. At the time of the hearing in December 1983, respondent was residing with Weatherford, though she was not married to him.

Upon this evidence, Judge Gardner made extensive findings of fact which chronicled the minor child's history and the respondent's conduct from 1979 until the time of the hearing. In addition to his own findings made from the evidence and the court file, he adopted findings made by Judge Ellis in the initial order adjudicating the minor child to be neglected, in the 1980 order returning custody to respondent, and in the several review orders entered in this case between 1979 and 20 May 1983 when the minor child was last placed in respondent's care. More importantly, he made detailed findings as to the events which had occurred from 20 May 1983 until 30 August 1983 when the petition was filed. After doing so, Judge Gardner perceived a pattern of conduct which he described within the following order:

> 54. The Court finds that this matter, and the matter of the care, supervision, discipline and environment of Kathryn

Susan Castillo has repeatedly been brought before this Court, and the respondent has repeatedly assured the Court of her intention to be a responsible parent, and to properly care for the child.

55. That notwithstanding the repeated promises and assurances of the respondent, Rebecca Smith, she has neglected the child, and refused to properly care for the child. That, as noted by the guardian in this case, the Court notes a pattern on the part of the respondent to embark for a short period of time upon a course of responsible parenthood, after which she lapses into irresponsibility, by associating herself with males who have assaulted and abused her in the presence of her minor child, and other conduct detrimental to the child.

. . .

57. That, notwithstanding the fact that she was gainfully employed on a fulltime basis, in the summer of 1983, the respondent, in failing to maintain a home for the child failed in the economic aspect of parenthood, and failed to provide for the physical needs of the child. At the same time, she was residing with a man not her husband, and living openly with him, and the combination of failing to provide a permanent home for the child, and living with a man not her husband openly in the presence of the child is evidence of such clarity and degree that the Court can only conclude that the respondent's relationship with the child lacks the essential ingredients of love, affection, and parental regard that distinguish the relationship from and raise it above an economic transaction.

. . .

62. The Court further finds that it would be in the best interest of the aforesaid minor child for the parental rights of the respondent, Rebecca Smith, to be terminated, so that the said child may be placed eventually in a permanent home, where she can have a stable and permanent home environment, and where the said child can have the maximum opportunity to develop into a mature and responsible adult.

63. The Court further finds that, because of the respondent's history of irresponsibility, illicit relationships with men,

instability, and repeated moves from one place to another, it would be contrary to the child's best interest to ever return the said child to the custody of the respondent, and that to do so would be injurious to the said child.

Judge Gardner concluded that respondent had failed to provide proper care for the child, had repeatedly placed the child in an environment injurious to her welfare, and that, therefore, the child was a neglected juvenile as defined by G.S. 7A-517(21). Neglect being a statutory ground for termination of parental rights under G.S. 7A-289.32(2), Judge Gardner concluded that an order should be entered terminating the parental rights of the respondent with respect to the minor child.

[1] Respondent first contends that Judge Gardner erred in admitting into evidence the adjudication of neglect entered 10 August 1979 because the later order of 21 October 1980 returning custody to respondent (1) "cured" the earlier condition of neglect, and (2) rendered that evidence so remote as to be of no probative value. We do not agree.

The North Carolina Supreme Court has ruled that the trial court may consider a prior adjudication of neglect in ruling on a later petition to terminate parental rights on the ground of neglect. *In re Ballard*, 311 N.C. 708, 319 S.E. 2d 227 (1984); *In re Moore*, 306 N.C. 394, 293 S.E. 2d 127 (1982), *appeal dismissed*, 459 U.S. 1139, 103 S.Ct. 776, 74 L.Ed. 2d 987 (1983). The Court stated in *Ballard*, *supra* at 714, 319 S.E. 2d at 231-32; "Certainly, termination of parental rights for neglect may not be based solely on conditions which existed in the distant past but *no longer exist*." (emphasis supplied.) However, the Court went on to say that "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and *the probability of a repetition of neglect*." *Id.* at 715, 319 S.E. 2d at 232. (emphasis supplied.)

Although neither *Ballard* nor *Moore* involved the situation where, as here, a prior adjudication of neglect had been followed by an order adjudging the child to no longer be neglected, we believe that the rationale for the rules stated in those cases is applicable in the case *sub judice*. There was ample evidence that the minor child did not receive proper care and lived in an environment injurious to her welfare at the time of the original adjudica-

tion of neglect. The evidence also showed that after custody was removed from respondent, she made efforts to improve her ability to care for the child and to avoid the types of conduct which had led to her loss of custody. When custody was restored, her efforts ceased and she resumed her former lifestyle. This pattern of conduct was repeated by respondent after each loss of custody and after each order of the court permitting the child to reside with her. The evidence was sufficient to warrant the court's finding that the respondent ". . . has not provided a permanent and stable home environment for the . . . minor child," and its determination that the conditions which had existed in the past continued to exist and, in all probability, would be repeated in the future if parental rights were not terminated. Though the neglect found by the 1979 order was in remission when custody was returned in 1980, it had not been "cured" and its existence was highly probative on the issue of its recurrence. It is clear that Judge Gardner based his decision to terminate parental rights upon the best interests of the minor child and the fitness of the respondent to care for her at the time of the hearing, in light of all evidence of neglect and the probability of its repetition.

Respondent also contends that the 1980 order adjudging the child to no longer be neglected and returning custody to respondent terminated the action and rendered it a separate action so that the order of neglect could not be used to prove a fact in issue in the proceeding to terminate parental rights. We find no merit in this contention. G.S. 7A-664(c) provides:

> In any case where the judge finds the juvenile to be . . . neglected . . . the jurisdiction of the court to modify any order or disposition made in the case shall continue during the minority of the juvenile or until terminated by order of the court.

No order has been entered terminating the jurisdiction of the court over this proceeding.

[2] Finally, respondent contends that the findings of fact are insufficient to support the conclusion of law that the minor child is a neglected child as defined by the statute, and that the findings are not supported by clear, cogent and convincing evidence. We have examined the record and the transcript of the testimony. Each finding of fact is more than amply supported by clear,

cogent and convincing evidence; as to many facts the evidence was uncontradicted, others were admitted by respondent. These findings were sufficient to support the conclusion that the child was neglected.

We hold that the trial court complied with the statutory provisions with respect to termination of parental rights for neglect and properly found that respondent's parental rights should be terminated. The order appealed from is therefore

Affirmed.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. MICHAEL STREATH

No. 843SC375

(Filed 19 March 1985)

1. Criminal Law § 34.5; Rape and Allied Offenses § 4.1— prior sexual misconduct —admissible

In a prosecution for misdemeanor false imprisonment, indecent exposure, and assault on a female, two other incidents were sufficiently similar to be admitted where all three incidents occurred on commercial premises, particularly parking lots, in the same city and during business hours; each woman was accosted by defendant as she was entering her car; both other witnesses reported seeing defendant at other times cruising around the parking lot and sitting in his car with no apparent business; and all three positively identified defendant's car and defendant as the driver.

2. Criminal Law § 34.8— evidence of general criminal plan—admissible

In a prosecution for misdemeanor false imprisonment, indecent exposure, and assault on a female where defendant had offered the victim a ride after her car would not start, the trial court did not err by admitting the testimony of a service station attendant that a tire presented to him for repair had no leaks and that the air could easily be let out of a tire. There had been earlier testimony of a similar incident in which defendant had stopped a woman about to drive away and told her that she had a flat tire; the service station attendant's testimony was relevant to show defendant's general criminal plan to get women into his car. Moreover, the motion to strike came long after the alleged irrelevancy became apparent.

3. False Imprisonment § 2.1; Obscenity § 5— evidence sufficient

The evidence was sufficient to take the charges of false imprisonment and indecent exposure to the jury where the prosecuting witness testified that de-

fendant put his arm around her and threatened to kill her if she screamed, and that she definitely saw his private parts, despite other testimony that she had closed her eyes at one point. Defendant's placing of the witness's hand on his bare privates necessarily involved exposure, and the open parking lot of a business is obviously a public place. G.S. 14-190.9.

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. Opinion filed by this court 5 February 1985, dismissing the appeal for failure to show derivative jurisdiction of the superior court, was vacated and remanded by the Supreme Court of North Carolina for determination on the merits by order entered 25 February 1985. Our prior opinion is accordingly withdrawn and we now consider this appeal on its merits.

Defendant appealed from misdemeanor convictions for false imprisonment, indecent exposure, and assault on a female. The evidence for the state tended to show that on the afternoon of 15 August 1982, the prosecuting witness had been shopping at a department store. She got into her car to go home, but her car would not start. Defendant offered her a ride home, and she accepted. Instead of taking her home, defendant drove to another business parking lot. There he stopped his car, and slid over to the prosecuting witness, placing his arm around her and locking the door. Defendant threatened to kill her if she screamed. Defendant fondled and kissed the prosecuting witness, then pulled out his penis and placed her hand on it. She did not consent to these actions.

The state also presented evidence of incidents involving defendant and two other women. All three identified defendant in court; corroborative identification testimony was presented by police officers.

Defendant testified and denied committing the crimes, stating he had been at home all afternoon on 15 August 1982; his wife corroborated this testimony. He presented evidence of his good character, as well as evidence of reform from alcoholism.

The jury returned verdicts of guilty, and defendant received sentences totaling four years, six months active imprisonment, the remainder suspended with certain conditions of probation. Defendant 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.

[1] In his first two assignments of error, defendant challenges the admission of the testimony of the two other women concerning incidents involving defendant. At trial and on appeal, both sides argue the applicability of the rules governing the admission of evidence of other crimes, as set out by Justice Ervin in the landmark case of *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). We are not certain that the incidents at issue here involved criminal conduct. *McClain* deals exclusively with the admissibility of other offenses; nevertheless, its principles apply to non-criminal, but socially unacceptable, conduct. *State v. Freeman*, 303 N.C. 299, 278 S.E. 2d 207 (1981). We therefore analyze these assignments in light of *McClain* and its progeny.

In *McClain* Justice Ervin enunciated 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." *Id.*

> The general rule rests on these cogent reasons: (1) "Logically, the commission of an independent offense is not proof in itself of the commission of another crime." . . . (2) Evidence of the commission by the accused of crimes unconnected with that for which he is being tried, *when offered by the State in chief*, violates the rule which forbids the State initially to attack the character of the accused, and also the rule that bad character may not be proved by particular acts, and is, therefore, inadmissible for that purpose. . . . (3) "Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence." . . . (4) "Furthermore, it is clear that evidence of other crimes compels the defendant *to meet charges of which the indictment gives him no information*,

> confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the charge immediately before it. The rule may be said to be an application of the principle that the evidence must be confined to the point in issue in the case on trial." . . .

Id. (Citations omitted) (emphasis added). Because of these highly prejudicial tendencies, the general rule excluding this evidence should be "strictly enforced," and evidence subjected to "rigid scrutiny" before admission. *Id.*

The general rule is subject to exceptions, however; those applicable here are as follows:

> . . .
>
> 4. Where the accused *is not definitely identified* as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged. . . .
>
> . . .
>
> 6. Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. . . . Evidence of other crimes receivable under this exception is ordinarily admissible under the other exceptions which sanction the use of such evidence to show criminal intent, guilty knowledge, or identity.

Id. (Citations omitted) (emphasis added). As suggested above, the practical difference between the identity and common plan exceptions is small, such that they are frequently used almost interchangeably. *See State v. Hyman*, 312 N.C. 601, 324 S.E. 2d 264 (1985); *State v. Grace*, 287 N.C. 243, 213 S.E. 2d 717 (1975); *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974).

We read the language of identity exception, that makes it applicable *only* where the accused is not definitely identified, in conjunction with the danger (as recognized by Justice Ervin) of al-

lowing the state to introduce highly prejudicial character evidence, with tendency to surprise, in its case in chief, as suggesting that such evidence should *only* be allowed in as rebuttal evidence. Thus, unless the defendant presents alibi evidence, evidence of other crimes to show identity, either directly or indirectly (common plan), should not be admitted under *McClain*. In *State v. Thomas*, 310 N.C. 369, 312 S.E. 2d 458 (1984), the court stated that the identity of the defendant *must* be at issue in the case before other crimes evidence may be used to show identity, tending to support our reading. *See also State v. Moore*, 309 N.C. 102, 305 S.E. 2d 542 (1983) (properly presented "on rebuttal").

Nevertheless, the cases have overlooked this feature of *McClain*. Without inquiry as to actual relevance *at the time presented* to rebut alibi evidence, the supreme court has routinely approved evidence of other misconduct in the state's case in chief. *See, e.g., State v. Thomas, supra* (case in chief; after voir dire on identification); *State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981) (in chief; identification uncontroverted unless in unreported opening arguments), *cert. denied*, 456 U.S. 932 (1982); *State v. Bishop*, 293 N.C. 84, 235 S.E. 2d 214 (1977) (similar to *Williams*). The broadest statement of the supreme court's position appears in *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839 (1969). There the court recognized the general rule that other crimes evidence merely showing bad character or criminal disposition may not be introduced against one who has not testified in his or her own behalf. Nevertheless, a plea of not guilty controverts every material allegation in the indictment, including the accused's identity as the perpetrator, and therefore the other crimes evidence was properly admitted, even though the defendant presented no evidence. *Id.*

The liberal application of the *McClain* exceptions tends to undermine the policy and usefulness of the general rule, and cast a heavy burden on the defense. *See State v. May*, 292 N.C. 644, 235 S.E. 2d 178 (Exum, J., dissenting), *cert. denied*, 434 U.S. 928 (1977); W. Geimer, *The Law of Homicide in North Carolina: Brand New Cart Before Tired Old Horse*, 19 Wake Forest L. Rev. 331, 359-63 (1983). We note that recent decisions of the supreme court have demonstrated willingness to undertake stricter enforcement of the general *McClain* rule. *See State v. Hyman, supra* (reciting policy of strict enforcement); *State v. Willis*, 309 N.C. 451, 306

S.E. 2d 779 (1983) (disapproving liberal admission in drug case); *State v. Moore, supra* (applying strict policy). However, no change has occurred in the operative framework of evidentiary rules applicable to this case. Therefore we must conclude that the state could properly present this evidence of other misconduct in its case in chief if it fit the *McClain* exceptions.

Evidence of other misconduct is admissible under the identity exception upon a showing of unusual facts present in both acts, or particularly similar acts which tend to show that the same person committed both. *State v. Thomas, supra; State v. Moore, supra.* Applying this test, in light of the facts in *Thomas* and *Moore*, we conclude that the incidents in question here are sufficiently similar that the evidence was properly admitted. All three incidents occurred on commercial premises, particularly parking lots, in the same city and during business hours. Each woman was accosted by defendant as she was entering her car. Both other witnesses reported seeing him at other times cruising around the parking lot and sitting in his car with no apparent business. All three positively identified his car and identified defendant as the driver. Therefore defendant's first two assignments must be overruled.

[2] Defendant also challenges the admission of testimony of a service station attendant. This evidence followed testimony of one of the other women that she got into her car and was about to drive away when defendant stopped her and told her she had a flat tire. The attendant testified that the woman later brought the tire to him for repair and he discovered no leaks, despite extensive experience in fixing tires. The attendant also described the ease with which air can be let out of a tire. This evidence was relevant, and thus properly admitted in the discretion of the court, to show defendant's general criminal plan to get women into his car. We note that defendant's motion to strike this testimony came long after the alleged irrelevancy became apparent, and the motion thus could properly be denied on that ground. *See State v. Lewis*, 281 N.C. 564, 189 S.E. 2d 216 (motion after intervening question too late), *cert. denied*, 409 U.S. 1046 (1972).

[3] Finally, defendant assigns error to the denial of various motions to dismiss and for mistrial. To the extent that these

assignments are based on the admission of evidence of other incidents, our previous discussion resolves them against defendant. On a motion to dismiss for insufficient evidence, the evidence must be considered in the light most favorable to the state, together with all favorable inferences; defendant's evidence is not considered unless favorable to the state. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). Applying this standard, we conclude that defendant's motions were properly denied.

Defendant contends that the false imprisonment charge should have been dismissed because of insufficient evidence of restraint against the will of the victim. It is not necessary that the state show actual force; threat or even fraud resulting in coerced consent may suffice. *State v. Ingland*, 278 N.C. 42, 178 S.E. 2d 577 (1971). The prosecuting witness testified that defendant put his arm around her and threatened to kill her if she screamed, and that she did not consent to his actions. This sufficed to take the case to the jury. The fact that she originally entered his car voluntarily does not affect our consideration; it is the coerced restraint against leaving that constitutes the criminal conduct. *Id.; see also State v. Wilson*, 73 N.C. App. 398, --- S.E. 2d --- (1985).

Defendant argues that the state did not present sufficient proof of indecent exposure. The elements of that offense are (1) willful exposure of private parts, (2) in a public place, (3) in the presence of at least one person of the opposite sex. N.C. Gen. Stat. § 14-190.9 (1981); *State v. Robert King*, 285 N.C. 305, 204 S.E. 2d 667 (1974). *State v. Charlie King*, 268 N.C. 711, 151 S.E. 2d 566 (1966) (per curiam). Defendant contends that the prosecuting witness admitted she had her eyes closed at one point, and therefore no willful exposure took place. The prosecuting witness testified elsewhere that she definitely saw his private parts, however. Defendant's placing of the witness' hand on his bare privates, whether seen or not, necessarily involved exposure. An open parking lot of a business, where these events occurred, is obviously a public place. Intentional exposure while sitting in an automobile in a public place constitutes exposure in a public place. *State v. Charlie King, supra.* At least one person of the opposite sex was present. This charge was therefore properly submitted to the jury.

Defendant received a fair trial, free of prejudicial error.

No error.

Judges ARNOLD and PARKER concur.

EMMA D. HOKE v. BRINLAW MANUFACTURING COMPANY AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 8427SC581

(Filed 19 March 1985)

1. **Master and Servant § 108— unemployment compensation—leaving work because of health problem**

Evidence of a health problem and of medical advice to leave work or change a job because of that problem is ordinarily sufficient to establish the existence of adequate health reasons for leaving the job.

2. **Master and Servant § 108— unemployment compensation—leaving job for health reasons—insufficient findings to support conclusion**

The Employment Security Commission's conclusion that claimant left work voluntarily without good cause attributable to her employer and was thus disqualified from receiving unemployment compensation benefits was unsupported by the findings where the evidence was insufficient to support findings as to whether claimant had received medical advice that her high blood pressure was aggravated by conditions on her job and that she should seek a change and as to whether claimant took the necessary minimal steps to preserve her employment, such as requesting a leave of absence. Therefore, the cause must be remanded to the Employment Security Commission for proper findings of fact.

3. **Master and Servant § 108— unemployment compensation—pro se claimant—failure of appeals referee to ask relevant questions**

It is inappropriate for the Employment Security Commission to disqualify a pro se claimant from receiving unemployment benefits because she failed to produce evidence of facts that case law from other states says she must establish when the appeals referee never asked her the relevant questions.

4. **Master and Servant § 108— unemployment compensation—leaving work for health reasons—reasonable person standard**

In unemployment compensation cases involving an involuntary leaving of work for health reasons, the claimant's actions should be assessed in light of the reasonable person standard.

APPEAL by claimant from *Gaines, Judge.* Judgment entered 12 April 1984 in Superior Court, GASTON County. Heard in the Court of Appeals 5 February 1985.

This is an appeal from an order affirming the Employment Security Commission's denial of claimant's claim for unemployment insurance benefits. The record discloses the following:

Claimant was employed by Brinlaw Manufacturing Company (Brinlaw) as a presser in April of 1981. In May of 1983, she left her job and, on 2 October 1983, filed a claim for unemployment insurance benefits. Her claim was denied by a claims adjudicator based on the adjudicator's determination that Ms. Hoke's stated reason for leaving work, high blood pressure, did not constitute good cause attributable to her employer. The adjudicator noted that claimant presented no evidence of medical advice to leave work. Claimant appealed.

After an evidentiary hearing attended only by claimant, an appeals referee found claimant disqualified from receiving benefits because she had not shown that her leaving was with good cause attributable to her employer. This determination was appealed to the Commission. Affirming the decision of the referee, the deputy commissioner made the following findings of fact:

> 2. The claimant quit this job because she felt that the heat and steam emitted by the machine she operated at work adversely affected her health. Claimant was employed as a presser. This job required her to work in close proximity to steamboards. Such boards emit a substantial amount of heat. Claimant felt the excessive heat made her faint and dizzy.
>
> 3. The claimant suffers from high blood pressure. She had consulted a physician concerning this condition, but apparently had not been advised as to any restrictions on her ability to work in her regular job.
>
> 4. The claimant made the employer aware that working near the steamboards caused her to feel ill. The claimant had asked to be transferred from first shift to second shift but her request was denied. The employer did not operate steamboards on the second shift. It is not known whether a leave of absence was available for the claimant, or whether one was requested.

5. When the claimant left the job, continuing work was available for the claimant there.

On appeal to the superior court, the Commission's decision was affirmed. Claimant appealed to this court.

Legal Services of Southern Piedmont, Inc. by Pamela A. Hunter, for claimant-appellant.

No counsel for appellee Brinlaw Manufacturing Company.

Donald R. Teeter for appellee Employment Security Commission.

EAGLES, Judge.

I

With respect to appeals from decisions of the Employment Security Commission, our law provides, "In any judicial proceeding under this section, the findings of the commission as to the facts, if there is evidence to support them and in the absence of fraud, shall be conclusive and the jurisdiction of said court shall be confined to questions of law." G.S. 96-15(i) (Cum. Supp. 1983). *Accord., In re Steelman*, 219 N.C. 306, 13 S.E. 2d 544 (1941); *In re Huggins v. Precision Concrete Forming*, 70 N.C. App. 571, 320 S.E. 2d 416 (1984).

Claimant's first three assignments of error raise the question of whether the superior court correctly concluded that the evidence of record here supports the Commission's findings of fact and whether the findings support the conclusions of law and the Commission's decision that claimant is disqualified from receiving unemployment insurance benefits. Claimant contends that the evidence does not support certain of the Commission's findings and that the findings do not support the legal conclusions. We agree.

Claimant was not discharged from Brinlaw. The question before the Commission was whether the claimant left work voluntarily without good cause attributable to the employer. The basis of claimant's argument is that her leaving work was not voluntary but was caused by problems related to her high blood pressure which prevented her from continuing to work at her job as a presser.

As recently noted by Judge Arnold in *Milliken Co. v. Griffin*, 65 N.C. App. 492, 309 S.E. 2d 733 (1983), *rev. denied* 311 N.C. 402, 319 S.E. 2d 272 (1984) (filed 20 days after the decision of the appeals referee was mailed from the Commission), our courts have not addressed directly the question of whether a person who leaves work for health reasons has left involuntarily with good cause attributable to the employer. Relying on *In re George*, 42 N.C. App. 490, 256 S.E. 2d 826 (1979), the *Milliken* court said that "a claimant who leaves a job for health reasons has left involuntarily with good cause attributable to the employer as long as he meets the three qualifications in G.S. Section 96-13(a)." 65 N.C. App. at 497, 309 S.E. 2d at 736.

In order to meet the qualifications of G.S. 96-13(a), a claimant must show that he or she has (1) registered for work and continued to report to an employment office as prescribed by Commission regulations; (2) made a claim for benefits; and (3) is able and available for work within the meaning of the law. The threshold question, however, is whether the claimant has established that his leaving his employment was involuntary due to health reasons. In its "Memorandum of Law," the Commission notes that in order to carry this burden,

> [A] claimant must (1) introduce competent testimony that at the time of leaving adequate health reasons existed to justify the leaving, (2) inform the employer of the health problem, (3) specifically request the employer to transfer him to a more suitable position, and (4) take the necessary minimal steps to preserve his employment such as requesting a leave of absence if appropriate and available.

[1] The Commission concluded that the "claimant has failed to meet her burden of proving either the 1st or 4th requirements." As to the first, the Commission specifically concluded that claimant presented insufficient medical evidence that the conditions on her job aggravated her high blood pressure or caused the dizziness and faintness that she complained of. Though it has not been unequivocally stated, evidence of a health problem and of medical advice to leave work or change a job because of that problem is ordinarily sufficient to establish the existence of adequate health reasons. *See Milliken Co. v. Griffin, supra* (claimant read statement from her doctor advising her to change jobs or

work shorter shifts). Claimant here presented undisputed evidence by her own sworn testimony that she had high blood pressure and had several times become ill while at work. She testified that her high blood pressure was aggravated by conditions on her job which caused her to experience dizziness and fainting. There was no evidence that claimant's physician had told her that her high blood pressure was aggravated by conditions on her job or that he had advised her to seek a change.

[2] The Commission's conclusion was based at least in part on the finding that claimant "*apparently* had not been advised of any restrictions on her ability to work in her regular job." (Emphasis added.) This finding was in turn based on the following exchange between the Commission's appeals referee (Q) and the claimant (A) at the appeals hearing:

> Q: Were you going to a doctor about your blood pressure?
>
> A: Sure have. I take blood pressure pills every day.
>
> Q: What doctor do you go to?
>
> A: Doctor Coffield.
>
> Q: Had he told you anything about your job, what you should do about you [sic] job?
>
> A: No, cause the last time I went to him, my blood pressure had never been stable, after I threatened this stroke. I went down to the emergency room cause it happened and I kept feeling bad that Friday when I got off of work and that Saturday I layed around. I thought it was just a slight headache and I got up that Sunday morning and I couldn't hardly see. So I went down to the emergency room and they kept me down there for about pretty close to almost 2 hours and the doctor told me I'd have to sign a form to make sure I go to my, you know, family doctor on account of it was serious, my blood pressure had run up, it was 200 and something.

The Commission argues that the record is "quite clear" that claimant had not consulted her physician on her dizziness at work and that, in response to the appeals referee's question whether her doctor had advised her about work, "claimant directly

answered no." Considering the pivotal significance attached by the Commission to the question of whether claimant had been advised to leave work or change jobs, we cannot agree that the record is either "clear" or "direct" with regard to claimant's medical treatment or any physician's advice. Rather, we agree with claimant that the referee's questions were vague and that the *pro se* claimant's answers were unresponsive. In our view, the evidence here does not support a finding either way on the question of whether claimant had received medical advice. The inconclusive nature of the evidence on this issue is reflected in the Commission's indefinite finding. Though it appears that it may have had pivotal significance for the Commission, we cannot determine the importance or weight attached by the Commission to this indefinite finding or the evidence, or lack of it, on which the finding is based. Insofar as it is based on this finding, the Commission's conclusion that claimant presented inadequate health reasons to justify her leaving is error.

The Commission also notes that claimant failed to meet the fourth requirement of taking "the necessary minimal steps to preserve his employment such as requesting a leave of absence if appropriate and available." This conclusion is based in part on the finding, "It is not known whether a leave of absence was available for the claimant, or whether one was requested." This finding, while correct, suffers from the same legal deficiency already discussed: there is simply no evidence on which a finding could be made either way. Moreover, the wording of the fourth requirement indicates that requesting a leave of absence is only one example of a "necessary minimal step," not an absolute prerequisite. The Commission's finding does not lead inescapably to the conclusion that the claimant did not take the necessary minimal steps to preserve her employment and it does not, without more, support that conclusion. Mindful that it is not our role to find the facts; nevertheless, we note that the record is replete with evidence of claimant's unsuccessful attempts to "work with" her supervisor in an attempt to keep her job. We note also that the appeals referee never asked claimant whether a leave of absence was available to her or whether she requested one.

[3] We agree with the Commission that a claimant in an appeals hearing has the burden of proving that he is not disqualified from receiving unemployment insurance benefits. Similarly, the Com-

mission is not required to notify a claimant of the specific facts that he will be required to establish or to prove the claimant's case for him. However, the Commission does have the responsibility to conduct its hearings in a manner that allows a party the opportunity to make the required showing. Especially in the case of an uncounseled claimant, the Commission's responsibility involves asking the right questions. We do not think it is appropriate for the Commission to disqualify a *pro se* claimant from receiving benefits because she failed to produce evidence of facts that case law from other states says she must establish when the appeals referee never even asked her the relevant questions. We hold that the Commission's conclusion that claimant failed to show that she took necessary minimal steps to preserve her employment is erroneous.

Our research has disclosed no North Carolina case or statute that sets forth what a claimant must show in order to establish the threshold proposition that a leaving of employment was involuntary due to health reasons. We do not perceive the four requirements, quoted from the Commission's "Memorandum of Law," to be, when fairly applied, unduly burdensome on a claimant, especially in view of the holding in *Milliken* that a claimant's testimony regarding medical advice need not be substantiated by a doctor's sworn testimony or affidavit.

[4] Emphasizing strongly that each case must be decided on its own peculiar facts, we believe that one or more of the four requirements should be applied in most cases involving an involuntary leaving for health reasons, depending on the facts. Even so, in every case, the claimant's actions should be assessed in light of the reasonable person standard. In appropriate cases, the application of these requirements will effect the policy balance referred to in *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1, 35 A.L.R. 3d 1114 (1968): i.e., that claimants should be compensated when their unemployment is occasioned through no fault of their own, but unemployment insurance should not be treated as a substitute for disability pay or health insurance.

We reverse the order of the superior court and remand this cause with directions that it be remanded to the Employment Security Commission for proper findings of fact and, if necessary, an additional evidentiary hearing.

Reversed and remanded.

Judges ARNOLD and PARKER concur.

EDWIN H. COBB AND WIFE DAISY D. COBB v. TED L. SPURLIN AND WIFE MARY F. SPURLIN

No. 8426SC617

(Filed 19 March 1985)

1. **Boundaries § 8.3— special proceeding to determine boundaries—title put in issue—transfer to superior court**

   Where the answer to a petition for a special proceeding to establish the correct boundary lines between petitioners' and respondents' property raised the issue of title, the action was no longer a mere boundary line dispute, but was properly an action to quiet title and was transferred by the clerk to the civil docket of superior court. G.S. 38-1, *et seq.*; G.S. 41-10.

2. **Quieting Title § 2.2; Adverse Possession § 18— evidence of adverse possession under color of title—division of disputed land between parties—improper**

   The court in an action to quiet title to land erred by dividing the land in question into two lots and awarding one to petitioners and one to respondents where the evidence at trial showed adverse possession of the disputed land by respondents' predecessor in title for at least seven years under color of title.

APPEAL by respondents from *Burroughs, Judge.* Judgment entered 13 July 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 February 1985.

This is a special proceeding in which petitioners, Edwin H. Cobb and wife, Daisy D. Cobb, seek to establish correct boundary lines between their land and the adjoining land of respondents, Ted L. Spurlin and wife, Mary F. Spurlin, pursuant to G.S. 38-1, et seq.

The essential facts are:

Both petitioners and respondents claim title to their respective lands from a common source. Descriptions in their respective deeds reveal an overlappage of approximately .35 of an acre.

On 11 April 1983, the Clerk of Superior Court, Mecklenburg County, determined that respondents' answer raised issues of law

and title and transferred the special proceeding to the civil trial calendar of Superior Court, Mecklenburg County, pursuant to G.S. 1-399.

On 1 June 1983 the case was tried without a jury. Petitioners offered evidence tending to show title to the disputed land from a common source and better title in petitioners from the source. Petitioners' evidence further tended to show an unbroken chain of title from the common source dating from 1924 while respondents' claim was based on a 1952 deed from a grantor who did not in fact have title to the disputed land.

Respondents offered evidence tending to show title in them pursuant to G.S. 47B-1, et seq., the Real Property Marketable Title Act. Petitioners then offered evidence tending to show a deed recorded on 28 December 1981, within the thirty year period following the 1952 conveyance by respondents' predecessor in title.

The trial court then made the following pertinent findings of fact:

> (7) [Respondents' predecessor in title] took possession of said realty and used said realty for recreational purposes while they owned said property.
>
> (8) [Respondents' predecessor in title] built a brick fireplace, sunk a water well, installed an outhouse and brought in a bus to be used as a dressing room, and had a boat pier and boat landing area built.
>
> (9) [An attorney for respondents' predecessor in title] wrote a letter to petitioners in 1981 and advised them to remove a fence that had been installed across the realty in question.
>
> (10) The respondents and their predecessor in title have not held the realty in question for the statutory period as set forth in G.S. 47B-1, et seq.

The trial court then made the following pertinent conclusions of law:

> (2) G.S. 47B-1, et seq. are [sic] not applicable in this cause.

(3) [Respondents' predecessor in title] held a portion of the realty in question, under color of title for a period in excess of twenty-one (21) years.

The trial court then concluded that petitioners and respondents were each entitled to a portion of the disputed land, dividing the disputed land into lots identified as "A" and "B." Lot "A" was awarded to petitioners and lot "B" was awarded to respondents. The parties were ordered to have a survey made conforming to the judgment.

Respondents appealed.

Richard S. Clark and Bobby H. Griffin, for petitioner-appellees.

Haywood, Carson, and Merryman, by Charles B. Merryman, Jr., for respondent-appellants.

EAGLES, Judge.

I

[1] We note at the outset that petitioners filed before the Clerk of Superior Court, Mecklenburg County, for a determination of a boundary line. Where the only issue to be tried is the location of a dividing line, it is a processioning proceeding under G.S. 38-1, et seq. See, *Cornelison v. Hammond*, 225 N.C. 535, 35 S.E. 2d 633 (1945). However, where title to the land is put in issue the clerk has no authority to pass on any question involved. He must transfer the proceeding to the regular session of superior court where it becomes in effect an action to quiet title pursuant to G.S. 41-10. *Bumgarner v. Corpening*, 246 N.C. 40, 97 S.E. 2d 427 (1957); *Roberts v. Sawyer*, 229 N.C. 279, 49 S.E. 2d 468 (1948).

In an order filed 11 April 1983, the Clerk of Superior Court, Mecklenburg County, found that "respondents' answer raised issues of law and of title to the property; and that this matter should be transferred to the Superior Court for proceedings consistent with these findings."

The respondents answered as follows:

4. That by deed dated 13 May 1982, F. C. Davis and his wife, Avis L. Davis conveyed that tract of land to Ted L.

Spurlin and wife, Mary F. Spurlin described in Book 4534 at page 936 in the Mecklenburg Public Registry.

5. That the Respondents are the owners of that tract of land located in Long Creek Township, Mecklenburg County, State of North Carolina, and more particularly described as follows:

BEGINNING at an iron in the high water mark on the south side of the Catawba River, the corner of E. H. Johnson Property; running thence with the said high water line N. 72-15 E. 200 feet to an iron; thence S. 38-32 E. 200 feet to an iron; thence with two lines of A. F. Stephens property: (1) S. 73-35 W. 200 feet to an iron; (2) N. 26-59 W. 100 feet to an old iron, the corner of E. H. Johnson; thence with the E. H. Johnson line N. 50-59 W. 100 feet to the point of beginning.

(6) That the Respondents and their predecessor in title have paid the County Property Taxes on the above-described tract of land.

(7) That the Respondents and their predecessor in title have openly used the property described in paragraph 5 without restriction and without hindrance.

Based upon the answer filed by respondents, the action transferred by the Clerk of Superior Court to the civil issue docket of the Superior Court, Mecklenburg County, was no longer a mere boundary line dispute pursuant to G.S. 38-1, et seq., but was properly an action to quiet title to the land claimed in respondents' answer.

II

[2] The trial court divided the land in question into two lots, awarding lot "A" to petitioners and lot "B" to respondents. Respondent assigns this as error alleging that respondents should receive title to the land claimed in their deed under adverse possession for seven years under color of title or the Real Property Marketable Title Act. We agree that there was error and hold that respondents have title to that land described in their deed dated 13 May 1982 from F. C. Davis and wife and recorded at Book 4534, page 936 in the Mecklenburg Public Registry based on possession under seven years color of title. G.S. 1-38.

Where one, or his predecessor in title, enters upon land and asserts ownership of the whole under an instrument constituting color of title, the law will extend his occupation of a portion of the land to the outer bounds of his deed. *Price v. Tomrich Corporation*, 275 N.C. 385, 167 S.E. 2d 766 (1969); *Willis v. Johns*, 55 N.C. App. 621, 286 S.E. 2d 646 (1982). Adverse possession under color of title is occupancy under a writing that purports to pass title to the occupant but which does not actually do so either because the person executing the writing fails to have title or capacity to transfer the title or because of the defective mode of the conveyance used. *Hensley v. Ramsey*, 283 N.C. 714, 199 S.E. 2d 1 (1973); *Price v. Tomrich, supra.*

The evidence at trial tended to show that respondents' predecessor in title, F. C. Davis, took the property in question by deed on 9 January 1952. The disputed portion, though described by the deed, was not owned by F. C. Davis' predecessor in title. F. C. Davis owned the property originally as a tenant in common with his brother-in-law and later solely in fee simple until 13 May 1982 when he conveyed the land by general warranty deed to respondents. The description in the deed to respondents was the same description contained in the deed of 9 January 1952.

The evidence further tended to show and the trial court found as fact that Fred (F.C.) Davis and his brother-in-law possessed the disputed tract and used it for recreational purposes, that Davis built a brick fireplace, sunk a water well, installed an outhouse, brought in a bus to use as a dressing room and built a pier and boat launching facility.

F. C. Davis testified that in 1981 petitioners' predecessor in title put a fence on the property in question. F. C. Davis had his attorney give notice that the fence be removed. The fence was never removed, but petitioners' predecessor in title approached F. C. Davis and attempted to buy the disputed land for $1500.00.

The trial court then concluded as a matter of law that "F. C. Davis and his brother-in-law held a portion of the realty in question, under color of title, for a period in excess of twenty-one (21) years."

This evidence shows adverse possession of the disputed land by respondents' predecessor in title for at least seven years

under color of title. There is no evidence of adverse possession of the disputed land by another. *Willis v. Johns, supra.*

III

When a case is tried by the court, without a jury, findings of fact made by the court and supported by competent evidence are conclusive, even though there is evidence in the record which would have supported contrary findings. *Rock v. Ballou*, 286 N.C. 99, 209 S.E. 2d 476 (1974). A judgment based upon properly supported findings will not be disturbed on appeal, absent error of law appearing on the face of the record. *Wall v. Timberlake*, 272 N.C. 731, 158 S.E. 2d 780 (1968); *Distributing Corp. v. Schofield*, 44 N.C. App. 520, 261 S.E. 2d 688 (1980). Notwithstanding the rule that an appellate court is bound by findings of fact which are supported by competent evidence of record, it is not bound by the conclusions of law or inferences the trial court draws from them. *Heath v. Manufacturing Co.*, 242 N.C. 215, 87 S.E. 2d 300 (1955). Upon appeal an appellate court may look to the evidence in the record to interpret the findings of fact made by the trial court. *Harrelson v. Insurance Co.*, 272 N.C. 603, 158 S.E. 2d 812 (1968). Where crucial factual findings fail to support the trial court's conclusion of law, the judgment entered thereon is properly reversed. *Heath v. Manufacturing Co., supra.* Here the trial court concluded as a matter of law that:

> The respondent is entitled to title and possession of a portion of the realty in question, [Lot "B"].
>
> The petitioners are entitled to title and possession of the remaining portion of the realty in question. [Lot "A"].

The evidence and findings of fact found at trial do not support the conclusions of law and the judgment that divides the property. However, the trial court's conclusion of law that respondents' predecessor in title "held a portion of the realty in question, under color of title, for a period in excess of twenty-one (21) years" is fully supported by the evidence and the facts found.

For these reasons, the judgment of the trial court in 82SP1954 is reversed and remanded for entry of judgment awarding respondents fee simple title to the tract in dispute, described in Book 4534 at page 936 in the Mecklenburg County Public Registry and further described as:

BEGINNING at an old iron in the high water mark on the south side of the Catawba River, the corner of E. H. Johnson property; running thence with the said high water line N. 72-15 E. 200 feet to an iron; thence S. 38-32 E. 200 feet to an iron; thence with two lines of A. F. Stephens property: (1) S. 73-35 W. 200 feet to an iron; (2) N. 26-59 W. 100 feet to an old iron, the corner of E. H. Johnson; thence with the E. H. Johnson line N. 50-59 W. 100 feet to the point of beginning.

Our disposition of this case makes it unnecessary to consider the remaining assignments of error.

Reversed and remanded.

Judges ARNOLD and PARKER concur.

GEORGE WILBUR BOYD AND WIFE PEARLINE W. BOYD v. JESSIE EDWARD WATTS

No. 8419DC718

(Filed 19 March 1985)

1. Vendor and Purchaser § 11— option contract—oral agreement to make payments for purchaser—subsequent acquisition of title—no preclusion to assert default provision

When plaintiffs became the owners of legal title to property subject to a contract to purchase by defendant containing a provision allowing the sellers to take possession of the premises and to retain all previous payments as rent upon default in the payment of any installment, plaintiffs were not precluded from exercising their rights under the contractual default provision by their oral agreement, made before they acquired title, to make the monthly payments on defendant's behalf while their son lived on the property where defendant had notice of plaintiffs' intent to claim full title on the basis of default after plaintiffs' son moved from the property, and defendant thereafter made no monthly installment payments.

2. Vendor and Purchaser § 1.3— creation of option contract

An option contract was created by an agreement providing that the plaintiffs would sell property to defendant for a certain price, payable in monthly installments with one final payment of the balance due on 10 November 1984, and containing a default provision entitling plaintiffs to possession of the premises and to retain all previous payments as rent. On default, then, defendant retained the right to purchase by paying the unpaid balance plus contract interest at any time before 10 November 1984.

3. Quieting Title § 1.1— action to quiet title against optionee—when permitted

An action against an optionee to quiet title will only lie during the contract period where plaintiffs assert some invalidity in the contract. Where plaintiffs premised their action to quiet title on the validity of the option contract and their right to take action on its literal terms, they were estopped to deny the validity of defendant's option, and directed verdict for plaintiffs on their action to quiet title was error.

4. Vendor and Purchaser § 2.1— expiration of option pending appeal—erroneous judgment—remand for exercise of option within reasonable time

Where the trial court's judgment erroneously declared defendant's option contract to be forfeited and cancelled, and the time for defendant to exercise his option expired pending the appeal of that judgment and the appellate court's decision entered over a year after the judgment, the cause will be remanded for entry of an order allowing defendant a reasonable time of six months to exercise his option.

APPEAL by defendant from *Grant, Judge*. Judgment entered 6 March 1984 in ROWAN County District Court. Heard in the Court of Appeals 6 March 1985.

Plaintiffs, the Boyds, claiming a fee simple title in a house and lot through Dayvault Enterprises, Inc. and Harold L. Mills and wife, brought this action to quiet title against defendant Watts. (Defendant is the brother of plaintiff Pearline Boyd.) In December 1979, defendant entered into a contract with Dayvault for purchase of the property, where he had lived since 1974. The contract called for monthly payments of $75 toward the purchase price of $4,966.48. Payment of the outstanding balance plus interest was due 10 November 1984. In addition, defendant agreed to reimburse Dayvault for insurance and taxes. Dayvault held legal title pending full payment, while defendant retained full use of the premises. The agreement contained the following provision for default:

> DEFAULT: Upon default in the payment of any installment as set out herein, including pro-rated taxes and insurance, and should said default remain for a period of thirty (30) days, then said Sellers [Dayvault] may take possession of the premises and expel the Buyers [defendant] therefrom. In such event, all payments made under the terms of this Contract shall be deemed rental payments and said Sellers shall retain all payments for the rent of said premises.

In May 1980, defendant left North Carolina for Florida, having made only three payments and without making arrangements to pay arrears. Another sister, Mary Barnhardt, made some payments. Plaintiffs' son moved into the house in October of 1980. Defendant contacted plaintiffs from Florida at some point and some arrangement was made for plaintiffs to make the payments. Plaintiffs paid the $75 monthly to Barnhardt, who paid Dayvault; plaintiffs also made up the arrearages owed Dayvault. Dayvault never acted on the default provisions.

In December 1980, Dayvault transferred its interest to the Mills, subject to the contract. Plaintiffs made two payments directly to the Mills, but then ceased payments. On 25 May 1981, the Mills sent a "Notice of Default" to defendant care of Barnhardt and care of his last known address in Florida, as well as posting a copy on the property. The notice stated that defendant had defaulted and that all payments would be deemed rent if arrears were not paid before 10 June 1981. No payment was made.

On 12 June 1981 the Mills executed a quitclaim deed to plaintiffs, accompanied by an assignment of all their rights under the contract, executed 22 June 1981. After defendant refused to sign a quitclaim deed in December 1982, plaintiffs brought the present action.

By complaint filed in March 1983, plaintiffs sued to quiet title, and for a declaration that defendant had forfeited his rights under the contract. Defendant answered and counterclaimed, alleging an oral agreement with plaintiffs, wherein plaintiffs agreed to make the payments due under the contract on defendant's behalf, and that, therefore, plaintiffs acquired title in bad faith, deliberately allowing the contract to go into default and thus fraudulently depriving him of his property. A jury trial ensued. At the close of all the evidence, the trial court granted plaintiffs' motions for directed verdict on both claims. Defendant appealed.

William F. Rogers, Jr. for plaintiffs.

Larry E. Harris for defendant.

WELLS, Judge.

Neither side challenges the validity of the contract; despite reservations, we therefore express no opinion thereon. *See* J. Narron, *Installment Land Contracts in North Carolina,* 3 Camp. L. Rev. 29 (1981). Nothing in the contract prevented Dayvault or the Mills from transferring their legal title to the property, and no irregularities are alleged or apparent in the title transfers. It is clear then that plaintiffs became the owners of the legal title to the property. The only questions presented therefore involved directed verdict on the contract claims. They are: (1) were plaintiffs precluded by their own fraud or bad faith from exercising their rights under the contractual default provision and (2) if not, what is the effect of defendant's default on plaintiffs' action to quiet title.

A directed verdict should be granted if, viewing the evidence in the light most favorable to the non-movant, the case presents only issues of law. *See Hong v. George Goodyear Co.,* 63 N.C. App. 741, 306 S.E. 2d 157 (1983). Ordinarily, a verdict should not be directed in favor of the party with the burden of proof. If, however, the evidence shows there is no genuine issue of material fact for the consideration of the jury, directed verdict for the party with the burden of proof is not improper. *Financial Corp. v. Harnett Transfer,* 51 N.C. App. 1, 275 S.E. 2d 243, *disc. rev. denied,* 302 N.C. 629, 280 S.E. 2d 441 (1981).

[1] Even assuming the existence of an oral agreement as alleged by defendant, there is no evidence that plaintiffs ever agreed to make monthly payments on his behalf other than as rent while their son lived in the house. The evidence is uncontroverted that the son moved out at the latest several months before Christmas 1982. Defendant admitted discussing title to the house with plaintiffs, and plaintiffs' claim of default, at Christmas 1982. The complaint was filed in March 1983. Defendant admitted at trial that he had not paid anything after March 1980, nor does anything in the record suggest that anyone made payments in his behalf after Christmas 1982. Defendant never tendered any such payments or arrears. Plaintiffs enjoyed control of the premises and did not need to expel defendant. Therefore, regardless of plaintiffs' intent when the contract went into default in June 1981, it is clear that defendant had adequate notice as of Christmas 1982 of plaintiffs'

intent to claim full title on the basis of default. Under the terms of the contract, then, it is abundantly clear that defendant defaulted after Christmas 1982 and plaintiffs properly deemed all payments rent as of the time of the filing of the complaint in March 1983.

It is settled law that a party to a contract who refuses to perform is not entitled to performance by the other party. *Peaseley v. Coke Co.*, 282 N.C. 585, 194 S.E. 2d 133 (1973); *McAden v. Craig*, 222 N.C. 497, 24 S.E. 2d 1 (1943); *Edgerton v. Taylor*, 184 N.C. 571, 115 S.E. 156 (1922); Restatement (Second) of Contracts § 237 (1981). In order to preserve his rights under the contract, the allegedly injured party must either render his promised performance or offer to do so. *Peaseley v. Coke Co., supra; McAden v. Craig, supra*; Restatement (Second) of Contracts § 238 (1981). A party cannot insist upon its contract rights in the abstract, while simultaneously neglecting entirely its duty to perform. Nothing in the record suggests that plaintiffs prevented defendant from performing. *Compare Goforth v. Jim Walter, Inc.*, 20 N.C. App. 79, 201 S.E. 2d 51 (1973) (plaintiffs prevented contractor from repairing house, could not complain of defects). Defendant has not demonstrated that tender of performance would be pointless or legally excused. *See Edgerton v. Taylor, supra.* On this record, we conclude that the court correctly granted directed verdict for plaintiffs. Our decision in *Thomas v. Ray*, 69 N.C. App. 412, 317 S.E. 2d 53 (1984), supports this result. There we upheld summary judgment for a defendant insurer, on the grounds that the insured failed entirely to protect the asserted contractual rights despite numerous opportunities to do so. The facts of the present case require a similar result; directed verdict for plaintiffs on the fraud claims was thus correctly granted. Defendant suffered no egregious loss thereby, since he personally paid only $225, plus whatever small amounts Mary Barnhardt paid on his behalf.

[2] Having determined that the default provisions of the contract were properly exercised, we now must determine their effect. This involves interpretation of the contract. Plaintiffs have contended throughout that default extinguished all right and interest of defendant. It is unclear what interpretation defendant gave the default provision; he appears to contend he retained some interest in the property. Fortunately, the language of the contract is clear and therefore controlling. *Brown v. Scism*, 50

N.C. App. 619, 274 S.E. 2d 897, *disc. rev. denied*, 302 N.C. 396, 276 S.E. 2d 919 (1981). It must be enforced as written; this court may not disregard its plain meaning. *Catawba Athletics v. Newton Car Wash*, 53 N.C. App. 708, 281 S.E. 2d 676 (1981).

Under the contract, sellers (now plaintiffs, by assignment) agreed to sell to defendant for a certain price, payable in monthly installments with one final payment of the balance due 10 November 1984. The default provision merely entitled plaintiffs to possession of the premises and to retain all previous payments as rent. The contract does not provide for all other payments to become due on default, or for the contract to terminate or to be rescinded on default. On default, then, defendant retained the right to purchase by paying the unpaid balance plus contract interest at any time before 10 November 1984. This contractual relation is readily recognizable as an option contract. *Lawing v. Jaynes and Lawing v. McLean*, 285 N.C. 418, 206 S.E. 2d 162 (1974). The option remained exercisable at any time before 10 November 1984, and could not be revoked by plaintiffs. *Catawba Athletics v. Newton Car Wash, supra; see Trust Co. v. Frazelle*, 226 N.C. 724, 40 S.E. 2d 367 (1946).

If plaintiffs could not revoke the option, could they accomplish its extinction through an action to quiet title? Actions to quiet title are governed by N.C. Gen. Stat. § 41-10 (1984). This statute is remedial in nature, designed to provide a means for determining all adverse claims to land, including those formerly encompassed within the equitable proceedings to remove clouds on title. *York v. Newman*, 2 N.C. App. 484, 163 S.E. 2d 282 (1968). While we have not found any North Carolina authority directly on point, it appears that an option can constitute a cloud or adverse claim subject to an action to quiet title. *See Satterwhite v. Gallagher*, 173 N.C. 525, 92 S.E. 369 (1917) (contract to convey cloud); 65 Am. Jur. 2d *Quieting Title* § 10 (1972); 74 C.J.S. *Quieting Title* § 14b (1951); *Bixwood, Inc. v. Becker*, 181 Ind. App. 223, 391 N.E. 2d 646 (1979) (right to bring action to cancel option recognized).

It is no longer necessary for the plaintiff in a quiet title action to show as an independent proposition the invalidity and wrongfulness of the adverse claim. *Wells v. Clayton*, 236 N.C. 102, 72 S.E. 2d 16 (1952). Nevertheless, the fundamental purpose of the

statute is to extinguish wrongful claims, since an adverse claim is necessarily wrongful if it conflicts with the true title. *Id.*; *see Heath v. Turner*, 309 N.C. 483, 308 S.E. 2d 244 (1983) (means of proving title). An adverse claim must be presently determinable to be wrongful and hence actionable. *Vandiford v. Vandiford*, 241 N.C. 42, 84 S.E. 2d 278 (1954). An action to quiet title will not lie where the adverse claim is only speculative and potential. *Id.*; *see* 74 C.J.S. *Quieting Title* § 15 (1951). Pending the expiration of the option period, an option contract is merely a right to purchase which may or may not be exercised at the sole option of the optionee. *Lawing v. Jaynes and Lawing v. McLean, supra.* It is therefore not presently determinable by its terms.

[3] We therefore conclude, and the cases we have found support us, that an action against an optionee to quiet title will only lie during the contract period where plaintiffs assert some invalidity in the contract. *See Satterwhite v. Gallagher, supra* (lack of privy examination); *Fiebiger v. Fischer*, 276 N.W. 2d 241 (N.Dak. 1979) (unconscionability); *Rorem v. Sinclair Oil & Gas Co.*, 40 Okla. B.A.J. 1824 (1969) (oral contract); *Moon v. Phipps*, 67 Wash. 2d 948, 411 P. 2d 157 (1966) (breach of fiduciary duty). Only compelling circumstances not present here would justify relaxing this rule. *See Pigeon v. Hatheway*, 156 Conn. 175, 239 A. 2d 523 (1968) (need to settle claims against estate). Here, to the contrary, plaintiffs premised their action on the validity of the contract and their right to take action on its literal terms. Accordingly, they were estopped to deny the validity of defendant's option. *Lockleair v. Martin*, 245 N.C. 378, 96 S.E. 2d 24 (1957). Directed verdict for plaintiffs on their quiet title action was therefore clearly error.

[4] The judgment of the court, based on the erroneous directed verdict, reads that plaintiffs' title is quieted and the contract "is hereby declared forfeited and cancelled." The judgment must therefore be vacated. However, pending our decision, over a year after entry of judgment, the time for defendant to exercise his option has expired. Pending appeal, defendant had no rights under the contract since it had been judicially cancelled. Under the circumstances, it would be unjust simply to vacate the judgment, since defendant would be deprived of all relief even though he prevailed on this issue on appeal. Exercising our equitable power to make such orders as justice between the parties may require,

Chamberlain v. Beam, 63 N.C. App. 377, 304 S.E. 2d 770 (1983), we remand the cause for entry of an order allowing defendant a reasonable time to exercise his option. Judgment against defendant was entered 6 March 1984. Under the contract, plaintiffs' option to purchase expired 10 November 1984. We therefore hold that six months is a reasonable time to allow defendant to exercise his option. Should defendant fail to do so, final judgment shall be entered for plaintiffs.

The trial court's judgment dismissing defendant's counterclaim is affirmed. The trial court's judgment quieting title for plaintiffs is vacated. The cause is remanded for entry of further order or judgment consistent with this opinion.

The cost in this action shall be equally assessed between plaintiffs and defendant.

Affirmed in part; vacated and remanded in part.

Judges WHICHARD and BECTON concur.

STATE OF NORTH CAROLINA v. LARRY TATE

No. 8415SC442

(Filed 19 March 1985)

1. Burglary and Unlawful Breakings § 5.9— evidence sufficient for jury

Defendant's motion to dismiss charges of breaking and entering and larceny of Hursey's Bar-B-Q was properly denied where Hursey's owner testified that his walk-in refrigerated box was broken into and barbeque was removed without permission, and an accomplice in other break-ins testified that defendant had admitted to him on the night of the break-in that the large quantity of barbeque in boxes and buckets in defendant's car was taken from Hursey's.

2. Burglary and Unlawful Breakings § 4; Criminal Law § 34.8— accomplice testimony of other break-ins—admissible

In a prosecution for breaking and entering and larceny, the trial court did not err by denying defendant's motion *in limine* to prohibit testimony about a misdemeanor breaking and entering to which he had pled guilty or by admitting evidence of other crimes in which defendant was involved. The break-in to which defendant pled guilty was factually similar to the break-ins and larcenies charged, a four-month period between the crimes is not too tenuous a

connection to show a common plan or scheme, and the trial court gave a proper limiting instruction.

3. Criminal Law § 88.1— cross-examination limited—no error

The trial court did not abuse its discretion by not allowing defendant to ask an accomplice who testified for the State why he signed an affidavit of indigency.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 19 August 1983 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 17 January 1985.

Defendant was found guilty of four counts of felonious breaking and entering pursuant to G.S. 14-54(a) and five counts of felonious larceny pursuant to G.S. 14-72(b)(2) with regard to five businesses in Alamance County in the fall of 1982. The State's evidence tended to show that the businesses were entered without permission and that items were unlawfully removed from each: On 9 September 1982, Hursey's Bar-B-Q, Inc. was broken into and approximately 800 pounds of barbeque was stolen; on 5 October 1982, C & D International, Inc., a farm equipment business, was broken into and tools and $3,569.94 was stolen; on 14 October 1982, Somer's Seafood was broken into and quantities of fish, oysters, chicken and shrimp were stolen; on 15 October 1982, Payne Oil Company was broken into and a variety of tools and $14 was stolen; and on 5 November 1982, Glencoe Salvage Company was broken into and assorted watches, knives, tools and radios were stolen.

The State's evidence connecting defendant to these crimes consisted mainly of the testimony of Michael D. Clark, who had committed these crimes with defendant and was testifying against Tate pursuant to a plea bargain. Clark also testified that in the fall of 1982, prior to the charged offenses which he and defendant had committed together, he and defendant rode around breaking into houses and stores near Highway 49 in Orange County. As to the charged offenses except for the Hursey's Bar-B-Q break-in on 9 September 1982, Clark testified that he rode with defendant and broke into the businesses on 5 October, 14 October, 15 October, and 5 November 1982 while defendant drove back and forth. Clark then, by himself or with defendant's aid, would load the items he had taken into defendant's car. Clark and Tate would then sell the items and split the proceeds.

On the night of 9 September 1982, however, Clark rode with defendant and others in the vicinity of Hursey's Bar-B-Q, got out of defendant's car to visit a friend at a nearby laundromat, saw defendant's car pull into a parking lot on the side of Hursey's and was picked up by defendant again in that area later that night. When Clark got back into defendant's car, he noticed a large quantity of meat in buckets and boxes. When questioned by Clark, Tate admitted that it had come from Hursey's.

Defendant filed a motion in limine, which was denied, to suppress any evidence of a misdemeanor breaking and entering charge of 24 March 1983, to which defendant pled guilty and was currently serving a sentence. Clark testified that he began acting as an informant when he turned himself in to the police in February, 1983 and that defendant approached him in March, 1983 about breaking into the place where Tate worked. After Clark informed the police, Tate picked up Clark and drove to another business, Glencoe Salvage; defendant and Clark were arrested by police after the two had removed the window casing and crawled inside.

Two detectives corroborated Clark's testimony, stating that Clark had given each a similar statement of his involvement with defendant and others in the charged crimes and that Clark had proved to be a reliable informant. On cross-examination, defendant's attorney asked Clark why he had filled out an affidavit of indigency to obtain a court-appointed lawyer. The trial court sustained the State's objection to this question.

Defendant offered no evidence.

From the judgments entered against him, defendant appeals.

Attorney General Edmisten, by Associate Attorney General Victor H. E. Morgan, Jr., for the State.

Craig T. Thompson for defendant appellant.

EAGLES, Judge.

[1] We first consider whether the trial court erred when it denied defendant's motion to dismiss the breaking and entering and larceny charges with regard to Hursey's Bar-B-Q, 83CRS8529. Defendant contends that the evidence was contradictory and in-

sufficient to go to the jury or to sustain a conviction. We disagree.

Any evidence tending to prove defendant's guilt or which reasonably and logically leads to that conclusion is for the jury to consider. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977). Here the State's evidence, considered in the light most favorable to the State, was sufficient to show that defendant committed the larceny at Hursey's Bar-B-Q. Hursey's owner testified that his walk-in refrigerated box was broken into and barbeque was removed without his permission. Clark testified that defendant admitted to him on the night of the break-in that the large quantity of warm barbeque in buckets and boxes in defendant's car was taken from Hursey's. There was substantial evidence of the essential elements of larceny: (1) the wrongful taking and carrying away of another's personal property without his consent, and (2) the intent to permanently deprive the owner of his property and to appropriate it to his own use. *State v. Smith*, 66 N.C. App. 570, 312 S.E. 2d 222, *disc. rev. denied*, 310 N.C. 747, 315 S.E. 2d 708 (1984). *See*, G.S. 14-72(b). All contradictions and discrepancies in the evidence were for the jury to resolve. *State v. Lowery*, 309 N.C. 763, 309 S.E. 2d 232 (1983).

[2] Defendant also asserts three evidentiary errors: (1) denial of his motion in limine to suppress State's evidence of defendant's participation in and sentence for the 24 March 1983 breaking and entering of Glencoe Salvage; (2) admission of testimony concerning other similar crimes committed by defendant and Clark in the fall of 1982; and (3) restrictions on defendant's cross-examination of the State's witness, Michael Clark. We disagree and find no error.

[2] Defendant contends that the trial court erred when it permitted the State's witness, Michael Clark, to make references to his involvement with defendant in similar crimes. In support of his motion in limine to prohibit testimony of defendant's breaking and entering charge on 24 March 1983, defendant argues that the crime was not sufficiently similar and was too remote in time to those charged to be admissible. We disagree and hold that the motion in limine was properly denied and the testimony was admissible.

The complained-of evidence tends to establish a common plan or scheme "embracing the commission of a series of crimes so related to each other that proof of one or more tends to . . . connect the accused with its commission." *State v. Sink*, 31 N.C. App. 726, 729, 230 S.E. 2d 435, 437 (1976), quoting, *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954); *State v. Grace*, 287 N.C. 243, 213 S.E. 2d 717 (1975). *See*, *State v. Fleming*, 52 N.C. App. 563, 279 S.E. 2d 29 (1981). The 24 March 1983 break-in to which defendant pled guilty was factually similar to the other break-ins and larcenies charged. On 24 March 1983 Clark and defendant rode in defendant's car to a business they decided to break into; Clark tried to break-in by lifting off the window casing while Tate stayed away in the woods. Unable to lift the casing, Clark went back to defendant for help. In each of the charged crimes, Clark rode with defendant in defendant's car and would get out of the car and break into a business while Tate drove away from the scene. Tate would then return, arriving only to help load the stolen goods into his car. This evidence established a concurrence of common features explained as being caused by a general plan. *See*, 2 Wigmore on Evidence § 304 (3d ed. 1940).

We find no prejudicial error and see no merit to defendant's claim that the four months elapsed is too tenuous a connection to show a common plan or scheme. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, 100 S.Ct. 3050, *reh. denied*, 448 U.S. 918, 65 L.Ed. 2d 1181, 101 S.Ct. 41 (1980) [where the court allowed evidence of persons defendant admitted poisoning over a four-year period as part of the State's evidence for first degree murder]; *State v. Duncan*, 290 N.C. 741, 228 S.E. 2d 237 (1976) [where the court allowed evidence of other burglaries in several states over a seven-month period committed prior to the charged crime, which was to the effect that defendant, two witnesses and others were members of a group which, over a period of time, burglarized houses]. *See*, *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976), *cert. denied*, 429 U.S. 1093, 51 L.Ed. 2d 539, 97 S.Ct. 1106 (1977). We note that the trial court gave a proper limiting instruction:

> Now, members of the jury, you've heard this witness and also Mr. Clark talk about the alleged breaking and entering at Glencoe on March 24th of this year. Now this was offered for the purpose of showing, if you find it does show, that

> there existed in the mind of the defendant a plan or a scheme involving the same crime charged in this—the same—involving the same type crime that he's charged with here. You cannot convict him on these crimes he is now charged with because—merely because he did something on March 24th. He is not charged with that break-in. You may consider it only for the purpose if you find it does show a plan or scheme in the mind of the defendant to commit these other break-ins.

Evidence of the other crimes in which defendant was involved in the fall of 1982, and to which defendant objects, is admissible. We see no prejudice to defendant here. We note that the effect of the complained-of testimony was carefully circumscribed by the trial court in its limiting instructions. We find that any error in admission of evidence of other crimes is harmless and not prejudicial based on the plenary direct evidence by Michael Clark that he and defendant committed the charged offenses.

[3] Finally, defendant assigns as error the trial court's limitation of his cross-examination of the State's main witness, Michael Clark. Defendant contends that he should have been permitted to ask Clark *why* he signed an affidavit of indigency permitting him to obtain a court-appointed lawyer. Foregoing consideration of its questionable relevancy, we note that the scope of cross-examination rests largely within the trial court's discretion. *State v. Ziglar*, 308 N.C. 747, 304 S.E. 2d 206 (1983). We find no abuse of discretion and overrule the assignment of error.

No error.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. FREDERICK JONES

No. 843SC474

(Filed 19 March 1985)

1. Criminal Law § 91.4— denial of continuance to obtain new counsel

The trial court did not err in the denial of defendant's motion for a continuance in order to retain private counsel as a substitute for his court-appointed

public defender where the record shows that, after an initial summary denial of defendant's motion before jury selection, defendant was offered an opportunity to be heard on the motion, and defendant declined and orally indicated his satisfaction with his court-appointed counsel and his willingness to proceed, and where defendant has shown no prejudice arising from the denial of his motion to continue.

2. **Criminal Law § 138— sentencing—failure to weigh mitigating factor**

Defendant is entitled to a new sentencing hearing where the trial court found as a mitigating factor that defendant reasonably believed that his conduct was legal but the trial court failed properly to weigh this mitigating factor against the sole aggravating factor which it found. G.S. 15A-1340.4(a)(2)(k).

Judge ARNOLD concurring in part and dissenting in part.

APPEAL by defendant from *Winberry, Judge.* Judgment entered 19 October 1983 in Superior Court, PITT County. Heard in the Court of Appeals 5 February 1985.

This is a criminal action in which defendant, Frederick Jones, entered guilty pleas to the felony of shooting into an occupied vehicle, G.S. 14-34.1, and the misdemeanor of assault with a deadly weapon, G.S. 14-33(b)(1). Defendant was sentenced to ten years imprisonment for the felony and two years imprisonment for the misdemeanor to run concurrently with the felony sentence. The presumptive sentence for the felony is three years. G.S. 15A-1340.4(f)(6). Defendant appeals, assigning errors in his sentencing and the trial court's failure to grant his motion for a continuance.

The essential facts are:

Defendant was originally charged in bills of indictment with two counts of assault with a deadly weapon with intent to kill and shooting into an occupied vehicle. He was also charged with misdemeanor larceny. Defendant pleaded not guilty to all charges. On the day the cases were called for trial, defendant moved for a continuance in order to retain private counsel as a substitute for his court-appointed public defender. The motion was denied and defendant then indicated that he was willing to continue being represented by the public defender. At the conclusion of the State's evidence, defendant entered into a plea bargain that did not deal with sentencing.

At the sentencing hearing, the trial court found one factor in aggravation (that defendant had two prior convictions punishable by more than 60 days) and one factor in mitigation (that defend-

ant reasonably believed that his conduct was legal) and declined to find as a mitigating factor that defendant acted because of "strong provocation." The trial court then stated that it did not believe the mitigating factor found was actually established but would list it as a mitigating factor found, only because "knowing how some of our appellate courts operate, they might." The trial court then found that the factor in aggravation outweighed the factor in mitigation and imposed the ten year sentence from which defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Alfred N. Salley, for the State.

Arthur M. McGlauflin for defendant-appellant.

EAGLES, Judge.

I

[1] Defendant first assigns as error the trial court's denial of his motion for continuance in order to give him time to employ private counsel. We find no error.

An examination of the record here indicates that on the day of trial just prior to jury selection, defendant's court-appointed counsel on behalf of defendant made an oral motion to continue. The reason given for the motion was to allow defendant time to employ private counsel. The motion was denied.

Defendant argues on appeal that his motion to continue in order that he might employ private counsel was arbitrarily denied without an opportunity to be heard.

After the jury was selected but before it was impaneled, the following transaction was entered into the record:

> Court: Now, let the record show that defendant . . . has advised the court through his counsel . . . that he desires to employ his own lawyer and, therefore, moves that the case be continued. Let the record show that [defendant's counsel] brought that [motion] to my attention before the jury selection began and I told him that *at that time* we were prepared to proceed to trial and that I was going to deny that motion. [Emphasis added.]

The trial court then asked defendant if he had anything to say. At that time defendant declined and orally indicated his satisfaction with court-appointed counsel and willingness to proceed. We also note that defendant later stated in his transcript of guilty plea that he was satisfied with his attorney and the legal services provided.

Upon a motion to continue in order to retain counsel of his own choice, defendant must be afforded a fair opportunity to be heard concerning his reasons for his apparent dilatoriness in retaining counsel of his choice, *see, U.S. v. Oliver*, 571 F. 2d 664 (D.C. Cir. 1978), or his reasons for dissatisfaction with his court-appointed counsel. *See, McGill v. U.S.*, 348 F. 2d 791 (D.C. Cir. 1965). Here, the record shows that after an initial summary denial of defendant's motion before jury selection, defendant was offered an opportunity to be heard on the motion. Defendant declined and orally indicated his satisfaction with his court-appointed counsel and his willingness to proceed. Further, defendant has shown no prejudice arising from the trial court's denial of his motion to continue.

The right of a criminal defendant to the assistance of counsel is guaranteed by the Sixth Amendment of the United States Constitution and by Article I, Section 23 of the North Carolina Constitution. *State v. Wise*, 64 N.C. App. 108, 306 S.E. 2d 569 (1983). The record before us indicates that this defendant's right to the effective assistance of counsel was satisfied.

II

Defendant's remaining assignments of error concern his sentencing under North Carolina's Fair Sentencing Act, G.S. 15A-1340.1 et seq. An examination of some of the State's evidence is necessary for an understanding of these assignments of error.

The State, through several witnesses, presented evidence tending to show that Danny Hines managed a sporting goods store in a shopping mall in which defendant, a slender man, tried on a ladies' warm-up suit. Defendant left the store with Hines following him, because Hines believed defendant had stolen the ladies' warm-up suit he had tried on.

When confronted by Hines, defendant ran. Hines chased defendant on foot out of the mall and across an adjacent field before Hines lost sight of defendant. Hines and others searched the area outside the shopping mall for the stolen clothing but failed to locate it.

Defendant was subsequently detained nearby on the shoulder of Highway 11 by a mall security officer. Hines joined the officer and defendant. Hines then told the officer that he (Hines) would "take care of it" and that the officer could leave, which he did.

Hines and defendant walked back towards the mall. Defendant left Hines, crossed Highway 11 and engaged in conversation with occupants of a vehicle parked in a lot adjacent to the highway. Defendant and one of the vehicle's occupants recrossed the highway and approached Hines. A confrontation then occurred between Hines and defendant. Defendant yelled obscenities at Hines, after which Hines struck defendant with his fist. Hines was 6 feet, 7 inches tall and weighed 270 pounds. Defendant was small-framed and "fit well into a ladies' warm-up suit."

Defendant called to a companion who tossed a pistol to him. Defendant pointed the pistol at Hines, threatened to kill Hines, and fired the pistol. Hines fell to the ground but was not wounded. Defendant crossed the highway away from the scene.

Robert Hartman, an employee of a pet store in the mall, had followed Hines to the area in his van. Immediately after the shooting incident, he pulled his van onto Highway 11 and drove generally towards defendant in the median at a speed of between 10 and 25 miles per hour. The van was approximately 15 feet from defendant when defendant fired the pistol at the van. A bullet penetrated the cab of the van.

At the conclusion of the State's evidence, defendant entered a plea of guilty to the Class H felony of shooting into an occupied vehicle and the misdemeanor of assault with a deadly weapon.

[2] Defendant assigns as error the trial court's refusal to find as a factor in mitigation that defendant acted under strong provocation, G.S. 15A-1340.4(a)(2)(i) and the trial court's refusal to weigh the mitigating factor found, i.e., that defendant reasonably believed that his conduct was legal, G.S. 15A-1340.4(a)(2)(k), against the factor in aggravation found. While there is no error in the

court's refusal to find the "strong provocation" mitigating factor, we agree with defendant that there was error in the trial court's failure to properly weigh the mitigating factor found.

The trial court listed as a factor in mitigation that defendant reasonably believed that his conduct was legal, G.S. 15A-1340.4 (a)(2)(k). However, the trial court's comments on the record at the sentencing hearing make it clear that the court did not properly weigh this mitigating factor against the aggravating factor found:

> THE COURT: . . . And, although I don't believe it, but knowing how some of our Appellate Courts operate, they might, I am going to find there is a factor in mitigation that the defendant reasonably believed his conduct was legal. . . . In my opinion, again the mitigating factor was not.
>
> There is not a single mitigating factor before me. I found the only one that could have possibly existed, and I did that out of deference to the Appellate Courts.

These comments by the trial court tend to show that the trial court did not consider this mitigating factor as proven by a preponderance of the evidence and did not properly weigh it against the sole factor in aggravation found. Accordingly, the sentence imposed upon defendant's plea to the felony of shooting into an occupied vehicle is vacated and this case is remanded for a new sentencing hearing. *State v. Ahearn,* 307 N.C. 584, 300 S.E. 2d 689 (1983). Our disposition of this case makes it unnecessary to consider defendant's remaining assignments of error.

Vacated and remanded.

Judge PARKER concurs.

Judge ARNOLD concurs in part and dissents in part.

Judge ARNOLD concurring in part and dissenting in part.

I concur in that portion of the opinion which finds no error in defendant's conviction. I dissent, however, from that portion which awards defendant a new sentencing hearing. I believe that the learned trial judge's comments show that while he considered the mitigating factor, he did not accord it a great deal of weight.

As our Supreme Court stated in *State v. Ahearn*, 307 N.C. 584, 596-597, 300 S.E. 2d 689, 697 (1983), "[w]hile he is required to justify a sentence which deviates from a presumptive term to the extent that he must make findings of aggravation and mitigation properly supported by the evidence and in accordance with the Act, a trial judge need not justify the weight he attaches to any factor." I believe the comment cited by the majority is merely a verbalization of the trial court's reasons for finding that the factors in aggravation outweighed the factors in mitigation. Thus, I would find no error as to the defendant's sentence.

JOHN LYNN PITTMAN v. R. L. PITTMAN, JR., TRUSTEE UNDER THE WILL OF DR. R. L. PITTMAN, SR., AND R. L. PITTMAN, JR., INDIVIDUALLY

No. 8412SC106

(Filed 19 March 1985)

1. Trusts § 5— subsequently adopted child as beneficiary of trust for children now in being or hereafter born

Summary judgment should not have been granted for defendant trustee in an action to determine whether plaintiff, a child adopted by defendant after testator's death, was a beneficiary of a testamentary trust created by defendant's father for defendant's children ". . . now in being or hereafter born." The evidence disclosed that plaintiff, at the time the will was executed, had been a part of defendant's household since his infancy, that he used the Pittman family name exclusively, and that he was treated as a son by his father and as a grandchild by the testator in the same manner as defendant's two natural children. No evidence was presented that the testator ever realized that plaintiff had not been formally adopted by defendant and a question of fact existed as to whether the testator considered plaintiff one of defendant's children in being. G.S. 48-23 (1984).

2. Courts § 9.4— laches—defendant precluded from raising—previous ruling of another judge

In an action to determine whether plaintiff was a beneficiary of a testamentary trust, to discharge defendant trustee, and for damages for mismanagement of the trust, defendant was precluded from raising laches where another superior court judge had previously ruled on defendant's motion to dismiss and had made a specific finding that plaintiff had not been guilty of laches.

APPEAL by plaintiff from *Brewer, Judge.* Judgment entered 7 November 1983 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 23 October 1984.

Johnson & Johnson, P.A., by W. A. Johnson and Sandra L. Johnson, for plaintiff appellant.

McCoy, Weaver, Wiggins, Cleveland & Raper, by L. Stacy Weaver, Jr., for defendant appellee.

BECTON, Judge.

I

Plaintiff, John Lynn Pittman, is the adopted son of defendant R. L. Pittman, Jr. Defendant is the son of Dr. R. L. Pittman, Sr., and the trustee of a testamentary trust established by Dr. Pittman for the benefit of his grandchildren and other family members. Plaintiff filed this civil action in Wake County on 27 August 1982, seeking (a) a determination that he is a beneficiary of the testamentary trust, (b) removal and discharge of defendant trustee, and (c) damages for mismanagement of the trust. By Order dated 12 August 1983, the trial court denied defendant's Rule 12(b)(6) motion to dismiss, and transferred the cause to Cumberland County. Defendant subsequently moved for summary judgment. The motion was granted, and plaintiff appeals.

Plaintiff's sole argument on appeal is that summary judgment was improperly granted because the will in question does not establish that Dr. Pittman intended to exclude plaintiff, a grandchild adopted after the testator's death, as a beneficiary of the testamentary trust. Defendant's response is that the will clearly establishes the testator's intention to so exclude plaintiff and, alternatively, that the plaintiff was guilty of laches in bringing this action. We conclude that there remains an issue of fact whether the testator intended to exclude plaintiff as a beneficiary of the testamentary trust, and therefore reverse the trial court's entry of summary judgment.

II

[1] Dr. Pittman died testate on 1 August 1963. His will, executed in 1958, established a trust for the benefit of certain of his relatives, including defendant and defendant's children. The portion of the will governing distribution of income from the trust provides that income is to be distributed to "the children of Raymond L. Pittman, Jr., [defendant] now in being or hereafter born" and further provides for a recomputation of how the income is to

be distributed "upon the birth of any child of Raymond L. Pittman, Jr." The provision of the will governing termination of the trust and distribution of the corpus and accumulated income provides for the distribution "to the then surviving children" of defendant. Plaintiff was born in 1946, and was the natural child of defendant's wife by a former marriage. Although plaintiff's mother married defendant while plaintiff was still an infant, the final order by which defendant adopted plaintiff was not signed until 17 February 1964.

Both parties cite N.C. Gen. Stat. Sec. 48-23 (1984) which provides that:

> (1) An adopted child shall have the same legal status, including all legal rights and obligations of any kind whatsoever, as he would have had if he were born the legitimate child of the adoptive parent or parents at the date of the signing of the final order of adoption, except that the age of the child shall be computed from the date of his actual birth.
>
> . . .
>
> (3) From and after the entry of the final order of adoption, the words 'child,' 'grandchild,' 'heir,' 'issue,' 'descendant,' or an equivalent, or the plural forms thereof, or any other word of like import in any deed, grant, will or other written instrument shall be held to include any adopted person, unless the contrary plainly appears by the terms thereof, whether such instrument was executed before or after the entry of the final order of adoption and whether such instrument was executed before or after the enactment of this section.

Plaintiff emphasizes that the legislative intent in enacting this statute was to work a "complete substitution of families" as to the rights of an adoptee to property passing under a will, *Crumpton v. Mitchell*, 303 N.C. 657, 281 S.E. 2d 1 (1981), and relies on the following test, quoted with approval in *Crumpton*, to show that he is entitled to the benefits of the trust: "What would [the adoptee's] standing and [legal] rights be if [the adoptee] had been born to [the] adoptive parents at the time of the adoption?" 303 N.C. at 663, 281 S.E. 2d at 5.

The plaintiff submits that had he been born to defendant on 17 February 1964, the date on which the final order of adoption was signed, he would indisputably be included in the class of grandchildren who are beneficiaries of the trust. Therefore, by virtue of his adoption on that date, plaintiff concludes that G.S. Sec. 48-23(3) (1984) demands that he be included in the class of beneficiaries.

A testator is not, of course, prohibited from excluding adopted children from taking under a will. G.S. Sec. 48-23(3) (1984) makes it clear, however, that such an intent to exclude must plainly appear on the face of the instrument. *See Stoney v. MacDougall*, 31 N.C. App. 678, 230 S.E. 2d 592 (1976), *disc. rev. denied*, 291 N.C. 716, 232 S.E. 2d 208 (1977) (cardinal principal of will construction is that testator's intent is to be effectuated as it appears from instrument itself subject to limitations of statute or decision).

The heart of defendant's response is that, by the use of the terms "hereafter born" and "upon the birth of any child," Dr. Pittman plainly manifested his intention to limit the class of grandchildren entitled to the benefits of the trust to those of the bloodline. Defendant cites *Wachovia Bank and Trust Co. v. Andrews*, 264 N.C. 531, 142 S.E. 2d 182 (1965), in support of his position.

Andrews also involved the construction of a testamentary trust. The will provision in question allowed a class of beneficiaries composed of the testator's great-nieces and great-nephews to be increased by "those who hereafter may be born within twenty-one (21) years after my death. . . ." At the time the will was executed, this class was composed only of naturally born relatives. During the twenty-one year period, however, the class was increased by both naturally born and by adopted great-nieces and great-nephews. Our Supreme Court held that it clearly appeared in the instrument that the testator intended to exclude adopted children from enjoying the benefits of the trust, declaring that "[b]irth is not synonymous with adoption." *Id.* at 538, 142 S.E. 2d at 187, and emphasizing that the twenty-six persons named in the will as beneficiaries of the trust were all blood relatives of the testator.

The facts in the present case differ from those in *Andrews* and compel a different result. The evidence discloses that at the time the will was executed, plaintiff, the natural son of defendant's wife, had been a part of defendant's household since his infancy, that he used the Pittman family name exclusively, and that he was treated as a son by his father, and as a grandchild by Dr. Pittman, in the same manner as defendant's two natural children. No evidence was presented indicating that Dr. Pittman ever realized that plaintiff had not been formally adopted by defendant.

Dr. Pittman's will speaks of distributing income to grandchildren "now in being or hereafter born." If defendant had already been adopted at the time the will was executed, he would have been "in being," and thus a beneficiary of the trust by operation of law. G.S. Sec. 48-23(3) (1984). Although plaintiff had not yet been adopted at the time the will was executed, we nevertheless do not accept the lower court's conclusion that as a matter of law, plaintiff was excluded from the class of grandchildren described in the will. Based on the materials before the court, a question of fact exists whether, at the time he executed his will, Dr. Pittman considered plaintiff one of defendant's children in being. It is axiomatic that summary judgment may not be granted when there remains a triable issue of fact. *E.g., Williams v. State Bd. of Educ.*, 284 N.C. 588, 201 S.E. 2d 889 (1974).

III

[2] Defendant also contends that the plaintiff was guilty of laches in bringing this action. He argues that in a lawsuit filed on 13 April 1971, plaintiff alleged "substantially the identical causes of action" as alleged in the instant action, and that the nine years that elapsed after a voluntary dismissal in the earlier action, before plaintiff filed this suit, was an unreasonable and unexplained delay that constituted laches. We find that at this stage of the proceedings, defendant is precluded from raising an argument based on laches.

On 10 August 1983, Superior Court Judge Donald L. Smith entered an order denying defendant's motion to dismiss and granting defendant's motion for change of venue. Judge Smith rejected defendant's argument based on his affirmative defense of laches, specifically finding as fact that "[t]he plaintiff has not been

guilty of laches." "[O]rdinarily one judge may not modify, overrule, or change the judgment of another Superior Court Judge made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E. 2d 484, 488 (1972). *Accord Estrada v. Jaques*, 70 N.C. App. 627, 321 S.E. 2d 240 (1984). Superior Court Judge Coy E. Brewer, Jr., was thus without authority to overrule, either expressly or implicitly, Judge Smith's prior determination that plaintiff was not guilty of laches in his order granting summary judgment.

IV

In conclusion, defendant has not shown, pursuant to G.S. Sec. 48-23(3) (1984), that the testator, Dr. Pittman, plainly intended to exclude plaintiff as a beneficiary of a testamentary trust. The order granting summary judgment must be, and is,

Reversed.

Chief Judge HEDRICK and Judge WELLS concur.

FRED W. MAUNEY v. JAMES H. MORRIS AND WIFE, DOROTHY W. MORRIS, MORRIS RENTALS, INC., A NORTH CAROLINA CORPORATION, AND MORRIS CASEWORKS, INC., A NORTH CAROLINA CORPORATION

No. 8426SC550

(Filed 19 March 1985)

1. Appeal and Error § 6.7— denial of motion to amend complaint—right of immediate appeal

In an action in which plaintiff's original complaint sought to place an equitable lien on real property of defendants, the denial of plaintiff's motion to amend his complaint to enforce a claim of lien for labor and materials affected a substantial right and was immediately appealable. G.S. 1-277; G.S. 7A-27.

2. Pleadings § 33.1; Rules of Civil Procedure § 15.1— denial of motion to amend complaint—new cause of action—statute of limitations expired

In an action in which plaintiff's original complaint sought to place an equitable lien on real property of defendants, an amendment of the complaint seeking to enforce a claim of lien for labor and materials would state a new related cause of action which would not relate back to the date of the original complaint, and the trial court properly denied plaintiff's motion to amend the complaint where the 180 day time limit of G.S. 44A-13 for instituting an action

to enforce a claim of lien for labor and materials had expired at the time the amendment was sought. G.S. 1A-1, Rule 15(a).

APPEAL by plaintiff from *Grist, Judge*. Judgment entered 10 January 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 January 1985.

On 18 July 1983, plaintiff, Fred Mauney, filed a summons without a complaint along with a motion to extend time to file a complaint, which was granted. Plaintiff, on the same date, filed a Notice of Lis Pendens to have an equitable lien placed upon the real property of defendants, James and Dorothy Morris. Plaintiff filed a motion to amend the summons on 8 August 1983 to add Morris Caseworks, Inc. as a party defendant, which was granted by the Clerk of Superior Court.

Plaintiff then filed an unverified complaint on 8 August 1983 seeking recovery of damages, the establishment of an equitable lien, a judgment enforcing the equitable lien, an accounting by defendants, conveyance of outstanding shares of stock and payment of net revenues. Defendants filed a verified answer and counterclaim on 8 September 1983. Thereafter, on 12 September 1983, defendants filed a motion to strike the notice of lis pendens. The motion to strike was granted on 3 October 1983.

After the notice of lis pendens was cancelled, plaintiff filed, on 11 October 1983, a claim of lien in the amount of $27,950. On 8 December 1983, plaintiff sought to amend his complaint to state a claim against defendants for materials and labor furnished by him for improvements made to the real property, enforcement of the claim of lien and in quantum meruit for the reasonable value of the materials and labor provided. Plaintiff filed a reply to defendants' counterclaim on 16 December 1983.

The motion to amend the complaint was denied on 11 January 1984. From the denial of his motion to amend, plaintiff appeals.

DeLaney, Millette & McKnight, P.A., by Steven A. Hockfield, for plaintiff appellant.

Joseph R. Cruciani, for defendant appellees.

JOHNSON, Judge.

[1] The initial question that must be addressed is whether appeal of the order denying plaintiff's motion to amend his complaint is premature. General Statutes 1-277 and 7A-27 in effect provide "that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment." (Citations omitted.) *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). An interlocutory order is one made "during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E. 2d 431, 433 (1980).

The order denying the motion to amend is interlocutory, for it does not determine the entire controversy and requires further action by the trial court. Ordinarily, an appeal from an interlocutory order will not be reviewed, unless it affects a substantial right and will work injury to the appellant if not corrected before appeal from final judgment. *Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975).

We hold that a substantial right is involved here. Plaintiff's potential interest in this specific piece of real property could be severely diminished if he must wait until a final judgment is rendered to appeal the trial court's order. First, there is nothing to prevent defendants, equitable owners of the property, from disposing of the property or placing an encumbrance upon the property. Second, plaintiff would have no protection against anyone that has the right to attach or execute a judgment against the property. Plaintiff, if he must wait to appeal this order, must take subject to any encumbrance placed on the land. Third, interest in real property is to be afforded every possible protection, for it is unique and once it is lost there is no replacement. We hold that plaintiff has a right to have the order denying his motion to amend his complaint reviewed at this stage of the proceeding.

[2] The question we are now confronted with is whether the trial court erred in denying plaintiff's motion to amend his complaint. Under G.S. 1A-1, Rule 15(a), amendment of a pleading after

a responsive pleading has been served is "only by leave of court or by written consent of the adverse party." Plaintiff's motion to amend was filed after the defendants had served their answer to the complaint, thus pursuant to Rule 15(a) plaintiff was required to seek court approval. It has repeatedly been held that a motion under Rule 15(a) for leave of court to amend a pleading is addressed to the sound discretion of the trial judge and the denial of such a motion is not reviewable absent a clear showing of an abuse of discretion. *Garage v. Holston*, 40 N.C. App. 400, 253 S.E. 2d 7 (1979).

In the case at bar, plaintiff filed a claim of lien for materials and labor furnished on 11 October 1983 as required by law. Claims of lien may be filed at any time after the maturity of the obligation secured thereby but not later than 120 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien. G.S. 44A-12. Plaintiff alleges that the labor and materials were last furnished on 15 June 1983, which is within the 120 days required by the statute. G.S. 44A-13 states that an action to enforce the lien may be instituted in any county in which the lien is filed, but no such action may be commenced later than 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien. Plaintiff did not institute an action within the 180 day time limit, but instead seeks now to institute the required action by filing an amended complaint which he contends relates back to the date of the filing of the original complaint. By relating back to the date of the original complaint, plaintiff contends that the action would be instituted within the 180 day time limit.

Plaintiff, in his original complaint, alleged facts which stated a cause of action for an equitable lien. "An equitable lien arises either from a written contract which shows an intention to charge some particular property with a debt or obligation, or is declared by a court of equity out of the general considerations of right and justice, as applied to the relations of the parties and the circumstances of their dealing." *Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965). "The doctrine of 'equitable liens' was introduced for the sole purpose of furnishing a ground for the specific remedies which equity confers, operating upon particular identified property, instead of general pecuniary recoveries granted by courts of law." *Id.* In the absence of a contract an equitable lien most fre-

quently arises in cases where one person has wrongfully expended, for improvements on his property, the funds of another, but instances of this sort of lien are not confined to such cases. *Id.*

Plaintiff, in his amended complaint, seeks to allege facts which will state a related new cause of action for a materialmen's or laborers' lien. A materialmen's or laborers' lien arises pursuant to G.S. 44A-8. Any person who performs or furnishes labor or professional design or surveying services or furnishes materials pursuant to a contract, either expressed 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 labor done or professional design or surveying services or material furnished pursuant to such contract. G.S. 44A-8.

Equitable liens and materialmen's or laborers' liens are separate and distinct causes of actions. An equitable lien is imposed by the courts to see that justice is done, while a materialmen's or laborers' lien is statutorily created. The allegations for a materialmen's or laborers' lien in the amended complaint appear to interject a wholly different cause of action. The materialmen's or laborers' lien is connected with the same subject matter (real property of defendants) as the original complaint, but new and additional facts are required for a just resolution of the issue. The amended complaint is related to the original complaint, as the subject matter is identical, but it states a new cause of action. When a related new cause of action is set up by amendment, the statute of limitations operates as of the time of the amendment and not the time of the institution of the action. *Lane v. Griswold*, 273 N.C. 1, 159 S.E. 2d 338 (1968); *Perkins v. Langdon*, 233 N.C. 240, 63 S.E. 2d 565 (1951); 10 Strong, N.C. Index 3d, Pleadings, sec. 35.1, p. 291. Thus, the amended complaint would not relate back to the date of the original complaint.

The trial court properly denied plaintiff's motion to amend on 11 January 1984. If the trial court had granted plaintiff's motion, the action to enforce the laborers' or materialmen's lien would have commenced as of that date. Plaintiff did not have a right to enforce the lien on 11 January 1984, for the action had to be instituted by 12 December 1983 to be within the 180 day time limit prescribed by law. A lien is lost if the steps required to perfect

it are not taken in the manner and within the time prescribed by law. *Strickland v. Contractors, Inc.*, 22 N.C. App. 729, 207 S.E. 2d 399 (1974).

In light of the statutory time limits, the trial court had no other alternative than to deny the motion to amend. If plaintiff's motion to amend had been allowed, the effect would have been to circumvent the statutes relating to filing and enforcement of laborers' or materialmen's lien.

We do not address plaintiff's second assignment of error that the trial court's findings of fact were not supported by the evidence in view of our holding that the court did not err in denying plaintiff's motion to amend his complaint.

The order of the trial court is

Affirmed.

Judges BECTON and MARTIN concur.

VALERIE A. GLESNER v. MICHAEL DEMBROSKY, JOHN DEMBROSKY AND VIVIAN DEMBROSKY

No. 844DC716

(Filed 19 March 1985)

1. **Contempt of Court § 5.1; Appearance § 2— civil contempt—show cause order waived by appearance**

In a child visitation action in which plaintiff was held in contempt for failure to obey a prior court order, plaintiff waived her objection to the lack of a show cause order or notice by appearing at the hearing, presenting substantial evidence on the issues of which she claims no notice, and stipulating to jurisdiction in the record on appeal. G.S. 5A-23(a) (1981).

2. ***Contempt of Court § 6.2— disobedience of child visitation order—sufficiency of the evidence***

In a child visitation dispute in which plaintiff was found in contempt for not obeying a prior court order, the evidence supported the court's findings that plaintiff had the ability to comply with the terms of a prior order; had never given defendants, the paternal grandparents, a useful telephone number; had refused to let them talk to the child when they discovered the correct number; had refused to allow in-person visitation; and that defendants

recognized the inappropriateness of their behavior with the child and would not continue it in the future. Plaintiff did not move for a change in visitation due to changed circumstances, but waited until the last minute to deny visitation; the parties may not cease compliance with judgments at whatever time they may see fit. G.S. 50-13.5 (1984), G.S. 50-13.7 (1984).

3. Contempt of Court § 6.3— civil contempt—no authority to award damages

The court did not have the authority to direct plaintiff to pay the out of state defendants' travel costs in an order holding plaintiff in contempt for not obeying a prior visitation order. Contempt is a wrong against the State, and monies collected for contempt go to the State alone.

APPEAL by plaintiff from *Martin, Judge.* Judgment entered 11 April 1984 in ONSLOW County District Court. Heard in the Court of Appeals 15 February 1985.

Under an order entered by a New Jersey court, defendants John and Vivian Dembrosky, the paternal grandparents of Michael Mullen, were given certain visitation rights with Michael.

Subsequent to the entry of the New Jersey order, plaintiff sought to have defendants' visitation rights terminated. The Onslow County District Court entered an order on 13 December 1982 giving the New Jersey order full faith and credit and continuing defendants' visitation rights. In that order, plaintiff was also ordered to keep defendants advised as to her telephone number so that defendants might exercise telephone visitations with Michael.

On 12 January 1984, defendants filed a motion in Onslow County District Court in which they alleged that plaintiff was denying defendants' visitation rights and prayed that the court hold plaintiff in civil contempt. At a hearing held pursuant to defendants' motion on 15 March 1984, both sides presented extensive evidence. The trial court found that plaintiff had wrongfully denied defendants' visitation rights and that plaintiff's disobedience to the court's prior order was wilful. The court's order stated that plaintiff was in wilful contempt and ordered plaintiff to serve a jail sentence of thirty days, suspended on stated terms of compliance.

From that order, plaintiff has appealed.

Warlick, Milsted, Dotson & Carter, by John T. Carter, Jr., for plaintiff.

Collins and Howard, by Jill R. Howard, for defendants.

WELLS, Judge.

[1] Plaintiff first challenges the jurisdiction of the trial court, on the grounds that no order or notice commanding her to appear and show cause was ever issued. Such an order or notice is required by N.C. Gen. Stat. § 5A-23(a) (1981):

> (a) Proceedings for civil contempt are either by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt or by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt. The order or notice must be given at least five days in advance of the hearing unless good cause is shown. . . .

Subject matter jurisdiction is conferred on the district court elsewhere, N.C. Gen. Stat. § 5A-23(b) (1981); the quoted provisions clearly govern exercise of jurisdiction over the person. *Compare* N.C. Gen. Stat. § 1A-1, Rule 4 of the Rules of Civil Procedure (summons to appear); *Childress v. Forsyth County Hospital Auth.*, 70 N.C. App. 281, 319 S.E. 2d 329 (1984), *disc. rev. denied,* 312 N.C. 796, 235 S.E. 2d 484 (1985). Objections to lack of jurisdiction over the person may be waived by voluntary appearance. N.C. Gen. Stat. § 1-75.7 (1983). We have recently held that this includes objections to the notice required by G.S. § 5A-23. *Bethea v. McDonald,* 70 N.C. App. 566, 320 S.E. 2d 690 (1984). *See also Lowder v. Mills, Inc.*, 301 N.C. 561, 273 S.E. 2d 247 (1981) (appearance waives right to object to procedure). Plaintiff never objected below to lack of an order or notice. Plaintiff appeared at hearing and presented substantial evidence on the issues of which she claims no notice; in addition, she stipulated to jurisdiction in the record on appeal. She thereby waived her objection to the lack of notice. *Bethea v. McDonald, supra.* The assignment is overruled.

[2] With one exception, plaintiff's remaining assignments of error challenge the sufficiency of the evidence to support the trial

court's findings of fact and in turn the conclusions of law. It is well settled that in contempt proceedings the trial court's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment. *Clark v. Clark*, 294 N.C. 554, 243 S.E. 2d 129 (1978); *Foy v. Foy*, 69 N.C. App. 213, 316 S.E. 2d 315 (1984). The trial court is not required to make separate conclusions of law. N.C. Gen. Stat. § 5A-23(e) (1981). *Compare* N.C. Gen. Stat. § 1A-1, Rule 52(a) of the Rules of Civil Procedure. Contempt proceedings are not a form of punishment, but serve to ensure obedience to orders of the court. *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980). Therefore, it is essential that the alleged contemnor have the means to comply, and that the court so find, before she can be found in contempt. *Henderson v. Henderson*, 307 N.C. 401, 298 S.E. 2d 345 (1983).

We have reviewed the record and conclude that the findings are supported by the evidence and that they support the order. There was evidence that plaintiff never gave defendants a useful telephone number, and that after defendants discovered the correct number when they called, plaintiff refused to let them talk to Michael. These actions effectively and completely frustrated the court-ordered telephone visitation. The court's finding that plaintiff refused to allow in-person visitation as ordered is amply supported by the evidence. Compliance with the literal terms of the order was clearly within plaintiff's physical ability, as the court found. Nothing else appearing, the order adjudging plaintiff in contempt was entirely proper.

The thrust of plaintiff's arguments, on appeal and below, is that defendants' conduct justified non-compliance or justified insisting on additional conditions of compliance. Such an argument should properly have been brought before the court by a motion for change in visitation due to changed circumstances. *See* N.C. Gen. Stat. §§ 50-13.5, 50-13.7 (1984). Plaintiff made no such motion. The trial court could properly have refused to hear her evidence. *See Lowder v. Mills, Inc.*, 45 N.C. App. 348, 263 S.E. 2d 624 (1980) (only question in show cause hearing is whether order violated), *rev'd on other grounds*, 301 N.C. 561, 273 S.E. 2d 247 (1981). Nevertheless, the court heard the evidence and made findings accordingly. Again, these findings are conclusive if supported by

any competent evidence. *Searl v. Searl*, 34 N.C. App. 583, 239 S.E. 2d 305 (1977).

The trial judge heard a great deal of evidence concerning defendants' behavior with Michael, including extensive psychiatric testimony. We find that there was competent evidence that defendants recognized the inappropriateness of their behavior and would not continue it in the future. This supports the court's finding that defendants were willing to cease the objectionable behavior.

The real problem, from plaintiff's perspective, is that the court ordered in-person visitation to continue despite defendants' past behavior. We recognize that courts of law cannot hope to regulate ongoing domestic relationships in a manner satisfactory to all concerned. *See Clark v. Clark, supra.* Nevertheless, the trial courts have the duty to decide domestic disputes, guided always by the best interests of the child and judicial objectivity. *Id.* To that end, trial courts possess broad discretion to fashion custodial and visitation arrangements appropriate to the particular, often difficult, domestic situations before them. *Pruneau v. Sanders*, 25 N.C. App. 510, 214 S.E. 2d 288, *cert. denied*, 287 N.C. 664, 216 S.E. 2d 911 (1975). The decision of the trial judge, who sees and hears the witnesses and observes their demeanor, ought not to be upset on appeal absent a clear showing of abuse of that discretion. *King v. Demo*, 40 N.C. App. 661, 253 S.E. 2d 616 (1979). On this record, we conclude that plaintiff has failed to make such a showing.

Like the trial court, we find persuasive the facts that plaintiff had allowed visitation previously, despite admitted knowledge of the grounds now raised, and that plaintiff waited to the last minute to deny visitation. The integrity of the court system and its judgments demands that parties may not cease compliance with judgments at whatever times they may see fit. *Gates v. Gates*, 69 N.C. App. 421, 317 S.E. 2d 402 (1984), *aff'd*, 312 N.C. 620, 323 S.E. 2d 920 (1985) (per curiam). Under compelling equitable circumstances, we have remanded for further proceedings where literal compliance with a contempt order would result in injustice. *Id.* The present record does not disclose such circumstances.

[3] The only assignment requiring further discussion involves the court's directive that plaintiff pay into court defendants' travel expenses, in attending the hearing on defendants' motion,

for reimbursement to defendants. A North Carolina court has no authority to award damages to a private party in a contempt proceeding. *Records v. Tape Corp. and Broadcasting System v. Tape Corp.*, 18 N.C. App. 183, 196 S.E. 2d 598, *cert. denied*, 283 N.C. 666, 197 S.E. 2d 880 (1973). *Compare* 17 Am. Jur. 2d *Contempt* § 113 (1964) (majority rule apparently *contra*). Contempt is a wrong against the state, and moneys collected for contempt go to the state alone. *In the matter of Rhodes*, 65 N.C. 518 (1871). That portion of the order accordingly constituted error and must be vacated.

The record before us reflects a conscientious and objective effort by the trial judge to reach a fair result in a trying situation. We conclude that the order represents a reasonable solution in the best interests of the child. The order appealed from is therefore affirmed, except for the one erroneous directive requiring plaintiff to pay defendants' travel expenses, which is vacated.

Affirmed in part; vacated in part.

Judges WHICHARD and BECTON concur.

STATE OF NORTH CAROLINA v. DELMA JUNE EDWARDS

No. 8428SC728

(Filed 19 March 1985)

1. Constitutional Law § 48— inquiries from State Bar—subsequent disbarment—no presumption of ineffective assistance of counsel

Inquiries from the State Bar to defendant's counsel before her trial and the disbarment of defendant's attorney subsequent to her trial did not create a presumption of ineffectiveness of counsel at her trial.

2. Constitutional Law § 48— effective assistance of counsel—failure to file pretrial motions

Defendant was not denied the effective assistance of counsel because her attorney failed to file any pretrial motions where the record shows that the attorney was prepared to defend the case against defendant and that he capably conducted such defense.

3. Constitutional Law § 48— disruptive conduct by counsel—no ineffective assistance of counsel

Defendant was not denied the effective assistance of counsel because her attorney, during the prosecutor's cross-examination of an alibi witness, slammed a group of papers to the table in front of him and then stood up and interrupted the prosecutor by addressing the court, and the court then admonished defense counsel that he would be held in contempt if he repeated such conduct.

4. Criminal Law § 99.5— no expression of opinion

Defendant's cause was not prejudicially discredited when the trial court admonished defense counsel that he would be held in contempt if he repeated certain disruptive conduct, although the court failed to give corrective instructions, where the record shows that counsel was not intimidated thereby.

ON writ of certiorari to review judgment entered by *Thornburg, Judge*. Judgment entered 22 January 1981 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 15 February 1985.

Defendant was indicted for the second degree murder of Frank Waldroup. The evidence for the state tended to show that defendant lived with Waldroup. The two had been drinking and arguing at their home in a trailer park. Waldroup went to the manager's trailer to ask if he could spend the night in an empty trailer. He was shot on the manager's front steps. There were no eyewitnesses to the actual shooting, but witnesses observed defendant walking back to her trailer from the scene after the shooting and overheard her making incriminating statements. She was arrested at home shortly afterward. Defendant presented evidence of alibi and of intoxication. Upon a verdict of guilty, defendant received a sentence of thirty to thirty-five years imprisonment. She appealed, but her appeal was never perfected, apparently because of disbarment proceedings against her attorney. Writ of certiorari was granted 16 March 1984.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Wilson Hayman, for the State.

Assistant Public Defender Lawrence C. Stoker for defendant.

WELLS, Judge.

Defendant does not challenge the introduction of or the sufficiency of the evidence. Instead, her assignments of error relate to

the effectiveness of counsel, and the trial court's admonition to defense counsel following an incident during the trial.

[1] Defendant first contends that the pending and ultimate disbarment of her trial counsel, Wesley F. Talman, Jr., *see N.C. State Bar v. Talman*, 62 N.C. App. 355, 303 S.E. 2d 175, *disc. rev. denied*, 309 N.C. 192, 305 S.E. 2d 189 (1983), raises a reasonable doubt as to the effectiveness of his assistance at trial. We note first that defendant bears a heavy burden of proof on this issue. *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982). The record clearly shows that actual proceedings against Talman did not commence until *after* defendant's trial had ended. (Talman had received inquiries from the State Bar eight months before trial.) Only rarely will such surrounding circumstances justify a presumption of ineffectiveness independent of counsel's actual trial performance. *United States v. Cronic*, --- U.S. ---, 104 S.Ct. 2039 (1984). Subsequent disbarment of counsel does not appear to be such a circumstance. *Id.* To the contrary, the limited authority we have found leads us to conclude that *subsequent* disbarment proceedings generally are irrelevant in considering Sixth Amendment claims. *See Ruffin v. United States*, 330 F. 2d 159 (8th Cir. 1964) (no "legal shadow" cast by "abstract fact" of subsequent disbarment); *Curry v. Estelle*, 412 F. Supp. 198 (S.D. Tex. 1975) (attorney had been convicted of felony, on appeal at time of trial; not incompetent), *aff'd*, 531 F. 2d 1260 (5th Cir. 1976) (per curiam); *United States ex rel. Ortiz v. Sielaff*, 404 F. Supp. 268 (N.D. Ill. 1975) (simply irrelevant), *aff'd*, 542 F. 2d 377 (7th Cir. 1976); *Escobedo v. United States*, 350 F. Supp. 894 (N.D. Ill. 1972) (attorney served with disciplinary petition *before* trial; conviction affirmed), *aff'd*, 489 F. 2d 758 (7th Cir. 1973) (mem.). Based on the foregoing authorities, we also conclude that the State Bar's inquiries do not raise any question of ineffectiveness.

In order to show ineffective assistance at trial, defendant bears the burden of showing a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, --- U.S. ---, 104 S.Ct. 2052 (1984); *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241 (1985). The reviewing court must consider the totality of the circumstances and the evidence adduced. *Strickland v. Washington, supra.*

[2] Defendant alleges only two errors as constituting ineffective assistance. The first is that Talman never filed any pretrial motions. Such failure does not constitute ineffective assistance *per se*, but must be viewed in light of the entire transcript. *State v. Ginn*, 59 N.C. App. 363, 296 S.E. 2d 825, *disc. rev. denied and appeal dismissed*, 307 N.C. 271, 299 S.E. 2d 217 (1982). The record clearly reflects that Talman was prepared to defend and did indeed capably conduct the defense. He examined the state's witnesses vigorously, using information apparently discovered in the preliminary proceedings. Talman timely requested *voir dire* hearings and obtained suppression of highly incriminating evidence on Fourth Amendment grounds. He presented evidence in defendant's behalf. In the face of powerful evidence of guilt, we conclude that Talman's trial preparation and presentation of defendant's case were more than constitutionally adequate.

[3] Defendant's second instance of allegedly ineffective assistance, on which her remaining assignments of error are also based, involved an outburst by Talman. Talman had completed direct examination of an alibi witness. While the state was cross-examining her, Talman raised up a group of papers and slammed them to the table in front of him, then stood up and addressed the court, interrupting the district attorney. While this conduct was unusual and unprofessional, nothing in the record suggests that this isolated incident affected the quality of the defense, which continued thereafter as before. No similar outbursts occurred. We do not believe that there is a reasonable probability, as opposed to mere speculation, that this attorney error affected the result. *Strickland v. Washington, supra.*

[4] Following Talman's outburst, the following exchange took place:

COURT: Mr. Talman, if you do that again—

MR. TALMAN: I'm sorry, Your Honor. I'm sorry.

COURT: Just wait until I finish. If you do that again, I'm telling you in open Court and in the presence of everybody assembled that it will be adjudged by me to be a contemptuous act and you will be punished accordingly. Now, did you wish to address the Court?

MR. TALMAN: Yes, Your Honor. I am somewhat upset, Your Honor, about this continuous implication that there is something wrong about this witness talking to me, or of his implication that I am doing something wrong.

COURT: If you have a remark to make or objection to make, make it and I will rule on it. I don't want any more of that conduct. Now, you may have a seat.

MR. TALMAN: All right, sir. I move for a mistrial.

COURT: Motion denied.

Defendant contends that the admonition, without corrective instructions, prejudicially discredited her cause in the eyes of the jury. Such a contention must be evaluated in light of all the circumstances. *State v. Brady*, 299 N.C. 547, 264 S.E. 2d 66 (1980). It is clear that the court had power, including contempt sanctions, to control the proceedings and maintain the dignity of the court in the face of disruptive conduct. *In re Paul*, 28 N.C. App. 610, 222 S.E. 2d 479, *disc. rev. denied and appeal dismissed*, 289 N.C. 614, 223 S.E. 2d 767 (1976). The court made no comment as to the evidence in the case. *See State v. Davis*, 253 N.C. 86, 116 S.E. 2d 365 (1960), *cert. denied*, 365 U.S. 855 (1961). The record reveals only this one admonition; it is apparent from subsequent events in the trial that Talman was not intimidated thereby. *See State v. Norris*, 26 N.C. App. 259, 215 S.E. 2d 875, *cert. denied and appeal dismissed*, 288 N.C. 249, 217 S.E. 2d 673 (1975), *cert. denied*, 423 U.S. 1073 (1976). *Compare United States v. Davis*, 442 F. 2d 72 (10th Cir. 1971) (repeated threats by judge, record revealed intimidation; new trial). No disciplinary action took place before the jury. *See State v. Simpson*, 233 N.C. 438, 64 S.E. 2d 568 (1951) (witnesses arrested for perjury during trial). While an explanatory instruction might have been desirable, none was requested and none appears to be required by these circumstances. In short, we do not believe defendant has shown that this one isolated incident affected the result of the trial. *Accord State v. Coleman*, 65 N.C. App. 23, 308 S.E. 2d 742 (1983), *cert. denied*, 311 N.C. 404, 319 S.E. 2d 275 (1984) (counsel threatened with contempt before jury venire, no prejudicial error). Defendant's accompanying motion for mistrial was therefore properly denied.

Defendant finally urges that her motion for a new trial, based on the foregoing alleged errors, was incorrectly denied. Our dispo-

sition of those questions resolves this assignment against defendant. Defendant received a fair trial, free of prejudicial error.

No error.

Judges WHICHARD and BECTON concur.

ELBERT METCALF v. MAC JR. McGUINN AND WIFE, MARY P. McGUINN; GEORGE DAVID BRADLEY AND WIFE, JANIE S. BRADLEY; GEORGE R. BRADLEY AND WIFE, BERNICE BRADLEY; HOWARD BRADLEY AND WIFE, ALICE M. BRADLEY; JOHN JACKSON AND WIFE, ARGIE MAE JACKSON; AND LEONARD JACKSON AND WIFE, PATRICIA JACKSON

No. 8429SC670

(Filed 19 March 1985)

1. Boundaries § 8.2— processioning—landowners not adjacent to disputed boundary—not necessary parties

The court did not err by allowing the petitioner in a processioning action to take a voluntary dismissal of the portion of his petition calling for adjudication of the boundary line beyond the point where respondents' land ended. Necessary and proper parties under G.S. 38-3(a) are those landowners whose land adjoins the disputed boundary; landowners whose land adjoins boundary lines which are not in dispute, but which may connect with or intersect the disputed line, are not necessary parties, but may be joined in the discretion of the trial judge. G.S. 38-1 to -4.

2. Evidence § 48— apprentice surveyor—qualified as expert

The trial court did not abuse its discretion in a processioning action by allowing expert testimony from a licensed surveyor who had been an unlicensed apprentice at the time he made the surveys. The lack of a surveyor's license, of itself, did not disqualify the witness as an expert, and testimony that the surveyor under whom the witness had worked was licensed did not prejudice respondents because no surveys by that surveyor were offered in evidence.

3. Boundaries § 5— processioning—surveyor's testimony—no map—properly excluded

The trial judge in a processioning action did not err by instructing the jury to disregard the testimony of a surveyor who did not make a map depicting the line he located in relation to landmarks and the line claimed by petitioner. His testimony did not reveal the exact location of the line he surveyed and was not competent to prove the true location of the boundary line.

APPEAL by respondents from *Mills, Judge.* Judgment entered 26 January 1984 in Superior Court, POLK County. Heard in the Court of Appeals 12 February 1985.

This case concerns a boundary line dispute. On 16 June 1980, Elbert Metcalf petitioned to establish the boundary between his property and that owned by respondents. On 3 February 1981 the Polk County Clerk of Court entered an order locating the boundary and requiring a survey. Petitioner appealed to the Polk County Superior Court. Respondents moved to dismiss the petition, first, on grounds that it failed to state facts sufficient to constitute a cause of action and, second, because the petition did not join all necessary parties, *i.e.*, all persons who owned land along the line petitioner wants settled.

Petitioner moved for voluntary dismissal of the portion of the petition calling for adjudication of the boundary line beyond the point where respondents' land ended. The trial court allowed the voluntary dismissal, and declined to grant respondents' motion to dismiss the petition.

At trial, the jury approved the boundary line proposed by petitioner. Respondents appeal.

Prince, Youngblood & Massagee, by Sharon B. Ellis and Boyd B. Massagee, Jr., for petitioner appellee.

Hamrick and Hamrick, by J. Nat Hamrick, for respondent appellants.

ARNOLD, Judge.

[1] Respondents contend that the trial judge erred in allowing petitioner to take a voluntary dismissal as to part of his petition to establish the true boundary line between his land and that of respondents. Petitioner made the motion for voluntary dismissal prior to trial in Superior Court but after the jury had been impaneled. His motion followed a motion by respondents to dismiss his petition for failure to join necessary parties, other landowners along the disputed line. Petitioner's motion asked for voluntary dismissal as to the portion of the line bounding the northwest corner of his land, which adjoined land owned by persons not joined as respondents in the present suit.

Respondents argue that the processioning statute, G.S. 38-1 to -4, which provides procedures for settling disputes over boundary lines, does not provide for amendment to petitions between the hearing by the clerk of court and trial in Superior Court. Yet, the statute does provide that trial in Superior Court shall be *de novo*. G.S. 38-3(b). This gives the trial court full jurisdiction to try the case as if no action had been instituted below, *In re Hayes*, 261 N.C. 616, 135 S.E. 2d 645 (1964), and therefore to allow amendment of the pleadings as if the suit had been originally brought in Superior Court, *see Sudderth v. McCombs*, 67 N.C. 353 (1872).

Petitioner's voluntary dismissal was properly allowed pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. Nothing in the statute requires that the matter be sent back for rehearing before the clerk of court. The trial judge correctly proceeded on the amended petition.

The petition as amended did not fail to join as respondents any persons owning land along the disputed boundary. In light of the voluntary dismissal, the trial court did not commit error by refusing to grant respondents' motion to dismiss on grounds that all necessary parties were not joined. The pertinent statute provides:

> The owner shall file his petition under oath stating therein facts sufficient to constitute the location of such line as claimed by him and *making defendants all adjoining landowners whose interest may be affected by the location of said line.*

G.S. 38-3(a) (emphasis added).

We take this to mean that all landowners whose land adjoins the *disputed* boundary and whose interest may be affected are necessary and proper parties. Landowners whose land adjoins boundary lines which are not in dispute, but which may connect with or intersect the disputed line, are not necessary parties under the statute, although they may be joined in the discretion of the trial judge. The joinder of all persons who own land on a boundary line that might be affected by location of the disputed line would be an endless process and processioning would become so time-consuming and complex that the legislature's interest in a swift and orderly resolution of boundary disputes would be frustrated.

The trial judge's refusal to allow respondents' motion to dismiss the petition was not error.

The respondents attempt to raise an issue in their argument as to the petitioner's alleged failure to describe the true location of the boundary line. Respondents may not now argue that question as they failed to present it according to Rule 28 of our Rules of Appellate Procedure.

[2] Respondents contend that the trial court should not have allowed Mr. Odum to testify as to surveys he made before he was a licensed surveyor, and to testify that the person he was working under when he made these surveys, Mr. Joe Jack Wells, was a licensed surveyor. Mr. Odum's lack of a surveyor's license, of itself, does not disqualify him as an expert. 1 Brandis, North Carolina Evidence § 133 (1982). Mr. Odum was a surveyor's apprentice at the time he made the surveys, and at the time he testified he was a licensed surveyor. The evidence in the record of Mr. Odum's training indicates that the trial judge did not abuse his discretion in allowing him to testify as an expert.

Mr. Odum's testimony that Mr. Wells is a licensed surveyor came as he was establishing his training and experience: he had worked as an assistant to Mr. Wells. No surveys done by or opinion of Mr. Wells were offered in evidence. The admission of Mr. Odum's testimony that Mr. Wells was licensed did not prejudice respondents.

[3] Respondents contend also that the trial court erred in instructing the jury to disregard the testimony of Mr. Marlowe, a surveyor respondents had hired to survey the disputed line. The trial judge told the jury that he gave them this instruction because Mr. Marlowe did not go on the ground and establish the boundary line.

Our review of the record indicates that Mr. Marlowe first did deed research and then platted out the deed description contained in petitioner's deed. He then went out onto the petitioner's property to survey petitioner's land. He gathered evidence of where the property line might be by doing traverses and noting the location of fence lines, fence corners, iron pins, blazes on trees, and tree stumps or hubs. He then compared the physical evidence of the property line with the deed calls, and then went out on the

land and measured the distances given in the deed with a tape. He used corners and points he had established on his first reconnoiter and distances given in the deed to calculate the azimuths, or horizontal degree measurements. He apparently did not make a map depicting the line he located in relation to landmarks and to the line claimed by the petitioner.

The respondents did not present a map prepared by Mr. Marlowe on the basis of his survey. They did submit the plat he prepared on the basis of his deed research done prior to the survey.

In the pretrial conference, the trial judge stated that Marlowe's testimony did not locate the line on a map or in relation to the lines proposed by petitioner. We agree with the trial judge that Marlowe's testimony did not reveal the exact location of the line he surveyed, and accordingly it could not be used to establish the true boundary line between petitioner and respondents. The evidence was not competent to prove the true location of the boundary line, and the trial judge's instruction that the jury not consider it for that purpose was proper.

The respondents have made a number of other contentions in their brief, none of which are supported by argument or authorities. We deem them abandoned pursuant to Rule 28 of the North Carolina Rules of Appellate Procedure.

No error.

Judges EAGLES and PARKER concur.

GEORGE R. NASSIF v. SOUTHERN WHOLESALE, INC., A NORTH CAROLINA CORPORATION

No. 8426SC651

(Filed 19 March 1985)

Contracts § 26.2— severance pay—title to car—circumstances surrounding prior car

In an action to recover severance pay allegedly owed to plaintiff by defendant under an oral contract, evidence of the circumstances surrounding

plaintiff's possession and use of a 1978 Cadillac leased by defendant and assurances by defendant's president that plaintiff would eventually be given title to the car was relevant to plaintiff's claim that title to a leased 1980 Cadillac was to be given to plaintiff under the terms of the severance pay agreement.

Judge JOHNSON concurring.

APPEAL by plaintiff from *Burroughs, Judge.* Judgment entered 1 February 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 February 1985.

This is a civil action wherein plaintiff seeks to recover severance pay allegedly owed to him by defendant under the terms of an oral contract between the parties. The parties stipulated to the amount of damages plaintiff would be entitled to recover from defendant in the event the jury should find that a contract existed between the parties and that the defendant breached the contract; consequently, the judge submitted only the following issues to the jury, answered by the jury as indicated:

> 1. Did the Defendant, Southern Wholesale, Inc., through its President, Bob Beaty, enter into a contract with the Plaintiff, George R. Nassif, for Southern Wholesale, Inc. to pay George R. Nassif severance pay? ANSWER: Yes.
>
> 2. Did the defendant, Southern Wholesale, Inc., breach its contract with the Plaintiff, George R. Nassif? ANSWER: No.

From entry of judgment for defendant, plaintiff appealed.

Eugene C. Hicks, III, for plaintiff, appellant.

Wardlow, Knox, Knox, Freeman & Scofield, by John B. Yorke and Mark T. Sumwalt, for defendant, appellee.

HEDRICK, Chief Judge.

Plaintiff first assigns error to the trial court's exclusion of certain evidence. The facts necessary to an understanding of this assignment of error are as follows:

Plaintiff was employed as general manager of defendant, a wholesale beer distributor. In March, 1981, plaintiff's employment by defendant was terminated. In his complaint, plaintiff alleged that defendant, acting through its president, Bob Beaty, agreed to

provide plaintiff with weekly severance pay in the amount of $500 for twelve weeks, one-fourth of his previous year's bonus (approximately $3,750), and the title to a 1980 Fleetwood Cadillac leased by the defendant and used by plaintiff for both personal and business activities. In exchange for defendant's agreement to provide plaintiff with this "severance pay," plaintiff agreed to resign from defendant's employ. In his complaint plaintiff alleged that defendant breached the terms of this agreement by paying him $500 a week for only nine weeks, by terminating plaintiff's possession of the 1980 Fleetwood Cadillac after only twelve weeks, and by refusing to provide plaintiff with title to the car.

In its answer defendant admitted that it agreed to pay plaintiff $500 a week severance pay, but denied that the agreed upon period was twelve weeks, contending instead that it agreed to provide plaintiff with this sum for two months. Similarly, defendant asserted that plaintiff was told he might retain possession of the automobile for two months; defendant denied plaintiff's allegation that it agreed to give him title to the car. The evidence tended to show that the fair market value of the automobile in question was $12,000 at the time of the alleged agreement.

At trial plaintiff sought unsuccessfully to introduce evidence tending to show the following: In March, 1978, plaintiff had a birthday party, which was attended by Bob Beaty, defendant's president. At this party Mr. Beaty presented defendant with the keys to a 1978 Sedan DeVille. The following Monday plaintiff encountered Mr. Beaty and thanked him again for the gift of the car. Plaintiff testified on *voir dire* that Mr. Beaty responded as follows: "Well, you understand it's leased. . . . Use it as a company car and personal car and that after a couple of years, we'll—you'll have to pay $1.00 or $10.00, nominal fee and the car will be yours. You can give it to your wife to drive and we'll give you another company car." Plaintiff testified that, at Mr. Beaty's suggestion, he later exchanged this car for the 1980 diesel Fleetwood Cadillac at issue in the present action. According to plaintiff, Mr. Beaty indicated that the gas-driven 1978 Sedan DeVille "was using a lot of gas," and said, "If you get a Diesel and give it to your wife in a couple years. . . . The car will last you a long time and will operate a lot cheaper." Like the 1978 Sedan DeVille, the 1980 Fleetwood was leased by defendant. At trial Judge Bur-

roughs refused to permit plaintiff to testify about any of the facts relating to the 1978 car.

Plaintiff's testimony before the jury was that he met with Mr. Beaty on 13 March 1981, at which time he was asked to resign. Plaintiff testified that he and Mr. Beaty discussed the terms of plaintiff's severance pay in some detail, and that, at the end of the conversation, Mr. Beaty said, "Of course, the car"; plaintiff responded by saying, "That's the second time you give me the car."

Plaintiff contends that the excluded evidence was relevant to his claim for the 1980 Fleetwood Cadillac because it tended to render more credible his contentions as to the disputed terms of the oral agreement between plaintiff and defendant. We agree. The jury's determination of the disputed terms of the oral agreement hinged on the credibility of plaintiff and Mr. Beaty. The evidence plaintiff was allowed to present to the jury tended to show that plaintiff and Mr. Beaty discussed at some length severance pay amounting to approximately $9,750, and that Mr. Beaty thereafter, without discussion and in an off-handed manner, agreed to include property having a fair market value of $12,000. We believe plaintiff's testimony in this regard is far more credible when considered in light of the excluded evidence that plaintiff had previously been assured by defendant that he would eventually be given title to the car. Because we believe the erroneous exclusion of this evidence may well have been prejudicial to plaintiff, we hold that plaintiff is entitled to a new trial.

New trial.

Judge JOHNSON concurs in the opinion.

Judge COZORT concurs.

Judge JOHNSON concurring.

I concur for the following reasons. Facts or circumstances connected in any way with the matter in issue or from which any inference of the disputed fact can be reasonably drawn should not be excluded from the consideration of the jury. *Pettiford v. Mayo*,

117 N.C. 27, 23 S.E. 252 (1895); *see also, Corum v. Comer*, 256 N.C. 252, 123 S.E. 2d 473 (1962). It is not required that the evidence bear directly upon the question in issue; the evidence is competent and relevant if it is one of the circumstances surrounding the parties and necessary to be known to properly understand the conduct or motive of the parties or to weigh the reasonableness of their contentions. *Jones v. Hester*, 260 N.C. 264, 132 S.E. 2d 586 (1963).

In the case *sub judice*, the excluded evidence was calculated to enable the jury to properly understand the conduct of the parties and to weigh the reasonableness of their contentions. The circumstances surrounding the parties' action regarding the leasing, possession and use of the 1978 Cadillac are so connected to the leasing, possession and use of the 1980 Cadillac, which was included in the severance agreement, that the jury should have been permitted to consider this evidence in arriving at its determination of the truth of the matter in dispute. Under the circumstances, I think the excluded evidence was relevant and material as bearing upon the credibility of the parties' testimony and the reasonableness of their contentions as to the terms of the severance pay agreement.

STATE OF NORTH CAROLINA v. DENNIS SINGLETARY AND RAY CHARLES BELLAMY

No. 8413SC443

(Filed 19 March 1985)

1. **Obstructing Justice § 1— obstructing an officer in performance of duties—not unconstitutionally vague—does not chill communications**

G.S. 14-223, which prohibits willfully and unlawfully resisting, delaying, or obstructing a police officer in discharging or attempting to discharge a duty of his office, is not unconstitutionally vague and does not chill communications between individuals and police officers.

2. **Obstructing Justice § 1; Criminal Law § 73.2— testimony not offered for truth of matter therein—not within hearsay rule**

In a prosecution for obstructing an officer while attempting to arrest a suspect, the trial court did not err by refusing to strike the testimony of an officer that he had information that the suspect would run. The testimony was admitted with a limiting instruction only for the purpose of explaining the officers' actions, not for the truth of the matter asserted.

3. Obstructing Justice § 1— testimony that defendants hindered officers and heard order to stop—no error

In a prosecution for obstructing an officer attempting to arrest a suspect, the trial court did not commit prejudicial error in refusing to strike testimony that the defendants hindered officers when they caused the prisoner to get away and that defendants and everyone else in the crowd had heard a comment to stop.

4. Obstructing Justice § 2; Indictment and Warrant § 17.1— no fatal variance between indictment and proof—evidence sufficient for jury

In a prosecution for obstructing an officer attempting to make an arrest, the evidence was sufficient to go to the jury and there was not a fatal variance between the warrants and the evidence where the warrants alleged interference with an officer by charging the officer and refusing to get out of his way, and the evidence was that defendants advanced within six feet of officers after being told to halt, that one defendant yelled "no, no, no, he ain't going nowhere," and the other yelled "stop it, he ain't going." The evidence reflected a willful obstruction of the officers in discharging their duty, and the allegations in the warrants did not differ from the proof so significantly that defendants would be taken by surprise as to what statute they were charged with violating.

APPEAL by defendants from *Bruce, Judge.* Judgment entered 23 September 1983 in Superior Court, Columbus County. Heard in the Court of Appeals 17 January 1985.

The defendants were charged with obstructing an officer, Gerald Lincoln, while he was attempting to arrest a suspect, Harold Ford, on a warrant alleging drug offenses, at a local nightspot called Ro-Jays. A crowd of approximately forty people was outside Ro-Jays when the police officer and his colleague Officer Pierce first attempted to arrest Mr. Ford.

The crowd advanced towards Officer Lincoln and Mr. Ford. Mr. Ford was struggling. The police officer told the crowd to stop, and all did except for three who continued to come forward. Those three included the defendants. They advanced within six feet of the police officers. They halted after both police officers pulled their revolvers. Mr. Ford escaped when Officer Lincoln reached for his revolver. Officer Lincoln chased Mr. Ford and apprehended him.

The State's testimony shows that as they advanced toward the police officers, the defendants shouted and made threatening gestures. Officer Lincoln testified that defendant Singletary had

his fists balled in the air and yelled, "no, no, no, he ain't going nowhere." Defendant Bellamy shouted, "stop it, he ain't going."

The defendants were arrested on warrants charging that while Officer Gerald Lincoln:

> [W]as attempting to discharge and discharging a duty of his office, to wit; to arrest defendant Harold Irvin Ford, on a warrant for drugs charges. [sic] the interferred [sic] was that Ray Charles Bellamy [and Dennis Singletary, in the second warrant] came running at the said officer in xxxxx charging manner. [sic] and refusing to get out of officer [sic] way in violation of the law referenced on this Warrant.

After trial the defendants were found guilty of obstructing an officer. From the judgment, defendants appeal.

Attorney General Rufus L. Edmisten, by Associate Attorney Sueanna P. Peeler, for the State.

Williamson and Walton, by C. Greg Williamson and Michael W. Willis, for defendant appellants.

ARNOLD, Judge.

[1] The defendants contend first that the trial court committed reversible error by denying defendants' motions to dismiss the charges prior to the beginning of trial on grounds that G.S. 14-223 is unconstitutional on its face due to vagueness.

G.S. 14-223 states:

> If any person shall willfully and unlawfully resist, delay, or obstruct a police officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both.

A statute is unconstitutionally vague if its language is so general and uncertain that "it may embrace not only acts commonly recognized as reprehensible but also others which it is unreasonable to presume were intended to be made criminal," *State v. Graham*, 32 N.C. App. 601, 607, 233 S.E. 2d 615, 620 (1977).

G.S. 14-223 does not suffer from this defect; it is not so generally phrased that it proscribes innocent but orderly communication with police officers. The statute prohibits only *willful* resistance, delay or obstruction of a police officer in attempting to discharge or in discharging a duty of his office. An individual who disagrees with or criticizes a police officer, but who does not intend to resist, obstruct or delay the officer's performance of his duty cannot be convicted under G.S. 14-223. *See State v. Leigh*, 278 N.C. 243, 251, 179 S.E. 2d 708, 713 (1971). We agree that the term "unlawfully" in the statute is conclusory but do not find that that makes the statute as a whole unconstitutionally vague.

G.S. 14-223 gives a person of ordinary intelligence fair notice of the behavior it proscribes. The legislature has drafted with "reasonable precision" a comprehensible rule of conduct. *State v. Hales*, 256 N.C. 27, 32, 122 S.E. 2d 768, 773 (1961). The statute is not unconstitutionally vague.

The defendants suggest that G.S. 14-223 chills communications between individuals and police officers. Communications intended merely to assert rights, clarify a misunderstanding, or gain information in a peaceable and orderly manner, however, are not chilled. Those intended to hinder or prevent an officer from carrying out his duty admittedly are discouraged by the statute, and we have found that these restrictions are in the public interest and not so intrusive as to violate the First or Fourteenth Amendments. *State v. Leigh*, 278 N.C. at 251, 179 S.E. 2d at 713.

[2] The defendant next contends that the trial court committed reversible error in refusing to strike the testimony of the witness, Officer Lincoln, that "we had information in reference to serving the warrant on Harold that he would run" on grounds that the testimony was hearsay. This testimony was admitted only for the purpose of explaining why the police officers, on seeing Mr. Ford arrive in his car, returned to their own car and waited for him to park his before approaching him. The trial judge instructed the jury that the officer's testimony was not admitted "for the purpose of showing that the information was true, that is [sic] that Harold Erwin Ford would run, but it is admitted solely for the purpose of explaining why this officer did what he did."

Because it was not introduced to prove the truth of the matter asserted, the testimony did not include hearsay evidence. Moreover, the trial judge's limiting instruction avoided any prejudicial effect. *State v. Alexander*, 4 N.C. App. 513, 167 S.E. 2d 37 (1969), is therefore distinguishable.

[3] The defendant contends further that the trial court committed prejudicial error in refusing to strike the testimony of the witness, Officer Pierce, that the defendants ". . . hindered us when they first approached us when they caused our prisoner to get away," and in refusing to strike the officer's testimony that the defendants and everyone else in the crowd had heard his comment to stop. After reviewing all the evidence, we find no prejudicial error in this testimony.

[4] The defendant contends also that the trial court committed reversible error in refusing defendants' motion to set aside the verdict because of a fatal variance between the allegations contained in the warrants and the evidence offered at trial. The warrants issued against both defendants charge that the defendants interfered with Officer Lincoln by "running at the said officer in . . . charging manner. [sic] and refusing to get out of officer [sic] way."

The evidence shows that both defendants advanced to within six feet of the police officers after they had been told to halt. One of the defendants had his fists balled in the air and yelled, "no, no, no, he ain't going nowhere." the other defendant yelled, "stop it, he ain't going." Their behavior reflected a determination to prevent the officers from arresting Harold Ford, and did in fact cause the officers to lose control of Ford so that he could struggle free. This was willful obstruction of the police officers in discharging their duty, and was illegal under G.S. 14-223. The variance between the warrant and proof accordingly was not fatal. *State v. Jacobs*, 25 N.C. App. 500, 503, 214 S.E. 2d 254, 256 (1975). Moreover, the allegations in the warrant did not differ from the proof so significantly that the defendants would be taken by surprise as to what statute they were charged with violating. *Id.*

Given the facts as described above, the evidence was clearly sufficient to carry the case to the jury. The defendants were not "merely remonstrating" with the officer on behalf of another. The

trial judge did not err in denying defendants' motion to dismiss made at the close of all the evidence.

The trial judge's denial of the defendants' motion to set aside the verdict and motion for judgment notwithstanding the verdict was no abuse of discretion.

No error.

Judges WELLS and EAGLES concur.

WILLIAM EDGAR STAPLES BY HIS DULY APPOINTED GUARDIAN AD LITEM, GARLAND STAPLES, GARLAND STAPLES AND ANITA STAPLES v. WOMAN'S CLINIC OF THE ALBEMARLE, P.A., ALFRED M. MONCLA, M.D., AND ALBEMARLE HOSPITAL, INC.

No. 841SC642

(Filed 19 March 1985)

Rules of Civil Procedure § 60.2— motion to set aside summary judgment—newly discovered evidence—discovery of expert witness

Where the parties in a medical malpractice case stipulated that by a specific date plaintiffs would file a complete response to interrogatories as to the identity of their expert witnesses, plaintiffs failed to identify experts as stipulated, and plaintiffs stated in response to a request for an admission that they had no expert to testify against defendant, the trial court did not abuse its discretion in refusing to set aside summary judgment entered for defendant on the ground that plaintiff's subsequent discovery of an expert constituted "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under G.S. 1A-1, Rule 59(b)." G.S. 1A-1, Rule 60(b)(2).

Judge BECTON concurring.

APPEAL by plaintiffs from *Small, Judge.* Order entered 27 January 1984 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 8 February 1985.

Plaintiffs filed a complaint on 3 February 1982 alleging failure of defendant Albemarle Hospital, Inc. (defendant) to provide obstetrical and pediatric care and treatment to plaintiffs mother and child in accordance with the standard of practice among hospitals in similar communities at the time of the treat-

ment. On 1 September 1982 defendant served plaintiffs with interrogatories requesting, *inter alia*, information as to expert witnesses who would testify against it. Plaintiffs responded that their experts were "unknown." On 28 December 1982 defendant moved to compel identification of plaintiffs' experts. On 25 January 1982 plaintiffs and defendant stipulated that in lieu of a hearing on defendant's motion plaintiffs would identify their experts by 19 February 1983. Plaintiffs failed to identify experts as stipulated. In response to defendant's 29 March 1983 request for admission plaintiffs stated they had no expert to testify against defendant. In the absence of evidence to support plaintiffs' allegations, the court granted defendant's motion for summary judgment on 31 May 1983.

In August 1983 plaintiffs located an expert witness. On 16 August 1983 they requested relief from the summary judgment order on the ground that discovery of an expert constituted "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under [G.S. 1A-1] Rule 59(b)." *See* G.S. 1A-1, Rule 60(b)(2).

The court denied plaintiffs' motion and renewed the order of summary judgment for defendant. It found, pursuant to G.S. 1A-1, Rule 54(b), "that there is no just reason for delay," thus making the order subject to immediate appeal. From that order plaintiffs appeal.

Clark & Stant, P.C., by Stephen C. Swain and D. Keith Teague, for plaintiff appellant.

Harris, Cheshire, Leager & Southern, by Claire L. Moritz, for defendant appellee Albemarle Hospital, Inc.

WHICHARD, Judge.

Under G.S. 1A-1, Rule 60(b)(2), the court has discretion to relieve a party from a final judgment upon a showing of newly discovered evidence "which by due diligence could not have been discovered in time to move for a new trial" within ten days after entry of the original judgment as required by G.S. 1A-1, Rule 59. *Conrad Industries v. Sonderegger*, 69 N.C. App. 159, 161, 316 S.E. 2d 327, 328 (1984). Plaintiffs contend that the court gave no reason for its ruling and "did not even exercise discretion in denying

Plaintiffs' motion." They contend, alternatively, that the court abused its discretion.

> When no reason is assigned by the court for a ruling which may be made as a matter of discretion for the promotion of justice or because of a mistaken view of the law, the presumption on appeal is that the court made the ruling in the exercise of its discretion.

Brittain v. Aviation, Inc., 254 N.C. 697, 703, 120 S.E. 2d 72, 76 (1961). Nothing in this record rebuts the presumption that the court here ruled in the exercise of its discretion. Further, the court couched its ruling in the following language: "the [c]ourt *being of the opinion,* based upon the evidence before it, that the summary judgment in favor of defendant *should* not be rescinded" (emphasis added) renews the order as to defendant. Absent evidence to the contrary, this language appears affirmatively to suggest that the court was acting in its discretion. We therefore do not believe the court acted under the misapprehension that it was bound by the parties' stipulation and was powerless to set aside the summary judgment. Appellate review thus is limited to determining whether the court abused its discretion. *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E. 2d 532, 541 (1975).

Where as here parties have stipulated that by a specific date they will "file full and complete response to [an] interrogatory answering with particularity each and every request" as to the identity of expert witnesses, and they fail to comply with said stipulation, we find no basis for holding that the court abused its discretion in denying their motion for relief from the judgment entered as a consequence of their failure to comply.

Affirmed.

Judges WELLS and BECTON concur.

Judge BECTON concurring.

Procedural stipulations entered into by counsel are not absolutely binding on the trial court. Thus, summary judgment based on procedural stipulations may be set aside at the discretion of the trial court. Under Rule 16 of the North Carolina Rules of Civil Procedure pre-trial orders, including stipulations, may be

"modified at the trial to prevent manifest injustice." "The Court may . . . set [stipulations] aside, on timely application, for inadvertence, improvidence or excusable neglect by either party if there is no prejudice to the opposite party and it would be inequitable or oppressive to hold the parties to the agreement." *Hester v. New Amsterdam Casualty Co.*, 268 F. Supp. 623, 627 (D.S.C. 1967). *See generally* Annot., 161 A.L.R. 1161 (1946) (relief from stipulations).

The clear distinction drawn between stipulations relating to substantive rights and procedural matters is important. *See Palliser v. Home Tel. Co.*, 170 Ala. 341, 54 So. 499 (1911); 161 A.L.R. 1161, *supra*. Relief from procedural stipulations should be much more liberally granted absent a showing of prejudice to the opposing party. *See Lillard Pipe and Supply, Inc. v. Bailey*, 387 P. 2d 118 (Okla. 1963).

Because and only because of the presumption enunciated in *Brittain*, do I concur with the majority's conclusion.

J. F. WILKERSON CONTRACTING COMPANY, INC. v. SELLERS MANUFACTURING CO., INC.

No. 8410SC574

(Filed 19 March 1985)

Accord and Satisfaction § 1— acceptance of check for disputed amount—accord and satisfaction

Summary judgment was properly entered for defendant in an action arising from a construction contract where plaintiff and defendant disagreed about whether plaintiff owed liquidated damages and plaintiff had negotiated a check from defendant for the final payment minus liquidated damages. Plaintiff had to accept the check on the terms offered by defendant or not at all; acceptance and negotiation constituted an accord and satisfaction despite plaintiff's attempts to characterize it otherwise.

APPEAL by plaintiff from *Herring, Judge*. Judgment entered 6 March 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 17 January 1985.

The single issue presented in this case is whether plaintiff and defendant entered into an accord and satisfaction when plain-

tiff cashed a check tendered by defendant as payment for construction work done by plaintiff.

On 9 July 1979, plaintiff and defendant entered into a contract under which plaintiff agreed to do certain clearing, grading, paving, sanitary sewage and drainage work for defendant for a lump sum of $354,656.50. The work was to begin no later than 1 August 1979 and was to finish no later than 1 February 1980. The parties agreed that if plaintiff did not finish by the contract date, defendant could deduct liquidated damages of $50 per additional day from its agreed payment to plaintiff.

Due to errors in the plans and specifications, and in the "field engineering lay-out," which plaintiff ascribes to the Project Engineer, plaintiff fell behind in its work, and with the onset of winter, had to stop work during the months January, February and March. Plaintiff claims that the Project Engineer, who plaintiff also claims was defendant's agent, assured plaintiff that it could have extensions of time to avoid liquidated damages.

Plaintiff substantially completed the project on 1 July 1980, 150 days beyond the contract date. Plaintiff sent defendant a final request for payment of $15,939.21. Plaintiff claims that nine months later defendant agreed it owed this amount. Yet, on 6 July 1981, defendant tendered a check to plaintiff in the amount of $8,439.21. The check was attached to a voucher that read:

$15,939.21	Final Payment
(7,500.00)	Less $50.00 per day for 150 days over
$ 8,439.21	Balance Due.

Accompanying the check was a letter from defendant to the Project Engineer, explaining that the $8,439.21 was final payment to plaintiff.

The trial judge granted a summary judgment against plaintiff on all issues raised by plaintiff and, finding no just reason for delay, entered a final order as to them. Plaintiff appeals.

John E. Bugg for plaintiff appellant.

Akins, Mann, Pike & Mercer, by J. Jerome Hartzell, for defendant appellee.

ARNOLD, Judge.

Plaintiff contends that defendant owes it $7,500, an amount defendant deducted as liquidated damages from the total amount of $15,939.21 owed to plaintiff as final payment for construction work. Defendant deducted the $7,500 because plaintiff finished its work for defendant 150 days beyond the contract date and because the parties had agreed that defendant was entitled to liquidated damages of $50 per day for each day the project was not finished beyond the contract completion date. Defendant thus tendered a check for the lesser amount of $8,439.21 as "final payment" and contends that plaintiff's negotiation of it constituted a settlement of the account, an accord and satisfaction which estops plaintiff from seeking additional payment.

Defendant moved for summary judgment against plaintiff, which was granted by the trial judge. Normally, the existence of an accord and satisfaction is a question for the jury, but, "if the only reasonable inference is its existence or nonexistence, accord and satisfaction is a question of law and may be adjudicated by summary judgment when the essential facts are made clear of record." *Sharpe v. Nationwide Mut. Fire Ins. Co.*, 62 N.C. App. 564, 565, 302 S.E. 2d 893, 894, *cert. denied* 309 N.C. 823, 310 S.E. 2d 353 (1983).

When two parties disagree about an amount owed, and the debtor tenders a check to the creditor as full payment, the creditor's negotiation of the check constitutes an accord and satisfaction as a matter of law. *Sharpe*, 62 N.C. App. at 566, 302 S.E. 2d at 894; *Barber v. White*, 46 N.C. App. 110, 112, 264 S.E. 2d 385, 386 (1980); *Brown v. Coastal Truckways, Inc.*, 44 N.C. App. 454, 455, 261 S.E. 2d 266, 267 (1980); *Barger v. Krimminger*, 262 N.C. 596, 598, 138 S.E. 2d 207, 210 (1964).

The record in the present case indicates without doubt that prior to plaintiff's negotiation of the check tendered by defendant, the plaintiff and defendant disagreed on the amount defendant owed for the construction work. On 31 March 1981 plaintiff issued to defendant a bill for final payment in the amount of $15,939.21. On 6 July 1981 defendant sent plaintiff a check for $8,439.21. The accompanying voucher showed:

15,939.21	Final Payment
(7,500.00)	Less $50.00 per day for 150 days over
$8,439.21	Balance Due

A letter also accompanied the check. It read:

Mr. Don C. Kennedy, P.E.
Bass, Nixon & Kennedy, Inc.
7416 Chapel Hill Road,
Raleigh, N. C. 27607

Dear Don:

We are enclosing our check for $8,439.21 as final payment to J. F. Wilkerson Contracting Company.

According to your June 17, 1981 letter Wilkerson is penalized for being 150 days late in completing the project as contracted. Therefore we have deducted $7,500.00, or 150 days at $50.00 per day.

Please forward this check to Wilkerson and the extra copy of this letter enclosed for their records.

Yours very truly,

SELLERS MANUFACTURING COMPANY
s/ BEN F. BULLA
Ben F. Bulla, Treasurer

CC: Mr. Ben E. Jordan, Jr., President
J. F. Wilkerson Contracting Co.

Enclosure 2

These documents indicate that plaintiff and defendant disagreed on the total amount owed, primarily because they disagreed as to whether or not plaintiff owed liquidated damages.

When plaintiff elected to accept defendant's check this represented its acceptance of the balance due as final payment. Plaintiff's attempt to alter the terms of the letter and voucher is unavailing. Plaintiff had "to accept it [the check] on the terms offered by defendant or not at all, and . . . acceptance and negotiation of it constituted an accord and satisfaction despite [plaintiff's] attempt to characterize it otherwise." *Sharpe*, 62 N.C. App. at 567, 302 S.E. 2d at 894.

An accord and satisfaction was established as a matter of law and the trial judge's grant of a summary judgment was proper.

Affirmed.

Judges WELLS and EAGLES concur.

KATIE L. ADAMS v. LESLIE PIERRE BROOKS, JR., HAROLD WILLARD STEEN AND NORRIS EUGENE GLEAVES

No. 8420SC569

(Filed 19 March 1985)

Rules of Civil Procedure § 4— *failure to deliver summons to sheriff—subsequent endorsements begin action anew*

Plaintiff could not obtain a valid endorsement of her summons when it was not delivered to any sheriff for service within 30 days of issuance. Rather, the summons expired and later endorsements constituted the filing of the action as of the date of each respective endorsement. G.S. 1A-1, Rule 4(a) and (b).

APPEAL by plaintiff from *Wood, Judge.* Orders entered 5 March 1984 in Superior Court, ANSON County. Heard in the Court of Appeals 4 March 1985.

This is a civil action wherein plaintiff seeks recovery for personal injuries received on 7 July 1976 in an automobile accident with the defendants in Anson County.

The complaint was filed on 5 July 1979, and summonses were issued on the same day in the names of each of the defendants. Extensions of time were endorsed, purportedly in accordance with G.S. 1A-1, Rule 4(d), on sixteen subsequent occasions, the last endorsement being obtained on 24 November 1982. A copy of the summons and complaint was received by the Sheriff of Anson County for service on defendant Brooks on 17 December 1982, and service was accomplished the same day. A copy of the summons and complaint was received by the Sheriff of Richmond County for service on defendant Steen on 17 December 1982, and service was accomplished on 23 December 1982.

On 25 April 1983, defendant Steen moved the court for summary judgment, asserting that the action was barred by G.S.

1-52(5). On 21 February 1984, defendant Brooks moved the court for summary judgment in his favor. On 5 March 1984, plaintiff obtained an entry of default against defendant Gleaves.

On 5 March 1984, the court granted defendant Brooks' motion for summary judgment and dismissed the action against him with prejudice. The court also granted defendant Steen's motion for summary judgment, and dismissed the case against him. Plaintiff appealed.

Toms & Bazzle, P.A., by Ervin W. Bazzle and James H. Toms, for plaintiff, appellant.

Golding, Crews, Meekins, Gordon & Gray, by C. Byron Holden and Henry C. Byrum, Jr., for defendant Brooks, appellee.

Wade & Carmichael, by R. C. Carmichael, Jr., for defendant Steen, appellee.

HEDRICK, Chief Judge.

In the only assignment of error presented on appeal, plaintiff asserts that the motions for summary judgment were erroneously granted. Plaintiff contends that the applicable three year statute of limitations, G.S. 1-52(5), was tolled when the action was commenced by the filing of her complaint on 5 July 1979. Defendants assert that since plaintiff made no attempt to deliver a copy of the complaint and summons, after issuance, to the sheriff for service, that the original summons expired and that every later endorsement simply constituted the filing of this action as of the date of each respective endorsement, and that the action is thus barred by G.S. 1-52(5).

The central issue presented by this appeal is whether the timely filing of a complaint is all that is necessary to toll permanently the statute of limitations. Rule 3 of the North Carolina Rules of Civil Procedure provides that "[a] civil action is commenced by filing a complaint with the court." G.S. 1A-1, Rule 3. Plaintiff filed her complaint on 5 July 1979, seeking damages for personal injuries received on 7 July 1976. Therefore, pursuant to G.S. 1-52(5), plaintiff timely filed her action by two days.

G.S. 1A-1, Rule 4(a) provides that: "Upon the filing of the complaint, summons shall be issued forthwith, and in any event

within five days. *The complaint and summons shall be delivered to some proper person for service.*" (Emphasis added.) The summonses herein were issued on 5 July 1979. Plaintiff failed to deliver the complaint and summonses to some proper person for service.

G.S. 1A-1, Rule 4(d) provides that:

> When any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant by either of the following methods of extension:
>
> 1) The plaintiff may secure an endorsement . . . or
>
> 2) The plaintiff may sue out an alias or pluries summons. . . .

Plaintiff has failed to comply with these statutory requirements. The words "not served" in Rule 4(d) do not contemplate a lack of service because plaintiff made no effort to obtain service. Rather, "not served" means that plaintiff must have taken some action to obtain service which was not successful. Therefore, plaintiff could not obtain a valid endorsement, and could not sue out an alias summons, when no attempt had been made to serve the original summons within 30 days of issuance.

Any other result would be contrary to the policies behind G.S. 1-52(5). "The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time." *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E. 2d 870 (1970). To decide otherwise would encourage the timely filing of complaints, followed by a subsequent unlimited waiting period for the most advantageous time in which to litigate the case before attempting service.

The purpose behind G.S. 1A-1, Rule 4 and G.S. 1-52(5) is to give notice to the party against whom an action is commenced within a reasonable time after the accrual of the cause of action. *Wiles v. Construction Co.*, 295 N.C. 81, 243 S.E. 2d 756 (1978). These defendants had no knowledge of the action commenced against them on 5 July 1979 until December 1982. The record is silent as to why no attempt was made to serve these defendants

prior to this time. Both defendants filed affidavits stating that they were continuous residents of their respective counties at all times subsequent to 7 July 1976, and both defendants were found and readily served at the addresses contained in the original summonses.

We hold that the plaintiff's failure, after the timely filing of her complaint and summons, to comply with G.S. 1A-1, Rule 4(a) and (d) caused the original summonses to expire on 4 August 1979, since it was never delivered to any sheriff for service prior to the first endorsement extending time. Consequently, the summonses issued herein on 5 July 1979 could not be used as a basis for an extension of time for service. Every later endorsement simply constituted the filing of this action as of the date of each respective endorsement. Since this action was not filed against either of these defendants until 24 November 1982, the date of the last extension, it was filed more than three years following the accrual of the plaintiff's cause of action and is barred by G.S. 1-52(5). This Court has held that a defendant is entitled to judgment as a matter of law where the claim against him is barred by the statute of limitations. *Brantley v. Dunstan,* 10 N.C. App. 706, 179 S.E. 2d 878 (1971).

The orders of the trial court which granted summary judgment to these defendants are

Affirmed.

Judges JOHNSON and COZORT concur.

HOWARD WOODRUFF v. ROBERT L. SHUFORD, III

No. 8425SC704

(Filed 19 March 1985)

Accounts § 2— action on accounts—evidence insufficient for account stated—directed verdict improper

In an action which alleged that defendant was "indebted to plaintiff for an account rendered in the sum of $11,891.35" without specifying the basis, the trial court erred by directing a verdict against defendant. The directed verdict

could be upheld only if the evidence led solely to the conclusion that defendant was indebted to plaintiff on an account stated; all that the evidence showed was that plaintiff had an account, not that defendant agreed to it.

Judge MARTIN concurring.

APPEAL by defendant from *Howell, Judge*. Judgment entered 9 February 1984 in Superior Court, CALDWELL County. Heard in the Court of Appeals 14 February 1985.

In the complaint, without specifying the basis therefor, plaintiff simply alleged that defendant was "indebted to plaintiff for an account rendered in the sum of $11,891.35." By answer defendant denied the allegation. A jury trial was had and at the end of all the evidence the court directed a verdict for plaintiff in the amount sued for and entered judgment accordingly.

When viewed in its most favorable light for the defendant the evidence presented was to the following effect: In the fall of 1979 defendant orally engaged plaintiff, a builder, to renovate certain buildings that he owned. The buildings, two A-frame cabins, were situated in Deerhorn Park in Caldwell County, and the work agreed to included constructing basements under and otherwise renovating both buildings and putting a new roof on one of them. The parties agreed that the work would be finished by the spring of 1980, that labor would be billed at $4.00 an hour, materials at plaintiff's cost, and that defendant would pay when billed and when the work was "satisfactorily completed." Plaintiff's first billing in December, 1979 for $3,516.04 was paid by defendant. In June, 1980, without any written billing or documentation, plaintiff asked defendant to pay him $3,500, which defendant did after stating that further payments would only be made in response to written documentation for labor and materials. The job did not proceed as expected, no work was done for months at a time, and in February, 1982 defendant terminated plaintiff's employment and obtained someone else to complete the project. In April, 1982 plaintiff billed defendant for $11,891.35, but about forty of the charges for labor and materials were not supported by an invoice of any kind, some of the invoices that were furnished did not show that they were related to defendant's property, and four invoices had the word "nursery" or "personal" written on them. Defendant owned no nursery business or facility, but plaintiff did. After the bill was received by mail defendant talked with plaintiff

about these discrepancies and requested clarification or documentation. Defendant also complained to plaintiff about ceiling damage due to four leaks in the roof and about the wall panelling and carpeting in one of the basements being ruined because the basement did not drain properly, stated that the bill was excessive, and refused to pay it.

Wilson and Palmer, by W. C. Palmer, for plaintiff appellee.

Rudisill & Brackett, by Keith Bridges, for defendant appellant.

PHILLIPS, Judge.

For us to uphold the verdict directed against defendant we would have to determine that the foregoing evidence can lead only to the conclusion that defendant is indebted to plaintiff on an account stated in the amount of $11,891.35. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971). That we cannot do, because other reasonable conclusions are possible, and a new trial is ordered. For that matter, the evidence presented does not even support the claim of account stated, though it does tend to support a claim for work done and materials furnished. This is because an *account* can only become an *account stated* by the party charged agreeing, either expressly or impliedly, to its correctness. *Mahaffey v. Sodero*, 38 N.C. App. 349, 247 S.E. 2d 772 (1978). An account stated involves the striking of a balance between the parties, either expressly or by implication. *Little v. Shores*, 220 N.C. 429, 17 S.E. 2d 503 (1941). All that the evidence in this case shows is that plaintiff had an account or bill in the amount of $11,891.35. It does not show that defendant agreed to it; on the contrary it shows that he disputed it. Thus what defendant owes plaintiff, if anything, was a question of fact for the jury, rather than one of law for the court.

The course that this case has followed so far and has yet to follow, more than a year after a jury had heard the evidence and was ready to assess it, demonstrates still again both the expediency and wisdom of permitting juries to arrive at a verdict when the evidence has been completed. Following this wise and expeditious course cannot possibly do any harm, since any verdict rendered can still be set aside when the evidence is deemed insufficient; whereas, failing to follow it, as our reports show, often

causes unnecessary appeals and retrials, to the great delay, inconvenience and expense of courts, litigants, lawyers, and witnesses alike.

New trial.

Judge WEBB concurs.

Judge MARTIN concurs in the result.

Judge MARTIN concurring.

I agree that a verdict was improvidently directed in favor of the plaintiff in this case for the reasons stated by the majority. The final paragraph of the majority opinion, however, is unnecessary to a decision in this case and, to the extent that it may intimate that the granting of a motion for directed verdict pursuant to G.S. 1A-1, Rule 50(a) is never appropriate, is potentially misleading to the trial bench and bar. In ruling upon a motion for directed verdict, the judge should be guided, instead, by the following principle set forth in *Manganello v. Permastone, Inc.*, 291 N.C. 666, 669-70, 231 S.E. 2d 678, 680 (1977):

> Where the question of granting a directed verdict is a *close one*, the better practice is for the trial judge to reserve his decision in the motion and allow the case to be submitted to the jury. If the jury returns a verdict in favor of the moving party, no decision on the motion is necessary and an appeal may be avoided. If the jury finds for the nonmoving party, the judge may reconsider the motion and enter a judgment notwithstanding the verdict under G.S. 1A-1, Rule 50(b), provided he is convinced the evidence was insufficient. On appeal, if the motion proves to have been improperly granted, the appellate court then has the option of ordering entry of the judgment on the verdict, thereby eliminating the expense and delay involved in a retrial. [emphasis added.]

STATE OF NORTH CAROLINA v. ALLEN MITCHELL OWENS

No. 844SC520

(Filed 19 March 1985)

Robbery § 1— common law robbery—lesser degree of armed robbery

Common law robbery is a lesser included offense of robbery with a dangerous weapon.

APPEAL by defendant from *Stevens, III, Judge*. Judgment entered 26 January 1984 in Superior Court, SAMPSON County. Heard in the Court of Appeals 6 February 1985.

Defendant was indicted and tried upon an indictment proper in form with robbery with a dangerous weapon. The Court submitted three possible verdicts to the jury: (1) guilty of robbery with a dangerous weapon, or (2) guilty of common law robbery, and (3) not guilty. The jury found the defendant guilty of common law robbery upon which the court imposed a sentence of eight years imprisonment. Defendant appeals.

Evidence adduced at trial tended to show the following: On 27 November 1983, at approximately 2 a.m., the defendant was in a club called the "B. W. Express." Also present were Bobby Matthis and Charles Cooper. Defendant and Matthis observed Cooper buying drinks for other club patrons and that Cooper possessed a large sum of money which he was flashing around. Defendant and Matthis began discussing a plan as to how they could take the money from Cooper. They concluded that they could get the money if they could entice Cooper outside. In furtherance of their scheme, defendant offered Cooper a ride home which Cooper accepted. When defendant, Matthis and Cooper went outside to leave, defendant told Cooper that the car was parked behind the building. When the three walked behind the building, Matthis struck Cooper on the head with a piece of firewood. Cooper was knocked unconscious for 15 to 20 minutes. Matthis took $70 to $200 from Cooper's wallet. Defendant and Matthis reentered the club where they split the money. When Cooper recovered, he went back inside the club and reported that he had been robbed of $200, a set of car keys, and a ski jacket.

In testifying on his own behalf, the defendant admitted that he was instrumental in getting Cooper to go outside. He also ad-

mitted that he knew that Cooper would be robbed once he left the club. However, defendant denied receiving any of the money.

Attorney General Rufus Edmisten, by Assistant Attorney General James Peeler Smith, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender James A. Wynn, Jr., for defendant.

JOHNSON, Judge.

Defendant's sole contention on appeal is that common law robbery is not definitionally a lesser included offense of robbery with a dangerous weapon, therefore the court erred in submitting common law robbery as a possible verdict. We disagree.

Defendant was indicted under G.S. 14-87(a) which reads as follows:

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets such person or persons in the commission of such crime, shall be guilty of a Class D felony.

Under the statute a defendant may be convicted of robbery with a dangerous weapon when it is charged that he *took* or *attempted* to take property from the person of another and that he did so by using or threatening to use a dangerous weapon. *State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978). On the other hand, however, common law robbery requires an *actual* taking of property with violence or intimidation. *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980).

Because common law robbery requires an *actual* taking of property, defendant argues that it is not definitionally a lesser included offense of robbery with a dangerous weapon which requires either an *actual* taking *or* an *attempted* taking of property. Although defendant acknowledges the precedent of cases holding

that common law robbery is a lesser included offense of robbery with a dangerous weapon, *see, e.g., State v. Swaney*, 277 N.C. 602, 178 S.E. 2d 399, *appeal dismissed*, 402 U.S. 1006, 91 S.Ct. 2199, 29 L.Ed. 2d 428 (1971); *State v. Wenrich*, 251 N.C. 460, 111 S.E. 2d 582 (1959); *State v. Hare*, 243 N.C. 262, 90 S.E. 2d 550 (1955), defendant submits that *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982) redefined the test for determining what is a lesser included offense and that *Weaver*, therefore, requires this Court to hold that common law robbery is not a lesser included offense of robbery with a dangerous weapon.

In *Weaver*, the primary question was whether the offense of taking indecent liberties with a child under the age of sixteen, G.S. 14-202.1, is a lesser included offense of first degree rape of a child of the age of twelve or less, G.S. 14-27.2(a)(1). In addressing this issue, the Court stated that the determination is made on a *definitional*, not a factual basis. The court then reiterated the well-established rule in this jurisdiction that:

> [w]hen a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser, all of which could be proved by proof of the allegations in the indictment. Further, when there is some evidence supporting a lesser included offense, a defendant is entitled to a charge thereon even when there is no specific prayer for such instruction, and error in failing to do so will not be cured by a verdict finding a defendant guilty of a higher degree of the same crime.

Weaver, supra, at 633-34, 295 S.E. 2d at 377.

The Weaver Court broke no new ground. It merely restated that a lesser included offense is one in which the greater offense contains all of the essential elements of the lesser offense. Thus, the traditional standard is applicable in the case at bar. Robbery with a dangerous weapon contains all of the essential elements of common law robbery. Thus, common law robbery is a lesser included offense. *State v. Swaney, supra; State v. Tarrant*, 70 N.C. App. 449, 320 S.E. 2d 291 (1984). Consequently, defendant's assignment of error is without merit.

In the trial of defendant's case, we find no error.

No error.

Chief Judge HEDRICK and Judge COZORT concur.

DARRIN KEITH MERCER, BY HIS GUARDIAN AD LITEM, JEAN MERCER v. ROGER CROCKER AND DONNIE H. CROCKER

No. 847SC470

(Filed 19 March 1985)

1. **Automobiles and Other Vehicles § 84— contributory negligence—children presumed incapable**

A thirteen-year-old farm worker who fell from the back of a pickup truck could not be held contributorily negligent as a matter of law where he was between the ages of seven and fourteen.

2. **Automobiles and Other Vehicles §§ 92.3, 105.1— farm worker falls from back of pickup truck—driver is brother of truck owner—directed verdict for defendants improper**

A directed verdict for defendants was not proper in an action by a thirteen-year-old farm worker who fell from the back of a pickup truck where the evidence showed that one defendant drove the truck with no tailgate along a paved road at 45 miles an hour, slowed to approximately 5 miles per hour, then speeded up without warning; that plaintiff was thrown off the truck as a result of the unexpected acceleration and did not jump off the truck or dangle his feet off the tailgate, although there was conflicting evidence; and that the driver of the truck was the brother of the owner and was operating it with his consent. G.S. 20-71.1.

APPEAL by plaintiff from *Brown, Judge.* Judgment entered 21 February 1984 in Superior Court, WILSON County. Heard in the Court of Appeals 8 January 1985.

On 28 July 1980, Darrin Mercer and his brother George Mercer were employed by Roger and Donnie Crocker in harvesting tobacco. Darrin was thirteen years old at the time. The Crockers came to pick Darrin and George up after lunch on 28 July in a pickup truck. Darrin and George rode in the back of the truck. The truck had no tailgate. The truck belonged to Roger Crocker and was driven by Donnie Crocker.

Darrin testified that as the truck neared the tobacco field they were harvesting, Darrin's hat blew off. Darrin was sitting down at the time. He estimated that the truck's speed was 45 miles per hour. The truck then slowed down to less than 5 miles per hour, and Darrin thought the truck was going to turn off the paved road, onto a driveway.

Darrin testified further that, as the truck slowed, he moved into a crouching position in order to jump off the truck when it turned into the driveway. Yet, the truck speeded up and went on down the paved road, throwing Darrin onto the pavement. He suffered severe head injuries. Darrin testified that he did not jump from the truck.

Darrin's mother, Jean Mercer, brought suit for negligence against the Crocker brothers on Darrin's behalf. On the defendants' motion, the trial court directed the verdict against the plaintiff. Plaintiff appeals the judgment.

Lee, Reece & Oettinger, by Cyrus F. Lee and Rachel V. Lee, for plaintiff appellant.

Battle, Winslow, Scott & Wiley, by Robert L. Spencer, for defendant appellees.

ARNOLD, Judge.

The plaintiff appeals from a directed verdict. The question on appeal is whether the evidence, considered in the light most favorable to the plaintiff, is sufficient to present a question for the jury. *See Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47 (1969); *Watt v. Crews*, 261 N.C. 143, 134 S.E. 2d 199 (1964). We hold that it is.

[1] The defendants alleged in their motion for directed verdict that Darrin Mercer was contributorily negligent. Yet, Darrin was thirteen years of age on 28 July 1980. He thus benefits from the rule that a person between the ages of seven and fourteen is presumed to be incapable of contributory negligence and may not be held contributorily negligent as a matter of law. *See Golden v. Register*, 50 N.C. App. 650, 653, 274 S.E. 2d 892, 894 (1981). The issue of whether he was capable of contributory negligence was one for the jury, and should not have been the basis of a directed verdict. *See Hamilton v. McCash*, 257 N.C. 611, 619, 127 S.E. 2d

214, 219 (1962). The case *Edwards v. Edwards*, 3 N.C. App. 215, 164 S.E. 2d 383 (1968), relied on by defendants, is distinguishable because the plaintiff there was fourteen years of age.

[2] We next consider the question whether the directed verdict was proper on the issue of defendants' negligence. The testimony of Darrin Mercer shows that Donnie Crocker drove the truck with no tailgate along a paved road at 45 miles per hour, then slowed to approximately five miles per hour, and then speeded up without warning. The testimony shows further that as a result of the truck's unexpected acceleration, Darrin Mercer was thrown off the truck. Darrin testified that he did not jump off the truck or dangle his feet off the tailgate, although there is other evidence that he did dangle his feet off the tailgate, and that his feet may have caught beneath the truck. Considering the evidence in the light most favorable to the plaintiff, however, we conclude that there is evidence that the manner in which the defendant Donnie Crocker operated the truck caused or contributed to Darrin's fall. This, combined with the evidence of the lack of a tailgate, is sufficient to take the case to the jury on the question of whether Donnie Crocker's operation of the truck was negligent.

The defendant Roger Crocker admitted that he was the owner of the truck being operated by his brother Donnie Crocker, and that Donnie Crocker was driving it with his permission. The defendant Roger Crocker admitted that he and his brother worked each other's farms and used each other's employees. Further, he admitted that they used each other's trucks to pick up their employees, including the Mercer brothers. Roger Crocker's admission that he was the owner of the truck being operated by his brother, and that his brother was operating it with his consent to pick up the Mercer brothers, by virtue of G.S. 20-71.1, was sufficient to carry the case to the jury on the question of the legal responsibility of defendant Roger Crocker for operation of the truck by his brother Donnie Crocker. *Kellogg v. Thomas*, 244 N.C. 722, 731, 94 S.E. 2d 903, 910 (1956).

We reverse the directed verdict as to both defendants and remand for new trial.

Reversed and remanded.

Judges WELLS and COZORT concur.

STATE OF NORTH CAROLINA v. ALTON GORDON SMITH

No. 8416SC699

(Filed 19 March 1985)

Criminal Law § 138— resentencing hearing—aggravating factors supported by original trial—law of the case

Evidence did not have to be presented at a resentencing hearing to support the trial court's findings of certain aggravating factors where evidence at the original trial amply supported such findings, since a court can take judicial notice of its own proceedings and records in the same case. Moreover, the existence of these factors was judicially established by an appeal of the case and became a part of the law of the case.

APPEAL by defendant from *Barnette, Judge.* Judgment entered 29 May 1984 in Superior Court, ROBESON County. Heard in the Court of Appeals 14 February 1985.

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

Regan and Regan, by Cabell J. Regan, for defendant appellant.

PHILLIPS, Judge.

This case has been here before. *State v. Smith,* 66 N.C. App. 570, 312 S.E. 2d 222, *disc. rev. denied,* 310 N.C. 747, 315 S.E. 2d 708 (1984). That appeal resulted in defendant's convictions being affirmed and the case being remanded to the Superior Court for resentencing. The crimes defendant was convicted of were aiding and abetting felonious breaking or entering, and aiding and abetting felonious larceny, both of which are Class H felonies with a presumptive term of three years and a maximum term of ten years. Following the trial Judge Herring found three factors in aggravation, found no mitigating factors, and imposed a ten-year prison sentence on the first count and a consecutive term of five years on the second. Resentencing was ordered by this Court because one of the three aggravating factors found by the court, that the offense was committed for hire or pecuniary gain, had no support in the evidence. Defendant's contention on appeal that another aggravating factor found by the court—that defendant had a prior conviction or convictions for criminal offenses

punishable by more than 60 days confinement—had no evidentiary support was overruled, but the validity of the other aggravating factor found by the trial judge—that defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants—and the court's failure to find any factors in mitigation were not contested in that appeal. Upon the return of the case to the Superior Court Judge Barnette resentenced defendant to ten years on the first count and three years consecutively on the second. Before doing so he found no factors in mitigation and found the same *matters* in aggravation that Judge Herring did, except for the pecuniary gain finding which was not made, but the factors found were numbered differently than before because the sentencing form has been changed. On the new sentencing form the prior convictions factor is as it was before, but the phrase about defendant inducing "others to participate" is a separate factor and so is the phrase about defendant occupying a "position of leadership or dominance." Thus, the matters involved constituted three factors this time, whereas before they constituted only two.

On this appeal defendant contends that he is entitled to be resentenced again because the sentence imposed on the first count exceeded the presumptive term and none of the aggravating factors that the court found are supported by evidence, as G.S. 15A-1340.4(a), (b) requires. In support thereof defendant points to the recorded fact that at the resentencing hearing no witnesses testified, no exhibits were introduced, and defendant expressly refused to stipulate to any facts whatever. Even so, we are of the opinion that the aggravating factors that the court found have all the support that the law requires. It is not the law that facts essential to a judgment can only be established by the testimony of witnesses, by exhibits introduced into evidence, or by a stipulation of the parties; they can also be established by judicial notice and by operation of law. When the case was tried, as the opinion in the prior appeal shows, there was abundant evidence that defendant induced another to participate in these crimes and occupied a position of leadership in regard to them and had two prior convictions for criminal offenses that were punishable by more than sixty days confinement. Evidence as to these matters did not have to be presented again, since a court can take judicial notice of its own proceedings and records in the

same case. 1 Brandis N.C. Evidence § 13 (2d rev. ed. 1982). Furthermore, the existence of these factors was judicially established by the previous appeal and became a part of the law of the case. 1 Strong's N.C. Index 3d, *Appeal and Error* § 68 (1976). We note that though the judge did not deem it necessary to receive evidence as to defendant's criminal record and part in the crimes committed, he recognized defendant's right to present evidence, but the invitation was declined.

The defendant's other contention, that the court erred in finding an aggravating factor not found at the first hearing, is likewise without merit. Though the factors are numbered differently, nothing in the transcript suggests that the resentencing judge believed or thought that an aggravating factor was being found that had not been found at the first hearing; the record clearly indicates that his intention was to find the same factors, and only those factors, that had been upheld on the first appeal. In effect, that is what was done and we do not perceive how the defendant could possibly have been prejudiced thereby. Furthermore, the restriction on resentencing is not against finding new factors in aggravation, but on imposing a more severe sentence than before, G.S. 15A-1335, and the sentence imposed was less than before.

Affirmed.

Judges WEBB and MARTIN concur.

BARBARA G. HALE v. GEORGE HALE

No. 8418DC599

(Filed 19 March 1985)

1. Appeal and Error § 6.3— denial of motion to dismiss—lack of subject matter jurisdiction—no immediate appeal

In a motion in the cause for increased alimony, defendant's appeal from the denial of his Rule 12(b)(1) and (2) motions to dismiss a portion of plaintiff's claim for lack of jurisdiction involved only personal jurisdiction, since G.S. 1-277(b), which provides immediate appeal from adverse rulings on jurisdiction, does not apply to motions seeking dismissal for lack of subject matter jurisdiction.

2. Appearance § 1.1; Divorce and Alimony § 19.1— consent judgment—general appearance

In a motion in the cause for increased alimony in which defendant, a Texas resident, had previously signed a consent judgment, the court did not err in denying defendant's motion to dismiss for lack of personal jurisdiction. When defendant signed a 1978 consent judgment, he made a voluntary appearance in the matter and thus consented to North Carolina jurisdiction; once jurisdiction attaches, it exists until the cause is fully and completely determined.

APPEAL by defendant from *Daisy, Judge.* Order entered 8 May 1984 in District Court, GUILFORD County. Heard in the Court of Appeals 11 March 1985.

This is a motion in the cause for an increase in alimony. On 18 October 1978, plaintiff and defendant entered into a consent judgment which awarded to plaintiff $125.00 per month as permanent alimony. On 15 March 1984, plaintiff filed this motion to have the court consider, among other things, the defendant's military retirement pension in awarding an increase. Defendant filed a motion to dismiss this action pursuant to Rule 12(b)(1) and 12(b)(2), asserting that the North Carolina courts are precluded from considering his retirement pay unless certain jurisdictional prerequisites, contained in the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Sec. 1408 (1983), are met. Judge Daisy denied defendant's motion to dismiss this cause for lack of jurisdiction. Defendant appealed.

Gabriel, Berry, Weston & Weeks, by M. Douglas Berry, for plaintiff, appellee.

Forman, Hall & Marth, P.A., by Paul E. Marth, for defendant, appellant.

HEDRICK, Chief Judge.

[1] In his only assignment of error defendant asserts that the court erred as a matter of law in denying his motion to dismiss a portion of plaintiff's claim for lack of jurisdiction. G.S. 1-277(b) provides that "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant. . . ." This section does not apply to orders denying motions made pursuant to G.S. 1A-1, Rule 12(b)(1) seeking dismissal for lack of subject

matter jurisdiction. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E. 2d 182 (1982). Therefore, we need only decide whether our courts can properly assert personal jurisdiction over defendant.

[2] Defendant's contention that the court lacks jurisdiction over him is untenable. Jurisdiction over the person of a defendant is obtained by service of process upon him, by his voluntary appearance, or consent. *In re Peoples*, 296 N.C. 109, 250 S.E. 2d 890 (1978). When defendant signed the 1978 consent judgment, he made a voluntary appearance in the matter and thus consented to our jurisdiction.

In *Barber v. Barber*, 216 N.C. 232, 4 S.E. 2d 447 (1939), plaintiff wife obtained judgment against defendant husband for subsistence without divorce, and the defendant subsequently became a nonresident of the state. The plaintiff filed a motion in the prior cause, and the defendant moved to dismiss for lack of jurisdiction. The question presented was whether the defendant could challenge the jurisdiction of the court to hear the plaintiff's motion after he had made a general appearance in the case. The Court said:

> An action in court is not ended by the rendition of a judgment, but in certain respects it is still pending until the judgment is satisfied. . . . Motion affecting the judgment but not the merits of the original controversy may be made in the cause. . . . This is particularly true of judgments . . . in actions for alimony without divorce, in which it may not be said that the judgment is in all respects final. . . . Such actions are always open for motions in the cause. . . .

Id. at 234, 4 S.E. 2d at 448. The Court concluded: "Want of jurisdiction of the court in such matters may not be challenged by special appearance. The right of the plaintiff to make the motion may not be thus questioned." *Id.*

Defendant contends that his submission to our jurisdiction in 1978 does not preclude him from withdrawing or limiting the extent of his consent. We do not agree. "Jurisdiction once acquired is generally not divested by subsequent events." *Neal v. Neal*, 69 N.C. App. 766, 767, 318 S.E. 2d 255, 255 (1984). "For once jurisdiction of a court attaches it exists for all time until the cause is

fully and completely determined." *Kinross-Wright v. Kinross-Wright*, 248 N.C. 1, 11, 102 S.E. 2d 469, 476 (1958). Alimony actions cannot be fully and completely determined until the death or remarriage of the dependent spouse. G.S. 50-16.9(b).

We make no decision today as to whether the jurisdictional requirements contained in the Uniformed Services Former Spouses' Protection Act have been met. Those requirements relate to subject-matter jurisdiction rather than to personal jurisdiction. We are of the opinion and so hold that once jurisdiction attached, as it did here by defendant's consent in 1978, it exists until the cause is fully and completely determined. Consequently, the court did not err in denying defendant's 12(b)(2) motion to dismiss for lack of personal jurisdiction.

The order appealed from, insofar as it denies defendant's motion to dismiss for lack of personal jurisdiction, is affirmed. The appeal from the order denying defendant's motion to dismiss for lack of subject-matter jurisdiction is dismissed and the cause is remanded to the District Court for a hearing on plaintiff's motion in the cause.

Affirmed in part, dismissed in part, and remanded.

Judges WELLS and MARTIN concur.

THOMAS G. RATTON v. MAVIS RATTON

No. 8422DC750

(Filed 19 March 1985)

Divorce and Alimony § 19.5— alimony consent judgment prior to 1 October 1967— alimony increase precluded

A mutually executed confession of judgment was an "order entered by consent" as described in G.S. 50-16.9(a). Where defendant's motion for an increase in alimony was predicated on an order for the payment of alimony entered by consent prior to 1 October 1967, defendant's motion failed to state a claim upon which relief could be granted since G.S. 50-16.9(a) specifically excludes orders entered by consent before 1 October 1967.

Judge MARTIN concurring.

APPEAL by defendant from *Fuller, Judge.* Judgment entered 5 April 1984 in District Court, DAVIDSON County. Heard in the Court of Appeals 11 March 1985.

This is a motion in the cause to increase alimony. Plaintiff executed a confession of judgment and judgment was entered for the payment of alimony to defendant on 13 February 1967.

On 19 January 1984, defendant filed a motion to increase alimony, requesting the modification of the judgment entered 13 February 1967. Plaintiff filed a motion to dismiss for failure to state a claim for which relief can be granted pursuant to G.S. 1A-1, Rule 12(b)(6). Plaintiff's motion to dismiss was granted. Defendant appealed.

Leonard and Bell, by Joe H. Leonard, for plaintiff, appellee.

Charles E. Frye, III, for defendant, appellant.

HEDRICK, Chief Judge.

To modify an order for alimony, a party must meet the requirements of G.S. 50-16.9(a). This section specifically excludes from its application all orders for the payment of alimony "entered by consent" prior to 1 October 1967. A mutually executed confession of judgment, like the one herein involved, is an "orde[r] entered by consent" as described in G.S. 50-16.9(a). This Court has so held in *Yarborough v. Yarborough,* 27 N.C. App. 100, 106, 218 S.E. 2d 411, 415 (1975). Since defendant's motion for an increase was predicated on an order for the payment of alimony entered by consent prior to 1 October 1967, defendant's motion failed to state a claim upon which relief could be granted.

In *State v. Camp,* 286 N.C. 148, 152, 209 S.E. 2d 754, 756 (1974), the Supreme Court concluded that "[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." G.S. 50-16.9(a) states clearly and unambiguously that all orders to pay alimony entered by consent prior to 1 October 1967 are excluded from the application of the statute.

Defendant's remaining assignments of error urge that G.S. 50-16.9(a) violates the equal protection and due process clauses of the 14th Amendment of the United States Constitution and Article 1, Section 19 of the North Carolina Constitution. These constitutional arguments were not presented to or considered by the trial court, and this Court will not pass upon constitutional questions not raised and considered in the court from which the appeal was taken. *Brice v. Moore*, 30 N.C. App. 365, 368, 226 S.E. 2d 882, 884 (1976).

The judgment appealed from is

Affirmed.

Judges WELLS and MARTIN concur.

Judge MARTIN concurring.

Consent judgments for the payment of alimony were subject to modification in North Carolina before the enactment of G.S. 50-16.9(a), depending upon whether the consent judgment sought to be modified rested solely upon contract or was an adjudication by the court. *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964). If the court merely approved the amount of support which the husband agreed to pay the wife, and set that amount out in a judgment against him, such consent judgment constituted nothing more than a contract and could not be modified simply upon a showing of changed conditions. On the other hand, a consent judgment in which the court adopted the agreement of the parties as "its own determination of their respective rights and obligations," and ordered the husband to pay alimony in the agreed upon amount, was subject to modification at any time changed conditions warranted. *Bunn, supra.* With the enactment of G.S. 50-16.9(a), the distinction ceased to exist.

The confession of judgment entered into by plaintiff on 13 February 1967 was a consent judgment of the former type, resting upon contract, and was therefore not subject to modification upon a showing of changed circumstances under the law as it existed prior to the enactment of G.S. 50-16.9(a). Since that statute specifically excludes "orders entered by consent before 1 October 1967," neither is defendant entitled to modification under the present law.

Had the amount of support agreed upon by the parties been adopted by the court as its own determination of the amount of support to be paid by the plaintiff, the consent order would be subject to modification notwithstanding the fact that it was consented to before 1 October 1967. In such case, the former law, and not G.S. 50-16.9(a), would control.

STATE OF NORTH CAROLINA v. DENNIS LEE CHURCH

No. 8423SC680

(Filed 19 March 1985)

Narcotics § 1.3— acquisition of controlled substance by subterfuge—intentional by definition—no misdemeanor offense exists

There is no misdemeanor offense under G.S. 90-108(a)(10), which prohibits the acquisition of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge, because G.S. 90-108(b) provides that intentional violations of G.S. 90-108(a)(10) are felonies and the legal definitions of misrepresentation, fraud, forgery, deception and subterfuge have in common a requirement of a specific *intention* to deceive.

APPEAL by defendant from *Collier, Judge.* Judgment entered 10 February 1984, in Superior Court, WILKES County. Heard in the Court of Appeals 13 February 1985.

Defendant was charged in a bill of indictment with: "unlawfully, willfully and feloniously and intentionally acquir[ing] and obtain[ing] possession of Diazepam (Valium), a controlled substance included in Schedule IV of the North Carolina Controlled Substances Act, by misrepresentation, fraud, forgery, deception, or subterfuge in that the defendant presented a prescription for diazepam (valium), dated June 9, 1983, to James Robinson of Revco Pharmacy, D. Street, North Wilkesboro, North Carolina, which contained the forged signature of Jerry F. Watson, M.D., the defendant knowing said prescription contained the forged signature of Jerry F. Watson, M.D."

Defendant was found guilty of "nonfeloniously acquiring possession of a controlled substance." From a judgment imposing a prison sentence of eighteen months defendant appealed.

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

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

HEDRICK, Chief Judge.

The bill of indictment in which defendant was charged was drawn from G.S. 90-108(a)(10) (Cum. Supp. 1983) which states:

> (a) It shall be unlawful for any person:
>
> . . .
>
> (10) To acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge.

G.S. 90-108(b) (Cum. Supp. 1983) states:

> (b) Any person who violates this section shall be guilty of a misdemeanor. Provided, that if the criminal pleading alleges that the violation was committed intentionally, and upon trial it is specifically found that the violation was committed intentionally, such violations shall be a Class I felony.

The verdict purported to find defendant guilty of a misdemeanor under G.S. 90-108(a)(10). In its instructions to the jury the court differentiated between the felony and the misdemeanor under the statute by saying, "Nonfeloniously obtaining possession of a controlled substance differs from feloniously obtaining possession in that the State need not prove that he did so intentionally."

The legal definitions of the statutory terms "misrepresentation, fraud, forgery, deception or subterfuge" have in common a requirement that the person acting in a dishonest manner do so intentionally. Stated another way, these actions involve not only some behavior that tends to deceive others, but also a specific *intention* to deceive. Because any commission of the offense set out in G.S. 90-108(a)(10) is by definition intentional, and because G.S. 90-108(b) provides that intentional violations of G.S. 90-108 are felonies, a misdemeanor offense under G.S. 90-108(a)(10) does not exist. Thus, the misdemeanor described in the instructions to the jury is not a lesser included offense of the felony described in the

bill of indictment and the statute. Because defendant was convicted of a crime which does not exist, the judgment of the trial court must be vacated.

Judgment vacated.

Judges JOHNSON and COZORT concur.

STATE OF NORTH CAROLINA v. MICHAEL BRYANT

No. 843SC552

(Filed 19 March 1985)

Criminal Law § 143.7— probation revocation—willfulness and lack of lawful excuse

If a defendant in a criminal proceeding to revoke probation fails to offer evidence of his inability to comply with the probationary terms, evidence establishing his noncompliance is sufficient to justify a finding that the failure was willful and without lawful excuse.

APPEAL by defendant from *Strickland, Judge.* Order entered 27 February 1984 in Superior Court, CRAVEN County. Heard in the Court of Appeals 7 February 1985.

Defendant appeals from an order revoking probation. He was placed on probation on 27 May 1981 after pleading guilty to possessing marijuana with intent to sell and deliver, in violation of G.S. 90-95. One condition of his probation was that he pay $25 a month, later reduced to $15, on the fine, court costs, restitution and probation supervision fee. Defendant has made few of the payments ordered and has been cited for violating the probationary terms on four previous occasions. At the hearing on this latest citation defendant presented no evidence and defendant's probation officer, Douglas Loftin, was the only witness. On direct examination he testified that defendant was roughly $300 in arrears, and he knew only of two brief jobs that defendant had had during the three years or so involved; and on cross-examination he testified that he had no knowledge of defendant being offered any jobs and refusing them, and that "there is some problem finding jobs" in the area where defendant lived.

The court found that defendant's failure to make the payments ordered was wilful and without lawful justification or excuse, and invoked the active sentence previously imposed.

Attorney General Edmisten, by Special Deputy Attorney General H. A. Cole, Jr., for the State.

John H. Harmon for defendant appellant.

PHILLIPS, Judge.

The only question presented by this appeal is whether the order revoking defendant's probation has the evidentiary support that the law requires. Relying upon the paucity of the State's evidence, which established only defendant's failure to make the payments ordered, defendant contends that the order is without support since the evidence does not show that he was able to make the payments. If this was a civil case and defendant had been found in civil contempt for not making the payments ordered, his point would be well taken. *Brower v. Brower*, 70 N.C. App. 131, 318 S.E. 2d 542 (1984). But in a criminal proceeding to revoke probation if a defendant fails to offer evidence of his inability to comply with the probationary terms, evidence establishing his non-compliance is sufficient to justify a finding that the failure was wilful or without lawful excuse. *State v. Young*, 21 N.C. App. 316, 204 S.E. 2d 185 (1974).

Affirmed.

Judges WEBB and MARTIN concur.

RALEIGH PAINT & WALLPAPER COMPANY v. JAMES T. ROGERS BUILDERS, INC.

No. 8410DC374

(Filed 19 March 1985)

Contracts § 20.2— flooring contract—full performance prevented by defendant

In an action in which plaintiff was suing to collect the amount owed for installing vinyl flooring and defendant denied performance and counterclaimed, alleging that the flooring was not installed in a workmanlike manner, the

court's finding that defendant prevented plaintiff from fully performing the contract was supported by evidence that the owner of the building had complained of scratches on the vinyl after it was installed; plaintiff had had the floor buffed and waxed but the scratches were still apparent; plaintiff, while maintaining that the flooring was not defective or improperly done, had agreed to replace the flooring at no extra cost; and defendant's president had refused to let plaintiff's installer do the reflooring, telling him to leave the premises and having the flooring replaced by someone else.

APPEAL by defendant from *Redwine, Judge.* Judgment filed 6 January 1984 in District Court, WAKE County. Heard in the Court of Appeals 30 November 1984.

Plaintiff, a building materials supplier and floor covering subcontractor, furnished certain materials for and installed the vinyl flooring in a building defendant, a general contractor, constructed for Dr. Craig Wilson's veterinary clinic. Plaintiff sued to collect the $2,745.27 that defendant agreed to pay therefor. By its answer defendant denied plaintiff's performance of the contract and counterclaimed, alleging that plaintiff did not install the flooring in a workmanlike manner. A jury was waived and trial was had before Judge Redwine, who found that plaintiff performed the contract, except to the extent defendant prevented it from doing so, and rendered judgment for plaintiff in the amount sued for, together with interest from 16 November 1982.

Jean P. Werner for plaintiff appellee.

Everett & Hancock, by S. Allen Patterson, for defendant appellant.

PHILLIPS, Judge.

Though defendant poses seven questions for our consideration, the appeal raises but one question, and that is whether the court's finding that defendant prevented plaintiff from completing its performance of the contract is supported by competent evidence. If it is, the finding is conclusive, *Williams v. Pilot Life Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975), and defendant is precluded from using plaintiff's failure to perform the contract either as a defense to the case or as the basis for a counterclaim. This elemental proposition has been enforced by the common law since the days of Lord Coke, if not before. *Cape Fear and Deep River Navigation Co. v. Wilcox*, 52 N.C. 481 (1860).

There was testimony to the following effect: After plaintiff installed the flooring on 4 October 1982 and Dr. Wilson complained of some scratches on the vinyl, plaintiff had the floor buffed and waxed with two coats three days later, but the scratches were still apparent and on 13 October 1982, though maintaining that the flooring was not defective or improperly done, plaintiff agreed to replace the flooring at no additional charge in order to satisfy defendant and the building owner. Just three days later on 16 October 1982, plaintiff's installer went to the clinic building to do the reflooring, but defendant's president refused to let him do the job, told him to leave the premises, and later had the flooring replaced by someone else.

This evidence amply supports the judge's finding that defendant prevented plaintiff from fully performing the contract, and the judgment appealed from is therefore affirmed.

Affirmed.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. ERNEST LEON MYERS

No. 8428SC572

(Filed 2 April 1985)

1. **Criminal Law § 33.3— admission of irrelevant testimony contradicting part of defendant's statement—weight of other evidence—no prejudice**

Although testimony which contradicted defendant's statement of his whereabouts on the morning of 21 February 1975 was irrelevant because the murder occurred in the afternoon, the testimony tending to establish defendant's guilt was so strong that there was no reasonable possibility that a different result would have been reached had the testimony been excluded. G.S. 15A-1443(a) (1983).

2. **Criminal Law § 113.9— failure to object to jury instruction at trial—issue waived**

Defendant could not raise on appeal the issue of the court's instruction on irrelevant evidence contradicting his statement of his whereabouts because he did not object to the instruction at the instruction conference or after it was given. His pretrial motion *in limine* to suppress the relevant evidence and his objections at the time of admission were not sufficient to bring the jury

charge before the Court of Appeals; furthermore, the Supreme Court's dicta in a prior appeal characterizing the evidence as completely irrelevant did not dictate that the instruction was plain error. Rule of App. Procedure 10(b)(2).

3. Criminal Law § 15.1— change of venue for pretrial publicity denied—no error

There was no abuse of discretion in the denial of defendant's motion for a change of venue where the radio broadcasts and newspaper article on which the motion was based were factually informative and patently uninflammatory or were not included in the record on appeal; where several prospective jurors had heard or read about the case when it was tried in 1975, but only two had heard the radio broadcasts or had seen something on t.v.; and where defendant removed those who demonstrated a modicum of knowledge about the case. G.S. 15A-957.

4. Criminal Law § 102.6— prosecutor's argument not improper in context of evidence

Placing the prosecutor's argument in the context of the evidence produced at trial, there was no abuse of discretion in the denial of defendant's objection to the portion of the argument in which the prosecutor contended that there was no evidence that someone else committed the crime. Moreover, those portions of the prosecutor's arguments not objected to at trial did not rise to the level of gross impropriety.

Judge BECTON dissenting.

APPEAL by defendant from *Howell, Judge*. Judgment entered 14 November 1983 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 8 February 1985.

This appeal arises from a new trial granted to defendant by our supreme court in *State v. Myers*, 309 N.C. 78, 305 S.E. 2d 506 (1983). At retrial, defendant was again tried for the first degree murder of Gillia Dianne Hennessee on 21 February 1975 and found guilty of second degree murder.

The state's evidence at retrial tended to show that in February 1975 Ms. Hennessee lived at 25 Howland Road, Rondette No. R-4, and was in the process of moving to another residence in Asheville. Ms. Hennessee was last seen alive by several individuals at approximately noon on 21 February. The following morning, Ms. Hennessee was found dead in her rondette.

Ms. Hennessee's body was clothed from the waist up and nude from the waist down. One-half of a brick was found beside the victim's legs and one-half of a brick was located above the victim's head; both halves covered with blood. Substantial amounts of blood were found in the bathroom sink, walls, and carpeting

throughout the rondette. An autopsy revealed that the victim had, among other comparatively minor injuries, multiple lacerations of the scalp ranging from one to five inches in length and fractures on both sides of the skull, including the base of the skull. Fragments of brick were found in one laceration. A foreign fiber was found in the victim's lungs, suggesting that some material had been firmly applied over the victim's nose or mouth, or both, approximately fifteen minutes before death. There was no evidence that Ms. Hennessee had been sexually assaulted. None of the physical evidence found at the scene and analyzed by the State Bureau of Investigation suggested defendant's presence at the rondette.

Alphonzo Pearcy, an employee of the Asheville City Street Department, testified that he had met defendant at a restaurant in Asheville at approximately noon on 21 February 1975. Defendant asked Pearcy if he knew the present whereabouts of Harry McQueen, which Pearcy did, and they drove to McQueen's rondette on Howland Road, in defendant's gold colored Toyota automobile. McQueen was not at home and both individuals left.

Mary Ellen Toreson testified that she lived on Howland Road on 21 February 1975. At approximately 2:00 p.m. she saw a black male, in his late twenties, medium height and build, with a short-cropped afro hairstyle park in front of the rondettes. Toreson's description generally matched that of defendant. The black male was driving a foreign model car, yellow-brown color, with a hatchback. Later, Mrs. Toreson saw the black male and Ms. Hennessee standing in the back of the latter's rondette talking. After 3:00 p.m., Mrs. Toreson heard an abrupt, loud noise from the victim's rondette which she described like a desk being moved, and the drapes were briefly parted.

Myra Allen, a resident occupying a rondette on Howland Road, testified that on 21 February 1975 she walked past Ms. Hennessee's residence at approximately 4:30 p.m. She identified defendant as the man she saw leaving from the door of the victim's rondette. Defendant exhibited no unusual behavior. On cross-examination, Ms. Allen admitted that in a written statement she had given to the police several months after Ms. Hennessee's death, she had stated that defendant was quickly leaving the victim's residence.

Delores Poore and Asheville City Chief of Police Fred Hensley testified that Ms. Allen had separately told them that she had seen defendant leaving the victim's rondette.

Johnny McConneyhead testified that while an inmate at Craggy State Prison he met defendant, who was also an inmate. In October 1977, defendant, David Lee and McConneyhead had a conversation in which defendant told him Ms. Hennessee, a nurse, had been getting drugs for defendant from the hospital at which she worked. When Ms. Hennessee refused to obtain more drugs for him, defendant raped her then beat her to death with a brick.

Robert Smith testified that he was a prisoner in Craggy State Prison and knew defendant. In 1978, Smith had a conversation with defendant in which defendant related that Ms. Hennessee was to have obtained drugs for him, she had not done so, and he "freaked out" and he beat her with a brick. Six or seven months later Smith and defendant again discussed the matter, defendant giving essentially the same version of Ms. Hennessee's death. On cross-examination, Smith admitted that he had given a statement to the police in which he had stated that defendant had recounted that he had blood on his clothes after the beating and he had burned them in a house that was either on Madison Avenue or Magnolia, in the house of Paulette Briggs, and that defendant claimed to have driven a Fleetwood Cadillac on the day of the murder. Smith admitted to having a close friendship with one Harry McQueen, deceased at the time of trial, from whom defendant had stolen drugs. Smith had also told police that he had had a conversation with Ms. Allen who told him that she had seen the victim's door partially open on the date of the murder, but she had not paid any attention to it. She may have said something about seeing defendant at the rondette, but she felt that defendant had killed Ms. Hennessee.

Ikey Noah, an inmate at Craggy State Prison, overheard a conversation between defendant and an unidentified female visitor in which the latter stated she felt someone was following her. Defendant asked if she felt it was because of the nurse, and she stated that she thought so. Defendant told the visitor not to worry because he would be released soon and he was leaving.

Dianne Lloyd testified that she met defendant after February 1975 at the home of a friend and overheard defendant state that

he had dressed up as a woman and killed a white woman up on the mountain by hitting her with a brick. Lloyd stated that she and defendant were taking drugs at the time he made the statement.

Billy C. Mathews, Special Agent of the State Bureau of Investigation, testified that defendant had given him a statement in July 1975. The substance of that statement was that on 21 February 1975, defendant had been to Dr. Love's, a dentist, in the morning to have two teeth pulled and two filled. Later, Alphonzo Pearcy had requested defendant to take him to Harry McQueen's in exchange for $1. Pearcy had to show defendant where to go since he had never been to McQueen's and they left when they could not locate McQueen. Defendant denied having returned to Howland Road that afternoon, but he could not remember where he had been from his return until he had picked up his wife at her place of employment at 3:30 p.m. In September 1981, defendant was again questioned by authorities about his previous statement and defendant confirmed the truth of his first statement.

Dr. Love testified that defendant was not in his office on the morning of 21 February 1975, but was in his office for the first time on 24 March 1975 and he extracted only one tooth and filled no teeth.

Defendant offered no evidence.

Defendant was found guilty and sentenced to sixty years imprisonment.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Evelyn M. Coman, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Malcolm Ray Hunter, Jr., for defendant.

WELLS, Judge.

Defendant brings forth three assignments of error contending that (1) the trial court improperly admitted irrelevant evidence impeaching defendant's exculpatory statement to the police and instructing the jury that it could use that evidence to find that defendant had a consciousness of guilt, (2) the trial court erred in denying defendant's motion for a change of venue, and (3)

the prosecutor's closing argument created reversible error. We find no error in defendant's trial.

[1] Defendant first argues that the trial court erred in admitting Dr. Love's testimony that defendant was not in his office on the morning of 21 February 1975 which contradicted defendant's statement to investigating authorities that he had two teeth extracted and two filled on the morning of that date. Defendant contends that because the state's theory of Ms. Hennessee's murder was based on defendant returning to the victim's rondette at approximately 3:00 p.m. and leaving the rondette at approximately 4:30 p.m. contradiction of defendant's whereabouts on the morning of the homicide was irrelevant.

Our supreme court fully outlined the law of this state on showing consciousness of guilt by contradiction of an accused's statements in defendant's appeal from his first trial:

> It is established by our decisions that false, contradictory or conflicting statements made by an accused concerning the commission of a crime may be considered as a circumstance tending to reflect the mental processes of 'a person possessed of a guilty conscience seeking to divert suspicion and to exculpate [himself].' . . . The probative force of such evidence is that it tends to show consciousness of guilt. . . .
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> . . .
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> Our research discloses that 'consciousness of guilt' may be established, *inter alia,* by evidence of flight on the part of an accused. We are of the opinion that the rules of law governing flight which show consciousness of guilt are equally applicable to evidence of falsehood. . . .
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> In North Carolina, evidence of flight does not create a presumption of guilt but is some evidence which may be considered with other facts and circumstances in determining guilt. However, proof of flight, standing alone, is never sufficient to establish guilt. . . . Further, evidence of flight *may not* be considered as tending to show premeditation or deliberation. . . .
>
> In instant case, we find the challenged instruction erroneous because it permitted the jury to roam at will without

> making it clear that the falsehood did not create a presumption of guilt or that, standing alone, such evidence was not sufficient to establish guilt. Neither did the trial judge inform the jury that such evidence could not be considered as tending to show premeditation and deliberation. Furthermore, the statements referred to in the instruction under scrutiny were completely irrelevant since the alleged falsehood referred to defendant's whereabouts during the morning hours of 21 February 1975 and all the evidence was to the effect that the crime occurred in the afternoon of that day.

State v. Myers, supra (citations omitted) (footnotes omitted) (emphasis in original). While the issue presented in *Myers* was the correctness of the trial court's instruction to the jury, we conclude for the purposes of the case before us that defendant's statement as to his appointment with Dr. Love on the morning of 21 February 1975 and the clearly contradictory evidence were irrelevant to the issue of defendant's guilt. Defense counsel repeatedly objected to admission of this evidence, based on the supreme court's holding in *Myers*.

Recognizing that defendant's statement as to his appointment with Dr. Love and Dr. Love's contradictory testimony were irrelevant, the question is whether defendant was so prejudiced by admission of the testimony that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C. Gen. Stat. § 15A-1443(a) (1983). Defendant's statements to investigating authorities were contradicted in three aspects; (1) his appointment with Dr. Love (contradicted by Dr. Love), (2) his statement that Alphonzo Pearcy had wanted to go to Harry McQueen's and the latter paid defendant $1 for taking him there (contradicted by Pearcy) and (3) he had not returned to the rondette on the afternoon of Ms. Hennessee's murder (contradicted by Toreson). Defendant does not contend that admission of the evidence of contradiction in the latter two areas was error. The evidence of defendant's whereabouts on the morning of 21 February 1975 was a relatively minor feature of the case against defendant. The evidence tending to establish defendant's guilt, especially the testimony of the four Craggy State Prison inmates, was so strong that the admission of the objected to evidence as to defendant's whereabouts on the morning of 21 February 1975 did not establish a

reasonable possibility that a different result would have been reached had such evidence been excluded. This assignment of error is overruled.

[2] Defendant argues that the trial court erred in instructing the jury that it could use the irrelevant evidence of defendant's contradicted statement as to his dental appointment to show a guilty conscience. The trial judge did instruct the jury that it could consider the evidence contradicting defendant's statements as to the dental appointment in the morning and defendant's activities in the afternoon. The rule in this state is that:

> No party may assign as error any portion of the jury charge . . . unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury. . . .

Rule 10(b)(2) of the Rules of Appellate Procedure. The trial court held a recorded jury conference in which he specifically advised counsel of his intent to give an instruction on defendant's false, contradictory, or conflicting statements:

> The instruction probably will be something like this, in case it will help you, that the State has offered evidence which it contends tends to show that the Defendant made a statement which was false in whole or in part with regard to his whereabouts on February 21st, and that they may consider such evidence, if they believe it, in determining whether the combined circumstances amount to a show of consciousness of guilt; but even if they do believe it and believe it beyond a reasonable doubt, it creates no presumption of guilt, and in fact, standing alone, it is insufficient to establish guilt; and that it cannot, in all events, be considered with respect to the issue of premeditation and deliberation.

Defense counsel did not object to the proposed instruction during the instruction conference. The trial court instructed the jury as indicated, and defense counsel did not object to the instruction in an unrecorded conference held after the trial court instructed the jury. Having failed to timely object to the trial court's instruction, defendant is precluded from raising the issue on appeal.

In oral argument before this court, counsel asserted that defendant's pretrial motion *in limine* to suppress the irrelevant evidence and objections made at the time of admission were sufficient to bring the questioned jury charge before this court. We reject this argument as we can find no authority to support the position and Rule 10(b)(2) clearly negates the argument. Defendant also argued that our supreme court's dicta categorizing the contradictory evidence of defendant's whereabouts on 21 February as "completely irrelevant" dictated that the trial court, in instructing on the irrelevant evidence, committed plain error. Our supreme court has stated:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has ' "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" ' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'

State v. Odom, 307 N.C. 655, 300 S.E. 2d 375 (1983) (quoting *United States v. McCaskill*, 676 F. 2d 995 (4th Cir.), *cert. denied*, 459 U.S. 1018 (1982) (footnotes omitted) (emphasis in original). The *Odom* court discussed the interplay of the plain error rule and Rule 10(b)(2) in the context of improper jury instructions and concluded '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' *Id.* (Quoting *Henderson v. Kibbe*, 431 U.S. 145 (1977).) We decline to invoke the "plain error" rule in this case, and this assignment is overruled.

[3] Defendant next argues that the trial court erred in denying his motion for a change of venue. He contends that the trial court applied an erroneous standard of review by concluding 'defendant has not shown that it is *impossible* for him to get a fair and impartial trial.' The trial court can grant a change of venue if "there

exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial." N.C. Gen. Stat. § 15A-957 (1983). The motion for change of venue:

> [I]s addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed absent a showing of abuse of discretion. . . .
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> . . . the burden of proving that a fair and impartial trial cannot be received due to pretrial publicity falls on the defendant. . . . [T]he United States Supreme Court held that due process mandates that criminal defendants receive a trial by an impartial jury free from outside influences. The Court also held that where there is a reasonable likelihood that prejudicial pretrial publicity will prevent a fair trial, the trial court should remove the case to another county . . .

State v. Jerrett, 309 N.C. 239, 307 S.E. 2d 339 (1983) (citations omitted).

Defendant based his motion on three radio news broadcasts concerning defendant's first trial and pending retrial aired by WWNC Radio on the morning of the retrial and one Asheville Citizen news story. We have carefully reviewed the contents of the radio broadcasts and find them to be factually informative and patently uninflammatory. The Asheville Citizen article was introduced into evidence but was not included in the record on appeal and, therefore, we have been unable to review it. The record before us does reveal that the article listed the names of witnesses from the first trial, recounted some of the facts presented in that trial, discussed the defendant's criminal record, and cited testimony given before the grand jury. Defense counsel argued that because the Asheville Citizen was known to be read throughout Buncombe County it would be "impossible" for defendant to receive a fair trial. The *voir dire* of the venire reveals that several prospective jurors had read or heard about the case in 1975, but only one individual had heard the WWNC radio broadcast and one potential juror had seen something on television. The record is equally clear that defendant removed those venire who demonstrated a modicum of knowledge about the case.

Based on the facts discussed above it is clear that defendant did not conclusively establish that he could not receive a fair and impartial trial in Buncombe County, and that the trial court did not abuse its discretion in denying defendant's motion. This assignment of error is overruled.

[4] Defendant's final argument is that the prosecutor's closing argument to the jury went beyond the record evidence, expressed personal belief as to the case, incorrectly argued that certain evidence was uncontradicted, and urged the jury to convict on a civic duty rather than on the evidence before them. Of the various portions of the prosecutor's argument to the jury to which defendant assigns error, defendant only objected to one argument at trial. When the defendant fails to object to the closing argument, thereby giving the trial court an opportunity to correct any error prior to jury deliberations, the "standard of review is one of gross impropriety." *State v. Craig and State v. Anthony*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, --- U.S. ---, 104 S.Ct. 263 (1983). We conclude from our review of those portions of the prosecutor's arguments not objected to at trial that they do not rise to the level of gross impropriety. Defense counsel did object to the following argument and was overruled by the trial court:

> I have no idea what Mr. Stoker is going to say. He might say Harry McQueen did it. Absolutely no evidence that Harry McQueen did this. In fact, Chief Hensley told you the investigation revealed that Harry McQueen was in Durham that day. It's easy to go after a man after he's dead. He wasn't even enough of a suspect in this case to submit his fingerprints to the S.B.I.

The trial transcript reveals that Chief of Police Hensley testified that his investigation disclosed that Harry McQueen was in Durham, he was not fingerprinted, while some other suspects in the killing were, and McQueen died prior to retrial. Placing the prosecutor's argument in context of the evidence produced at trial, we hold that the trial court did not abuse its discretion in overruling defendant's objection. *State v. Craig and State v. Anthony, supra; State v. Woods*, 56 N.C. App. 193, 287 S.E. 2d 431, *cert. denied*, 305 N.C. 592, 292 S.E. 2d 13 (1982).

We have thoroughly reviewed the record in this case and find that defendant received a fair trial in which we can find

No error.

Judge WHICHARD concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

The majority correctly "conclude[s] . . . that defendant's statement as to his appointment with Dr. Love on the morning of 21 February 1975 and the clearly contradictory evidence were irrelevant to the issue of defendant's guilt." Ante p. 7. The language of *State v. Myers*, 309 N.C. 78, 305 S.E. 2d 506 (1983) compels that conclusion and the further conclusion that a "consciousness of guilt" instruction should not be given unless the "false, contradictory or conflicting statements made by an accused *[concern] the commission of a crime. . . .*" *Id.* at 86, 305 S.E. 2d at 511.

In this case, defense counsel, in anticipation of the State's attempt to present the same evidence at Myers' new trial, filed a motion *in limine* to prohibit the State from presenting irrelevant evidence of defendant's whereabouts during the morning hours of 21 February 1975. And, to use the majority's words, "[d]efense counsel repeatedly objected to admission of this evidence, based on the supreme court's holding in *Myers, supra.*" Ante p. 7. Considering defense counsel's efforts to keep the irrelevant evidence from the jury and the Supreme Court's opinion in *Myers*, which was available to the trial judge when he denied defendant's motion *in limine*, I believe defendant is entitled to a new trial. Unlike the majority, I am unable to conclude that there was a reasonable possibility that a different result would not have been reached. The trial court's instructions specifically invited the jury to infer "consciousness of guilt" if it found that defendant's statement about his whereabouts on the morning of 21 February 1975 was false.

And although defense counsel failed to object to the court's instructions to the jury on "consciousness of guilt," I believe that,

on the facts of this case, no objection was necessary since the trial court knew, on the basis of the motion *in limine* and the arguments presented, that defendant objected to the admission of the irrelevant evidence and a consciousness of guilt instruction. Thus, the test is whether an objection to the court's instructions to the jury would have been a *pro forma* exception rather than a timely objection calling the court's attention to a matter it need consider. In any event, the plain error rule should be invoked in this case. *See State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

Based on the foregoing, defendant is entitled to a

New trial.

STATE OF NORTH CAROLINA v. DANNY FITZHUGH PARRISH

No. 846SC347

(Filed 2 April 1985)

1. Criminal Law § 92.2— consolidation of related charges—no error

There was no error in the joinder for trial of felonious escape and felonious larceny charges where the State's motion was not in writing but was made at trial and where there was a transactional connection in that the larceny of the truck was to facilitate defendant's flight from prison. G.S. 15A-952.

2. Criminal Law § 112— pretrial instructions—no error

There was no prejudicial error in the court's pretrial charge to the jury where the court's comments did not depart from those points of law which later arose on the evidence and the explanation of defendant's presumption of innocence, the State's burden of proof, and reasonable doubt was an accurate statement of the law and was later applied to the evidence in the court's closing instructions.

3. Escape § 6; Criminal Law § 87— nonresponsive answer—within personal knowledge of witness—no prejudice

In a prosecution for felonious escape and larceny, there was no error in admitting a prison guard's testimony about the responsibilities of his position and the procedures used for determining the presence of inmates, even though some of his testimony was not responsive to the questions posed to him, because the testimony was for the most part based on his own personal knowledge or on matters within his control.

4. Escape § 6— judgment and commitment not properly admitted—defendant's confession—no error

In a prosecution for felonious escape, the trial court erred by allowing the State to read to the jury a judgment and commitment without it being properly introduced into evidence; however, there was no prejudice and defendant's motion to dismiss was properly denied because defendant's confession that at the time of his escape he was serving a ten-year sentence for armed robbery was properly introduced. G.S. 148-45.

5. Criminal Law § 76.8— confession—evidence that statement voluntary sufficient

The trial court properly denied defendant's motion to suppress his inculpatory statement where the evidence tended to show that defendant was brought to a detective's office, advised of his rights and told that if he talked he could get time or the sentences could run consecutively and that the detective could not tell him or promise what the courts would do; after he confessed defendant was taken to another detective who advised him of his rights and obtained a signed waiver of rights form; defendant confessed in detail; and defendant's testimony at the *voir dire* was consistent with the evidence offered by the State.

6. Criminal Law § 115.1— larceny of automobile—no evidence of lesser-included offenses—no instruction on lesser-included offense

In a prosecution for felonious escape and felonious larceny of an automobile, there was no error in the trial court's denial of an instruction on the lesser-included offense of unauthorized use of a motor vehicle where the evidence was positive as to each and every element of the larceny and there was no evidence that would support a finding that defendant was guilty of unauthorized use of an automobile.

7. Criminal Law § 102.8— argument by defendant on failure to testify not permitted—no error

The trial court did not err by refusing to permit defendant's attorney to argue to the jury concerning defendant's failure to testify; the court properly instructed the jury that defendant had a right to elect not to testify and that no unfavorable inference could be drawn therefrom.

APPEAL by defendant from *Brown, Frank R., Judge.* Judgment entered 20 April 1983 in Superior Court, HALIFAX County. Heard in the Court of Appeals 9 January 1985.

Defendant was charged in indictments proper in form with felonious escape in violation of G.S. 148-45(b)(1) and with felonious larceny in violation of G.S. 14-72(a). These two charges were consolidated for trial, and the jury convicted defendant of both offenses. Judgment was entered committing defendant to an active prison sentence of three years for felonious escape and three years for felonious larceny. Defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

Hux, Livermon & Armstrong, by James S. Livermon, Jr., for defendant appellant.

MARTIN, Judge.

Defendant appeals his convictions of felonious escape and felonious larceny. We have examined the record concerning the felonious escape under G.S. 148-45 and the felonious larceny under G.S. 14-72(a) and find no basis for reversal.

[1] Defendant first assigns as error the joinder for trial of the felonious escape and felonious larceny. The State's motion for joinder pursuant to G.S. 15A-926 was allowed by the trial court over defendant's objection. Defendant objected to the motion on two grounds: (1) the motion was not in proper form or timely made, and (2) the requisite "transactional connection" did not exist between the offenses joined.

Motions must be in writing and their service must be certified "[u]nless made during a hearing or trial." G.S. 15A-951(a)(1). Here the State's motion was made at trial, upon the calling of the cases; therefore, the motion was not required to be in writing, as defendant contends, and the motion was proper in form. Under the provisions of G.S. 15A-952, when arraignment is held and trial is calendared at the same session of court, certain motions must be filed on the preceding Wednesday. A motion by the State to join related offenses under G.S. 15A-926 is not one of them; therefore, the motion was timely made. *See State v. Wilson*, 57 N.C. App. 444, 291 S.E. 2d 830, *disc. rev. denied*, 306 N.C. 563, 294 S.E. 2d 375 (1982).

G.S. 15A-926 provides in pertinent part that

> [t]wo or more offenses may be joined in one pleading or for trial when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. . . .

Thus, there must be a "transactional connection" between offenses joined for trial. *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978). When this transactional connection is present, motions

to join offenses under G.S. 15A-926 are addressed to the discretion of the trial court, and absent an abuse of discretion, its ruling will not be disturbed on appeal. *State v. Avery*, 302 N.C. 517, 276 S.E. 2d 699 (1981). However, if joinder would hinder defendant's ability to present his defense or otherwise receive a fair trial, the motion to join offenses should be denied. *Id.* The determination of whether joinder would prejudice defendant evokes the question of "whether the offenses are so separate in time or place and so distinct in circumstances as to render a consolidation unjust and prejudicial to defendant." *Id.* at 525, 276 S.E. 2d at 704, *quoting State v. Johnson*, 280 N.C. 700, 704, 187 S.E. 2d 98, 101 (1972).

We hold that joinder of the offenses in the present case was proper. Defendant escaped from prison in Halifax County on 23 September 1982. He stole a truck nine miles away approximately 36 hours later. The larceny of the truck was to further facilitate his flight from prison and thus render his recapture more difficult. The requisite "transactional connection" existed between the escape and larceny; the State's motion for joinder was, therefore, properly granted.

[2] Defendant next assigns as error the trial court's preliminary comments to the jury before any evidence was introduced. The court emphasized the presumption of defendant's innocence, explained the State's burden of proving each element of the offenses beyond a reasonable doubt, and defined reasonable doubt. Defendant contends that the brevity of the court's instruction in defining reasonable doubt was improper. The court instructed the jury that

> [a] reasonable doubt is not a mere possible doubt for most things that relate to human affairs or open to some possible or imaginary doubt. A reasonable doubt is a fair doubt based on reason and common sense, generated by the sufficiency of the evidence.

Pretrial instructions to the jury are neither condemned nor approved; however, "trial judges should have the utmost freedom of action in conducting trials so long as litigants are not prejudiced, positive rules of procedure are not violated, and no injustice is done." *Hardee v. York*, 262 N.C. 237, 241, 136 S.E. 2d 582, 586 (1964). The court's comments in the case *sub judice* did not depart from those points of law which later arose on the evi-

dence. The explanation of defendant's presumption of innocence, the State's burden of proof, and reasonable doubt was an accurate statement of the law and later applied to the evidence in the court's closing instructions. Defendant has failed to demonstrate prejudicial error from the pretrial charge.

[3] Defendant next contends the court erred in allowing Sergeant Salmon, officer in charge of the Halifax Prison Unit, to testify over objection concerning his responsibilities and the procedure used for determining whether all of the unit's inmates are present. Defendant argues that Salmon's answers were unresponsive to the questions posed to him and related to the actions of others who were out of his presence.

A witness may testify to facts that are within his own personal knowledge. *State v. Hudson,* 295 N.C. 427, 245 S.E. 2d 686 (1978). A witness is also entitled to give a full answer to a question propounded to him, subject to the right of the court in its discretion, to cut off an unnecessarily detailed or repetitious answer. *State v. Cook,* 280 N.C. 642, 187 S.E. 2d 104 (1972).

Applying these basic tenents to the case under review, we find no prejudicial error in Salmon's testimony. In response to the prosecutor's inquiry about the responsibilities of his position, Salmon responded with specific duties of supervision, control, and feeding, and added that he was on second shift at the time of the escape. In response to the prosecutor's inquiry concerning procedures used for determining the presence of inmates, Salmon testified to specific procedures used by Halifax Prison Unit which would entail actual performance by personnel under Salmon's supervision. Although some of Salmon's testimony was not responsive to the questions posed to him, it was for the most part based on his own personal knowledge or on matters within his control. There is nothing in connection with his testimony to indicate an abuse of discretion by the trial court in allowing it.

[4] Defendant next asserts that the trial court erred in allowing the district attorney to read to the jury a purported judgment and commitment from Wake County against the defendant without it being properly introduced into evidence; and that because the proof that defendant was serving a sentence imposed upon conviction of a felony was not properly before the court, his motion for directed verdict should have been allowed. At the end of

the testimony of the State's first witness, the district attorney stated:

MR. BEARD: I would like this marked as State's exhibit No. Two, your Honor.

MR. LIVERMON: Objection. [Overruled.]

(State's exhibit No. Two marked for identification)

MR. BEARD: May I read this to the jury, your Honor?

MR. LIVERMON: Object, if your Honor please.

THE COURT: Overruled.

At this point the district attorney proceeded to read to the jury a certified judgment and commitment of defendant for the offenses of breaking or entering and larceny, possession of a firearm by a felon and escape; the State did not introduce said judgment into evidence.

When a defendant is charged with felonious escape from the state prison system under G.S. 148-45, the State has the burden of proving that defendant was in the legal custody of the Department of Correction at the time of the escape, serving a sentence imposed upon conviction of a felony. *See State v. Hammond,* 307 N.C. 662, 300 S.E. 2d 361 (1983). Accordingly, the State is entitled to introduce evidence of any and all convictions for which defendant was in custody at the time of escape. *Id.*

The State failed to offer the certified judgment and commitment as evidence that defendant was serving a sentence imposed upon conviction of a felony; rather, the State merely read to the jury the exhibit which had been marked but not offered into evidence. Defendant objected to the improper reading of the exhibit to the jury and indicated no intention to waive his right to require the State to properly prove to the jury that he was in fact serving a sentence imposed upon conviction of a felony. The State's obligation is to prove that fact to the jury, and it was error for the court to allow into evidence that proof without its proper introduction. However, on appeal the burden is on the appellant not only to show error, but to show prejudicial error amounting to the denial of some substantial right, or, in other words, to show that if the error had not occurred, there is a

reasonable probability that the result of the trial might have been materially more favorable to him. *Johnson v. Heath*, 240 N.C. 255, 81 S.E. 2d 657 (1954). This the defendant has failed to do. Subsequently during the trial, evidence of defendant's confession that at the time of his escape he was serving a ten year sentence imposed upon conviction of the felony of armed robbery was properly introduced. This rendered the error in reading the judgment and commitment to the jury without its proper introduction non-prejudicial. *See Davis v. Vaughn*, 243 N.C. 486, 91 S.E. 2d 165 (1956).

In passing upon a motion to dismiss pursuant to G.S. 15A-1227, all of the evidence admitted, whether competent or incompetent, is viewed in the light most favorable to the State, and the State is entitled to every reasonable inference therefrom. *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981); *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971). Upon application of this standard, and in light of the evidence before the court from defendant's confession of his confinement for the felony of armed robbery, defendant's motion for directed verdict was properly denied.

[5] Defendant next assigns as error the trial court's denial of his motion to suppress all statements made by him to law enforcement officers. After conducting an extensive *voir dire* hearing, the trial court entered findings of fact and conclusions of law and denied defendant's motion. Defendant argues that the investigating officers induced in him a hope or fear which resulted in his making inculpatory statements, and that those statements were, as a result, involuntary and inadmissible.

In cases such as the one at bar in which the requirements of *Miranda* have been met and the defendant has not asserted the right to have counsel present during questioning, our Supreme Court has stated that

> no single circumstance may be viewed in isolation as rendering a confession the product of improperly induced hope or fear and, therefore, involuntary. In those cases the court must proceed to determine whether the statement made by the defendant was *in fact* voluntarily and understandingly made, which is the ultimate test of the admissibility of a confession. In determining whether a defendant's statement was

> in fact voluntarily and understandingly made, the court must consider the *totality of the circumstances* of the case and may not rely upon any one circumstance standing alone and in isolation.

State v. Corley, 310 N.C. 40, 48, 311 S.E. 2d 540, 545 (1984) (original emphasis); *see also State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971).

Turning to an examination of the totality of the circumstances surrounding defendant's statements, the evidence for the State during the *voir dire* hearing tended to show the following: Defendant was brought into the Halifax County Sheriff's Department to Detective Warren's office. Detective Warren advised defendant of his constitutional rights, and stated that he "wanted to talk to him about a larceny of a truck that was taken from my County." Defendant replied, "Well, if I told you, what would happen to me?" Detective Warren answered, "Several things could happen to you. You can get time for it. The courts could do many things with you. You would get time for it or the sentences could run concurrently. I can't tell you and I can't promise you what the courts will do." Defendant then stated that he stole the truck.

Later, defendant was taken into the office of Detective Sledge, who advised defendant of his constitutional rights. Detective Sledge asked the defendant whether he understood those rights and handed him a waiver of rights form. The defendant indicated that he understood them and signed the form. Defendant's statement indicated that at the time of his escape he was serving ten years for armed robbery, breaking and entering and larceny. A day following his escape from the Halifax Prison Unit he came upon a house with a truck parked in the yard. The keys were in the truck. Defendant got in the truck and drove to Smithfield. Several days later he drove to Goldsboro. While there he sold a toolbox that was on the truck for fifty dollars. He then drove back to Smithfield, and about a week and a half later he abandoned the truck. Defendant requested Detective Sledge to advise the district attorney of his cooperation and of his desire for a concurrent sentence on the larceny charge. Detective Sledge said he would make this known to the district attorney's office.

The defendant took the stand and testified on his own behalf during the *voir dire* hearing. For the most part his testimony was

consistent with the evidence offered by the State during the *voir dire* hearing. The defendant testified that Detective Warren said he would talk to the district attorney and ask him about a concurrent sentence for larceny of the truck with the time he was already serving. The defendant also testified that he gave a statement to Detective Sledge "because he said he would talk to the D.A. for me and get it to run concurrent with the time I was already doing and this is the only reason I agreed to give a statement."

The trial court made findings of fact essentially in accord with the evidence offered by the State during the *voir dire* hearing. Based upon these findings of fact, the trial court concluded that the inculpatory statement by the defendant to Detective Sledge was made freely, voluntarily and understandingly, and was, therefore, admissible.

In a *voir dire* hearing on the admissibility of a defendant's confession, the findings by the trial court are conclusive and binding on appeal if supported by competent evidence in the record. *State v. Johnson*, 304 N.C. 680, 285 S.E. 2d 792 (1982). This is true even though the evidence is conflicting. *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983).

The findings of the trial court at the conclusion of the *voir dire* in the case *sub judice* were supported by competent evidence, even to great extent by defendant's own testimony. Those findings are binding upon this court. The totality of circumstances compelled the trial court's determination that defendant's statement was made freely, voluntarily, and understandingly. We hold that the trial court properly denied the defendant's motion to suppress his inculpatory statement.

[6] Defendant next assigns as error the trial court's denial of his motion for an instruction on the lesser-included offense of unauthorized use of a motor vehicle. The trial court is not required to submit to the jury the question of a defendant's guilt of a lesser degree of the crime charged in the indictment when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972). The necessity for instructing the jury as to a crime of lesser degree than charged arises when and only when

there is evidence from which the jury could find that such included crime of lesser degree was committed. *State v. Lampkins*, 286 N.C. 497, 212 S.E. 2d 106 (1975), *cert. denied*, 428 U.S. 909, 49 L.Ed. 2d 1216, 96 S.Ct. 3220 (1976).

In this case, defendant was charged with the felonious larceny of an automobile; the evidence presented by the State was positive as to each and every element of felonious larceny, and there was no conflicting evidence relating to any element. Defendant admitted taking without the owner's consent a 1977 Ford truck valued at $4,500.00 and selling $650.00 worth of tools and a toolbox that were on the truck. Defendant kept the truck for over a week and a half until the police "got after" him, at which time he abandoned the vehicle. There was no evidence that would warrant or support a finding that defendant was guilty of the lesser-included offense of unauthorized use of an automobile.

[7] Defendant finally contends that the trial court erred in refusing to permit defendant's attorney to argue to the jury concerning defendant's failure to testify. This assignment of error is without merit as "[t]he rule in North Carolina is that neither the counsel for the State nor counsel for the defendant is allowed to comment on the failure of the defendant to testify." *State v. Boone*, 39 N.C. App. 218, 222-23, 249 S.E. 2d 817, 821 (1978). In his charge to the jury, the trial court properly instructed the jury that defendant had a right to elect not to testify, and that no unfavorable inference could be drawn therefrom.

Defendant received a fair trial free from prejudicial error.

No error.

Judges BECTON and JOHNSON concur.

WARREN BRIGGS AND WIFE, GLORIA BRIGGS v. JOHN ROSENTHAL AND THE SUN PUBLISHING CO., INC.

No. 8415SC497

(Filed 2 April 1985)

1. Torts § 1; Trespass § 2— intentional infliction of mental distress—extreme and outrageous article—questions for court and jury

In an action for intentional infliction of mental distress arising out of a publication, whether the article may reasonably be regarded as extreme and outrageous is initially a question of law for the court. If the court determines that it may reasonably be so regarded, it is for the jury to decide whether, under the facts of a particular case, defendant's conduct in publishing the article was in fact extreme and outrageous.

2. Torts § 1; Trespass § 2— magazine article—no intentional infliction of mental distress

A magazine article about plaintiffs' deceased son in which the son was described as being a heavy drinker but also honest, full of life, tender, happy, free and optimistic was not so extreme or outrageous that it would support an action to recover damages for the intentional infliction of mental distress.

APPEAL by plaintiffs from *Fountain, Judge.* Order entered 25 October 1983 in Superior Court, ORANGE County. Heard in the Court of Appeals 10 January 1985.

Plaintiffs' complaint, which is premised on the theory of intentional infliction of mental distress, in summary alleges that their only son, Warren Briggs, Jr., died in an automobile accident on 30 June 1982. In October 1982 defendant Rosenthal wrote an article about Warren which was published by defendant Sun Publishing Company in a magazine-periodical called *The Sun.* The article described several unpleasant characteristics of Warren in an unpleasant and insulting manner calculated to cause outrage. It was published in a reckless and irresponsible manner, and defendants knew or should have known that the article would cause great pain and suffering to plaintiffs. The plaintiffs have suffered and will continue to suffer severe anguish and emotional distress from reading the article, and from its public distribution.

The article, which was incorporated by reference into the complaint, was entitled "Saying Goodbye to Warren." In the article defendant Rosenthal described his friend Warren as being a

heavy drinker, but also honest, full of life, tender, happy, free and optimistic:

> No categories really work for Warren. Because I can't place him I am driven to write this piece which might enable me to touch on his complexity. He went against all the rules, certainly all the rules of character and appreciation. Who was he? I don't know. Ask fifty people in town and you will get answers which couldn't describe the same person. For instance, strangers usually disliked him when he was drinking, which was a lot of the time, because he wasn't serene: he rolled around town with a raucous energy, his eyes on fire for some kind of hooray, his tongue constantly testing out accents from weird countries. His life would pour out of his stunning sea-green eyes and out of his red, red face, and trying to save everything which had piled up inside all at once, he would sputter, hold his head in his hands, and whirl around in circles.
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> . . . .
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> He didn't do very well with responsibility. But this is what I mean by the categories not working. If he needed liquor then other people need something else: the nipple of security, money in the bank, status, respect (what can you do with it? he might ask), the illusion of power, another frying pan or wok. We say society works with these compensations, but not with booze. Screw society. It's not working no matter what we say. The rich are still in charge and the slaves settle for less. Warren was a pain in the ass but he was evidence that we exist. You couldn't pretend that he wasn't there the way we pretend most things aren't there.
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> . . . .
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> But when you figured that out, what did you do with Warren? Dismiss him? Feel sorry for him? Call him a drunk and avoid him? This is what he taught you if you were brave enough for the lesson: that unrehabilitated and to some extent hopeless, he was as good as anybody you knew; I mean, he was even great. The fact is, those who condemned him, those who held their liquor, those who woke up in their own bed all the time, were simply not his match. In the ways that

count I am certain that he was immensely substantial person, as fine, as dignified (ah, the digno!), as important as any solid citizen I ever met, and certainly more than those who put him down.

You see, he never went for votes, telling you anything he didn't know, or made any kind of deal that would cleverly trick you out of something. He was as incapable of manipulation as a flower. What you saw, you got. If he didn't like you or his feelings were hurt, he would sit quietly, without smiling; he wouldn't talk about you from a corner of the room. Never. He despised gossip and psychology as being the same thing. Perhaps he had been too easily used by soft-core doctors who sat in front of him with their little ordered lives and wrote negative reports about his past and possibilities. He knew he was fodder for a particular type of person, but he didn't mind because, truly, they weren't really there for him: in his mind, a desk person with only words hasn't yet come fully alive, and tied as he was, miserably and handsomely, to his own life, he wasn't about to get angry at their mere income-earning words. He knew he could always run from them and he was very fast, very fast.

. . . .

Yet I don't want to take anything away from my friend as I try to understand him, now that his death makes that an obligation. He was confused, but so are we. He traded in a lot of possibilities for good times but almost everyone else trades in the good times for possibilities which to Warren were unimaginable. And the things he kept were wonderful—his spirit, his insistence that boredom was the enemy, his refusal to be false or dishonest. He was a fool indeed but he was God's fool, here to show us the limits of pomposity and the chill in our households. The wonder of Warren—as well as his tragedy—was that he never settled for a stunted version of life, and especially not the most recent reduction which has us dominated by the chicken-shit myths of pop psychology, obsessed with our health and money markets, in awe of our own self-absorption, all the glory of our language reduced to the babble of computerized discourse, all life down to a plea.

. . . .

And I remember that once, while we were walking down Franklin Street, Warren suddenly dived on the hood of a parked car. It was unexplainable of course. He was filled with something, joy and frustration perhaps, and the only way to express his feelings at that moment was to dive on the car. I recall how he looked flying through the air, and how at the last moment he spun around so he ended up bouncing on the hood in a sitting position and there he lolled for awhile, as puzzled and delighted by himself as I was.

He was the only friend I had who would dive on the hood of a car. What does that mean? Look around you and you will see it meant a lot.

In their answer defendants moved for a dismissal pursuant to G.S. 1A-1, Rule 12(b)(6). From the trial judge's order granting the motion to dismiss, plaintiffs appeal.

Alexander and Associates by Sydenham B. Alexander, Jr., and H. William Miller, Jr., for plaintiff appellants.

Smith, Patterson, Follin, Curtis, James and Harkavy by Donnell Van Noppen III, and Northern and Little by J. Anderson Little for defendant appellees.

PARKER, Judge.

The sole issue before us is whether the trial judge erred in dismissing plaintiffs' complaint pursuant to G.S. 1A-1, Rule 12(b)(6). A complaint should not be dismissed for failure to state a claim, unless it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). A complaint must be dismissed when on its face it appears that no law supports it, that some essential fact is missing, or that some disclosed fact defeats it. *Mumford v. Hutton & Bourbonnais Co.*, 47 N.C. App. 440, 267 S.E. 2d 511 (1980). The question before us is whether plaintiffs' complaint is sufficient on its face to withstand defendants' motion. We hold that it is not.

Here the only conduct alleged was publication of the article attached as Exhibit A and incorporated by reference into the complaint.

While North Carolina has recognized the tort of intentional infliction of mental distress, our research does not disclose a reported decision in this jurisdiction arising out of publication of an article. In *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981), defendant brutally assaulted plaintiff and threatened death if plaintiff did not move out-of-state; in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979), defendant breached his agreement to pay taxes in a marital dispute property settlement; in *Woodruff v. Miller*, 64 N.C. App. 364, 307 S.E. 2d 176 (1983), defendant, in an overt hate campaign, posted wanted signs publicizing an old teenage criminal charge against plaintiff, a prominent citizen in the community; and in *Morrow v. Kings Dept. Store*, 57 N.C. App. 13, 290 S.E. 2d 732, *review denied*, 306 N.C. 385, 294 S.E. 2d 210 (1982), this court upheld dismissal of plaintiff's action for intentional infliction of mental distress arising out of defendant's detention of plaintiff for shoplifting.

The elements of the tort are: (i) extreme and outrageous conduct, (ii) which is intended to cause and does cause (iii) severe emotional distress to another. *Dickens v. Puryear*, *supra.*

[1] In ruling on defendants' Rule 12(b)(6) motion, the initial question is whether the determination of extreme and outrageous conduct is a question of fact for the jury or a question of law for the court. We hold that in an action for intentional infliction of mental distress arising out of a publication, whether the article may reasonably be regarded as extreme and outrageous is initially a question of law for the court. If the court determines that it may reasonably be so regarded, then it is for the jury to decide whether under the facts of a particular case, defendants' conduct in publishing the article was in fact extreme and outrageous. *See, e.g., Casamasina v. Worcester Telegram & Gazette, Inc.*, 2 Mass. App. Ct. 801, 307 N.E. 2d 865 (1974) where defendant newspaper published an article concerning the death of plaintiff's daughter which included a statement by the medical examiner that she had a long history of involvement with drugs; the court held defendant's conduct was neither extreme nor outrageous, and affirmed the trial court's sustaining of defendant's demurrer. *See also Fry v. Ionia Sentinel-Standard*, 101 Mich. App. 725, 300 N.W. 2d 687 (1980). *See generally* Restatement (Second) of Torts (hereinafter "Restatement") § 46, Comment h.

As to what is sufficiently outrageous to give rise to liability, the comments in the Restatement are instructive.

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.
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> . . . .
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> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion . . . .

Restatement § 46, Comment d.

> The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, or outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know. It must be emphasized again, however, that major outrage is essential to the tort; and the mere fact that an actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough.

Restatement § 46, Comment f.

[2] We find, after reading "Saying Goodbye to Warren," that the article may not be reasonably regarded as extreme or outrageous. Although perhaps not flattering, the article was honest, sincere and sensitive. Although we recognize that to plaintiffs, grieving parents bereft of their son, the article was offensive, we find that the article does not reach the level of extreme and outrageous conduct necessary to sustain a cause of action.

Moreover, in the instant case, unlike previous cases decided by our appellate courts, defendants' action, publication of the article, was not specifically directed toward plaintiffs. The tort of intentional infliction of mental distress imports an act which is done with the intention of causing emotional distress or with the reckless indifference to the likelihood that emotional distress may result. Restatement § 46, Comment i. As this is an intentional tort the actor must act with reckless disregard or the intent to cause severe emotional distress to the victim.

Defendants' article was published in a periodical magazine intended for the public. Plaintiffs were not the subject of the article. Their claim is that of third party family members distressed because they feel their deceased son is disparaged in defendants' article. Prosser and Keeton, in the Law of Torts, § 12 (5th ed. 1984), observe that recovery to third parties "is clearly limited to the most extreme cases of violent attack, where there is some especial likelihood of fright or shock." In the instant case there was no physical act committed against plaintiffs' son, nor was the article directed to the parents.

After careful analysis of decisions of our Supreme Court relating to the tort of intentional infliction of mental distress, and guided by the Restatement, we do not believe application of the tort of intentional infliction of mental distress should be extended, under the facts alleged in plaintiffs' complaint, to allow recovery by a third party in the context of the published article presented here. The trial court's dismissal of the complaint pursuant to G.S. 1A-1, Rule 12(b)(6) is

Affirmed.

Chief Judge HEDRICK and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. JOSEPH LAMONT ABBITT

No. 8421SC394

(Filed 2 April 1985)

1. Robbery § 5.2— person from whom property taken—instructions—no plain error

In a prosecution for armed robbery, the trial court did not commit plain error entitling defendant to a new trial despite his failure to object when it instructed the jury that the State must prove beyond a reasonable doubt that defendant took property from the person or presence of a certain store employee rather than from the place of business of Hop-In Stores as alleged in the indictment.

2. Constitutional Law § 76; Criminal Law § 48— post-arrest silence—use for impeachment—no plain error

The admission of testimony of defendant's post-arrest silence for impeachment purposes did not constitute plain error entitling defendant to a new trial despite his failure to object.

Chief Judge HEDRICK concurring in result.

Judge WHICHARD concurring in result.

APPEAL by defendant from *Collier, Judge.* Judgment entered 2 February 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 15 January 1985.

Defendant was charged on an indictment, proper in form, with armed robbery. He was found guilty and sentenced to a term of eighteen years.

At trial the State's evidence tended to show that on 6 November 1983, defendant went into a Hop-In Food Store, asked Roberta Hunt, the employee, for a pack of cigarettes, pulled a knife out of his pocket and told Hunt to give him all the money in the cash register. Defendant, who was wearing a red baseball cap and blue jacket, left the store with the money. Three police officers found defendant in a kudzu covered bank behind the School of the Arts. Defendant had twenty-five dollars in small bills, eight quarters and two extension cords in his pockets.

Hunt identified defendant less than one hour after the robbery when the police brought him to the Hop-In.

Defendant, testifying on his own behalf, denied robbing the Hop-In.

From the judgment and sentence of eighteen years defendant appeals.

Attorney General Edmisten by Assistant Attorney General Richard L. Kucharski for the State.

Appellate Defender Adam Stein by Assistant Appellate Defender Robin E. Hudson for defendant appellant.

PARKER, Judge.

In his two assignments of error defendant argues that although he failed to object at trial to the alleged errors, we should review these errors by applying the plain error rule as adopted by our Supreme Court in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). The plain error rule allows review of assignments of error normally barred by waiver rules such as Rule 10, Rules of Appellate Procedure. The rule is defined as follows:

> "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has ' "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" ' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.' "

State v. Odom, 307 N.C. at 660, 300 S.E. 2d at 378, *quoting United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 103 S.Ct. 381, 74 L.Ed. 2d 513 (1982) (footnotes omitted) (emphasis in original).

[1] In his first assignment of error defendant contends the trial court erred by instructing the jury that defendant took property from the person or presence of Hunt while the indictment alleged defendant took property from the place of business of Hop-In Food Stores.

Robbery with firearms or other dangerous weapons, G.S. 14-87, provides that "[a]ny person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon . . . whereby the life of a person is endangered or threatened, unlawfully takes . . . personal property from another or from any place of business . . . shall be guilty of a Class D felony."

The indictment alleged that defendant took sixty-nine dollars from the place of business of Hop-In Food Stores. In his charge to the jury the trial judge said the State must prove beyond a reasonable doubt that defendant took property from the person of Lynne Hunt. Defendant contends the trial judge erred in failing to instruct the jury that they must find that defendant took property from the place of business of Hop-In Stores. Defendant, however, failed to raise this issue when, out of the presence of the jury, the judge asked if there were any requests for corrections to the charge to the jury. Thus, defendant is precluded by Rule 10(b)(2), Rules of Appellate Procedure[1] from assigning error to this portion of the jury charge. *State v. Bennett*, 308 N.C. 530, 302 S.E. 2d 786 (1983). Moreover, after reviewing the entire record, we find the trial court did not commit plain error according to the standard set forth in *Odom*; thus defendant's failure to comply with Rule 10(b)(2) precludes his right to appeal this issue.

[2] In his second assignment of error defendant argues that his constitutional right to silence was violated when the trial court allowed the State to attempt to impeach him at trial with his silence at the time of his arrest and after his arrest. Defendant failed to object at trial to these questions, instead he merely inserted "exception" throughout this portion of the trial transcript. A party may not comb through the transcript and randomly insert "exception" in disregard of Rule 10, Rules of Appellate Procedure. *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983). Failure to object to error at trial is a waiver of the right to assert the error on appeal, unless the exception "by rule or law was

1. Rule 10(b)(2) provides in pertinent part: "No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury. . . ."

deemed preserved or taken without any such action," Rule 10(b)(1), Rules of Appellate Procedure, or the party alleging error contends the error was plain error. *Id.*

In *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983), the plain error rule adopted in *Odom* was extended to the situation in which no objection or exception was made to evidence at trial. Review, in this situation, is limited to determining whether plain error was committed at trial.

The issues of impeachment by silence and by inadmissible statements have been addressed by the United States Supreme Court. In *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971), the court held that the trial judge did not commit error by allowing the State to introduce into evidence, for impeachment purposes, prior inconsistent statements made by the defendant, which were inadmissible to establish the State's case in chief under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

In *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed. 2d 86 (1980), the United States Supreme Court held that a defendant, who at trial testified that he acted in self-defense, could be impeached by his prearrest silence. The court observed that attempted impeachment on cross-examination of a defendant may enhance the reliability of the criminal process. "[I]mpeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial." *Jenkins v. Anderson*, 447 U.S. at 238, 100 S.Ct. at 2129, 65 L.Ed. 2d at 94. The court concluded that although each State is entitled to formulate evidentiary rules defining the situations in which silence is considered more probative than prejudicial, the use of prearrest silence to impeach a defendant's credibility does not violate his Constitutional rights.

In *Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed. 2d 490 (1982), the United States Supreme Court, in a per curiam decision, held it did not violate due process for a State to permit cross-examination to impeach defendant as to his postarrest silence when defendant chooses to testify, and there is no evidence that *Miranda* warnings were given. The Court reiterated that each State is entitled to resolve, under its own rules of evidence,

the extent to which postarrest silence may be deemed to impeach a criminal defendant who chooses to testify.

The North Carolina Supreme Court has not passed upon the question of impeachment of a criminal defendant by his pretrial silence. In *State v. Lane*, 301 N.C. 382, 271 S.E. 2d 273 (1980), our Supreme Court addressed the question of whether a defendant was prejudicially deprived of his constitutional rights when the trial court permitted the State to cross-examine him concerning his failure to disclose his alibi at the time he made a statement to police officers or at any time before trial. The court noted that with or without *Miranda* warnings, defendant's exercise of his right to remain silent was guaranteed by Article I, Section 23, of the North Carolina Constitution and the Fifth Amendment as incorporated by the Fourteenth Amendment to the United States Constitution. To determine whether defendant's statement was a prior inconsistent statement the court set forth the following test: whether it would have been natural for defendant to have mentioned his alibi defense at the time he made his statement. The court determined that it would not have been natural for defendant to do so, the statement was not a prior inconsistent statement, and allowing the cross-examination was prejudicial error.

The issue of impeachment by silence, when the defendant has not made any statement, has been addressed by this court recently. In *State v. McGinnis*, 70 N.C. App. 421, 320 S.E. 2d 297 (1984), the defendant made no statements to the police, and the record did not disclose whether he was advised of his *Miranda* rights. On cross-examination the State attempted to impeach defendant with his failure to tell the police before trial that the shooting was accidental, which was his defense at trial. This court, applying the test set forth in *Lane*, held that it clearly would have been natural for defendant to have told the arresting officer that the shooting was accidental if defendant had believed so, and overruled defendant's assignment of error. The court made no mention of the fact that in *Lane* the defendant failed to disclose his alibi in a statement he made to the police officers, while in *McGinnis* the defendant made no statement at all.

In *State v. Hunt*, 72 N.C. App. 59, 323 S.E. 2d 490 (1984) (appeal by defendant pursuant to G.S. 7A-30(2) pending), the defendant made no statement before or after his arrest, and the record

did not disclose whether he was given his *Miranda* rights. On cross-examination the State attempted to impeach defendant as to his pretrial silence. This court again applied the *Lane* test, observing that it does not make any difference whether defendant remains totally silent or makes some statement, and held defendant's pretrial failure to assert his defense brought forth at trial, namely that he was innocent and the victim's son actually did the killing, was an inconsistency which the jury could consider as impeaching evidence. The dissenting opinion in *Hunt*, by Judge Whichard, points out that *Lane* involved a postarrest statement, whereas *Hunt* involved postarrest silence. The dissent in *Hunt* views *Lane* as holding that impeachment by a prior inconsistent statement is the single exception to the constitutional right to silence; silence is involved only insofar as a prior inconsistent statement may be silent as to a material circumstance testified to at trial, which it would have been natural for defendant to have mentioned in his prior statement. The dissent concluded that the impeaching evidence was violative of defendant's privilege against self-incrimination provided by Article I, Section 23 of the North Carolina Constitution. "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." *State v. Hunt* (dissent), 72 N.C. App. at 80, 323 S.E. 2d at 502.

While we believe the rationale of dissent in *Hunt* is meritorious, the doctrine of *stare decisis* leads us to follow *McGinnis* and *Hunt*, and we, therefore, find

No error.

Chief Judge HEDRICK and Judge WHICHARD concur in result.

Chief Judge HEDRICK concurring in result.

In my opinion, the two assignments of error discussed in the majority opinion are wholly without merit and require no discussion. Furthermore, I do not believe in the rationale of the dissent in *State v. Hunt*, 72 N.C. App. 59, 323 S.E. 2d 490 (1984). I believe in the rationale of the majority opinion in *Hunt*, and in that of

State v. Lane, 301 N.C. 382, 271 S.E. 2d 273 (1980) and *State v. McGinnis*, 70 N.C. App. 421, 320 S.E. 2d 297 (1984).

Judge WHICHARD concurring in the result.

My position on the substantive issue of impeachment by pretrial silence is fully stated in the dissenting opinion in *State v. Hunt*, 72 N.C. App. 59, 69, 323 S.E. 2d 490, 495 (1984). In *Hunt*, however, unlike here, defendant had objected at trial to admission of the impeaching testimony. Because defendant here did not object at trial, he is entitled to a new trial only if admission of the impeaching testimony constituted "plain error." *See State v. Black*, 308 N.C. 736, 739-41, 303 S.E. 2d 804, 805-07 (1983). "Plain error" may be found only if admission of the evidence had a probable impact on the jury's finding of guilt or if there is a reasonable probability that the evidence "tilted the scales" in favor of conviction. *Black*, 308 N.C. at 741, 303 S.E. 2d at 807. In light of the eyewitness identification testimony here, I do not believe the impeaching evidence had a probable impact on the finding of guilt. I therefore decline to find "plain error" and concur in the determination that defendant's trial was free from prejudicial error.

STATE OF NORTH CAROLINA v. DARRELL SAMUEL DELLINGER

No. 8427SC873

(Filed 2 April 1985)

1. **Automobiles and Other Vehicles §§ 121, 123— driving while impaired—horse as vehicle—rider as operator**

A horse is a "vehicle" for the purpose of a prosecution under the driving while impaired statute, G.S. 20-138.1, and a horseback rider is an "operator" who is in "control of a vehicle which is in motion" within the purview of G.S. 20-4.01(25) when the horse is ridden upon a street, highway or public vehicular area. Furthermore, in enacting G.S. 20-171, the legislature intended that the provisions of the traffic laws applicable to drivers of "vehicles" should apply to horseback riders irrespective of whether a horse is a vehicle.

2. **Automobiles and Other Vehicles § 127.1— riding horse while impaired—sufficient evidence of driving while impaired**

Evidence tending to show that defendant was riding a horse on a street while defendant had an alcohol concentration of .18 was sufficient for the jury

to find that defendant drove a vehicle upon a street while under the influence of an impairing substance.

3. **Automobiles and Other Vehicles § 126.3; Constitutional Law § 43— breathalyzer test—no right to counsel**

The administration of a chemical analysis to determine if a driver was acting under the influence of an impairing substance is not a critical stage of the prosecution for driving while impaired entitling defendant to counsel.

4. **Automobiles and Other Vehicles § 126.2— driving while impaired—requirement of two breathalyzer tests after 1 January 1985—equal protection**

A defendant charged with driving while impaired prior to 1 January 1985 was not denied equal protection of the laws because G.S. 20-139.1(b3) requires that defendants charged with impaired driving after 1 January 1985 be given two breathalyzer tests since the statute merely treats the same group of people in different ways at different times.

5. **Automobiles and Other Vehicles § 126.3— breathalyzer test—improper maintenance of machine—burden of proof on defendant—constitutionality**

The statute putting the burden on defendant to object and show that a breathalyzer machine has not been maintained in accordance with regulations of the Commission for Health Services, G.S. 20-139.1(b2), does not unconstitutionally shift the burden of proof to defendant since the absence of proper maintenance is an affirmative defense, and the State may permissibly put the burden of establishing affirmative defenses on the defendant.

6. **Automobiles and Other Vehicles § 126.3— breathalyzer operator granted permit before Safe Roads Act**

A breathalyzer operator who was granted his permit by the Division of Health Services before the enactment of the Safe Roads Act, including G.S. 20-139.1, was nevertheless "a person granted a permit by the Department of Human Resources under G.S. 20-139.1" within the purview of G.S. 20-4.01(3b) and was thus qualified to testify as to the results of defendant's breathalyzer tests.

APPEAL by defendant from *Griffin, Judge.* Judgment entered 6 April 1984 in Superior Court, LINCOLN County. Heard in the Court of Appeals 13 March 1985.

Defendant was arrested on 3 December 1983 and charged with driving while impaired. The arrest stemmed from defendant's riding a horse in the Lincolnton Christmas parade. The horse would spin and lift its feet off the ground, apparently when kicked by defendant. Defendant was taken to the Lincoln County jail and given a breathalyzer test which indicated that he had an alcohol concentration of 0.18. Defendant was convicted at a jury trial and appeals.

Attorney General Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

Harris, Bumgardner and Carpenter, by R. Dennis Lorance and James R. Carpenter, for defendant-appellant.

EAGLES, Judge.

I

[1] This appeal presents an issue of first impression: whether a horse is a vehicle for the purpose of charging a violation of G.S. 20-138.1? We hold that it is.

G.S. 20-138.1 provides in pertinent part:

> A person commits the offense of impaired driving *if he drives any vehicle* upon any highway, any street, or any public vehicular area within this state . . . [w]hile under the influence of any impairing substance; or . . . [a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.10 or more. [Emphasis added.]

Defendant argues that a horse cannot be a "vehicle" and that even if it is, defendant was not "driving" it within the meaning of G.S. 20-138.1. We disagree.

"Vehicle" is defined in G.S. 20-4.01(49) as "every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power." "Driver" is defined in G.S. 20-4.01(7) as the "operator of a vehicle" and "operator" is defined in G.S. 20-4.01(25) as a "person who is in actual control of a vehicle which is in motion or which has the engine running."

We recognize that a distinction may have been made between driving and operating in prior case law and statutes regulating vehicles. However, no such distinction is supportable under G.S. 20-138.1 since a "driver" is defined as an "operator." It is clear that the legislature intended the two words to be synonymous. *State v. Coker*, 312 N.C. 432, 323 S.E. 2d 343 (1984).

Defendant's main argument is that a horse is not a "device" and therefore cannot be a "vehicle." While we have found no

North Carolina decisions defining a saddle horse as a vehicle for the purpose of a prosecution under the driving while impaired statute, we find decisions from other jurisdictions persuasive on this point. In *Conrad v. Dillinger,* 176 Kan. 296, 270 P. 2d 216 (1954), the Kansas Supreme Court held that a saddle horse is a "vehicle" within their statutory definition which is identical to G.S. 20-4.01(49). The Kansas court noted that its legislature expressly made the definition of the word "vehicle" so broad that it included not only automobiles and animal-drawn vehicles, but every device upon or by which any person may be transported, and that this definition is sufficiently broad to cover ridden animals. 270 P. 2d at 218. In addition to defining a horse as a vehicle for the purposes of the traffic laws of the State of Kansas, the court noted that by adoption of G.S. 1949, 8-506, the legislature made all the provisions of Kansas traffic laws applicable to persons riding animals upon a roadway irrespective of whether such animals come under the definition of a vehicle. 270 P. 2d at 218. *See also, Broussard v. Annaloro,* 268 So. 2d 293 (La. App. 1972); *Watson v. Stallings,* 270 N.C. 187, 154 S.E. 2d 308 (1967).

North Carolina has a similar statute, G.S. 20-171, that states:

> Every person *riding an animal* or driving any animal drawing a vehicle upon a highway shall be subject to the provisions of this Article applicable to the driver of a vehicle, except those provisions which by their nature can have no application. [Emphasis added.]

We are convinced that the North Carolina legislature intended the provisions of the traffic laws of North Carolina applicable to the drivers of "vehicles" to apply to horseback riders irrespective of whether a horse is a vehicle.

We are further convinced that by our legislature's broad definition of vehicles in G.S. 20-4.01(49), it was intended that horses are vehicles within the meaning of G.S. 20-138.1 when operated upon a street, highway or public vehicular area by one who is impaired.

[2] We further hold that a horseback rider is an "operator" who is in "control of a vehicle which is in motion" where the horse is *ridden upon a street, highway or public vehicular area.* Accordingly, where the evidence shows that defendant was riding a horse on a street while defendant had an alcohol concentration of 0.18,

the evidence is sufficient from which a jury could find that defendant drove a vehicle upon a street while under the influence of an impairing substance. G.S. 20-138.1.

II

Defendant next assigns as error the trial court's refusal to dismiss the charge of driving while impaired based on constitutional grounds. We find no error.

Defendant filed a motion to dismiss pursuant to G.S. 15A-952 alleging that G.S. 20-138.1 violates defendant's rights under the Sixth Amendment of the United States Constitution by failing to provide for the right to counsel at a critical stage of the prosecution, and violates the Equal Protection Clause of the Constitutions of the United States and North Carolina and the ruling and reasoning of *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975), by shifting the burden of proof to defendant. We disagree.

[3] The administration of a chemical analysis to determine if a driver was acting under the influence of an impairing substance is not a critical stage of the prosecution for driving while impaired entitling defendant to counsel. *State v. Howren,* 312 N.C. 454, 323 S.E. 2d 335 (1984). For this reason, it was not error for the trial court to refuse to dismiss the driving while impaired charge based on a violation of defendant's Sixth Amendment right to counsel at a critical stage of the prosecution.

[4] Defendant's assignment of error on the grounds of a violation of the Equal Protection Clauses of the United States and North Carolina Constitutions is based on the requirement of G.S. 20-139.1(b3) that defendants charged with impaired driving be given two breathalyzer tests after 1 January 1985. However, this new requirement for two tests does not create an impermissible classification denying defendant equal protection of the laws. *State v. Howren, supra.* G.S. 20-139.1(b3) merely treats the same group of persons, those arrested for driving while impaired, in different ways at different times. *Id.* It was not error for the trial court to refuse to dismiss the driving while impaired charge based on a violation of equal protection of the law.

[5] G.S. 20-139.1(b2) provides that the results of a breath analysis are inadmissible if defendant objects to their introduc-

tion into evidence and demonstrates that the instrument used to conduct the analysis had not been maintained according to the regulations of the Commission for Health Services. Defendant, citing *Mullaney v. Wilbur, supra,* contends that this is an unconstitutional shifting of the burden of proof to defendant. We disagree. The possibility that the breathalyzer may not have been properly maintained is an affirmative defense to be established by defendant and the State may permissibly put the burden of establishing affirmative defenses on the defendant. *State v. Howren, supra.* Accordingly, the trial court did not err in refusing to dismiss the driving while impaired charge based on an unconstitutional shift in the burden of proof to defendant.

III

[6] Defendant next assigns as error the trial court's refusal to exclude the testimony of the breathalyzer operator. We find no prejudicial error.

G.S. 20-4.01(3b) defines a chemical analyst as "a person granted a permit by the Department of Human Resources under G.S. 20-139.1 to perform chemical analyses." The breathalyzer operator was granted his permit on 26 October 1982, before the effective date of the Safe Roads Act, by the Division of Health Services, North Carolina Department of Human Resources. Since G.S. 20-139.1 was not in existence when the breathalyzer operator was granted his permit, defendant argues that he was not a person granted a permit by the Department of Human Resources under G.S. 20-139.1. We disagree and note that G.S. 20-4.01, "Definitions.," states that "Unless the context otherwise requires the following words and phrases, for the purpose of this Chapter, shall have the following meanings: . . . ." We hold that in the present case the context requires that "chemical analyst" for purposes of G.S. 20-139.1 include a person who was validly licensed by the Department of Human Resources to perform chemical analyses immediately prior to the enactment of the Safe Roads Act. To hold otherwise would mean that an individual licensed to perform chemical analyses under one statute would automatically lose his license when the testing procedures are merely recodified in another statute. Obviously the legislature did not intend that result. We note the absence of any specific voiding language as to the capacity of chemical analysts to administer tests where those

chemical analysts were licensed prior to the enactment of the Safe Roads Act. Of similar import, the Safe Roads Act imposed no new training or education criteria on breathalyzer operators, but left the licensing power with the Commissioner of Health Services of the Department of Human Resources as it was under the prior law. For these reasons it was not error for the trial court to allow the breathalyzer operator to testify as to the results of the defendant's breathalyzer test.

For the reasons herein stated, we find no error in the trial of this action. Defendant's remaining assignments of error are without merit.

No error.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. GREGORY THOMAS STONE

No. 847SC337

(Filed 2 April 1985)

1. **Homicide § 19.1— exclusion of acts of violence by deceased**

The trial court in a homicide case properly excluded evidence of specific acts of violence committed by the victim where defendant had introduced no evidence of self-defense or defense of others.

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

The State's evidence was sufficient for the jury in a prosecution of defendant for second-degree murder where it tended to show that defendant was awakened by the screaming and shouting of his sister and the victim in another room; defendant procured a rifle and entered the bedroom of his sister and the victim with the rifle in his possession; upon entering the room, defendant pointed the gun at the victim and shot him; the victim was not in possession of a weapon when he was shot; defendant then left in a truck and eventually threw the rifle over a bridge; and defendant told his girl friend that he had shot the victim.

3. **Homicide § 28.5— instructions on defense of others—use of "self-defense"**

Defendant was not prejudiced by the trial court's use of the term "self-defense" at different times in its instructions on defense of others.

APPEAL by defendant from *Small, Judge.* Judgment entered 3 November 1983 in Superior Court, NASH County. Heard in the Court of Appeals 9 January 1985.

Defendant was charged in a bill of indictment with the first degree murder of Shelton Gay. The State proceeded on the charge of second degree murder. The court submitted four possible verdicts to the jury: (1) guilty of murder in the second degree, (2) guilty of voluntary manslaughter, (3) guilty of involuntary manslaughter, or (4) not guilty. The jury found the defendant guilty of second degree murder, whereupon the court imposed the presumptive sentence of fifteen years imprisonment. Defendant appeals.

The evidence for the State tended to show the following: Defendant shared a home with his sister, Lisa Stone, and the victim, Shelton Gay, who was Lisa's boyfriend. On 20 August 1983, defendant attended a pig picking at Lake Royale. Defendant was accompanied by a friend, Tammy Narron, and Lisa while Gay arrived at the pig picking later in the day. Defendant and Gay were both drinking at the pig picking, but no trouble ensued between the two. Defendant, Tammy Narron, and Lisa left the pig picking to go to a tavern in Middlesex, North Carolina known as Rebel's Lounge. They were not accompanied by Shelton Gay, who elected to stay at the pig picking. After staying at the tavern for a short time, they returned to defendant's home. Defendant and Tammy Narron remained at the house, but Lisa returned to the tavern with three other individuals where she stayed until sometime between 12:00 midnight and 1:00 a.m., at which time she returned home and went to sleep.

Shelton Gay returned to the house about 2:30 a.m., whereupon he entered the bedroom and grabbed Lisa Stone. He questioned her as to her whereabouts earlier in the evening and whom she was with. Not satisfied with her response, he slapped her and threw her down on the floor. An argument ensued between the two, which resulted in the two yelling and screaming at one another. As a result of the yelling and screaming, defendant was awakened from his sleep. Defendant heard Lisa crying and screaming for Shelton Gay to leave. Defendant then got out of bed, looked on the dresser and around the room for a pistol. Not finding the pistol, defendant procured a rifle which was located in

a gun rack in the den of the house. Defendant entered Lisa's bedroom with the gun down by his side. Shelton Gay was positioned beside Lisa near the bed. Upon entering the room, defendant pointed the gun at Shelton Gay and shot him. There was also evidence that the defendant never saw Shelton Gay with a weapon in his hand.

After shooting Shelton Gay, defendant exited Lisa's room and returned to the bedroom occupied by Tammy Narron. Tammy Narron questioned defendant as to what happened. Defendant responded, "I shot that son-of-bitch, Shelton." Defendant, after putting on a shirt, and Tammy Narron left the house by truck and just started driving. After driving for a while, they stopped at a first bridge, but proceeded on. At a second bridge, defendant got out of the truck and threw the rifle over the bridge. They proceeded on to Wilson, N.C. at which time defendant telephoned his sister, Rhonda, who lived beside the defendant in Middlesex. Questioned by Tammy Narron about the condition of Shelton Gay, defendant responded that he was "deader than hell." Defendant returned to Nash County and turned himself in to the Sheriff's Department.

Defendant's evidence leading up to the events transpiring in the bedroom tends to be in agreement with the State's evidence. Defendant's evidence further showed that from the commotion occurring in Lisa's bedroom, he could tell someone was turning over "stuff in the room" and that his sister was being beaten. Defendant was concerned for his sister's safety, therefore he decided to find his pistol before entering the room. He could not locate the pistol, but was aware that Shelton Gay knew where the pistol was kept. Defendant took the rifle down from the gun rack and entered the bedroom with the gun pointed down by his side. Upon entering the room, he saw his sister's face was bleeding and her shirt was torn. Shelton Gay was standing next to Lisa and looked as though he was about to grab her, when he suddenly moved towards the defendant. Defendant stepped back bringing the rifle up and shooting Shelton Gay in the chest.

Attorney General Rufus Edmisten, by Special Deputy Attorney General Charles J. Murray, for the State.

C. Ray Joyner, for defendant appellant.

JOHNSON, Judge.

Defendant's initial contention is that the trial court erred in excluding evidence of specific acts committed by the victim which would have shown that the victim had a propensity for danger and violence. This assignment is not supported by an exception duly taken at trial and therefore presents no question for appellate review. *State v. Green*, 280 N.C. 431, 185 S.E. 2d 872 (1972); Rule 10, Rules of Appellate Procedure. Nevertheless, upon examination of the record, we find the exclusion of defendant's evidence proper.

[1] Defendant contends the trial court excluded evidence that the victim, on prior occasions, had violently knocked holes in the walls of his bedroom and had violent arguments with his girlfriend who was the defendant's sister. In a criminal prosecution for homicide, if there is a proper showing that the accused may have acted in self-defense or some comparable justification, evidence of specific acts of violence committed by the victim is admissible. *State v. Johnson*, 270 N.C. 215, 154 S.E. 2d 48 (1967); 1 Brandis, N.C. Evidence sec. 106 (rev. ed. 2d). However, as a condition precedent to the admissibility of such evidence, the defendant must first present viable evidence of the necessity of self-defense. *State v. Allmond*, 27 N.C. App. 29, 217 S.E. 2d 734 (1975). This logically extends to defense of others, which was defendant's justification in the case *sub judice*. At the time defendant sought to elicit the excluded evidence, he had introduced no evidence as to the defense of others. No evidence having been presented, the court did not err in sustaining the objections to the inquiries in question. *See State v. Green*, 62 N.C. App. 1, 301 S.E. 2d 920, *affirmed; modified on other ground*, 309 N.C. 623, 308 S.E. 2d 326 (1983).

[2] Defendant's second contention cites as error the trial court's denial of his motion to dismiss the charge of second degree murder. On a motion to dismiss, the evidence is considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Simmons*, 57 N.C. App. 548, 550, 291 S.E. 2d 815, 817 (1982). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *State v. Gray*, 56 N.C. App. 667, 672, 289

S.E. 2d 894, 897, *disc. rev. denied,* 306 N.C. 388, 294 S.E. 2d 214 (1982).

When considered in light of the foregoing principles, we hold the State's evidence was sufficient to withstand a motion to dismiss. The State's evidence tended to show that the defendant was awakened by screaming and shouting by his sister and the victim in another room. Defendant then searched for his pistol in his bedroom, but not finding the pistol took down a rifle from a gun rack in the den. Defendant entered the bedroom of his sister and the victim with the gun in his possession. There was evidence that the victim was not in possession of a weapon when the gun in the possession of the defendant went off and killed the victim. Upon being questioned about the series of events, defendant responded, "I shot that son-of-a-bitch, Shelton." Defendant then left in a truck and eventually threw the rifle over a bridge. The trial court properly denied defendant's motion to dismiss.

[3] Defendant's final contention is that the trial court erred in instructing the jury on defense of others. Again, defendant has failed to comply with the Rules of Appellate Procedure. No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection. Rule 10(b)(2), Rules of Appellate Procedure. Defendant did not object to the jury instructions during the trial proceedings, thus is prevented from raising it on appeal.

Nevertheless, we have reviewed the jury instructions and find defendant's contention is without merit. The trial court instructed the jury pursuant to the North Carolina Pattern Jury Instructions. N.C.P.I. Crim. 308.60, "Killing In Lawful Defense of a Family Member." Defendant cited the trial court's use of the term "self-defense" at different times of the instructions as error. We find that so overbalanced was the charge on the defense of others, that the jury was not misled by the infrequent mention of the term "self-defense." Taken as a whole, we find no prejudicial error in the jury instructions as given.

No error.

Judges BECTON and MARTIN concur.

EDNA SCALES v. BASIL M. TUCKER, D.P.M. AND CATHERINE BIRDSALL HEALY, D.P.M.

No. 8417SC530

(Filed 2 April 1985)

Physicians, Surgeons and Allied Professions § 16.1— podiatric malpractice—evidence insufficient

Directed verdict for defendant podiatrists was proper in a medical malpractice action where plaintiff's expert witness, the vascular surgeon who ultimately amputated plaintiff's leg, testified that plaintiff lost her leg because of her peripheral vascular disease and diabetes rather than any alleged act by defendants, and where the surgeon found no evidence of a cut on plaintiff's foot and there was no mention of a cut in the pathologist's report. Plaintiff failed to introduce any evidence of proximate cause.

APPEAL by plaintiff from *Washington, Judge.* Judgment entered 11 January 1984 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 15 January 1985.

This is a medical malpractice action. Plaintiff is a ninety-four year old woman suffering from diabetes mellitus, hypertrophic arthritis, and arteriosclerosis. Plaintiff's complaint alleges, and plaintiff and her daughter testified at trial, that on 21 April 1980 defendant Healy, a doctor of podiatry who was employed by defendant Tucker in Eden, North Carolina, examined plaintiff's left foot, trimmed plaintiff's toenails, and cut off a callus on the bottom of plaintiff's left third toe. Dr. Healy then bandaged plaintiff's toe and gave her medication to prevent infection. Because of this cut, plaintiff's left foot became infected and gangrenous necessitating amputation of her left leg below the knee.

At trial Dr. Healy testified that she was not working with Dr. Tucker in Eden, North Carolina on 21 April 1980, having left Dr. Tucker's practice on 28 February 1980 and moved to Statesville, North Carolina. The last time Dr. Healy saw plaintiff was on 25 February 1980. At that time Dr. Healy noticed that plaintiff's left third toe was discoloring and advised plaintiff to see Dr. Fleishman, a vascular surgeon. Dr. Healy saw no sores or lesions on plaintiff's left foot, and she did not make an incision on plaintiff's left third toe. In Dr. Healy's opinion plaintiff lost her leg because of severe vascular disease.

Dr. Tucker testified that plaintiff was seen by Dr. Healy on 25 February 1980, and according to office notes, the left third toe was ischemic, which means a lack of blood supply, with no sign of infection. Plaintiff was advised to see Dr. Fleishman, but refused. Dr. Tucker saw plaintiff on 31 March 1980 and noted that the third left toe was discolored, he also advised plaintiff to see Dr. Fleishman, but she refused. Dr. Tucker further testified that the ischemia had been present for sometime in plaintiff's left third toe, was irreversible, and surgery was inevitable. Dr. Tucker saw plaintiff again on 10 April 1980 and on 21 April 1980. Each time he counseled plaintiff to see Dr. Fleishman. Dr. Tucker testified he did not cut plaintiff's left third toe and he saw no cut there. In Dr. Tucker's opinion, neither he nor Dr. Healy did anything to necessitate plaintiff's amputation.

Dr. Fleishman, tendered as an expert by plaintiff in the fields of general surgery and vascular surgery, testified that he saw plaintiff on 23 April 1980 and 12 May 1980. Plaintiff had very advanced ischemia disease on her left third toe. On 2 June 1980 Dr. Fleishman noted that plaintiff's left third toe had dry gangrene; on 18 June her entire left foot was gangrenous, and Dr. Fleishman then amputated plaintiff's left leg. The pathology report pursuant to the operation revealed that the arteries near the amputation site were extremely arteriosclerotic. Dr. Fleishman testified that he found no cut on plaintiff's left third toe on 23 April 1980, and no such cut was documented in the pathology report. In response to a hypothetical question based on plaintiff's allegation that the gangrene was caused by cutting a callus from plaintiff's toe, Dr. Fleishman said that it was highly unlikely that it was the cause because he found no such cut and the left third toe had dry gangrene, which means that it was not infected.

At the close of all the evidence defendants' motion for a directed verdict was granted.

Joe L. Webster and W. Steven Allen for plaintiff appellant.

Tuggle, Duggins, Meschan and Elrod by Joseph E. Elrod III and Sally A. Lawing for defendant appellees.

PARKER, Judge.

Plaintiff assigns error to the trial judge's entry of directed verdict in favor of defendants. The trial judge was correct in

granting defendants' motion for a directed verdict if plaintiff's evidence, considered true and with the benefit of every inference resolved in her favor, failed to establish all of the following elements: (i) the standard of care required of defendant physician; (ii) breach of the standard of care; (iii) proximate cause; and (iv) damages. *Lowery v. Newton*, 52 N.C. App. 234, 278 S.E. 2d 566, *reconsideration of denial of discretionary review denied*, 304 N.C. 195, 291 S.E. 2d 148 (1981). *Accord*, *Mitchell v. Parker*, 68 N.C. App. 458, 315 S.E. 2d 76, *review denied*, 311 N.C. 760, 321 S.E. 2d 140 (defendant Hall), 311 N.C. 760, 321 S.E. 2d 141 (defendant Parker) (1984).

We find the trial judge's entry of directed verdict for defendants was proper because plaintiff failed to present any evidence to support the allegation that defendants' treatment was the proximate cause of her gangrene which necessitated the amputation. Dr. Fleishman, plaintiff's expert witness, testified that plaintiff's amputation was necessary because of her severe peripheral vascular disease. Dr. Fleishman thoroughly examined plaintiff's left foot on 23 April 1980 and found no evidence of a cut. There was also no mention of a cut in the pathologist's report. Dr. Fleishman testified:

> Q. What you are telling the jury is that this lady lost her leg because of her peripheral vascular disease and because of diabetes, not because of a cut alleged to have occurred on April 21, 1980?
>
> A. [Dr. Fleishman]: That is my opinion, sir.
>
> . . . .
>
> Q. Doctor, in your opinion this lady's leg that was amputated by you, this amputation was not caused by any podiatric care that was either given or not given by either Dr. Tucker or Dr. Healy, is that correct?
>
> Mr. Webster: Objection.
>
> Court: Overruled.
>
> A. [Dr. Fleishman]: No, I don't think that was caused by her podiatric care.

Notwithstanding, Dr. Fleishman's isolated deposition testimony in response to a hypothetical question that if the toe were cut, "it could be a contributing factor" his testimony considered in its entirety manifests a positive opinion that defendants' treatment was not a proximate cause of plaintiff's injury. *See Largent v. Acuff*, 69 N.C. App. 439, 317 S.E. 2d 111, *review denied*, 312 N.C. 83, 321 S.E. 2d 896 (1984). An expert witness is allowed to conform his answer to his true opinion, *id.*, and that opinion may be based, in whole or in part, on personal knowledge or observation. *See Ballenger v. Burris Industries, Inc.*, 66 N.C. App. 556, 311 S.E. 2d 881, *review denied*, 310 N.C. 743, 315 S.E. 2d 700 (1984).

Considered in the light most favorable to plaintiff, and giving plaintiff the benefit of every reasonable inference, plaintiff has failed to introduce any evidence of proximate cause; the directed verdict entered for defendant is, therefore,

Affirmed.

Chief Judge HEDRICK and Judge WHICHARD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 MARCH 1985

Case	County	Disposition
DAVIS OIL CO. v. SOUTHLAND CORP. No. 8422SC951	Iredell (80CVS957)	Dismissed
FARLOW v. MORETZ No. 8429DC527	Transylvania (82CVD63)	Affirmed in part; vacated & remanded in part.
GONYO v. WRIGHT No. 846SC478	Hertford (83CVS306)	Affirmed
IN RE FORECLOSURE OF MURRAY No. 845SC669	Pender (83SP87) (83SP102)	Affirmed
STATE v. ADDISON No. 8314SC996	Durham (82CRS26893)	No Error
STATE v. COOPER No. 847SC933	Wilson (82CRS117)	No Error
STATE v. CORBETT No. 845SC927	New Hanover (84CVS4794)	No Error
STATE v. DYER No. 8429SC984	Rutherford (83CRS6896)	No Error
STATE v. GRIFFIN No. 8419SC594	Cabarrus (84CRS451)	No Error
STATE v. HARRIS No. 8414SC964	Durham (81CRS17373) (81CRS29068)	No Error
STATE v. JONES No. 8412SC918	Cumberland (83CRS47800)	No Error
STATE v. MINCEY No. 8420SC826	Richmond (83CRS3875)	No Error
STATE v. MOORE No. 8426SC974	Mecklenburg (83CRS7176)	No Error
STATE v. PARKER No. 834SC785	Onslow (83CRS4146) (83CRS4147)	Affirmed
STATE v. STEPHENSON No. 8410SC932	Wake (83CRS85355)	No Error
STATE v. SWAIN No. 842SC953	Washington (83CRS1606)	No Error

STATE v. TAYLOR No. 848SC941	Wayne (83CRS16552)	No Error
STATE v. YANKOWIAK No. 8412SC973	Cumberland (82CRS35617)	No Error
WERTZ v. WERTZ No. 8422DC940	Davidson (81CVD1450)	Appeal Dismissed; Petition for Writ of Certiorari Denied.
WILLIFORD v. CRABTREE No. 8414DC555	Durham (83CVD02902) (83CVD01960) (83CVD01823)	Affirmed

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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ACCORD AND SATISFACTION

§ 1. Nature and Essentials of Agreement

Summary judgment was properly entered for defendant in an action involving a dispute over liquidated damages in a construction contract where plaintiff negotiated a check from defendant for the final payment minus liquidated damages. *J. F. Wilkerson Contracting Co., Inc. v. Sellers Manufacturing Co., Inc.*, 620.

ACCOUNTS

§ 2. Accounts Stated

The trial court erred by directing a verdict against defendant in an action which alleged that defendant was indebted to plaintiff without specifying the basis. *Woodruff v. Shuford*, 627.

ADVERSE POSSESSION

§ 7. Exclusive and Hostile Character of Possession by One Tenant in Common against other Tenants in Common

The ouster necessary to establish title by adverse possession was presumed upon respondents' showing that one tenant in common possessed the land in question and took all rents and profits from the land for over twenty years without any demand having been made upon him for possession or for a share of the rents and profits. *Ellis v. Poe*, 448.

§ 18. Color of Title; Presumptive Possession to Outermost Boundaries of Deed

Where the evidence at trial showed adverse possession of the disputed land by respondents' predecessor in title for at least seven years under color of title, the court in an action to quiet title erred by dividing the land into two lots and awarding one to petitioners and one to respondents. *Cobb v. Spurlin*, 560.

AGRICULTURE

§ 5. Rights of Lienholders as against Warehousemen Selling Crop

The court properly denied defendant warehouse's motion to dismiss where plaintiff's complaint alleged that the provisions of a future advance note and security agreement were breached by selling tobacco subject to the security interest without plaintiff's prior written consent. *E-B Grain Co. v. Denton*, 14.

Summary judgment was properly granted against defendant warehouse on a claim for conversion of tobacco used as collateral where the sale bills prepared by defendant contained ASCS farm numbers identifying the source of the tobacco. *Ibid.*

In an action for conversion of tobacco used as collateral, summary judgment as to damages was not proper. *Ibid.*

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability

A summary judgment order entered in favor of one of two defendants affected a substantial right and was immediately appealable. *Abner Corp. v. City Roofing & Sheetmetal Co.*, 470.

APPEAL AND ERROR – Continued

§ 6.3. Appeals Based on Jurisdiction

Defendant's appeal from the denial of his motion to dismiss a portion of plaintiff's claim for increased alimony for lack of jurisdiction involved only personal jurisdiction. *Hale v. Hale*, 639.

§ 6.7. Appeals Based on Amendments to Pleadings

The denial of plaintiff's motion to amend his complaint to enforce a claim of lien for labor and materials affected a substantial right and was immediately appealable. *Mauney v. Morris*, 589.

§ 6.9. Appealability of Preliminary Matters

An order requiring a blood grouping test was an interlocutory order which was not appealable, but which was treated by the Court of Appeals as a petition for certiorari. *Heavner v. Heavner*, 331.

§ 24. Necessity for Objections, Exceptions and Assignments of Error

Exceptions and specific assignments of error were not required where the sole issue presented in the brief was whether the trial court erred in granting summary judgment in favor of plaintiff. *Vernon, Vernon, Wooten, Brown & Andrews, P.A. v. Miller*, 295.

In an action arising from the death of a tenant in one of defendant's apartments, plaintiff could not assert on appeal a claim for breach of contract where the trial court did not mention plaintiff's claim for breach of contract in any of its directed verdict entries and plaintiff did not question the court about the breach of contract claim, make it the point of a specific exception, or seek any post-trial relief relative to it. *Jackson v. Housing Authority of High Point*, 363.

§ 25. Parties Entitled to Object and Take Exception

Where one of several defendants appealed and assigned error, but filed an appellee's brief and attempted to cross-assign error, her brief was not properly before the court and was dismissed. *Ferguson v. Croom*, 316.

§ 68. Law of the Case

A statement in a Court of Appeals' opinion that there was no binding contract was not necessary to the holding that an unresolved issue of fact existed, and the law of the case doctrine did not apply. *Southland Assoc. Realtors v. Miner*, 319.

APPEARANCE

§ 1.1. What Constitutes a General Appearance

The court did not err in denying defendant's motion to dismiss for lack of personal jurisdiction where defendant had previously signed a consent judgment and thereby made a voluntary appearance and consented to jurisdiction. *Hale v. Hale*, 639.

§ 2. Effect of Appearance

Plaintiff waived her objection to the lack of a show cause order in a contempt proceeding by appearing at the hearing, presenting substantial evidence, and stipulating to jurisdiction on appeal. *Glesner v. Dembrosky*, 594.

ASSAULT AND BATTERY

§ 13. Competency of Evidence

In a prosecution for kidnapping and felonious assault, testimony by the victim that defendant was holding his shotgun and "putting the shells in it evidently" was properly admitted. *S. v. Wilson*, 398.

ATTORNEYS AT LAW

§ 7.1. Validity and Construction of Fee Agreements

Summary judgment should not have been granted for plaintiff attorneys in an action to collect legal fees where the positions of the parties varied materially as to the services each contemplated would be covered by each phase of the fee agreement. *Vernon, Vernon, Wooten, Brown & Andrews, P.A. v. Miller*, 295.

§ 11. Debarment Procedure

The Hearing Committee in an attorney disciplinary proceeding did not err in excluding testimony offered to prove character, habit and customary professional practices of defendant attorney or in excluding the affidavit of an unavailable witness. *N. C. State Bar v. Sheffield*, 349.

§ 12. Grounds for Disbarment

A conclusion in an attorney disciplinary proceeding that defendant attorney failed to maintain complete records of funds received on a client's behalf and to render appropriate accountings to the client in violation of the disciplinary rules was supported by evidence and findings. *N. C. State Bar v. Sheffield*, 349.

The evidence in an attorney disciplinary hearing supported findings that defendant accepted employment in a wrongful death case and that he never withdrew. *Ibid.*

A conclusion by the Hearing Committee that defendant attorney failed to respond to a letter of notice of a grievance and a subpoena and thus engaged in conduct adversely reflecting upon his fitness to practice law was supported by the findings and a stipulation. *Ibid.*

AUTOMOBILES

§ 2.3. Suspension of License; Nature of Scope of Review

G.S. 20-25 creates no right to appeal a driver's license suspension under G.S. 20-4.20(b) for failure to comply with a citation issued in another state. *Palmer v. Wilkins, Com'r of Motor Vehicles*, 171.

§ 3.1. Offense of Driving without License; Sufficiency of Notice of Prior Suspension or Revocation

Defendant's stipulation constituted sufficient evidence of revocation and notice of revocation to support his conviction of driving while his license was revoked. *S. v. Curtis*, 248.

§ 3.5. Offense of Driving without License; Argument by Counsel

The court did not err in permitting the prosecutor to argue to the jury that the State's evidence of the mailing of the revocation of defendant's license created a presumption that the notice was received by defendant and that there was no evidence to the contrary. *S. v. Curtis*, 248.

AUTOMOBILES — Continued

§ 45.6. Action for Negligent Operation of Vehicle; Photographs

The court did not err by admitting photographs of the scene taken more than two years after the accident where plaintiff testified that the photographs were a fair and accurate portrayal of the intersection at the time of the accident. *Sizemore v. Raxter*, 531.

§ 83.2. Contributory Negligence of Pedestrians while Standing on Highway

The trial court did not err in denying defendant's motion for a directed verdict based on contributory negligence in a personal injury action by a plaintiff who was directing traffic in a Runathon when he was struck by defendant's automobile. *Sizemore v. Raxter*, 531.

§ 84. Contributory Negligence of Children

A thirteen-year-old farm worker who fell from the back of a pickup truck could not be held contributorily negligent as a matter of law where he was between the ages of seven and fourteen. *Mercer v. Crocker*, 634.

§ 89.1. Sufficiency of Evidence of Last Clear Chance

The court did not err by submitting the issue of last clear chance to the jury in a personal injury action by a plaintiff who was struck by an automobile while directing traffic at a Runathon. *Sizemore v. Raxter*, 531.

§ 105.1. Directed Verdict on Issue of Respondeat Superior

A directed verdict for defendants was not proper in an action by a thirteen-year-old farm worker who fell from the back of a pickup truck where the evidence showed that one defendant drove the truck and the other owned it. *Mercer v. Crocker*, 634.

§ 113.1. Sufficiency of Evidence of Homicide

The State's evidence was sufficient to support defendant's conviction of involuntary manslaughter resulting from striking the victims' car while driving in an intoxicated condition. *S. v. McGill*, 206.

§ 114. Instructions in Homicide Case

The trial court in an involuntary manslaughter prosecution erred in refusing to instruct the jury that, in addition to proof of driving under the influence as a proximate cause of decedent's death, the State must also prove that defendant's violation of some rule of the road was a proximate cause of the death. *S. v. McGill*, 206.

§ 126.2. Driving under the Influence; Breathalyzer Tests

A defendant charged with driving while impaired prior to 1 January 1985 was not denied equal protection because G.S. 20-139.1(b)(3) requires that defendants charged with impaired driving after 1 January 1985 be given two breathalyzer tests. *S. v. Dellinger*, 685.

The statute putting the burden on defendant to object and show that a breathalyzer machine has not been properly maintained does not unconstitutionally shift the burden of proof to defendant. *Ibid.*

§ 126.3. Driving under the Influence; Manner and Time of Administration of Breathalyzer Test

The administration of a breathalyzer test is not a critical stage of a prosecution for driving while impaired entitling defendant to counsel. *S. v. Dellinger*, 685.

AUTOMOBILES — Continued

A breathalyzer operator who was granted his permit before enactment of the Safe Roads Act was qualified to testify as to the results of defendant's breathalyzer tests. *Ibid.*

§ 127.1. Sufficiency of Evidence of Driving under the Influence; Particular Cases

Evidence that defendant was riding a horse on a street while defendant had an alcohol concentration of .18 was sufficient for the jury to find that defendant drove a vehicle upon a street while under the influence of an impairing substance. *S. v. Dellinger*, 685.

§ 127.2. Sufficiency of Evidence of Driving under the Influence; Evidence of Identity of Defendant as Driver

Defendant's motion to dismiss the charge of driving under the influence was properly denied. *S. v. Clark*, 277.

§ 129. Driving under the Influence; Instructions

In a prosecution for driving under the influence of intoxicants, the trial court erred in failing to charge on the lesser included offense of careless and reckless driving after consuming alcohol although defendant had taken a breathalyzer test which showed a .19 percent blood alcohol content. *S. v. Bain*, 461.

BASTARDS

§ 5.1. Competency and Relevancy of Evidence of Blood Tests

The trial court erred by ordering a blood grouping test where plaintiff had previously pled guilty to criminal nonsupport and had alleged in the complaint that the child was born of his marriage to defendant. *Heavner v. Heavner*, 331.

BOUNDARIES

§ 5. Description by Reference to Map

The trial judge in a processioning action did not err by instructing the jury to disregard the testimony of a surveyor who did not make a map depicting the line he located in relation to landmarks and the line claimed by petitioner. *Metcalf v. McGuinn*, 604.

§ 8.2. Procedural Requirements Generally of Proceeding to Establish

The court did not err by allowing the petitioner in a processioning action to take a voluntary dismissal of the portion of his petition calling for adjudication of the boundary line beyond the point where respondents' land ended. *Metcalf v. McGuinn*, 604.

§ 8.3. Proceeding to Establish; Pleading Matters

An action was properly transferred from the clerk to superior court where the answer to a petition to establish correct boundary lines raised the issue of title. *Cobb v. Spurlin*, 560.

BROKERS AND FACTORS

§ 6. Right to Commissions Generally

In an action to recover a realtor's commission, judgment for plaintiff by a court sitting without a jury was affirmed. *Southland Assoc. Realtors v. Miner*, 319.

BURGLARY AND UNLAWFUL BREAKINGS

§ 1. Definition

Breaking or entering is not a lesser included offense of felonious larceny. *S. v. Cameron,* 89.

§ 4. Competency of Evidence; Testimony

There was no error in permitting a corporate president and sole stockholder to testify that defendant did not have permission to enter the premises after hours. *S. v. Grady,* 452.

The trial court did not err by denying defendant's motion in limine to prohibit testimony about a misdemeanor breaking and entering to which defendant had pled guilty or by admitting evidence of other crimes in which defendant was involved. *S. v. Tate,* 573.

§ 5.8. Sufficiency of Evidence of Breaking and Entering and Larceny of Residential Premises

Neither the absence of a separation agreement nor the presence of defendant's clothing and tools in the house was relevant to defendant's right to enter the house occupied exclusively by his wife and daughter. *S. v. Cox,* 432.

There was sufficient evidence to submit first-degree burglary to the jury where the evidence tended to show that defendant had moved out of the house occupied by his wife and daughter and that, after an argument, he kicked in the door, walked down the hall, and stabbed the man who was with his wife. *Ibid.*

§ 5.9. Sufficiency of Evidence of Breaking and Entering and Larceny of Business Premises

Defendant's motion to dismiss charges of breaking and entering and larceny was properly denied. *S. v. Tate,* 573.

§ 6.2. Sufficiency of Evidence of Felonious Intent to Require Instruction

There was sufficient evidence that defendant intended to commit an assault with a knife when he gained entry to a house by kicking down a door. *S. v. Cox,* 432.

§ 6.4. Instruction on Breaking and Entering

In a prosecution for first-degree burglary and felonious assault occurring at the residence of defendant's estranged spouse, the court did not err in failing to give instructions relating to defendant being on his own premises because there was no evidence that he was on his own premises or that he had a right to enter the dwelling house. *S. v. Cox,* 432.

CONSTITUTIONAL LAW

§ 20. Equal Protection Generally

Allowing non-legally dependent stepchildren to recover death benefits as dependents under the Workers' Compensation Act does not violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States or the fundamental law of North Carolina. *Winstead v. Derreberry,* 35.

The statute which provides personal immunity for staff members of State hospitals does not violate the equal protection clause of the North Carolina Constitution because no suspect class or fundamental right is involved and because a rational basis is served. *Pangburn v. Saad,* 336.

CONSTITUTIONAL LAW – Continued

§ 23.1. Scope of Protection of Due Process; Taking of Property

The statute which validates marriages performed by ministers of the Universal Life Church did not deprive plaintiff of property without due process of law where she had initiated a lawsuit for fraud and misrepresentation prior to the time the statute was passed. *Fulton v. Vickery*, 382.

§ 24.9. Right to Trial by Jury

There is no right to a jury trial on an equitable distribution claim. *Phillips v. Phillips*, 68.

§ 31. Affording the Accused the Basic Essentials for Defense

The trial court did not err in the denial of the Cuban defendant's motion for the appointment, at State expense, of an additional psychiatrist fluent in both Spanish and English to evaluate his mental capacity after defendant had twice been evaluated by psychiatrists at Dorothea Dix Hospital. *S. v. Barranco*, 502.

§ 34. Double Jeopardy

Defendant's motion for dismissal based on double jeopardy was properly denied where the judge in his first trial had declared a mistrial after personally observing a police officer in conversation with two jurors. *S. v. Montalbano*, 259.

§ 43. Right to Counsel; What Is Critical Stage of Proceedings

The administration of a breathalyzer test is not a critical stage of a prosecution for driving while impaired entitling defendant to counsel. *S. v. Dellinger*, 685.

§ 48. Effective Assistance of Counsel

In a prosecution for armed robbery, defendant received effective assistance of counsel even though his counsel did not subpoena character witnesses in an effort to mitigate the sentence. *S. v. Crain*, 269.

In a prosecution for second-degree rape, defendant's counsel was not ineffective in entering into a stipulation admitting into evidence the results of the vaginal examination of the victim. *S. v. Aiken*, 487.

Defendant's counsel was not ineffective because he failed to move to suppress defendant's pretrial statement to police. *Ibid.*

In a prosecution for second-degree rape, defense counsel was not ineffective in allowing the prosecution to elicit testimony solely to raise the issue of race. *Ibid.*

In a prosecution for second-degree rape, defendant's counsel was not ineffective where the direct examination of defendant was much briefer than the cross-examination. *Ibid.*

In a prosecution for second-degree rape, defendant's counsel was not ineffective in that he failed to object to the court's charge on intoxication of the victim. *Ibid.*

Inquiries from the State Bar to defendant's counsel before her trial and the disbarment of defendant's attorney after her trial did not create a presumption of ineffectiveness of counsel at her trial. *S. v. Edwards*, 599.

Defendant was not denied the effective assistance of counsel because her attorney failed to file any pretrial motions or because her attorney improperly interrupted the prosecutor during cross-examination of an alibi witness. *Ibid.*

CONSTITUTIONAL LAW — Continued

§ 52. Speedy Trial; Requirement that Delay be Negligent or Willful

Defendant was not denied his Sixth Amendment right to a speedy trial where his retrial was 134 days after an initial mistrial. *S. v. Clark,* 277.

§ 65. Right of Confrontation Generally

The denial of defendant's motion to compel the State to locate a confidential informant was proper where the officer in charge of the undercover operation testified that he had attempted to locate the informant for two months without success. *S. v. Newkirk,* 83.

§ 74. Self-Incrimination Generally

There was no reasonable possibility that evidence as to defendant's post-arrest silence might have contributed to his conviction and the trial court's error in admitting such evidence therefore was not prejudicial. *S. v. Shown,* 150.

§ 76. Nontestimonial Disclosures by Defendant

The admission of testimony of defendant's post-arrest silence for impeachment purposes did not constitute plain error. *S. v. Abbitt,* 679.

CONTEMPT OF COURT

§ 5.1. Sufficiency of Notice and Show Cause Order

In a child visitation action in which plaintiff was held in contempt for failure to obey a prior court order, plaintiff waived her objection to the lack of a show cause order or notice by appearing at the hearing, presenting substantial evidence, and stipulating to jurisdiction on appeal. *Glesner v. Dembrosky,* 594.

§ 6.2. Hearings on Orders to Show Cause; Sufficiency of Evidence

The evidence supported the court's findings in a child visitation dispute in which plaintiff was found in contempt for not obeying a prior court order. *Glesner v. Dembrosky,* 594.

§ 6.3. Hearings on Orders to Show Cause; Findings and Judgment

The court did not have the authority to direct plaintiff to pay the out of state defendants' travel costs in an order holding plaintiff in contempt for not obeying a prior child visitation order. *Glesner v. Dembrosky,* 594.

CONTRACTS

§ 4.2. Circumstances Where There Was No Consideration

The trial court erred in granting summary judgment for plaintiff in an action to recover commissions under an alleged contract where there was no valid enforceable contract due to a lack of legally sufficient consideration. *Penn Compression Moulding, Inc. v. Mar-Bal, Inc.,* 291.

§ 20.2. Excuse for Nonperformance; Conduct by Adverse Party Preventing Performance

In an action in which plaintiff was suing to collect the amount owed for installing vinyl flooring and defendant denied performance, the court's finding that defendant prevented plaintiff from fully performing the contract was supported by the evidence. *Raleigh Paint & Wallpaper Co. v. James T. Rogers Builders, Inc.,* 648.

CONTRACTS — Continued

§ 21. Sufficiency of Performance

Directed verdict was properly entered for plaintiff in an action on a worthless check received in payment for babysitting where defendant alleged breach of the babysitting agreement. *Snider v. Hopkins,* 326.

§ 25.1. Pleadings in Actions on Contracts; Sufficiency of Particular Allegations

Plaintiff's claim against one defendant to recover for the cost of tires sold to another defendant was not barred by the statute of frauds, since a promise, as in this case, to the debtor to pay the debtor's debts, in contrast to a promise to the creditor to pay debts owed by another, is not contemplated by the statute of frauds. *Brad Ragan, Inc. v. Callicutt Enterprises, Inc.,* 134.

Plaintiff's complaint adequately stated a claim based on third-party beneficiary contract doctrine where it alleged that one defendant promised a second defendant that he would make payments to plaintiff for tires sold by plaintiff to the second defendant. *Ibid.*

§ 26.2. Actions on Contracts; Competency and Relevancy of Evidence of Other Contracts or Dealings

Evidence of the circumstances surrounding plaintiff's possession and use of a 1978 Cadillac leased by defendant was relevant to plaintiff's claim that title to a leased 1980 Cadillac was to be given to plaintiff under the terms of a severance pay agreement. *Nassif v. Southern Wholesale,* 608.

COURTS

§ 1. Nature and Function of Courts in General

G.S. 122-24, which grants personal immunity to staff members at State hospitals, does not leave the injured plaintiff without a remedy in violation of the open courts provision of Art. I, § 18 of the North Carolina Constitution. *Pangburn v. Saad,* 336.

§ 9.4. Jurisdiction to Review Rulings of another Superior Court Judge; Motions for Dismissal

Defendant was precluded from raising laches where another superior court judge had previously ruled on defendant's motion to dismiss and had made a specific finding that plaintiff had not been guilty of laches. *Pittman v. Pittman,* 584.

CRIMINAL LAW

§ 15.1. Pretrial Publicity as Ground for Change of Venue

There was no abuse of discretion in the denial of defendant's motion for a change of venue based on pretrial publicity. *S. v. Myers,* 650.

§ 16.1. Concurrent and Exclusive Jurisdiction; Superior Courts and District Courts

The felony of larceny of a motor vehicle and the misdemeanor of unauthorized use of a motor vehicle were properly joined and the superior court had jurisdiction over the misdemeanor after the felony was dismissed. *S. v. Pergerson,* 286.

§ 23.3. Requirement that Guilty Plea Be Voluntary and Made with Understanding

The trial court properly found that defendant entered a guilty plea freely, understandingly and voluntarily despite defendant's evidence that his plea was

CRIMINAL LAW — Continued

based on erroneous information from his attorney that he would receive only a 7-year sentence. *S. v. Crain,* 269.

§ 26.4. Former Jeopardy; Same Offense; Different Acts Violating Same Statute

Judgment was properly entered on two convictions for possession of the same controlled substance where the evidence clearly established that a different tablet of the same substance was obtained from defendant on two separate days. *S. v. Newkirk,* 83.

§ 29. Mental Capacity to Stand Trial

The trial court did not err in finding that defendant was competent to proceed to trial. *S. v. Barranco,* 502.

§ 33.3. Evidence as to Collateral Matters

There was no prejudicial error in the admission of irrelevant testimony which contradicted defendant's statement of his whereabouts on the morning of a murder which occurred in the afternoon. *S. v. Myers,* 650.

§ 34.8. Admissibility of Defendant's Guilt of Other Offenses to Show Common Plan or Scheme

In a prosecution for breaking or entering and larceny the trial court did not err in allowing into evidence testimony of a State's witness that he and defendant committed at least five other similar break-ins in the county and surrounding area. *S. v. Cameron,* 89.

In a prosecution for misdemeanor false imprisonment, indecent exposure, and assault on a female, the court did not err by admitting testimony of a service station attendant relating to a similar incident where the testimony was relevant to show defendant's general criminal plan. *S. v. Streath,* 546.

§ 40.2. Defendant's Motion for Transcript of Former Trial

The trial court erred by denying defendant's motion for a continuance so that he could obtain a transcript of his first trial, which ended with a deadlocked jury. *S. v. Wells,* 329.

§ 48. Silence of Defendant as Implied Admission

The admission of testimony of defendant's post-arrest silence for impeachment purposes did not constitute plain error. *S. v. Abbitt,* 679.

§ 50.1. Admissibility of Expert Opinion Testimony

A pediatrician was properly permitted to state his opinion that children don't fantasize to the extent of lying about sexual abuse. *S. v. Raye,* 273.

§ 58. Evidence in Regard to Handwriting

In a prosecution of defendant for obtaining property by false pretenses the trial court did not err in asking defendant's handwriting expert whether two checks allegedly written by defendant were written by the same person. *S. v. Horton,* 107.

§ 63.1. Nature and Competency of Evidence as to Sanity of Defendant

A psychiatrist was properly permitted to state his opinions that defendant could distinguish between right and wrong at the time of the crimes, that his intoxication did not negate his ability to form a specific intent, that defendant's suicide gestures were not a serious suicide attempt, and that defendant presented himself as being mentally ill in order to avoid prosecution. *S. v. Barranco,* 502.

CRIMINAL LAW — Continued

§ 73.1. Admission of Hearsay Statement as Harmless Error

In a prosecution for second-degree rape, the failure of defense counsel to object to hearsay testimony was not prejudicial or ineffective assistance of counsel. *S. v. Aiken,* 487.

§ 73.2. Statements not within Hearsay Rule

The trial court did not err by refusing to strike the testimony of an officer that he had information that the suspect would run. *S. v. Singletary,* 612.

§ 76.8. Confession; Voir Dire; Evidence Sufficient to Support Findings with Respect to Warning as to and Waiver of Constitutional Rights

The trial court properly denied defendant's motion to suppress his inculpatory statement. *S. v. Parrish,* 662.

§ 83.1. Actions in which Wife May Testify against Husband

Defendant's wife was competent to testify in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and first-degree burglary. *S. v. Cox,* 432.

§ 85. Character Evidence Relating to Defendant

The trial court erred in reading to the jury the text of plea agreements between the State and two witnesses for the State where the agreements mentioned other charges pending against defendant in addition to the charges for which he was being tried, but such evidence was not prejudicial to defendant. *S. v. Castleberry,* 420.

§ 87.1. Leading Questions

There was no error in allowing the State to ask two of its witnesses leading questions where the questions were in response to the witness's answer that he had stated all he remembered. *S. v. Aiken,* 487.

§ 88.1. Conduct and Scope of Cross-Examination

The trial court did not abuse its discretion by not allowing defendant to ask an accomplice who testified for the State why he signed an affidavit of indigency. *S. v. Tate,* 573.

§ 89.4. Corroboration of Witnesses; Prior Inconsistent Statements

The trial court properly instructed the jury that prior inconsistent statements by police officers could be considered as bearing on the officers' credibility, but not as substantive evidence. *S. v. Grady,* 452.

§ 91. Speedy Trial

Though defendant was not tried within the 120-day time period of the Speedy Trial Act, he was nevertheless brought to trial within apt time where the trial court properly excluded the period of delay resulting from defendant's request for discovery and the State's efforts to comply. *S. v. Thompson,* 60.

There was no violation of the Speedy Trial Act where defendant's first trial resulted in a mistrial on 26 July 1983, his case was scheduled for retrial on 31 August 1983, a personal tragedy involving the judge resulted in cancelling that term, and defendant's case was not reached until 7 December 1983. *S. v. Clark,* 277.

§ 91.14. Continuance to Obtain New Counsel

The trial court did not err in denying defendant's motion for a continuance to retain private counsel as a substitute for his court-appointed public defender. *S. v. Jones,* 578.

CRIMINAL LAW – Continued

§ 92.2. Consolidation Held Proper; Related Offenses

There was no error in the joinder for trial of felonious escape and felonious larceny charges. *S. v. Parrish,* 662.

§ 93. Order of Proof

The trial court did not err in allowing a detective to testify prior to a witness whose testimony the detective was supposed to corroborate. *S. v. Thompson,* 60.

§ 99.4. Expression of Opinion by Court; Remarks in Connection with Objections and Rulings Thereon

The trial court did not express an opinion to the jury on the credibility of defendant's testimony when the court stated to defendant, "Son, I want you to be able to tell your story, but don't go into anything she may have told you at this time." *S. v. Shown,* 150.

§ 99.5. Expression of Opinion by Court; Remarks in Connection with Colloquies with Counsel

The trial court's comments to defense counsel during a bench conference that the court did not know "what the hell defense counsel was doing" or "what the hell was going on with this case" were inherently prejudicial and the resulting taint was not dissipated by curative instructions. *S. v. Majors,* 26.

§ 99.6. Expression of Opinion by Court; Questions in Connection with Examination of Witnesses

In a prosecution of defendant for obtaining property by false pretenses the trial court did not err in asking defendant's handwriting expert whether two checks allegedly written by defendant were written by the same person. *S. v. Horton,* 107.

§ 102.5. Conduct of Counsel in Examining Defendant and Other Witnesses

There was no error in not granting defendant's motion to strike and for a mistrial after the State asked the victim to point out the person who shot her twice in the back ". . . and did this awful thing to you." *S. v. Wilson,* 398.

There was no prejudice in a comment by the prosecutor during defendant's testimony where defendant's objection was sustained and the jury was instructed to disregard the comment. *Ibid.*

§ 102.6. Particular Comments in Jury Argument

There was no abuse of discretion in the denial of defendant's objection to the portion of the prosecutor's argument in which he contended that there was no evidence that someone else committed the crime. *S. v. Myers,* 650.

§ 102.8. Counsel's Comment on Failure to Testify

The trial court did not err by refusing to permit defendant's attorney to argue to the jury concerning defendant's failure to testify. *S. v. Parrish,* 662.

§ 112. Instructions on Burden of Proof and Presumptions

There was no prejudicial error in the court's pretrial charge to the jury. *S. v. Parrish,* 662.

§ 112.4. Charge on Degree of Proof Required of Circumstantial Evidence

The trial court did not err in refusing to give defendant's requested instructions on circumstantial evidence where the State offered eyewitness testimony that defendant was in actual possession of a bottle resembling one containing heroin found in an alleyway. *S. v. Hall,* 101.

CRIMINAL LAW — Continued

§ 112.6. Charge on Insanity

Defendant's evidence of prior mental hospitalization, his suicide attempts while in jail awaiting trial, and the improvement of his mental condition when prescribed anti-psychotic medication was insufficient to require the trial court to instruct on the defense of insanity. *S. v. Barranco*, 502.

§ 113.9. Error in Charge; Objection to Misstatement

Defendant could not raise on appeal the issue of the court's instruction on irrelevant evidence contradicting his statement of his whereabouts because he did not object to the instruction at the instruction conference or after it was given. *S. v. Myers*, 650.

§ 115.1. Instructions on Lesser Degrees of Crime; Particular Cases

In a prosecution for felonious escape and felonious larceny of an automobile, there was no error in the denial of an instruction on the lesser-included offense of unauthorized use of a motor vehicle. *S. v. Parrish*, 662.

§ 122.1. Jury's Request for Additional Instructions

There was no abuse of discretion in the trial court's refusal of the jury's request for clarification of the victim's testimony. *S. v. Wilson*, 398.

§ 122.2. Additional Instructions upon Failure to Reach Verdict

Where the jury announced its inability to reach a verdict after considering the case for less than an hour, the trial court did not err in giving additional clarifying instructions on the role of the jury, sending the jury back to deliberate further, and denying defendant's motion to declare a mistrial. *S. v. Hall*, 101.

§ 124.1. Sufficiency of Verdict; Clerical Errors

Defendant was not prejudiced where the court resubmitted the verdict sheet with additional instructions. *S. v. Clark*, 277.

§ 138. Severity of Sentence

When sentencing a defendant for felonious escape, the trial court improperly used as an aggravating factor the conviction for which defendant was in custody when he escaped. *S. v. Malone*, 323.

The trial court improperly found as an aggravating factor that defendant's offense involved damage causing great monetary loss based on a collision between two vehicles that were both chasing defendant. *Ibid.*

The trial court improperly used the same evidence to support two aggravating factors when it found that the victim was old and blind and also found that defendant inflicted injury upon his blind victim who was defenseless in excess of the amount necessary to prove the offenses. *S. v. Isom*, 306.

The trial court erred in finding the "course of conduct" aggravating factor in sentencing defendant for felonious attempt to burn a dwelling and felonious burning of personal property. *S. v. Robinson*, 238.

The trial court erred in failing to find as a mitigating factor that prior to arrest defendant voluntarily acknowledged wrongdoing to a law officer. *Ibid.*

The evidence did not require the trial court to find as a mitigating factor that defendant was suffering from a mental condition that significantly reduced his culpability for the offense. *Ibid.*

The trial court was required to find as a mitigating factor that defendant had no record of criminal convictions based upon a statement by the prosecutor. *Ibid.*

CRIMINAL LAW — Continued

The trial court erred in finding as an aggravating factor for second-degree murder that defendant did have time to deliberate and premeditate the killing. *S. v. Williams*, 282.

There was no error in the trial court's failure to consider mitigating factors where defendant did not object at the sentencing hearing, failed to tender any proposed findings to the trial judge, and received the presumptive term on each charge. *S. v. Wilson*, 398.

The trial court erred in finding as a factor in aggravation of two subornation of perjury offenses that the offenses were committed against a deputy clerk of court while engaged in the performance of her official duties. *S. v. Castleberry*, 420.

The trial court could properly find a prior conviction as an aggravating factor when the commission of that crime occurred after the commission of the crime for which defendant was being sentenced. *S. v. Stamps*, 473.

In a sentencing hearing in which the court found as a mitigating factor that defendant's intoxication was a mental condition that reduced his culpability for the crime, the trial court did not err in failing also to find as a mitigating factor that defendant's intoxication was a physical condition that significantly reduced his culpability for the crime. *S. v. Barranco*, 502.

Intoxication does not support a finding of the mitigating factor that defendant's limited mental capacity at the time of the offense significantly reduced his culpability for the offense. *Ibid.*

Defendant is entitled to a new sentencing hearing where the trial court found a mitigating factor but failed properly to weigh this mitigating factor against the sole aggravating factor which it found. *S. v. Jones*, 578.

Evidence did not have to be presented at a resentencing hearing to support the trial court's findings of certain aggravating factors where evidence at the original trial amply supported such findings. *S. v. Smith*, 637.

§ 143.7. Evidence of Violation of Probation Conditions; Willfulness and Lack of Lawful Excuse

If defendant fails to offer evidence of his inability to comply with probationary terms, evidence establishing his noncompliance is sufficient to justify a finding that the failure was willful and without lawful excuse. *S. v. Bryant*, 647.

§ 148.1. Judgments Appealable; Orders Before or During Trial

Defendant was entitled to pursue an appeal based on the denial of his motion to dismiss for double jeopardy even though it was interlocutory because it concerned a substantial right. *S. v. Montalbano*, 259.

§ 163. Necessity for Objection and Assignment of Error to Charge

Defendant was not prejudiced though the trial court erred in instructing the jury first to consider the offense of possession of more than one gram of cocaine and if it found defendant guilty of that offense, second, to consider the charge of possession with intent to manufacture, rather than in the reverse order. *S. v. Oliver*, 118.

Defendant's assignment of error to the court's instructions was properly before the appellate court where the trial court denied defendant's timely written request for instructions. *S. v. McGill*, 206.

CRIMINAL LAW — Continued

§ 181.3. Review of Judgment Entered at Post Conviction Hearing

The summary dismissal of defendant's motion for appropriate relief and the denial of his motion to vacate and reconsider was not reviewed on appeal because defendant was entitled to assert any errors during the appeal. *S. v. Aiken*, 487.

DAMAGES

§ 3.5. Loss of Earnings

The plaintiff in a medical malpractice case was not deprived of the right to recover damages for loss of future earning capacity simply because she was a housewife. *Nelson v. Patrick*, 1.

§ 17. Instructions Generally

The trial court did not err in failing to instruct the jury not to consider damages caused by a defendant against whom plaintiff took a voluntary dismissal. *Hanna v. Brady*, 521.

DESCENT AND DISTRIBUTION

§ 1.1. Operation and Effect of Intestate Succession Statute

The trial court erred by excluding two children from sharing in assets of an estate not devised by a will which lacked a residuary clause. *Ferguson v. Croom*, 316.

DIVORCE AND ALIMONY

§ 19.1. Jurisdiction to Modify Alimony Decree

The court did not err in denying defendant's motion to dismiss plaintiff's motion for increased alimony where defendant, a Texas resident, had previously signed a consent judgment and thus consented to North Carolina jurisdiction. *Hale v. Hale*, 639.

§ 19.5. Modification of Alimony Decree; Effect of Consent Decrees

An order for the payment of alimony entered by consent before 1 October 1967 was not subject to modification. *Ratton v. Ratton*, 642.

§ 21.9. Equitable Distribution of Marital Property

The parties' separation agreement entered into on 3 March 1981, before the Equitable Distribution Act was enacted, was not affected by its passage. *Case v. Case*, 76.

§ 24.5. Modification of Child Support Order; Changed Circumstances

The receipt of Aid to Families with Dependent Children was a sufficient change of circumstances to permit a modification of a consent judgment. *Cartrette v. Cartrette*, 169.

§ 30. Equitable Distribution of Marital Property Generally

The trial court in an equitable distribution action erred by submitting to the jury questions about marital property and equitable distribution that were not pure issues of fact. *Phillips v. Phillips*, 68.

The trial court in an equitable distribution action erred by admitting evidence of fault and making findings as to the relative fault of the parties. *Ibid.*

DIVORCE AND ALIMONY — Continued

In an action for equitable distribution where defendant owned 98% of a corporation prior to the marriage, assets acquired by loans from the corporation which were repaid in part by income earned during the marriage should not have been treated as immune from equitable distribution. *Ibid.*

In an action for equitable distribution the court did not err in permitting the C.P.A. who handled plaintiff's corporate accounting to testify concerning the source of funds used to purchase assets, did not err in making findings as to defendant's remarriage, employment, and where her child lived after the separation, and did not err in allowing defendant to testify that plaintiff gave her $9,000 to purchase a condominium after the parties separated. *Ibid.*

In an action for equitable distribution where the parties separated in 1975, property purchased with money earned or acquired after the separation date was not marital property. *Wilson v. Wilson,* 96.

In an action for divorce and equitable distribution in which plaintiff husband refused to cooperate in determining marital property and introduced no evidence, the court erred by finding that assets were marital property because they were acquired before the divorce. *Ibid.*

Findings in an equitable distribution action regarding an adulterous affair by the wife were irrelevant and inappropriate to the award of marital property. *Dusenberry v. Dusenberry,* 177.

EMINENT DOMAIN

§ 7. Statutory Authority to Institute Condemnation Proceedings

Parties to a non-adversarial condemnation proceeding cannot consent to settle incidental questions of title to land. *VEPCO v. Tillett,* 512.

ESCAPE

§ 6. Evidence

In a prosecution for felonious escape and larceny, there was no error in admitting a prison guard's testimony even though some of his testimony was not responsive. *S. v. Parrish,* 662.

In a prosecution for felonious escape, there was no prejudice from the State reading to the jury a judgment and commitment that was not properly introduced because defendant confessed that he was serving a ten-year sentence when he escaped. *Ibid.*

EVIDENCE

§ 29.2. Business Records

The trial court properly denied the jury's request to use a medical pamphlet which plaintiff had employed in her examination of expert witnesses. *Morrison v. Stallworth,* 196.

The plaintiff in a medical malpractice case failed to meet her burden of justifying admission of a film on the early detection of cancer as a "reliable and authoritative text" under G.S. 8-40.1. *Ibid.*

§ 48. Competency and Qualification of Expert

The trial court did not abuse its discretion in a processioning action by allowing expert testimony from a licensed surveyor who had been an unlicensed apprentice at the time he made the surveys. *Metcalf v. McGuinn,* 604.

EVIDENCE — Continued

§ 48.2. Qualification of Expert; Discretion of Trial Court

In an action arising from defendant insurer's refusal to pay damages resulting from a deliberately set fire on plaintiff's business premises, the court did not err by allowing a fire chief and an S.B.I. agent to testify that plaintiff's building was not forcibly entered. *Yassoo Enterprises, Inc. v. N. C. Joint Underwriting Assoc.*, 52.

FALSE IMPRISONMENT

§ 2.1. Sufficiency of Evidence

The evidence was sufficient to take the charges of false imprisonment and indecent exposure to the jury. *S. v. Streath*, 546.

FALSE PRETENSE

§ 3. Evidence

In a prosecution of defendant for obtaining property by false pretenses, the trial court did not err in ordering defendant's attorney to give defendant's driver's license to the prosecutor who then gave it to the State's witness, a sales clerk, who identified the license as the one presented to her by defendant at the time of the alleged offense. *S. v. Horton*, 107.

In a prosecution of defendant for obtaining property by false pretenses the trial court did not err in asking defendant's handwriting expert whether two checks allegedly written by defendant were written by the same person. *Ibid.*

§ 3.1. Sufficiency of Evidence

Evidence was sufficient for the jury in a prosecution for obtaining property by false pretenses where it tended to show that defendant presented two checks to merchants in exchange for merchandise, and she subsequently falsely reported the checks as having been stolen so that the checks were dishonored and the merchants received no money. *S. v. Horton*, 107.

FRAUD

§ 4. Knowledge and Intent to Deceive

Summary judgment was properly entered on a claim for negligence and fraud arising from a marriage by a Universal Life Church minister where plaintiff produced no evidence that either defendant knew of the falsity of any representations that were made or made them in either a negligent or culpably ignorant fashion. *Fulton v. Vickery*, 382.

§ 5.1. Reliance on Misrepresentation and Deception; Inspection

Plaintiffs' evidence was sufficient for the jury in an action against defendant real estate agents for fraud in the sale of a house by falsely representing that the house had a sprinkler system in every room. *Harbach v. Lain and Keonig*, 374.

HOMICIDE

§ 19.1. Evidence Competent on Question of Self-Defense; Evidence of Character or Reputation

The trial court properly excluded evidence of specific acts of violence committed by the victim where defendant introduced no evidence of self-defense. *S. v. Stone*, 691.

HOMICIDE — Continued

§ 21.7. Sufficiency of Evidence of Second Degree Murder

The State's evidence was sufficient for the jury in a prosecution for second-degree murder of his sister's boyfriend. *S. v. Stone,* 691.

§ 28.5. Instructions on Defense of Others

Defendant was not prejudiced by the trial court's use of the term "self-defense" at different times in its instructions on defense of others. *S. v. Stone,* 691.

§ 30.3. Submission of Guilt of Involuntary Manslaughter

The trial court in a second-degree murder case committed prejudicial error in submitting involuntary manslaughter as a possible verdict. *S. v. Fournier,* 465.

HUSBAND AND WIFE

§ 11. Binding and Conclusive Effect of Separation Agreement

The parties' separation agreement entered into on 3 March 1981, before the Equitable Distribution Act was enacted, was not affected by its passage. *Case v. Case,* 76.

§ 11.2. Construction of Separation Agreement

The parties' separation agreement provided for a division of their personal property, and such provision was free from ambiguity and clear enough for the trial court to render judgment as a matter of law. *Case v. Case,* 76.

§ 12. Separation Agreement; Resumption of Marital Relationship

The parties' reconciliation and resumption of marital relations did not void their separation agreement. *Case v. Case,* 76.

INCEST

§ 1. Generally

Testimony by the sister of the prosecutrix concerning defendant's sexual advances to her was competent in an incest case. *S. v. Raye,* 273.

INDICTMENT AND WARRANT

§ 11.1. Identification of Victim; Corporations and other Entities

In a prosecution for felonious breaking or entering and felonious larceny, there was no fatal variance between the bill of indictment and the evidence as to ownership of the building and personal property. *S. v. Grady,* 452.

§ 17.1. Variance; Charging Same Offense

There was no fatal variance between the warrants and the evidence where the allegations in the warrants did not differ from the proof so significantly that defendants would be taken by surprise as to what statute they were charged with violating. *S. v. Singletary,* 612.

§ 17.4. Variance as to Ownership

There was no fatal variance between the indictment, which alleged that the house of "Mrs. Narest Phillips" was broken into and items of property were stolen, and the proof, which showed that the victim of the crimes in question was "Mrs. Ernest Phillips." *S. v. Cameron,* 89.

INFANTS

§ 18. Delinquency Hearing; Sufficiency of Evidence

The evidence was inadequate to withstand respondent's motion to dismiss a juvenile delinquency proceeding based upon misdemeanor larceny. *In re Glenn*, 302.

INSANE PERSONS

§ 11. Restoration of Sanity and Discharge

Plaintiff's complaint for wrongful discharge of a mental patient stated a claim upon which relief could be granted and should not have been dismissed. *Pangburn v. Saad*, 336.

INSURANCE

§ 87.3. Automobile Liability Insurance; Omnibus Clause; Authority of Permittee to Delegate Permission

Summary judgment should not have been entered for defendant under an omnibus clause where the insured loaned a vehicle to his daughter with instructions not to let anyone else drive it, and the daughter loaned the vehicle to a man who became involved in an accident with plaintiff. *Belasco v. Nationwide Mutual Ins. Co.*, 413.

§ 136. Actions on Fire Policies

In an action arising from defendant insurer's refusal to pay damages from a deliberately set fire in plaintiff's business premises, the court erred by admitting testimony that plaintiff's burglar alarm system had a "bad control" and that a service call was refused. *Yassoo Enterprises, Inc. v. N. C. Joint Underwriting Assoc.*, 52.

In an action against an insurer for failing to pay damages resulting from a deliberately set fire, the court did not err by refusing to instruct the jury that evidence of motive has no probative value unless there is other evidence directly linking plaintiff or an agent of plaintiff to the fire. *Ibid.*

JUDGES

§ 1.2. Jurisdiction within District of Judge's Residence

A resident superior court judge had the authority to hear plaintiff's motion for summary judgment on Saturday, out of session, and over defendant's written objection. *E-B Grain Co. v. Denton*, 14.

KIDNAPPING

§ 1.2. Sufficiency of Evidence

There was no error in denying defendant's motion to dismiss the charge of kidnapping. *S. v. Wilson*, 398.

§ 1.3. Instructions

There was no error where the court did not instruct the jury as to intoxication by drugs or specific intent as an element of kidnapping. *S. v. Wilson*, 398.

LANDLORD AND TENANT

§ 8.3. Liability of Landlord for Injuries to Persons on Premises; Sufficiency of Evidence of Negligence of Landlord

The court erred by directing a verdict against defendant on plaintiff's ordinary negligence claim arising from the death of a tenant in one of defendant's apartments where the evidence viewed favorably for plaintiff was sufficient to support an inference that decedent's death proximately resulted from defendant's failure to exercise due care in preventing a heating flue from becoming clogged by dead birds and other debris. *Jackson v. Housing Authority of High Point*, 363.

LARCENY

§ 1. Definition

Breaking or entering is not a lesser included offense of felonious larceny. *S. v. Cameron*, 89.

§ 9. Verdict

The trial court did not err in entering a judgment for felonious larceny rather than misdemeanor larceny when defendant was acquitted of felonious breaking or entering and the court gave no instructions on fixing the value of the property stolen where a second person was involved in the crimes and the court instructed on acting in concert. *S. v. Marlowe*, 443.

LIBEL AND SLANDER

§ 5.4. Particular Statements as Actionable Per Se or Per Quod; Statements Imputing Crime

Defendant's motion for a directed verdict in an action for slander was properly denied. *Gibby v. Murphy*, 128.

§ 6. Publication

The trial court erred by directing verdict for Orkin in an action for libel where Orkin did not have a qualified privilege to publish a letter to persons who were not proper parties. *Gibby v. Murphy*, 128.

§ 14. Pleadings Generally

The trial court erred in dismissing a former policeman's complaint for failure to state a claim for relief in a libel action against a city manager based on statements in a press release that plaintiff was not able to disprove accusations that he had been seen taking a bribe and that his polygraph test revealed deception. *Boston v. Webb*, 457.

§ 14.3. Privilege

A city manager had at most a qualified privilege in making statements in a news release about a former city policeman. *Boston v. Webb*, 457.

§ 18. Verdict

The court did not err by directing a verdict against plaintiff on his claims for punitive damages in a defamation action where there was no evidence from which the jury might have concluded that statements were made with actual malice. *Gibby v. Murphy*, 128.

LIMITATION OF ACTIONS

§ 4.2. Accrual of Negligence Actions

Plaintiff's claim for negligence arising from a marriage performed by a Universal Life Church minister accrued at the time of the wedding and was barred by the statute of limitations. *Fulton v. Vickery*, 382.

§ 8.2. Fraud as Exception to Operation of Limitation Laws; Sufficiency of Notice of Facts Constituting Alleged Fraud

Plaintiff's claim for fraud arising from a marriage performed by a Universal Life Church minister accrued at the time of the wedding and was barred by the three-year statute of limitations. *Fulton v. Vickery*, 382.

MARRIAGE

§ 2. Creation and Validity of Marriage

In an action arising from a marriage performed by a minister of the Universal Life Church, Inc., plaintiff's contention that the validating statute was inapplicable by its reference to the Universal Life Church rather than the Universal Life Church, Inc. was without merit. *Fulton v. Vickery*, 382.

Plaintiff did not have a cause of action for negligence, misrepresentation or fraud in that her marriage ceremony was performed by a Universal Life Church minister because G.S. 51-1.1 validated the marriage. *Ibid.*

§ 4. Consequences of Marriage Being Void or Voidable

In an action to determine the sole heir of a man who had married both plaintiff and defendant, the trial court's finding that he was the sole owner of personal property amounting to $15,432.55 and the award of that amount to plaintiff as the first wife minus a down payment made by defendant was supported by ample and competent evidence. *Mayo v. Mayo*, 406.

§ 6. Presumptions Applicable to Multiple Marriages

When two marriages to the same person are shown, the second marriage is presumed to be valid and the burden of proof is on the party asserting its illegality. *Mayo v. Mayo*, 406.

MASTER AND SERVANT

§ 55.1. Workers' Compensation; What Constitutes Accident

Evidence was sufficient to support the Industrial Commission's conclusion that a back injury sustained by plaintiff was not the result of an accident arising out of and in the scope of his employment. *Phillips v. The Boling Co.*, 139.

§ 55.3. Workers' Compensation; Particular Injuries as Constituting Accident

The evidence supported the Industrial Commission's finding that plaintiff had sustained an injury to his foot by accident arising out of his employment. *Hill v. Bio-Gro Systems*, 112.

The Full Commission properly concluded that plaintiff was injured by accident where the findings were that plaintiff injured his back while filling in for an absent employee whose job involved heavy lifting not required by plaintiff's regular job. *Gaddy v. Cranston Print Works Co.*, 313.

§ 68. Occupational Diseases

The Industrial Commission correctly found that plaintiff's disability was caused by his exposure to cotton dust and that his exposure significantly contributed to or

MASTER AND SERVANT — Continued

was a causal factor in his chronic obstructive lung disease. *Gibson v. Little Cotton Mfg. Co.*, 143.

§ 69.1. Workers' Compensation; Meaning of Disability

The Industrial Commission erred by merely finding that plaintiff has an overall impairment of a certain percentage without ascertaining the percentage of plaintiff's inability to work caused by his occupational disease. *Gibson v. Little Cotton Mfg. Co.*, 143.

There was competent evidence to support the Industrial Commission's findings that plaintiff had reached maximum improvement on 19 November 1981 and that his condition on 28 January 1981 had only temporarily improved. *Carpenter v. Industrial Piping Co.*, 309.

§ 79.1. Workers' Compensation; Persons Entitled to Payment Generally; Dependents

The Industrial Commission's award of death benefits to stepchildren under the Workers' Compensation Act was affirmed. *Winstead v. Derreberry*, 35.

§ 90. Workers' Compensation; Notice to Employer of Accident

There was ample evidence to support the Industrial Commission's findings that defendant had actual knowledge of plaintiff's injury within a week and was not prejudiced by a lack of formal written notice. *Hill v. Bio-Gro Systems*, 112.

§ 108. Right to Unemployment Compensation Generally

The Employment Security Commission's conclusion that claimant left work voluntarily without good cause attributable to her employer was unsupported by the findings, and the cause is remanded for findings as to whether claimant had received medical advice that her high blood pressure was aggravated by conditions on her job and that she should change her job. *Hoke v. Brinlaw Mfg. Co.*, 553.

A pro se claimant should not be disqualified from receiving unemployment benefits because she failed to produce evidence of facts that case law from other states says she must establish when the appeals referee never asked her the relevant questions. *Ibid.*

§ 108.1. Right to Unemployment Compensation; Effect of Misconduct

Evidence was sufficient to support a decision by the Employment Security Commission that plaintiff was disqualified for unemployment compensation because she was discharged for misconduct connected with her work. *Forbis v. Wesleyan Nursing Home*, 166.

§ 114. Occupational Health and Safety Act in General

The Occupational Health and Safety Review Board's decision that defendant violated construction safety standards by not requiring safety-toe shoes was supported by substantial evidence that a reasonably prudent employer would have recognized that carrying heavy objects above unprotected feet was hazardous to employees. *Daniel Construction Co. v. Brooks*, 426.

MECHANICS' LIENS

§ 2. Priorities and Enforcement

The evidence was sufficient for the jury on the issue of "actual damages" suffered by plaintiff as a result of defendant's failure to conduct a sale of plaintiff's automobile for storage costs in substantial compliance with G.S. 44A-4(e). *Drummond v. Cordell*, 438.

MORTGAGES AND DEEDS OF TRUST

§ 32.1. Restriction of Deficiency Judgments Respecting Purchase-Money Mortgages

G.S. 45-21.36 did not apply to plaintiff's deficiency action on a second mortgage where plaintiff had purchased defendant's house for less than the appraised value at a foreclosure sale held by the first mortgagee. *Northwestern Bank v. Weston,* 162.

MUNICIPAL CORPORATIONS

§ 2. Territorial Extent and Annexation

G.S. 160A-56, which exempts certain counties from Part 3 of Chapter 160A, does not violate the equal protection clause of Section 19, Art. I of the North Carolina Constitution. *Knight v. City of Wilmington,* 254.

§ 2.3. Annexation; Compliance with Other Statutory Requirements

In an action challenging an annexation, petitioners failed to show noncompliance with the statute requiring the use of natural topographic features wherever practical in setting boundaries. *Knight v. City of Wilmington,* 254.

§ 2.6. Extension of Utilities to Annexed Territory

In an action challenging an annexation ordinance, the City was not required to extend services in the annexed area as a condition precedent to annexation. *Knight v. City of Wilmington,* 254.

§ 9. Rights, Powers and Duties of Employees

Defendant's chief building inspector had no authority to have plaintiffs' dwelling demolished until the 60-day repair period allowed by the inspector had elapsed. *Wiggins v. City of Monroe,* 44.

§ 10. Civil Liability of Municipal Officers and Agents

In ordering the repair or demolition of plaintiffs' dwelling, defendant city's building inspector was a public official performing governmental duties involving the exercise of judgment and discretion, but plaintiffs' affidavits tended to show that the inspector's behavior was corrupt or malicious or that he acted outside of and beyond the scope of his duties, and the inspector therefore was not immune from liability. *Wiggins v. City of Monroe,* 44.

§ 12.3. Waiver of Governmental Immunity

Defendant city waived its immunity from liability for torts of its officers committed while they were performing a governmental function by the purchase of a comprehensive general liability insurance policy which provided coverage for an "occurrence" which resulted in "bodily injury or property damage neither expected nor intended from the standpoint of the insured." *Wiggins v. City of Monroe,* 44.

§ 25. Attack on Assessments

There is no right to a trial de novo or a jury trial in an appeal to superior court from a city council's assessment for street improvements. *In re Assessment of Dunn,* 243.

§ 30.3. Validity of Zoning Ordinances Generally

Neither the trial court's findings nor the record as a whole supported the conclusion that petitioner is violating the zoning ordinance of the City of Rocky Mount by permitting her son and his family to occupy a small dwelling house behind her dwelling house. *Farr v. Board of Adjustment,* 228.

MUNICIPAL CORPORATIONS — Continued

§ 30.15. Zoning Ordinances; Nonconforming Uses Generally

A landowner who constructed a grain storage facility valued at $400,000 on his property in good faith reliance upon a zoning ordinance amendment which was subsequently invalidated by the Court of Appeals acquired a vested right to continue using the facility as a nonconforming use. *Godfrey v. Zoning Bd. of Adjustment,* 299.

NARCOTICS

§ 1.3. Elements and Essentials of Statutory Offenses

There is no misdemeanor offense under G.S. 90-108(a)(10), which prohibits the acquisition of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge. *S. v. Church,* 645.

§ 4.1. Cases where Evidence Was Insufficient

Defendants' motions to dismiss charges of manufacturing marijuana should have been granted. *S. v. Payne,* 154.

§ 4.3. Sufficiency of Evidence of Constructive Possession

Evidence was sufficient for the jury in a prosecution for possession of heroin where it was ample to raise the inference that defendant possessed a bottle containing heroin which he threw into an alleyway when he observed the presence of police officers. *S. v. Hall,* 101.

§ 4.5. Instructions Generally

The trial court did not err in refusing to give defendant's requested instructions on circumstantial evidence where the State offered eyewitness testimony that defendant was in actual possession of a bottle resembling one containing heroin found in an alleyway. *S. v. Hall,* 101.

A trial court's instruction on sale and delivery of a controlled substance was correct. *S. v. Newkirk,* 83.

Defendant was not prejudiced though the trial court erred in instructing the jury first to consider the offense of possession of more than one gram of cocaine and if it found defendant guilty of that offense, second, to consider the charge of possession with intent to manufacture, rather than in the reverse order. *S. v. Oliver,* 118.

§ 5. Verdict and Punishment

Defendant could not be sentenced both for possession of cocaine and for possession with intent to manufacture, sell, and deliver the same cocaine. *S. v. Oliver,* 118.

NEGLIGENCE

§ 2. Negligence Arising from the Performance of a Contract

A tenant in a building could maintain an action against defendant for its negligent performance of a subcontract to replace the building roof, and genuine issues of material fact were presented as to negligence and contributory negligence. *Abner Corp. v. City Roofing & Sheetmetal Co.,* 470.

§ 50.1. Negligence in Condition of Buildings; Other Conditions

The trial court erred by dismissing plaintiff's claim for punitive damages on the pleadings and directing a verdict against plaintiff on the claim of "malicious,

NEGLIGENCE — Continued

wilful, or wanton injury, or gross negligence" arising from the death of a tenant in one of defendant's apartments. *Jackson v. Housing Authority of High Point,* 363.

In an action arising from the death of a tenant in one of defendant's apartments, the trial court erred by directing a verdict for defendant on plaintiff's claim for breach of the implied warranty of habitability. *Ibid.*

In an action arising from the death of a tenant in one of defendant's apartments, possibly caused by a blocked heater flue, directed verdict for defendant was proper on plaintiff's strict liability claim. *Ibid.*

NUISANCE

§ 2. Noise and Disturbance

The trial court did not err in refusing to order a new trial of an action to recover damages caused by blasting and nuisance in the operation of a quarry on the ground that testimony was admitted as to damages occurring more than three years prior to the filing of the complaint. *Hanna v. Brady,* 521.

§ 7. Damages

The trial court did not err in refusing to grant a new trial on the ground that the remitted award of $35,000 for nuisance in the operation of a quarry was excessive. *Hanna v. Brady,* 521.

OBSCENITY

§ 5. Indecent Exposure

The evidence was sufficient to take the charges of indecent exposure and false imprisonment to the jury. *S. v. Streath,* 546.

OBSTRUCTING JUSTICE

§ 1. Generally

An indictment against defendant failed to charge the essential elements of deceit and intent to defraud which were necessary to elevate the misdemeanor offense of obstruction of justice to a felony. *S. v. Preston,* 174.

G.S. 14-223 is not unconstitutionally vague and does not chill communications between individuals and police officers. *S. v. Singletary,* 612.

In a prosecution for obstructing an officer while attempting to arrest a suspect, the trial court did not err by refusing to strike the testimony of an officer that he had information that the suspect would run. *Ibid.*

The trial court did not commit prejudicial error in refusing to strike testimony that the defendants hindered officers when they caused the prisoner to get away and that defendants and everyone else in the crowd heard a comment to stop. *Ibid.*

§ 2. Sufficiency of Warrant

There was sufficient evidence to go to the jury where the evidence reflected a willful obstruction of the officers in discharging their duty. *S. v. Singletary,* 612.

PARENT AND CHILD

§ 1.6. Termination of Parental Rights; Competency and Sufficiency of Evidence

The trial court could properly consider a prior adjudication of neglect in ruling on a later petition to terminate parental rights even though the prior adjudication

PARENT AND CHILD — Continued

of neglect had been followed by an order adjudging the child to be no longer neglected. *In re Castillo*, 539.

The evidence supported the trial court's order terminating respondent's parental rights for neglect of her child. *Ibid.*

PARTNERSHIP

§ 5. Liabilities of Partners for Torts Committed by One Partner

A partner in a professional medical corporation could be held jointly and severally liable for any negligence of another partner which occurred during the course of the corporation's business. *Nelson v. Patrick*, 1.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 11. Malpractice Generally; Duty and Liability of Physician

An action for injuries suffered by a third party resulting from the wrongful release of a mental patient is not a medical malpractice case, and physician-patient privity is not required. *Pangburn v. Saad*, 336.

§ 11.1. Malpractice; Standards as Determined by Locality of Practice

In a medical malpractice action against radiologists who practiced in Kinston, the trial court did not err in allowing plaintiff's expert witness to testify about the standard of medical care and acceptable practice in Chapel Hill. *Nelson v. Patrick*, 1.

In a medical malpractice action for the negligent reading of x-rays, defendant's own testimony was sufficient to establish the standard of care by which his actions would be judged. *Shuffler v. Blue Ridge Radiology Assoc., P.A.*, 232.

There was no error in the exclusion of deposition testimony as to the standard of practice where there was no evidence that the witness was familiar with the standards of practice among radiologists in Morganton or similar communities. *Ibid.*

§ 15. Malpractice; Competency and Relevancy of Evidence

The trial court in a medical malpractice case properly refused to permit defense counsel to ask plaintiff's gynecologist about a notation in plaintiff's medical records that plaintiff had asked him not to tell her husband she had been taking birth control pills since the only relevance of the evidence was to suggest that plaintiff was of bad character. *Nelson v. Patrick*, 1.

§ 15.1. Malpractice; Expert Testimony

The trial court did not err in permitting plaintiff's referring gynecologist to testify that the bowel damage suffered by plaintiff from radiation therapy was greater than any he had seen. *Nelson v. Patrick*, 1.

§ 16.1. Sufficiency of Evidence of Malpractice

Directed verdict for defendant podiatrists was proper where plaintiff failed to introduce any evidence of proximate cause. *Scales v. Tucker*, 696.

§ 17.1. Sufficiency of Evidence of Malpractice; Failure to Inform Patient of Risks

The trial court in a medical malpractice action based on lack of informed consent did not err in submitting a general issue as to whether plaintiff was injured by the negligence of defendant. *Nelson v. Patrick*, 1.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS — Continued

Failure of a physician to inform a patient of certain risks because the physician determines that the need to know is outweighed by the anxiety the disclosure might cause will no longer shield the physician from liability. *Ibid.*

The trial court in a medical malpractice case abused its discretion in denying plaintiff's Rule 56(f) motion to continue a ruling on defendant's motion for summary judgment until an expert's signed affidavit could be filed or to allow the late filing of the expert's signed affidavit. *Ipock v. Gilmore*, 182.

§ 17.2. Sufficiency of Evidence of Malpractice; Diagnosis; Use of X-ray

Directed verdict should not have been entered for defendants in an action for the negligent reading of x-rays. *Shuffler v. Blue Ridge Radiology Assoc., P.A.*, 232.

§ 20.2. Instructions in Malpractice Actions

The trial court's failure to instruct the jury on an alternative basis for proving lack of informed consent was error favorable to defendant and did not justify setting aside the verdict for plaintiff. *Nelson v. Patrick*, 1.

The trial court erred in instructing the jury that a doctor in obstetrics and gynecology does not ordinarily guarantee or insure the success of his breast examination and diagnosis. *Morrison v. Stallworth*, 196.

The trial judge in a medical malpractice case expressed an opinion on the credibility of a plastic surgeon who testified for plaintiff when he instructed the jury to keep in mind that defendant and the witness did not possess expertise in the same field. *Ibid.*

In a medical malpractice case based on alleged negligence by defendant in failing to diagnose plaintiff's breast cancer, the trial court erred in framing the single negligence issue in terms of plaintiff's "injury" rather than in language proposed by plaintiff concerning whether plaintiff was "damaged or injured." *Ibid.*

§ 21. Damages in Malpractice Actions

The plaintiff in a medical malpractice case was not deprived of the right to recover damages for loss of future earning capacity simply because she was a housewife. *Nelson v. Patrick*, 1.

Shortened life expectancy and disfigurement were compensable elements of damages in a medical malpractice case based on alleged negligence by defendant in failing to diagnose plaintiff's breast cancer. *Morrison v. Stallworth*, 196.

PLEADINGS

§ 33.1. Amendment Introducing New Cause of Action

The trial court did not err in denying plaintiff's motion to amend his complaint to enforce a claim of lien for labor and materials where the amendment would state a new cause of action which would not relate back to the date of the original complaint, and the statute of limitations on the new action had expired. *Mauney v. Morris*, 589.

PROSTITUTION

§ 1. Constitutionality of Statutes

The loitering for the purpose of prostitution statute is not unconstitutionally vague and overbroad, does not unfairly discriminate in favor of male prostitutes, and was not unconstitutionally applied because only female prostitutes and not their male customers were arrested. *S. v. Evans*, 214.

PROSTITUTION — Continued

§ 2. Prosecutions for Prostitution

Testimony by police officers that defendant was a "known prostitute" and had prior convictions for prostitution was admissible under G.S. 14-206. *S. v. Evans*, 214.

QUIETING TITLE

§ 1.1. Requisites of and Matters Affecting Right to Maintain Action

An action against an optionee to quiet title will lie during the contract period only where plaintiffs assert some invalidity in the contract. *Boyd v. Watts*, 566.

§ 2.2. Evidence

The court in an action to quiet title erred by dividing the land in question into two lots and awarding one to petitioners and one to respondents. *Cobb v. Spurlin*, 560.

RAPE AND ALLIED OFFENSES

§ 4. Competency of Evidence

A pediatrician was properly permitted to state his opinion that children don't fantasize to the extent of lying about sexual abuse. *S. v. Raye*, 273.

The trial court did not err by admitting lay testimony that the victim was unconscious. *S. v. Aiken*, 487.

§ 4.1. Proof of Other Acts and Crimes

In a prosecution for misdemeanor false imprisonment, indecent exposure, and assault on a female, two other incidents were sufficiently similar to be admitted into evidence. *S. v. Streath*, 546.

§ 5. Sufficiency of Evidence

The unsupported testimony of the prosecutrix was sufficient to support defendant's conviction of second-degree rape. *S. v. Raye*, 273.

§ 6. Instructions

The trial court did not err by instructing the jury that it could find defendant guilty if the victim was drunk and physically helpless. *S. v. Aiken*, 487.

The court did not give conflicting instructions by instructing that defendant knew the victim was helpless after earlier instructing the jury during the testimony of a witness not to consider what defendant was aware of. *Ibid.*

ROBBERY

§ 1. Nature and Elements of Offense

Common law robbery is a lesser included offense of armed robbery. *S. v. Owens*, 631.

§ 4.5. Sufficiency of Evidence of Aiding and Abetting

The State's evidence was sufficient to support conviction of defendant for armed robbery as an aider and abettor. *S. v. Moose*, 264.

§ 5.2. Instructions Relating to Armed Robbery

The trial court did not commit plain error when it instructed the jury that the State must prove that defendant took property from the person or place of a cer-

ROBBERY — Continued

tain store employee rather than from the place of business alleged in the indictment. *S. v. Abbitt*, 679.

§ 6.1. Sentence

Where two or more armed robbery offenses are being disposed of in the same sentencing proceeding, the sentences are not required by G.S. 14-87 to be consecutive. *S. v. Crain*, 269.

RULES OF CIVIL PROCEDURE

§ 4. Process

Plaintiff could not obtain a valid endorsement of her summons when it was not delivered to any sheriff for service within 30 days of issuance. *Adams v. Brooks*, 624.

§ 15.1. Discretion of Court to Grant Amendment

The trial court did not err in denying plaintiff's motion to amend his complaint to enforce a claim of lien for labor and materials where the amendment would state a new cause of action which would not relate back to the date of the original complaint, and the statute of limitations on the new action had expired. *Mauney v. Morris*, 589.

§ 41. Dismissal of Actions Generally

Defendant's motion for a directed verdict in a non-jury trial was treated on appeal as a motion for involuntary dismissal but was not reviewed because defendant presented evidence after her motion was denied. *Mayo v. Mayo*, 406.

§ 56. Summary Judgment

The trial court in a medical malpractice case abused its discretion in denying plaintiff's Rule 56(f) motion to continue a ruling on defendant's motion for summary judgment until an expert's signed affidavit could be filed or to allow the late filing of the expert's signed affidavit. *Ipock v. Gilmore*, 182.

§ 56.1. Summary Judgment; Timeliness of Motion

The trial court did not err in entering summary judgment while discovery was still pending. *Case v. Case*, 76.

§ 60.2. Grounds for Relief from Judgment

Where summary judgment was entered for defendants in a medical malpractice case after plaintiffs failed to identify expert witnesses as stipulated, the trial court did not err in refusing to set aside the summary judgment on the ground that plaintiff's subsequent discovery of an expert witness constituted newly discovered evidence. *Staples v. Woman's Clinic*, 617.

SEARCHES AND SEIZURES

§ 3. Searches at Particular Places

Defendant failed to demonstrate a legitimate expectation of privacy in a van that was searched and therefore failed to show any infringement of his Fourth Amendment rights. *S. v. Thompson*, 60.

SEARCHES AND SEIZURES — Continued

§ 8. Search and Seizure Incident to Warrantless Arrest

The trial court properly found probable cause to arrest and denied defendant's motion to suppress evidence seized in a search of his person incident to arrest. *S. v. Grady*, 452.

§ 26. Insufficient Showing of Probable Cause for Issuance of Warrant; Information from Informers

Information which the magistrate could properly consider did not provide a substantial basis for concluding that probable cause existed for issuance of a warrant to search defendants' apartment for narcotics. *S. v. Heath*, 391.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 2. Recovery of Amount Paid to Recipient

The receipt of Aid to Families with Dependent Children was a sufficient change of circumstances to permit a modification of a consent judgment regarding child support, and a motion in the cause filed by the Department of Social Services should not have been dismissed. *Cartrette v. Cartrette*, 169.

STATE

§ 4.2. Particular Actions against Officers of the State

The defense of sovereign immunity did not apply and defendant's motion to dismiss was properly denied where plaintiff's complaint raised factual issues as to whether defendant Patterson exceeded her authority. *Sperry Corp. v. Patterson*, 123.

TAXATION

§ 9.1. Taxes on Imports

The imposition of a nondiscriminatory ad valorem tax on imported tobacco stored in customs bonded warehouses for domestic use does not violate the Import-Export clause of the U.S. Constitution, does not place an undue burden on foreign commerce, and does not violate due process. *In re Appeal of Reynolds Tobacco Co.*, 475.

TORTS

§ 1. Nature and Elements of Torts

A magazine article about plaintiffs' deceased son did not support an action to recover damages for the intentional infliction of mental distress. *Briggs v. Rosenthal*, 672.

§ 6.1. Satisfaction of Judgment against Tort-feasors

Satisfaction of a judgment against two joint tort-feasors for plaintiff's hypoxic brain damage barred plaintiff from seeking further damages against defendant third joint tort-feasor for the brain damage but did not bar plaintiff's claim against such defendant for separate and distinct injuries resulting from his negligent performance of surgery on plaintiff. *Ipock v. Gilmore*, 182.

TRIAL

§ 13. Allowing Jury to View Exhibits

It is not error for the trial court to permit the jury to view exhibits in the courtroom in its presence and in the presence of the parties. *Nelson v. Patrick,* 1.

§ 16. Withdrawal of Evidence

The trial court's failure to instruct the jury to disregard a witness's answer after allowing a motion to strike was not prejudicial error. *Nelson v. Patrick,* 1.

§ 36.1. Expression of Opinion on Evidence in Instructions; Particular Instructions

The trial judge in a medical malpractice case expressed an opinion on the credibility of a plastic surgeon who testified for plaintiff when he instructed the jury to keep in mind that defendant and the witness did not possess expertise in the same field. *Morrison v. Stallworth,* 196.

§ 52.1. Setting Aside Verdict for Excessive Award; Particular Cases

The trial court did not err in refusing to grant a new trial on the ground that the remitted award of $35,000 for nuisance in the operation of a quarry was excessive. *Hanna v. Brady,* 521.

The trial court did not err in entering a remittitur rather than awarding a new trial for excessive damages. *Ibid.*

TRUSTS

§ 5. Trusts for Private Beneficiaries; Construction

Summary judgment should not have been granted for defendant trustee in an action to determine whether a child adopted by defendant after testator's death was a beneficiary of a trust created for defendant's children now in being or hereafter born. *Pittman v. Pittman,* 584.

§ 19. Sufficiency of Evidence in Action to Establish Constructive Trust

Summary judgment was properly granted for defendants in an action to impose a constructive trust on land conveyed by plaintiff to her son. *Martin v. Martin,* 158.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

The consumer protection and anti-trust laws of Chapter 75 of the General Statutes do not create a cause of action against the State because the State is not a "person, firm, or corporation" within the meaning of G.S. 75-16. *Sperry Corp. v. Patterson,* 123.

UNIFORM COMMERCIAL CODE

§ 36. Collection of Checks and Drafts

A bank was not discharged after paying three certificates of deposit to a purchaser who was not in possession because the S.B.I. had confiscated the certificates in connection with an investigation of fraud and embezzlement by the purchaser. *Champion Int. Corp. v. Union Nat'l Bank,* 147.

§ 40. Creation of Security Interest

There was no genuine issue of material fact as to the existence of a written security agreement executed by the debtors. *E-B Grain Co. v. Denton,* 14.

UNIFORM COMMERCIAL CODE — Continued

A financing statement with the mailing address "Whitakers, N.C. 27891" was not so incomplete as to be misleading or as to interfere with the notice function of the filing. *Ibid.*

A U.C.C. financing statement did not contain an ineffective description of real property on which tobacco used as collateral was grown where the statement listed the number of acres involved, the kind of crop grown on the land, the county in which the land was located, and the agriculture stabilization and conservation service numbers. *Ibid.*

VENDOR AND PURCHASER

§ 1.3. Construction of Options

An option contract was created by an agreement providing for the sale of property for a certain price payable in monthly installments with one final payment of the balance due on 10 November 1984 and containing a default provision, and on default, defendant retained the right to purchase by paying the unpaid balance plus interest at any time before 10 November 1984. *Boyd v. Watts*, 566.

§ 11. Abandonment and Cancellation of Contract

Plaintiffs were not precluded from exercising their rights under a contractual default provision by their oral agreement, made before they acquired title, to make the monthly payments on defendant's behalf while their son lived on the property. *Boyd v. Watts*, 566.

WILLS

§ 33.1. Words of Limitation or Purchase; "Heirs"

In an action to construe an 1899 will, the words "brothers and sisters or their heirs" were words of purchase rather than limitation. *Tunnell v. Berry*, 222.

§ 35.2. Time of Vesting of Estates; Contingent Interests

In an action to construe an 1899 will, the word "heirs" referred only to those persons who were alive when the contingency occurred. *Tunnell v. Berry*, 222.

§ 69. Conveyance of Title by Contingent Remaindermen

A 1941 quitclaim deed by those persons who would have taken at that time under a contingent devise estopped those who executed it and who were still alive from pursuing their claim when the contingency occurred in 1979. *Tunnell v. Berry*, 222.

WITNESSES

§ 6.2. Evidence Competent to Impeach or Discredit Witness; Character or Reputation of Witness

The trial court in a medical malpractice case properly refused to permit defense counsel to ask plaintiff's gynecologist about a notation in plaintiff's medical records that plaintiff had asked him not to tell her husband she had been taking birth control pills since the only relevance of the evidence was to suggest that plaintiff was of bad character. *Nelson v. Patrick*, 1.

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