NORTH CAROLINA COURT OF APPEALS REPORTS

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THE COURT OF APPEALS

OF

NORTH CAROLINA

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4. Appointed 15 August 1986 to replace Edward H. Blair who resigned 30 July 1986.

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CASES REPORTED WITHOUT PUBLISHED OPINION

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COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ALLEN G. HART v. VERONICA M. HART

No. 844DC272

(Filed 2 April 1985)

1. Rules of Civil Procedure § 32— deposition admissible as substantive evidence —offered only for corroboration—admitted only for corroboration

There was no error in admitting depositions of Florida residents for corroborative purposes only, even though they qualified for admission as substantive evidence under G.S. 1A-1, Rule 32 (1983), where they were only *offered* for corroborative purposes.

2. Divorce and Alimony § 23.9— child custody—letters—admission harmless error

In a child custody dispute in which the date on which the children were moved from North Carolina to Florida was in issue, letters from the wife's father in Florida suggesting that the children first left North Carolina on 30 December 1982 were inadmissible for corroboration and improperly formed the basis for a substantive finding of fact; however, the admission of the letters was harmless error because the children's presence in North Carolina in the fall of 1982 was substantiated by the testimony of three other competent witnesses.

3. Divorce and Alimony § 23— child custody—ex parte determination of jurisdiction in North Carolina—proper

The trial court correctly found in an *ex parte* child custody order that North Carolina had been the children's home state for the six months before the commencement of the proceeding where the allegations of the complaint satisfied the home state rule in that North Carolina "had been the children's home state within six months before commencement of the proceeding," the children were absent from the State "for other reasons," and the husband "continues to live in this State." G.S. 50A-3(a)(1)(ii) (1984).

4. Divorce and Alimony § 23— child custody—residence of husband in North Carolina—evidence sufficient

In a child custody dispute in which jurisdiction was in issue, the serviceman husband's testimony that he considered himself a North Carolina resident, though equivocal, was sufficient to satisfy the requirement that a parent or person acting as parent reside in this state. The "domicile" jurisdictional requirement for divorce is not applicable to child custody actions under Chapter 50A.

5. Divorce and Alimony § 23.9— child custody—findings supporting jurisdiction in North Carolina

The trial court correctly concluded that it had jurisdiction over a child custody action where there was competent evidence to support findings that the children had lived in North Carolina from July 1981 until December 1982; that the wife had removed the children on 30 December 1982 without the consent, desire or knowledge of the husband; and that North Carolina was the home state. G.S. 50-3(a)(1) (1984).

6. Divorce and Alimony § 23— child custody—jurisdiction in North Carolina—findings that one parent has a significant connection with North Carolina

The evidence and findings were sufficient to conclude that the children and at least one parent in a child custody dispute have a significant connection with North Carolina and that substantial evidence relevant to the children's present or future care, protection, training, and personal relationships is available in this state where the trial court found that the children had lived in North Carolina with their parents from July 1981 through December 1982. G.S. 50A-3(a)(i) and (ii).

7. Divorce and Alimony § 23.6— child custody—North Carolina convenient forum

The trial court did not abuse its discretion in finding that North Carolina was a convenient forum for a child custody determination under G.S. 50A-7 (1984).

8. Divorce and Alimony § 23— child custody—jurisdiction in North Carolina proper—Florida action filed one day after North Carolina action

The North Carolina trial court did not err in assuming jurisdiction in a child custody matter where the wife's action was filed in Florida the day after the husband filed his action in North Carolina. G.S. 50A-6(a) (1984).

APPEAL by defendant from *Henderson, Judge*, and *Cameron, Judge*. Orders entered 17 March and 1 December 1983 in District Court, ONSLOW County. Heard in the Court of Appeals 15 November 1984.

Van Camp, Gill & Crumpler, P.A., by Sally H. Scherer, for defendant appellant.

Bell and Pittman, by Hiram C. Bell, Jr., for plaintiff appellee.

BECTON, Judge.

This is an interstate child custody jurisdictional dispute involving a husband stationed with the military in North Carolina and a wife who is presently living in Florida with the parties' two minor children at her parents' home.

The parties were raised in Florida and married there in February 1977. Although the husband was stationed with the military, first in Tennessee and then in North Carolina, the parties maintained their Florida drivers' licenses, car and voter registration. Their two children were born in Tennessee in 1977 and 1980. While the husband was stationed in Tennessee, the parties separated for approximately one year. During the separation, the wife and the two children lived with her parents in Florida. In the summer of 1981 the wife and children joined the husband in North Carolina. The family lived together in North Carolina until August 1982, when the husband left for active duty on Okinawa. Sometime after the husband's departure the two children were sent to live with their maternal grandparents in Florida. According to the wife, the children have lived in Florida since the end of August 1982. According to the husband, the children did not move to Florida until 30 December 1982. It is uncontroverted that the wife returned to Florida after the fall school semester. In any event, the wife and children were no longer in North Carolina when the husband returned from Okinawa in March 1983.

On 17 March 1983 the husband filed a verified Complaint asking the trial court to grant him temporary and permanent custody of the parties' two children, a divorce from bed and board, ownership of the parties' mobile home and personal property and injunctive relief. The same day, 17 March 1983, the trial court issued an *ex parte* temporary child custody order, awarding the husband custody of both children. On 6 April 1983 the wife moved to dismiss the action for lack of personal and subject matter jurisdiction. In support of her motion the wife submitted an affidavit stating that an action for divorce, child custody, child support and alimony, filed 18 March 1983, was pending in Florida. A hearing on the wife's motion to dismiss was held in October 1983.

From the trial court's 17 March 1983 *ex parte* order and its 1 December 1983 order, asserting jurisdiction "for all purposes," the wife appeals.

I

On appeal the wife assigns error to several of the trial court's evidentiary rulings in addition to its rulings on personal and subject matter jurisdiction.

II

Evidentiary Rulings

A.

[1] Due to a medical problem the wife was unable to attend the hearing on her motion to dismiss. The wife's sole witness, her father, Joseph Bobba, testified that he had driven the children to Florida from North Carolina in late August 1982. Her attorney offered the depositions of seven Florida residents, attesting that the children had lived in Florida continuously since the end of August 1982. The wife contends that the trial court erred in admitting the depositions for corroborative purposes only, rather than as substantive evidence. For the following reasons, we disagree.

Generally, depositions of witnesses who are more than 100 miles from the hearing may be used as substantive evidence as long as the opposing party was present or represented at the taking of the deposition or had reasonable notice thereof. N.C. Gen. Stat. Sec. 1A-1, Rule 32 (1983). There is no question that the wife's depositions qualified under Rule 32 as substantive evidence. However, it is clear from the record that the depositions were only *offered* for corroborative purposes. Therefore, the trial court did not err in admitting them for corroborative purposes only.

B.

[2] After the wife's father had testified that he took the children to stay with him in Florida in late August 1982, the husband gave conflicting testimony about telephone calls he had made to the children in North Carolina during the fall of 1982. In an effort to corroborate his own testimony, the husband introduced the contents of two letters he had received from the wife's father while the husband was on Okinawa. The letters suggested that the children first left North Carolina on 30 December 1982. The wife asserts that the trial court erred in admitting the two letters for corroborative purposes and then finding as facts:

> that the [husband] received various letters and correspondence from the [wife's] father, Mr. Joseph C. Bobba, indicating that Mr. Bobba picked up the minor children on December 30, 1982 from the [wife] and that they have resided in the State of Florida since December 30, 1982.

We agree that the letters were inadmissible for corroborative purposes and further, that they improperly formed the basis for a substantive finding of fact. We, nevertheless, find the error harmless considering the weight of the other evidence presented.

Although the letters were admissible to impeach the wife's father's testimony, they were not admissible as corroborative evidence. *See State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972) (prior inconsistent statements relating to material facts may be proved by others without first laying foundation on cross-examination). "[E]xtrajudicial declarations of someone other than the witness purportedly being corroborated" are not admissible to corroborate the witness unless they come within an exception to the hearsay rule, or unless they are not hearsay, under the circumstances. 1 H. Brandis, *North Carolina Evidence* Sec. 52, at 196 & nn. 67-70 (2d rev. ed. 1982). The contested letters fit neither of the above categories—a hearsay exception or non-hearsay. Thus, they were inadmissible as corroborative evidence. The error is harmless though because, in addition to the husband's own testimony, the children's presence in North Carolina in the fall of 1982 was substantiated by the testimony of three other competent witnesses. *See Wilson County Bd. of Educ. v. Lamm*, 276 N.C. 487, 173 S.E. 2d 281 (1970).

III

Jurisdiction

Finally, the wife contends that the trial court erred in entering the 17 March 1983 *ex parte* custody order and in assuming jurisdiction in the 1 December 1983 order, to determine permanent custody, when it lacked subject matter jurisdiction and personal jurisdiction over the nonresident wife. We are not persuaded. We conclude that the trial court correctly assumed jurisdiction in this matter.

The jurisdiction of the courts of this State to make child custody determinations is controlled by N.C. Gen. Stat. Sec. 50A-3

(1984), the jurisdiction provision of the Uniform Child Custody and Jurisdiction Act (UCCJA). *See* N.C. Gen. Stat. Sec. 50-13.5(c)(2) (1984). G.S. Sec. 50A-3(a) provides four alternative bases for jurisdiction:

> (1) This State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this State because of the child's removal or retention by a person claiming the child's custody or for other reasons, and a parent or person acting as parent continues to live in this State; or
>
> (2) It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and the child's parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence relevant to the child's present or future care, protection, training, and personal relationships; or
>
> (3) The child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or
>
> (4) (i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

Once the trial court has gained jurisdiction by establishing one of the above bases, it may enter an *ex parte* order for temporary custody prior to service of process or notice, "[i]f the circumstances of the case render it appropriate." G.S. Sec. 50-13.5(d)(2) (1984); *Story v. Story*, 57 N.C. App. 509, 291 S.E. 2d 923 (1982).

Significantly, " 'home state' means the state in which the child immediately preceding the time involved lived with the

child's parents, a parent, or a person acting as parent, for at least six consecutive months. . . ." N.C. Gen. Stat. Sec. 50A-2(5) (1984). Personal jurisdiction over the nonresident parent is not a requirement under the UCCJA. Garfield, *Due Process Rights of Absent Parents in Interstate Custody Conflicts*, 16 Ind. L. Rev. 445 (1983); Comment, 34 Mercer L. Rev. 861 (1983).

In its 17 March 1983 *ex parte* order the trial court concluded that it had jurisdiction over "the custody matter," the children and the parties. Based on the verified Complaint and the arguments of plaintiff's counsel, the trial court found that North Carolina satisfied two of the jurisdictional bases: the home state rule, G.S. Sec. 50A-3(a)(1), and the significant connection test, G.S. Sec. 50A-3(a)(2). After hearing evidence from the parties at the hearing on the motion to dismiss for lack of jurisdiction, the trial court in its 1 December 1983 order, found the identical alternative bases for jurisdiction—the home state rule and the significant connection test. We find competent evidence to support these findings in both instances.

A. *The Home State Rule*

[3] In the verified Complaint the husband alleged that the children had lived in North Carolina from July 1981 until January 1983. Further, he alleged that he and his wife were residents of this State for more than six months preceding the institution of this action. And he alleged that the children had lived in North Carolina with both parents from July 1981 until September 1982, then with the mother from September 1982 until January 1983. Moreover, he alleged that both children were presently in the custody of the wife's parents in Florida. The father filed this action on 17 March 1983. Therefore, the allegations of the Complaint satisfy the home state rule, G.S. Sec. 50A-3(a)(1)(ii) (1984): North Carolina "had been the children's home state within six months before commencement of the proceeding"; the children were absent from this State "for other reasons"; and the husband "continues to live in this State." The trial court, in its *ex parte* order, correctly found that North Carolina "had been the [children's] home state within six (6) months before commencement of the proceeding" based on the evidence before it. *See Plemmons v. Stiles*, 65 N.C. App. 341, 309 S.E. 2d 504 (1983) (child's 15 months continuous presence in North Carolina—home state).

[4] At the subsequent hearing on the wife's motion to dismiss for lack of jurisdiction, the husband testified that he was with the military. Although his testimony was equivocal, the husband also testified that he considered himself a North Carolina resident.

> Q. Do you expect to stay here in North Carolina?
>
> A. No, ma'am, I do not.
>
> Q. Do you, in fact, want to leave North Carolina?
>
> A. That's a fact, yes, ma'am.
>
> COURT: Where do you intend for your residence to be?
>
> A. At the present time I'm undecided, sir. I'm thinking about just staying here in North Carolina, sir.
>
> COURT: Do you consider yourself a resident of North Carolina, or a resident of Florida?
>
> A. A resident of North Carolina, sir.

He further testified that before leaving for Okinawa he had changed his "permanent address for military purposes" to Hubert, North Carolina. "I intend Hubert to be my permanent address when I leave North Carolina." However, he maintained his Florida driver's license, car and voter registration. The trial court found that

> the [husband] is a resident of the State of North Carolina and has been for more than six months next preceding the institution of this action and the [husband] has resided in the State of North Carolina from July 1981 until the present time with the intention to make North Carolina his home state and to reside here permanently.

The wife relies on *Martin v. Martin*, 253 N.C. 704, 118 S.E. 2d 29 (1961), in arguing that the above finding is not supported by evidence that the serviceman husband intended to establish North Carolina as his "domicile." We need not determine whether there is competent evidence of his intent to establish a "domicile," since the "domicile" jurisdictional requirement for one of the parties in actions for divorce, N.C. Gen. Stat. Sec. 50-8 and -18 (1984); *Israel v. Israel*, 255 N.C. 391, 121 S.E. 2d 713 (1961); *Martin v. Martin*, is not applicable to child custody actions under Chapter

50A. "Historically, divorce has been regarded as an action *in rem*, and domicile has been considered the core of divorce jurisdiction." Note, 40 N.C. L. Rev. 343, 345 (1962). The policy reasons for the UCCJA support our analysis.

> The UCCJA marks a shift in the emphasis of policy in the area of child custody. The focus is no longer on what law a court should apply in resolving a custody dispute; instead the focus is on which court is best able to make the decision. The state with the maximum contact with the child will be the one to determine the case. This change indicates the UCCJA is definitely child-centered rather than parent-centered.

Comment, 4 Campbell L. Rev. 371, 376 (1982). *See also* Comment, 34 Mercer L. Rev. 861 (1983); *Unif. Child Custody Jurisdiction Act Sec. 3 & Commissioners' Note*, 9 U.L.A. 122-5 (1968). Significantly, the language of G.S. Sec. 50A-3(a) (1984) itself bolsters our interpretation. None of the four independent statutory bases for jurisdiction refer to "residence" or "domicile." Rather, the emphasis is on the maximum contact with the child. Therefore, the finding that the husband "is on active duty with the United States Marine Corps and is stationed at Camp Lejeune, North Carolina" is sufficient to satisfy the home state rule requirement that "a parent or person acting as parent continues to live in this State." G.S. Sec. 50A-3(a)(1)(ii) (1984).

[5] In its 1 December 1983 order, the trial court found that the children lived in North Carolina from July 1981 until December 1982. Although the evidence at the hearing was conflicting, as discussed in IIB, *supra*, there is competent evidence to support this finding. Further, the trial court found that the wife had removed the children from the state on 30 December 1982 "without the consent, desire or knowledge" of the husband. This again satisfies the provisions of subsection (ii) of the home state rule and is supported by competent evidence. Finally, the trial court found and concluded that "North Carolina is the home state. . . ." Findings of fact supported by competent evidence are binding on appeal. *Davison v. Duke Univ.*, 282 N.C. 676, 194 S.E. 2d 761 (1973). In contrast, conclusions of law denominated as findings of fact are fully reviewable. *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E. 2d 189 (1980). The above finding is actually a

conclusion of law. After reviewing the other findings, we conclude that North Carolina *had been* the children's home state within six months before commencement of the proceeding, thus fulfilling the requirements of the home state jurisdictional basis. G.S. Sec. 50A-3(a)(1) (1984). Thus, the trial court correctly concluded that it had jurisdiction over this child custody determination.

B. *Significant Connection Test*

[6] Alternatively, the evidence before the trial court and its findings of fact were sufficient to conclude that the children and at least one parent have a significant connection with this State, G.S. Sec. 50A-3(2)(i) and that "substantial evidence relevant to the [children's] present or future care, protection, training, and personal relationships . . . is available in this State." G.S. Sec. 50A-3(2)(ii). The trial court found that the children had lived in North Carolina with their parents from July 1981 through December 1982, a period of one and a half years. Unlike the child in *Holland v. Holland*, 56 N.C. App. 96, 286 S.E. 2d 895 (1982), who had not lived in North Carolina for six years at the time of the child custody dispute, the children in the case *sub judice* have spent a substantial amount of time in this State recently. The husband and the children have a "significant connection" with this State. Consequently, "evidence of [their present or future] life style, home environment, neighborhood environment, . . . and the conditions of [their] health" is available in this State. *Holland*, 56 N.C. App. at 99, 286 S.E. 2d at 897; G.S. Sec. 50A-3(2)(ii). *See also Plemmons v. Stiles* (residency of father and grandparents further evidence of significant connection with this State).

IV

[7] In the *ex parte* order and the 1 December 1983 order the trial court found that North Carolina was not an inconvenient forum to make the child custody determination "within the meaning of N.C. Gen. Stat. Sec. 50A-7" (1984). G.S. Sec. 50A-7(a) grants the trial court the discretion to decline to exercise its jurisdiction upon finding that North Carolina is an inconvenient forum. Some of the factors the trial court may consider include:

(1) If another state is or recently was the child's home state;

(2) If another state has a closer connection with the child and the child's family or with the child and one or more of the contestants;

(3) If substantial evidence relevant to the child's present or future care, protection, training, and personal relationships is more readily available in another state;

(4) If the parties have agreed on another forum which is no less appropriate; and

(5) If the exercise of jurisdiction by a court of this State would contravene any of the purposes stated in G.S. 50A-1.

G.S. Sec. 50A-7(c) (1984). After reviewing the evidence, we find that the trial court did not abuse its discretion in finding that North Carolina was a convenient forum for this child custody determination.

V

[8] Under N.C. Gen. Stat. Sec. 50A-6(a) (1984) a court of this State is prohibited from assuming jurisdiction in a child custody matter, "[i]f at the time of filing the petition a proceeding concerning the custody of the child was *pending* in a court of another state exercising jurisdiction substantially in conformity with this Chapter. . . ." (Emphasis added.) The wife's action was filed in Florida on 18 March 1983, the day *after* the husband filed his action in North Carolina. Therefore, the trial court was not prohibited from assuming jurisdiction by the Florida proceedings. *Plemmons v. Stiles* (Texas action filed 2 days later—no bar).

VI

In summary, the trial court did not err in assuming jurisdiction over this child custody determination.

Affirmed.

Judges ARNOLD and WELLS concur.

BETTIE BROADWAY LITTLE v. GLENN K. LITTLE, II

No. 8420DC95

(Filed 2 April 1985)

1. **Divorce and Alimony § 30— accident insurance proceeds as marital property**

Accident insurance benefits paid to the husband to compensate him for his lost ability to work at gainful employment after a motorcycle accident left him partially paralyzed constituted marital property.

2. **Divorce and Alimony § 30— equitable distribution—failure of order to list all marital property**

The trial court's order in an action for equitable distribution was fatally defective where it failed to contain a complete listing of the marital property.

3. **Divorce and Alimony § 30— deficient order of equitable distribution**

The trial court's equitable distribution order was deficient in failing to value a second house and lot and a van which constituted marital property and in valuing the husband's current savings inconsistently.

4. **Divorce and Alimony § 30— valuing marital property**

Net value rather than fair market value is the proper measure for valuing marital property for equitable distribution.

5. **Divorce and Alimony § 30— unequal distribution of marital property—insufficient findings**

Although the trial court did make findings concerning the incomes of both parties and the monthly expenses of the wife and concluded that the wife was healthy and employed and the husband disabled and in need of care for his condition, the trial court's order did not contain sufficient findings to support an unequal division of the marital property where the court failed to make findings as to the husband's monthly expenses, the need of the custodial parent, the wife, to own or occupy the marital residence, any expectation of nonvested pension or retirement rights, the liquid or nonliquid character of the marital property, and the tax consequences to each party. G.S. 50-20(c)(1), (4), (5), (9) and (11).

6. **Divorce and Alimony § 24.1— child support order—insufficient findings**

The trial court's child support order was insufficient where the court failed to make any findings as to the father's present reasonable expenses and the estates of both parties, taking into account the distribution of marital property.

APPEAL by plaintiff from *Huffman, Judge.* Judgment entered 7 October 1983 in District Court, ANSON County. Heard in the Court of Appeals 23 October 1984.

E. A. Hightower and Charles M. Welling, for plaintiff appellant.

Larry E. Harrington for defendant appellee.

BECTON, Judge.

I

This appeal deals with an unequal equitable distribution of marital property and an award of child support. Plaintiff wife filed her Complaint on 20 April 1983, seeking an absolute divorce, and custody of, and support for, the parties' minor child. On 11 May 1983, the wife filed an application and motion for an equitable distribution of the marital assets. Defendant husband filed an Answer and Counterclaim on 24 May 1983, praying that the wife be required to contribute to the support of the child from her own earnings.

A prior action had been filed by the husband in which he, as plaintiff, had sought a divorce from bed and board from his wife. An interlocutory order was entered in that action on 11 October 1982, which gave the wife custody of the child and also directed the father to pay $100 per month as child support. The record on appeal contains a judgment of absolute divorce dated 13 June 1983. This judgment was apparently entered in the present case, although this is not altogether clear.

In the present action, the trial court entered its order of equitable distribution on 7 October 1983. In the order, the court distributed the marital assets unequally, awarding the greater portion to the husband, and also reduced the amount of child support payable by the husband to $25.00 per month.

The wife contends on appeal that (1) the trial court failed to comply with various aspects of N.C. Gen. Stat. Sec. 50-20 (1984), and (2) that it erred in reducing the amount of child support. We agree with the wife that the trial court failed to comply with G.S. Sec. 50-20 (1984) in distributing the marital property, and also find that the trial court committed error in that portion of the order setting child support. We therefore vacate the order of the lower court, and remand for further proceedings.

II

Factual Background

The parties to this action were married on 22 September 1973. With the exception of some unspecified personal belongings and two automobiles that were not paid for, neither party owned any property, real or personal, at the time of the marriage. One child, Glenn K. Little, III, was born of the marriage, on 21 January 1978. On 2 June 1979, the husband was injured in a motorcycle accident that left him partially paralyzed from the waist down. The parties separated on 19 April 1982, and were divorced on 13 June 1983.

The parties owned a marital dwelling as tenants by the entireties. This dwelling was built on a half-acre lot conveyed to the parties by the husband's parents. The parties do not dispute that this conveyance was a gift and that the lot became marital property. Subsequent to this conveyance, the parties executed a note, secured by a deed of trust, in the amount of $21,000 to finance the construction of the house.

Prior to the marriage, the husband was issued a life insurance policy with accident benefits, and after his injury, on 3 October 1980, he was paid proceeds in a lump sum of $100,000 as "Family Accident Benefits." In addition, the husband's insurance paid his medical and hospital bills. As an insurance policy of the wife's also paid these bills, the sum of $6,195.43 was refunded to the husband in February 1980.

The proceeds of both insurance policies were deposited in the parties' joint bank account. These proceeds were utilized to pay off the mortgage of $19,236.33 on the family home, to pay off the balance due on their two automobiles, a 1979 Oldsmobile and a 1981 Mazda, and to purchase a $50,000 certificate of deposit in the joint names of the parties. Upon maturity, the wife withdrew the certificate and purchased a second certificate with the principal and interest in the amount of $52,900, again in the parties' joint names. At some point thereafter, the husband closed the joint bank account, and also withdrew the second certificate before it had matured. It was apparently at this point that the husband purchased a Chevrolet van, specially equipped for a handicapped person, and a second house and lot (also described as a "store lot

and building" and an "exercise building"); opened savings and/or checking accounts; and purchased a certificate or certificates of deposit, all in his name alone.

In making its order of equitable distribution, the trial court identified the following property as marital property: (1) the lot on which the marital dwelling was built, (2) the marital dwelling, (3) the 1979 Oldsmobile, (4) the 1981 Mazda, (5) the insurance policy proceeds, and (6) certain listed items of personalty, mostly furniture. The trial court concluded that although the insurance policy proceeds were marital property, an equal distribution of them would not be equitable because the wife was healthy and gainfully employed, and the husband disabled and in need of the proceeds. The court next concluded that an equal distribution of all property acquired during the marriage, other than the insurance policy proceeds, would be equitable.

Following from its conclusions that an equitable distribution would entail awarding to the husband all marital property obtained with the insurance proceeds, and dividing all the other marital property equally between the parties, the trial court, in the distributive portion of the order, awarded the marital property as follows: The husband was awarded the marital dwelling and lot, the Chevrolet van, $21,183.77 in savings and checking accounts, and possession of the majority of the jointly-owned personalty. The wife was awarded the Oldsmobile, the Mazda, and the remainder of the personalty. The order also directed the husband to pay the wife the sum of $8,434.23, $6,381.23 of which represented her one-half interest in the marital dwelling, once the $19,236.33 mortgage payment (which payment was made with the insurance proceeds) was subtracted from the fair market value of $32,000, and the remaining $2,053.00 of which represented her one-half interest in the personalty retained by the husband.

III

We note at the outset a failing lamentably common to appeals from equitable distribution orders—neglect of the Rules of Appellate Procedure. *See Wade v. Wade*, 72 N.C. App. 372, 325 S.E. 2d 260 (1985); *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E. 2d 772 (1984). The wife lists eleven assignments of error, presenting several distinct questions of law, under a single broad argument that the trial court did not comply with G.S. Sec. 50-20

(1984). Despite the resultant violations of Rules of Appellate Procedure, Rules 10 and 28, we exercise our discretion and treat this appeal on its merits.

This case is governed by North Carolina's Equitable Distribution Act (the Act), N.C. Gen. Stat. Secs. 50-20 and -21 (1984). The Act requires the trial court to first determine what constitutes marital property, to then determine the net market value of that property, and finally, to distribute it based on the equitable goals of the statute and the specific statutory factors. *See, e.g., Alexander v. Alexander; Turner v. Turner*, 64 N.C. App. 342, 307 S.E. 2d 407 (1983). We conclude that at each stage of the procedure by which equitable distribution is accomplished the trial court committed reversible error. We address each stage separately.

[1] A. The first task of the trial court in an action for equitable distribution is to ascertain, based upon appropriate findings of fact, what is marital property. G.S. Sec. 50-20(a) (1984); *Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E. 2d 33 (1985); *Alexander v. Alexander*. We note preliminarily that the trial court properly concluded that the insurance proceeds were marital property.

Marital property includes personal property acquired by a spouse during the marriage, with the specific exceptions of property acquired by "bequest, devise, descent, or gift." G.S. Sec. 50-20(b)(2) (1984). As the insurance proceeds were not acquired by bequest, devise, descent, or gift, the legislature did not exempt them from incorporation in the pool of assets denominated "marital property."

Furthermore, the majority rule from other jurisdictions appears to be that absent a statute to the contrary, "claims and awards for personal injuries resulting from occurrences during the marriage are generally treated as marital property." 1 *Valuation and Distribution of Marital Property* Sec. 18.05 [5], at 18-75 (J. McCahey ed. 1984); *see also id.* at Sec. 20.03 [3][d]; 2 *Valuation and Distribution of Marital Property, supra*, Sec. 23.07 [1][c]; L. Golden, *Equitable Distribution of Property* Secs. 6.24 to -.26 (1983). This result has been reached on the grounds that the award or settlement does not fit the statutory definition of separate property, *e.g., Platek v. Platek*, 309 Pa. Super. 16, 454 A. 2d 1059 (1982); *Nixon v. Nixon*, 525 S.W. 2d 835 (Mo. Ct. App. 1975), and justified on the grounds that the money represents

wages, and enables the injured spouse to provide for his family as he presumably would have done had he not been injured. *In re Gan*, 83 Ill. App. 3d 265, 404 N.E. 2d 306 (1980). Although a court may, for equitable reasons, ultimately award the greater portion of the settlement or proceeds to the injured party, this does not change their essential character as marital property. *See In re Mack*, 108 Wis. 2d 604, 323 N.W. 2d 153 (1982).

We are aware that some courts distinguish between money realized as compensation for pain and suffering as the personal property of the injured spouse, and that portion of an award representing lost wages and medical expenses as marital property. *Amato v. Amato*, 180 N.J. Super. 210, 434 A. 2d 639 (1981); *In re Brown*, 100 Wash. 2d 729, 675 P. 2d 1207 (1984); *Rich v. Rich*, --- Misc. 2d ---, 483 N.Y.S. 2d 150 (1984) (noneconomic loss is separate property, economic loss marital property). In the instant case, however, the trial court made the following unexcepted-to finding of fact: "The $100,000 paid to husband for the disability was a sum provided to compensate him for his lost ability to work at gainful employment." As these proceeds were intended as exclusive recompense for defendant's lost wages and medical expenses, we find that the trial court correctly characterized them as part of the marital estate subject to distribution.

[2] The problem with the trial court's determination of marital property is that the order contains only a partial listing thereof. G.S. Sec. 50-20(a) (1984) makes it incumbent upon the court to determine what is marital property, which G.S. § 50-20(b)(1) (1984) defines as "all real and personal property" falling within the scope of the statute. Thus, the Act mandates a complete listing of marital property, and an order that fails to do so is fatally defective. In this case, the court neglected entirely to list, value, or award the second house and lot. Although it awarded the Chevrolet van and various bank accounts to the husband, it never stated whether they were marital property. Perhaps the trial court intended for its conclusion that the insurance proceeds were marital property to be extrapolated and applied to all property purchased with the proceeds; however, marital property is not to be identified by implication. *See Wade v. Wade* (court below must identify marital property with sufficient detail to permit proper appellate review). In addition, the trial court's identification of marital property was interspersed throughout the findings of fact,

conclusions of law, and the distributive award. This has resulted in some confusion in reviewing the record on appeal.

[3, 4] B. After identifying marital property, the trial court must determine the net (market) value of the marital property as of the date of separation. G.S. Sec. 50-20(c) (1984); G.S. Sec. 50-21(b) (1984); *Alexander v. Alexander* (defining net value). In the case *sub judice*, the court completely failed to value the second house and lot and the Chevrolet van. It valued the defendant's current savings inconsistently, using a figure of $21,000 in one place, and $30,000 in another; no competent evidence seems to support either figure. The order is unclear whether the Mazda was ever paid for in full, which casts doubt upon the finding of that vehicle's net value. The finding that the marital dwelling had a fair market value, rather than a net value, of $32,000, is harmless error only because there were no encumbrances against the property, and that, therefore, net value and fair market value happened to be the same. We emphasize that net value, rather than fair market value, is the proper measure for valuing marital property for equitable distribution. *See Wade v. Wade.* Plaintiff also submits it was error for the court to value the marital dwelling as of 9 April 1982 rather than 19 April 1982, the date of separation. This appears to be a typographical error, and is nonprejudicial in any event.

[5] C. Finally, the order did not contain sufficient findings upon which an unequal distribution of marital property must be based. The Act mandates an equal division of the marital property unless the court determines that such division is not equitable. *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). In that event, the court may order an unequal distribution after making written findings based upon relevant statutory and nonstatutory factors. Our opinion in *Alexander v. Alexander* declared: "[T]he trial court should clearly set forth in its order findings of fact based on the evidence which support its conclusion that an equal division is not equitable." 68 N.C. App. at 552, 315 S.E. 2d at 776. *Alexander* has been expressly followed. *E.g., Wade v. Wade; Brown v. Brown*, 72 N.C. App. 332, 324 S.E. 2d 287 (1985).

Although the trial court did make some findings concerning the income of both parties and the monthly expenses of the wife,

and also concluded that the wife "remains healthy" and that husband "is disabled, and needs care and attention for his condition," other factors plainly raised by the evidence were ignored—for example, the husband's monthly expenses, G.S. Sec. 50-20(c)(1) (1984), the need of the custodial parent, the wife, to own or occupy the marital residence, G.S. Sec. 50-20(c)(4) (1984), any expectation of nonvested pension or retirement rights, G.S. Sec. 50-20(c)(5) (1984), the liquid or nonliquid character of the marital property, G.S. Sec. 50-20(c)(9) (1984), and the tax consequences to each party, G.S. Sec. 50-20(c) (11) (1984). Clearly, the order is deficient in the findings of fact required to justify an unequal division of marital property.

IV

The wife next argues that the trial court erred in reducing from $100 to $25 per month the amount of child support paid by the husband to the wife for support of their minor child. The wife shows that the trial court made no finding that there had been a substantial change in circumstances, and argues that such a finding is required to support an order decreasing child support payments. N.C. Gen. Stat. Sec. 50-13.7 (1984); *Newman v. Newman*, 64 N.C. App. 125, 306 S.E. 2d 540, *disc. rev. denied*, 309 N.C. 822, 310 S.E. 2d 351 (1983). Although the wife is incorrect in her contention that a showing of changed circumstances is necessary in this case, the trial court's determination of child support was not in accordance with applicable law for other reasons.

In the current action, the wife sought an absolute divorce, custody and support of the minor child, and equitable distribution of the marital assets. In the earlier action filed by the husband for divorce from bed and board, the court entered an order "pending further order," which, *inter alia*, granted the wife custody of the child, and ordered that the husband pay $100 per month child support. The order was devoid of any findings concerning the child's needs, or the relative abilities of the parties to provide support, and recited that its provisions were "completely and totally without prejudice with regard to the respective rights of the parties" concerning equitable distribution and child support. The order entered in the instant case was manifestly the first time a determination on the merits of the issue of child support was made. There was therefore no need for the trial court to make any finding or findings relating to changed circumstances.

[6] The trial court did fail, however, to make certain obligatory findings of fact in setting the amount of child support. N.C. Gen. Stat. Sec. 50-13.4(c) (1984) provides:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

In interpreting G.S. Sec. 50-13.4(c) (1984), our Supreme Court has held that orders for child support must be based upon the interplay of the trial court's conclusions of law as to the amount of support necessary to meet the reasonable needs of the child and the relative abilities of the parents to provide that amount. These conclusions must, in turn, be based upon factual findings sufficiently specific to indicate to the appellate court that the trial court took due regard of the estates, earnings, conditions and accustomed standard of living of both child and parents. *Coble v. Coble,* 300 N.C. 708, 268 S.E. 2d 185 (1980). *Accord Plott v. Plott,* 313 N.C. 63, 326 S.E. 2d 863 (1985) at 7-9.

In the case before us, the trial court made findings as to (1) the monthly income of the child from Social Security and interest on a certificate of deposit in his name, (2) the monthly expenses of the child, (3) the monthly incomes of both parents, and (4) the average monthly expenses of the wife. Based on these findings, the trial court concluded that the child's needs in excess of his income were $66.50, that the husband was able to pay $25 per month of that amount, and accordingly ordered the husband to pay the wife monthly child support of $25.

The trial court made no finding pertaining to the husband's average expenses. Nor were there any findings pertaining to the estates of the parties. Before child support may be set, "the trial court must hear evidence and make findings of fact on the parents' income[s], estates (e.g., savings; real estate holdings, including fair market value and equity; stocks; and bonds) and present reasonable expenses. . . ." *Newman v. Newman,* 64 N.C. App. at 128, 306 S.E. 2d at 542. Without such findings, the trial court cannot properly determine the parties' relative abilities to pay.

Id. Therefore, the trial court's failure to make any findings as to the husband's present reasonable expenses, and the estates of both parents, taking into account the distribution of marital property, was reversible error, and the child support portion of the order is remanded on that basis. We also note that the trial court did not state its conclusions of law separately, but included them within the factual findings. Upon remand, we encourage the court to adopt the more preferable format of stating its factual findings and conclusions of law separately.

V

In conclusion, we vacate the order of the trial court, and remand this cause so that the marital property may be equitably distributed according to applicable law as outlined in this opinion, and we also remand so that child support may be determined in a manner not inconsistent with this opinion.

Vacated and remanded.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. JAMES ERNEST GREENE

No. 8425SC460

(Filed 2 April 1985)

1. Criminal Law § 76.10— attack on confession—theory not used at trial—not permitted

In a prosecution for second-degree murder where defendant objected to the admission of his statement to officers only on the basis of accuracy, he could not argue on appeal that the jury should have been instructed that the statement could only be used for impeachment or that the statement should not have been read to the jury after the State had argued that it could be used to refresh the officer's recollection.

2. Homicide § 21.9— involuntary manslaughter—evidence sufficient

In a prosecution for murder in which defendant was convicted of involuntary manslaughter, the court properly denied defendant's motion to set aside the verdict and for a new trial where the evidence showed that defendant, who had been drinking, pointed a fully loaded high powered rifle at David Whistine with the hammer cocked and the safety off; and that when Buddy Whistine

tried to push or pull the barrel of the rifle away from David, defendant jerked or "slung" the rifle out of Buddy's grasp, keeping the hammer fully cocked and safety off; and that defendant in so doing shot and killed Buddy Whistine.

3. Criminal Law §§ 102.5, 169— admission of evidence—no objection or similar evidence admitted without objection—control of cross-examination—no error

In a prosecution for murder resulting in an involuntary manslaughter conviction, there was no prejudicial error in a witness's reference to defendant's house as the "crime scene" where the reference was repeated later without objection, no prejudicial error in the prosecutor asking a witness if defendant had made a statement after he was advised of his rights when defendant did not object at trial, and no abuse of discretion in the court's control of the cross-examination of defendant.

Chief Judge HEDRICK dissenting.

APPEAL by defendant from *Lupton, Judge.* Judgment entered 9 December 1983 in Superior Court, CALDWELL County. Heard in the Court of Appeals 4 February 1985.

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

Wilson and Palmer by W. C. Palmer for defendant appellant.

COZORT, Judge.

Defendant was indicted for second-degree murder. The jury convicted him of involuntary manslaughter. The primary questions for our consideration are whether the trial court erred by allowing the State to introduce into evidence a statement made by the defendant during a custodial interrogation without instructing the jury that the statement was to be considered only for impeachment purposes, and whether the trial court erred by denying defendant's motion to set aside the guilty verdict on the ground that the verdict was contrary to the weight of the evidence. We find no error. The facts follow.

On the night of 17 June 1983 the defendant, defendant's wife, and David Whistine went to an establishment in Wilkesboro where the defendant and Whistine shot pool and drank beer. The three of them then went to a place called Country Boys near Lenoir where the defendant and Whistine continued drinking beer. Around midnight, as the three prepared to leave Country Boys, a scuffle occurred in the parking lot between the defendant and

Whistine. The defendant nicked Whistine on the back a few times with a knife, and Whistine hit the defendant in the chin with a set of brass knuckles. The defendant's wife then drove the defendant to his home a few miles away. A short time later, Whistine left Country Boys in a taxicab.

After the defendant returned home, he walked a short distance to the home of Johnny Tilson, who was David Whistine's brother-in-law and at whose house David had been staying, along with his brother, Buddy Whistine. The defendant went to the Tilson home armed with a high-powered rifle, and according to the State's evidence, threatened to kill David, who had not yet returned from Country Boys. As he walked away from the Tilson house back toward his house, the defendant fired one shot in the air. Buddy Whistine left the Tilson house and walked over to the defendant's house to talk to the defendant. There was no argument or confrontation between Buddy and the defendant.

When David Whistine arrived at the Tilson home, he had a disagreement with Johnny Tilson and his sister, Tilson's wife, about bringing liquor into the Tilson house. He left the Tilson house and walked the short distance to the defendant's home, carrying a bottle of liquor. When David reached the defendant's house, the altercation between the defendant and David began again, with David kicking at the defendant, and the two of them cursing at each other. The defendant went in the back door of his house, retrieved the rifle, came back and stood in or just outside the doorway with the screen door open, and pointed the gun at David. Buddy, who was standing on the carport next to the open door, grabbed the rifle by the barrel. The defendant jerked the rifle out of Buddy's grasp. Buddy grabbed the rifle barrel a second time. According to David Whistine's testimony, the defendant "slung" the rifle loose from Buddy's grasp and fired the rifle twice, with one of the shots striking and killing Buddy. The defendant testified that Buddy pulled the rifle barrel towards him and that the rifle accidentally discharged. He testified that he fired a second shot at David's feet and another shot over David's head. David started after the defendant, and the defendant hit David over the head with the rifle barrel. When law enforcement officers arrived to investigate the shooting, they found the rifle had been fully reloaded. The defendant gave a statement to a detective at the Sheriff's Department. A firearms and ballistics

expert testified that the rifle used by the defendant could not be fired unless the hammer was pulled all the way back and a safety catch at the base of the rifle was completely pushed down into a slot inside the rifle.

[1] The defendant's first argument on appeal concerns whether it was proper for the trial court to allow a witness for the State, one of the investigating officers, to read to the jury the complete transcript of the statement given by the defendant to that officer, without the trial court instructing the jury that the statement could be used only for the purpose of impeachment. The defendant also argues that it was error to allow the full transcript to be read to the jury by the witness when the State had argued at trial that the transcript could be used to refresh the officer's recollection of what the defendant told him. A close reading of the transcript of the trial below shows the defendant is entitled to no relief.

The defendant took the stand in his own defense, as well as offering other witnesses. He gave his version of the scuffle at Country Boys and the altercation at his house which resulted in Buddy Whistine's death. At the conclusion of the defendant's evidence, the State offered rebuttal evidence, including the testimony of Marshall Clontz, a Caldwell County Sheriff's Department detective who interviewed the defendant at 3:00 the morning Buddy Whistine was shot. The State offered Clontz's testimony concerning his interview with the defendant apparently to show that defendant's description at the trial of the events occurring on 18 June 1983 differed in several respects from statements he made to Clontz shortly after the shooting. When the defendant objected to the witness testifying about the defendant's statement, the jury was sent out and the following transpired:

> THE COURT: What is the basis for your objection, Mr. Palmer?
>
> MR. PALMER [DEFENDANT'S COUNSEL]: Well, if your Honor please, the District Attorney has asked him if he has made a statement and if it were transcribed. If he is going to use some transcription of it the State's got to show that the transcription is accurate.

MR. MCKINNEY [STATE'S ATTORNEY]: I am asking him what he told him. He can use anything he wants to to refresh his recollection.

MR. PALMER: That is not the only objection, your Honor. My client, according to the evidence so far, was under arrest at that time.

MR. MCKINNEY: It wouldn't make any difference if he was under arrest. He has already testified any statement he made can be used against him for impeachment purposes.

* * * *

THE COURT: Objection overruled. case of *U S Against Harris* held that statements of the defendant could be used for impeachment purposes after they testify. Let the jury come in.

After the jury returned, the following questions and answers were stated by the State's attorney and Officer Clontz, respectively:

Q. Officer Clontz, what was the first thing Mr. Greene said to you on the morning of June 18, 1983?

A. At approximately 3 A M Mr. Greene made the following statement: "I guess I am at fault. Did the boy die? I hate that, but there is no way I could help it. A man kicks your door down, what must you do?"

Q. Did you thereafter after you advised him of his rights make any other statements?

A. Yes, sir. I had asked him to sign the Departmental Waiver form. He said, "Let me sign this [*sic*]. Said, I should not have killed. I have never done anything like this before. I don't want to sign it now. Give me time."

Q. Did he proceed to make a statement after you advised him of his rights?

A. Yes; he did.

Officer Clontz then read the entire statement to the jury. The defendant did not make any objection during the witness's reading of the statement, nor did he request any instruction on

impeachment before, during, or after the reading of the statement. Furthermore, the defendant requested no instruction on impeachment during the jury instruction conference, and he requested no instruction on impeachment after the charge when the trial court again offered both counsel an opportunity for further instruction requests.

Defendant at trial first objected to the admission of the statement apparently on the basis of whether the statement was accurate. He then hints at questioning whether the statement was voluntary by referring to the defendant being under arrest at the time, but he did not object on those grounds. He did not pursue the objection on the ground of the accuracy of the statement, and he did not object or request a voir dire on the voluntariness of the statement. Thus, his only objection at trial is on whether the statement was accurate. Therefore, the questions he now raises on appeal are being raised for the first time.

In *State v. Ricks*, 308 N.C. 522, 302 S.E. 2d 770 (1983), the North Carolina Supreme Court held that a defendant cannot attack the admissibility of his confession in the appellate division upon a theory entirely different from that relied upon at trial. In that case Chief Justice Branch wrote: "At trial, defendant unequivocally testified on *voir dire* and on direct examination before the jury that he signed only a blank piece of paper and that he did not make any statement to the police admitting his involvement in the crime. . . . Defendant now argues for the first time on appeal that the confession was erroneously admitted because he did not have sufficient opportunity to execute a knowing and intelligent waiver. . . . We decline to consider this theory for the reasons stated in *State v. Hunter*, 305 N.C. 106, 286 S.E. 2d 535 (1982)." *Id.* at 528-29, 302 S.E. 2d at 773-74.

In *Hunter*, Chief Justice Branch wrote: "The theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions. . . . A defendant, represented by counsel, cannot sit silently by at trial and object to the admission of evidence for the first time on appeal. [Citation omitted.] [W]hen a confession is challenged on other grounds which are not clearly brought to the attention of the trial judge, a specific objection or explanation pointing out the reason for the objection or motion to suppress is necessary. [Citation

omitted.] In order to clarify any misunderstanding about the duty of counsel in these matters, we specifically hold that when there is an objection to the admission of a confession or a motion to suppress a confession, counsel must specifically state to the court before voir dire evidence is received the basis for his motion to suppress or for his objection to the admission of the evidence." *State v. Hunter, supra,* at 112, 286 S.E. 2d at 539.

In the case *sub judice*, we hold that the principles enunciated in *Ricks* and *Hunter* are controlling, and we therefore decline to consider the theories now advanced by defendant.

[2] The other primary question raised by defendant is whether his motion to set aside the verdict should have been allowed by the trial court. The proper motion for the defendant to have made at that stage of the criminal proceeding was either a motion to dismiss under G.S. 15A-1227(a)(3) or a motion for appropriate relief under G.S. 15A-1414(b)(2). Under either motion, the test is whether there is substantial evidence of each essential element of the offense charged or of a lesser offense included therein and of the defendant's being the perpetrator of the offense. The evidence is to be considered in the light most favorable to the State, with the State being entitled to every reasonable intendment and inference to be drawn therefrom, and the jury resolving contradictions and discrepancies in the evidence. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982).

The defendant was convicted of involuntary manslaughter. "The elements of involuntary manslaughter are: (1) unlawful killing of a human being, (2) without malice, (3) without premeditation and deliberation, and (4) without intention to kill or inflict serious bodily injury. [Citation omitted.] 'It seems that with few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon . . . and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter.' [Citation omitted.]" *State v. Best*, 59 N.C. App. 96, 97, 295 S.E. 2d 774, 775 (1982). Involuntary manslaughter is the " 'unintentional killing of a human being without either express or implied malice (1) by some unlawful act not amounting to a felony *or naturally dangerous to human life*, or (2) by an act or omission constituting culpable negligence.' "

State v. Wilkerson, 295 N.C. 559, 579, 247 S.E. 2d 905, 916 (1978), quoting the dissent in *State v. Wrenn*, 279 N.C. 676, 687, 185 S.E. 2d 129, 136 (1971).

If the killing of Buddy Whistine was purely accidental and was not caused by the criminally negligent actions of defendant, as defendant contends, then it was error for the trial court to deny the defendant's motion. After a careful review of the evidence, we hold that there was sufficient evidence of criminally negligent acts by the defendant resulting in the killing of Buddy Whistine and that the trial court correctly denied the defendant's motion to set aside the verdict and for a new trial. The State's evidence showed the defendant, who had been drinking, pointed a fully loaded, high-powered rifle, cocked and with the safety off, at David Whistine, and that when Buddy Whistine tried to push or pull the barrel of the rifle in a direction away from David, the defendant jerked or "slung" the rifle out of Buddy's grasp, keeping the hammer fully cocked and the safety off, and in so doing, shot and killed Buddy Whistine. This is sufficient evidence of criminal negligence in the defendant's handling of the loaded rifle which resulted in Buddy Whistine's death. This assignment of error is overruled.

[3] The defendant raises three other arguments on appeal. First, he contends that it was prejudicial error to allow a State's witness to invade the province of the jury by describing the defendant's residence as the "crime scene." Although the defendant objected to this reference to his residence as the "crime scene," he did not object to this same reference later in the trial. Assuming *arguendo* that the reference to "crime scene" was prejudicial, "[i]t is well recognized in this jurisdiction that the admission of incompetent evidence is cured when substantially the same evidence is . . . thereafter admitted without objection." *State v. Covington*, 290 N.C. 313, 339, 226 S.E. 2d 629, 647 (1976). Next, he argues that it was error for the prosecuting attorney to ask a witness if the defendant had made a statement after he was advised of his rights, when there was no other independent evidence that the defendant had been advised of his rights. Defendant did not object to this question at the trial below. These assignments of error are frivolous and are hereby dismissed.

Defendant lastly contends the trial court erred by allowing the State to question the defendant on cross-examination in a repetitive and argumentative manner. Our review of the record shows that the trial court sustained some of the defendant's counsel's objections to the State's questions. Defendant has failed to show that the trial court abused its discretion in controlling the cross-examination of the defendant. *See State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980). This assignment of error is overruled.

In defendant's trial and conviction, we find no error.

No error.

Judge JOHNSON concurs.

Chief Judge HEDRICK dissents.

Chief Judge HEDRICK dissenting.

I agree with the majority that there is sufficient evidence in the record to support the verdict finding defendant guilty of involuntary manslaughter, but because, in my opinion, defendant has been convicted of a crime with which he was not charged, I vote to arrest judgment. I realize that for many years in this State we have assumed that involuntary manslaughter is a lesser included offense of murder. I have been unable to discover any Supreme Court decision that has specifically held that involuntary manslaughter is a lesser included offense of murder, but the Court has approved on numerous occasions the submission of involuntary manslaughter as a possible verdict in cases wherein the defendants were charged with murder. In at least two cases, *State v. Boyd*, 61 N.C. App. 238, 300 S.E. 2d 578, *disc. rev. denied*, 308 N.C. 545, 304 S.E. 2d 238 (1983) and *State v. Hudson*, 54 N.C. App. 437, 283 S.E. 2d 561 (1981), this Court has specifically said that involuntary manslaughter is a lesser included offense of murder. In at least three other cases, *State v. Fournier*, 73 N.C. App. 465, 326 S.E. 2d 84 (1985), *State v. Mercado*, 72 N.C. App. 521, 325 S.E. 2d 313 (1985), and *State v. Cason*, 51 N.C. App. 144, 275 S.E. 2d 221 (1981), this Court has said that involuntary manslaughter is *not* a lesser included offense of murder, but

in no case has this Court or the Supreme Court applied such a rule.

In *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982), the Supreme Court held that taking indecent liberties with a child under the age of sixteen is not a lesser included offense of first degree rape of a child of the age of twelve or less. In so holding, Justice Carlton elaborated on just how we must determine whether one crime is a lesser included offense of another crime:

> It might be argued that *under certain factual circumstances* taking indecent liberties with a child is a lesser included offense of first-degree rape. . . .
>
> We do not agree with the proposition that the *facts* of a particular case should determine whether one crime is a lesser included offense of another. Rather, the *definitions* accorded the crimes determine whether one offense is a lesser included offense of another crime. *State v. Banks*, 295 N.C. 399, 415-16, 245 S.E. 2d 743, 754 (1978). In other words, all of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a *definitional*, not a factual basis.

Id. at 635, 295 S.E. 2d at 378-79 (emphasis original). Since *Weaver*, the Supreme Court has repeatedly applied the definitional test in determining whether one offense is a lesser included offense of another. *See, e.g., State v. Warren*, 309 N.C. 224, 306 S.E. 2d 446 (1983); *State v. Freeman*, 308 N.C. 502, 302 S.E. 2d 779 (1983). *See also State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983); *State v. Bates*, 70 N.C. App. 477, 319 S.E. 2d 683 (1984).

Applying the definitional rule set out in *Weaver* to the question whether involuntary manslaughter is a lesser included offense of murder requires that we first define the two crimes. Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Payne*, 213 N.C. 719, 197 S.E. 573 (1938); *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983). Involuntary manslaughter is "the unintentional killing of a human being without either express or

implied malice (1) by some unlawful act not amounting to a felony or naturally dangerous to human life, or (2) by an act or omission constituting culpable negligence." *State v. Watson*, 310 N.C. 384, 398, 312 S.E. 2d 448, 457 (1984). *See also State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). It is readily apparent that the definition of involuntary manslaughter contains an element not present in the definition of murder: the commission of some unlawful or culpably negligent act. Consequently, the crime of involuntary manslaughter is not a lesser included offense of murder.

I recognize that I suggest a radical departure from a well-established practice, but I do nothing more than follow the rule set out in *Weaver*. The effects of the holding herein suggested can only be salutary. I perceive few if any harmful results.

STATE OF NORTH CAROLINA v. BETTY LOU EVANS

No. 847SC812

(Filed 2 April 1985)

Parent and Child § 2.2; Homicide § 21.9— death of child—involuntary manslaughter—sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of involuntary manslaughter of a two-year-old child where it tended to show that the child had been left in the custody of defendant and her husband some four days prior to her death; the child had no bruises or scratches at that time; the child was seen approximately five hours before her death by a witness who testified that the child looked fine and was walking normally; defendant had exclusive custody of the child during the five hours prior to her death; examination of the child revealed numerous recent bruises and scratches probably received within twelve hours of death; an autopsy indicated a subdural hematoma, or bleeding inside the child's skull, probably caused by violent shaking; and the hematoma was a significant cause of death.

Judge BECTON dissenting.

APPEAL by defendant from *Allsbrook, Judge.* Judgment entered 7 March 1984 in NASH County Superior Court. Heard in the Court of Appeals 8 March 1985.

Defendant was indicted for involuntary manslaughter in the death of a two year old child. The state's evidence tended to show

the following: the child's mother left the child with defendant and her husband while away on a week-long trip. Defendant had cared for the child on numerous prior occasions. The child had no bruises or scratches when placed in defendant's care on 6 August 1983. Another witness saw the child on the morning of 10 August 1983 when defendant dropped her husband off at work; the child appeared fine and was walking normally, and the witness noticed no injuries. Defendant brought the child to the hospital about five hours later, after the baby stopped breathing. Defendant told police at the hospital that the child beat its head against the crib through the previous night. She stated that she noticed something was wrong when the child woke up briefly after an afternoon nap. Defendant also stated that no one else had had access to the child during the day. Examination of the child revealed numerous recent bruises and scratches, probably received within twelve hours of death. The state presented one medical expert, a pathologist. His autopsy indicated a subdural hematoma, or bleeding inside the child's skull, probably caused by violent shaking. The hematoma was a significant cause of death.

Defendant presented no evidence directly. Her evidence on cross-examination tended to show that her relationship with the child was very loving, and that she and her husband had offered to adopt the child. In addition, the child was suffering at the time of death from severe malnutrition of a longstanding nature, as well as being severely dehydrated, although the dehydration could have occurred within periods of as little as twelve hours. Dehydration alone might have been fatal, but the pathologist had no prior body weight from which to compute percentage loss of body fluid and therefore could express no opinion as to the actual threat. The pathologist could not isolate any single factor, including the hematoma, as the cause of death.

The jury returned a verdict of guilty, and defendant received the presumptive sentence. Defendant appealed.

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

Henson, Fuerst & Willey, P.A., by Ralph G. Willey, III, for defendant.

WELLS, Judge.

Defendant argues only one assignment of error, challenging the denial of her motions to dismiss the charges against her. She argues several questions under the one assignment.

The evidentiary principles governing motions to dismiss are set out at length in *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). Briefly summarized, they are that the evidence must be considered in the light most favorable to the state, with the benefit of all permissible favorable inferences. If the trial judge finds substantial evidence, regardless of weight, of each essential element of the crime, and that defendant committed it, the motion should be denied. Defendant's evidence, unless favorable to the state, is not considered.

Defendant argues that the state, having introduced uncontradicted evidence of her exculpatory statement that the child had beat her head on the crib, was bound by it. The state would only be bound by such a statement, however, if it could produce no other evidence tending to throw a different light on the death. *State v. Wooten*, 295 N.C. 378, 245 S.E. 2d 699 (1978); *State v. Bright*, 237 N.C. 475, 75 S.E. 2d 407 (1953). The state need not produce any single circumstance flatly contradicting the defendant, but may contradict the exculpatory statement using the totality of the circumstances adduced. *State v. Wooten, supra.* The nature of this type of case, in which the victim, even if he or she survives the assault, likely cannot testify thereto, renders such a rule practical and necessary. *See State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). *See also Marshall v. State*, 646 P. 2d 795 (Wyo. 1982) ("only one can talk"). There was ample circumstantial evidence establishing some assaultive behavior, and expert opinion testimony that the fatal injuries were not self-inflicted. This sufficed to contradict defendant's statement.

Along the same lines, defendant argues that her motion should have been granted, since the evidence establishes other equally credible theories of the cause of death. This argument simply restates a no longer valid premise, that circumstantial evidence must exclude every reasonable hypothesis other than guilt to go to the jury. Whatever conflict in authority remained on this issue was settled in *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981). To the extent that *State v. Langlois*, 258 N.C. 491,

128 S.E. 2d 803 (1963) relied on the questioned premise, it appears to have been overruled by *Jones*. *See State v. Smith, supra* (questioning *Langlois*). We also note that *Langlois* antedated our current child abuse laws and judicial recognition of the "battered child" problem. *See* N.C. Gen. Stat. § 14-318.2 (1981); *State v. Fredell*, 283 N.C. 242, 195 S.E. 2d 300 (1973); M. Thomas, *Child Abuse and Neglect Part II: Historical Overview, Legal Matrix and Social Perspectives on North Carolina*, 54 N.C.L. Rev. 743, 767-74 (1976). The only sort of modern case we have found calling for application of a rule that the state exclude all reasonable hypotheses inconsistent with guilt is one where the state presents no evidence that the accused was present at the scene of the crime. *See State v. Morton*, 230 Kan. 525, 638 P. 2d 928 (1982). Such was not the case here. The evidence showed that defendant had observed the victim through the previous night and had exclusive custody of the victim during the five-hour period following her last appearance as a healthy child, and that the fatal injuries were very recent, inflicted within the last twelve hours. This sufficed to take the case to the jury.

Even if we accept *Langlois* as authoritative we conclude that it is distinguishable on its facts. There the victim died as a result of a single hard blow administered some 24 to 48 hours prior to death. The evidence linking defendant to the act consisted only of a general pattern of punishment. Exclusive control of the infant was not established. Here, on the other hand, the state's evidence showed a fatal combination of recent injuries administered while the victim was in defendant's custody, including exclusive custody in the five hours before death. The child had been seen beforehand by someone who was familiar with her and who testified that she looked fine and was walking normally. *Langlois* does not control.

Our adherence to *Jones* also means we reject defendant's contention that the state had to exclude the possibility that death may have resulted from the infant's long-term weakened condition. It is well established that a preexisting physical condition, but for which the allegedly criminal conduct would not have been fatal, does not excuse criminal responsibility. *State v. Luther*, 285 N.C. 570, 206 S.E. 2d 238 (1974) (heart attack brought on by assault); *see also State v. Atkinson*, 298 N.C. 673, 259 S.E. 2d 858 (1979) (victim a "walking bombshell"); *State v. Alford Jones*, 290

N.C. 292, 225 S.E. 2d 549 (1976) (intervening negligence in treatment no excuse). This rule is particularly apposite in cases like the present one, where the accused has some control of the physical well-being of the decedent.

Finally, defendant attacks the evidence causally connecting the child's injuries and death. The pathologist testified positively for the state that the child's numerous injuries were not self-inflicted, that the child would not have died but for them, and that the subdural hematoma was a significant cause of death. He testified that the hematoma could have been caused by violent shaking causing tearing of the blood vessels between the dura and the brain, adding that death could result either from swelling of the brain or from rapid trauma to the brain from alteration of the blood supply. This testimony was properly admitted. *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). It sufficed to take the state's case on causation to the jury. *State v. Earnhardt, supra.* The fact that the pathologist could not definitely identify the hematoma as the cause of death does not negate his testimony. *State v. Luther, supra.* Nor does the pathologist's inability to describe exactly the attack that produced the hematoma negate his testimony. *State v. Lane*, 39 N.C. App. 33, 249 S.E. 2d 449 (1978) (similar facts; pathologist testified shaking "could" cause hemorrhage, but could not exclude other possibilities). These aspects of the expert testimony went to the weight of the testimony, not to its sufficiency. *State v. Reynolds*, 307 N.C. 184, 297 S.E. 2d 532 (1982). Defendant's reliance on the lack of edema, or swelling, of the brain focuses inordinately on one isolated part of the pathologist's testimony, ignoring his opinion that the probable cause of death was a combination of intentional injuries culminating in a rapid trauma to the brain induced by violent shaking.

We conclude that the motion to dismiss was correctly denied. Our review of recent cases in North Carolina and other states lends support. As noted above, we have already affirmed one conviction on similar evidence. *State v. Lane, supra.* We have also affirmed a conviction on similar medical evidence ("could cause" hemorrhage) coupled with admission of beatings. *State v. Vega*, 40 N.C. App. 326, 253 S.E. 2d 94, *disc. rev. denied and appeal dismissed*, 297 N.C. 457, 256 S.E. 2d 809, *cert. denied*, 444 U.S. 968 (1979). The decision of our supreme court in *State v. Byrd*, 309

N.C. 132, 305 S.E. 2d 724 (1983), reversing a similar conviction, is distinguishable: there the state relied on evidence that *another* child was abused, questions of access to the child were unclear, and the examining pathologist concluded death resulted from natural causes.

Decisions of other states reflect a general rule that it is not necessary to prove exactly which blow is fatal as long as the prosecution establishes (1) a pattern of violent behavior towards the child, or exclusive control, (2) a pattern of non-accidental injuries, and (3) probability of death from such injuries. *See State v. Vega, supra; State v. Lane, supra; State v. Austin*, 84 S.Dak. 405, 172 N.W. 2d 284 (1969); *State v. Morton, supra; Fiorot v. State*, 641 P. 2d 551 (Okl. Crim.), *cert. denied*, 456 U.S. 1011 (1982); *State v. Abram*, 537 S.W. 2d 408 (Mo. 1976); *State v. Felo*, 454 So. 2d 1150 (La. App. 1984); *State v. Durand*, 465 A. 2d 762 (R.I. 1983); *Bean v. State*, 460 N.E. 2d 936 (Ind. 1984). This case fits this general rule. And the theory of cause of death here, violent shaking, resulting in subdural hematoma, has been accepted as legally sufficient in other cases. *State v. Lane, supra; State v. Austin, supra; see also State v. Durand, supra* (no direct evidence of cause of hematoma; substantial evidence negated accident, conclusion that sole custodian inflicted injury "flows logically from the totality of the circumstances").

Defendant's motions to dismiss were properly denied. We conclude that she received a fair trial, free of prejudicial error.

No error.

Judge WHICHARD concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

In this death of a two-year-old child case, believing that the State failed to establish "(1) a pattern of violent behavior towards the child or exclusive control, (2) a pattern of non-accidental injuries, and (3) probability of death from such injuries," ante p. 7, I dissent.

First, and summarily, I find the evidence of "causation" close, but insufficient to take the case to the jury. The majority relies

on *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982), *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978), and *State v. Lane*, 39 N.C. App. 33, 249 S.E. 2d 449 (1978); however, I find those cases inapposite.

My second, and more substantial, reservation about the majority's result involves what I believe to be a flawed premise by the majority—"The evidence showed that defendant had observed the victim through the previous night and had exclusive custody of the victim during the five-hour period following her last appearance as a healthy child, . . . [and that] the state's evidence showed a fatal combination of recent injuries administered while the victim was in defendant's custody, including exclusive custody in the five hours before death." Ante pp. 4-5. Assuming, *arguendo*, that the child was seen by State's witness Edel Elsayed on 10 August 1983,[1] five hours before her death,

1. The assumption is made because on nonsuit the evidence must be taken in the light most favorable to the State. The witness, Elsayed, was equivocal, however, as is evidenced by excerpts from his testimony:

Q. All right; how many times before had you seen that little girl?

A. Once in a while, a week, you know, like, not every week, once in awhile week, you know, she kept her like babysitter, you know.

Q. So, you'd seen the child several times before?

A. Uh huh.

Q. Are you sure that you saw this child . . . prior to August 10th, when had you last seen this child?

A. That's last time I saw her.

Q. How are you able to remember that you saw this child particularly on August 10, 1983?

A. I saw her, you know, she's fine, she's walking with her, you know.

Q. Was there anything unusual about that particular day to you?

A. No, because I see, you know like somebody coming and going I watch, that's my job, collecting rent. If somebody come [sic] in office [sic] something like that, you know.

Q. Are you sure about the date?

A. The date.

Q. That you saw this child?

A. Same date.

Q. Are you sure it was not Wednesday August 3rd rather than the 10th that you saw this child?

Elsayed's testimony does not aid the State measurably. Even conceding the majority's point that "[t]he child had been seen beforehand by [Elsayed] who was familiar with her and who testified that she looked fine and was walking normally," ante p. 5, Elsayed, himself, testified that the child was clothed when he saw her and was holding the defendant's hand as she walked. An excerpt from the actual direct examination of Elsayed follows:

> Q. Can you describe the appearance of the little girl that morning, what did she look like?
>
> A. She's fine, she walk with her hand, you know.
>
> Q. Excuse me?
>
> A. She catch his hand, she walk with him.
>
> Q. Speak louder so we can hear you.
>
> A. She walk, she was walk [sic] with him, you know.
>
> Q. And, held someone's hand?
>
> A. Yeah.
>
> Q. Whose hand was she holding?
>
> A. Betty.

A. Wednesday in the morning, about nine thirty, ten o'clock.

Q. You remember it was on a Wednesday?

A. I believe.

Q. You believe?

A. (No response.)

Q. Are you sure whether or not it was a Wednesday?

A. I'm not sure about the date, you know, but I, you know, some man keep [sic] coming and ask me, you know, some officer. I forgot his name, police officer, detective or whatever.

Q. But, you're not sure of the date?

A. I'm not sure, you know, about the date. I remember about the day, whatever, you know, Wednesday, or Thursday, whatever, you know.

Q. But, you're not sure about the date at all?

A. No, I'm not sure about the, I [sic] have to go look at a calendar and read you for that day.

Q. And, you'd seen the child several other times as well?

A. Uh huh.

Q. This lady over here (indicating)?

A. Uh huh.

Q. Betty Evans?

A. Uh huh.

Q. How was the little girl acting?

A. Okay, she catch her hand and she walk with her, that's it.

Q. Did she have any injuries?

A. What you mean injuries?

MR. WILLEY: OBJECTION.

COURT: OVER-RULED.

Q. Did you see any marks—

A. Mark?

Q. —on the baby, on the little girl?

A. She had on clothes, I can't see.

Q. Did you see her face?

A. Yeah, face was fine.

Q. Was anything wrong with her face?

A. Uh uh.

Q. I'll hand you what's been marked for identification as State's Exhibit #1—

A. Uh huh.

Q. —can you tell us what that is?

A. It's a girl but I know, you know, because she come and go, you know, I can, like, you know, it's regular, like somebody coming in and going and looking just coming here and she left.

Q. Is that the same little girl you saw that morning—

A. Uh huh.

Q. —with Betty Evans.

MR. WILLEY: OBJECTION, Your Honor.

A. Uh huh.

COURT: OVER-RULED.

Q. It is?

A. Uh huh.

MR. SYKES: Thank you, that's all the questions I have.

Nothing about this testimony convinces me that the State has carried its burden. This is still a "who done it" case. Did the defendant's husband or some other person cause the subdural hematoma by violently shaking the child *before* she was seen by Elsayed? I find no evidence in the record that the child would have died immediately after having been shaken, or would not have been able to walk while holding someone's hand after having been violently shaken. Significantly, the State's expert witness, Dr. Levy, testified not that the injuries were inflicted within five hours of the child's death, but rather, within twelve hours. In responding to the district attorney's question about the age of the injuries, including the subdural hematoma, suffered by the child, Dr. Levy testified: "I formed the opinion that because of the things that I saw microscopically, that they all happened in a very short period of time prior to death, probably in the order of less than twelve hours. Being more specific is very difficult, almost impossible." Consequently, based on the above, and considering that the defendant did not admit shaking the child as was the case in *State v. Lane*, a case relied on by the majority, I believe defendant's motion to dismiss should have been allowed. I therefore vote to reverse.

STATE OF NORTH CAROLINA v. WALTER LEON CARRINGTON

No. 8414SC427

(Filed 2 April 1985)

1. Automobiles and Other Vehicles § 131.1 – leaving scene of accident – testimony that piece of chrome matched defendant's damaged car – admissible

In a prosecution for driving while his license was permanently revoked and for failing to give required information after an accident involving property damage, there was no error in admitting an officer's testimony that a piece of plastic chrome fit a damaged portion of defendant's car headlight rim "like a puzzle." The officer's testimony was based on his personal knowledge and concerned circumstances he had actually observed, the expression "fit like a puz-

zle" was merely a shorthand statement of fact rather than an expression of opinion, and the jury was free to come to their own conclusion.

2. Automobiles and Other Vehicles §§ 3.4, 131.1— driving with revoked license—leaving scene of accident—evidence sufficient

In a prosecution for leaving the scene of an accident and driving with a revoked license, defendant's motions to dismiss for insufficient evidence were properly denied where a man who had known defendant since 1968 testified that he saw defendant driving a silver and burgundy Chevrolet away from the site of a collision with the witness's car, that defendant did not stop to leave the required information, and that defendant gave the witness $800 to pay for the damage to his car and to persuade him not to report the accident to defendant's insurance company; an officer testified that the Chevrolet was registered to defendant and his wife, that part of defendant's damaged car was found near the other car, and that defendant's driving record showed that his license had been revoked; and defendant admitted that his license had been permanently revoked. G.S. 20-166(b), G.S. 20-28(b).

3. Criminal Law § 117.5— limiting instruction on prior convictions—failure to list all prior convictions

Defendant could not successfully argue on appeal that the trial court erred when it failed to list all of his prior convictions when instructing the jury that defendant's testimony about his prior convictions could only be used to judge his truthfulness because the court had done precisely what defendant's counsel requested. Moreover, the omitted offenses and the two offenses instructed on were all traffic offenses; thus, the category encompassing all of defendant's prior convictions was dealt with as required in the trial court's instructions to the jury.

4. Criminal Law § 111.1— instructions on driving without license and leaving scene of accident—no error

In a prosecution for driving with a revoked license and not leaving the required information at the scene of an accident, the court did not err by instructing the jury that a 1977 Chevrolet is a motor vehicle and that Lancaster Street in Durham is a public highway. The court's statements were merely statements of fact which could have been judicially noticed; moreover, defendant did not object to this portion of the instruction at trial.

APPEAL by defendant from *Hobgood (Robert H.), Judge.* Judgment entered 2 December 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 16 January 1985.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General Jo Anne Sanford for the State.

William G. Goldston for defendant appellant.

COZORT, Judge.

The jury convicted Walter Leon Carrington of driving while his driver's license was permanently revoked and failing to give required information after an accident or collision involving property damage. The defendant's assignments of error on appeal concern the admission of evidence, the denial of his motions to dismiss, jury instructions, and an alleged improper expression of opinion by the trial judge. Having reviewed the defendant's contentions, we hold that the defendant's trial was free of prejudicial error. The facts follow.

On 31 March 1983, at approximately 9:40 p.m., Thomas Leroy Williams, Jr., was at his home on Lancaster Street when he heard what sounded like a car hitting another car. Williams rushed to his front door and saw the defendant in a silver and burgundy Chevrolet making a U-turn at an intersection about twenty feet away. Williams followed the car down the street, but turned back toward his home when he lost sight of the automobile. Upon his return home, he then saw the silver and burgundy Chevrolet parked on Lancaster Street. Williams went into a house on Lancaster Street where people gather to socialize and found the defendant. Williams called Officer Ervin Roberts. At trial, Williams stated that his car had been damaged in the amount of $1,100.00. He also testified that he found a piece of plastic chrome lying by his left rear wheel and that Officer Roberts took it as evidence.

Officer Roberts of the Durham Public Safety testified that he responded to the call on 31 March 1983 concerning the hit and run collision on Lancaster Street. Officer Roberts met Williams at the scene and obtained from Williams the license number of the silver and burgundy car Williams had seen. He later determined that the car was registered to the defendant and his wife, Lois Carrington. Officer Roberts also testified that Williams gave him a piece of plastic chrome and that when he applied the piece of chrome to the right front quarter of the silver and burgundy car where a piece of chrome was missing, "it fit like a puzzle." Officer Roberts further stated that the defendant's license had been permanently revoked in 1981 according to the certified copy of the defendant's driving record admitted into evidence.

The defendant admitted at trial that his license had been revoked but stated that he did not drive his car at any time. The defendant testified that on the evening of 31 March 1983 he rode with his wife to a friend's house, then walked to the house where he was found on Lancaster Street and remained there until he was arrested by Officer Roberts.

[1] On appeal, the defendant first contests the admission of Officer Roberts' testimony regarding the results of what the defendant terms as a "test or experiment" conducted on the defendant's car with the piece of plastic chrome. Officer Roberts testified that he took a piece of plastic chrome that Williams had found beside his car, attempted to match it to a damaged portion of the defendant's car headlight rim, and found that the two edges "fit like a puzzle." The defendant contends that this testimony was improperly admitted opinion evidence because Roberts had never been qualified as an expert in the field of physics or metallurgy.

We disagree that Roberts' testimony constituted opinion evidence which required, in order to be admitted, that he be better qualified than the jury to draw inferences from the facts. *State v. Siler*, 66 N.C. App. 165, 311 S.E. 2d 23, *modified on other grounds and affirmed*, 310 N.C. 731, 314 S.E. 2d 547 (1984). In the first place, Roberts' testimony was based on his personal knowledge and concerned circumstances he had actually observed. Thus, it was not improper for Officer Roberts to testify that the broken edge of the piece of chrome matched the broken edge of the rim of the defendant's car headlight. Roberts' further explanation that the chrome "fit like a puzzle" was merely a shorthand statement of the facts rather than an expression of an opinion. *See State v. Miller*, 302 N.C. 572, 276 S.E. 2d 417 (1981). The jury was still free to come to their own conclusion as to whether they believed the chrome came from the defendant's car headlight and whether it was broken off during the collision with Williams' car. We hold that Roberts' testimony was properly admitted.

[2] As his second assignment of error, the defendant asserts that the trial court erred in denying his motions to dismiss at the close of the State's evidence and at the close of all the evidence.

In ruling on a motion to dismiss for insufficient evidence, the trial judge must view the evidence in the light most favorable to the State and determine whether the State has presented sub-

stantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conviction. *State v. Brown*, 310 N.C. 563, 566, 313 S.E. 2d 585, 587 (1984).

The defendant was charged with violations of G.S. 20-166(b) and G.S. 20-28(b) on 31 March 1983. These statutes were later amended, effective 1 October 1983. G.S. 20-166(b), as it read at the time the defendant was charged, in substance required that the driver of a vehicle involved in an accident or collision resulting in property damage alone immediately stop his vehicle at the scene of the collision and give his name, address, and other pertinent information to the owner of the damaged property. If the damaged property is a parked and unattended vehicle, the responsible driver under G.S. 20-166(b) must furnish this information to the nearest available peace officer or leave a paper writing containing the required information in a conspicuous place on the damaged vehicle and later contact the owner as provided under G.S. 20-166.1(c).

To obtain a conviction under G.S. 20-28(b) at the time the defendant was charged and presently, the State must 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." *State v. Atwood*, 290 N.C. 266, 271, 225 S.E. 2d 543, 545 (1976).

In the present case, the State offered the testimony of Thomas Leroy Williams, Jr., who stated that he saw the defendant, whom he had known since 1968, on the night in question driving a silver and burgundy Chevrolet away from the site of the collision with his car. The defendant did not stop his car to attempt to leave the required information with Williams or on the damaged car. Williams further testified that the defendant gave him $800.00 to pay for the damage to his car and to persuade him not to report the accident to the defendant's insurance company.

The State also offered the testimony of Officer Roberts to show that the silver and burgundy Chevrolet was registered to the defendant and his wife and that part of the defendant's damaged car was found near Williams' car. Officer Roberts also testified that according to the defendant's driving record his

license had been revoked. The defendant later admitted that his license had been permanently revoked.

We hold that the evidence presented by the State constituted substantial evidence from which a reasonable mind might accept as adequate to support a conviction of failing to give required information after an accident or collision involving property damage in violation of G.S. 20-166(b) and driving a motor vehicle on a public highway while his driver's license was permanently revoked in violation of G.S. 20-28(b).

[3] Thirdly, the defendant contends in his brief that the trial court erred when it failed to list or name all of the defendant's prior convictions when it instructed the jury that the defendant's testimony about his prior convictions could be used only as a means to judge the defendant's truthfulness. Citing *State v. Wallace*, 54 N.C. App. 278, 283 S.E. 2d 404 (1981), the defendant argues that it was error for the trial judge to give the "truthfulness only" instruction with regard to the convictions of driving under the influence, second offense, and driving while his license was revoked, elicited from the defendant on cross-examination, while the trial court gave no instruction whatsoever on fourteen other traffic convictions listed on the defendant's driving record which had been admitted into evidence and circulated among the jurors for the purpose of showing that the defendant's license was in a state of revocation on 31 March 1983.

Our review of the transcript in this case reveals that contrary to the defendant's current argument, the trial court did precisely what the defendant's counsel requested at trial. After the State's request for an instruction listing all of the convictions that were admitted into evidence, defense counsel, attempting to ease the trial court's fear of reversal on the basis of *Wallace*, stated:

> Well, let's be on the safe side, if Your Honor please. I would like to be upon record that, even though the jury has seen [his driving record], I don't think as a matter of instructions to the jury . . . that anything other than the fact that his license, and we admitted, was in a state of permanent revocation . . . should be included . . . .

Defense counsel's overall reasoning was based on the fact that the State had not cross-examined the defendant on all of the convictions contained in his driving record. The trial court thereafter sustained the defendant's objection and agreed to instruct *only* with respect to the two prior convictions brought out and discussed on cross-examination.

The trial court then asked whether there were any other requests for instructions. After the State requested an instruction on circumstantial evidence, the trial court again asked whether there were any other requests for instructions. Defendant's counsel replied: "None, your Honor." At the completion of the charge, the trial court sent the jury out to select a foreman and then inquired of both counsel: "[A]re there any objections, corrections, or additions to the Charge?" After the State replied that it had none, defendant's counsel stated: "Nor from the defendant, if Your Honor, please." The defendant made no further objection or request. We therefore hold that the defendant cannot now successfully argue on appeal that the trial court committed reversible error when it honored the defendant's request to omit any reference in the charge to the other fourteen offenses contained within the defendant's driving record.

We note that in any event the principle set forth in *Wallace* has not been violated in this case. *Wallace* requires that if the trial court chooses to mention any prior conviction, it must, at least, "state every category of prior convictions supported by the evidence so that the jury will know that the limiting instruction applies to all the prior convictions contained in the record." *Id.* at 283, 283 S.E. 2d at 408. In the case *sub judice*, the two offenses mentioned in the trial court's instructions to the jury were traffic offenses: driving under the influence and driving while license revoked. The convictions contained in the defendant's driving record were also traffic offenses. Thus, the category encompassing all of the defendant's prior convictions was dealt with as required in the trial court's instructions to the jury.

[4] As his final assignment of error, the defendant asserts that the trial court improperly expressed his opinion to the jury regarding whether the State had met its burden of proof on two elements of the crime of driving while license revoked. The trial judge instructed the jury as follows:

Now, I charge that for you to find the defendant guilty of driving a motor vehicle on a public highway while his driver's license was permanently revoked, the State must prove three things beyond a reasonable doubt:

First, that the defendant drove a motor vehicle. *A 1977 Chevrolet is a motor vehicle.*

Second, that he drove the motor vehicle on a public highway. *Lancaster Street in Durham is a public highway;* and . . . . (Emphasis added.)

The defendant contends that the trial judge committed prejudicial error when he stated that a 1977 Chevrolet is a motor vehicle and that Lancaster Street is a public highway. Again, the defendant did not object to this portion of the instruction at trial. In any event, we hold that the trial court's statements did not constitute an improper expression of an opinion, but were merely statements of fact which could have been judicially noticed, which would have alleviated the State's burden of producing evidence to establish these facts. *See generally, State v. Painter*, 261 N.C. 332, 134 S.E. 2d 638 (1964); *State v. Davis*, 20 N.C. App. 252, 201 S.E. 2d 198 (1973). As stated in *State v. Vick*, 213 N.C. 235, 238, 195 S.E. 779, 781 (1938), "justice does not require that courts profess to be more ignorant than the rest of mankind." This assignment of error is overruled.

For the reasons stated above, we hold the defendant's trial was free of prejudicial error.

No error.

Judges WEBB and EAGLES concur.

DOK YOUNG KIM v. PROFESSIONAL BUSINESS BROKERS LIMITED, SUSAN P. KRENACH, AND KISHORE K. ACHARYA

No. 8421SC522

(Filed 2 April 1985)

1. **Bills and Notes § 19— counterclaim on note—failure to submit—fraud by defendants**

In an action to recover damages for fraud and unfair or deceptive trade practices in the sale of a motel, the trial court did not err in failing to submit issues to the jury on defendants' counterclaims on promissory notes given by plaintiff to defendants where the jury found that all defendants had engaged in fraud, since defendants were thus not entitled to recover on the notes. G.S. 25-3-305(a)(c); G.S. 25-3-306(b).

2. **Torts § 3.1— indemnity—all defendants in pari delicto**

The trial court did not err in failing to submit an issue on a cross-claim by two defendants against a third defendant for indemnity where the evidence showed and the jury found that all defendants were in *pari delicto.*

3. **Brokers and Factors § 4— fiduciary duty to client**

A broker representing a purchaser or seller in the purchase or sale of property owes a fiduciary duty to its client based upon the agency relationship itself.

4. **Trial § 40— one damages issue as to all parties—absence of objection**

Defendants cannot complain on appeal that the trial court erred in submitting only one issue as to damages for all defendants where defendants failed to object at trial, App. Rule 10(b)(2), and defendants' counsel recommended to the court that only one damage issue be submitted to the jury.

5. **Unfair Competition § 1— fraud in sale of motel—unfair trade practice affecting commerce—treble damages**

Fraud by defendant brokers and defendant owner in the sale of a motel constituted an unfair or deceptive act in or affecting commerce within the purview of G.S. 75-1.1, and the trial court should have awarded plaintiff treble damages under G.S. 75-16 for such fraud.

6. **Unfair Competition § 1— unfair trade practice—attorney fees**

Where there is a reasonable possibility that the trial court refused to award plaintiff treble damages and attorney fees because it erroneously believed that defendants' fraud in the sale of a motel did not constitute an unfair or deceptive trade practice in or affecting commerce, the cause must be remanded for the trial court to determine, in its discretion, whether to award attorney fees to plaintiff.

APPEAL by plaintiff and defendants from *Cornelius, Judge.* Judgment entered 2 September 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 11 January 1985.

Plaintiff instituted this action seeking damages arising out of the alleged fraud and unfair or deceptive trade practices engaged in by defendants concerning plaintiff's purchase of a motel in Pageland, South Carolina. Defendant Kishore K. Acharya, the owner of the motel, sold the motel to plaintiff. Defendant Professional Business Brokers Limited (hereinafter Probus) acted both as defendant Acharya's selling agent and as plaintiff's purchasing agent. Defendant Susan Krenach, an employee of defendant Probus, acted as plaintiff's individual purchasing agent. Defendants Probus and Krenach filed a joint answer in which they denied the material allegations of the complaint and asserted a counterclaim for the amount due on a promissory note executed by plaintiff in favor of defendant Probus. They also cross claimed against defendant Acharya seeking indemnity from defendant Acharya in the event they were held liable. Defendant Acharya also counterclaimed for the amount due on a promissory note executed by plaintiff in favor of him.

At the conclusion of trial, the jury answered the issues submitted to it by the court as follows:

> 1. Did the defendants, Professional Business Brokers, Ltd. and Susan P. Krenach, make a false representation of a material fact, with knowledge of its falsity or make it recklessly without any knowledge of its truth or falsity with intent that it would be acted upon by plaintiff, Dok Young Kim and did the plaintiff reasonably rely upon the representation and suffer damages by her reliance upon the misrepresentation?
>
> ANSWER: Yes
>
> 2. At the time the plaintiff, Dok Young Kim, leased with option to purchase the Pageland Motel, did a relationship of trust and confidence exist between the plaintiff and the defendant, Susan P. Krenach?
>
> ANSWER: Yes
>
> 3. Was the lease with option to purchase the Pageland Motel by the plaintiff, Dok Young Kim, an open, fair and honest transaction?
>
> ANSWER: No

4. Did the defendant Kishore K. Acharya make a false representation of a material fact with knowledge of its falsity or make it recklessly without any knowledge of its truth or falsity with intent that it would be acted upon by the plaintiff, Dok Young Kim, and did the plaintiff reasonably rely upon the representation and suffer damages by her reliance upon the misrepresentation?

ANSWER: Yes

5. What amount of actual damages, if any, is the plaintiff, Dok Young Kim entitled to recover from the defendants, Professional Business Brokers, Ltd., Susan P. Krenach and Kishore K. Acharya?

ANSWER: $39,000 with the recommendation that the note for $2,694.00 to Probus (Professional Business Brokers, Ltd.) be paid by Kishore K. Acharya.

Upon the return of the jury's verdict and the denial of their post trial motions, defendants gave notice of appeal. Plaintiff also gave notice of appeal from the denial of her motion for treble damages made pursuant to G.S. 75-16.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and William McBlief, for plaintiff.

Crumpler & Hedgpeth, by Thomas T. Crumpler and James C. Eubanks, for defendants Professional Business Brokers Limited and Susan P. Krenach.

Sparrow & Bedsworth, by W. Warren Sparrow and George A. Bedsworth, for defendant Kishore K. Acharya.

JOHNSON, Judge.

DEFENDANTS' APPEAL

[1] Defendants all contend that the court erred in failing to submit issues to the jury on their counterclaims on the notes. These contentions have no merit. Defendants did not object in a timely manner to the court's failure to submit these issues. Even if the defendants had timely objected, the court's failure to submit the issues was not prejudicial error. There was no issue of fact as to plaintiff's liability on the notes other than the question of fraud.

If the jury found a defendant engaged in fraud, then that defendant was not entitled to recover on his or its note. *See* G.S. 25-3-306(b); G.S. 25-3-305(2)(c). Conversely, if the jury found no fraud, defendants were entitled to recover on the note. The jury found that all defendants had engaged in fraud; therefore, the court's failure to submit issues on the counterclaims was not prejudicial error.

[2] Defendants Probus and Krenach contend that the court erred in failing to submit issues as to their cross claim against defendant Acharya for indemnity. The right to indemnity between defendants arises when liability is imposed upon one defendant for the other's tortious conduct through operation of law, as for example, through the doctrine of *respondeat superior*. *See Hayes v. City of Wilmington*, 243 N.C. 525, 91 S.E. 2d 673 (1956). Indemnity is not permitted when the defendants are in *pari delicto*, that is, when both defendants breach substantially equal duties owed to the plaintiff. *Id.* In order to recover indemnity from a second defendant, the first defendant must allege and prove (1) that the second defendant is liable to the plaintiff and (2) that the first defendant's liability to the plaintiff is derivative, that is, based upon the tortious conduct of the second defendant. *Anderson v. Robinson*, 275 N.C. 132, 165 S.E. 2d 502 (1969). Here, the plaintiff alleged and the jury found that defendants Probus and Krenach made a false representation of a material fact with knowledge of its falsity or made it recklessly without any knowledge of its truth, with the intent that it would be relied upon by plaintiff, and which was relied upon by plaintiff to her damage. Defendants have brought forward no exception to the court's submission of the first fraud issue to the jury or to the jury's finding. Since defendants Probus and Krenach were in *pari delicto* with defendant Acharya, and their liability was not derivative, the trial court did not err by failing to submit an issue as to indemnity.

[3] Defendants Probus and Krenach next contend that the court erred in submitting the second and third issues to the jury. Citing *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971), defendants argue that there must be a "transaction" between persons in a fiduciary relationship in order for there to be constructive fraud. This contention has no merit. Defendants Probus and Krenach did receive a commission from the sale of the motel. It is now well settled that a broker representing a purchaser or seller in the

purchase or sale of property owes a fiduciary duty to his client based upon the agency relationship itself. *See Raleigh Real Estate and Trust Co. v. Adams*, 145 N.C. 161, 58 S.E. 1008 (1907); *Starling v. Sproles*, 66 N.C. App. 653, 311 S.E. 2d 688 (1984); *Real Estate Licensing Board v. Gallman*, 52 N.C. App. 118, 277 S.E. 2d 853 (1981); 12 Am. Jur. 2d Brokers secs. 83-84 (1964). Even if the submission of the issues was error, it was not prejudicial, as the jury found actual fraud and did not need to consider the second and third issues.

[4] We also reject the remaining contention of defendants Probus and Krenach that the court erred in submitting only one issue as to damages for all defendants. Not only is the issue not properly before us due to counsel's failure to object, Rule 10(b)(2), Rules of Appellate Procedure; *Lee v. Keck*, 68 N.C. App. 320, 315 S.E. 2d 323, *disc. rev. denied*, 311 N.C. 401, 319 S.E. 2d 271 (1984), but also defendants' counsel recommended to the court that only one damage issue be submitted to the jury. Defendants cannot now complain on appeal that this was error. *Overton v. Overton*, 260 N.C. 139, 132 S.E. 2d 349 (1963). Since the jury's verdict otherwise properly disposed of the issues, the jury's recommendation that Acharya pay the note to Probus was properly disregarded by the court as surplusage. 89 C.J.S. Trial sec. 509 (1955).

PLAINTIFF'S CROSS APPEAL

[5] Plaintiff contends that the court erred in denying her motion for treble damages made pursuant to G.S. 75-16. G.S. 75-16 provides:

> If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case *judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.* (Emphasis added.)

Thus, if unfair methods of competition or unfair or deceptive acts or practices in or affecting commerce under G.S. 75-1.1 are found, the court must treble the damages awarded. The determination of

whether an act or practice affects commerce and is unfair or deceptive is to be made by the court. *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). This determination involves a two party inquiry: (1) whether the act or practice affects commerce, and (2) whether the act or practice is unfair or deceptive. *Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980).

For the purposes of G.S. 75-1.1, " 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." G.S. 75-1.1(b). The foregoing section has been broadly applied to cover many activities. *See, e.g., Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981) (leases of mobile home lots); *Kent v. Humphries*, 50 N.C. App. 580, 275 S.E. 2d 176, *modified on other grounds and affirmed*, 303 N.C. 675, 281 S.E. 2d 43 (1981) (leases of commercial property); *Vickery v. Olin Hill Construction Co.*, 47 N.C. App. 98, 266 S.E. 2d 711, *disc. rev. denied*, 301 N.C. 106, --- S.E. 2d --- (1980) (brokered real estate transactions); *Johnson v. Phoenix Mutual Life Ins. Co., supra* (transaction between borrower and mortgagor). Defendants' activities clearly fall within G.S. 75-1.1(b).

The second inquiry is whether the act or practice is unfair or deceptive. The Court in *Hardy v. Toler, supra*, stated that fraud, if proved, necessarily constituted a violation of the prohibition against unfair or deceptive practices. Plaintiff here obtained a jury finding of fraud. The trial court, therefore, had no choice but to treble plaintiff's damages. *Strickland v. A & C Mobile Homes*, 70 N.C. App. 768, 321 S.E. 2d 16 (1984), *disc. rev. denied*, 313 N.C. 336, --- S.E. 2d --- (1985); *Vickery v. Olin Hill Construction Co., supra*. The court therefore erred in denying plaintiff's motion for treble damages.

[6] Plaintiff also contends that the court erred in denying her motion for attorney's fees made pursuant to G.S. 75-16.1. That statute gives the presiding judge the discretionary authority to allow a reasonable attorney fee to the attorney of the prevailing party in an action alleging violations of G.S. 75-1.1 if he finds (1) that the party charged with the violations willfully engaged in the act or practice and unwarrantedly refused to pay the claim constituting the basis of the action, or (2) that the party instituting the action knew, or should have known, that the action

was frivolous and malicious. We have held today that the court erred in denying plaintiff's motion for treble damages. There is a reasonable possibility that the trial court denied the motion for treble damages because it did not believe this to be a case of unfair or deceptive trade practices in or affecting commerce. For that same reason, it may have denied the motion for attorney's fees. We cannot be sure that the court denied the motion for attorney's fees on proper grounds. For this reason, the cause must be remanded for the trial court to determine, in its discretion, whether to award attorney's fees. If it chooses to award attorney's fees, it must make the proper findings.

For the foregoing reasons, we find no error in the trial, but we do find error in the denial of treble damages. The cause must therefore be remanded for the entry of a judgment consistent with this opinion and for a determination of whether plaintiff is entitled to an award of attorney's fees. The results are:

As to defendants' appeals,

No error.

As to plaintiff's cross appeal,

Reversed and remanded.

Judges BECTON and MARTIN concur.

HENRY B. ROWE v. MARY W. ROWE

No. 8417DC627

(Filed 2 April 1985)

1. Divorce and Alimony § 19.5— property settlement and alimony inseparable— evidence of negotiations supports findings

The trial court's finding that a property settlement and consent judgment for alimony were intended as reciprocal and inseparable parts of a single agreement and so were not modifiable was supported by evidence that the parties negotiated a domestic settlement over an eight-month period through a series of proposals and counter-proposals made via letters exchanged by their

lawyers, that alimony was listed with suggestions for division of various items of property in the letters, that when the amount of the periodic payment was adjusted during negotiations changes were also made in other items, and that defendant testified that her intent from the start had been to settle the alimony and property matters together and that the agreement would not have been consummated if any points had been left out.

2. Process § 6— subpoena duces tecum quashed—no abuse of discretion

The trial judge did not abuse his discretion when he granted defendant's motion to quash plaintiff's subpoena duces tecum as to certain documents in the file of one of defendant's attorneys. The documents were examined *in camera* and contained little or no information relevant or material to the issues in the case. G.S. 1A-1, Rule 52(6)(2).

APPEAL by plaintiff from *John, Judge.* Judgment entered 9 February 1984 and filed 20 February 1984 in District Court, GUILFORD County, after being heard out of district by and with the parties' consent; judgment filed 13 February 1984 in SURRY County. Heard in the Court of Appeals 5 March 1985.

This case is before this Court for the second time, after having been remanded by the North Carolina Supreme Court pursuant to its opinion of 3 March 1982. *Rowe v. Rowe*, 305 N.C. 177, 287 S.E. 2d 840 (1982).

The primary issue in this case is whether a consent order between the parties, providing for the payment of "alimony," is subject to modification. The consent order contained a proviso that it would not be modifiable as provided by G.S. 50-16.9(a). In the first appeal of this case, this Court found that the proviso was void as against public policy. 52 N.C. App. 646, 656-58, 280 S.E. 2d 182, 188-89 (1981). The North Carolina Supreme Court noted also that such a proviso would ordinarily be contrary to public policy and so without force and effect. 305 N.C. 177, 184, 287 S.E. 2d 840, 844 (1982). Yet, the Supreme Court recognized an exception to this rule in cases where the provisions for "alimony," or periodic payments, in the consent order were intended as reciprocal consideration for the provisions of a property settlement. *Id.* The Supreme Court thus remanded the present case for a rehearing on the question of whether the consent order was an integral part of the parties' property settlement, and not true alimony, and therefore not modifiable according to statute.

On remand, the trial court found that the parties intended that the consent order be an integral part of the property settlement, and concluded that the consent order was therefore not modifiable.

In the course of admitting new evidence on remand, the trial court granted defendant's motion to quash a subpoena duces tecum as to certain documents (Court Exhibit 1).

The plaintiff appeals the trial court's judgment and its grant of the motion to quash as to Court Exhibit 1.

Smith Moore Smith Schell & Hunter, by Jack W. Floyd and Jeri L. Whitfield, for plaintiff appellant.

Tuggle Duggins Meschan & Elrod, by David F. Meschan and William R. Sage, for defendant appellee.

JOHNSON, Judge.

In its opinion in *Rowe v. Rowe*, 305 N.C. 177, 287 S.E. 2d 840 (1982), the North Carolina Supreme Court remanded this case to determine whether a consent order providing for payment of alimony was an integral part of a property settlement. On remand, the trial court decided that it was, and concluded that the consent order accordingly was not modifiable under G.S. 50-16.9(a). The plaintiff contends on appeal that the trial court erred in finding that the consent order was an integral part of the property settlement.

We note that this case is not subject to the rule of *Walters v. Walters*, 307 N.C. 381, 298 S.E. 2d 338 (1983): that any time the parties to a separation agreement bring that agreement before a court for approval, the agreement will no longer be treated as a private contract between the parties. The *Walters* rule was made applicable only to the judgment appealed in that case and to judgments entered after the entry of the *Walters* opinion. Accordingly, this case is governed by *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964), and *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979), both of which the North Carolina Supreme Court relied upon in 1982 when it remanded the present case. In *Bunn* and *White*, and in the 1982 *Rowe* opinion, our Supreme Court recognized that the alimony provisions of some separation agree-

ments approved by courts are not modifiable under G.S. 50-16.9(a). These agreements include those where, although the separation agreement has been adopted as an order of the court and the provisions for periodic payment are called "alimony," "they and other provisions for a property division between the parties constitute reciprocal consideration for each other." *White*, 296 N.C. at 666, 252 S.E. 2d at 701. As Justice (later Chief Justice) Sharp wrote in *Bunn v. Bunn*:

> [I]f the support provision and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties.

Bunn, 262 N.C. at 70, 136 S.E. 2d at 243.

We now review the Supreme Court's instructions to the trial court in its 1982 opinion in the present case. First, the Court placed the burden of proof on defendant, who claims the consent order and property settlement are part of one agreement:

> For purposes of determining whether a consent judgment may be modified under the statute, there is a presumption that the provisions for property division and support payments are separable. [Citation omitted.] The burden of proof rests on the party opposing modification to show that the provisions are not separable. [Citation omitted.]

Rowe, 305 N.C. at 184, 287 S.E. 2d at 844.

Then, the Court found that, given the ambiguity in the consent order, the trial court should have allowed the defendant to introduce evidence of the negotiations of the parties in order to show that the parties intended that the consent order and property settlement were reciprocal agreements.

> In accord with G.S. 50-16.9, the consent order may be modified unless defendant can show it was an integral part of the property settlement. *White v. White, supra.* The intention of the parties regarding the reciprocity of the agreements is not evident from a reading of the consent order. Therefore, evidence of the negotiations and contemporaneous property settlement agreements of the parties are [sic] ad-

missible to clarify the uncertainty created when the non-modification provision of the order appears to be void as a matter of law.

Rowe, 305 N.C. at 185, 287 S.E. 2d at 845.

On remand, the trial court heard evidence of the negotiations of the parties, and found that the defendant met her burden of showing that the parties intended the consent order to be an integral part of the property settlement. We must now consider whether the trial court's findings of fact are supported by any competent evidence, *see Allison v. Allison*, 51 N.C. App. 622, 628, 277 S.E. 2d 551, 555, *disc. rev. denied*, 303 N.C. 543, 281 S.E. 2d 660 (1981).

[1] In its judgment of 9 February 1984, the trial court found the following facts. The parties negotiated a domestic settlement over an eight-month period through a series of proposals and counter-proposals made via letters exchanged by their lawyers. In this period, at least eight letters were exchanged, five of which were from plaintiff's counsel and three of which were from defendant's counsel. The first two letters contained no mention of proposed "alimony" or support payments. Yet, beginning with the letter of 26 April 1976, from defendant's counsel to plaintiff's counsel, each letter contained a proposal for "alimony," or periodic payments, listed as one of several numbered points addressing the overall settlement terms.

The trial court found that the letters indicated the parties' intent to settle all issues, including that of the periodic payments. Moreover, he found that the letter of 2 December 1976 memorialized entirely the final negotiated agreement between the parties, settling the division of property and income, and that the consent order of 6 December 1976 implemented the provision in the letter of 2 December for payments of $2,500 per month, designated "alimony."

We have reviewed the series of letters, and we agree that they support the trial judge's findings. In particular, they reflect the parties' intent that the terms concerning the "alimony" payments and the property division were given for each other and are part of one agreement. The letters show that the defense counsel originally proposed periodic payments of $5,000 per month, while the plaintiff's counsel offered $2,000. In subsequent

letters, the defense reduced its proposal to $3,000 and then accepted plaintiff's proposal of $2,500. In each of the letters, the alimony proposal was listed with suggestions for division of various items of property, and each time the "alimony payments" were adjusted, changes were also made in certain of the other items. The letters suggest that the defendant was willing to accept lower payments in exchange for a more advantageous division of the property.

We find it significant that defendant's first proposal of alimony, in the letter of 26 April 1976, came in response to plaintiff's first detailed proposal for a division of the property. In the letter of 26 April, defendant's lawyer expressly stated that the "alimony" was essential to the property settlement: "We must, of course, have alimony in addition or some settlement in lieu of alimony."

The defendant's testimony supports further the conclusion that the agreement as to the "alimony" payments was essential to the property settlement. The defendant testified that her intent from the start had been to settle the alimony and property matters together, and that it was also never her intent to settle the property matters without settling the alimony matters, and vice versa. Finally, defendant testified that if any of the points had been left out of the agreement, the agreement would not have been consummated, so far as she was concerned. Plaintiff never contradicted or rebutted this testimony.

We agree with the trial judge's finding that the letters expressly indicate an intent to settle all issues, including that of periodic payments. We agree that the letter of 2 December 1976 (Defendant's Exhibit 25) indicates an intent that the terms of the entire settlement were finalized and agreed to by both parties. This letter provided that a consent order would be entered in plaintiff's action for divorce in order to implement the payment of "alimony."

Competent evidence thus supports the trial court's findings, and in particular, his finding that the property settlement and the consent order were intended as reciprocal and inseparable parts of a single settlement agreement. The trial court's conclusion that the consent order is not modifiable is supported by his findings.

[2] We reach now plaintiff's contention that the trial court erred in granting defendant's motion to quash the subpoena duces tecum directed to David Meschan, defendant's attorney, with respect to documents labeled Court Exhibit 1. The subpoena duces tecum was issued to Mr. Meschan, when the other defense attorney, Mr. P. M. Sharpe, who was also served with such a subpoena, stated that he had given files relating to his representation of defendant to Mr. Meschan. Mr. Meschan filed a motion to quash the subpoena on grounds of attorney-client privilege, work product privilege, and relevancy. Mr. Meschan produced the entire contents of Mr. Sharpe's files for an *in camera* inspection by the trial judge. After *in camera* review, the trial judge ruled that certain documents (Court Exhibit 2) were producible, and that the remaining ones (Court Exhibit 1) were not. The plaintiff objects to the trial court's ruling as to Court Exhibit 1. His objection has no merit.

Whether to allow an *in camera* inspection and whether to release some or all of the documents at issue, or parts of some of those documents, is a matter within the discretion of the trial judge. *See Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 736, 294 S.E. 2d 386, 387 (1982); *Willis v. Duke Power Co.*, 291 N.C. 19, 36, 229 S.E. 2d 191, 201 (1976). Our review of the documents in Court Exhibit 1 reveals little or no information which is material and relevant to the issues in this case, or which might lead to the discovery of admissible evidence. Plaintiff is not entitled to a fishing expedition. *See Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 448, 271 S.E. 2d 522, 524 (1980).

The trial judge made no formal findings when he ruled on the motion to quash. Since neither party requested such findings, the Rules do not require that he should have done so. N.C.R.C.P. 52(a)(2). In the absence of findings, we may presume that the trial court also recognized the absence of relevancy and materiality of the information in Court Exhibit 1. Without reaching the questions of attorney-client privilege and work product doctrine, we hold that the trial court did not abuse his discretion in granting defendant's motion to quash the subpoena duces tecum as to Court Exhibit 1.

We affirm the judgment of the trial court.

Affirmed.

Judges EAGLES and PARKER concur.

IN RE: ADOPTION OF JOSHUA NEAL SEARLE

No. 8426SC725

(Filed 2 April 1985)

1. **Appeal and Error § 31.2— failure to note exceptions—waived to correct manifest injustice**

Although respondent failed to note exceptions anywhere in the record and listed no exceptions under the assignments of error, App. Rule 10 was suspended because the trial court's error was so fundamental that manifest injustice would result if it was not corrected.

2. **Adoption § 2.2; Rules of Civil Procedure § 4— summons endorsed 102 days after issuance—period for determining abandonment of child—began with endorsement**

The trial court erred in an adoption proceeding by instructing the jury that it should consider the six-month period preceding 2 August 1983 when determining whether respondent had abandoned the child because the complaint was filed on 2 August 1983 and the summons was issued three days later but endorsed on 15 November 1983, 102 days after it was issued. The action commenced as to respondent on 15 November 1983 and the court should have instructed the jury to consider the six months preceding that date. Although rendered moot by the error in the court's instructions, it was clear that the court continued to misapply the law when it ruled on respondent's motions for directed verdict and judgment n.o.v. G.S. 48-2(1)(a), G.S. 1A-1, Rules 3 and 4.

APPEAL by respondent from *Downs, Judge.* Judgment entered 1 March 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 March 1985.

Joshua Neal Searle, a minor, is the only child born of the marriage between Susan Brewster, wife of petitioner James Brewster, and respondent Frederick Leon Searle. Susan Brewster and respondent were married in 1977 and Joshua was born in 1978. Both parents have since remarried. Pursuant to an earlier court order, custody of the minor child is with the mother and respondent has no visitation rights.

The facts pertinent to our decision in this case may be summarized as follows: On 31 July 1983, respondent, who had not seen his child since early 1981, spoke with petitioner and learned that petitioner wished to adopt the child. Respondent indicated that he would not consent to the adoption. On 2 August 1983, respondent hired a lawyer to attempt to modify the order denying him visitation and sent $500 in child support to the child's mother and her husband. Also on 2 August 1983, petitioner filed with the Clerk of Mecklenburg County Superior Court a petition to adopt Joshua Neal Searle and a petition to have him declared abandoned by his natural father. Summons was issued 3 days later, but was not served on respondent. Respondent's motion to modify the visitation order was filed on 10 August 1983, was called for hearing by the court on 15 November 1983, but was continued because of the pending adoption proceeding. The summons issued in the adoption proceeding on 5 August 1983 was endorsed for the first time on 15 November 1983 and then served on respondent. No alias or pluries summons had been issued. Respondent responded to the petition on 15 November 1983, denying the allegation of abandonment.

A hearing on the alleged abandonment was held on 28 and 29 February 1984 in Superior Court. The evidence adduced at that hearing is not pertinent to our decision and a summary of it would serve no purpose. At the close of the evidence, the following issue was submitted to the jury and answered as indicated:

> Did the respondent, Frederick L. Searle, abandon his child, Joshua, for at least six consecutive months immediately before August 2, 1983?
>
> ANSWER: YES.

Respondent's motions for directed verdict, made at the close of petitioner's evidence, and for judgment n.o.v. were denied by the court. The court entered judgment on the jury's verdict that respondent had abandoned his son. Respondent appealed.

Robert P. Hanner, II, and W. David Thurman for petitioner-appellee.

Ronald Williams for respondent-appellant.

EAGLES, Judge.

Respondent's first two assignments of error raise the single issue of whether it was error for the court to instruct the jury that, for purposes of determining the period of respondent's alleged abandonment of his child, the adoption proceeding was instituted on 2 August 1983. We hold that the action was not instituted on 2 August 1983 and that the court's instruction to the jury was erroneous.

[1] We note first that respondent failed to note anywhere in the record his exceptions to the trial court's jury instructions. Further, no exceptions are listed under the relevant assignments of error. The Rules of Appellate Procedure are mandatory and failure to follow them subjects the appeal to dismissal. *Craver v. Craver*, 298 N.C. 231, 258 S.E. 2d 357 (1979); *Marisco v. Adams*, 47 N.C. App. 196, 266 S.E. 2d 696 (1980). Further, the very language of Appellate Rule 10(a) would ordinarily preclude our consideration of exceptions not properly set out or of the arguments advanced in support of the assignments of error purportedly based on those exceptions. Because the trial court's error was so fundamental that manifest injustice will result if it is not corrected, acting under Appellate Rule 2 we suspend Appellate Rule 10 to allow for consideration of this first issue.

[2] Adoption proceedings are special proceedings and not civil actions. *In re Daughtridge*, 25 N.C. App. 141, 212 S.E. 2d 519 (1975); G.S. 48-12(a). Adoption proceedings are within the original jurisdiction of the clerk of superior court. *Francis v. Durham Co. Dept. of Social Services*, 41 N.C. App. 444, 255 S.E. 2d 263 (1979); G.S. 48-12. Where an issue of fact is raised in a special proceeding, it must be determined by the court. The clerk is directed by G.S. 1-273 and 1-399 to transfer the action to the superior court docket for trial of the issues raised in the pleadings. *Oxendine v. Catawba County*, 303 N.C. 699, 281 S.E. 2d 370 (1981). Because respondent raised an issue of fact as to whether he had wilfully abandoned the child, this action was properly heard in superior court.

Under our statutes, an abandoned child is defined as follows:

> [A]n "abandoned child" shall be any child who has been willfully abandoned at least six consecutive months imme-

diately preceding institution of an action or proceeding to declare the child to be an abandoned child.

G.S. 48-2(1)(a). Respondent contends that the adoption proceeding in this case was instituted on 15 November 1983 when he was served with process and not on 2 August 1983 when the petition was first filed. We agree.

Although an adoption proceeding is a special proceeding, no separate procedure is prescribed by statute so the Rules of Civil Procedure and the statutes governing special proceedings, G.S. 1-393 *et seq.*, would apply. *VEPCO v. Tillett*, 73 N.C. App. 512, 327 S.E. 2d 2 (1985). G.S. 1-394 provides in part as follows: "Special proceedings against adverse parties shall be commenced as is prescribed for civil actions." Clearly, this adoption proceeding involves respondent as an adverse party; petitioner and respondent here are in the same relative position as a plaintiff and defendant would be in a civil action. G.S. 1A-1, Rule 3 provides, "A civil action is commenced by filing a complaint with the court." G.S. 1A-1, Rule 4 provides for the issuance of a summons upon the filing of a complaint, requires that each defendant in an action be served with process, and prescribes the manner for service of process. G.S. 1A-1, Rule 4(c) requires that service of process occur within 30 days after the issuance of the summons. The validity of the summons for service of process may be extended under G.S. 1A-1, Rule 4(d) by endorsement of the original summons or issuance of an alias or pluries summons within 90 days of the issuance or last prior endorsement of the original summons. As long as this chain of summonses is maintained, the service of summons will relate back to the original date of issuance. *Williams v. Bray*, 273 N.C. 198, 159 S.E. 2d 556 (1968) (decided under prior law); *Roshelli v. Sperry*, 57 N.C. App. 305, 291 S.E. 2d 355 (1982).

However, when the original summons is not endorsed or an alias or pluries summons is not issued within 90 days of the date of original issuance or last prior endorsement, G.S. 1A-1, Rule 4(e) provides, "the action is discontinued as to any defendant not theretofore served with summons within the time allowed." The discontinued action may be revived by endorsement of the summons or the issuance of an alias or pluries summons but, as to the party named in the complaint, "the action shall be deemed to

have commenced on the date of such issuance or endorsement." G.S. 1A-1, Rule 4(e). A discontinuance breaks the chain of summonses and a summons endorsed more than 90 days after the issuance of the original summons does not relate back to the original date of filing of the complaint. *See Lackey v. Cook*, 40 N.C. App. 522, 253 S.E. 2d 335, *rev. denied*, 297 N.C. 610, 257 S.E. 2d 218 (1979).

Here, the complaint was filed on 2 August 1983 and the summons issued 3 days later. The record affirmatively discloses and petitioner concedes in his brief that the summons was not endorsed until 15 November 1983, 102 days after it was originally issued. Therefore, under G.S. 1A-1, Rule 4(e), the action was discontinued as to respondent and the endorsed summons that was served on him does not relate back to 2 August 1983. As to respondent, then, the adoption proceeding was not instituted until 15 November 1983. It was error for the trial court to instruct the jury that, for purposes of determining whether respondent had abandoned the child, they should consider the six month period preceding 2 August 1983. Since the action commenced as to respondent on 15 November 1983, the court should have instructed the jury to consider the six months preceding that date.

In his fourth and fifth assignments of error, respondent contends that the court erred in denying his motions for directed verdict and for judgment n.o.v. With respect to both of these assignments, respondent argues that the evidence clearly shows that his failure to provide child support was not willful and that his failure to maintain contact with the child was due to the court order denying visitation.

With respect to these assignments of error, we find that respondent has again failed to note his exceptions in the record. As noted above, we are precluded under Appellate Rule 10 from considering his assignments of error or the arguments advanced in support of them and his appeal is subject to dismissal. *Craver v. Craver; Marisco v. Adams*, both *supra*. Even if respondent's exceptions were properly set out, our consideration of the issue raised by his assignments of error would be rendered moot by our holding on the first issue presented. It is obvious from the issue submitted to the jury that the court erred in determining which 6 months period was to be considered. Based on this error, it is clear that the court continued to misapply the law when it

ruled on respondent's motions for directed verdict and judgment n.o.v., and erroneously used the 2 August 1983 date instead of 15 November 1983.

Though respondent states several other assignments of error, he neither supports them with exceptions in the record nor argues them in his brief. Accordingly, we dismiss those assignments of error. Appellate Rule 28(b)(5).

The judgment of the superior court is vacated and the cause remanded for further proceedings consistent with this opinion.

Vacated and remanded.

Judges ARNOLD and PARKER concur.

TOWN OF MOREHEAD CITY v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND NORTH CAROLINA BOARD OF TRANSPORTATION v. CHARLES H. SLEDGE, HENRY TULL, III, H. RAY BARTS, JR., MICKEY MARSH, MARVON MOORE, TOM RADY, GEORGE AJLOUNY, DEMUS THOMPSON, CAROLYN BALLOU MANN, JAMES MORTON DAVIS, LARRY BOOR, PAUL JOHNSON, JAMES JOHNSON, GEORGE FOSTER, DAVID SLEDGE, HERMAN MOORE, PHILLIP S. CHURCH, WILLIAM E. HALE, G. WARD BALLOU, TED GARNER, JR., MARGARET ANN PINER, JOHN BATES, ROBERT YOUNGBLOOD, MAX GRAFF, PAUL WHITLEY, HOBERT KELLY, JOSEPH LOGAN, JAMES MOOTS, ALAN SHERLOR, AND URSULA FOSCUE

No. 843SC468

(Filed 2 April 1985)

Highways and Cartways § 5— streets not part of State highway system—authority of DOT

The trial court correctly granted summary judgment for defendants and against intervenor defendants in an action in which plaintiff town sought in part a declaratory judgment of the rights of the parties and injunctions restraining defendant DOT from improving, enlarging, widening, or closing two streets which were not part of the State highway system but which would be used in an intersection at the northern terminus of a replacement bridge over Bogue Sound. The DOT and BOT act on behalf of the State and have permanent authority over municipal corporations; DOT's discretionary authority under G.S. 136-54 is not subject to judicial review unless its action is so clearly unreasonable as to amount to oppressive and manifest abuse. G.S. 136-66.2(f) provides that streets that are within municipalities that are on the State

highway system will remain on the State highway system until changes are made in accordance with the statute. G.S. 136-45, G.S. 136-54.

APPEAL by plaintiff from *Strickland, Judge.* Order entered 5 April 1984 in Superior Court, CARTERET County. Heard in the Court of Appeals 8 January 1985.

This is a civil action wherein plaintiff sought (i) a declaratory judgment declaring the rights of the parties with respect to certain streets in Morehead City, (ii) a permanent injunction restraining defendant, Department of Transportation (DOT) from improving, enlarging, widening, or closing these streets, and (iii) a permanent injunction restraining defendants from constructing a replacement bridge across Bogue Sound at the Alternative No. 1, 23rd Street location, proposed by defendants.

On 10 June 1983, defendant DOT voted to replace the two-lane draw bridge over Bogue Sound, constructed in 1953, with a four-lane high-rise structure. The intersection design concept around the northern terminus of the replacement bridge requires the use of 23rd and 24th Streets in Morehead City, and necessitates that Evans Street on either side of the project be closed permanently.

Evans Street and 23rd Street are part of the Municipal Street System of plaintiff and are not part of the State highway system. Jurisdiction of these streets has not been ceded to defendant to be incorporated into the State highway system. Twenty-fourth Street is a part of the State highway system.

On 9 August 1983, the Morehead City Town Council resolved that the defendants "shall not use 23rd Street, 25th Street, and 28th Street . . . as a part of the State Highway System, nor shall Evans Street at its intersections with these three streets be closed by the Department of Transportation."

On 12 August 1983, defendant Board of Transportation (BOT) reconfirmed its previous approval of the 23rd Street location site, and so informed plaintiff. On 16 November 1983, plaintiff filed this civil action. Defendants subsequently filed a general Motion to Dismiss. On 17 February 1984, various citizens of Carteret County were allowed to intervene as a class. All parties subsequently filed Motions for Summary Judgment.

On 5 April 1984, Judge Strickland (i) granted defendants' Motion for Summary Judgment against plaintiff, (ii) denied plaintiff's Motion for Summary Judgment against defendants, and (iii) granted plaintiff's Motion for Summary Judgment against the Intervenor-defendants' Crossclaim. Plaintiff and Intervenor-defendants appealed.

Nelson W. Taylor, III for plaintiff appellant.

Attorney General Edmisten by Eugene A. Smith, Senior Deputy Attorney General, Claude W. Harris, Special Deputy Attorney General, Robert G. Webb, Assistant Attorney General for defendant appellees.

Wallace, Barwick, Landis, Rodgman & Bower, P.A., by F. E. Wallace, Jr., for Intervenor-defendant appellant.

PARKER, Judge.

The issue presented on this appeal is whether the defendant DOT has the authority to add 23rd Street to the State highway system or to close Evans Street without the consent or approval of the Town of Morehead City. Plaintiff contends that since 23rd Street and Evans Street are part of its municipal street system, defendant DOT does not have authority to add, improve or close these streets without its consent and approval pursuant to G.S. 136-66.2. Defendants DOT and BOT contend that the general grant of authority to municipalities over streets is subordinate to the Department's rights and duties to maintain the State highway system. We agree with defendants' position and hold that the trial court did not err in granting defendants' Summary Judgment motions. The question is one of first impression in this jurisdiction and requires consideration of applicable statutes.

We note at the outset that plaintiff did not appeal from the trial court's order dismissing that portion of plaintiff's complaint which sought to enjoin construction of the bridge. The underlying factual question is not where the bridge is to be built, but whether the DOT can incorporate 23rd Street and Evans Street into the State highway system to connect with the bridge.

General Statute 143B-346 provides:

> The general purpose of the Department of Transportation is to provide for the necessary planning, construction, maintenance, and operation of an integrated statewide transportation system for the economical and safe transportation of people and goods as provided for by law.

General Statute 143B-350, creating the Board of Transportation, states:

> (a) There is hereby created a Board of Transportation. The Board shall carry out its duties consistent with the needs of the State as a whole and it shall not sacrifice the general statewide interest to the purely local desires of any particular area. . . .

General Statute 136-45, under the heading State Highway System, provides:

> The general purpose of the laws creating the Department of Transportation is that said Department of Transportation shall take over, establish, construct and maintain a statewide system of hard-surfaced and other dependable highways running to all county seats, and to all principal towns, State parks, and principal State institutions, and linking up with state highways of adjoining states and with national highways into national forest reserves by the most practical routes, with special view of development of agriculture, commercial and natural resources of the State, and for the further purpose of permitting the State to assume control of the State highways, repair, construct, and reconstruct and maintain said highways at the expense of the entire State, and to relieve the counties and cities and towns of the State of this burden.

General Statute 136-54 states:

> The Board of Transportation shall be authorized, when in its judgment the public good requires it, to change, alter, add to, or abandon and substitute new sections for, any portion of State Highway System.

Plaintiff argues that with respect to municipal streets G.S. 136-45 and G.S. 136-54 were repealed by the enactment of G.S. 136-66.2. We do not agree. General Statute 136-45 and General Statute

136-54 have both been amended numerous times since 1959, and there has been no mention of their repeal. Repeal by implication is not favored in the law, *Commissioner of Insurance v. N. C. Automobile Rate Office*, 294 N.C. 60, 241 S.E. 2d 324 (1978), and statutes dealing with the same subject matter must be construed in *pari materia*, and harmonized if possible to give each effect. 12 Strong's North Carolina Index 3d, Statutes, § 5.

In the instant case we are concerned with the power of the sovereign State of North Carolina to act through the DOT and BOT in behalf of the State and for its immediate sovereign purposes. *See Highway Commission v. Board of Education*, 265 N.C. 35, 143 S.E. 2d 87 (1965). The BOT and the DOT, acting on behalf of the State itself, are in essence the sovereign and have paramount authority over municipal corporations which are subservient to the State in such matters. The DOT's discretionary authority under G.S. 136-54 is not subject to judicial review unless its action is so clearly unreasonable as to amount to oppressive and manifest abuse. *Guyton v. N.C. Board of Transportation*, 30 N.C. App. 87, 226 S.E. 2d 175 (1976). As stated in 4A Nichols on Eminent Domain, 3d ed. (1981) § 15.2(2):

> Whatever doubts may arise regarding other property, it is well settled that streets and highways are held in trust for the public, and whatever estate or interest in them belongs to the city or town in which they lie is owned by the municipality in its governmental capacity and as an agency of the State. The power of the State over highways is (as against the municipality) absolute, and the legislature, as the representative of the public, may decide what roads shall be built and how they shall be paid for.

Plaintiff contends that the enactment of G.S. 136-66.2 permitting the development of a plan for a coordinated street system precludes the DOT and BOT from declaring 23rd Street and Evans Street part of the State highway system. First, it should be noted that under G.S. 136-66.2(a), the onus for development of the plan is placed on the municipality. Further, G.S. 136-66.2(b) provides:

> [A]s part of the plan, the governing body of the municipality and the Department of Transportation shall reach an agreement as to which of the existing and proposed streets and

highways included in the plan will be a part of the State highway system and which streets will be a part of the municipal street system.

Subsection (e) of G.S. 136-66.2 anticipates the situation where there has been no comprehensive plan for future development and states that, "the Department of Transportation and any municipality may reach an agreement as to which existing or proposed streets and highways within the municipal boundaries shall be added to or removed from the State highway system."

This statute became effective in 1959. Plaintiff has failed since that time, a period of 25 years, to present to the DOT or its predecessor, a comprehensive plan of development. Plaintiff now argues that without such an agreement, the DOT is without power to act with respect to streets within the Town of Morehead City. To allow such an interpretation would be to thwart the clear legislative intent granting the DOT and BOT broad powers to carry out their mandate to construct and maintain an integrated highway system consistent with the public good of the State of North Carolina.

Plaintiff emphasizes G.S. 136-66.2(f) to support its position that because 23rd Street and Evans Street were part of the municipal system on July 1, 1959, they must remain part of the municipal street system until changed in accordance with this section. This reliance is misplaced for the reason that G.S. 136-66.2(f) provides that streets within municipalities that are on the State highway system will remain on the State highway system until changes are made in accordance with this section. If the Legislature had intended that the converse be true, *i.e.*, that municipal streets would remain municipal streets, the Legislature could have so stated.

The only direct route between the Town of Atlantic Beach and the Town of Morehead City is by way of the bridge over Bogue Sound. This bridge also forms the most direct route between the Town of Atlantic Beach and the Town of Beaufort, the County Seat of Carteret County. All three are principal towns. The DOT is acting within its legislative authority granted under G.S. 136-45 in constructing the bridge and declaring 23rd Street and Evans Street part of the State highway system in order to facilitate completion of the project.

In view of the foregoing, the trial court's granting of summary judgment in favor of defendants is affirmed.

We also affirm the trial court's granting of plaintiff's Motion for Summary Judgment against the Intervenor-defendants on their Crossclaim for the reason that the Court will not inquire into the legislative body's motives in passing the 9 August 1983 Resolution. *See Clark's v. West*, 268 N.C. 527, 151 S.E. 2d 5 (1966). Moreover, we note that as indicated in their brief, Intervenors' substantive position in the lawsuit is consistent with that of defendants.

Affirmed.

Chief Judge HEDRICK and Judge WHICHARD concur.

GROVER C. MORETZ, JR., EMPLOYEE v. RICHARDS & ASSOCIATES, INC., EMPLOYER, AND UNITED STATES FIDELITY & GUARANTY INSURANCE COMPANY, INSURER, DEFENDANTS

No. 8410IC662

(Filed 2 April 1985)

Master and Servant § 72 – workers' compensation – permanent partial disability – credit for excessive temporary total disability payments

Where defendant carrier paid plaintiff disability benefits for 362 weeks and 2 days from 7 November 1975 until 25 October 1982, and the evidence and findings support the conclusion that plaintiff's maximum recovery was reached on 1 December 1977, all payments made by defendants after 1 December 1977 constituted permanent partial disability payments, and the Industrial Commission abused its discretion under G.S. 97-42 in refusing to allow defendants credit on a permanent partial disability award for payments made to plaintiff after 1 December 1977.

APPEAL by defendants from an opinion and award of the North Carolina Industrial Commission. Opinion and award entered 4 April 1984. Heard in the Court of Appeals 12 February 1985.

This is a worker's compensation claim in which plaintiff, Grover C. Moretz, Jr., an employee of defendant, Richards & As-

sociates, seeks recovery for an injury resulting from his employment.

The essential facts are:

Plaintiff was employed as a pipe welder for defendant employer on 6 November 1975, when he suffered a back strain as he lifted a heavy bottle of veneer. The lifting was part of plaintiff's normal duties. When he suffered the back strain, he was not performing a task different from those which he usually performed. Nevertheless, defendant carrier, United States Fidelity & Guaranty Insurance Company, accepted the injury as compensable and concedes that it is bound by the acceptance.

Plaintiff's condition was diagnosed as phlebitic leg syndrome of the left leg which developed as a result of plaintiff's hospitalization in November 1975, for treatment of the back injury. While the original injury was to the back, Dr. Tyson Bennett testified that plaintiff has a 90% disability of the left leg. Dr. Phillip J. Hess testified that plaintiff has a 75% disability of the left leg. It was stipulated that plaintiff's condition has not undergone any significant change "since at least 1 December 1977."

Defendant carrier paid plaintiff disability benefits for 362 weeks and 2 days from 7 November 1975 through 25 October 1982.

On 14 June 1982, defendants requested a hearing "to determine whether or not the employee is entitled to continue receiving disability payments." This request was made allegedly because defendant carrier had been unable to obtain from the treating physician answers to questions necessary for defendant carrier to determine whether it should continue making payments.

The case was heard by Chief Deputy Commissioner Forrest H. Shuford, II, on 18 October 1982. Commissioner Shuford found that plaintiff's physical disability was restricted to his left leg and that he had a 90% permanent partial disability of the left leg. Commissioner Shuford also found that plaintiff's condition had been fairly stable, with no significant changes since 1977. Commissioner Shuford then ordered defendants to pay 180 weeks of permanent partial disability.

Defendants sought a credit for compensation paid to plaintiff for disability benefits from 7 November 1975 through 25 October 1982 as against any compensation which is due for permanent partial disability. Commissioner Shuford found that "G.S. 97-42 permits but does not require the Industrial Commission to grant such credit. This case would seem to be a proper case for not allowing such credit to the end that compensation may be paid for plaintiff's permanent disability of the left leg." The parties stipulated only that the payments were "disability benefits." In finding of fact number 4 Commissioner Shuford characterized all payments from 7 November 1975 to 25 October 1982 as "temporary total disability."

Defendants appealed to the Full Commission which affirmed the opinion and award of Commissioner Shuford. Defendants appeal from the opinion and award of the Full Commission. Plaintiff filed notice of appeal to this court, but did not perfect his appeal.

Hedrick, Eatman, Gardner, Feerick and Kincheloe, by Phillip R. Hedrick and Thomas E. Williams, for plaintiff-appellee.

Jones, Hewson & Woolard, by R. G. Spratt, III, and Hunter M. Jones, for defendant-appellants.

EAGLES, Judge.

Where a claimant suffers an injury that results in temporary total disability followed by a specific disability compensable under G.S. 97-31, as here where there is a 90% permanent partial disability of the left leg, compensation for the specific disability is payable in addition to that awarded for temporary total disability. *Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E. 2d 588 (1971). Defendants argue on appeal that they are entitled to a credit for either permanent partial disability payments already made since 1 December 1977 or an overpayment of temporary total disability. Compensation for temporary disability is available during the healing period of the injury until maximum recovery has been achieved. Permanent disability is available pursuant to G.S. 97-31 at the end of the healing period when maximum recovery has been achieved. *Crawley v. Southern Devices*, 31 N.C. App. 284, 229 S.E. 2d 325 (1976), *cert. denied*, 292 N.C. 467, 234 S.E. 2d 2 (1977).

It was stipulated that plaintiff's condition has not undergone any significant changes since at least 1 December 1977. Dr. Bennett testified that plaintiff's condition has been very stable for the last several years and Dr. Hess testified that plaintiff's condition did not change from his first examination of plaintiff on 1 December 1977 until his second examination during December 1982. Defendants argue that 1 December 1977 is the latest date that plaintiff reached maximum medical improvement and that disability payments made thereafter are attributable to the permanent partial disability. We further note that finding of fact number 3 ("plaintiff's condition has remained fairly stable and he has undergone no significant changes in his physical condition since 1977"), combined with the stipulations and medical testimony, supports a conclusion that plaintiff's maximum recovery was achieved 1 December 1977. The record before us discloses no evidence of continuing temporary total disability after 1 December 1977. Accordingly, all disability payments made by defendants after 1 December 1977 should be characterized as "permanent partial" disability payments for which defendants are eligible for a credit in the discretion of the Industrial Commission pursuant to G.S. 97-42. This is consistent with the Commission's conclusion that the deputy commissioner could have allowed a credit in his discretion.

G.S. 97-42 provides:

> Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Industrial Commission be deducted from the amount to be paid as compensation. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment.

The language of G.S. 97-42 clearly indicates that a credit (or deduction from the amount of the award to be paid) is not *required* to be granted. Rather, the language places the decision of whether to grant a credit within the sound discretion of the Industrial Commission. The decision to grant or deny the credit will not be disturbed in the absence of an abuse of discretion. *Taylor v. J. P. Stevens Company*, 307 N.C. 392, 298 S.E. 2d 681 (1983).

It has long been settled in our jurisdiction that an appellate court's review of a trial court's discretionary ruling is strictly limited to a determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the trial court. *Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1983). We hold that the record in this case affirmatively demonstrates a manifest abuse of discretion in not allowing a credit for permanent partial disability payments made after 1 December 1977.

Here, defendant carrier accepted responsibility in an apparently close case and paid plaintiff disability benefits for 362 weeks and 2 days from 7 November 1975 through 25 October 1982. Only when defendant carrier could not obtain answers to questions from the treating physician concerning plaintiff's disability status, did it file this action. Defendants do not contest that plaintiff is entitled to 180 weeks of permanent partial disability payments, rather defendants argue that the permanent partial disability payments have already been paid by reason of plaintiff's maximum recovery on 1 December 1977 and that they are entitled to a credit for that which has already been paid. We agree.

We find persuasive the reasoning of appellate courts in other jurisdictions concerning credits for amounts overpaid.

> An employer who has paid an employee at the time of that employee's greatest need more than he was obligated to pay should not be penalized by being denied full credit for the amount paid above the requirements of the act as against the amount which might subsequently be determined to be due the employee. To do so would inevitably cause employers to be less generous. By limiting the payments the employer can safely make to the amount of temporary total disability the result would be that the employee would lose his full salary at the very moment he needs it most.

Cowan v. Southwestern Bell Telephone Co., 529 S.W. 2d 485, 488 (Mo. App. 1975). *See also Western Casualty and Surety Co. v. Adkins*, 619 S.W. 2d 502 (Ky. App. 1981) (voluntary payment of benefits during pendency of proceedings is a matter of great importance and should not be discouraged).

There is strong public policy against double recovery and in favor of prompt payment of benefits to injured employees. For

these policy reasons and based on the facts of this case where the defendant carrier has paid plaintiff disability benefits for 362 weeks and 2 days, from 7 November 1975 until 25 October 1982, we hold that here defendants are entitled to a credit on the permanent partial disability award for payments made to plaintiff after 1 December 1977, the date maximum recovery was reached.

The opinion and award appealed from is vacated and this cause remanded to the Industrial Commission for entry of an award reflecting the credit.

Our disposition of this case makes it unnecessary to consider the remaining assignments of error.

Vacated and remanded.

Judges ARNOLD and PARKER concur.

VIVIAN M. CRUMP v. THE DURHAM COUNTY BOARD OF EDUCATION

No. 8414SC383

(Filed 2 April 1985)

1. Schools § 13.2— dismissal of career teacher—not arbitrary

Petitioner's dismissal from her teaching job was not "arbitrary, capricious and for personal reasons" where the record clearly showed a thoughtful, patient, persistent, but unavailing effort by the school authorities to get petitioner to recognize that she was not properly controlling her classes and to correct the situation. Moreover, the five members of the independent Professional Review Committee unanimously agreed that the charge that she had inadequately performed her job as a schoolteacher had been substantiated. G.S. 115C-325.

2. Schools § 13.2— dismissal of career teacher—statute not unconstitutionally vague

G.S. 115C-325(d)(1), which authorizes the dismissal of a career teacher for inadequate performance, is not unconstitutionally vague because the term "inadequate performance" can be readily understood by any person of ordinary intelligence who knows what a job entails. Furthermore, petitioner clearly understood that her job as a schoolteacher entailed maintaining good order and discipline in the classroom. G.S. 115C-307(a).

3. Schools § 13.2— dismissal of career teacher—supported by evidence

There was substantial evidence to support petitioner's dismissal for inadequate performance as a teacher under the whole record test where, according to the testimony of three professional educators who had seen or heard students misbehave in petitioner's classroom on many different occasions, petitioner maintained an unruly, chaotic, noisy, and disruptive classrooom and was apparently content to maintain such a classroom over a long period of time.

4. Schools § 13.2— dismissal of career teacher—arguments irrelevant or not supported by evidence

Where petitioner was a career teacher dismissed for not maintaining classroom discipline, her argument that she had more than her share of problem students was not supported by the evidence, including her own testimony, and her argument that her classroom control was no worse than other teachers was irrelevant and at variance with the evidence that the misconduct which occurred in petitioner's classroom did not occur in other rooms even though all of petitioner's students were in other classrooms for six periods each day.

APPEAL by petitioner from *Bowen, Judge*. Judgment entered 16 January 1984 in Superior Court, DURHAM County. Heard in the Court of Appeals 30 November 1984.

The respondent Board of Education, after a hearing, dismissed petitioner from her school teaching job on the grounds of inadequate performance. Her dismissal had been recommended by the Superintendent of Durham County Schools and was approved by the Professional Review Committee. The decision of the respondent Board was reviewed and affirmed by the Superior Court and petitioner's appeal is therefrom.

During the hearings conducted by the Professional Review Committee and the respondent Board evidence to the following effect was presented: In August, 1983 petitioner had been a junior high school teacher in the Durham County school system for twenty-seven years and was then assigned to Chewning Junior High School, where she had taught science for several years. During the 1980-81 school term there were many disciplinary problems in petitioner's classroom, and at the end of the term the school principal, Mr. Barry, discussed these problems with her. Shortly before the 1981-82 school term began respondent received a letter from a student's parent complaining of petitioner's failure to maintain order in her classroom during the preceding term. The letter, which listed several specific disturbances by students that petitioner allegedly did nothing about, was put in her person-

nel file. After that Principal Barry and Mr. Gatling, the coordinator of mathematics and science teaching programs in the county, met with petitioner and suggested ways that she could improve both her classroom control and teaching effectiveness, and Gatling made periodic visits to petitioner's classroom. At the end of the 1981-82 school term Principal Barry again recommended that petitioner take various steps to improve classroom discipline and placed her on marginal status. During the second semester of the 1982-83 school term Principal Barry visited petitioner's classroom often and noted many instances of uncorrected student misconduct. He saw or heard, among other things, students walking around, talking and laughing loudly, and ignoring petitioner's pleas for quiet; students squirting water on each other, throwing papers at each other and the teacher, and climbing in and out of windows; the classroom door opened and closed many times with a bang; students playing cards and reading materials other than those assigned; and students misusing textbooks and audio-visual aids. Four other teachers complained to him during that time about petitioner's failure to control her classes at different times of the day. Mr. Gatling testified that during his visits to petitioner's classroom he also saw and heard many uncorrected instances of student misbehavior and specified what they were. Both Principal Barry and Mr. Gatling advised petitioner in writing of the various delinquencies noted, made specific suggestions for improving her classroom discipline and teaching techniques, required her to observe the classroom methods of an exemplary teacher in another school for a week and the respondent Board paid her substitute; but neither petitioner's control of her class nor her teaching methods improved. Ms. Fletcher, a teacher whose classroom was next to petitioner's, testified that her classes were often disturbed by students in petitioner's classroom yelling, banging on the walls, and making other loud noises, and that the only week during the Spring of 1983 that her classes were not so disturbed was when petitioner was away and a substitute teacher had her class. In April, 1983 the county school superintendent recommended that petitioner be dismissed from her teaching job on the grounds of inadequate performance. This recommendation was approved by the Peer Review Committee in June, 1983 and she was dismissed by the respondent Board on August 15, 1983.

Kennedy, Kennedy, Kennedy and Kennedy, by Harvey L. Kennedy and Harold L. Kennedy, III, for petitioner appellant.

Maxwell, Freeman, Beason and Morano, by James B. Maxwell and Mark R. Morano, for respondent appellee.

PHILLIPS, Judge.

[1] Petitioner's first contention that her constitutional rights to due process and equal protection have been violated because her dismissal was "arbitrary, capricious and for personal reasons" is rejected without discussion, because nothing in the record supports, much less requires, such a conclusion. What the record clearly shows, we think, is a thoughtful, patient, persistent, but unavailing, effort by the school authorities to get petitioner to recognize that she was not properly controlling her classes and to correct the situation; it does not indicate any hasty, arbitrary, capricious or ill-founded action on their part. For that matter, much more than impulse is needed under our law to discharge a career teacher. *See* G.S. 115C-325. A ground for dismissal specified by the statute must be asserted; the Board must find from a preponderance of the evidence that the ground for dismissal is true; and an exacting procedure designed to protect the teacher's rights, one of which is to have the evidence for and against dismissal appraised by an impartial panel comprised of teachers, administrators and laymen, must be followed. Corroborative of our holding on this point is the fact that when petitioner exercised her right to have the charge against her independently evaluated the five members of the Professional Review Committee, who heard the testimony presented by both parties and saw the witnesses face to face, *unanimously* agreed that the charge that she had inadequately performed her job as a schoolteacher had been substantiated.

[2] The petitioner's second contention that G.S. 115C-325(d)(1), which authorizes the dismissal of a career teacher for "inadequate performance," is unconstitutionally void for vagueness is likewise overruled. That question was considered and rejected in *Nestler v. Chapel Hill/Carrboro City Schools Board of Education*, 66 N.C. App. 232, 311 S.E. 2d 57, *appeal dismissed, rev. denied*, 310 N.C. 745, 315 S.E. 2d 703 (1984), for the reason that the term "inadequate performance" in regard to a job can be readily understood

by any person of ordinary intelligence who knows what the job entails. Nor is the statute unconstitutional as applied in this case to petitioner. The evidence clearly shows that she was aware that her job as a schoolteacher entailed maintaining good order and discipline in the classroom, as G.S. 115C-307(a) provides, and that her alleged failure to maintain good classroom order on numerous, specific occasions was the basis for the steps taken to dismiss her.

[3] Petitioner's final contention, that in view of the whole record there is no substantial evidence to support her dismissal for inadequate performance of her job, is likewise without merit and is overruled. That the evidence referred to above substantially supports the conclusion that petitioner inadequately performed her duty to maintain good order and discipline in the classroom is, we think, self-evident. Though it is fundamental and generally known that students cannot effectively learn and teachers cannot effectively teach in an unruly, chaotic, noisy, disruptive classroom, that is just the kind of classroom that petitioner had and was apparently satisfied to have over a long period of time, according to the testimony of the three professional educators who had seen or heard students misbehave in her classroom on many different occasions. The only evidence of probative value that might detract from all this direct evidence of petitioner's failure to maintain good order in her classroom, and therefore must be considered under the "whole record" test laid down in *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977), is the following: Petitioner's testimony that some of the disorders that occurred during Principal Barry's surveillance of her classroom were aggravated by *his* failure to correct the misbehaving students, but the duty to maintain control of the classroom was hers, not his, as she conceded; and the testimony of one of petitioner's many students that she is a good teacher. The other testimony on her behalf—by her pastor and several members of her church, where she had taught Sunday School and been a Deacon for several years, to the effect that she is a good, conscientious and efficient person in handling young people—really does not address the specific issue raised. In all events, all of the other evidence relating to petitioner's classroom control by whoever presented detracts not a whit from the great volume of direct evidence that the respondent Board presented as to petitioner's failure to maintain any semblance of good order and discipline in her classroom on innumerable occasions.

[4] The argument that petitioner's failure to maintain order was because she had more than her share of problem students is not supported by the evidence, including petitioner's own testimony. And the further argument that her classroom discipline and control was no worse than that maintained by other teachers is both irrelevant and at variance with much evidence and the Board's finding that the disturbing misconduct that repeatedly occurred in petitioner's classroom did not occur in other rooms, even though all of petitioner's students were in other classrooms for six periods each school day.

Affirmed.

Judges WHICHARD and JOHNSON concur.

OLIVIA PARKER PLOTT v. ARTIST LEE PLOTT

No. 8422DC645

(Filed 2 April 1985)

1. **Divorce and Alimony § 24.4— enforcement of child support order—contempt—required findings**

In a civil contempt proceeding to enforce a child support order, the court was not required to make the findings necessary for determining the amount of child support but was required to find only that the delinquent obligor had the means to comply with the order and that she willfully refused to do so.

2. **Divorce and Alimony § 24.4— contempt for violation of child support order—willful failure to comply—implicit findings**

Although the court's order holding plaintiff in contempt for failure to make child support payments contained no explicit finding that plaintiff willfully failed to comply, the order was sufficient where it was implicit in the court's findings that plaintiff both possessed the means to comply and willfully refused to do so.

3. **Divorce and Alimony § 24.4— contempt for violation of child support order—sufficient evidence**

The evidence was sufficient to support the court's order finding plaintiff in contempt for violation of a child support order where the court had found probable cause to believe plaintiff was in contempt based on the verified allegations in defendant's motion, and plaintiff failed to carry her burden of showing why she should not be found in contempt. G.S. 5A-23.

4. Divorce and Alimony § 27— enforcement of child support order—award of attorney fees—sufficiency of findings

The trial court's findings were sufficient to support its award of attorney fees to defendant in an action to enforce a child support order where there was no evidence and no allegation of bad faith on the part of defendant; it can be inferred from the facts found that plaintiff refused to provide adequate support under the circumstances existing at the time this action to enforce the support order was instituted; and defendant's allegation in his verified motion that he lacked sufficient means to pay the legal costs of the action was not contradicted. Explicit findings are not required in an order awarding attorney fees where there is no conflicting evidence and the facts are obvious.

APPEAL by plaintiff from *Cathey, Judge.* Judgment entered 8 February 1984 in District Court, DAVIE County. Heard in the Court of Appeals 5 March 1985.

This is a civil action in which defendant seeks enforcement of an order directing the plaintiff to pay child support.

Plaintiff wife and defendant husband were divorced on 15 December 1982. Custody of the two minor children of the marriage was originally with plaintiff but was transferred to defendant by a consent order entered by the court on 7 April 1983. On 2 May 1983, the court entered an order granting plaintiff visitation rights and directing plaintiff to pay monthly child support to defendant. The order contained the following findings of fact:

> That the plaintiff is regularly employed and earning $1,000.00 per month and is capable of contributing to the support of her children; that the older child, Thomas, is employed at Fisherman's Quarter and receives a net salary of approximately $55.00 per week, and in addition, drives a school bus which produces income of $85.00 per month; that from the child's earnings, he pays a car payment; that the defendant presented to the Court an expense affidavit and the Court finds that the defendant is in need of child support and the plaintiff is capable of paying support in the sum of One Hundred Twenty-Five Dollars ($125.00) per month for her minor children.

Plaintiff did not appeal from the 2 May 1983 order but on 28 October 1983 defendant filed a motion alleging non-compliance with the order and an arrearage of $485. The court, finding probable cause for contempt, issued an order directing plaintiff to appear and show cause why she should not be held in contempt.

The matter was heard on 11 January 1984. Plaintiff appeared and stipulated through her attorney that she was then $1,025.00 in arrears but presented no evidence and apparently made no argument. On 8 February 1984, the court entered an order containing certain findings of fact set out in the body of this opinion.

Based on its findings, the court found plaintiff in contempt and ordered her jailed by the Davie County Sheriff until she paid the arrearage and defendant's attorney fees of $150. Plaintiff appealed from this order.

Brock and McClamrock, by Grady L. McClamrock, Jr., for plaintiff-appellant.

Powell and Yeager, by Lawrence J. Fine, for defendant-appellee.

EAGLES, Judge.

Plaintiff first assigns error to the court's order on the basis that the evidence does not support the findings of fact and that the findings of fact do not support the conclusions of law. Specifically, plaintiff contends that there is no evidence to support the finding that plaintiff possessed the means to comply with the support order. She argues that this unsupported finding was error because *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980) requires that court orders in child support cases be supported by findings based on competent evidence. We disagree with her contention.

Coble v. Coble, supra, applies to actions to determine the amount of child support. When the court entered the 2 May 1983 order directing the payment of child support, it made the findings required by *Coble v. Coble, supra*. There was no appeal and those findings presumably were supported by competent evidence. Here, plaintiff does not contend that the findings in the 2 May 1983 child support order were not supported by competent evidence. Rather, she argues that those same findings must be made and supported in this proceeding to enforce the child support order. This argument is without merit.

[1] It is well established that in civil contempt proceedings to enforce orders for child support, the court is required to find only that the allegedly delinquent obligor has the means to comply

with the order and that he or she wilfully refused to do so. *E.g., Fitch v. Fitch*, 26 N.C. App. 570, 216 S.E. 2d 734, *cert. denied*, 288 N.C. 240, 217 S.E. 2d 679 (1975); *Bennett v. Bennett*, 21 N.C. App. 390, 204 S.E. 2d 554 (1974). The court here made the following pertinent findings:

> 3. That since the entry of the aforesaid Order, the plaintiff has paid a total of $140.00 for the support and maintenance of the minor children born to the marriage and that the total arrearage which is due and owing under the terms of said Order is $1,025.00.
>
> 4. That the plaintiff has had the means with which to comply with the terms of the Order of May 2, 1983, each month since its entry.
>
> 5. That the plaintiff's expenses for her support are approximately the same now as on May 2, 1983, and that the plaintiff has had no extraordinary financial expenditures since that date.

Based on these findings, the court concluded that plaintiff was in contempt of court for failure to comply with the child support order.

[2] Though the findings are not explicit, it is clear that plaintiff both possessed the means to comply with the order and has wilfully refused to do so. While explicit findings are always preferable, they are not absolutely essential where the findings otherwise clearly indicate that a contempt order is warranted. *Medlin v. Medlin*, 64 N.C. App. 600, 307 S.E. 2d 591 (1983).

[3] Plaintiff's contention that the court's findings are not supported by evidence is likewise without merit. The statutes governing proceedings for civil contempt in child support cases clearly assign the burden of proof to the party alleged to be delinquent. Civil contempt proceedings are initiated by a party interested in enforcing the order by filing a motion in the cause. The motion must be based on a sworn statement or affidavit from which the court determines there is "probable cause to believe that there is civil contempt." G.S. 5A-23. The opposing party must then show cause why he should not be found in contempt. In a proceeding to enforce an order for child support, this would involve showing either that the alleged delinquent lacked the

means to pay or that the failure to pay was not wilful. *See generally*, Lee, *N.C. Family Law* Section 166 (1980).

The court here had already found probable cause to believe that there was civil contempt based on the verified allegations in defendant's motion. Plaintiff offered no evidence except a stipulation as to the amount of the arrearage. This was clearly not sufficient to refute the motion's allegations. Since plaintiff failed to carry her burden, the court was warranted in finding her in contempt. Plaintiff's contention that the evidence is not sufficient is without merit.

[4] Plaintiff contends that the evidence and findings supporting the award of attorney fees to defendant were insufficient. We disagree. In actions for support only, the court may award reasonable attorney fees to a party if it finds: (1) that the party is acting in good faith; (2) that the party has insufficient means to defray the costs of the action; and (3) that the party ordered to pay support had not provided adequate support under the circumstances existing at the time of the institution of the action or proceeding. *Gibson v. Gibson*, 68 N.C. App. 566, 316 S.E. 2d 99 (1984); *Quick v. Quick*, 67 N.C. App. 528, 313 S.E. 2d 233 (1984); G.S. 50-13.6.

The trial court made the following finding regarding defendant's attorney fees:

> 6. That the defendant's attorney has rendered further legal services to the defendant in this cause, in the preparation, filing and hearing of this Motion on behalf of the defendant and the minor children born to the marriage, and that the value of said services is $150.00.

Accordingly, the court concluded "[t]hat the defendant is entitled to an award from the plaintiff as attorney's fees." The other required findings are not so explicit. Nevertheless, the essential facts are evident in the court's order. There is no allegation and no evidence of bad faith on the part of defendant. From the terms of the 2 May 1983 order setting the amount of child support, plaintiff's stipulation in court that the arrearage was $1,025, and the absence of any evidence from plaintiff, we can properly infer that plaintiff had refused to provide adequate support under the circumstances existing at the time this action to enforce the support order was instituted by defendant.

Further, defendant alleged in his verified motion that he lacked sufficient means to pay the legal costs of the action. This allegation was not contradicted. The court, in concluding that defendant was "entitled" to attorney fees, necessarily found defendant's allegation to be true. We think that *Medlin v. Medlin, supra,* applies to awards of attorney fees so that explicit findings are not required where there is no conflicting evidence and the facts are obvious. Plaintiff's argument is without merit.

The order appealed from is

Affirmed.

Judges ARNOLD and PARKER concur.

ROBERT EARL RADFORD, PLAINTIFF/APPELLANT v. JAMES LLOYD NORRIS AND BECKY ANN NORRIS, DEFENDANT/APPELLEES

No. 8410SC774

(Filed 2 April 1985)

Automobiles and Other Vehicles § 88.5; Negligence § 35.1 — instructions on contributory negligence — evidence insufficient

In an action arising from a collision between plaintiff's motorcycle and defendants' automobile, the court erred by instructing on contributory negligence where the evidence showed that plaintiff saw defendants' car from at least eighty feet away and slowed down as defendants' car moved forward as if to enter traffic ahead of him; that plaintiff accelerated after defendants' car stopped, defendant driver apparently being aware of plaintiff; that plaintiff estimated his speed at thirty to forty-five miles per hour; that plaintiff observed defendant pulling out in front of him when he was about twenty feet away; that defendant and her passenger did not see a motorcyclist and pulled out into the highway; and that the passenger screamed and defendant attempted to turn but was struck immediately. There was nothing to suggest how plaintiff might have kept a better lookout and no evidence that plaintiff was unable to control his motorcycle as a result of speed; all the evidence was that plaintiff was in his proper lane of travel, that defendant pulled out in front of him, and that plaintiff deliberately slid his motorcycle into defendants' car to mitigate the consequences of an unavoidable accident.

APPEAL by plaintiff from *Herring, Judge.* Judgment entered 24 February 1984 in WAKE County Superior Court. Heard in the Court of Appeals 13 March 1985.

This lawsuit arises out of a collision between plaintiff's motorcycle and defendants' car, driven by Becky Ann Norris (hereinafter defendant; James Lloyd Norris' sole connection with the case is his ownership of the car). Plaintiff, commuting northward at the rush hour, arrived at U.S. 401 on a side road. U.S. 401 is a four-lane divided highway. Rather than wait behind the line of traffic at the stop sign on the side road, plaintiff turned left, cutting through a store parking lot. He then turned right from the parking lot onto 401 North, entering the left of two northbound lanes. Defendant had crossed 401 South from the other side of the highway, and was in a crossover in the median waiting to turn left onto 401 North. As plaintiff approached the crossover defendant pulled out in front of him. Plaintiff collided with defendant's car, sustaining personal injury and other damage.

The first trial resulted in a verdict for plaintiff. On appeal, this court remanded for a new trial for error related to issues of damages. *Radford v. Norris*, 63 N.C. App. 501, 305 S.E. 2d 64 (1983). A new trial on all issues resulted in a verdict that defendant was negligent, but that plaintiff was contributorily negligent. The jury therefore did not reach the damages issue. Plaintiff appealed.

Van Camp, Gill & Crumpler, P.A., by William B. Crumpler, for plaintiff.

Moore, Ragsdale, Liggett, Ray & Foley, P.A., by Jane Flowers Finch, for defendants.

WELLS, Judge.

The only question presented is whether the court erred in instructing on contributory negligence. We hold that it did and award a new trial.

In determining the sufficiency of the evidence to justify submission of contributory negligence, we consider defendant's evidence in the light most favorable to her, with all reasonable inferences therefrom, and disregard plaintiff's evidence except to the extent favorable to defendant. *Jones v. Holt*, 268 N.C. 381, 150 S.E. 2d 759 (1966). Evidence which merely raises a conjecture as to plaintiff's negligence will not support an instruction. *Id.* However, since negligence usually involves issues of due care and

reasonableness of actions under the circumstances, it is especially appropriate for determination by the jury. *See Haddock v. Smithson*, 30 N.C. App. 228, 226 S.E. 2d 411, *disc. rev. denied*, 290 N.C. 776, 229 S.E. 2d 32 (1976). In "borderline cases," fairness and judicial economy suggest that courts should decide in favor of submitting issues to the jury. *Cunningham v. Brown*, 62 N.C. App. 239, 302 S.E. 2d 822, *disc. rev. denied*, 308 N.C. 675, 304 S.E. 2d 754 (1983). These policies ought to apply especially where the subject matter is particularly familiar to lay jurors, as in this case.

The court instructed on two theories of contributory negligence: that plaintiff (1) failed to maintain a proper lookout and (2) failed to keep his vehicle under proper control. The duty to maintain a proper lookout requires that the operator of a motor vehicle be reasonably vigilant, and that he or she anticipate the presence of others. *Tarrant v. Bottling Co.*, 221 N.C. 390, 20 S.E. 2d 565 (1942). This duty of care is mutual. *Id.* Thus, a motorist has no duty, except in unusual circumstances not applicable here, to anticipate the negligence of others. *Riggan v. Highway Patrol*, 61 N.C. App. 69, 300 S.E. 2d 252, *disc. rev. denied*, 308 N.C. 387, 302 S.E. 2d 253 (1983). *See generally* 7A Am. Jur. 2d *Automobiles and Highway Traffic* §§ 416-17 (1980). The fact of accident, standing alone, does not mean a driver failed to keep a proper lookout. *See Lane v. Dorney*, 250 N.C. 15, 108 S.E. 2d 55 (1959), *rev. on other grounds on rehearing*, 252 N.C. 90, 113 S.E. 2d 33 (1960). There must be some proof of negligence. *Id.*

> If there is no showing of what a careful lookout would have disclosed and what effective precautionary action the driver could have taken to avoid the accident, then there is no basis for submitting to the jury the question whether the driver was negligent in failing to maintain a proper lookout.

40 Am. Jur. Proof of Facts 2d, *Driver's Failure to Maintain a Proper Lookout* § 1 (1984). Applying these principles, we conclude that the evidence did not support an instruction on contributory negligence on this issue, even in light of the policy discussed above.

Plaintiff's evidence showed that he saw defendant's car from at least eighty feet away. He observed it move forward, as if to enter 401 North in front of him, and he slowed down. When he saw defendant stop and "get situated," he resumed acceleration,

it appearing to him that defendant was aware of him. Plaintiff's estimates of his speed range from thirty to forty-five m.p.h.; the speed limit on 401 North was forty-five m.p.h. Plaintiff testified that he observed that defendant was actually pulling out in front of him when he was twenty feet away. Defendant's evidence was that she and her passenger did not see a motorcyclist, and that she pulled out into 401 North. The passenger screamed, and defendant attempted to turn but was struck immediately. We find nothing in this evidence to suggest how plaintiff might have kept a better lookout. Even if he had seen defendant from a greater distance, that would be irrelevant to what action he might have taken when she pulled out in front of him. Nothing suggests that plaintiff only saw defendant for the first time as she pulled out in front of him. Instead, all the evidence showed that he observed her car earlier and had already taken some precautionary measures. We conclude that this evidence did not support an instruction on failure to keep a proper lookout.

The physical facts do not compel a different result. There is no evidence that plaintiff was driving anywhere but straight down his lane of 401 North for at least 100 feet before impact. There were only twenty-eight feet of scuff marks at the scene; plaintiff testified that the car dragged him about ten feet. Defendant makes much of the fact that plaintiff had cut through a parking lot and had accelerated rapidly. This evidence had no relevance to whether plaintiff maintained a proper lookout *once he entered his travel lane* on 401 North.

White v. Greer, 55 N.C. App. 450, 285 S.E. 2d 848 (1982), cited by defendant as controlling, is clearly distinguishable. That case involved a collision between a motorcycle and a car turning left from the same street across its path. The plaintiff, a motorcyclist, admitted seeing the defendant's car, with its turn signal on, some 275 feet away. The plaintiff left sixty-two to eighty-eight feet of skid marks before striking the right rear of the defendant's car. Here, on the other hand, taking the evidence in the light most favorable to the defendant, it showed that plaintiff saw her from about 100 feet away, when she was stopped, and that at some point thereafter she pulled out in front of him. Plaintiff left only approximately twenty feet of skid marks before impact. The inattention clearly inferable in *White* simply was not suggested by these facts.

The second theory of contributory negligence charged on by the court was that plaintiff failed to maintain proper control of his vehicle. Maintaining proper control means driving in such a manner that the vehicle "can be stopped quickly or with a reasonable degree of celerity, which does not mean instantly under any and all circumstances." 7A Am. Jur. 2d *Automobiles and Highway Traffic* § 415 (1980), *see* Black's Law Dictionary at 298 (5th ed. 1979). Again, the duty of control generally does not require that a driver maintain the ability to avoid collision with those who are themselves negligent. *Id.* Speed and control are interrelated; as speed increases, it obviously becomes more difficult to maintain proper control. *Id.* Nevertheless, speed and control are separate factors.

All the evidence showed that plaintiff was in his proper lane of travel at all times and that defendant pulled out in front of him. Plaintiff did not have time to avoid a collision. He swerved sideways to avoid being thrown from his motorcycle. Plaintiff's maximum speed indicated by the evidence was forty-five m.p.h. There is no evidence that he was unable to control his motorcycle as a result of this speed. In fact, plaintiff was able to do exactly what he intended to do in response to defendant's actions. As noted above, excessive speed and improper control are interrelated but not interchangeable. The evidence did not reach the quantum required to support an instruction on improper control by plaintiff, even in light of the general policies discussed earlier.

The North Carolina cases support our result. They have not always clearly distinguished between proper control and excessive speed, but we have found no case treating the two as the same. Comparison of the facts of this case with representative cases where insufficient evidence of improper control was found compels us to conclude that our ruling is correct. *See Henderson v. Henderson*, 239 N.C. 487, 80 S.E. 2d 383 (1954) (defendant remained in own lane at all times, confronted by sudden swerve; insufficient evidence); *Garner v. Pittman*, 237 N.C. 328, 75 S.E. 2d 111 (1953) (defendant remained in own lane at all times, 100 feet away when plaintiff pulled out; insufficient); *Hall v. Kimber*, 6 N.C. App. 669, 171 S.E. 2d 99 (1969) (defendant remained in own lane at all times, left straight skid marks stopping at point of impact; insufficient). *Compare Miller v. Enzor*, 17 N.C. App. 510, 195 S.E. 2d 86, *cert. denied*, 283 N.C. 393, 196 S.E. 2d 276 (1973)

(defendant's car left road briefly while passing; sufficient). The fact that plaintiff deliberately slid his motorcycle into defendant's car to mitigate the consequences of an unavoidable accident was justified under the circumstances by the sudden emergency doctrine, and does not show improper control resulting in the accident itself. *See Riggan v. Highway Patrol, supra.*

Plaintiff asks that we limit the scope of a new trial to issues of damages, accepting liability as established by the first trial. There having been a new trial on all issues, however, the result of the first trial is no longer relevant. Although this means starting at the beginning for the third time, in this posture of the case, there must be a

New trial.

Chief Judge HEDRICK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. WALTER JACKSON, JR.

No. 8414SC656

(Filed 2 April 1985)

1. Assault and Battery § 14.6— assault on a law officer—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for assault with a deadly weapon upon a law officer where it tended to show that defendant intentionally drove his truck toward a police officer and his patrol car while the officer was attempting to arrest defendant for numerous traffic violations, and that the officer was forced to take evasive action to avoid being struck in a collision.

2. Criminal Law § 66.20— admission of identification testimony—failure to make findings

The trial court did not err in the admission of photographic and in-court identification testimony without making findings of fact where the evidence on *voir dire* consisted only of the unrefuted testimony of State's witnesses and the State's evidence justified admissibility.

APPEAL by defendant from *Bowen, Judge.* Judgment entered 23 February 1984 in Superior Court, DURHAM County. Heard in the Court of Appeals 5 March 1985.

Defendant was convicted of assault with a deadly weapon upon a law enforcement officer. G.S. 14-34.2.

The evidence at trial tended to show that Sgt. David Laeng of the Durham Public Safety Department was driving on routine patrol in the pre-dawn hours of 8 October 1983 when he observed a red "Road Commander" truck tractor proceeding along a city street without taillights. Sgt. Laeng turned on his blue lights and siren and attempted to stop the truck. The driver of the truck did not stop and increased the speed of the truck to 65 miles per hour in a 35 mile per hour zone. Sgt. Laeng testified that the truck stopped at a stop sign at the intersection with Highway 54. He drove around the truck and stopped his patrol car in the middle of Highway 54 a few feet in front of the truck across the truck's path. Sgt. Laeng observed that the truck was being driven by a black male in dark clothing.

As he was about to get out of his patrol car to approach the truck, Sgt. Laeng noticed that the truck was accelerating and moving toward his patrol car. Sgt. Laeng testified that he "threw the patrol car in gear" and moved it out of the way. He testified that he believed if the patrol car had not been moved, the oncoming truck would have pushed the patrol car off the road.

A chase then ensued from Durham into Wake County with officers of several law enforcement agencies participating. The truck eventually turned onto Interstate 40, going the wrong way towards oncoming traffic, and ran into an embankment. The driver of the truck ran from the scene. Two children, ages 5 and 3 years, were found in the truck.

Sgt. Laeng testified that he could not identify the driver of the truck.

James A. Gilbert, a civilian, was a passenger in one of the highway patrol cars participating in the chase through Durham and Wake Counties. On *voir dire*, Gilbert testified that the patrol car in which he was riding pulled alongside of the truck at about 75 miles per hour in an attempt to pass the truck. Gilbert testified that during this passing attempt he looked up at the truck driver who looked down at him for about 5 or 6 seconds. Gilbert was contacted about three weeks after the incident of 9 October to determine whether he could identify the truck driver. On 25

January 1984, State Highway Patrol Sgt. Raymond Isley displayed a group of photographs for Gilbert who selected defendant from the photographs and identified him as the truck driver. Gilbert also made an in-court identification of defendant.

John W. Johnson, a self-employed towing service operator, testified that on the night of the incident, he was called by police to tow the truck that had been involved in the chase. He towed the truck approximately a mile from where it had been wrecked and abandoned on I-40 and stopped to rotate two of the truck's tires for easier towing. Johnson testified that the tow truck's four floodlights were in operation while he was changing the two tires. He heard a noise, turned around and saw a person who was within "touching distance." Johnson shined his flashlight in the face of the person who he identified in court as defendant. Johnson testified that he had seen the defendant on prior occasions at Southern Truck Sales in Durham where defendant's brother worked.

The identification testimony and pictures were allowed into evidence over objection. The jury returned a verdict of guilty to the charge of assault with a deadly weapon on a law enforcement officer. From a judgment imposing the presumptive term of two years imprisonment, defendant appeals.

Attorney General Edmisten, by Associate Attorney General Michael Smith, for the State.

Appellate Defender Stein, by Assistant Appellate Defender James A. Wynn, Jr., for defendant-appellant.

EAGLES, Judge.

I

Defendant first assigns as error the trial court's denial of his motions to dismiss the charge of assault with a deadly weapon upon a law enforcement officer. We find no error.

It is well settled that upon a motion to dismiss in a criminal action, all the evidence admitted, whether competent or incompetent, must be considered by the trial judge in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. Any con-

tradictions or discrepancies in the evidence are for the jury to resolve. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). The trial court must decide whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). *See State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984).

[1] All the evidence at trial came from witnesses for the State. The evidence tended to show that defendant intentionally drove his truck toward Sgt. Laeng and his patrol car while he was performing a duty of his office, attempting to arrest defendant for numerous traffic violations. Sgt. Laeng was forced to take evasive action to avoid being struck in a collision. We note that a motor vehicle may be a deadly weapon if used in a dangerous and reckless manner. *State v. Coffey*, 43 N.C. App. 541, 259 S.E. 2d 356 (1979). Viewed in the light most favorable to the State, there was sufficient evidence from which a jury could conclude that defendant assaulted Sgt. Laeng with a deadly weapon while Sgt. Laeng was performing a duty of his office. G.S. 14-34.2.

II

[2] Defendant next assigns as error the admission into evidence of the out-of-court and in-court identification of defendant. We find no error.

The basis of defendant's assignment of error is the trial court's apparent summary ruling that identification testimony based on photographs and in-court testimony was admissible. The record does not disclose findings of fact or conclusions of law although the trial court, after ruling the evidence admissible, ordered the prosecutor to "draw an order, make the appropriate findings of fact [and] conclusions of law."

Generally, when the admissibility of an in-court identification is challenged on the grounds that it is tainted by an out-of-court identification made under constitutionally impermissible circumstances, the trial court must make findings of fact to determine whether the testimony meets the test of admissibility. When the facts so found are supported by competent evidence, they are conclusive on appeal. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d

884 (1974); *State v. Plowden*, 65 N.C. App. 408, 308 S.E. 2d 918 (1983).

Here, the evidence consisted only of the unrefuted testimony of State's witnesses. The trial court allowed the identification testimony into evidence after *voir dire*, but findings of fact and conclusions of law as to the admissibility of the evidence do not appear of record. We note, however, that "[i]f there is no material conflict in the evidence on *voir dire*, it is not error to admit the challenged evidence without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. [Citations omitted.] In that event, the necessary findings are implied from the admission of the challenged evidence." *State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1980). Here, defendant produced no evidence to refute the State's evidence and the State's evidence justified admissibility. Accordingly, it was not error for the trial court to admit the challenged identification evidence.

In the trial of this case we find no error. We have carefully examined the record and find defendant's remaining assignments of error to be without merit.

No error.

Judges ARNOLD and PARKER concur.

STATE OF NORTH CAROLINA v. CHARLES EDWARD HIGHSMITH

No. 843SC827

(Filed 2 April 1985)

1. Criminal Law § 91.7— absence of witness—continuance denied—no error

The denial of defendant's motion for a continuance in order to obtain witnesses did not violate defendant's rights under the federal or state constitutions where the indictment had been pending since June 1983; defendant had not been able to locate the witnesses on at least one previous occasion when the case was set for trial, but had not subpoenaed the two witnesses to be present at the October 1983 trial; and defendant and another witness testified with regard to defendant's claim of self-defense. The two missing witnesses would not have added anything more than corroboration and defendant failed to demonstrate prejudice.

2. Evidence § 22— absent witnesses—testimony at probable cause hearing not admitted—no error

The court did not err by excluding the testimony given at the probable cause hearing by witnesses absent from the trial where defendant had attempted to contact the witnesses through private investigation but had not subpoenaed them.

3. Criminal Law § 138— failure to find mitigating factor of strong provocation—no error

The court did not err by failing to find the mitigating factor of strong provocation where, after the original altercation which evidenced a threat or challenge to defendant by the victim, defendant proceeded to his residence six blocks away, obtained a shotgun and shells, and returned to the vicinity of the original fight. G.S. 15A-1340.4(a)(2)i.

APPEAL by defendant from *Allsbrook, Judge.* Judgment entered 6 October 1983 in Superior Court, PITT County. Heard in the Court of Appeals 11 March 1985.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury. On the day the case was called for trial, defendant moved for a continuance for the purpose of obtaining two absent witnesses. The trial judge denied the motion.

The State's evidence tended to show that on the evening of 6 May 1983, Curtis Brown, accompanied by his girlfriend, was collecting admission at the entrance of the Rocking Palace, a local nightclub. Brown was armed with a .22 caliber pistol in a shoulder holster underneath his jacket. As defendant exited the Rocking Palace, he made some suggestive remarks to Brown's girlfriend. Brown followed the defendant outside the club and demanded that he apologize. Defendant refused and a fight ensued in which Brown hit defendant several times and knocked him out. Brown did not display his pistol. He returned to the club and gave his pistol to his girlfriend, who left to go home. Approximately twenty minutes later Brown left the club. As he approached his car, he noticed the defendant walk from behind another car toward him. Defendant said, "You jumped on me when I was drunk while ago." Brown asked him "did he want some more of what he got." At that point, Brown "saw him bring something from his side. . . . The only thing I remember is when I saw him bringing something up from his side everything went black." Charles Crandell testified that he was parked in a nearby car, saw defend-

ant carrying something, and then heard two shotgun blasts. Brown sustained gunshot wounds to the face and chest.

Defendant testified that after the first altercation with Brown he ran several blocks to his residence and secured his shotgun. He returned to the vicinity of the Rocking Palace to retrieve his glasses, hat and coat and carried the shotgun with him in case any more trouble developed with Brown. As he approached the Rocking Palace, he placed the shotgun behind a nearby church building and called to a friend, Gary Smith, to see if he could find defendant's hat and coat. Defendant then saw Brown and his brother, James, and heard Brown yelling at him to "come here." Defendant retrieved his shotgun and was leaving the area when he heard two pistol shots and heard bullets pass close by him. As he was running he fired one shot in the direction of Brown and his brother. Donald Ray Williams testified that he heard two pistol shots before the shotgun blast and that he had seen James Brown with a .38 caliber pistol earlier that night.

Defendant was convicted of assault with a deadly weapon inflicting serious injury, a violation of G.S. 14-32(b). The court found as a factor in aggravation that defendant had a prior conviction for a criminal offense punishable by more than sixty days' confinement. The court found no mitigating factors and that the factors in aggravation outweighed those in mitigation. Defendant received a seven year sentence, four years in excess of the presumptive term. Defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General James E. Magner, Jr., for the State.

Arthur M. McGlauflin, for defendant appellant.

MARTIN, Judge.

Defendant assigns as error the denial of his motion for a continuance, the exclusion of prior testimony from the probable cause hearing, and his sentencing. For the reasons which follow, we find no error in defendant's trial and sentencing.

[1] Defendant first assigns as error the trial court's denial of his motion to continue in order to obtain witnesses on his behalf. Defendant does not contend the trial court abused its discretion in denying his motion for continuance; rather, he asserts as error

the denial of his constitutional rights, arguing the testimony of the absent witnesses was necessary to establish his claim of self-defense. *See State v. Chambers*, 53 N.C. App. 358, 280 S.E. 2d 636, *cert. denied*, 304 N.C. 197, 285 S.E. 2d 103 (1981). If a motion for a continuance is based on a right guaranteed by the federal and state constitutions, the question presented is one of law and not of discretion. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976). Defendant "must show both that there was error in the denial of the motion and that he was prejudiced thereby before he will be granted a new trial." *State v. Thomas*, 294 N.C. 105, 111, 240 S.E. 2d 426, 431-32 (1978). Prejudicial error amounts to a denial of a substantial right, or, in other words, defendant must show that if the error had not occurred, there is a reasonable possibility 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).

Applying this standard to the case at bar, we find that defendant's rights under the federal and state constitutions were not denied him. Due process requires that defendant be allowed a reasonable time and opportunity to produce competent evidence in defense of the crime with which he is charged and to confront his accusers with other testimony. *State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526 (1970). The record discloses that defendant was given the opportunity to fairly prepare and present his defense. The indictment had been pending since June 1983. Although the witnesses had testified at the probable cause hearing, defendant had not been able to locate them on at least one previous occasion when the case was set for trial. Still, defendant had not subpoenaed the two witnesses to be present at the October trial. Additionally, both the defendant and Donald Ray Williams testified with regard to the pistol shots heard before the shotgun blast, i.e., defendant's claim of self-defense. Defendant has failed to demonstrate that the lack of testimony from the two witnesses was prejudicial to him. Their testimony would not have added anything more than corroboration to his defense. *See State v. Davis*, 61 N.C. App. 522, 300 S.E. 2d 861 (1983). Defendant's constitutional rights have not been denied; this assignment of error is overruled.

[2] Defendant next assigns error to the trial judge's exclusion of the prior testimony of the absent witnesses at the probable cause

hearing. Defendant sought to introduce this prior testimony through cross-examination of the victim Brown, who was not able to identify the person who testified at the probable cause hearing, only that he "heard that someone said that it was two or three shots fired." He also sought, on cross-examination, to elicit the testimony of the State's witness, Charles Crandell, that he had heard Howard Kennedy testify at the probable cause hearing that Kennedy had heard pistol shots before the shotgun was fired.

When the original witness is unavailable, his testimony at a preliminary stage of the same cause is admissible under the prior testimony exception to the hearsay rule and may be proved by the testimony of a person who heard it. *See* Brandis on North Carolina Evidence, § 145. A witness is unavailable if he is dead, insane, beyond the reach of a summons, or the proponent of the prior testimony is unable, despite due diligence, to obtain the attendance of the witness. *See* N.C. Evid. R. 804. While defendant asserts that he exercised due diligence to obtain the attendance of the witnesses by attempting to contact them through his private investigation, we find that defendant has failed to meet the unavailability requirement necessary before the prior testimony may be admitted. Although the indictment had been pending since June 1983, defendant had not subpoenaed the two witnesses to be present at the October trial. In essence, defendant's justification for the absence of the witnesses was that they were "merely temporarily unavailable." From the record before us, defendant has not made a sufficient showing that the witnesses were unavailable. This assignment of error is overruled.

[3] Defendant finally contends there was evidence which was uncontradicted and manifestly credible in accord with the rule set forth in *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983), which required the court during the sentencing to find the mitigating factor that defendant acted under strong provocation. G.S. 15A-1340.4(a)(2)i. Defendant has failed to show that he acted under strong provocation. While the original altercation evidenced a threat or challenge by the victim to the defendant, *see State v. Puckett*, 66 N.C. App. 600, 312 S.E. 2d 207 (1984), the ensuing events of defendant proceeding to his residence six blocks away, obtaining a shotgun and shells, and then returning to the vicinity of the original fight manifest actions more consistent with a prior

determination to seek out a confrontation rather than a state of passion without time to cool placing defendant beyond control of his reason. The trial judge did not err in failing to find the mitigating circumstance of "strong provocation" under G.S. 15A-1340.4(a)(2)i, and therefore did not err in sentencing the defendant to a term in excess of the presumptive term.

Defendant received a fair trial and fair sentencing hearing.

No error.

Chief Judge HEDRICK and Judge WELLS concur.

THE NORTHWESTERN BANK v. JAMES E. RASH AND WIFE, SHIRLEY R. RASH

No. 8429SC720

(Filed 2 April 1985)

1. **Fraud § 12— misrepresentation of ownership—absence of detriment**

Defendants failed to make out a case of fraud entitling them to cancellation of a note given to plaintiff bank for the purchase of real property based on the bank's misrepresentation that it owned the property where defendants received the title to the property for which they contracted. The fact that this title was delivered from someone other than the plaintiff does not establish fraud by plaintiff.

2. **Fraud § 5— absence of reliance on misrepresentation**

Defendants failed to make out a case of fraud entitling them to cancellation of a note given to plaintiff bank for the purchase of real property based on the bank's misrepresentation of the amount of rent the property was producing where the evidence showed that defendants executed the note sued on some sixteen months after they learned that the bank's representation was false and that defendants thus did not rely on such representation in executing the note.

3. **Fraud § 12— failure to show false statement**

Defendants' evidence failed to show that plaintiff bank's representation as to the value of repairs made to property purchased by defendants was false so as to entitle defendants to cancellation of a note given for the property on the basis of fraud.

4. **Fraud § 3.1— promissory representation—failure to show intent not to comply**

Defendants' evidence was insufficient to show that plaintiff was guilty of fraud in promising to take back property sold to defendants if defendants

could not make money on the property where there was no evidence from which a jury could find that plaintiff made the promise to take back the property with no intent to honor it.

APPEAL by defendants from *Snepp, Judge.* Judgment entered 11 January 1985 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 7 March 1985.

This is a civil action wherein the plaintiff sued on a note executed by the defendants. The defendants answered admitting execution of the note, but counterclaimed seeking a cancellation of the note on the grounds that it was procured through fraud. The case came on for trial during the 9 January 1984 Civil Session of Rutherford County Superior Court. At the close of defendants' evidence the court granted plaintiff's motion for a directed verdict against the defendants as to the counterclaim and for plaintiff on its principal claim. Judgment was entered against defendants for $51,082.59. From this judgment, defendants appeal.

George R. Morrow for plaintiff appellee.

Brenda S. McLain for defendant appellants.

ARNOLD, Judge.

The sole issue presented for review is whether the court erred in granting plaintiff's motion to dismiss defendants' counterclaim at the close of the defendants' evidence. Believing the trial court properly found that defendants had failed to produce sufficient evidence to submit the issue of whether the plaintiff had fraudulently procured the execution of the note upon which it sued, we affirm the trial court's judgment.

The record indicates that this case was tried before a judge and jury. The record further shows that at the close of the defendants' evidence the plaintiff moved to dismiss defendants' counterclaim, and that this motion was granted. Motions to dismiss pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure are applicable only in cases where the matter is tried before a judge sitting without a jury. The proper motion in the present case would have been a motion for a directed verdict pursuant to Rule 50(a) of the North Carolina Rules of Civil Procedure. However, defendants made no objection to the improper motion, thus, we will treat the court's order as having been

entered pursuant to a motion for a directed verdict under Rule 50(a). *Hamm v. Texaco Inc.*, 17 N.C. App. 451, 194 S.E. 2d 560 (1973).

A directed verdict is proper only when taking non-movants' evidence as true and in the light most favorable to them the evidence is insufficient to justify a verdict for the non-movants. *See Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). The evidence in the case *sub judice*, when taken in the light most favorable to the defendants, tended to show the following. In March 1979 James Rash and J. C. Allen, a vice-president of the Northwestern Bank in Forest City, discussed the possibility of Rash buying some rental property on which the Bank had recently foreclosed. Allen agreed to let Rash have a 100% loan on the property at an interest rate 1½% below the prime rate. Allen told Rash to make the interest payment on the property for a year and if he couldn't handle the property, the Bank would take the property back. Allen also told Rash that each of the nine rental houses were rented, and each house bringing in $80 per month in rent. Finally, Allen told Rash that $20,000 in repairs had recently been made on the houses. Rash, relying upon these statements and a belief that the bank owned the property, agreed to purchase the property. On 20 March 1979, Rash and his wife bought the property and executed a $48,500 note payable on demand. Interest was to accrue at a rate of 9% per annum and was payable on demand, quarterly. Shortly after the transaction, the defendants received a deed for the property from Richard Morrow. After taking over the property the defendants learned that not all the houses were rented and that those houses which were rented were only bringing in $40 per month. The defendants also learned that several of the units needed extensive repairs. Defendants held the property for a year, and then began discussions with Allen about the plaintiff taking back the property. On 26 June 1980, the defendants signed a second note, the one which is the subject of this action, in the amount of $48,500 with an interest rate of 9% which called for 59 monthly payments of $616.24 with a final balloon installment payment of $30,294.88 which was to be paid on 7 July 1985. Following the execution of the second note the defendants made six payments of principal and interest, six payments of interest only and one $5,000 payment toward the reduction of the principal. The last payment

defendants made on the property was in August 1981. In March 1982, Mr. Rash had a deed drawn which conveyed the property to the plaintiff. He tendered this deed along with the surplus revenues which he had collected from the property to a bank official. The plaintiff refused to accept the deed and the money. In June 1982, after demanding payment, plaintiff filed suit to collect the note.

In order to establish fraud the defendants must show that the plaintiff made a representation relating to a material fact; that the representation was false; that plaintiff knew or should have known at the time it was made that it was false; that the false representation was made with the intention that it should be relied upon by the defendants; and that the defendants did in fact reasonably rely, to their detriment, upon the false representation. *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). The defendants argue that the plaintiff made four false representations each of which entitled them to prevail on the counterclaim. These representations were (a) that the plaintiff owned the property; (b) that each of the rental units was bringing in $80 rent per month; (c) that $20,000 in repairs had been done upon the property; and (d) that if the defendants could not make a profit on the property the plaintiff would take the property back and cancel the note. We will examine each of defendants' contentions separately to determine whether defendants have presented sufficient evidence to warrant the submission of the counterclaim to the jury based upon these allegedly fraudulent representations.

[1] First, we consider defendants' contention that they made out a case of fraud based upon the bank's misrepresentation of who owned the property. While a misrepresentation regarding ownership is a representation relating to a material fact, the defendants have failed to offer any evidence from which a jury could find that they relied upon the representation to their detriment. The defendants received a fee simple title, the title for which they contracted, to the property. The fact that this title was delivered from someone other than the plaintiff does not serve to establish fraud on the part of the plaintiff.

[2] Next, plaintiff contends that the bank misrepresented the rental value of the property. Statements regarding past or present rents received from a property have frequently been held to

be representation of a material fact upon which a claim for fraud may be predicated if the other elements of the tort are present. 37 C.J.S. *Fraud* § 54. However, the evidence indicated that the defendants executed the note sued upon some sixteen months after learning of the bank's representation regarding the amount of rent which the property was producing was incorrect, thus, the evidence fails to show that the defendants relied upon this misrepresentation.

[3] Defendants also contend that the plaintiff misrepresented the amount of repairs which had been done on the property. While they have offered evidence that some of the properties were in need of repair, they also offered evidence that some repairs had been made upon the property. There is no evidence as to the value of these repairs, therefore, they have failed to show that the representation as to the value of the improvements was false. This contention is also subject to the same defect as the contention regarding the misrepresentation of the company's rental value, because the evidence shows that the defendants were aware of the property's state of repair when they signed the note upon which the plaintiff has sued.

[4] Finally, defendants rely upon the contention that the plaintiff defrauded them by promising to take property back if the defendants could not make a profit on the deal, and then refusing to honor this promise. The general rule is that an unfulfilled promise cannot be the basis for an action for fraud unless the promise is made with no intention to carry it out. *Pierce v. Insurance Co.*, 240 N.C. 567, 83 S.E. 2d 493 (1954). Our examination of the record reveals no evidence from which a jury could find that the plaintiff made the promise to take back the property with no intent to honor it.

For the above stated reasons the judgment of the trial court is

Affirmed.

Judges EAGLES and PARKER concur.

STATE OF NORTH CAROLINA v. DEBORAH KAYE TEMPLES

No. 8421SC824

(Filed 2 April 1985)

1. **Homicide § 19.1— self-defense—general reputation of victim admitted—error**

In a prosecution for the murder by defendant of her allegedly abusive husband, the trial court erred by admitting evidence of the decedent's general reputation in the community. The State may offer evidence of a homicide victim's character for peace and quiet in rebuttal of evidence of the deceased's character for violence, but it may not go further and introduce evidence of the victim's general good character.

2. **Homicide § 15— murder by abused wife—suicide note—not relevant**

In a prosecution for the murder by defendant of her husband, the court erred by admitting for impeachment a note allegedly written by defendant in contemplation of suicide. The note was not relevant for impeachment; furthermore, the prejudicial impact of the inflammatory contents outweighed any conceivable probative value.

3. **Homicide § 28.3— self-defense—abuse of language—no evidence supporting instruction**

Where defendant was charged with the murder of her husband, the court erred by instructing the jury that one enters a fight voluntarily if she uses toward her opponent abusive language calculated to bring on a fight where there was no evidence from which a jury could find that defendant used such language.

4. **Homicide § 28.3— self-defense—instruction on effect of defendant's aggression—not supported by evidence**

In a prosecution for murder, the court erred by instructing the jury that a defendant acting in self-defense is guilty of voluntary manslaughter if she was the aggressor in bringing on the fight where the record contains no evidence that defendant was the aggressor; however, defendant did not properly raise the assignment of error under App. Rule 10(b)(2).

5. **Criminal Law § 167— errors not prejudicial considered alone—collectively prejudicial**

In a prosecution for murder where the court erred by admitting evidence of the deceased's general reputation, admitting a suicide note allegedly written by defendant, and giving instructions on abusive language and self-defense not supported by the evidence, the errors did not alone rise to the level of prejudicial error, but collectively raised a reasonable possibility that a jury would have reached a different verdict had those errors not occurred.

APPEAL by defendant from *Seay, Judge.* Judgment entered 21 March 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 11 March 1985.

Defendant was charged in a proper bill of indictment with murder. She was found guilty of second degree murder. From a judgment imposing the presumptive sentence of fifteen years, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Catherine McLamb, for the State.

Harrell Powell, Jr., and Lawrence J. Fine for defendant, appellant.

HEDRICK, Chief Judge.

Evidence introduced at trial tends to show the following: Defendant and the deceased were married in 1981. Their marital relationship was tumultuous, characterized by violent arguments and separations followed by periods of affection and reconciliation. When Mr. Temples consumed alcohol, he often became verbally and physically abusive toward defendant. Defendant testified that on the evening of 7 August 1983 Mr. Temples was drinking heavily and that she and her husband began to argue. She stated that Mr. Temples cursed her, pushed her to the floor, and threatened to hurt her if she got up. Defendant said that Mr. Temples then undressed and went into the bathroom to shower, leaving defendant crying on the floor. Defendant stated she reached for some Kleenex and saw a pistol she habitually carried in her pocketbook. Mrs. Temples testified that she took out the gun and put it to her head, contemplating suicide. She realized that she did not want to die just as her husband opened the bathroom door. The defendant testified that she then approached her husband, saying, "I love you, . . . please hold me," and that Mr. Temples reached for the gun, saying, "[Y]ou put that gun up to your god damn head and I'll help you pull it, I'll help you pull that trigger, you just hold it up there and I'll put my hand on it and pull it." Defendant testified that she believed the deceased intended to kill her and so closed her eyes, fired the gun, and then closed the bathroom door. Evidence introduced at trial tends to show that the gun was fired five times and that three bullets struck the deceased. The bullet that inflicted the fatal wound entered the deceased's back. Forensic evidence tends to show that the fatal bullet was fired from a distance in excess of two feet.

[1] By her first assignment of error defendant contends the court improperly admitted evidence of the decedent's general character and reputation in the community. We agree. While the State may offer evidence of a homicide victim's character for peace and quiet in rebuttal of evidence of the deceased's character for violence, *State v. Johnson*, 270 N.C. 215, 154 S.E. 2d 48 (1967), it may not go further and offer evidence of the victim's general good character. *State v. Champion*, 222 N.C. 160, 22 S.E. 2d 232 (1942). In the instant case, the State offered testimony, over defendant's objections, by five witnesses as to Mark Temples' general good character. We hold the court erred in admitting this evidence.

[2] Defendant next assigns error to the admission into evidence of State's Exhibit No. 18, a note apparently written in contemplation of suicide and allegedly written by defendant. The record shows that this note was found with numerous other papers and clippings in a shoulder bag in a closet in the apartment shared by defendant and her husband. The writing, which was neither dated nor signed, made reference to the writer's experiences with drugs, abortion, and incest. The record reveals that Judge Seay conducted a *voir dire* on the admissibility of this exhibit, and then ruled that the note could be admitted. On objection and further argument by counsel, however, the court reversed its ruling and excluded the exhibit. Following the close of the State's case on rebuttal, the district attorney inadvertently handed State's Exhibit No. 18 to a juror, and defendant moved for a mistrial. The court then granted the State's motion to re-open its case, allowed State's Exhibit No. 18 into evidence, and instructed the jury that the note was to be considered only for impeachment purposes. The record contains no ruling by the court on defendant's motion for a mistrial.

We agree with defendant that the court erred in admitting the challenged writing into evidence. We find the State's argument as to this exhibit's relevance for impeachment purposes totally unpersuasive; furthermore, in addition to its collateral nature, we observe that the contents of this document are inflammatory, with the potential prejudicial impact under the circumstances far outweighing any conceivable probative value of this evidence. *See State v. Strickland*, 208 N.C. 770, 182 S.E. 490 (1935).

[3] By Assignment of Error No. 10, defendant contends that the court erred in instructing the jury that "One enters a fight voluntarily if she uses toward her opponent abusive language which considering all the circumstances is calculated and intended to bring on a fight." Defendant argues that the record is devoid of evidence tending to show that defendant used abusive language toward Mark Temples on the morning of 8 August 1983. We agree, and hold that, because there is no evidence from which the jury could find that defendant voluntarily entered a fight with the deceased based on her use of abusive language calculated to bring on such a fight, the court erred in instructing the jury on this aspect of the law. *See State v. Cameron*, 284 N.C. 165, 171, 200 S.E. 2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 94 S.Ct. 3195, 41 L.Ed. 2d 1153 (1974) ("[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial.").

[4] Defendant's next contention is set out in her brief as follows:

> The trial court committed reversible error by instructing the jury that self-defense was not available to the defendant if she was the aggressor when there was no evidence in the record that the defendant was the aggressor.

Defendant has not properly raised this assignment of error under Rule 10(b)(2), North Carolina Rules of Appellate Procedure, which in pertinent part provides: "In the record on appeal an exception to instructions given the jury shall identify the portion in question by setting it within brackets or by any other clear means of reference." We point out, however, that it is error for the court to charge the jury that a defendant, if otherwise acting in self-defense, is guilty of voluntary manslaughter if he was the aggressor in bringing on the fight where the record contains no evidence that the defendant was the aggressor. *State v. Miller*, 223 N.C. 184, 25 S.E. 2d 623 (1943); *State v. Tann*, 57 N.C. App. 527, 291 S.E. 2d 824 (1982); *State v. Ward*, 26 N.C. App. 159, 215 S.E. 2d 394 (1975).

[5] "A defendant is entitled to a fair trial but not a perfect one." *Lutwak v. United States*, 344 U.S. 604, 619-20, 73 S.Ct. 481, 490, 97 L.Ed. 593, 605 (1953). Our courts have repeatedly said that a defendant has the burden of demonstrating not only error, but also that the error complained of was prejudicial, i.e., that there

is a reasonable possibility that a different verdict would have been reached had the errors not been committed. *See, e.g., State v. Milby and State v. Boyd*, 302 N.C. 137, 273 S.E. 2d 716 (1981); *State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978). We do not hold today that any of the errors discussed above, standing alone, rise to the level of prejudicial error. When the errors committed by the trial judge are considered collectively, however, we believe there is indeed a reasonable possibility that the jury would have reached a different verdict had these errors not occurred. Consequently, we hold that defendant is entitled to a

New trial.

Judges WELLS and MARTIN concur.

STATE OF NORTH CAROLINA v. JAMES CARL COATS

No. 848SC436

(Filed 2 April 1985)

1. **Larceny § 7.2— felonious larceny—sufficient evidence of value**

The State's evidence of the value of stolen goods was sufficient to support defendant's conviction of felonious larceny where it tended to show that defendant took the victim's purse which contained fifty dollars, a check for approximately $650, and three diamond rings which had cost $2,100 when purchased some twenty years before.

2. **Larceny § 6.1— cost of stolen property**

Testimony that stolen rings had cost $2,100 when purchased twenty years before was admissible in a prosecution for larceny of the rings.

3. **Criminal Law § 66.1— in-court identification—opportunity for observation**

The trial court properly permitted a witness to identify defendant as the perpetrator of a larceny where the witness clearly testified that she had an opportunity to observe defendant and that she based her in-court identification on her observation of defendant committing the larceny.

APPEAL by defendant from *Strickland, Judge*. Judgment entered 2 December 1983 in Superior Court, WAYNE County. Heard in the Court of Appeals 17 January 1985.

Defendant was indicted and tried for felonious larceny of the following items which were in a purse belonging to Jeanne Mel-

rose: fifty dollars, a United States government check for approximately $650, a diamond wedding band, and an engagement ring. The total value of the stolen items listed in the indictment was $2,115.

At trial the evidence for the State tended to show the following. On 2 April 1983, Melrose went to Bogart's, a nightclub. She sat down in a booth, and then went to the restroom leaving her grey purse and sweater in the booth. When Melrose returned to her table, there were other people sitting there. As Melrose looked unsuccessfully for her purse, Karen Temple, who was sitting in the booth, told her that she had seen someone take the purse and sweater. Temple pointed out the defendant, who was leaving the club, as the man who had taken the purse.

Goldsboro Police Officer Cecil Lupton testified that on 2 April 1983 he went to Bogart's with another officer and searched defendant's truck and the surrounding area, but they did not find the purse or the sweater.

Karen Temple saw defendant pick up Melrose's purse and sweater and walk out the back door. Temple identified defendant to Melrose and the police officer. A month later defendant called Temple and arranged a meeting. When Temple saw defendant she recognized him as the man who took the purse, but because she was scared she told defendant that she knew he had not taken the purse.

Beth Hooks testified that on 5 April 1983 defendant asked her to give the purse to Melrose's daughter. Defendant opened the purse in front of Hooks and inventoried the contents: ten dollars, the government check and some other items; there were no rings.

Defendant, testifying on his own behalf, said that he went to Bogart's with his friend, Charles. They sat in a booth, took off their coats, ordered setups, and went to the restroom. When they returned their seats were taken and their coats and fifth of gin were gone. The police officers arrived and searched defendant and his truck for Melrose's purse. The following Monday defendant found the purse, and he returned it to Bogart's. A woman named Sandra called defendant and asked him to contact Temple. Defendant called Temple, they met in a parking lot in front of a

grocery store, Temple told defendant she knew he had not stolen the purse. Defendant tape recorded their conversation.

The jury returned a verdict of guilty of felonious larceny. From the judgment and sentence of three years, the presumptive term, defendant appeals.

Attorney General Edmisten by Assistant Attorney General Daniel F. McLawhorn for the State.

John W. Dees for defendant appellant.

PARKER, Judge.

[1] In his first assignment of error defendant argues that the trial court erred in failing to grant his motion to dismiss at the close of all evidence. 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 essential elements of larceny are that defendant (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property. *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982). Larceny of goods valued at more than $400 is a Class H felony. G.S. 14-72(a). Defendant contends that there was insufficient evidence of the value of the stolen goods to support the charge of felonious larceny, and his motion to dismiss should have been granted. We do not agree.

The State's evidence tended to show that defendant took Melrose's purse which contained fifty dollars, a check for approximately $650, and three diamond rings. When viewed in the light most favorable to the State, these items together were clearly worth more than $400.

[2] Defendant next assigns error to the trial court's failure to strike Melrose's testimony that the rings had cost $2,100. Melrose testified that the rings were twenty years old, and described them as a yellow gold wedding ring with five little diamonds, a yellow gold engagement ring with a diamond in the middle and two smaller diamonds on each side, and a third yellow gold ring

with a cluster of eight or nine diamonds. As the evidence that the rings had originally cost $2,100 was admissible, *State v. Dickerson*, 20 N.C. App. 169, 201 S.E. 2d 69 (1973); *see State v. McCambridge*, 23 N.C. App. 334, 208 S.E. 2d 880 (1974); *see generally*, 1 Brandis on North Carolina Evidence § 128 (2nd ed. 1982), defendant's assignment of error is overruled.

[3] In his third assignment of error defendant argues that the trial court erred in allowing Temple to identify him as the alleged perpetrator. Temple testified that she "saw the purse and sweater in [defendant's] hand when he moved. He finished his drink, set his cup down, then he walked through that back door and we went and sat down." Her in-court identification was based on her observation of defendant committing the larceny:

> I pointed [defendant] out to [Melrose]—I said, "That's the man that carried the purse and sweater out." And then I went back inside and I sat down and in a few minutes [Melrose] came back inside and asked me would I go back out in the hall because the police was out there.
>
> . . . .
>
> Q. (Mr. Ferguson) This man that you identified to Ms. Melrose, who was that?
>
> A. Who was the man?
>
> Q. Yes, ma'am.
>
> A. That man over there, Mr. Coats.

Temple clearly testified that she had an opportunity to observe defendant, and she based her in-court identification on her observations when the purse was stolen. Moreover, any lack of certainty in this identification would go to the weight and not the admissibility of the testimony. *State v. Billups*, 301 N.C. 607, 272 S.E. 2d 842 (1981).

We have carefully considered defendant's assignments of error and find

No error.

Chief Judge HEDRICK and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. VERNON DOMAN WILLIAMSON

No. 8426SC382

(Filed 2 April 1985)

1. **Larceny § 7.4— doctrine of recent possession—evidence sufficient**

The trial court properly allowed the jury to rely on the doctrine of recent possession and the evidence was sufficient to support defendant's convictions for felonious breaking or entering and felonious larceny where defendant was seen in the vicinity of the house which was broken into carrying a brown radio under his arm and a silver portable radio with a broken speaker by the handle, those radios matched the description of the radios identified as the only items missing from the house, and the occupants of the house testified that they had listened to one radio and that the other had been on a bookcase the morning of the larceny.

2. **Arson and Other Burnings § 4.2— evidence insufficient—inference on inference**

There was insufficient evidence to sustain defendant's arson conviction where the jury had to first infer that defendant was in the building based upon his possession of the stolen radios, and from that infer that he willfully and wantonly set the house on fire.

3. **Criminal Law § 98.2— witnesses conferring after sequestration—no evidence of collusion—no error**

The court did not err by allowing three of the State's witnesses to confer together with the prosecutor after the court granted the parties' motion to sequester where one of the witnesses had testified and been dismissed, one had testified and was subject to recall but was never recalled, the third was approaching the end of his testimony, and there was no evidence of collusion.

APPEAL by defendant from *Burroughs, Judge*. Judgments entered 15 September 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 January 1985.

Defendant was indicted for and convicted of felonious breaking or entering and felonious larceny and one count of second degree arson. He was sentenced to three years for the breaking or entering and larceny convictions and to twelve years for the arson conviction.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Lennon, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Robin E. Hudson, for defendant appellant.

JOHNSON, Judge.

The State presented evidence tending to show that a fire broke out in the back bedroom of a house located at 1325 W. Sixth Street in Charlotte at approximately 2:00 p.m. on 3 June 1983. The occupants of the house, Mrs. Annie B. Thompson and her daughter, Edna Thompson, were away from the house when the fire broke out. Upon learning of the blaze, they returned to the house where they discovered the screen had been torn off the back window of the bedroom. They also discovered two radios were missing: Mrs. Thompson's brown, flat, eight to ten inch long clock radio, and her daughter's gray and silver portable radio, which was approximately eighteen inches long and had a broken speaker on one side. The daughter's radio had been in the back bedroom.

Mr. James Caraway, who reported the fire at approximately 2:15 p.m., testified that he saw defendant standing outside the house at 1325 W. Sixth Street some time before the fire started. Mrs. Edna Hyatt, a back door neighbor of the Thompsons, testified that she was at her clothesline in her back yard at approximately 2:00 p.m. on 3 June 1983 when she saw defendant walk through her back yard coming from Sixth Street carrying a small brown radio under one arm, and carrying a silver radio with a broken speaker, approximately eighteen inches long, by the handle. About five minutes later she heard the fire alarm.

Mr. Hunter Lacy, an expert in fire investigation, testified that in his opinion the fire started in the rear corner of the rear bedroom and that it had been intentionally set using a chemical accelerant. A chemist who analyzed charred wood fragments from the house testified that there were components of pine oil and gasoline in the fragments.

Defendant presented testimony from several witnesses that he was at the movies from approximately 12:45 p.m. to 7:00 p.m. on the date of the fire. Mr. A. P. Wilson, the owner of the house at 1325 W. Sixth Street, testified that Mrs. Thompson had had trouble with her son for breaking out windows in the residence and that she had taken out a warrant against her son a few months before. He also testified that there were broken windows in the front of the house as well as in the back bedroom. Officer

Lacy conceded on cross-examination that the fire could have started in a housecoat on the floor.

[1] Defendant contends that the evidence was insufficient to support defendant's conviction on any count because the court improperly allowed the jury to rely upon the doctrine of recent possession. The doctrine of recent possession is a rule of law which raises a presumption of one's guilt of larceny of goods through one's possession of those goods recently after the larceny. *State v. Bell*, 270 N.C. 25, 153 S.E. 2d 741 (1967). In addition, when there is sufficient evidence that a building has been broken into and goods taken therefrom, the doctrine raises a presumption from one's possession of such goods recently after the breaking and entering that such person broke and entered the building. *State v. Lewis*, 281 N.C. 564, 189 S.E. 2d 216, *cert. denied*, 409 U.S. 1046, 34 L.Ed. 2d 498, 93 S.Ct. 547 (1972). To invoke the doctrine the State must prove beyond a doubt that (1) the goods were stolen; (2) the goods were in defendant's custody and control to the exclusion of others and (3) defendant possessed the property recently after the larceny. *State v. Maines*, 301 N.C. 669, 273 S.E. 2d 289 (1981). There must be clear and direct evidence of each of these elements. *See id.*

The State's evidence in the present case showed defendant was seen in the vicinity of the house which was broken into carrying a brown radio under his arm and a silver portable radio, approximately eighteen inches long, with a broken speaker, by the handle. These radios matched the description of the radios identified as the only items missing from the house. Mrs. Thompson testified that she had listened to her brown radio earlier that morning. Her daughter testified that her radio was on the bookcase when she left the house that morning at 10:30. The State, therefore, presented clear and direct evidence that defendant possessed stolen goods recently after the larceny. The evidence was therefore sufficient to support defendant's convictions for felonious breaking or entering and felonious larceny.

[2] The evidence, however, was not sufficient to sustain defendant's arson conviction. Arson is the malicious and willful burning of the dwelling house of another. *State v. Oxendine*, 305 N.C. 126, 286 S.E. 2d 546 (1982). To convict defendant of arson, the jury had to infer first that defendant was in the building based upon his

possession of the stolen radios, and from that infer that he willfully and wantonly set the house on fire. This the jury could not do. Such a stacking of inferences is not permissible. *See State v. Maines, supra.* As the District of Columbia Court of Appeals stated in *United States v. Carter*, 522 F. 2d 666, 679 (1975), "to allow the jury to infer from [the defendant's] possession of the recently stolen items that he attempted to burn the [building] would 'accord the evidence more than its natural probative force,' *i.e.*, the attempted burning, the inferred fact, is not, beyond a reasonable doubt, a corollary of possession of recently stolen property, the fact proved."

[3] Defendant's remaining contention is that the court committed prejudicial error by allowing three of the State's witnesses to confer together with the prosecutor after the court had granted the parties' motion to sequester the witnesses. The purpose of a sequestration order is to prevent the witnesses from hearing the testimony of other witnesses and colluding with each other. *State v. Carswell*, 40 N.C. App. 752, 253 S.E. 2d 635, *disc. rev. denied*, 297 N.C. 613, 257 S.E. 2d 220 (1979). At the time of the conference, one of the three witnesses had testified and had been dismissed; the second witness, Edna Thompson, had testified and was subject to recall but was never recalled; and the third witness, Mr. Lacy, the arson investigator, was approaching the end of his testimony. We can find no evidence of collusion. This contention has no merit.

For the foregoing reasons we hold the court erred in denying defendant's motion to dismiss the arson charge. In all other respects we find no error. The results are:

As to defendant's convictions for felonious breaking or entering and felonious larceny,

No error.

As to defendant's conviction for second degree arson,

Reversed.

Judges BECTON and MARTIN concur.

STATE OF NORTH CAROLINA v. DANNY PRESTON MICHAEL

No. 8418SC745

(Filed 2 April 1985)

Constitutional Law § 49— waiver of right to counsel—absence of thorough inquiry by court

The trial court erred in permitting defendant to waive counsel and proceed pro se without specifically advising defendant of the permissible range of punishments and determining whether defendant understood the consequences of his decision to proceed pro se as required by G.S. 15A-1242.

APPEAL by defendant from *Albright, Judge.* Judgment entered 17 November 1983 in GUILFORD County Superior Court. Heard in the Court of Appeals 6 March 1985.

Defendant was indicted for felonious breaking or entering, two counts of felonious larceny, second degree burglary, and larceny after breaking and entering. On 24 October 1983, defendant appeared before the Guilford County Superior Court, Judge Wood presiding, at which time defendant refused appointment of counsel and requested to proceed pro se. The trial court granted defendant's motion, defendant signing a written waiver of his right to counsel.

Defendant was tried and convicted on 17 November 1983 for second degree burglary and larceny after breaking and entering. He was sentenced to consecutive terms of imprisonment totaling twenty years. 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.

Appellate Defender Adam Stein, by Assistant Appellate Defender David W. Dorey, for defendant.

WELLS, Judge.

Defendant assigns three errors to the trial court, the principal assignment being whether defendant's waiver of counsel was a knowing and intelligent waiver of his constitutional right to counsel. Because we must order a new trial for the court's failure to follow the mandates of N.C. Gen. Stat. § 15A-1242 (1983) and as

the other alleged errors would not likely recur at retrial, we will only discuss the principal assignment of error.

It is hornbook law that the Sixth Amendment of the Constitution of the United States as applied to the states through the Fourteenth Amendment guarantees an accused the right to counsel in criminal cases, *e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963), and guarantees the accused the right to waive representation by counsel and to conduct his own defense. *E.g., Faretta v. California*, 422 U.S. 806 (1975). The Supreme Court has held that an accused's waiver of the right to counsel and to proceed pro se must be a voluntary relinquishment of a known right. *E.g., Edwards v. Arizona*, 451 U.S. 477 (1981); *Estelle v. Smith*, 451 U.S. 454 (1981); *see generally* R. Price, *N.C. Crim. Trial Prac.* § 7-1 (1980 and 1983 Supp.).

The North Carolina General Assembly has enacted specific guidelines for trial courts to employ when an accused desires to proceed pro se:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

G.S. § 15A-1242. The wording of the statute and the decisions of our appellate courts clearly demonstrate that the provisions of the statute are mandatory in every case where an accused requests to proceed pro se. *State v. McCrowre*, 312 N.C. 478, 322 S.E. 2d 775 (1984) (trial court was required to make inquiry to determine if defendant understood the statutory factors); *State v. Gerald*, 304 N.C. 511, 284 S.E. 2d 312 (1981) (statute sets forth the prerequisites necessary before a defendant may waive his right to counsel); *State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252 (1980)

(statute fully satisfies the constitutional requirement that waiver of counsel must be knowing and voluntary); *State v. Simmons*, 56 N.C. App. 34, 286 S.E. 2d 898 (trial court must make a thorough inquiry to determine whether to allow or deny the request to proceed pro se in accordance with the statute), *disc. rev. denied and appeal dismissed*, 305 N.C. 591, 292 S.E. 2d 12 (1982).

At defendant's pretrial hearing on 24 October 1984, he requested to proceed pro se. The following exchange occurred:

> THE COURT: The Court informs you that you have a right to have a lawyer to represent you in this matter . . . wherein you are charged . . . [with the crimes enumerated previously].
>
> The Court informs you that in these cases that you have a right to have a lawyer represent you. Do you want me to appoint a lawyer to represent you in each of these cases?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: All right, sir. Let him sign a waiver waiving his right to have a lawyer in these cases.
>
> . . .
>
> THE DEFENDANT: I'd like to go ahead and represent myself when it comes time for trial. I believe I can get myself across to a jury better than my lawyer could.

The state, in its brief, properly concedes that the trial court did not specifically advise the defendant of the permissible range of punishments and did not determine if defendant understood the consequences of his decision to proceed pro se.

The state, however, contends that defendant made a knowing and intelligent waiver of his constitutional right to counsel despite the trial court's failure to follow the statutory provisions of G.S. § 15A-1242. This argument overlooks the dispositive question which is the court's failure to comply with the requirements of G.S. § 15A-1242. The requirements of G.S. § 15A-1242 are mandatory, and we hold that the trial court erred in failing to undertake the "thorough" inquiry required by the statute to determine if defendant understood the consequences of his decision to proceed pro se and to explain the range of permissible punishments

which could be imposed if defendant was found guilty of the crimes charged.

Our decision is supported by *State v. McCrowre, supra.* In *McCrowre,* defendant waived his right to counsel, believing he would be able to obtain an attorney privately. At trial, defendant had not retained private counsel, he explained to the court that he was ready for trial but he would not be able to competently conduct some aspects of the case, and he requested that the court assign counsel to him. The trial court refused, stating that defendant had signed a written waiver of his right to trial counsel. Our supreme court noted that had defendant "clearly indicated that he wished to proceed pro se, the trial court was required to make inquiry to determine" if the defendant understood the factors enumerated in G.S. § 15A-1242. *Id.* The *McCrowre* court held that the trial court had not complied with the statute and, therefore, erred in refusing to appoint counsel as defendant requested. *Id.*

For the reasons stated above the defendant must be and is hereby awarded a

New trial.

Judges WHICHARD and BECTON concur.

STATE OF NORTH CAROLINA v. RONNIE BERNARD DURHAM

No. 8426SC881

(Filed 2 April 1985)

1. Criminal Law § 75.2— confession not coerced by threat to search house or defendant's knowledge of other contraband therein

In a prosecution for first-degree burglary, felonious larceny, and assault with a deadly weapon with intent to kill inflicting serious injury, defendant's confession was properly admitted where the police had told defendant they would obtain warrants to search his home and defendant feared they would discover illegal explosives concealed there. The police merely gave defendant an accurate statement of the law and the fear that the police would discover illegal explosives originated with defendant, not the police; moreover, defendant failed to except to any of the court's findings of fact.

2. Criminal Law § 101— juror's inquiry about note-taking—objection by defendant—no instruction—no error

There was no prejudicial error where the court did not instruct the jury that no notes could be taken as mandated by G.S. 15A-1228 (1983) after a party objected. The court's explanation and the juror's answer indicate that no notes were to be taken and nothing indicates that any notes were ever taken, or, if so, that they had any effect on the jury's deliberations.

3. Criminal Law § 177.1— inconsistency between verdict and judgment—no error

Where the verdict was guilty of assault with a deadly weapon, a misdemeanor, but the judgment reflected a conviction of felonious assault with a deadly weapon with intent to kill inflicting serious injury, a felony, the case was remanded to make the judgment consistent with the verdict. G.S. 14-32(a) (1981), G.S. 14-33(b) (Cum. Supp. 1983).

APPEAL by defendant from *Burroughs, Judge.* Judgment entered 4 November 1983 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 13 March 1985.

Defendant was indicted on charges of first degree burglary, felonious larceny, and assault with a deadly weapon with intent to kill inflicting serious injury. The State's evidence tended to show that the victim was in her bathroom when she saw a man in the hall. The intruder pushed his way into the bathroom and grabbed the victim. She screamed, and the man threatened her by holding a knife to her throat. She grabbed the knife and screamed again. The intruder ran from the apartment. The victim cut her hand on the knife. She and her roommate later discovered a camera and some money missing.

The victim could not identify the intruder but police investigation yielded palmprints at the scene which matched defendant's. Defendant was arrested. After signing a form waiving his *Miranda* rights, he was confronted by police with the above account and the palmprint match. Defendant then gave a statement identifying himself as the intruder.

Defendant presented no evidence. The jury returned verdicts of guilty of first degree burglary, felonious larceny, and assault with a deadly weapon. The cases were consolidated for sentencing and the presumptive sentence for the burglary imposed. Defendant appealed.

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

Public Defender Isabel Scott Day, by Assistant Public Defender Marc D. Towler, for defendant.

WELLS, Judge.

[1] Defendant first assigns error to the admission of his confession, alleging it was the product of coercion. He does not challenge the arrest or the procedures used to obtain the waiver of his *Miranda* rights, *see Miranda v. Arizona*, 384 U.S. 436 (1966); thus, no general rule requiring suppression applies. Instead, we consider the totality of the factual circumstances in the case. *State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984). The factual findings of the trial court in denying the motion are conclusive if supported by any evidence. *Id.* Failure to except to individual findings waives any challenge to the sufficiency of the evidence to support them. *State v. Ford*, 70 N.C. App. 244, 318 S.E. 2d 914 (1984). Defendant failed to except to any findings of fact, which are therefore conclusive; they in turn support the court's conclusion that the statement was voluntary. The assignment is therefore overruled. Nevertheless, we have examined defendant's arguments and find them unavailing in any event.

Defendant contends the police improperly threatened him by stating that they could obtain warrants to search his home. We find no coercion: at worst, the police simply gave defendant a correct statement of the law. Having picked defendant up at home and only later arrested him for larceny, police needed search warrants to search defendant's home. *Vale v. Louisiana*, 399 U.S. 30 (1970). Not having found the stolen property, but with a positive print match, the officers undoubtedly had sufficient probable cause to obtain a warrant to search defendant's home for the missing property. *See State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982).

Defendant contends that his fear that police would discover illegal explosives he had concealed at his home motivated his confession and rendered it the product of coercion. This fear originated with defendant, however, not with any pressures by police. The Hobson's choice, between confessing and being discovered

with illegal explosives, was solely of defendant's making. No unconstitutional overbearing of defendant's will occurred. *State v. Branch*, 306 N.C. 101, 291 S.E. 2d 653 (1982) (psychological coercion must originate with police); *see Lynumn v. Illinois*, 372 U.S. 528 (1963).

[2] During preliminary jury instructions one of the jurors asked if the jury could take notes. The court explained that the jury could take notes, but that it would require special instructions. The court asked if the juror wanted the special instructions and the juror replied, "No, sir." Later, while the jury was absent, the court discussed the matter with counsel. Defendant objected to the taking of notes, and the court promised to instruct the jury that no notes could be taken. No instruction was given, however, and defendant now assigns error. He relies on N.C. Gen. Stat. § 15A-1228 (1983), which apparently makes such instruction mandatory upon objection by any party. While the failure to instruct may have constituted error, defendant is not entitled to a new trial unless he can show some effect thereof on the jury's deliberations. N.C. Gen. Stat. § 15A-1443(a) (1983). The court's explanation and the juror's answer indicate that the juror understood that no notes were to be taken, and nothing indicates any notes ever were taken, or, if so, that they had any effect on the jury's deliberations. *See State v. Ward*, 286 N.C. 304, 210 S.E. 2d 407 (1974), *death sentence vacated*, 428 U.S. 903 (1976). The assignment is therefore overruled. We conclude that defendant received a fair trial, free of prejudicial error.

[3] The jury returned a verdict of guilty of assault with a deadly weapon, a misdemeanor. N.C. Gen. Stat. § 14-33(b) (Cum. Supp. 1983). The judgment, however, reflects a conviction of felonious assault with a deadly weapon with intent to kill inflicting serious injury, a felony. *See* N.C. Gen. Stat. § 14-32(a) (1981). The case must therefore be remanded to the Superior Court of Mecklenburg County to correct the judgment and make it consistent with the verdict. *State v. Williams*, 31 N.C. App. 111, 228 S.E. 2d 668, *disc. rev. denied*, 291 N.C. 450, 230 S.E. 2d 767 (1976).

No error in the trial.

Remanded for correction of judgment.

Chief Judge HEDRICK and Judge MARTIN concur.

DIXIE MOTT ALGARY, EMPLOYEE, PLAINTIFF v. McCARLEY & CO., INC., EMPLOYER v. PENNSYLVANIA NATIONAL INSURANCE CO., CARRIER, DEFENDANTS

No. 8410IC392

(Filed 2 April 1985)

1. **Master and Servant § 96— workers' compensation—evidence not in record on appeal—findings presumed correct**

The Industrial Commission's findings of fact that plaintiff has no disabling back, neck or emotional condition are presumed correct where plaintiff failed to include the evidence in the record on appeal.

2. **Master and Servant § 69.1— workers' compensation—disability benefits—return to work before maximum recovery**

Plaintiff was not entitled to disability benefits under G.S. 97-31 for the period following her return to work after surgery until she reached maximum recovery.

APPEAL by plaintiff from opinion and award of the North Carolina Industrial Commission filed 27 October 1983. Heard in the Court of Appeals 3 December 1984.

On 5 October 1976, while working at her job as a stockbroker, plaintiff fell and fractured her right hip and her orthopedic surgeon, Dr. Callison, replaced the femoral head with an Austin-Moore prosthesis. On 13 January 1977, though she was not fully recovered, plaintiff returned to work and thereafter worked regularly at the same job that she filled before, it not being until 30 July 1979 that Dr. Callison deemed that maximum recovery had been accomplished and rated her as having a 45 percent permanent partial loss of use of the right leg. She received compensation for temporary total disability during the period she was out of work, but was paid no other workers' compensation until February, 1980, when by agreement of the parties, approved by the Industrial Commission on 5 March 1980, she was compensated for her 45 percent permanent partial loss of use of the leg in accord with the schedule for injured bodily organs and members contained in G.S. 97-31. In the Fall of 1980 plaintiff began having increased pain in the injured hip and by letter to the Industrial Commission dated 23 January 1981 she claimed a change of condition and requested that her case be reopened. On 29 January 1981 Dr. Callison examined plaintiff and found that her leg loss of use

was still 45 percent as before, though he also found some indications of undue stress and wear in the joint. Plaintiff's pain continued and in June, 1981 she was examined by Dr. Willett, another orthopedic surgeon, who totally replaced the injured hip on 4 August 1981. This operation reduced plaintiff's pain and she returned to her job on 9 October 1981, though it was March of 1982 before she was deemed to have reached maximum recovery, at which time it was again determined by her treating physician that she still had a 45 percent permanent partial loss of use of the right leg. After returning to her job plaintiff has worked regularly at substantially the same earnings as before or more.

When the re-opened case was heard the Deputy Commissioner, in addition to the above stated facts, found that plaintiff's increased pain was a substantial change of condition for the worse, the second operation was necessary, and she was entitled to temporary total disability payments for the period she was out of work because of it. The Deputy Commissioner also found that except for the two periods following surgery when she was out of work that plaintiff had not been and was not disabled and concluded that no further compensation was due her. The Deputy Commissioner's opinion and award was affirmed by the Full Commission, and plaintiff's appeal is therefrom.

Harry DuMont for plaintiff appellant.

Morris, Golding and Phillips, by James N. Golding, for defendant appellees.

PHILLIPS, Judge.

[1] Plaintiff's second contention, which it is more convenient to dispose of first, is that the Commission erred in failing to award her compensation for injuries to her back, neck and emotions. In support of this contention plaintiff argues that the Commission should have found from the testimony presented by her orthopedic and psychiatric witnesses that she had a disabling neck and back condition and a psychiatric disorder that had causally developed from her hip injury. This contention must be and is rejected without either discussion or consideration of the legal principles that could apply to it, because plaintiff failed to include the transcript of the evidence in the record on appeal and we have no basis at all for holding that the Commission's findings of fact that

she has no disabling or incapacitating back, neck or emotional condition are either inadequate or erroneous, as plaintiff contends. Under the circumstances the Commission's findings of fact are presumed to be correct, *Fellows v. Fellows*, 27 N.C. App. 407, 219 S.E. 2d 285 (1975), and our review is limited to determining whether the Commission's findings of fact support its conclusions of law and the award made. *Worsley v. S. & W. Rendering Co., Inc.*, 239 N.C. 547, 80 S.E. 2d 467 (1954). We are of the opinion that they do.

[2] The plaintiff's only other contention, that the Commission erred in failing to award her disability benefits under G.S. 97-31 for the period *following* her return to work after each operation until maximum recovery was achieved, can be determined from the record before us, however, and we overrule it also. Her main reliance is upon the provision in G.S. 97-31 which directs that when one of the bodily organs, members or parts listed therein is lost or its use impaired, the injured worker "shall be paid for disability during the healing period," as well as for the impairment or loss according to the schedule therein contained. It has already been held, however, that the *healing period* within the meaning of G.S. 97-31 does not include time when an injured worker is able to and does work at his or her regular job. *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 229 S.E. 2d 325 (1976), *disc. rev. denied*, 292 N.C. 467, 234 S.E. 2d 2 (1977). Furthermore, by statutory definition *disability* in a workers' compensation case "means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment," G.S. 97-2(9), and according to the Commission's findings of fact, in which no error is perceived from the record before us, plaintiff's ability to work and earn has not been reduced, notwithstanding the severity of her injury. Finally, since the Commission's findings and the rest of the record certified to us, which is all that we have to go by, shows that the *only* injury plaintiff sustained was an injury to a bodily member covered by G.S. 97-31, her compensation after returning to her job is limited to the schedule stated in the statute, whether earning capacity has been impaired or not, *Little v. Anson County Schools Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978), and that amount was paid to her long ago.

Affirmed.

Judges ARNOLD and WELLS concur.

PYDIA JONES v. MURDOCH CENTER

No. 8410IC635

(Filed 2 April 1985)

Master and Servant § 65.2— workers' compensation—back injury causing arachnoiditis—permanent total disability

Where injury to plaintiff's back led to arachnoiditis, which causes severe recurrent pain, numbness and weakness in plaintiff's lower back, legs, arms, shoulder and chest and renders her incapable of holding any kind of job, all of plaintiff's injury was not to the back, and she is entitled to compensation for permanent total disability under G.S. 97-29 rather than only for impaired back function under G.S. 97-31.

APPEAL by defendant from opinion and award of the North Carolina Industrial Commission filed 22 December 1983. Heard in the Court of Appeals 7 February 1985.

In 1978, plaintiff suffered a back injury that is admittedly covered by the Workers' Compensation Act. Because of the injury she underwent a myelogram and three different operations, the last one in January 1980, when it was established that she has arachnoiditis as a consequence of either the myelogram or the previous surgery. The arachnoid is one of the thin membranes that envelopes the brain and spinal cord, and arachnoiditis is an inflammation of that membrane. The inflammation plaintiff had scarred the arachnoid tissues around the roots of various nerves that emanate from her lumbar spine, and the contraction of those scarred tissues causes pain in various places throughout the body that are served by those nerves. Because of this she suffers severe recurrent pain, numbness and weakness in her lower back, legs, arms, shoulders and chest that has rendered her incapable of holding any kind of job and of even putting on her hose, combing her hair, and driving a car. Her condition is not correctable by surgery or otherwise. At the hearing before the Deputy Commissioner plaintiff's doctor testified in effect that as a result of the injury plaintiff has a 35 percent permanent impairment of the

back and is also totally and permanently disabled. The Deputy Commissioner, though finding that plaintiff is in fact totally and permanently disabled as a result of the arachnoiditis, concluded that her only injury is to the back and awarded her compensation for the impaired back function in accord with the schedule set out in G.S. 97-31. Plaintiff appealed to the Full Commission, which vacated the Deputy Commissioner's conclusion that her only injury is to the back and awarded her compensation for permanent and total disability under the provisions of G.S. 97-29. Defendant's appeal is from that award.

Edmundson & Catherwood, by John W. Watson, Jr. and Robert K. Catherwood, for plaintiff appellee.

Attorney General Edmisten, by Assistant Attorney General Sandra M. King, for defendant appellant.

PHILLIPS, Judge.

The sole question presented is whether the Full Commission erred in awarding plaintiff compensation for permanent total disability under G.S. 97-29. That plaintiff is in fact totally and permanently incapable of holding any gainful employment because of the compensable injury sustained is overwhelmingly established by the evidence and defendant does not argue otherwise. What defendant contends is that since the injury was to her back and disability to the back is included in the compensation schedule for specific bodily members and organs contained in G.S. 97-31 that her compensation is limited to the schedule for back injuries therein stated. G.S. 97-31 does provide, as defendant emphasizes, that the compensation therein authorized "shall be in lieu of all other compensation." Nevertheless, this contention has been rejected by our Supreme Court under similar circumstances on several different occasions, and for the abiding reason that our workers' compensation law mandates compensation for *all* injuries that result from a work-related accident. *Perry v. Hibriten Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978); *Little v. Anson County Schools Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978). These decisions make plain that our workers' compensation law with respect to impaired bodily organs and members listed in G.S. 97-31 is as follows: When *all* of a worker's injuries are included in the schedule set out in G.S. 97-31 his compensation is limited to

that provided for in the statutory schedule without regard to his ability or inability to earn wages. When *all* of a worker's injuries are not included in the schedule contained in G.S. 97-31 *and* the worker's earning capacity has been permanently, but only partially, impaired he is entitled to the scheduled compensation provided for in G.S. 97-31 *and* an award for permanent partial disability as provided for in G.S. 97-30. When *all* of a worker's injuries are not covered by the schedule contained in G.S. 97-31 *and* the worker's earning capacity has been totally and permanently impaired, he is entitled to an award for permanent and total disability under the provisions of G.S. 97-29.

That the law as above stated was correctly applied to plaintiff's case by the Full Commission is clear, we think, and we affirm the award made. All of her injury is not to her back for the simple reason that the nerves that emanate from the spinal cord do not serve just the back. They radiate into and serve other parts of the body, and the injured nerves which radiate into and serve plaintiff's arms, legs, shoulders and chest have made it impossible for her to work and do many other things as well. Under strikingly similar circumstances the same decision was arrived at in *Fleming v. K-Mart Corp.*, 67 N.C. App. 669, 313 S.E. 2d 890 (1984), *aff'd*, 312 N.C. 538, 324 S.E. 2d 214 (1985), which we deem controlling here. In that case because injury to the back led to arachnoiditis, which caused pain in the feet and legs, making it impossible for plaintiff to hold a job, it was held that all of plaintiff's injury was not to the back and that he was entitled to total and permanent disability payments under G.S. 97-29, rather than back disability payments under G.S. 97-31.

Affirmed.

Judges WEBB and MARTIN concur.

STATE OF NORTH CAROLINA v. RANDY WILLIAMS

No. 849SC652

(Filed 2 April 1985)

Criminal Law § 14— car stolen in North Carolina—defendant arrested in car in District of Columbia—no evidence of possession in North Carolina

In a prosecution for felonious possession of stolen property, the trial court lacked jurisdiction where the evidence showed only that an automobile was stolen in North Carolina and defendant was arrested while driving that automobile later that evening in Washington, D.C. There was no evidence to support a conclusion that defendant possessed the car in North Carolina. G.S. 15A-134.

APPEAL by defendant from *Clark, Judge.* Judgment entered 13 March 1984 in Superior Court, Vance County. Heard in the Court of Appeals 13 February 1985.

Defendant was charged in a bill of indictment for felonious larceny of an automobile and for felonious possession of stolen property. The evidence showed that: On 5 October 1983, a blue Chevrolet Citation was stolen from Henderson Honda in Henderson, North Carolina. There is no indication as to the circumstances surrounding the taking of the automobile. Later that evening, defendant Williams was arrested in Washington, District of Columbia, for driving without a D.C. permit. It was later discovered that the defendant was driving the same automobile stolen from Henderson Honda. Williams denies having any knowledge of the theft and insists that he received the car from a female friend.

The State did not produce any evidence contradicting the defendant's denial of the offense. The jury found the defendant not guilty of felonious larceny and guilty of felonious possession of stolen property. Defendant appeals alleging that: (1) the trial court lacked jurisdiction to try or convict him; (2) that the trial court deprived him of his right to counsel by permitting defense counsel to withdraw and allowing him to proceed *pro se* without ascertaining if he knowingly waived his right to counsel; and (3) the court erred in failing to instruct the jury of the lesser included offense of unauthorized use of a motor conveyance.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Tiare B. Smiley, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Robin E. Hudson, for the defendant-appellant.

JOHNSON, Judge.

The first issue to be addressed is whether North Carolina had jurisdiction to prosecute and convict the accused for the felonious possession of stolen property when there is no evidence that the offense occurred partly or wholly within the state.

It is well settled law that an act must have occurred within the territorial boundaries of the state to be punishable as a crime in the state. *State v. Jones*, 227 N.C. 94, 40 S.E. 2d 700 (1946). There are few exceptions to this rule. However, prosecution may occur in conspiracy cases when the offense is executed inside the state but formed outside the state. *State v. Overton*, 60 N.C. App. 1, 36, 298 S.E. 2d 695, 716 (1982), *disc. rev. denied*, 307 N.C. 581, 299 S.E. 2d 653 (1983). Similarly, G.S. 15A-134, allows the prosecution of offenses which occur partly within state boundaries. The instant case does not fall within any of these exceptions.

There was no evidence presented which showed that the defendant possessed the stolen vehicle in North Carolina. The evidence only established that defendant Williams had possession of the car in the District of Columbia. The State contends that under the principles enunciated in *State v. Batdorf*, 293 N.C. 486, 238 S.E. 2d 497 (1977), it made a prima facie showing of jurisdiction based on inferences sufficient for the jury to infer that the defendant possessed the car in North Carolina. We cannot accept the State's argument that the jury could have inferred, under the facts and circumstances, that the defendant took possession of the motor vehicle in North Carolina and drove it to the District of Columbia. We find *Batdorf* clearly distinguishable from the case at bar.

In *Batdorf*, the State presented the following evidence as support that the crime occurred in North Carolina: (1) the murder weapon was concealed in North Carolina and recovered in North Carolina; (2) the victim's body was discovered in North Carolina; and (3) the materials with which the victim's body was bound and

weighted came from the North Carolina home of the defendant's girlfriend. These facts were undisputed and the Court held that these facts made out a prima facie showing of jurisdiction sufficient to carry the question to the jury.

In the case at bar, the State did not produce any evidence to support a conclusion that the defendant possessed the car in North Carolina. The bare fact that defendant possessed the car in the District of Columbia a few hours after its theft, without any supporting evidence is not sufficient to establish a prima facie showing of jurisdiction to warrant its submission to the jury. The ruling in *Batdorf* does not allow inferences to be drawn so broadly without more substantiating evidence. There is not a rational connection between the defendant's possession of the stolen vehicle in Washington and the inference which the jury would be allowed to draw, that being the defendant possessed the car in North Carolina, to meet due process standards. *State v. Batdorf, supra.*

Since there are no acts or evidence indicating that the offense occurred wholly or partly within our sovereignty, the decision of the trial court must be reversed. In view of this decision, there is no need to address the defendant's second and third assignments of error.

Reversed.

Chief Judge HEDRICK and Judge COZORT concur.

STATE OF NORTH CAROLINA, ON RELATION OF PETER GILCHRIST, DISTRICT ATTORNEY FOR THE 26TH JUDICIAL DISTRICT v. JAMES EVERETT COGDILL

No. 8426SC512

(Filed 2 April 1985)

1. Nuisance § 10— abatement of public nuisance—statement concerning conviction for solicitation for prostitution

In an action to abate a public nuisance created by defendant's operation of a house of prostitution, the trial court did not abuse its discretion in denying defendant's motion for a new trial because counsel for the State said in his opening statement that defendant had been convicted of the crime of soliciting

for prostitution since evidence of defendant's conviction was admissible at trial under G.S. 19-3(b).

2. **Nuisance § 11— abatement of public nuisance—forfeiture of income—adoption of referee's report**

In an action to abate a public nuisance created by defendant's operation of a house of prostitution, the trial court did not err in adopting the referee's report and ordering the forfeiture of the gross income estimated by the referee to have been taken in by the operation of defendant's premises as a nuisance, although the report did not specify what amounts were received from the sale of books and magazines before entry of a preliminary injunction, where defendant had the opportunity to offer evidence as to the amount of gross receipts from the sale of books and magazines but failed to do so, and where defendant did not object to the report and note exceptions as provided in G.S. 1A-1, Rule 53(g)(2).

3. **Nuisance § 10— abatement of public nuisance—admission of prior order**

In an action to abate a public nuisance, an order entered in a prior action perpetually enjoining defendant from operating a nuisance at this same location was admissible to prove the existence of the nuisance and defendant's knowledge, acquiescence and participation therein.

APPEAL by defendant from *Griffin, Judge* and *Saunders, Judge*. Orders and judgments were entered 18 May 1983 and 16 December 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 January 1985.

On 31 January 1983 the State, on relation of Peter Gilchrist, District Attorney for the 26th Judicial District, filed a complaint under G.S. Chapter 19 seeking to have defendant's place of business, known as Adult Center and Blue Reflections, declared a nuisance and perpetually enjoining defendant from operating a public nuisance on the premises. Defendant's business had previously, in 1981, been declared a nuisance and defendant perpetually enjoined from operating a nuisance at that location.

At trial, plaintiff introduced evidence through several Charlotte police officers who testified that they had arrested some of defendant's employees for soliciting for prostitution, and that defendant's place of business had a reputation as being a house of prostitution.

Defendant offered no evidence.

At the close of plaintiff's evidence the trial judge submitted the following issues to the jury:

1. Was a public nuisance as defined by North Carolina General Statute 19-1 conducted on the property known as 4409 North I-85, Charlotte, North Carolina, as alleged in the petition and complaint from late 1978 to date?

Answer: Yes

2. Did the Defendant James Everett Cogdill know of the operation of the public nuisance, or, in the exercise of reasonable diligence should he have known of the operation of the nuisance during the time period stated?

Answer: Yes

Judgment was entered on the verdict on 18 May 1983, ordering that the nuisance known as Adult Center and Blue Reflections be abated, perpetually enjoining defendant from maintaining a nuisance at that location and elsewhere in North Carolina. The judgment also provided that defendant forfeit an amount of money equal to the gross income from the unlawful commercial activity, this money to be shared equally by the City of Charlotte and Mecklenburg County. The trial judge appointed a referee to conduct the accounting pursuant to G.S. 19-6.

The order and judgment based on the referee's report was filed 16 December 1983.

From the entry of each judgment, defendant appealed.

Paul L. Whitfield, P.A. by Paul L. Whitfield and Thomas H. Ainsworth III for plaintiff appellee.

Keith M. Stroud for defendant appellant.

PARKER, Judge.

[1] In his first assignment of error defendant contends that the trial court erred in denying his motion for a new trial after counsel for the State, in his opening statement, said defendant had been arrested or convicted of the crime of soliciting for prostitution. Under G.S. 1A-1, Rule 59, a new trial may be granted for, among other reasons, "[a]ny irregularity by which any party was prevented from having a fair trial" and "[m]isconduct of the jury or prevailing party." A trial court's discretionary order, pursuant to Rule 59, for or against a new trial upon any ground may

be reversed on appeal only when abuse of discretion is clearly shown. *Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982). Evidence of defendant's conviction is admissible at trial under G.S. 19-3(b) which provides, in pertinent part:

> [A]n admission or finding of guilt of any person under the criminal laws against lewdness, assignation, prostitution . . . at any such place, is admissible for the purpose of proving the existence of said nuisance, and is evidence of such nuisance and of knowledge of, and of acquiescence and participation therein, on the part of the person charged with maintaining said nuisance.

We find no abuse of discretion; defendant's assignment of error is overruled.

[2] In his second assignment of error defendant contends that the trial court erred in adopting the referee's report. Defendant argues that the referee's report did not specify what amounts of money were received from sale of books and magazines before entry of the preliminary injunction. Defendant, however, was present at the hearing and had the opportunity to offer evidence as to the amount of gross receipts from the sale of books and magazines. Moreover, defendant did not object to the report and note exceptions as provided in G.S. 1A-1, Rule 53(g)(2). In the absence of exceptions to the factual findings of the referee, the findings are conclusive, and where no exceptions are filed the case is to be determined upon the referee's findings. *State of North Carolina, on Relation of Peter Gilchrist v. Hurley*, 48 N.C. App. 433, 269 S.E. 2d 646 (1980), *review denied*, 301 N.C. 720, 274 S.E. 2d 233 (1981). Defendant's assignment of error is overruled.

[3] In his last assignment of error defendant contends that the trial court erred in allowing the clerk of superior court to read the pleadings and orders from a prior case to the jury. The pleadings and orders read to the jury consisted of an earlier nuisance action against defendant, in which he was perpetually enjoined from operating a nuisance at this same location, and the violation of which resulted in the case *sub judice*. Under G.S. 19-3(b) the prior order was admissible for the purpose of proving the existence of the nuisance and defendant's knowledge, acquiescence and participation.

For the reasons stated, we find

No error.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. CAROL COFFEY

No. 8425SC638

(Filed 2 April 1985)

1. **Criminal Law § 143.5— probation revocation—evidence sufficient**

In an action to revoke defendant's probation, the evidence clearly supported the court's finding that defendant failed to report to the probation officer at reasonable times and in a reasonable manner as directed by the probation officer, and that was sufficient to support the court's order revoking probation.

2. **Criminal Law § 134.4— Committed Youthful Offender designation—applies to women**

The trial judge erred by refusing to consider whether a defendant whose probation had been revoked should have been committed as a Committed Youthful Offender because he didn't think the youthful offender program applied to women. Defendant met the criteria of G.S. 148-49.14 in that she was less than twenty-one when convicted and less than twenty-five when her probation was revoked.

APPEAL by defendant from *Britt, Samuel E., Judge.* Judgment entered 23 February 1983 in Superior Court, CALDWELL County. Heard in the Court of Appeals 5 March 1985.

On 3 September 1981, defendant pleaded guilty to uttering of a forged instrument and received a three to five year prison sentence. This sentence was suspended, and defendant was placed on probation. On 19 October 1983, a probation violation report was filed which alleged the following probation violations:

> On or about September 13, 1983, the defendant left her place of residence at Rt. 1, Box 278, Mt. Herman Rd., Hudson, NC wilfully and without lawful excuse absconding supervision and thereafter failed to make her whereabouts known to the probation/parole officer in violation of the condition of probation "Remain within the jurisdiction of the court unless

granted permission to leave by the court of her probation officer."

That the defendant failed and refused to maintain employment during the period of supervision as ordered without reasonable excuse, in violation of the condition of probation that she "Remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training that will equip her for suitable employment" and "notify the probation officer if she fails to obtain or retain suitable employment."

That the defendant has failed to cooperate with the probation/parole officer sufficiently to insure adequate supervision, having failed without reasonable excuse to keep scheduled appointments for the first week of September 1983 and of October, in violation of the condition of probation that she "Report as directed by the Court or her probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit her at such times and places, answer all reasonable inquiries and obtain prior approval from the probation/parole officer and notify the officer of, any change in address or employment."

At the revocation hearing the officer testified consistent with the allegations of the violation report. At the close of the evidence, the trial court found that defendant had wilfully and without lawful excuse violated the terms and conditions of the probationary judgment. Upon so finding he revoked her suspended sentence. The court reduced the sentence to eight months. Defendant's attorney requested the court to consider whether she should be committed as a youthful offender. The court declined stating that it didn't think the youthful offender program applied to women. From the judgment revoking her probation, defendant appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney Ellen B. Scouten, for the State.

Whisnant, Simmons, Groome & Pike, by Fred D. Pike, for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends *inter alia* the court erred because there was insufficient evidence to support its findings, conclusions and judgments. All that is needed to support the judgment revoking defendant's probation is evidence which "reasonably satisfies the trial judge in the exercise of his sound discretion that the defendant has violated a valid condition on which the sentence was suspended." *State v. Freeman*, 47 N.C. App. 171, 175, 266 S.E. 2d 723, 725, *disc. rev. denied* 301 N.C. 99, 273 S.E. 2d 304 (1980). The evidence offered clearly supports the court's finding that defendant failed to report to the probation officer at reasonable times and in a reasonable manner as directed by her probation officer. This is sufficient to support the trial court's order revoking defendant's probation.

[2] Defendant also contends the court erred by refusing to consider whether she should have been committed as a youthful offender. When counsel requested the youthful offender designation, the judge refused stating that he didn't think the youthful offender program applied to women.

G.S. 148-49.14 in pertinent part provides:

> Whenever the court shall suspend the imposition or execution of sentence and place a person on probation, the court shall not order commitment as a committed youthful offender; however, if probation be subsequently revoked and the active sentence of imprisonment executed, the court may at that time commit the person, if he is still under 25 years of age, to the custody of the Secretary of Correction as a committed youthful offender.

We find, consistent with this Court's opinion in *State v. Lewis*, 38 N.C. App. 108, 247 S.E. 2d 282 (1978), that this language read in conjunction with the remainder of the statute requires the court to make a determination as to whether a defendant shall be committed as a youthful offender in all cases where the defendant was less than 21 years of age when convicted and is less than 25 years of age when their probation is revoked. The record indicates that defendant meets both of these criteria. Thus, the trial court erred in refusing to consider whether she should have been committed as a youthful offender.

We have carefully considered defendant's other contentions and find them to be without merit.

The case is remanded to the Superior Court for a *de novo* sentencing hearing to determine whether defendant would benefit from commitment as a youthful offender.

Remanded for resentencing.

Judges EAGLES and PARKER concur.

IN THE MATTER OF: THE APPEAL OF R. J. REYNOLDS TOBACCO COMPANY FROM THE TAXATION OF FORSYTH COUNTY AND ITS AFFECTED MUNICIPALITIES OF CERTAIN TOBACCO AT 100% OF THE TAX RATE FOR 1983

No. 8410PTC758

(Filed 2 April 1985)

Taxation § 25.1— exemption for tobacco in storage

Where Reynolds had described certain tobacco in its tax listing as "leaf tobacco in storage" and claimed a 100% exemption for imported leaf tobacco on "constitutional principles," Reynolds was entitled to the 40% exemption under G.S. 105-277(a) where it was not disputed that Reynolds stored the tobacco for the purpose of manufacturing it into cigarettes and other tobacco products and that the tobacco was aged for more than a year before processing. Reynolds did not have to cite or make reference to the applicable statute in order to qualify for or claim the exemption because the application showed facts which entitled Reynolds to the exemption. G.S. 105-282.1(a) (Cum. Supp. 1983).

APPEAL by Forsyth County and its affected municipalities from the 28 February 1984 decision of the North Carolina Property Tax Commission. Heard in the Court of Appeals 12 March 1985.

This appeal arises from a decision by the North Carolina Tax Commission sitting as the State Board of Equalization and Review which ordered that certain tobacco stored by the R. J. Reynolds Tobacco Company be taxed at sixty percent of the rates for real property and other tangible personal property within Forsyth County. On 15 April 1983 Reynolds listed for taxes certain tobacco. It described it as "Leaf Tobacco in Storage" and claimed a 100 percent exemption for imported leaf tobacco on "Constitu-

tional Principles." On 2 June 1983 the tax supervisor notified Reynolds that the claim for 100 percent exemption for imported leaf tobacco was denied and the tobacco would be taxed at sixty percent of the tax rate. On 9 September 1983 the tax supervisor notified Reynolds that it had corrected a clerical error and the classification of the tobacco for taxation at a reduced rate for 1983 was denied because an application for reduced rates had not been filed.

Reynolds appealed to the North Carolina Property Tax Commission which ordered that the tobacco be taxed at sixty percent of the rate for real property and other personal property. Forsyth County and its affected municipalities appealed.

P. Eugene Price, Jr., and Jonathan V. Maxwell, for Forsyth County and its affected municipalities.

Horton, Hendrick & Kummer, by Thomas L. Kummer and John A. Cocklereece, Jr., for R. J. Reynolds Tobacco Company.

WELLS, Judge.

N.C. Gen. Stat. § 105-277(a) (1979) provides that any agricultural product held in storage by a manufacturer or processor for manufacturing or processing which product is of such a nature to customarily require storage for more than one year in order to age or condition the product for processing or manufacturing shall be taxed at sixty percent of the rate levied upon real property and other tangible personal property. There is no dispute that the tobacco in question in this case is qualified under G.S. § 105-277(a) to be taxed at the sixty percent rate. The question is whether Reynolds properly applied for tax treatment under G.S. § 105-277(a) as it is required to do by N.C. Gen. Stat. § 105-282.1(a) (Cum. Supp. 1983) in order to establish its entitlement to the forty percent exemption.

Appellant contends that no application was made for the forty percent exemption under G.S. § 105-277(a). It argues that the application did not refer to G.S. § 105-277(a) and nowhere does the application state that the tobacco was held for manufacturing or processing, a requirement for exemption under G.S. § 105-277(a). The appellant argues that Reynolds applied specifically for a 100 percent exemption on "constitutional principles" based on

the fact that this was stored imported tobacco and therefore it was not an application for exemption under G.S. § 105-277(a).

Reynolds did not have to cite or make reference to the applicable statute in order to qualify for or claim the applicable exemption allowed by the section, if the application showed facts which entitle the applicant to the exemption. In this case the application showed that Reynolds had the tobacco in storage. It is not disputed that Reynolds stored the tobacco for the purpose of manufacturing it into cigarettes and other tobacco products and that the tobacco was aged for more than a year before processing. These facts entitle Reynolds to the forty percent exemption. Although Reynolds asked for a 100 percent exemption, which was denied, this does not preclude the forty percent exemption to which it is entitled as shown by the application.

Reynolds has argued that it was not required to make an application for the reduced rate because the preferential treatment for agricultural products is neither an exemption nor an exclusion. It has also argued that by the procedure used by the tax supervisor it was denied a substantive hearing before the Forsyth County Board of Equalization and Review. In light of our opinion we do not discuss these arguments.

Affirmed.

Judges BECTON and PARKER concur.

WILLIE EVERETT, JR. v. U. S. LIFE CREDIT CORPORATION

No. 8414DC666

(Filed 2 April 1985)

Uniform Commercial Code § 45— secured transaction—repossession of collateral—redemption of collateral by debtor—repossession expenses—absence of notice of repossession

A secured party who repossessed the collateral without judicial process upon default of the debtor may legally require the debtor, upon redemption of the collateral, to pay reasonable expenses incurred in retaking the collateral even though the secured party gave no notice of intention to repossess. G.S. 25-9-503; G.S. 25-9-506.

Everett v. U. S. Life Credit Corp.

APPEAL by defendant from *Galloway, Judge.* Judgment entered 14 March 1984 in District Court, DURHAM County. Heard in the Court of Appeals 5 March 1985.

No brief filed for plaintiff appellee.

J. Randolph Ward for defendant appellant.

MARTIN, Judge.

The sole question for our determination is whether a secured party, entitled to possession of collateral upon default by the debtor, may legally require the debtor, upon redemption of the collateral, to pay reasonable expenses incurred in retaking the collateral even though the secured party gave no notice of intention to repossess. We conclude that, because no such notice is required prior to repossession, the absence of notice does not preclude the secured party from recovering these expenses.

On 3 December 1981, plaintiff obtained a loan from defendant, granting defendant a security interest in a 1970 Volkswagen automobile as security. Plaintiff defaulted in repayment of the loan, and on 28 August 1982, defendant employed American Lender's Company to effect a repossession of the automobile. The "self-help repossession" was accomplished during the night and without any notice to plaintiff. Defendant incurred expenses of $267.90 in retaking and storing the automobile. On 9 September 1982 plaintiff sought to redeem the automobile and was charged the remaining principal balance, accrued interest, and the expenses incurred by defendant for the repossession. Plaintiff made the payment and then instituted this action to recover the amount which had been charged for repossession expenses. The district court held that because the plaintiff had been given no notice of defendant's intention to repossess the automobile, and thus no opportunity to voluntarily surrender it and avoid the expenses incurred by defendant in retaking the collateral, defendant was not entitled to charge the repossession costs to plaintiff upon redemption.

G.S. 25-9-503 provides in part:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed *without judicial process*

if this can be done without breach of the peace or may proceed by action. [Emphasis supplied.]

The statute expressly provides for a peaceable "self-help repossession," and contains no requirement that notice be given the debtor before repossession is accomplished. Other jurisdictions have held that, in the absence of an agreement to the contrary, no prior notice of peaceable repossession is required by section 9-503 of the Uniform Commercial Code. *See Day v. Schenectady Discount Corp.*, 125 Ariz. 564, 611 P. 2d 568 (1980); *Fulton National Bank v. Horn*, 239 Ga. 648, 238 S.E. 2d 358 (1977); 69 Am. Jur. 2d *Secured Transactions* § 598, p. 495; 79 C.J.S. Supp. *Secured Transactions* § 105(b), p. 122. Of course, if there is confrontation at the time of the attempted repossession, the secured party must cease the attempted repossession and proceed by court action in order to avoid a "breach of the peace."

G.S. 25-9-506 provides that the debtor may redeem the repossessed collateral "by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition . . . ." The right of the secured party to recover these expenses is neither expressly nor impliedly conditioned upon the debtor having been given any notice or opportunity to voluntarily surrender the collateral.

The judgment of the trial court is therefore

Reversed.

Judges WEBB and PHILLIPS concur.

EDWARD W. McLEOD, III v. LOUISA FARMER McLEOD

Nos. 8412DC647, 8412DC755, 8412DC766

(Filed 16 April 1985)

1. Divorce and Alimony § 30— equitable distribution—inherited stock—active appreciation in value—marital property

Where plaintiff inherited during the marriage, after an exchange with his sister, 31.47 shares of a closely-held corporation, giving him an ownership in-

terest of approximately 30%, that interest qualifies as separate property under G.S. 50-20(b)(2). However, any increase in the value of the stock due to active rather than passive appreciation constitutes marital property subject to equitable distribution.

2. Divorce and Alimony § 30— equitable distribution—inherited stock in closely-held corporation—active appreciation—marital property—necessary findings

In determining the value of stock owned by plaintiff husband in a closely-held corporation which is marital property subject to equitable distribution, the trial court must make findings as to: (1) the value of plaintiff husband's minority interest in the corporation at the time he inherited stock in the corporation during the marriage; (2) the value of plaintiff's controlling interest in the corporation, gained when the corporation redeemed as treasury stock all outstanding shares except those owned by plaintiff, at the date of separation of the parties; (3) the difference between the two; and (4) the proportion of that difference that is due to active appreciation, i.e., attributable to funds, talent, or labor that are assets of the marital community. The resulting amount is marital property subject to equitable distribution.

3. Divorce and Alimony § 30— equitable distribution—stock in closely-held corporation—redemption of other shares as treasury stock—active appreciation—marital property

When plaintiff's minority interest in a closely-held corporation inherited during the marriage became the controlling stock of the corporation upon the corporation's redemption of all outstanding shares except those owned by plaintiff, the corresponding increase in value of plaintiff's shares resulted from active appreciation and constituted marital property subject to equitable distribution.

4. Divorce and Alimony § 30— equitable distribution—closely-held corporation—guaranty of note—no creation of marital interest

Defendant wife's signature guaranteeing a closely-held corporation's note given to obtain funds to redeem as treasury stock all outstanding shares except those owned by plaintiff husband did not itself create a marital interest in the ownership of the corporation.

5. Divorce and Alimony § 30— equitable distribution—tenancy by the entireties—consideration from separate property—rebuttable presumption of gift

Where a spouse furnishing consideration from separate property causes property to be conveyed to the other spouse in the form of tenancy by the entireties, a presumption of a gift of separate property to the marital estate arises, which is rebuttable by clear, cogent, and convincing evidence.

6. Divorce and Alimony § 30— equitable distribution—camper/trailer—separate and marital interest—source of funds formula

A camper/trailer financed and improved with funds from the sale of plaintiff husband's separate property (corporate stock) and from bonuses plaintiff received from a closely-held corporation partakes of both separate and marital interests and should be apportioned according to the formula for source of funds-active/passive appreciation (or depreciation) unless the court finds that

the parties have, by agreement meeting the requirements of G.S. 50-20(d), opted out of an equitable distribution with regard to the camper/trailer.

APPEALS by plaintiff and defendant from *Cherry, Judge.* Judgment entered 1 February 1984 in District Court, CUMBERLAND County. Heard in the Court of Appeals 15 February 1985.

The parties appeal from a judgment distributing marital property pursuant to the Equitable Distribution Act, G.S. 50-20 and 50-21.

Charles S. Fox for plaintiff appellant.

Jerome B. Clark, Jr., for defendant appellant.

WHICHARD, Judge.

Plaintiff and defendant were married in 1963 and divorced in 1984. Two children were born of the marriage.

In 1967 the parties purchased a house and lot which they held as tenants by the entirety. The court found that defendant contributed $8,000 toward the down payment and plaintiff contributed $2,000. The parties assumed a mortgage for the balance of approximately $13,000. In 1980 the parties deeded this property to defendant's parents. In exchange defendant's parents conveyed to them a house and lot located on Skye Drive in Fayetteville. The parties held the Skye Drive property, worth $126,000 at the date of separation, as tenants by the entirety. The court concluded that "[d]efendant owns an eighty (80%) percent interest in said house . . . and that the remaining twenty (20%) percent is marital property." The court then awarded the Skye Drive house and lot to defendant, adjudging it to be her "sole and separate property." The exact basis for the award is not clear from the judgment or the record. Nor is it clear whether the court was using the word "separate" as it is statutorily defined at G.S. 50-20(b)(2). Plaintiff appeals from this award.

In 1970 plaintiff inherited 61.23 shares of Edmac Trucking Company stock and 18.42 shares of Edmac Truck Sales and Service, Inc. (the corporation) stock. Before the stock was placed in plaintiff's name he exchanged the shares in Trucking Company with his sister for 13.05 shares of the corporation, giving him

31.47 shares of the corporation and an approximate ownership interest of thirty percent.

In 1974 plaintiff, as president of the corporation, borrowed $225,000 on a note guaranteed by the parties. With these funds, plus $21,743.45 in corporate funds, the corporation redeemed as treasury stock all outstanding and issued shares except those owned by plaintiff. Plaintiff thus became sole owner of the corporation, from which he drew his primary income during the marriage. The court concluded "[t]hat Edmac Truck Sales & Service, Inc. is the sole and separate property of the Plaintiff and is not marital property." It awarded him the corporation. Defendant appeals.

In 1978 plaintiff purchased a camper with dividends paid by inherited property—stock in Nedco Sales and Trucking (Nedco)—and funds from a bonus from the corporation. An addition to the camper was financed the same way. The court concluded the camper was marital property to be sold and the proceeds divided equally. Plaintiff appeals.

For reasons hereinafter set forth, we vacate and remand.

I.

In an action for equitable distribution first the court must classify property as either marital or separate as defined in G.S. 50-20(b)(1) and G.S. 50-20(b)(2). *Loeb v. Loeb*, 72 N.C. App. 205, 208-09, 324 S.E. 2d 33, 37 (1985). Next it must divide the marital property equally, unless it determines that an equal division is not equitable. G.S. 50-20(c); *White v. White*, 312 N.C. 770, 776, 324 S.E. 2d 829, 832 (1985). Separate property is not subject to equitable distribution. G.S. 50-20(c); *Loeb*, 72 N.C. App. at 209, 324 S.E. 2d at 37.

" '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 separation of the parties, and presently owned, except property determined to be separate property . . . ." G.S. 50-20(b)(1). " 'Separate property' means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage." G.S. 50-20(b)(2). "Property acquired in exchange for separate property" is separate property,

as is income derived from separate property and increases in value of separate property. *Id.*

The key term in both definitions is "acquired." In *Wade v. Wade*, 72 N.C. App. 372, 325 S.E. 2d 260 (1985), this Court adopted the source of funds rule, *id.* at 381-82, 325 S.E. 2d at 269, by which property is "acquired" as it is paid for, so that it may include both marital and separate ownership interests. Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C. L. Rev. 247, 255 (1983); Krauskopf, *Marital Property at Marriage Dissolution*, 43 Mo. L. Rev. 157, 180 (1978). Under the source of funds rule acquisition is an on-going process. *Harper v. Harper*, 448 A. 2d 916, 929 (Md. App. 1982). *See also Tibbetts v. Tibbetts*, 406 A. 2d 70, 75-76 (Me. 1979). It does not depend upon inception of title but upon monetary or other contributions made by one or both of the parties. In adopting this rule by which to characterize property as marital or separate or some combination, this Court recognized "that a dynamic rather than static interpretation of the term 'acquired' as used in G.S. 50-20(b)(1)" best serves to implement the remedial intent of the statute. *Wade*, 72 N.C. App. at 380, 325 S.E. 2d at 268.

Using a source of funds analysis, this Court drew a distinction in *Wade* between increases in value of separate property due to passive appreciation, such as by inflation or governmental action, *see e.g. Hoffmann v. Hoffmann*, 676 S.W. 2d 817 (Mo. banc 1984) (increased value of separate property due to Clean Water Act of 1977, 33 U.S.C. Sec. 1251), and increases due to active appreciation, such as by financial or managerial contributions from one or both of the spouses. *Wade*, 72 N.C. App. at 379, 325 S.E. 2d at 268; Sharp, *supra*, at 260-61. It interpreted G.S. 50-20(b)(2), which classifies increase in value of separate property as separate property, as referring only to increase due to passive appreciation, which does not deplete the marital estate. *Wade*, 72 N.C. App. at 379, 325 S.E. 2d at 268. It held that increase in value of separate property due to active appreciation, which otherwise would have augmented the marital estate, is marital property. *Id.* Thus the marital partnership shares in increases in value of property it has proportionately "acquired" in its own right. Sharp, *supra*, at 257.

II.

With the foregoing as background, we address the award of the corporation to plaintiff as his "sole and separate property."

The status of closely-held corporate stock brought into a marriage by one spouse—rather than inherited during the marriage as here—has recently been determined in *Phillips v. Phillips*, 73 N.C. App. 68, 326 S.E. 2d 57 (1985). There plaintiff owned 98 per cent of a corporation prior to his marriage to defendant. He accumulated considerable assets after the marriage by profit-making manipulation of corporate funds. Plaintiff contended that because he owned the corporation prior to marriage, it and assets purchased by withdrawal of corporate funds were separate property. In rejecting plaintiff's contentions this Court noted that under this view increases in value of separate property would be immune from equitable distribution even if the marriage partner managing the separate property "was 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." *Phillips*, 73 N.C. App. at 72, 326 S.E. 2d at 60. If this were the case, the Court continued, "the equitable distribution [would be] no help to the person whose spouse is a business[person] or entrepreneur [and] who brings considerable corporate property into the marriage . . . ." *Id.* "We do not believe," the Court concluded, "that merely by covering his transactions with the corporate veil plaintiff can claim that any assets acquired thereby are wholly insulated from equitable distribution." *Id.* at 74, 326 S.E. 2d at 61.

The *Phillips* court found, therefore, that the active appreciation of the closely-held corporation during marriage and before separation was marital property and that assets acquired by siphoning funds from the corporation could be marital property if such assets were a product of the active appreciation of the corporation and/or actively appreciated during the marriage.[1] The

1. We do not intend by this analysis to draw a bright line whereby appreciation in passive investments such as bank accounts or securities, not actively increased by the skill and labor of the spouse who inherited or brought them to the marriage, but which the parties were able to preserve intact only because they spent marital funds, invariably remains separate property.

New York, which has had more opportunity to construe its equitable distribution statute than we have ours, notes the following in the 1984 Supp. to the Consolidated Laws of New York Annotated:

Court thus followed the analysis of *Wade*, 72 N.C. App. 372, 325 S.E. 2d 260, reenforcing the principle that the sophisticated spouse who expends money and effort during the marriage to improve his or her separate property should not be insulated from equitable distribution when the marriage breaks down. *See Hall v. Hall*, 462 A. 2d 1179, 1181-82 (Me. 1983). *See also Roffman v. Roffman*, 124 Misc. 2d 636, 476 N.Y.S. 2d 713 (1983) (term "separate property" not applicable to growth of a business that was the primary economic foundation of a lengthy marriage).

We find *Phillips* controlling and rely upon its reasoning to determine the status of closely-held corporate stock inherited by one of the parties during the marriage here.

[1, 2] In 1970 plaintiff inherited, after an exchange with his sister, 31.47 shares of Edmac corporation, giving him an ownership interest of approximately 30 per cent. That initial interest qualifies as separate property under the statute. G.S. 50-20(b)(2). Any increase in its value due to active appreciation is marital property. *Wade*, 72 N.C. App. at 379, 325 S.E. 2d at 268; *Phillips*, 73 N.C. App. at 74, 326 S.E. 2d at 60-61. Thus, on remand, the court should make findings as to: (1) the value of plaintiff's minority interest at the time of inheritance, *see, e.g.* 2 McCahey, *Valuation and Distribution of Marital Property*, 22-5 to 22-129 (1984); (2) the value of plaintiff's controlling interest at the date of separation (while no finding was made, uncontradicted evidence shows

> The active/passive management distinction is certainly useful in avoiding the harsh results that would flow from viewing a business that was the economic cornerstone of a long-term marriage as separate property . . . .
>
> . . . .
>
> On the other hand, strict reliance upon an active/passive management distinction has it shortcomings as well. For example, assume that one spouse has a valuable interest in government securities at the time of marriage. Assume further that the other spouse is employed and generates such income so as to not require the invasion of the capital and therefore, the securities are periodically "rolled over" with interest being added to the original principal. Under a strict reading . . . those "rollovers" would be property in exchange for separate property. To hold that because the investment was "passive," indirect spousal contributions of the other spouse as wage earner [are to be unreimbursed upon dissolution of the marriage] would seem unfair.
>
> N.Y. Domestic Relations Law Sec. 236 (McKinney 1984), 1984 Practice Commentary at 87.

that value to be $400,000); (3) the difference between the two; and (4) the proportion of that difference that is due to active appreciation, i.e., attributable to funds, talent, or labor that are assets of the marital community. The resulting amount is marital property subject to equitable distribution.

[3] As guidance to the trial court, we note as a specific example of active appreciation that in 1974 the value of plaintiff's interest in the corporation increased due to a redemption by the corporation of all outstanding shares, whereby plaintiff became the sole owner. The minority interest plaintiff had inherited became the controlling stock of the corporation with a corresponding increase in value. Plaintiff contends that "this increase did not change the status of his interest in the Corporation as separate property." Under the source of funds analysis, however, the redemption of the outstanding shares by the corporation as treasury stock resulted in active appreciation of plaintiff's stock. The redemption was a business decision from which plaintiff as president derived substantial economic advantage which, in terms of our statute and cases, is property acquired during the marriage.

To suggest, as plaintiff does, that only his salary constitutes marital property ignores the reality of a closely-held corporation wherein persons in control have broad discretion in allocating salary, dividends, and retained earnings. *See Donahue v. Rodd Electrotype Co. of New England, Inc.*, 328 N.E. 2d 505, 511 (Mass. 1975) (close corporation characterized by (1) small number of shareholders, (2) no ready market for shares, and (3) substantial majority stockholder participation). "A decision which is entirely sound from the standpoint of corporate policy, still might operate to the disadvantage of a shareholder's spouse so as to deprive the spouse of a share of the fruits of the shareholder's labor." *Hoffmann*, 676 S.W. 2d at 830.

[4] In applying the active/passive dichotomy we reject defendant's contention that her signature guaranteeing the corporation's $225,000 debt of itself created a marital interest. We note, however, that where a spouse puts him or herself at risk guaranteeing repayment of a loan whose proceeds do not partake of marital property interests, courts have found the community entitled to an equitable lien for its contribution to separate property. *See In re Marriage of Bepple*, 683 P. 2d 1131 (Wash. App.

1984) (continued operation of the corporation due at least in part to the community guaranty of the loan).

Finally, we note that the approach we have adopted allows the court, given adequate proof, to treat a portion of the increased value of shares in a closely-held corporation as marital property even though the shares were inherited. "Any other approach would exalt substance over form and would greatly magnify the importance of the choice of business association." *Hoffmann*, 676 S.W. 2d at 829.

III.

We next address the award of the marital home to defendant as her "sole and separate property." This property was held by the parties as tenants by the entirety, a form of co-ownership with a right of survivorship created when real property is conveyed to a husband and wife and the unities of time, title, interest, and possession are observed. *Combs v. Combs*, 273 N.C. 462, 465, 160 S.E. 2d 308, 311 (1968). *See also Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924); Lee, *Tenancy by the Entirety in North Carolina*, 41 N.C. L. Rev. 67 (1962). The estate rests upon the doctrine of unity of the person and takes its origin from the common law where husband and wife were regarded as one. *Combs*, 273 N.C. at 465, 160 S.E. 2d at 311. It has not been abrogated by statute. *Id.*; Porter, *Tenancy by the Entirety in North Carolina: An Idea Whose Time Has Gone?* 58 N.C. L. Rev. 997, 997 (1980) ("Today this anomaly still exists in North Carolina much as it did at common law.").

The nature of a tenancy by the entirety does not insulate it from legislative change, however. *Sawyer v. Sawyer*, 54 N.C. App. 141, 143, 282 S.E. 2d 527, 528 (1981). The rights of tenants by the entirety depend upon the continuance of the marital status. *Id.* "An absolute divorce destroys the unity of person and thereby converts [the] estate . . . into a tenancy in common, wherein the parties hold undivided one-half interests." *Id.*

> When a divorce occurs, the marital relation is altered, and the rights of the severed parties in the property are altered as well . . . . This is not because of any retroactive effect of the decree of divorce on the original grant to the spouses, but because the creation of the tenancy by the entirety was dependent upon their marriage . . . . *Id.*

Various judicial presumptions have developed affecting the entireties estate, Porter, *supra*, at 1000, notably the gift presumption made applicable to both spouses in *Mims v. Mims*, 305 N.C. 41, 286 S.E. 2d 779 (1982). Under that rule our courts employ a presumption of gift when either spouse is the payor of property taken in the name of the other. *Mims*, 305 N.C. at 50, 286 S.E. 2d at 786. (Prior to *Mims* when the wife supplied the consideration the courts presumed a resulting trust in her favor.) "The extent of the gift is determined by the degree to which the title reflects an interest in the grantee disproportionate to the consideration supplied by the grantee." *Id.* at 53, 286 S.E. 2d at 787. The presumption of gift is rebuttable by clear, cogent, and convincing evidence. *Id.*

The Court in *Mims* confined its decision to cases in which the Equitable Distribution Act is not applicable, stating, "We do not purport here definitively to construe this new statute." *Id.* Clearly, however, the Court was motivated in part by the same concerns that impelled our legislature to enact the equitable distribution statute. *See Mims* at 51-53 and at n. 9, 286 S.E. 2d at 786-88 and at n. 9. Thus, we are guided by *Mims* in determining the disposition of the entireties property in this case.

Here the parties each contributed separate property—the wife $8,000, the husband $2,000—to make a down payment on a home costing $23,000. They made mortgage payments during the marriage. Due to home improvements, inflation, and an exchange of the original home with defendant's parents for one worth considerably more, at the time of separation the parties owned as tenants by the entirety appreciated property with a fair market value of $126,000.

Were this case before us in a different posture, rather than for classification of property in an action for equitable distribution, we would hold pursuant to *Mims* that each party presumably had made a gift to the other of that separate consideration that furnished the $10,000 down payment on their first home. This rule, the Court stated in *Mims*, "recognizes that such transfers are normally motivated by love and affection and the desire to make a gift." *Id.* at 53, 286 S.E. 2d at 788. We do not believe the rule should differ appreciably where the parties have applied for equitable distribution.

The source of funds approach—which this Court adopted, *Wade*, 72 N.C. App. at 381-82, 325 S.E. 2d at 269, for classifying other property—would dictate that each party retain as separate property the amount he or she contributed to the down payment, plus the increase on that investment due to passive appreciation; increases on that investment of separate property due to active appreciation, and amounts contributed by the marital unit plus increases on those amounts, would be marital property subject to equitable distribution.

[5] We believe the better rule, which we herein adopt, is that where a spouse furnishing consideration from separate property causes property to be conveyed to the other spouse in the form of tenancy by the entireties, a presumption of a gift of separate property to the marital estate arises, which is rebuttable by clear, cogent, and convincing evidence. *Accord Loeb*, 72 N.C. App. at 211, 324 S.E. 2d at 39 (Joint title creates rebuttable presumption of marital property which may be overcome by clear, cogent, and convincing evidence of a *third party donor's* contrary intent.). We believe this rule is consonant with the interspousal gift provision of our statute, with the separate property provision, and with the Supreme Court's enunciation of the common law in *Mims*, 305 N.C. 41, 286 S.E. 2d 779.

We note as well that with the exception of Maryland, *Grant v. Zich*, 477 A. 2d 1163 (Md. 1984), all other jurisdictions that have ruled on the question—including Colorado, Illinois, Iowa, Maine, Missouri, New Jersey, Wisconsin, and the District of Columbia—have determined that a presumption of gift to the marital estate arises from placing title to property in a tenancy by the entirety. *See, e.g., In re Marriage of Moncrief*, 535 P. 2d 1137, 1138 (Colo. 1975); *In re Marriage of Rogers*, 422 N.E. 2d 635, 638 (Ill. 1981); *In re Marriage of Butler*, 346 N.W. 2d 45, 47 (Iowa App. 1984); *Carter v. Carter*, 419 A. 2d 1018, 1022 (Me. 1980); *Conrad v. Bowers*, 533 S.W. 2d 614, 624 (Mo. App. 1975); *Pascarella v. Pascarella*, 398 A. 2d 921, 924 (N.J. Super. 1979); *Bonnell v. Bonnell*, 344 N.W. 2d 123, 126-27 (Wis. 1984); *Turpin v. Turpin*, 403 A. 2d 1144, 1146 (D.C. App. 1979) (property titled jointly, for whatever reason, no longer separate).

Of these states Maine has interpreted its equitable distribution statute most nearly as we have ours, adopting the source of

funds theory for the classification of property other than entireties property. Their statute was enacted, like ours, on the belief that existing common law rules were inequitable. *Carter*, 419 A. 2d at 1020; *White*, 312 N.C. at 774, 324 S.E. 2d at 831. To remedy the situation the Maine legislature adopted the concept of "marital property," intended to correspond to "partnership property" in a business entity or "community property" in a community property state. *Carter*, 419 A. 2d at 1020-21. "That some couples chose to put property in joint tenancy," the *Carter* court said, "even though one spouse had paid all of the purchase price from separate funds[,] represented a recognition of the partnership nature of marriage by those couples before the law itself adopted that theory." *Id.* at 1021. We find this reasoning persuasive.

In addition, our ruling is consonant with G.S. 50-20(b)(2), the interspousal gift provision. That provision creates a presumption that gifts between spouses are marital property. *Sharp, supra*, at 263-64. "[P]roperty acquired by gift from the other spouse during the course of the marriage shall be considered separate property *only if such an intention is stated in the conveyance.*" (Emphasis added.) G.S. 50-20(b)(2). *Accord, In re Marriage of Rogers*, 422 N.E. 2d 635, 638 (Ill. 1981) ("It may be anachronistic now to refer to an intent to convey a gift to the other spouse, but it is not improper to refer to an intent to convey a gift to the marriage."); *Conrad v. Bowers*, 533 S.W. 2d 614, 622 (Mo. App. 1975) (presumption of gift to marital estate overcome only by showing property acquired in exchange for separate property *and* transfer not intended as gift). Were the rule otherwise, "the nonsensical result would be that only gifts *from* marital property . . . could be marital property, a result clearly not intended under the exchange provision . . . ." *Sharp, supra*, at 267.

Our ruling is also consonant with the separate property provision. Prior to *Mims* that provision read, "Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both." G.S. 50-20(b)(2) (1981). Given that language, the *Mims* court wrote,

> It does appear . . . that in the context of a divorce and the "equitable distribution" of all "marital property" the

> legislature has opted for a rule that where land or personalty is purchased with the "separate property" of either spouse, it remains the "separate property" of that spouse regardless of how the title is made.

Mims, 305 N.C. at 53, 286 S.E. 2d at 787. In apparent response to this reading of the statute as it was written, the legislature amended the separate property provision to state that property acquired in exchange for separate property shall remain so regardless of title "and shall not be considered to be marital property *unless a contrary intention is expressly stated in the conveyance*." (Emphasis added.) G.S. 50-20(b)(2) (1983 Cum. Supp.).

Thus the legislature appears to have availed itself of the reasoning in *Mims* whereby when spouses title their real property without regard to the source of the consideration a gift will be presumed. When property titled by the entireties is acquired in exchange for separate property the conveyance itself indicates the "contrary intention" to preserving separate property required by the statute. *Accord In re Marriage of Lucas*, 614 P. 2d 285, 289 (Cal. 1980) ("The act of taking title in a joint and equal ownership form is inconsistent with an intention to preserve a separate property interest.").

We do not believe this interpretation conflicts with this Court's previous rejection of the doctrine of transmutation as a means to classify property. *Wade*, 72 N.C. App. at 381, 325 S.E. 2d at 269. Under that doctrine a married person may convert his or her separate property into marital property by conduct evidencing intent, such as the owner's oral statements, *Woods v. Security First National Bank of Los Angeles*, 299 P. 2d 657 (Cal. 1956), a documentary transaction, *Conrad v. Bowers*, 533 S.W. 2d 614 (Mo. App. 1975), or commingling of funds or assets, *Jaeger v. Jaeger*, 547 S.W. 2d 207 (Mo. App. 1977). As noted in one commentary, "[T]ransmutation is dangerously easy." Reppy & DeFuniak, *Community Property in the United States* 421 (1975), cited in Krauskopf, *Marital Property at Marriage Dissolution*, 43 Mo. L. Rev. 157, 192 n. 203 (1978). Here, however, only a titling of property as tenants by the entirety supplies the specific intent necessary to transform separate property into marital. G.S. 50-20(b)(2). Commingling of funds, the hallmark of transmutation, is irrelevant in that consideration for entireties property may

consist solely of separate property of one spouse, which under the gift presumption presumably becomes marital property.

The marital gift presumption follows naturally from this Court's previous decisions in *Loeb*, 72 N.C. App. 205, 324 S.E. 2d 33 and *Wade*, 72 N.C. App. 372, 325 S.E. 2d 260. In *Loeb* the Court held that property acquired during the marriage is presumably marital, rebuttable by clear, cogent, and convincing evidence that the property comes within the separate property provision. *Loeb*, 72 N.C. App. at 210, 214, 324 S.E. 2d at 38, 40. The language of the statute suggests this presumption in that it first defines marital property as "*all* . . . property acquired by either or both spouses, during . . . the marriage," (emphasis supplied), and only after so defining it, limits the class by stating, "*except* property determined to be separate." (Emphasis supplied.) G.S. 50-20(b)(1). In *Wade*, 72 N.C. App. at 381, 325 S.E. 2d at 269, the Court recognized that the marital property presumption is not explicitly adopted by the legislature but is, rather, a judicial gloss on the language of the statute. Moreover, once the presumption is overcome and property is shown to be separate—having been "acquired by a spouse before marriage or . . . by bequest, devise, descent, or gift [from a third party] during . . . marriage," G.S. 50-20(b)(2)—the Court discerned a clear legislative intent that property so acquired be returned to that spouse upon divorce, *Wade*, 72 N.C. App. at 381, 325 S.E. 2d at 269. Herein and in the cases discussed above, this Court has refined the meaning of "acquired" in the context of the Equitable Distribution Act.

Further, a presumption of gift to the marital estate of entireties property is consistent with a public policy to further the intent of both parties as evidenced by their mutual agreement. When one party titles property jointly it is reasonable that the other party expects it to be an addition to marital property. To protect those expectations the property should be classified as marital unless the donor's contrary intent was clearly brought to the attention of the donee. Krauskopf, *supra*, at 191.

With regard to the down payment on the home, neither party presented evidence of an intention that the separate property so used remain separate. We therefore do not reach whether the presumption of gift from separate property to the marital estate

is rebutted.[2] Should the issue arise on remand as to funds comprising the down payment, we note that in an analogous situation the Court in *Mims* stated, "If . . . [a spouse] can prove at trial by clear, cogent and convincing evidence that he [or she] did not intend to make a gift of an entirety interest in the property . . ., then he [or she] will have rebutted the presumption . . . ." *Mims*, 305 N.C. at 57-58, 286 S.E. 2d at 790. Upon rebuttal, the property is then classified according to the source of funds rule, *supra*.

IV.

[6] The court concluded that "the camper/trailer is marital property and should be sold and the proceeds divided equally between the parties." From the record we have determined that this property was financed and improved with funds from the sale of plaintiff's separate property (Nedco stock) and from bonuses plaintiff received from the corporation. It thus partakes of both separate and marital interests and on remand should be apportioned according to the formula for source of funds-active/passive appreciation (or depreciation) previously discussed. We note that defendant contends, and plaintiff did not dispute in oral argument, that she has paid plaintiff $10,000 for a transfer of title to the vehicle and an assignment of the leasehold on which it stands. Parties may, by agreement, opt out of an equitable distribution proceeding. G.S. 50-20(d). Therefore, if on remand the court determines that this agreement complies with G.S. 52-10 and 52-10.1 as provided by G.S. 50-20(d), it is binding on the parties.

V.

In conclusion, we hold:

(1) The corporation awarded to plaintiff as his sole and separate property partakes of separate and marital interests the value of which is to be determined on remand.

2. This decision thus leaves open what will be a showing by clear and convincing evidence that entireties titling was not intended as a gift to the marital estate. For cases where the evidence was held insufficient see *Goldstein v. Goldstein*, 310 So. 2d 361 (Fla. D.C. App. 1975) (Spouse who places separate securities in joint brokerage account to prevent distribution in bankruptcy may not claim separate property interest for divorce purposes.); *In re Marriage of Moncrief*, 535 P. 2d 1137 (Colo. 1975) (Parties' explanation that title placed in joint tenancy to avoid inheritance tax does not overcome gift presumption; rather it expresses reason why gift was made.). *See also* Krauskopf, *supra*, at 191.

(2) The Skye Drive home held as tenants by the entireties is presumed marital property unless on remand the court determines upon clear, cogent, and convincing evidence that the parties intended not to make a gift to the marital estate of separate funds used to purchase the property. In that case, unlikely on the record here, the property would partake of both separate and marital interests.

(3) The camper/trailer partakes of both separate and marital interests the value of which is to be determined on remand unless the court finds that the parties have met the requirements of G.S. 50-20(d).

(4) All property determined to be marital is then to be distributed equitably.

The judgment is vacated and the cause remanded for further proceedings consistent with this opinion.

Judges WELLS and BECTON concur.

STATE OF NORTH CAROLINA v. HARRY DOUGLAS DURHAM

No. 845SC767

(Filed 16 April 1985)

1. Rape and Allied Offenses § 10— direct cross-examination of five-year-old victim not allowed—cross-examination of mother permitted—no error

In a prosecution for taking indecent liberties with a five-year-old child where the court did not allow direct cross-examination of the child about her "night terrors" and treatment at a mental health clinic, there was no error under the rule of *State v. Edwards*, 305 N.C. 378, because the court permitted cross-examination of the child's mother on the same subject. However, it was noted that in a case such as this the rule may be criticized because it obscures and may work against a defendant's Sixth Amendment rights.

2. Rape and Allied Offenses § 10; Constitutional Law § 70— evidence that five-year-old victim's nightmares sexual in origin excluded—defendant deprived of effective cross-examination

In a prosecution for taking indecent liberties with a five-year-old child, the court erred by excluding evidence that the child had a history of nightmares in which she would sit up in bed screaming and crying with her eyes open, saying "don't touch me, leave me alone"; that she accused defendant at night after

swinging around, waking with a start and crying; that a few hours after accusing defendant the child told her mother and defendant's girl friend, who was living in the same house, that her father had abused her in the same way; and that the child's mother had told the girl friend about the night terrors and the treatment at the mental health center. By completely foreclosing cross-examination of the child or her mother on the child's accusation of her father and on the content of the child's nightmares, the trial judge deprived defendant of his right to effective cross-examination.

APPEAL by defendant from *Reid, Judge.* Judgment entered 14 December 1983 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 7 March 1985.

The defendant was charged with taking indecent liberties with a five-year-old child. The State produced as witnesses the child; her mother; a social worker, Anna Stringfield; and a Wilmington police officer, J. F. Newber. The State's evidence tended to show that on 3 August 1983 the defendant baby-sat for the child and another child named Jennifer at the mother's home. The child testified that the defendant read her a book, then pulled her pajama pants down, and licked her "in the crack." The child demonstrated at trial what defendant did to her, using dolls supplied by social worker Anna Stringfield.

The child first told her mother what defendant had done to her three days after the alleged crime. On 7 August 1983, at approximately four in the morning, the child's mother returned home and got into the bed where the child was sleeping. The child swung around in her sleep, hitting her mother, and awoke with a start. She then began to cry and tell her mother what defendant had done.

The child's mother then woke Becky Baker and defendant, who were sleeping in another room, and had the child repeat the accusations. Defendant left the house, and the mother and Becky Baker discussed the incident. Becky Baker testified, during a voir dire, that after defendant left the child told her and the mother that her (the child's) father had done the same thing to her as defendant had. The mother then told Becky Baker that the child had experienced "night terrors" for which she had been treated at a mental health clinic. Ms. Baker testified that the mother played a tape of the child experiencing one of her "night terrors." Ms. Baker stated that the mother indicated she had been told by

a mental health counselor that the night terrors were sexual in origin.

Defendant did not testify at trial. His position is that the alleged crime did not take place. He asserts that the child fantasized the incident. At an in-chambers conference before trial and a voir dire during trial, the defense proposed to offer evidence that the child's "night terrors" involved fears of being touched and may have been due to a previous incident of alleged sexual abuse by the child's father. The defense sought to introduce the evidence through cross-examination of the child and her mother, and through testimony of Becky Baker, the defendant's girl friend, who was living at the child's mother's home at the time of the alleged crime. The defense apparently also sought to introduce a tape of the child during one of her "night terrors."

The trial court ruled that the jury could hear evidence that the child had been treated for "night terrors" to the extent it bore on the question of the child's credibility. The trial court found, however, that evidence suggesting that the "night terrors" resulted from prior sexual abuse or the presence of a male was speculative and prejudicial, and should be excluded. The only testimony allowed at trial on the subject of "night terrors" was that the child had had "night terrors" and had been treated five times at a mental health center. This was given by the child's mother and by Becky Baker.

The defendant was convicted of taking indecent liberties and was sentenced to an eight year prison term. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General David Gordon, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Robin E. Hudson, for defendant appellant.

ARNOLD, Judge.

The defendant is charged with taking indecent liberties with a five-year-old child. The defendant argues that the child imagined or fantasized that defendant touched her in an indecent manner.

In this appeal defendant contends first that the trial judge erred by not allowing him to cross-examine the child as to the

fact that she had experienced "night terrors" and had been treated for them five times at a mental health clinic. The trial judge allowed the defense counsel to question the child's mother as to these matters for the purposes of attacking the child's credibility. The defendant argues that the trial judge denied his right to confront his accusers by refusing to let him question the child personally on a matter admittedly relevant to her credibility.

Further, defendant objects to the trial judge's refusal to allow him to cross-examine the child and her mother as to the content of the night terrors, and to submit testimony of Becky Baker, who lived in the mother's household, concerning the night terrors and the child's statement that her father also had similar sexual contact with her. The trial judge ruled that the contents of the child's night terrors and the child's accusation of her father were not relevant to defendant's guilt or innocence. The defendant argues that the trial judge by so restricting cross-examination and the presentation of evidence denied defendant his right to confront the witnesses against him and to present his defense.

I.

[1] We consider first defendant's contention that he should have been allowed to put questions to the child personally, which he was allowed to put to her mother, and which concerned a matter relevant to the child's credibility as a witness.

The right to confront one's accusers, guaranteed by the sixth amendment and made applicable to the states by the fourteenth, is central to an effective defense and a fair trial. *Pointer v. Texas*, 380 U.S. 400, 403-05, 85 S.Ct. 1065, 1067-68, 13 L.Ed. 2d 923, 926-27 (1965). At the heart of the right of confrontation is cross-examination. *Id.* As Professor Wigmore has stated:

> The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the *direct and personal* putting of questions and obtaining immediate answers.

5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940), *cited with approval* in *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed. 2d 347, 353 (1974) (emphasis added).

The right of effective cross-examination, recognized as fundamental by the Supreme Court, *Pointer*, 380 U.S. at 403-05, 85 S.Ct. at 1068, 13 L.Ed. 2d at 926-27; *Davis*, 415 U.S. at 318, 94 S.Ct. at 1111, 39 L.Ed. 2d at 355, is denied when a defendant is prevented from cross-examining a witness at all on a subject matter relevant to the witness's credibility. *Snyder v. Coiner*, 510 F. 2d 224, 225 (4th Cir. 1975), *cited* in *State v. Legette*, 292 N.C. 44, 53, 231 S.E. 2d 896, 901 (1977). Moreover, the denial of that right is a "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Davis*, 415 U.S. at 318, 94 S.Ct. at 1111, 39 L.Ed. 2d at 355, *citing Smith v. Illinois*, 390 U.S. 129, 131, 88 S.Ct. 748, 750, 19 L.Ed. 2d 956, 959 (1968) and *Brookhart v. Janis*, 384 U.S. 1, 3, 86 S.Ct. 1245, 1246, 16 L.Ed. 2d 314, 316 (1966).

It has been recognized that the right of cross-examination is not absolute and may, in appropriate cases, be outweighed by other legitimate interests in the criminal process. *See Mancusi v. Stubbs*, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed. 2d 293 (1972) (admission of previously-recorded testimony of unavailable witness not a violation of the confrontation clause if testimony bears sufficient "indicia of reliability"). *But see Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed. 2d 297 (1973) (state common law "voucher rule," preventing impeachment of one's own witness, does not outweigh right to cross-examine); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974) (state policy of preventing public disclosure of juvenile offender's record does not outweigh right to cross-examine). Yet, the denial or significant diminution of the right to effective cross-examination "calls into question the ultimate 'integrity of the fact-finding process,' and requires that the competing interest be closely examined," *Chambers*, 410 U.S. at 295, 93 S.Ct. at 1046, 35 L.Ed. 2d at 309, *quoting Berger v. California*, 393 U.S. 314, 315, 89 S.Ct. 540, 21 L.Ed. 2d 508 (1969).

Once a defendant has been given the full and fair opportunity guaranteed by the sixth and fourteenth amendments to cross-examine on matters raised in the direct examination and on matters relevant to credibility, the trial judge may in his discretion prevent cross-examination which is repetitious or harassing. When the trial judge commits error in controlling the scope of cross-examination which is within his discretion, the error is harmless if no proof is presented that prejudice resulted, *i.e.*, that

"the verdict was improperly influenced thereby." *State v. Britt*, 291 N.C. 528, 545, 231 S.E. 2d 644, 655 (1977).

The problem we face in the present case is whether by foreclosing personal cross-examination of the child on a matter relevant to her credibility the trial judge denied defendant's constitutional right of confrontation, or whether he acted within his discretion to control the scope of cross-examination.

The trial court refused to allow defendant to cross-examine the child as to her treatment for night terrors, while allowing defendant to cross-examine the child's mother as to that subject for purposes of attacking the child's credibility. From the fact that the child had had severe nightmares, or night terrors, and that her mother had taken her to a mental health center five times for treatment it is reasonable to infer that the child might have had some form of mental or emotional illness that might have affected her testimonial capacities. The trial judge correctly concluded that this was a subject relevant to the child's credibility as a witness.

If this was a subject matter relevant to the child's credibility as a witness, then defendant should have been permitted to cross-examine her. Yet, the trial judge only allowed defendant to put these facts into evidence through cross-examination of the child's mother. The rule in North Carolina is that where a trial court erroneously refuses to allow cross-examination of a witness, and then the evidence sought to be admitted by cross-examination is admitted later by another witness, the error is harmless. *See State v. Edwards*, 305 N.C. 378, 381-82, 289 S.E. 2d 360, 363 (1982); *see also State v. Smith*, 294 N.C. 365, 377, 241 S.E. 2d 674, 681 (1978).

While we will abide by that rule in this case, we believe it should be criticized as not in keeping with the underlying purposes of the sixth amendment right to confront one's accusers. The North Carolina rule in practice allows the trial judge to appoint an alternate to answer difficult credibility questions, and denies the defendant the right to question the witness personally in front of the jury, so that the jury can observe the witness's response and judge the witness's credibility. Where the witness is the principal accuser, and the only person except for the defendant who has first-hand knowledge of the crime and related events, the appointment of an alternate might deprive the jury of crucial

facts which only the witness himself knows and might reveal on cross-examination.

Further, we take issue with what appears to be the underlying motivation in child witness cases for permitting a relative to testify for the child. It has been argued, as the State did in the present case, that the trial court may appoint a relative to testify "to lessen the emotional trauma of the trial on the young victim." We agree that the State has an interest in protecting the child from further brutalization by the trial process.

Yet, answering the questions put by the defense counsel in cross-examination often is no more traumatic than describing the crime itself, which the child as principal witness must do. Our Constitution requires that a person who has been accused by another has a right to confront his accuser in the flesh, and not through an alternate or substitute. Moreover, this right extends to all subjects relevant to the accuser's credibility, whatever their emotional content. A child witness then, who is also a victim and principal accuser, cannot be insulated entirely from a relevant area of questioning which puts at issue the child's credibility. This is not to say, however, that the trial judge may not in his discretion oversee the cross-examination, as with all witnesses, to prevent the defense counsel from so phrasing his questions as to harass the witness.

On the issue of whether the trial judge's refusal to allow cross-examination of the child on a clearly relevant subject was error, in light of the cross-examination of the mother on the same subject, the rule of *State v. Edwards* controls, and we will adhere to it. The rule, however, in a case like the present, may be criticized because it obscures and may work against a defendant's sixth amendment rights.

II.

[2] We turn now to the second part of defendant's argument: that the trial court erred in refusing to admit any evidence of the nature and causes of the child's nightmares and of her statement that her father had abused her in the same way defendant had. The trial judge heard evidence in voir dire that the child's mother had been told that the child's night terrors had some basis in sexual abuse committed, presumably, by her father. This was given by Becky Baker, defendant's girl friend, who lived in the mother's house. Ms. Baker testified in the second voir dire that the morn-

ing after the child accused defendant, and the child's mother confronted him, the child then said in the presence of her mother and Ms. Baker that her father had done the same thing. Ms. Baker testified further that this caused the mother to tell Ms. Baker about the child's night terrors and to play a tape of the child while she was experiencing one of these nightmares. The trial judge questioned Ms. Baker about the mother's purpose in playing the tape, and Ms. Baker said she believed the mother had been told and believed the night terrors had a sexual origin.

We note initially that on appeal defendant contends he sought to introduce at trial the testimony of the mental health counselor, Goldie Walton, and the tape of the child experiencing one of her night terrors. Yet, the defendant did not preserve voir dire testimony of Ms. Walton in the record, nor did he preserve the tape or a copy of it. We thus have no means to review whether Ms. Walton's testimony and the tape should have been admitted, and our inquiry will therefore be limited to the excluded testimony of Becky Baker and the restrictions placed on defendant's cross-examination of the child and her mother.

The trial judge ruled in the voir dire that Ms. Baker's testimony was not admissible to present the child's accusation of her father, or to present the defense theory that the child's night terrors were somehow linked to the child's accusation of defendant. Further, the trial judge ruled at the earlier in-chambers conference that defendant could not cross-examine the child or her mother as to the substance of her night terrors and as to her accusation of her father. The trial judge reasoned that evidence of the contents of the night terrors and of the child's accusation of her father was not relevant, and was too speculative and prejudicial to be admitted before the jury.

The defendant says that by refusing to allow him to present Ms. Baker's testimony the trial judge denied his right to present his defense. Defendant thus invokes his fundamental right to present witnesses in his defense guaranteed by the compulsory process clause of the sixth amendment and made applicable to the states via the due process clause of the fourteenth amendment. *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed. 2d 1019 (1967). Defendant also says that by refusing to allow him to cross-examine the child and her mother as to the contents of the child's night terrors, the trial judge denied his right to cross-examine witnesses against him and so to put in issue their credibility. *See*

cases cited *supra.* Whether defendant's constitutional rights were violated reduces essentially to whether the evidence sought to be presented and the questions sought to be put were *relevant* to either defendant's claim that he did not touch the child in an indecent manner, or to the credibility of the witnesses against him.

We deal first with Becky Baker's testimony that the child accused her father of the same acts defendant allegedly committed, only a few hours after she accused defendant. The defendant argues that *State v. Baron,* 58 N.C. App. 150, 292 S.E. 2d 741 (1982), is pertinent. In that case this Court granted a new trial where the trial judge had excluded evidence that a thirteen-year-old prosecuting witness had previously and, it appears, falsely, accused others of improper sexual advances. The precise question before the Court was whether the trial judge erred in applying the North Carolina Rape Shield Statute, G.S. 8-58.6, to exclude these accusations. The Court held that the trial judge did err, citing *State v. Smith,* 45 N.C. App. 501, 263 S.E. 2d 371, *disc. rev. denied,* 301 N.C. 104, 273 S.E. 2d 460 (1980), on the grounds that the statute excluded evidence of "sexual behavior," but not evidence of language or conversation whose topic might be sexual behavior. Assuming that the evidence of the accusations was otherwise admissible, the Court found that defense counsel should have been allowed to introduce it in order to attack the credibility of the prosecuting witness. *Baron,* 58 N.C. App. at 153-54, 292 S.E. 2d at 743.

While we agree that in the present case the child's accusation of her father, to the extent it is evidence of conversation or language, is not excluded by the Rape Shield Statute, we still face the problem of whether this accusation is relevant to the child's credibility. In *Baron,* the child witness made a number of accusations, in circumstances from which it could be reasonably inferred that they were false. Certainly, this evidence was relevant to the child's credibility.

In the present case, however, the circumstances are different, and somewhat less compelling, but they are troubling nonetheless. The child informed her mother at 4:00 a.m. on 7 August 1983, after awaking with a start, and crying, that defendant had abused her. The child had a history of nightmares, in which she would sit up in bed, screaming and crying, with her eyes open, saying, "Don't touch me. Leave me alone." A few hours after she accused defendant, the child also told her mother and

Becky Baker that her father had abused her in the same way. This caused her mother to relate to Becky Baker the history of the child's night terrors, and treatment at a mental health center, and to play a cassette tape of the child experiencing a night terror, all which suggested to Ms. Baker that the child had mental problems, and that the child's night terrors were sexual in nature.

In these circumstances, we believe the child's accusation of the father was relevant to the child's credibility, and we believe the trial judge abused his discretion and violated defendant's constitutional rights by ruling such a subject irrelevant and by *completely foreclosing* any discussion of it by Becky Baker before the jury.

We find also that Becky Baker's testimony as to what the mother told her about the nature of the child's nightmares was relevant. This testimony tended to support defendant's contention that the child had a history of experiencing serious nightmares which may have had a sexual origin and nature, and that she accused defendant at night in a manner similar to that in which she behaved when she had her night terrors. We agree that defendant's evidence does not conclusively prove that the child fantasized the alleged crime. Yet, we believe that whether there was a connection between the night terrors and the child's accusation of defendant sufficient to absolve the defendant was a question of fact for the jury. The jury should have been allowed at least to consider this defense theory.

Finally, we believe that by completely foreclosing any cross-examination of the child or her mother on the child's accusation of her father and on the content of the child's nightmares the trial judge deprived the defendant of his right to effective cross-examination. The trial judge did not allow cross-examination of any witness on this subject, and so the rule of *State v. Edwards* does not apply. These subjects, as noted above, were relevant to the child's testimonial capacities. Moreover, we do not believe that the jury would have been confused or inflamed by carefully monitored cross-examination of the child or her mother on these topics.

Obviously, in a case such as this, the trial judge should screen in advance and oversee questioning of the child, her mother, and witnesses such as Ms. Baker. Moreover, the trial judge should carefully instruct the jury as to the purposes to which such evidence may be considered. In this way he may bet-

ter protect the child and other witnesses from harassment, safeguard against improper innuendo, and, when pertinent, insure compliance with the Rape Shield Statute.

We remand for retrial consistent with this opinion.

Judges EAGLES and PARKER concur.

NORMAN MORGAN INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR JENNIFER ANN MORGAN; TRUMAN ARLANDER DAVIS, JR., INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR THAD WILLIAM DAVIS; JERRY EDWARDS PRICE INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR KIMBERLY RAE PRICE; WILLIAM CLAUDY PACK INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR ANGELA GAIL PACK; BENJAMIN L. LYNCH INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR BRANDON JAMES LYNCH, PETITIONERS v. THE POLK COUNTY BOARD OF EDUCATION, A BODY CORPORATE; ROY L. MORGAN, WILLIE ARLEDGE, FRED EARL FOSTER, PHYLLIS H. CRAIN, AND KENNETH WILLIAMS CONSTITUTING MEMBERS OF SAID POLK COUNTY BOARD OF EDUCATION; JAMES E. BENFIELD, SUPERINTENDENT OF POLK COUNTY PUBLIC SCHOOLS AND *EX OFFICIO* SECRETARY OF THE POLK COUNTY BOARD OF EDUCATION; AND ANNE CARSWELL, SCHOOL FINANCE OFFICER OF THE POLK COUNTY PUBLIC SCHOOLS, RESPONDENTS, AND THE STATE BOARD OF EDUCATION OF NORTH CAROLINA, RESPONDENT-INTERVENOR

No. 8429SC653

(Filed 16 April 1985)

1. **Schools § 4.1 — experimental extended school time program — statutory authority**

The State Board of Education and the Polk County Board of Education had the authority under G.S. 115C-112(11) and G.S. 115C-47(8) to conduct an experimental extended school day and school term program which varied the length of the school term in Polk County from the 180-day term mandated by G.S. 115C-84(c). Moreover, the General Assembly implicitly granted the State Board of Education and the local boards of education the authority to increase the length of the school term beyond 180 days by an act appropriating funds for the experimental extended day program.

2. **Schools § 4.1 — experimental extended school time program — no violation of uniformity requirements**

An experimental extended school day and school term program conducted in Polk County did not violate the requirement of a "uniform system of free public schools" in Art. IX, § 2(1) of the N. C. Constitution since the Constitution does not require a uniform 180-day term. Nor did such program violate the portion of G.S. 115C-84(c) providing for a "uniform school term of 180 days" since other provisions of the statute show that it does not require exact uniformity of terms.

3. Schools § 4.1; Statutes § 4— constitutionality of statute—no standing to challenge

Petitioners had no standing to challenge an experimental extended school day and school term program on the ground that it denied them equal protection of the laws since (1) they do not belong to a class prejudiced by the program in that, rather than being burdened, they have been blessed with the opportunity to receive more free education, and (2) there is no evidence that they are in immediate danger of being prosecuted under the Compulsory Attendance Act for failure to send their children to school for the extra 20 days required by the extended day and term program.

4. Schools § 4.1— action against local school board—exclusion of evidence relating to State Board

In an action to enjoin the operation of an experimental extended school day and school term program in Polk County, the trial court properly excluded evidence relating to a public hearing and a special meeting conducted by the State Board of Education where petitioners took a voluntary dismissal of their claims against the State Board, and where the Wake County Superior Court has exclusive jurisdiction over claims concerning procedures by the State Board. G.S. 115C-2; G.S. 150A-45.

5. Evidence § 28.2; Statutes § 5.1— scope of legislative acts—minutes of legislative committee—authentication

Minutes of a meeting of the Joint Appropriations Expansion Budget Committee on Education were admissible to show the meaning and scope of an appropriations act for an experimental extended school time program. Furthermore, the minutes were sufficiently authenticated when an administrative officer for the General Assembly and custodian of materials contained in the legislative library testified that the minutes were a true and accurate copy of the original minutes. G.S. 1A-1, Rule 44.

APPEAL by petitioners from *Davis, Judge*. Judgment entered 22 February 1984 in Superior Court, POLK County. Heard in the Court of Appeals 11 February 1985.

Redmond, Stevens, Loftin & Currie, by Thomas R. West, for petitioner appellants.

McFarland, Key and McFarland, by Hugh L. Key, Jr., for respondent appellees Polk County Board of Education, et al.

Attorney General Rufus L. Edmisten, by Senior Deputy Attorney General Andrew A. Vanore, Jr., and Special Deputy Attorney General Edwin M. Speas, Jr., for respondent-intervenor appellee The State Board of Education of North Carolina.

JOHNSON, Judge.

In the spring of 1983, the National Commission on Excellence in Education and the Task Force for Economic Growth submitted

reports to the United States Department of Education and the Education Commission of the States, respectively, in which they questioned the sufficiency of the existing education system to meet the demands of the future. As a result of these reports, it was recommended that all states consider increasing the length of the school day and school term.

On 2 June 1983, Dr. A. Craig Phillips, the Superintendent of Public Instruction of the State of North Carolina, presented the findings and recommendations of these organizations, in addition to a report prepared by his staff on the issue, to the North Carolina State Board of Education. Following Dr. Phillips' presentation, the State Board decided to study the feasibility of extending the length of the school day and year in North Carolina. The State Board directed Dr. Phillips to prepare a mailing to the 143 public school systems in North Carolina advising the systems that the State Board was seeking three school systems to volunteer to pilot an extended school day and extended school year program, that the State Board was going to request funds from the General Assembly to implement the program, that selection of the participating systems would be based upon a representative sample, and that implementation of the program was contingent upon the availability of funds.

On 7 June 1983, James Benfield, Superintendent of the Polk County Schools, received one of these letters. Mr. Benfield indicated his interest in participating in the program, which would involve a seven hour school day and a two hundred day school term for a three year period, by returning an attached form. After attending meetings conducted by the Chairman of the State Board and officials of the Department of Public Instruction, Mr. Benfield presented the proposal to the Polk County School Board at its meeting on 21 June 1983. The Polk County School Board voted to participate in the program.

On 6 July 1983, the State Board met and approved the requests of Polk County and Halifax County to participate in the program, contingent upon the appropriation of funds by the General Assembly. On 15 July 1983, the General Assembly appropriated funds for the "extended day program in the Department of Public Education." Section 92 of the Appropriations Act provided:

> Of the reserve set up in Section 2 of this act for the extended day program in the Department of Public Education, a local

> school administrative unit may be selected only with the approval of that local board of education, and only upon a finding of fact by the State Board of Education after a public hearing by the State Board of Education in that local school administrative unit that there is sufficient support among the populace of that administrative unit and that the establishment of the program will result in a meaningful test of the effectiveness of this experimental program. The members of the State Board of Education shall hold the hearing themselves and shall not delegate to a hearing officer the responsibility to do so.

1983 Sess. Laws, c. 761, s. 92. On 22 July 1983, the public hearing required by Section 92 was conducted in Polk County by the State Board of Education. A special meeting of the State Board was called on 25 July 1983 to consider the results of the public hearings in Halifax and Polk Counties. The State Board approved the requests of the two counties to participate in the program based upon findings that there was sufficient support among the populace of the administrative units and that the establishment of the program would result in a meaningful test of the effectiveness of the program.

On 11 August 1983, petitioners filed a petition for writ of mandamus and a motion for a temporary restraining order and preliminary injunction, seeking to enjoin the Polk County School Board from implementing and operating a school term in excess of 180 days. On 22 August 1983, the State Board of Education was allowed to intervene, whereupon petitioners amended their petition to allege that the State Board of Education did not follow proper procedures in implementing the program. The State and the County Boards of Education filed separate answers. Petitioners subsequently, on 12 January 1984, took a voluntary dismissal of their claims against the State Board of Education in their amended complaint. Following a hearing, the court denied the relief sought and dismissed the action.

I

[1] The first issue we must decide is whether the State Board of Education and the Polk County Board of Education had the authority to vary the length of the school term from the 180 day term mandated by G.S. 115C-84(c).

The State Board of Education is provided for in the North Carolina Constitution. N.C. Const., Art. IX, sec. 4. It is given the

power by the Constitution to "supervise and administer the free public school system" and to "make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly." N. C. Const. Art. IX, sec. 5. The State Board of Education therefore derives its powers from both the Constitution and the General Assembly. *See Guthrie v. Taylor*, 279 N.C. 703, 185 S.E. 2d 193 (1971), *cert. denied*, 406 U.S. 920, 32 L.Ed. 2d 119, 92 S.Ct. 1774 (1972). Among the powers granted by the General Assembly to the State Board is the power "to sponsor or conduct education research and special school projects considered important by the Board for improving the public schools of the State." G.S. 115C-12(11). Similarly, the General Assembly has authorized local boards of education "to sponsor or conduct educational research and special projects approved by the Department of Public Instruction and the State Board of Education that may improve the school system under their jurisdictions." G.S. 115C-47(8).

The extended school day and extended school year program is such an educational research project. The letters mailed to the school superintendents indicate that the program was an "experimental program" which was "designed to test the impact of an extension of the school day and school year." The reports submitted to the State Board indicate that an extended school day and school year could improve the educational system; however, there were many unanswered questions about the feasibility and effectiveness of an extended school day and school year. Moreover, the General Assembly implicitly granted the State Board of Education and the local boards of education the authority to increase the length of the school term beyond 180 days by enacting Section 92 of the Appropriations Act and by funding the project. The General Assembly has the authority to provide for a school term in excess of nine months. *Harris v. Board of Commissioners*, 274 N.C. 343, 163 S.E. 2d 387 (1968); *Frazier v. Board of Commissioners*, 194 N.C. 49, 138 S.E. 433 (1927). We therefore hold the trial court properly concluded the State Board of Education and the Polk County Board of Education have the legislative authority to conduct the program.

II

[2] We next consider petitioners' contentions that the extended school day/year program violates the uniformity provisions of our

Constitution and G.S. 115C-84(c). Our Constitution provides: "The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students." N. C. Const. Art. IX, sec. 2(1). Our Supreme Court has construed this uniformity requirement as follows:

> The term 'uniform' here clearly does not relate to 'schools,' requiring that each and every school in the same or other districts throughout the State shall be of the same fixed grade, regardless of the age or attainments of the pupils, but the term has reference to and qualifies the word 'system' and is sufficiently complied with where, by statute of authorized regulation of the public school authorities, provision is made for establishment of schools of like kind throughout all sections of the State and available to all of the school population of the territories contributing to their support.

Board of Education v. Board of Commissioners, 174 N.C. 469, 473, 93 S.E. 1001, 1002 (1917). Similarly, the word "uniform" modifies the word "system," not the word "term." The Constitution, therefore, does not require a uniform 180 day term. The extended school term program does not violate the Constitution's uniformity requirement, as the trial court properly concluded.

As noted earlier, the General Assembly has the authority to establish the length of the school term. Pursuant to this authority, it enacted G.S. 115C-84(c), which provides: "There shall be operated in every school in the State a uniform school term of 180 days for instructing pupils." G.S. 115C-84(c) goes on to provide, however, that "(f)or up to five of these days during the school year on which schools are closed due to hazardous weather conditions, natural disaster or other emergency, local boards of education may excuse teachers and students from attendance without requiring that the days be made up. . . ." It is thus apparent that G.S. 115C-84(c) does not require exact uniformity of terms. Some school districts may have terms of less than 180 days due to the weather, etc. The question of the constitutionality of that provision is not before us. As indicated *supra*, the Constitution does not require a uniform term of 180 days. Moreover, uniformity of school days is not required as G.S. 115C-84(a) permits the local

boards of education to determine the length of the school day in their respective districts. The reports prepared by the Staff of the Department of Public Instruction show that school days vary from six to seven hours per day.

[3] Petitioners also contend that the operation of the extended school day/year program denies them equal protection of the law under the North Carolina Constitution and the United States Constitution. To challenge the constitutionality of a statute or a state action, the party challenging the action must be a member of the class prejudiced by the action. *In re Appeal of Martin*, 286 N.C. 66, 209 S.E. 2d 766 (1974). We do not think petitioners belonged to a class prejudiced by the action. Section 1 of Article IX of the North Carolina Constitution provides: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged." Section 2 of Article IX of the North Carolina Constitution provides that equal opportunities must be given to all students to attend public schools which are maintained at least nine months in every year. As evident from the Constitution, educational opportunities are highly valued in this State. Petitioners, rather than being burdened, have been blessed with the opportunity to receive more free education.

Petitioners, however, claim that a burden will be placed upon them as parents which will not be imposed on other parents because they will have to send their children to school 20 days longer or face criminal penalties under G.S. 115C-380 for violating G.S. 115C-378, which requires parents or guardians of children between the ages of seven and sixteen years to cause such children "to attend school continuously for a period equal to the time which the public school to which the child is assigned shall be in session." In order to challenge the constitutionality of a legislative or executive action, a party must be in immediate danger of sustaining a direct injury from the action. *Nicholson v. State Education Assistance Authority*, 275 N.C. 439, 168 S.E. 2d 401 (1969). There is no evidence that petitioners were in immediate danger of being prosecuted under the Compulsory Attendance Act. Petitioners therefore lack standing to raise this issue.

For the foregoing reasons, we hold the trial court properly concluded that there were no constitutional or statutory violations.

III

[4] The next issue is whether the court properly excluded evidence relating to the public hearing and the State Board's special meeting. The excluded evidence related to the issues of whether the State Board properly conducted the public hearing and whether it properly implemented the program in Polk County. The State Board of Education was a necessary party to claims alleging irregularities in its conducting of the public hearing and in its proceedings because it was so vitally interested in the controversy involved in the claim that no valid judgment could be rendered without it as a party. *See Booker v. Everhart*, 294 N.C. 146, 240 S.E. 2d 360 (1978). A court cannot consider a claim without such a necessary party. *Id.* Petitioners, here, took a voluntary dismissal of their claims against the State Board of Education. Moreover, the Polk County Superior Court had no jurisdiction over the claims concerning the State Board's procedures, because exclusive jurisdiction over this contested case belonged to Wake County Superior Court. G.S. 115C-2; G.S. 150A-45. We hold the court properly excluded the evidence.

For the same reasons, we reject petitioners' contention that the court erred in denying their request for a jury trial on the issue of whether the State Board of Education followed proper procedures.

IV

[5] Petitioners next contend that Section 92 was unambiguous in expressing an intent to fund only an extension of the length of the school day and not the school year; consequently, extrinsic evidence was improperly admitted to clarify the section. We disagree. When one reads Section 92, one asks, "What is the extended day program in the Department of Public Instruction?" It is not clearly stated on the face of Section 92. It thus becomes necessary to look at the section as a whole, the legislative history, and the circumstances surrounding its enactment to determine its meaning and scope. *See Milk Commission v. Food Stores, Inc.*, 270 N.C. 323, 154 S.E. 2d 548 (1967). The court therefore properly admitted the minutes of the Joint Appropriations Expansion Budget Committee on Education meeting on 23 June 1983, which indicated that the program involved an extension of the school day by

one hour and of the school term by twenty days, to determine the scope of Section 92.

Petitioners also contend that these minutes were not properly admitted because they were not admitted into evidence through the legislative librarian. The minutes were introduced through Mr. George Hall, who testified that he was an administrative officer for the General Assembly and custodian of materials contained in the legislative library and that the minutes were a true and accurate copy of the original of the minutes. We hold this was sufficient authentication of the official minutes. *See* G.S. 1A-1, Rule 44; *Kearney v. Thomas*, 225 N.C. 156, 33 S.E. 2d 871 (1945); 2 Brandis on North Carolina Evidence sec. 194 (1982).

V

Petitioners' next contention is that the following finding of fact was not supported by any evidence:

> Recognizing that it would be illogical to spend large sums of money to extend the school calendar in all the school systems in the State without knowing the benefits which that action would produce, the State Board determined that it should proceed initially with an increase in time for learning on an experimental basis. Accordingly, the State Board solicited school systems to volunteer to extend the length of the school term and school day for a period of three years in order that data would be available upon which to make an informed judgment about whether the benefits flowing from extension of the school term would justify the substantial cost associated with an extension of the school calendar in all school systems.

Dr. A. Craig Phillips, the Secretary of the State Board of Education, testified that the Board decided to conduct this experiment on a limited voluntary basis rather than across the board statewide because it was "easier and better" to find out that way whether a longer school day and school year would be beneficial to students. If the experimental program proved successful, additional funding would be sought to implement a longer school day and year statewide. The minutes of the 2 June 1983 meeting of the State Board also indicate that funding was a key concern of the State Board. We hold the foregoing evidence was sufficient to support the finding of fact.

VI

We last consider petitioners' contention that the court's conclusion of law that "the purposes of this experimental program were presented to the General Assembly in the context of widespread publicity about the quality of education and the need to increase the time provided children for learning" was not supported by the findings of fact. Though denominated a conclusion of law, it reads more like a finding of fact. We have reviewed the record and find that there is ample support in the record for this finding of fact.

For the foregoing reasons, we hold the trial court's findings of fact were supported by competent evidence which in turn support its conclusions of law and order. The order of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge COZORT concur.

STATE OF NORTH CAROLINA v. JAMES STANLEY

No. 8422SC430

(Filed 16 April 1985)

1. Rape and Allied Offenses § 5— second-degree rape—sufficiency of evidence

Defendant's motions to dismiss charges of second-degree rape were properly denied where the State presented evidence that tended to show that defendant told the victim to go home with him when they would be alone in the house, picked her up and carried her into the children's bedroom against her will while she was fighting him, held her so tightly he left a large bruise on her upper arm, took off her clothes, had sexual intercourse with her, dragged her into her bedroom and had sexual intercourse a second time, and warned her not to tell anybody. G.S. 14-27.3.

2. Criminal Law § 181— second-degree rape—motion for appropriate relief based on contradictions in evidence

Defendant's motion for appropriate relief to set aside a verdict of second-degree rape because of inconsistencies and contradictions in the evidence was properly denied. Contradictions and inconsistencies in the evidence are matters for the jury, and there was clearly sufficient evidence to warrant the submission of the case to the jury. G.S. 15A-1414(b)(2).

3. Criminal Law § 138— second-degree rape—aggravating factors—victim mentally infirm—defendant abused position of trust

Where defendant was convicted of second-degree rape, the trial court properly found as aggravating factors that the victim was mentally infirm and that defendant took advantage of a position of trust or confidence to commit the offense where it was uncontradicted that the victim was a nineteen-year-old mentally retarded girl who was a client at the Davidson County Sheltered Workshop for the Retarded, who had been asked by defendant's wife to stay with them to help with housework, and who testified that she considered defendant a parent or authority figure.

4. Criminal Law § 131.1— second-degree rape—motion for new trial for newly discovered evidence denied

In a prosecution for second-degree rape in which defendant testified that the victim made advances to him, there was no error in the denial of defendant's motion for a new trial for newly discovered evidence where a man who had testified at trial that he had gone to a movie with the victim testified that after the movie they had gone to defendant's house where the victim had unbuttoned three buttons of her blouse and asked him to touch various parts of her body. The testimony was not relevant under G.S. 8-58.6(b)(3) because it did not closely resemble defendant's version of the alleged encounter; furthermore, defendant did not show due diligence in that he had the opportunity to question the witness at trial. G.S. 15A-1415(b)(6).

5. Criminal Law § 89.4— cross-examination concerning testimony of probable cause hearing—properly limited

In a prosecution for second-degree rape, the court did not abuse its discretion by sustaining the State's objection to defendant reading from the probable cause hearing transcript after the victim started to cry during cross-examination. The transcript was admitted into evidence at the close of defendant's evidence with a proper limiting instruction.

6. Rape and Allied Offenses § 6— instructions that general reputation of victim should be considered on consent not given—no error

In a prosecution for second-degree rape, the court did not err by not instructing the jury that the general reputation and character of the prosecutrix should be considered regarding her consent to sexual intercourse with defendant where defendant did not request such an instruction at trial and the evidence which defendant contended was character evidence was ambiguous.

7. Criminal Law § 89.1— second-degree rape—victim's reputation for truth and veracity—questions limited to general reputation

In a prosecution for second-degree rape, the court did not err by not permitting defendant to ask about the victim's reputation for truth and veracity. The established rule in North Carolina permits the impeaching character witness to be asked only whether the witness knows the general reputation and character of the party and what that general reputation or character is. The witness may amplify or qualify the answer to the latter question with regard to specific virtues or vices but counsel offering the witness may not suggest that the witness do so.

8. Criminal Law § 86.2— error to exclude defendant's testimony of prior convictions—not sufficient prejudice for a new trial

In a prosecution for second-degree rape, the court erred by not permitting defendant to testify on direct examination about his prior convictions, but that error alone was not enough to warrant reversal.

APPEAL by defendant from *DeRamus, Judge.* Judgment entered 28 November 1983 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 17 January 1985.

Defendant was charged on an indictment, proper in form, with the second degree rape of Mildred Ann Pyburn. At trial the State's evidence tended to show the following. On 22 June 1983 Mildred Ann Pyburn (Ann) was living with defendant, his wife, and their two children. Ann was nineteen years old. She was staying with the Stanleys to help Mrs. Stanley with housework. On the morning of 22 June 1983 Ann woke up early and went with defendant and his family to visit defendant's grandmother. Later that day defendant asked Ann to return to his house with him to do some housework for his wife. When they got back to the house, defendant started talking to Ann about sex. Ann was scared. Defendant picked her up and took her into the children's bedroom. Ann struggled and fought with defendant. In the children's bedroom defendant undressed Ann and himself and forced Ann to have sexual intercourse. Then defendant made Ann have sexual intercourse with him again in her own bedroom. Defendant held Ann's arm so tightly he gave her a three-inch bruise. Defendant warned Ann not to tell anybody about what happened. Later, defendant and Ann picked up defendant's friend, Buck, and took him to work. Then defendant took Ann to Sky City, picked up his wife and children, and took Ann to the Boy's Group Home. At the Home Ann told Frankie Lane, a woman she knew from the Davidson County Sheltered Workshop for the Retarded, about the rape. Ann went to the Sheriff's Department and to the hospital.

On cross-examination Ann said she used to be a client at the Davidson County Sheltered Workshop for the Retarded. Ann had a friend named Jimmy Hayes who lived in the Boy's Group Home. She had been to see Jimmy a few days before the rape occurred; she was angry with him for dating another girl. The night before the rape Ann called defendant into her bedroom because she thought she saw a lizard on the wall. She waited out in the hall while defendant was in her bedroom.

Dr. James F. Black testified that he examined Ann on 22 June 1983, and in his opinion she had engaged in sexual intercourse within the past twenty-four hours.

Detective Richard Sink, from the Davidson County Sheriff's Department, testified that he spoke with Ann on 22 June 1983. Ann made a statement about the events that took place on that day. In her statement she said defendant had intercourse with her once. Ann returned to Sink's office the following day and when she went into further details about the incident, she said there had been two acts of intercourse.

Frankie Lane, an employee of the Davidson County Sheltered Workshop for the Retarded and the Boy's Group Home, testified that on 22 June 1983 Ann did not seem upset when she came by the Group Home, but forty-five minutes later she started crying and said defendant had raped her.

Defendant testified in his own behalf as follows. Ann moved into his house on 17 June 1983. On the 21st of June he took Ann to the Boy's Group Home to visit for an hour. When Ann returned, she "went berserk" and ran out into the shed. Defendant tried to get her to go into the house, but Ann wanted to sit in the shed and talk to him about Jimmy. Ann was upset that Jimmy was dating another girl. After supper while defendant, his wife, and Ann were playing cards, Ann was still upset about Jimmy; she said that, "she ought to go out and get on somebody." A few minutes after they all went to bed, Ann called defendant into her bedroom and "she was upset about Jimmy again, [and] mentioned sex." The next morning he woke up at seven and when he went into Ann's bedroom to wake her up, "she mentioned again having sex; I told her again about getting in trouble with Betty . . . she said wait; I looked back, she pulled off the sheet, she didn't have nothing on; we had sex." After breakfast the Stanleys and Ann went to visit defendant's grandmother. At 11:30 a.m. defendant left with Ann, and they took Buck to work. Then defendant dropped Ann off at Sky City. Defendant denied raping Ann.

Defendant was found guilty of second degree rape. The trial judge found the following statutory aggravating factors:

The victim was mentally infirm.

The defendant took advantage of a position of trust or confidence to commit the offense.

The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement.

The trial judge found the following non-statutory mitigating factors:

Defendant has been helpful in past to family members and others.

Defendant had voluntarily come forward to the U. S. Attorney and advised that he was on escape while the escape was not suspected by the U. S. Attorney.

Defendant has completed only the 8th grade and was employed at the Sheltered Workshop program similar to the Sheltered Workshop program participated in by the victim.

The trial judge found the factors in aggravation outweighed the factors in mitigation. From a judgment imposing a prison sentence of twenty-four years defendant appeals.

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

Stoner, Bowers and Gray, P.A. by Carl W. Gray for defendant appellant.

PARKER, Judge.

[1] In his first two assignments of error defendant contends the trial court erred in denying his motions to dismiss at the close of the State's evidence and at the close of all the evidence. When defendant elected to offer evidence after the denial of his motion to dismiss, he waived his motion to dismiss at the close of the 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 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).

Defendant argues there was no evidence he used force to overcome Ann's resistance. G.S. 14-27.3 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
>
> . . . .

The force required for second degree rape need not be actual physical force; constructive force, or female submission under fear or duress is sufficient. *State v. Dull*, 289 N.C. 55, 220 S.E. 2d 344 (1975), *death sentence vacated*, 428 U.S. 904, 96 S.Ct. 3211, 49 L.Ed. 2d 1211 (1976). The State presented evidence, which tended to show defendant told Ann to go home with him when they would be alone in the house, picked her up and carried her into the children's bedroom against her will while she was fighting him, held her so tightly he left a large bruise on her upper arm, took off her clothes, had sexual intercourse with her, dragged her into her bedroom and had sexual intercourse a second time, and warned her not to tell anybody. Clearly this evidence, viewed in the light most favorable to the State, was sufficient to withstand defendant's motion to dismiss.

[2] Defendant next assigns error to the trial court's denial of his motion for appropriate relief, pursuant to G.S. 15A-1414(b)(2), to set aside the verdict as contrary to the weight of the evidence. Defendant argues that inconsistencies and contradictions in the evidence required the trial judge to grant his motion. A motion under G.S. 15A-1414(b)(2) is addressed to the discretion of the trial court, and the ruling will not be disturbed on appeal absent an abuse of discretion. *State v. Batts*, 303 N.C. 155, 277 S.E. 2d 385 (1981). Any contradictions and discrepancies in the evidence are matters for the jury. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977). We find no abuse of discretion here, since there clearly was sufficient evidence to warrant submission of the case to the jury and to support the verdict. This assignment is without merit.

[3] In his fourth assignment of error defendant argues that two of the aggravating factors found by the trial court were not supported by the preponderance of the evidence: "[t]he victim was mentally infirm," and "[t]he defendant took advantage of a position of trust or confidence to commit the offense." We do not agree. It was uncontradicted that Ann was a client at the David-

son County Sheltered Workshop for the Retarded, which supports the trial judge's finding that she was mentally infirm. It was undisputed that Ann, a nineteen year old mentally retarded girl, was asked by defendant's wife to stay with them to help with housework. Ann said she trusted and obeyed defendant. Her testimony indicates that she considered defendant, who was sixteen years older than she, a parent or authority figure. As our Supreme Court observed in *State v. Ahearn*, 307 N.C. 584, 596, 300 S.E. 2d 689, 697 (1983), "The trial judge should be permitted wide latitude in arriving at the truth as to the existence of aggravating and mitigating circumstances, for it is only he who observes the demeanor of the witnesses and hears the testimony." We conclude, therefore, that this assignment of error is without merit.

[4] In his fifth assignment of error defendant contends the trial court erred in failing to grant him a new trial for newly discovered evidence. After the verdict and judgment were entered, defendant filed a motion for appropriate relief pursuant to G.S. 15A-1415(b)(6) on the grounds of newly discovered evidence. He presented testimony by Jimmy Hayes, who had testified at trial, that Jimmy and Ann had gone to a movie. Afterwards they went back to defendant's house where Ann unbuttoned three buttons of her blouse and asked Jimmy to touch various parts of her body. Jimmy refused to touch her. Jimmy said they never had sexual intercourse.

A motion for a new trial on the grounds of newly discovered evidence is addressed to the sound discretion of the trial judge and is not subject to review absent a showing of abuse of discretion. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). Here we find no abuse of discretion for the following reasons. For a new trial to be granted on the grounds of newly discovered evidence, it must appear by affidavit that the newly discovered evidence is probably true; the evidence is material, competent, and relevant; due diligence was used to procure the testimony at trial; the evidence is not merely cumulative or corroborative; the evidence does not merely tend to impeach or contradict the testimony of a former witness; and the evidence is of such a nature that a different result will probably be reached at a new trial. *State v. Person*, 298 N.C. 765, 259 S.E. 2d 867 (1979).

We do not find Jimmy Hayes' testimony satisfies this test because his testimony is not relevant under G.S. 8-58.6(b) which provides that the sexual behavior, other than the sexual act at issue, of the victim in a rape or sex offense case is irrelevant to any issue in the prosecution. This statute was designed to protect the witness from humiliation and embarrassment, while shielding the jury from unwanted prejudice that might result from evidence of sexual activity which has little relevance to the case and a low probative value. *State v. Younger*, 306 N.C. 692, 295 S.E. 2d 453 (1982). Evidence of the victim's sexual behavior can, however, be relevant under four circumstances. One of these circumstances, as provided in G.S. 8-58.6(b)(3), is when the evidence is "of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented."

Defendant argues that Ann's behavior with Jimmy was so similar to his version of their sexual encounter as to render Jimmy's testimony relevant under G.S. 8-58.6(b)(3). His version of the incident is, in summary, that he went into Ann's room the morning of 22 June 1983 to wake her up, she mentioned having sex, she pulled off her sheet, she was naked, and they had sexual intercourse. We do not find that Jimmy's testimony closely resembles defendant's version of the alleged encounter; therefore, it does not tend to prove that Ann consented to the alleged rape that took place during the afternoon of 22 June 1983. Jimmy's testimony is irrelevant under G.S. 8-58.6(b). Furthermore, we note that defendant had not shown due diligence in trying to obtain the evidence at trial. When Jimmy testified at trial that he had gone to a movie with Ann, defendant had the opportunity to question him about the date.

[5] Defendant's sixth assignment of error is that the trial court erred in refusing to allow defendant to cross-examine Ann on her testimony from the probable cause hearing. Evidence of a witness' prior inconsistent statement is admissible only to determine the witness' credibility. *State v. Brannon*, 21 N.C. App. 464, 204 S.E. 2d 895 (1974). *See* 1 Brandis on North Carolina Evidence § 46 (2d ed. 1982). Ann started to cry when defendant cross-examined her on her testimony from the probable cause hearing. At this

point the trial judge exercised his discretion and sustained the State's objection to defendant's reading from the probable cause hearing transcript. The transcript was admitted into evidence at the close of defendant's evidence, with a proper limiting instruction. We do not find prejudicial error.

[6] In his seventh assignment of error defendant contends the trial court erred by not instructing the jury that evidence of the general reputation and character of the prosecutrix, if accepted as true, should be considered regarding the question of her consent to sexual intercourse with defendant. At trial defendant did not request such instruction. Character evidence is a subordinate feature of the case, and failure of the court to instruct the jury on character evidence is not error absent a request for such instruction. *State v. Thompson*, 50 N.C. App. 484, 274 S.E. 2d 381, *review denied*, 302 N.C. 633, 280 S.E. 2d 448 (1981). Moreover, the evidence which defendant contends is character evidence is ambiguous:

> Q: Based upon your observations and associations with Ann during the period of time you have known her, what is her general character and reputation?
>
> A: [Frankie Lane] We always kept her under close supervision at the workshop at lunchtime and break area around the boys.

This could mean either that Ann tended to flirt with the boys, or that the boys were unruly and bothered Ann. We find the court fairly instructed the jury as to the credibility of defendant and the prosecutrix, and instructed the jury on both the corroborative and inconsistent statements made by Ann. Defendant's assignment of error is without merit.

[7] Defendant's eighth assignment of error is that the trial court erred by sustaining the State's objection to the following question:

> Q: Based on your observations and association with Ann during the period of time you have known her, what is her reputation for truth and veracity?
>
> Objection.
>
> Sustained.

As this court explained in *State v. Spicer*, 50 N.C. App. 214, 273 S.E. 2d 521, *appeal dismissed*, 302 N.C. 401, 279 S.E. 2d 356 (1981), the established rule in North Carolina permits only the following two questions to be asked of the impeaching character witness: (i) whether the witness knows the general reputation and character of the party, and (ii) what the general reputation or character is. "The witness may amplify or qualify his answers to the latter question with regard to specific virtues or vices of the party but counsel offering the witness may not suggest that the witness do so." *State v. Spicer*, 50 N.C. App. at 219, 273 S.E. 2d at 525. In *Spicer*, counsel for the defendant asked the witness: "[W]hat's the general reputation of Henry Minton as to his truth and honesty?" The State's objection was sustained. The Court then allowed defendant's counsel to ask the witness the following proper questions: "[D]o you know the general reputation and character of Henry Minton here in the community in which he lives?" A: "Yes, I do." Q: "And what is that?" In the instant case, if counsel for the defendant had rephrased his question, as was done in *Spicer*, the question would have been proper. Defendant's assignment of error is without merit.

[8] Defendant's ninth assignment of error is that the trial court erred by failing to allow him to testify on direct examination as to his prior criminal convictions. Defendant's counsel asked him, on direct examination, "Now, what have you been tried and convicted of?" The State objected on the grounds that counsel for defendant was impeaching his own witness. The objection was sustained. In *State v. Hedgepeth*, 66 N.C. App. 390, 310 S.E. 2d 920 (1984), this court observed that when a defendant is not permitted to testify on direct examination regarding his prior criminal record and the prior record is elicited on cross-examination, the defendant sustains a double blow to his credibility. In addition to the obvious effect of the prior conviction, the jury is left with the impression that the defendant tried to hide his criminal record and was not being entirely truthful. This court held that defendant's counsel should have been allowed to question defendant as to his prior criminal convictions as this might have bolstered his credibility. Although we agree with defendant that the trial court erred in prohibiting his testimony on direct examination as to his prior convictions, we find this error alone does not warrant reversal. To warrant reversal defendant must

show positive and tangible error that has substantially affected his rights, and that a different result would have likely ensued. *State v. Billups*, 301 N.C. 607, 272 S.E. 2d 842 (1981); G.S. 15A-1443(a).

We have carefully considered all assignments of error brought forward and find defendant received a trial free from prejudicial error.

No error.

Chief Judge HEDRICK and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. R. L. "BO" STURGIS

No. 8422SC386

(Filed 16 April 1985)

1. Criminal Law § 91— speedy trial—314 days from arrest to trial

There was no error in the trial court's denial of defendant's motion to dismiss on speedy trial grounds where defendant was tried 314 days after his arrest on the original warrant, which did not refer to an offense different from the one alleged in a subsequent indictment and warrant. The trial court properly excluded 33 days for a mental examination and 189 days for continuances issued on the motion of or with the consent of defendant, leaving 92 days that defendant had been awaiting trial. G.S. 15A-701 *et seq.*

2. Rape and Allied Offenses § 19— taking indecent liberties with a child—admission of other incidents—no error

In a prosecution for taking indecent liberties with an eleven-year-old child, the court did not err by admitting testimony from the victim and her younger sister that defendant had committed similar acts on other occasions. The evidence was competent to show defendant's intent, motive, and ongoing plan to gratify his sexual desires while ostensibly baby-sitting these children; moreover, there was no violation of a pretrial agreement with the district attorney not to inquire into events on other dates because defendant opened the door during his cross-examination of the victim.

3. Rape and Allied Offenses § 19— taking indecent liberties with a child—twelve-year-old witness—leading questions on direct examination proper

In a prosecution for taking indecent liberties with an eleven-year-old girl, the court did not abuse its discretion by permitting the State to ask the victim, who was twelve years old at the time of the trial, leading questions about the sexual acts committed upon her.

4. Rape and Allied Offenses § 19— taking indecent liberties with a child—doctor's testimony of lab results—not hearsay

In a prosecution for taking indecent liberties with a child, there was no error in permitting a pediatrician to testify that the victim's urine contained trichomonas, a one-celled organism indicative of sexual contact, where the urine specimen was collected by a nurse and the urinalysis was performed in the laboratory of the medical group to which the pediatrician belonged. The pediatrician's testimony was not inadmissible hearsay because it was not offered as substantive evidence of trichomonas but simply to show one of the bases for the medical opinion that the victim had had sexual contact.

Judge BECTON concurring in the result.

APPEAL by the defendant from *Morgan, Judge*. Judgment entered 16 November 1983 in Superior Court, IREDELL County. Heard in the Court of Appeals 11 January 1985.

Defendant was charged with taking indecent liberties with Sharon Curry, a minor child 11 years of age, in violation of G.S. 14-202.1. At trial, the State offered evidence which tended to show that on 2 September 1982 defendant was baby-sitting Sharon Curry at his house and her two younger sisters and that they spent the night there. During the night, defendant came into the bedroom where Sharon was sleeping with her sisters, woke her up and told her to pull her panties down. He then got on top of her and put his penis between her legs. He told her not to tell anyone, however one of the sisters, Patricia Ann Curry, awakened during the incident and observed the defendant on the bed with Sharon. Sometime later during the month of September 1982, the girls' aunt, Fannie Sue Gill, overheard them talking about the incident and questioned them. The incident was subsequently reported by the children's father to the Iredell County Sheriff's Department and the Department of Social Services. An investigation was undertaken and defendant was charged.

Defendant testified that he baby-sat for the Curry children on occasion at the request of their mother, and that he treated them like his own children. He denied ever having had any kind of sexual contact with any of the children. He also offered evidence tending to show his good character.

The jury returned a verdict of guilty and judgment was entered imposing an active sentence. Defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General David Gordon, for the State.

Roger Lee Edwards, for defendant appellant.

MARTIN, Judge.

Defendant has brought forward four assignments of error. The first of these relates to the denial of his motion to dismiss the charge, pursuant to G.S. 15A-703, for failure of the State to provide him with a speedy trial; the balance challenge evidentiary rulings made at defendant's trial. We have examined each of these assignments and find no prejudicial error in the defendant's trial.

[1] Initially, the defendant contends that he was not brought to trial within the time limits prescribed by G.S. 15A-701 *et seq.* and assigns as error the trial court's denial of his motion to dismiss the charge. The defendant was first charged in a warrant issued 9 December 1982 with taking indecent liberties with Sharon Curry on 11 September 1982. He was initially arrested on 8 January 1983. On 28 January 1983, defendant's probable cause hearing was continued until 4 March 1983 and court approval was given for the defendant to undergo a psychological evaluation. The record indicates that the evaluation was completed on 2 March 1983. On 3 March 1983 another warrant was issued charging the defendant with first degree rape of Sharon Curry, a violation of G.S. 14-27.2 (a)(1), on 2 September 1982. He was arrested on this warrant on 4 March 1983 and the earlier charge of taking indecent liberties with a minor was dismissed by the district attorney. On 9 May 1983 a true bill of indictment was returned charging the defendant with first degree rape. By three separate orders, dated 12 May 1983, 10 August 1983 and 10 October 1983, the trial of the case was continued until 14 November 1983 and, upon appropriate findings required by G.S. 15A-701(b)(7), the time was excluded from the limits established by G.S. 15A-701 *et seq.* One of these orders was entered upon motion of defendant; the other two were consented to by his counsel. On 14 November 1983 the district attorney sought, and obtained, a new bill of indictment charging defendant with taking indecent liberties with Sharon Curry on 2 September 1982. The earlier indictment charging first degree rape was then dismissed and defendant's trial began on 14 November 1983.

From the record before us, it is not apparent that the warrant issued 9 December 1982 refers to any different offense than those alleged in the subsequent warrant and indictment although the dates of when the offense is alleged to have occurred differ. Therefore, we must consider the first warrant as the original charge in this case for the purpose of computing the time within which defendant's trial must have begun pursuant to G.S. 15A-701(a1)(3). Of the events listed in the statute, the defendant's arrest on 8 January 1983 was the last to occur relating to the original charge and the computation of time commenced on that date. The total time between 8 January 1983 and 14 November 1983 was 314 days, well beyond the 120 days mandated by the statute. However, the trial judge properly excluded from computation 33 days as a delay occasioned by a mental examination pursuant to G.S. 15A-701(b)(1)(a), and 189 days as delays occasioned by the continuance orders issued on motion of, or with the consent of, defendant. He concluded that defendant had been awaiting trial for 88 days, well within the 120 day requirement of the statute. Although our computation results in a 92 day period, we find no prejudicial error in the trial judge's conclusion that defendant had been awaiting trial for 88 days, well within the 120 day requirement of the statute. We find no error in the denial of defendant's motion to dismiss on speedy trial grounds.

[2] Defendant's second assignment of error is directed to the admission of evidence of instances of similar sexual conduct by defendant with Sharon Curry and with her younger sister, Patricia Ann Curry. On redirect examination, in response to the district attorney's questions, Sharon Curry testified that on other occasions when she and her sisters had been entrusted to the care of defendant, he had committed acts similar to the offense charged in this case. Patricia Ann Curry testified that on one occasion, after the offense with which defendant is charged, defendant felt her privates and removed her clothing. Both girls testified that defendant instructed them not to tell their mother what he had done.

As a general rule, evidence of the commission of other independent offenses by an accused is not admissible as proof of guilt for the offense for which the accused is on trial. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). However, well established exceptions to the general rule permit proof of commission

of like offenses as evidence of intent, plan, design or motive to commit the offense charged. *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978); *State v. Fowler*, 230 N.C. 470, 53 S.E. 2d 853 (1949). In construing the exceptions to the general rule, our courts have been liberal in admitting evidence of similar sex crimes. *State v. Greene, supra; State v. Davis*, 229 N.C. 386, 50 S.E. 2d 37 (1948). For example, in *State v. Patterson*, 66 N.C. App. 657, 311 S.E. 2d 683 (1984), evidence that the defendant, charged with committing a sexual offense upon his stepson, had committed numerous similar acts upon the stepson over a four to five year period, was held competent to show defendant's "motive and intent." In *State v. Turgeon*, 44 N.C. App. 547, 261 S.E. 2d 501, *appeal dismissed*, 299 N.C. 740, 267 S.E. 2d 669 (1980), in which the defendant was convicted of assault with intent to commit rape upon a young girl, evidence that the defendant had committed sexual acts upon the sister of the prosecutrix over a two year period preceding the act with which defendant was charged, was held admissible to show "the animus and purpose" of the defendant.

Defendant contends, however, that the trial court, by the admission of this testimony, permitted the district attorney to violate a pre-trial agreement with his counsel, made at a bench conference prior to the beginning of the testimony, that the State would only inquire into the events occurring on 2 September 1982 unless defendant's counsel questioned witnesses about events occurring on other dates. There is no indication from the record that the trial judge participated in the discussion or approved the agreement nor does the record disclose any apparent reason for the district attorney's agreement to so limit the State's evidence. The defendant fails to suggest how any reliance by him on the agreement may have been to his detriment, and cites no authority in support of his contention that a violation of an agreement between defense counsel and the State to withhold admissible evidence would constitute grounds for a new trial.

While we question the validity of such an agreement in a criminal trial where the interests of the public, as well as the defendant and the victim, are involved, we need not decide the issue in this case. From our examination of the record, we conclude that there was no violation. The first witness called by the State was Sharon Curry; upon direct examination by the district attorney she recounted her version of the events which occurred

on 2 September 1982. Upon cross-examination by defendant's counsel, evidence was placed before the jury that she visited the defendant's house on frequent occasions, that defendant looked after her on weekends and that she played with his grandchildren, that he took her to the movies and that she sometimes stayed with him after school. The following exchange then took place:

Q: Do you remember testifying in District Court, Sharon?

A: Yes.

Q: Do you remember answering at that time that he did have his pants on?

A: Yes.

Q: And was that the truth when you told that at that time, Sharon?

A: Well, one time he had his pants on, and another time he didn't.

Q: But you said on this occasion that you said today he came in the one time, isn't that right?

A: Yes.

Through his cross-examination, defendant's counsel inquired directly into events occurring at times other than 2 September 1982, i.e., the frequent occasions on which Sharon Curry's care was entrusted to the defendant. After she testified that at one time he had had his pants on, and that at another time he had not, counsel's next question was phrased in such a manner that the jury could be reasonably led to believe that Sharon Curry had testified that defendant had engaged in sexual conduct with her on only one of the many occasions when she had been at defendant's house. Taken as a whole, the cross-examination opened the door for the district attorney to clarify the matter and to show that defendant had, on other occasions, engaged in similar sexual conduct with Sharon and her sister. The evidence was competent to show defendant's intent, motive and ongoing plan to gratify his sexual desires while ostensibly baby-sitting these children.

[3] Defendant also contends that the trial court erred in overruling his objections to two leading questions asked by the district

attorney during the redirect examination of Sharon Curry. A trial judge in North Carolina has discretionary authority to permit, when appropriate, the use of leading questions and in the absence of abuse the exercise of such discretion will not be disturbed on appeal. *State v. Rankin*, 304 N.C. 577, 284 S.E. 2d 319 (1981). It is within the discretion of the judge to permit counsel to ask leading questions when the witness "has difficulty in understanding the question because of age or immaturity, or where the 'inquiry is into a subject of delicate nature such as sexual matters.' " *State v. Williams*, 303 N.C. 507, 511, 279 S.E. 2d 592, 595 (1981), *quoting, State v. Greene*, 285 N.C. 482, 492, 206 S.E. 2d 229, 236 (1974). Sharon Curry was 12 years of age at the time of trial and was testifying about sexual acts committed upon her, certainly a subject of delicate nature. We find no abuse of discretion in permitting the district attorney to ask her leading questions as to these matters.

[4] In his final assignment of error, defendant contends that the trial court erroneously admitted testimony of the State's witness, Dr. Lewis, concerning the results of a laboratory test which he did not perform or supervise. We conclude that the testimony was properly admitted for the purpose of showing a basis for Dr. Durham's opinion that Sharon Curry had had sexual contact.

Dr. Lewis testified that he examined Sharon Curry on 8 October 1982. After obtaining a history from her, he conducted a physical examination and ordered certain laboratory tests, including a urinalysis. His nurse obtained the urine specimen from Sharon Curry and the urinalysis was performed in the laboratory of the Statesville Medical Group, where Dr. Lewis is a member of the pediatric department. He rendered his opinion that Sharon Curry "had had sexual contact, but not sexual intercourse." He went on to explain that, in his opinion, "there had been some sexual contact with her genital area but . . . I do not feel that there was any deep penetration." Dr. Lewis was then asked the basis for his opinion and he replied that there were two bases; first, the slightly enlarged vaginal opening which he found upon physical examination, and second, the laboratory finding of trichomonas, a one-celled organism indicative of sexual contact, in Sharon Curry's urine. The defendant objected to his testimony concerning the results of the laboratory tests as being inadmissible hearsay.

The applicable legal principle is stated in *State v. Wade*, 296 N.C. 454, 462, 251 S.E. 2d 407, 412 (1979), as follows:

> (1) A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable even though it is not independently admissible into evidence. The opinion, of course, may be based on information gained in both ways.
>
> (2) If his opinion is admissible the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion. [Citation omitted.]

Dr. Lewis' testimony as to the results of the urinalysis was not inadmissible as hearsay because it was not offered as substantive evidence for the purpose of proving the truth of the finding of trichomonas, but simply to show one of the bases for his medical opinion that Sharon Curry had had sexual contact. This assignment of error is overruled.

No error.

Judge JOHNSON concurs.

Judge BECTON concurs in the result.

Judge BECTON concurring.

Although I am not convinced that "the cross-examination opened the door for the district attorney . . . to show that defendant had, on other occasions, engaged in similar sexual conduct with Sharon and her sister," *ante* p. 193, I, nevertheless, concur in the result since there is other substantial and admissible evidence of defendant's guilt.

ETHYL H. LOWE v. BELL HOUSE, INC.

No. 8418DC309

(Filed 16 April 1985)

1. **Master and Servant § 112— Fair Labor Standards Act—night hours on call—compensable work time**

Night hours on call by plaintiff, a night supervisor in a residential care facility for physically handicapped young adults, constituted compensable work time under the Fair Labor Standards Act even though plaintiff was permitted to sleep where, in addition to her regular 40-hour work week, plaintiff was required to stay in an apartment on the premises for another 40 hours per week from 11:00 p.m. until 7:00 a.m. on Sunday through Thursday nights; plaintiff was awakened by a night aide an average of two to three times a week for a period of between one-half hour and an hour; and for some period during her employment plaintiff was also awakened once or twice a week by a malfunctioning fire alarm for a period of one to one and one-half hours per interruption. The frequency of interruptions and the fact that plaintiff's time was spent in the apartment predominately for the employer's benefit established that the night hours were compensable.

2. **Master and Servant § 112— recovery for violation of Fair Labor Standards Act**

An employer who violates the minimum wage or overtime provisions of the Fair Labor Standards Act is liable to the employee for the amount of unpaid minimum wages or unpaid overtime compensation, an equal amount as liquidated damages, reasonable attorney fees, and costs of the action. 29 U.S.C. §§ 206, 207 and 216(b).

APPEAL by defendant from *Hunter, Judge*. Judgment entered 31 October 1983 in District Court, GUILFORD County. Heard in the Court of Appeals 27 November 1984.

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

Thompson, Mann and Hutson, by M. Lee Daniels, Jr., for defendant appellant.

BECTON, Judge.

On 6 May 1982 plaintiff, Ethyl H. Lowe, instituted this action to recover unpaid minimum wages, overtime compensation, liquidated damages and attorney's fees from the defendant, Bell House, Inc., pursuant to the Fair Labor Standards Act of 1938 (FLSA), as codified at 29 U.S.C. Secs. 201-19 (1982). Lowe had worked as a night supervisor at Bell House, a non-profit residen-

tial care facility for physically handicapped young adults, from 22 October 1979 until 13 November 1980. After a bench trial, the trial court concluded that the night hours Lowe had spent on call at Bell House were compensable work time under the FLSA. The trial court ordered Bell House to pay to Lowe $5,609.98 in "back wages" and $2,000 in attorney's fees. Bell House appeals.

Bell House assigns error to several of the trial court's findings of fact, the conclusion that Lowe's night hours were compensable work time, and the award of attorney's fees. We are not persuaded. For the following reasons, though, we vacate and remand the matter to the trial court for additional findings of fact.

I

Initially, from 22 October 1979 until 23 August 1980, Lowe's duties as night supervisor included the personal care of the residents from 7:00 a.m. until 9:00 a.m. and 5:00 p.m. until 11:00 p.m., Monday through Friday, a total of forty hours per week. Moreover, she was required to remain on call in an apartment on the premises for an additional forty hours per week, from 11:00 p.m. until 7:00 a.m., Sunday night through Thursday night, in case of an alarm or an emergency. From 9:00 a.m. until 5:00 p.m., Monday through Friday and from 11:00 p.m. Friday until 11:00 p.m. Sunday, Lowe was free to leave Bell House and spend her time as she pleased. From 23 August 1980 until 13 November 1980, Lowe also worked a total of five weekends. On those weekends she was on call in the apartment at Bell House from 11:00 p.m. until 7:00 a.m. Friday and Saturday nights, a total of sixteen hours per weekend, and she personally supervised the residents from 7:00 a.m. until 11:00 p.m., Saturday and Sunday, a total of thirty-two hours per weekend.

Only the uncompensated night hours spent on call, 11:00 p.m. until 7:00 a.m., from 22 October 1979 until 13 November 1980, are contested work time. The parties stipulated, and the trial court found as facts, that (1) Lowe was allowed to sleep during those night hours on call; (2) Lowe was awakened by the night aide "on an average of two or three times a week for a time period of between one-half hour and one hour"; and (3) "for a period during her employment" she was also awakened "once or twice a week by a fire alarm malfunctioning for a period of one to one and one-half hours per interruption."

II

[1] Under the FLSA, an employee who is "engaged in commerce or in the production of goods for commerce," is entitled to compensation at one and a half times the regular rate if he works "overtime," *i.e.*, more than forty hours during a work week. 29 U.S.C. Sec. 207(a)(1) (1982). A salaried employee working a standard number of hours is entitled to overtime compensation at one and a half times his regular rate of pay, which is "computed by dividing the salary by the number of hours which the salary is intended to compensate." 29 C.F.R. Sec. 778.113 (1984). A salaried employee who has a "clear mutual understanding" with his employer that he will receive a fixed salary for fluctuating work hours comes within the separate provisions of 29 C.F.R. Sec. 778.114 (1984), which are not applicable here. We note that the trial court failed to make findings on Lowe's regular rate of pay, her status as an hourly wage or salaried employee, and the number of hours subject to overtime compensation, findings which are necessary to accurately compute overtime compensation. Bell House comes within the provisions of the FLSA pursuant to 29 U.S.C. Sec. 203(r)(1) (1982). *See Hahn v. Ingram*, 362 F. Supp. 982 (D. Del. 1973). Thus, Bell House's liability for overtime compensation under the FLSA depends on whether Lowe's night hours on call constitute compensable work time even though Lowe was permitted to sleep.

Sleep time may be considered work time under certain circumstances. *Armour & Co. v. Wantock*, 323 U.S. 126, 89 L.Ed. 118, 65 S.Ct. 165 (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134, 89 L.Ed. 124, 65 S.Ct. 161 (1944).

> Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.

Armour, 323 U.S. at 133, 89 L.Ed. at 124, 65 S.Ct. at 168. The *Skidmore* Court elaborated on the approach the trial court should take in resolving this factual question:

> scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the

> working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances.

323 U.S. at 137, 89 L.Ed. at 128, 65 S.Ct. at 163.

In the case *sub judice* the trial court found that there was no "written or oral agreement" between the parties "as to compensation of the contested hours Ms. Lowe spent each night on [Bell House's] premises." The trial court further found that Lowe's calls to active duty during the night hours were "numerous and regular" and that "the conditions at the apartment were inferior and substantially less desirable than would be likely to exist at [Lowe's] home" before concluding that the night hours on call were compensable work time.

"The well-established rule is that findings of fact made by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support them, although the evidence might have supported findings to the contrary." *Henderson County v. Osteen*, 297 N.C. 113, 120, 254 S.E. 2d 160, 165 (1979). Unless the facts are not supported by any substantial evidence, this Court is bound by the findings of fact and may review only the trial court's application of law to such facts. *Davison v. Duke Univ.*, 282 N.C. 676, 194 S.E. 2d 761 (1973). We find that there is competent evidence to support the trial court's findings of fact.

The frequency of the interruptions established that Lowe's night hours on call were compensable since they were "spent predominantly for the employer's benefit." *Armour*, 323 U.S. at 133, 89 L.Ed. at 124, 65 S.Ct. at 168. In *Central Missouri Tel. Co. v. Conwell*, 170 F. 2d 641 (8th Cir. 1948), the court held that telephone operators on duty for an eleven hour shift were entitled to overtime compensation for the entire three hours per night designated by the employer as sleeping time, because they were there "for their employer's benefit." Some nights the operators handled frequent calls. Other nights they were able to get "several hours of uninterrupted sleep." The Eighth Circuit distinguished *Rokey v. Day & Zimmerman*, 157 F. 2d 734 (8th Cir. 1946), the case of a watchman on twenty-four hour duty who was only awakened infrequently while on duty, on the average less than once every three months. In *Rokey* separate payment for each call to duty

was deemed adequate compensation. *See also Bowers v. Remington Rand, Inc.*, 159 F. 2d 114 (7th Cir. 1946) (24 hour shift—infrequent interruptions—no overtime for entire 8 hour rest period); *Rural Fire Protection Co. v. Hepp*, 366 F. 2d 355 (9th Cir. 1966) (24 hour duty—permanent residence—no overtime for entire sleep time—payment for all work time greater than one hour); *Skidmore* (question of fact—24 hour duty—infrequent interruptions—separate compensation for each call); *Armour* (24 hour duty—infrequent interruptions (less than ½ hour per week)—separate compensation for each call—no overtime). *Compare Strand v. Garden Valley Tel. Co.*, 51 F. Supp. 898 (D. Minn. 1943) (telephone operator—less than 24 hour duty—frequent interruptions—overtime).

The mere fact that Lowe "accepted her pay without complaint," is not conclusive evidence of an implied agreement between the parties, as argued by Bell House. The trial court made no findings on an implied agreement. In its brief, Bell House asserts that the existence of an implied agreement is a mixed question of law and fact that is fully reviewable on appeal. We disagree. The existence of an agreement is a question of fact properly submitted to the trier of fact. *Patton v. Sinclaire Lumber Co.*, 179 N.C. 103, 101 S.E. 613 (1919). Even if the trial court had found an implied agreement between the parties, it would have been simply one factor to consider in determining whether the sleep time was compensable work time. *Skidmore*. Indeed, some federal courts have held that an implied or express agreement is not enforceable if it contravenes the FLSA and the interpretative case law. *General Electric Co. v. Porter*, 208 F. 2d 805 (9th Cir. 1953); *Walling v. Mid-Continent Pipe Line Co.*, 143 F. 2d 308 (10th Cir. 1944); *Eustice v. Federal Cartridge Corp.*, 66 F. Supp. 55 (D. Minn. 1946). *Accord* 29 C.F.R. Sec. 785.22(b) (1984) (Although an employer and employee may agree to exclude an 8-hour sleep period from work time on a 24 hour shift, the entire 8 hours must be counted as work time "[i]f the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep."); 29 C.F.R. Sec. 785.23 (1984) (only a "reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted."); Opinion Letter No. 1559 (W-H 505) [2 Wages-Hours] Lab. L. Rep. (CCH) Sec. 31,362 (3 February 1981).

III

[2] Pursuant to 29 U.S.C. Sec. 216(b) (1982), any employer who violates the minimum wage or overtime provisions of 29 U.S.C. Secs. 206 and 207 (1982) is liable to the employee for the amount of unpaid minimum wages or unpaid overtime compensation and an equal amount as liquidated damages. In addition, the trial court shall award the employer a "reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. Sec. 216(b) (1982).

Bell House contends that if the sleep time is not compensable, the trial court should not have awarded any attorney's fees for the period after 1 August 1983, when Bell House made an offer of judgment for $1,309.00. *See* N.C. Gen. Stat. Sec. 1A-1, Rule 68 (1984). Since we have concluded that the sleep time on call was compensable, this assignment of error is summarily dismissed.

IV

We remand this case to the trial court for findings of fact on Lowe's regular rate of pay, her status as an hourly wage or salaried employee, and the number of hours subject to overtime compensation. Having properly concluded that all the night hours Lowe spent on call were compensable work time, the trial court may then calculate the amount of overtime compensation due Lowe.

Vacated and remanded for an order consistent with this opinion.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. JAMES McKINLEY DURHAM

No. 8421SC516

(Filed 16 April 1985)

1. Criminal Law § 104— sufficiency of evidence to support entry of judgment—all evidence considered

Where defendant challenged the sufficiency of the evidence to support the entry of judgment, G.S. 15A-1227(d) (1983) indicates that the reviewing court

must consider the defendant's evidence as well as the State's in determining the question of sufficiency.

2. Larceny § 7.4; Burglary and Unlawful Breakings § 5.4— breaking and entering of automobile—larceny—evidence sufficient

The State's evidence was sufficient to submit charges of breaking and entering a motor vehicle and nonfelonious larceny to the jury and to support the judgment even though defendant was never placed at the scene of the crime where golf clubs were stolen on 27 July 1983 between 8:00 a.m., when the owner left his locked car, and noon, when defendant pawned his clubs, and defendant admitted possessing the clubs and pawning them that day.

3. Constitutional Law § 48— defendant not denied effective assistance of counsel

Defendant was not deprived of the effective assistance of counsel where his counsel objected only once at trial, failed to produce witnesses, and failed to move for a dismissal because there was no showing that counsel's errors, if any, were so serious as to deprive defendant of a fair trial.

APPEAL by defendant from *Seay, Judge*. Judgment entered 19 January 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 6 February 1985.

Attorney General Lacy Thornburg, by Assistant Attorney General Francis W. Crawley for the State.

Laurel O. Boyles for defendant appellant.

BECTON, Judge.

Defendant appeals from his convictions for breaking and entering a motor vehicle and non-felonious larceny. The charges stemmed from the events of 27 July 1983, when someone smashed the right front window of a locked car and stole a set of golf clubs sometime between 8:00 a.m. and noon. At trial the State introduced evidence suggesting that defendant was the person who pawned the golf clubs around noon the same day at the local pawn shop. When initially questioned by the police, defendant admitted that he pawned the clubs for an unidentified man who paid him $10 for his services. Afterwards, the defendant gave the unidentified man a ride to defendant's neighborhood. Defendant was given several days to produce this person but failed to do so. Defendant offered no evidence at trial.

I

Only two assignments of error have been brought forward for our consideration: (1) the insufficiency of the evidence to sup-

port the judgment and sentence, and (2) the denial of effective assistance of counsel. Both are without merit.

II

[1] Defendant challenges the sufficiency of the evidence to support the entry of judgment. N.C. Gen. Stat. Sec. 15A-1227(d) (1983) provides that "[t]he sufficiency of all evidence introduced in a criminal case is reviewable on appeal. . . ." The phrase "all evidence" indicates that the reviewing court must consider the defendant's evidence as well as the State's in determining the question of sufficiency. Defendant presented no evidence.

[2] Although defendant was never actually placed at the scene of the crime, the trial court did not err in submitting the case to the jury. The State's evidence of defendant's possession of recently stolen goods was sufficient for the jury to infer the defendant's guilt. The doctrine of possession of recently stolen goods comes into play only when " ' "the possession is of a kind which manifests that the stolen goods came to the possessor by his own act or with his undoubted concurrence" . . ., and so recently and under such circumstances as to give reasonable assurance that such possession could not have been obtained unless the holder was himself the thief.' " *State v. McKay*, 32 N.C. App. 61, 66-67, 231 S.E. 2d 22, 25 (1977) (citation omitted) (quoting *State v. Weinstein*, 224 N.C. 645, 650, 31 S.E. 2d 920, 924 (1944), *cert. denied*, 324 U.S. 849, 89 L.Ed. 1410, 65 S.Ct. 689 (1945)). A minimal lapse of time between the theft and the possession is a crucial prerequisite. "The possession, in point of time, should be so close to the theft as to render it unlikely that the possessor could have acquired the property honestly." *State v. Jackson*, 274 N.C. 594, 597, 164 S.E. 2d 369, 370 (1968) (few minute time lapse—doctrine applicable). The inference of guilt derived from the possession of stolen goods fades with the lengthening time interval. *Id. See State v. Raynes*, 272 N.C. 488, 158 S.E. 2d 351 (1968) (Saturday afternoon to Sunday morning—doctrine applicable); *State v. Holbrook*, 223 N.C. 622, 27 S.E. 2d 725 (1943) (eleven days—doctrine inapplicable); *State v. McKay* (one to two days—doctrine applicable).

Here the golf clubs were stolen on 27 July 1983 between 8:00 a.m., when the owner left his locked car, and noon, when defendant pawned the clubs. Defendant admitted possessing the clubs

and pawning them that same day. This evidence clearly gives rise to the inference that defendant was the thief and stole the clubs by breaking and entering the car. The State's evidence was sufficient to go to the jury and to support the judgment.

III

[3] The effective assistance of counsel in a criminal trial is guaranteed by the Sixth Amendment to the United States Constitution and made applicable to the states by the Fourteenth Amendment, and by Article I, Sections 19 and 23 of the North Carolina Constitution. To successfully attack his conviction on this basis, a defendant must show that "his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-2, 324 S.E. 2d 241, 248 (1984) (quoting *Strickland v. Washington*, --- U.S. ---, ---, 80 L.Ed. 2d 674, 693, 104 S.Ct. 2052 (1984)). In *Strickland*, the United States Supreme Court set forth a two-part test to be applied in interpreting the range of competence standard established in *McMann v. Richardson*, 397 U.S. 759, 25 L.Ed. 2d 763, 90 S.Ct. 1441 (1970).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

--- U.S. at ---, 80 L.Ed. 2d at 693, 104 S.Ct. at ---. The *Braswell* Court expressly adopted the *Strickland* test as the uniform standard to be applied under the North Carolina Constitution as well as the United States Constitution to determine the ineffective assistance of counsel.

Under the *Strickland* test, defendant has failed to demonstrate that his counsel's performance was prejudicially deficient. In this instance, the fact that counsel objected only once at trial, failed to produce witnesses, and failed to move for a dismissal does not warrant a reversal. There has been no showing that counsel's errors, if any, were so serious as to deprive defendant of a fair trial.

Defendant was not denied effective assistance of counsel.

No error.

Judges WELLS and WHICHARD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 APRIL 1985

CITY OF FAYETTEVILLE v. GRAY No. 8412SC857	Cumberland (84CVS708)	Affirmed
DULIN'S HEATING & AIR v. WATERS CONSTR. No. 8426DC253	Mecklenburg (80CVD12071)	No Error
FORTSON v. CANNON MILLS No. 8410IC554	Industrial Commission (I-1052)	Affirmed
GROGAN v. SHIVELY No. 8417SC783	Rockingham (83CVS532)	Affirmed
IN RE GODFREY No. 8422DC731	Davidson (84SP98)	Affirmed
IN RE HOMESTEAD EXEMPTION OF ROGERS No. 8410SC721	Wake (84SP28)	Appeal Dismissed
IN RE NICHOLS No. 8414DC901	Orange & Durham (84J8) (84J36)	New Hearing
IN RE WILL OF BRINSON No. 844SC610	Onslow (83E43)	Affirmed
KAYLOR v. MAHATHA No. 8418DC732	Guilford (83CVD7871)	Affirmed
McCARTHA v. BRUCK No. 8426DC181	Mecklenburg (80CVD10977)	No Error
McDANIEL v. WOOD No. 8419DC879	Randolph (80CVD1039)	Affirmed as to Contempt Order; Vacated as to Change of Custody and Support Order
SLATE v. SLATE No. 8417DC776	Surry (82CVD649)	Affirmed in Part; Vacated in Part
STATE v. BECKHAM No. 8426SC829	Mecklenburg (83CRS28855) (83CRS29116)	No Error
STATE v. CHANNELL No. 8414SC489	Durham (83CRS6664)	No Error in Trial; Remanded for Resentencing

STATE v. CHAVIS No. 8416SC905	Robeson (83CRS12419)	No Error
STATE v. GRANT No. 847SC705	Nash (83CRS12734)	Remanded for Resentencing
STATE v. MARTIN No. 8428SC861	Buncombe (82CRS28478)	Affirmed
STATE v. MONROE No. 8412SC893	Cumberland (83CRS40598)	No Error
STATE v. SWEATT No. 8420SC855	Richmond (83CRS4558)	No Error
SUMMERWINDS PROTECTIVE ASSOC. v. TOWN OF CARY No. 8410SC484	Wake (82CVS8780)	Affirmed

STATE OF NORTH CAROLINA v. HERMAN LESLIE DAVIS

No. 844SC451

(Filed 16 April 1985)

Homicide § 21.7— second-degree murder—insufficient evidence

The State's evidence was insufficient to support defendant's conviction of second-degree murder where it tended to show only that defendant was drunk and a nuisance toward others on the weekend when the victim's death occurred; defendant was in the general vicinity of the victim's home at a time when the murder could have been committed; the victim's housekeys were found at or near the place on a public sidewalk where defendant had been sleeping some eight and one-half hours earlier; and a feather found on defendant's trousers five days after the murder and feathers found on a pillowcase in the victim's bedroom all originated from a white chicken.

APPEAL by defendant from *Llewellyn, Judge.* Judgment entered 1 December 1983 in Superior Court, DUPLIN County. Heard in the Court of Appeals 18 January 1985.

Defendant Herman Davis was charged with the first degree murder of Lillian Groves on 18 June 1983. At the close of the State's evidence, defendant moved for dismissal of the charges pursuant to G.S. 15A-1227(a). His motion was denied. Defendant presented no evidence and renewed the motion to dismiss, which was again denied. The jury convicted him of second degree murder and judgment was entered imposing a prison sentence of thirty-five years. Defendant appeals.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Walter M. Smith, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defenders Geoffrey C. Mangum and Lorinzo L. Joyner, for defendant appellant.

MARTIN, Judge.

The determinative issue on this appeal is whether the trial court erred in overruling defendant's motion for dismissal pursuant to G.S. 15A-1227(a). We conclude that because the State failed to meet its burden to present substantial evidence that defendant committed the murder of Lillian Groves, the motion should have been allowed.

Evidence for the State tended to show the following facts and circumstances. Lillian Groves, who was 65 years old, lived alone on North Pine Street in Rose Hill. On Saturday, 18 June 1983, she visited with several of her neighbors and was observed by others as she sat in her yard. She was known to lock her house even while out in her own yard, and to carry her keys on a safety pin fastened to her clothing. At least two of her neighbors observed her carrying her keys in this fashion on 18 June. She was last seen alive at approximately 9:30 p.m. on that same night, sitting in a rocking chair in the living room. None of her neighbors noticed any strangers in the neighborhood that night nor did they hear any unusual noises. Mrs. Groves was not seen by her neighbors on Sunday, 19 June, nor did they notice any lights on in her house Sunday night or Monday morning. On the afternoon of Monday, 20 June, Mrs. Hildred Dixon, Ralph Henderson and Mrs. Gerri Futrell went to her house to check on her and found the front door unlocked. Upon entering, they found Mrs. Groves' semi-nude body lying partially on and partially off the bed. The house was in disarray. Dr. Corbett Quinn, the Duplin County medical examiner, testified that Mrs. Groves had contusions, bruises and abrasions on her head, face, upper chest and legs, and that it appeared as though she had been beaten. He also testified that he could not determine the approximate time of her death, although when asked if death could have occurred between 9:30 and 10:00 p.m. on Saturday, 18 June, he said, "I think it could have, but I have no way of saying that it did happen during that time." An autopsy was conducted by Dr. Walter Gable, who found that Mrs. Groves had suffered fractured ribs and a brain hemorrhage due to a beating and that the cause of her death was strangulation and head injuries.

The State also offered evidence that defendant had come, by bus, to Rose Hill from Jacksonville, where he lived with his brother and worked as a carpenter, on Saturday, 18 June. Upon arrival, he walked to Elaine Siders' house to pay her for preparing his income tax return, but she was not at home. He visited with some people and then went to Duplin Wineries, purchased a fifth of wine and drank it. Later that afternoon he went into a grocery store and stared at a female cashier before being asked to leave by the manager. He also went to the barbershop where he was loud, profane and appeared to be drunk. At about 5:30

p.m. he walked to William Futrell's apartment at the Duplin Apartments, a short distance from Mrs. Groves' house. He was observed talking to Mrs. Groves as he walked by her house, he was waving his arms in the air and Mrs. Groves, who had been sitting in her yard, got up and went into her house. Defendant walked on. When he arrived at William Futrell's apartment, he borrowed Futrell's bicycle, telling him that he would return it in two hours. At approximately 9:30 p.m. defendant had not returned the bicycle so Futrell and his wife went looking for defendant in their automobile. As they passed Mrs. Groves' house, Mrs. Futrell observed her sitting inside the house with the lights on and the front door open. The Futrells rode through Rose Hill looking for defendant but were unable to locate him. As they were returning to their apartment, they observed defendant riding the bicycle in a direction away from Pine Street. He was about 500 yards from Mrs. Groves' house. The Futrells stopped to talk with defendant and to ask him to return the bicycle. He appeared drunk and, before talking to them, he went behind the car and appeared to "tuck down at his pants." Otherwise, they noticed nothing peculiar about his behavior or appearance. Defendant said he would return the bicycle, but instead he rode off in the other direction and into a trailer park. As the Futrells returned home, Mrs. Futrell observed that Mrs. Groves' house was dark and the door was closed.

The next morning, William Futrell again went looking for the defendant. He saw defendant coming out of the woods near Charlie Newkirk's house, about a half-mile from Futrell's apartment. Defendant told Futrell that he had gotten drunk and couldn't remember where he had left the bicycle. Futrell later found the bicycle at the trailer park where he had seen the defendant the previous night.

On Sunday morning, about 10:00 a.m., Officer Scott of the Rose Hill Police Department found defendant drunk and asleep, lying partially on the sidewalk and partially on the grass in front of Wendell Murphy's office on Church Street. Officer Scott put defendant in his patrol car and drove him to a trailer park. Shortly thereafter, Officer Scott saw defendant again near a gas station on Highway 117. Defendant was yelling at some women and trying to reach into their car. About 3:00 p.m. Officer Scott found defendant lying on the sidewalk of Church Street across from the post office. At that time, Officer Scott took defendant to the Duplin County jail at Kenansville. He noticed that defendant had

bruises on his neck and inquired as to how he had gotten the bruises. Defendant stated that he could not remember how he had gotten the bruises or where he had spent the night. The jailer let defendant out of jail about 8:45 p.m., gave him money for a bus ticket, and took him to Warsaw. The jailer, Robert Bostic, testified that defendant kept saying that he had to go to Jacksonville and that he had tears in his eyes. Although defendant had frequently been seen in Rose Hill before 18 June 1983, he was not seen around town thereafter.

On Sunday, 19 June, at about 6:30 p.m., Bennie Howard and her three young daughters were walking on Church Street when her daughters found three keys on a safety pin on the cement in front of Wendell Murphy's office. A fourth key was found in the grass beside the cement. The keys were found in the same area where Officer Scott had found defendant sleeping on Sunday morning. Mrs. Howard turned the keys over to the police. It was later determined that two of the keys fit a padlock found in Mrs. Groves' pocketbook and the other two keys fit the door lock of her house.

Chief Maready of the Rose Hill Police Department interviewed defendant in Jacksonville on 23 June 1983. Chief Maready gave defendant no indication of the reason for the interview; defendant gave no indication that he was aware that Mrs. Groves had been killed. Defendant told Chief Maready that he had gotten drunk on Saturday night in Rose Hill and did not remember where he had been. He denied having been to Mrs. Groves' house or having had her keys. Defendant voluntarily gave Chief Maready the clothes that he had been wearing that weekend and told him that the clothes had been washed. No blood was found on the clothes, but a white feather was found in the area of the front pocket of defendant's jeans.

Mrs. Groves' clothing and other items from her bedroom, including a bedsheet and pillow cases, were submitted to the SBI laboratory for analysis. No fiber or hair transfers were found between any of these items and defendant's clothing; some white feathers were found on one of the pillowcases. Mrs. Groves' house was processed for latent fingerprints but none were found that were sufficient for analysis. Vaginal swabs from Mrs. Groves' body did not reveal the presence of semen. Special Agent Deed-

rick of the Federal Bureau of Investigation laboratory conducted a microscopic comparison of the feathers found on the pillowcase with the feather found on defendant's jeans. In his opinion, the feathers appeared to have "originated from the same type of bird, which was a chicken."

Upon a defendant's motion for dismissal, pursuant to G.S. 15A-1227, it is a question of law for the Court to determine whether the State has produced substantial evidence of each of the material elements of the offense charged, or any lesser offense, and substantial evidence that the defendant was the perpetrator of the crime. *State v. LeDuc*, 306 N.C. 62, 291 S.E. 2d 607 (1982); *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). In ruling upon the motion

> [t]he evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion. [Citations omitted.]

State v. Powell, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980).

The test of the sufficiency of the evidence to sustain a conviction is the same whether the evidence is direct, circumstantial, or both. *Id.*

> When the motion . . . calls into question the sufficiency of circumstantial evidence, the question for the Court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty. [Citations omitted.]

Id. at 99, 261 S.E. 2d at 117, *quoting, State v. Rowland*, 263 N.C. 353, 358, 139 S.E. 2d 661, 665 (1965). However, "[i]nference may not be based on inference. Every inference must stand upon some clear and direct evidence, and not upon some other inference . . . ." *State v. Parker*, 268 N.C. 258, 262, 150 S.E. 2d 428, 431 (1966). If the evidence, when considered in the light of the forego-

ing principles, is sufficient only to raise a suspicion, even though the suspicion may be strong, as to either the commission of the crime or that the defendant on trial committed it, the motion for dismissal must be allowed. *In re Vinson*, 298 N.C. 640, 260 S.E. 2d 591 (1979).

Of course, the application of these well-established principles by the trial court to the unique facts and circumstances proven in each case is often a considerably more difficult task than their authoritative declaration in an appellate opinion. When is circumstantial evidence sufficiently substantial to provide a reasonable inference of a defendant's guilt, or only sufficient to raise a suspicion? It is not possible to answer the question with a precise rule of application, or test of "substantial evidence," due to the variant fact situations presented to the judge in each case. Nevertheless, while the standard requires that each case must stand or fall on the strength of its particular circumstances and the inferences reasonably drawn therefrom, a comparison with precedent will many times offer guidance, and provide some measure of consistency, in application.

With that thought in mind, we have examined several cases decided by our Supreme Court upon similar, and arguably somewhat stronger, circumstantial evidence than the evidence before us in the present case. In *State v. Cutler, supra*, the deceased was stabbed to death. The defendant was seen driving his truck to the home of the deceased on the day of the murder, and was later observed in a drunken condition and "bloody as a hog." He had a gash on his head. His knife blade also had human blood on it and a hair stuck on the blade was similar to the chest hair of the deceased. The defendant said that the deceased had killed himself. The Supreme Court held that the evidence was insufficient to go to the jury.

In *State v. Scott*, 296 N.C. 519, 251 S.E. 2d 414 (1979), the deceased was found in his home, shot to death from close range, and the house had been ransacked. The defendant's thumbprint was found on a metal box on the deceased's desk. The niece of the deceased, who had lived with her uncle all of her life, testified that she had never seen the defendant and, to her knowledge, he had never visited the home. Chief Justice Sharp, speaking for the court in *Scott*, held that the evidence, though sufficient to raise a

strong suspicion as to Scott's guilt, was insufficient to defeat a motion to dismiss.

In *State v. White*, 293 N.C. 91, 235 S.E. 2d 55 (1977), the deceased was stabbed to death in her mobile home unit located at a motel. A black man wearing a light shirt and dark trousers was seen running from the mobile home in the direction of the room where the defendant was staying. Shortly thereafter, police officers saw the defendant, who was black and was dressed in a white shirt and dark trousers, standing outside his room. Blood of the same type as that of the deceased was found on defendant's shoes, there was blood on the carpet of his room, and specks of blood were on his T-shirt. A knife of the same type as the murder weapon was found under the television in his room. This evidence was deemed insufficient to "remove the case from the realm of surmise and conjecture." For other examples where circumstantial evidence has been found insufficient to overcome a motion for dismissal, see *State v. Lee*, 294 N.C. 299, 240 S.E. 2d 449 (1978) (where victim and defendant had been living together, within two weeks of the murder defendant had beaten victim after she admitted to having an affair, a day before the murder defendant said he was going to kill her); *State v. Jones*, 280 N.C. 60, 184 S.E. 2d 862 (1971) (where victim and defendant were married; victim, who had been shot six times at close range with a .22 caliber weapon, was found in the storage room of family store where defendant had been working on the night of the murder; when arrested the same night, defendant was drunk and had five empty .22 caliber shell casings and three live rounds in his pocket); *State v. Gragg*, 122 N.C. 1082, 30 S.E. 306 (1898) (where victims were killed by dynamite, defendant had possessed dynamite, the relationship between defendant and victims was strained and defendant had made threats against one of them, shoe print of the same size shoe as worn by defendant was found a few hundred yards from the place of the homicide); *State v. Bell*, 65 N.C. App. 234, 309 S.E. 2d 464 (1983), *aff'd per curiam*, 311 N.C. 299, 316 S.E. 2d 72 (1984) (where victim's keys were found in defendant's pocket, a knife found near where defendant was apprehended fit a sheath found in victim's apartment and bloodstains found in victim's apartment were consistent with defendant's blood type).

Turning now to an analysis of the State's evidence in the case before us, we examine the circumstances proven to deter-

mine whether they give rise to a reasonable inference, so as to amount to substantial evidence, that defendant committed the murder of Lillian Groves. The State concedes that the question of the sufficiency of the evidence is a close one, but urges that the circumstances in combination were substantial. We disagree. The fact that Mrs. Groves' house keys were found at or near the spot on a public sidewalk where defendant had been sleeping some eight and a half hours earlier is so entirely speculative of guilt that it is of little, if any, probative value. First, the inference must be drawn from the established facts that the defendant was the person who dropped the keys there. From that tenuous inference, additional inferences must be drawn that defendant obtained the keys from Mrs. Groves' house and that, in doing so, he killed her. Such a building of inferences is not permitted. *State v. Parker, supra.*

Evidence that a feather found on defendant's trousers five days after the murder and feathers found on a pillowcase in the victim's bedroom had as their common source the same species of bird, i.e., a white chicken, is likewise of such insignificant probative value as to the identity of the defendant as the perpetrator that it cannot be reasonably said to be substantial evidence. Finally, the evidence that defendant, who had been walking and riding a bicycle about town while drunk, profane and antagonistic, had bruises on his neck gives rise only to a reasonable inference that he had provoked an altercation with someone during the weekend. Such evidence is far too tenuous to be considered as substantial evidence that he committed a murder.

In sum, the evidence, taken in the light most favorable to the State, shows only that defendant was contemptibly drunk and a general nuisance on the weekend when Mrs. Groves' death occurred, and that he was in the general vicinity of her home at a time when the murder could have been committed. While this evidence may raise a suspicion that defendant may have been the killer, it was insufficiently substantial to take the issue of his guilt "beyond the realm of surmise and conjecture." *State v. White, supra.* Defendant's motion to dismiss should have been allowed.

Defendant has brought forward numerous other assignments of error relating to the trial which we need not address in the

light of our holding that the evidence was insufficient to sustain the defendant's conviction.

Reversed.

Judges BECTON and JOHNSON concur.

STATE OF NORTH CAROLINA v. WILLIAM MURRAY MOSER

No. 8410SC938

(Filed 16 April 1985)

1. **Rape and Allied Offenses § 18.2— attempted first-degree rape—evidence sufficient**

In a prosecution for attempted first-degree rape, defendant's motions for a directed verdict and to set aside the jury's verdict were properly denied where defendant intruded upon the victim while she was in his bathroom, told the victim to take off her clothes and have sex with him, made sexually suggestive comments, questioned her about her prior sexual experience, urged her to go into the bedroom, kissed her on the mouth when she attempted to push past him at the bathroom door, produced a knife and displayed it to the victim while saying that he did not want to have to hurt her, and abandoned the attempt only after being informed that the victim's father was a federal judge.

2. **Rape and Allied Offenses § 4.1— attempted first-degree rape—prior conviction admitted during State's case in chief—no error**

In a prosecution for attempted first-degree rape, there was no error in the admission of defendant's 1967 conviction for assault with intent to commit rape during the State's case in chief because a prior conviction was relevant to show why defendant abandoned his attempt when confronted with the fact that the victim's father was a federal judge.

3. **Criminal Law § 119— request for limiting instructions on prior conviction not in writing—instruction not given—no error**

There was no error in the court's refusal to instruct the jury on the limited use of defendant's prior record where defendant did not request a limiting instruction when the record was introduced into evidence and did not comply with the requirements of Rule 21 of the General Rules of Practice by submitting the requested instructions in writing. G.S. 1-181.

4. **Criminal Law § 138— prior conviction—introduced by State during case in chief—found in aggravation—no error**

In a prosecution for attempted first-degree rape, the court did not err by finding in aggravation that defendant had a prior conviction where evidence of

a prior conviction was introduced to show why defendant abandoned his attempt and was not necessary to prove an element of the offense. G.S. 15A-1340.4(a)(1).

APPEAL by defendant from *Preston, Judge* and from *Lee, Judge*. Order entered 9 November 1983 in Superior Court, WAKE County. Judgment entered 26 March 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 15 March 1985.

This is a criminal case in which defendant was tried by a jury before the Honorable Edwin S. Preston, Jr., Superior Court Judge. Upon a verdict of guilty of attempted first degree rape, Judge Preston ordered defendant to undergo pre-sentence diagnostic study. A sentencing hearing was conducted before the Honorable Thomas H. Lee, Superior Court Judge, on 26 March 1984. Defendant was sentenced to 12 years imprisonment and appeals.

The essential facts are:

On 31 January 1983, defendant, William Murray Moser, was a self-employed cleaning service operator. On that same date and at defendant's request, the victim, a chemical supply salesperson, made a sales call at defendant's residence which was also his place of business. The purpose of her sales call was to secure an order for cleaning chemicals.

The victim arrived at defendant's residence at approximately 8:30 a.m. and was wearing a woman's business suit. She and defendant met and talked in his den. The meeting included talk about college sports, drinking coffee and discussion about the cleaning products sold by the victim.

No decision to purchase cleaning chemicals was made and the business interview was drawing to a close when the victim asked defendant if she could use his bathroom. She was instructed by defendant to use a bathroom on the second floor of the house.

The victim went upstairs as directed, closed the bathroom door, but did not lock it. As she was finishing and in the process of pulling up her pants and panty hose, defendant entered the bathroom with the victim and ordered her not to pull her pants up. He then told her to take off her clothes. The victim responded by saying "please don't do this to me, just let me go, just let me go" and "you're scaring me."

Defendant put his hand on the victim's shoulder and kissed her on the mouth. Defendant then indicated that he wanted the victim to go to the bedroom with him and asked her questions about sexual behavior. The victim told defendant that she had a "problem" and couldn't go to the bedroom with him. Defendant then produced a folding knife from his rear pocket, opened it, held it in the air and stated to the victim, "I don't want to have to hurt you." The victim then told defendant that her father was a federal judge. At that point, defendant folded the knife and allowed the victim to go back downstairs.

Defendant attempted to engage victim in conversation about her "problem" and allowed her to leave after she promised to meet him at a local restaurant later that evening. The victim went to police and reported the incident and police arrested defendant at the restaurant.

Defendant later told the investigating officer that he wanted to have sex with the victim and that he wanted to scare her "and make love to her like she had never been made love to before."

The investigative officer testified that defendant used the word "fear" in conjunction with the use of the knife and that defendant stated that using the knife was his way of threatening and controlling the victim.

Defendant made a motion for directed verdict at the close of the State's evidence and did not present evidence at trial. The motion for directed verdict was denied and the jury returned a verdict of guilty of attempt to commit first degree rape. Defendant's motions to set aside the verdict and for a new trial were denied.

Attorney General Edmisten, by Assistant Attorney General Walter M. Smith, for the State.

John T. Hall, for defendant-appellant.

EAGLES, Judge.

I

[1] Defendant first assigns as error the sufficiency of the evidence from which the jury could find that defendant committed the crime of attempted first degree rape. We find no error.

Defendant argues that it was error for the trial court to fail to direct a verdict in favor of defendant with respect to the charge of attempted first degree rape and that it was also error for the trial court to fail to set aside the jury verdict of guilty as to that charge.

The test of the sufficiency of the evidence in a criminal prosecution is the same whether the issue is raised by motion for dismissal, directed verdict or nonsuit. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). The test is the same whether applied to circumstantial or direct evidence. *State v. Locklear*, 304 N.C. 534, 284 S.E. 2d 500 (1981). All evidence admitted, whether competent or incompetent, must be considered by the trial court in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. Any contradictions or discrepancies in the evidence are for resolution by the jury. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). The trial court must decide whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980).

Here, defendant is charged in an indictment with attempted first degree rape. The elements of first degree rape, as applied to the evidence in this case, are (1) vaginal intercourse, (2) with another person, (3) by force, (4) against the will of that person, and (5) the use or display of a dangerous or deadly weapon which the other person reasonably believes to be a dangerous or deadly weapon. G.S. 14-27.2(a)(2). Though not defining "attempt," G.S. 14-27.6 sets forth the penalty for an attempt to commit first degree rape as defined by G.S. 14-27.2 as a Class "F" felony. A Class "F" felony carries a presumptive sentence of 6 years imprisonment and a maximum of 20 years imprisonment.

An attempt to commit rape has been defined as having the elements of (1) an intent to commit rape and (2) an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense. *State v. Freeman*, 307 N.C. 445, 298 S.E. 2d 376 (1983); *State v. Smith, supra.* Defendant argues that the State lacked substantial evidence to establish the ele-

ment of "intent" as it applies to attempted first degree rape. We disagree.

In construing the offense of assault with intent to commit rape under prior law and pertinent to the crime of attempted rape here, the North Carolina Supreme Court held:

> It is not necessary to complete the offense [of attempted first degree rape] that the defendant retained the intent throughout the [attempt] but if he, *at any time during the [attempt],* have an intent to gratify his passion upon the woman, notwithstanding any resistance on her part, the defendant would be guilty of [attempted first degree rape if he employed or displayed a dangerous or deadly weapon] . . . Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, i.e., by facts and circumstances which may be inferred.

State v. Banks, 295 N.C. 399, 412, 245 S.E. 2d 743, 752 (1978).

In the present case there was evidence that tended to show that defendant intruded upon the victim while she was in his bathroom. Defendant told the victim to "take off her clothes and have sex with [him]." He made sexually suggestive comments, questioned her about her prior sexual experience, and urged her to go into the bedroom. When she attempted to push past him at the bathroom door, he kissed her on the mouth. The evidence further tends to show that defendant produced a knife and displayed it to the victim as his way of threatening and controlling her, saying that he did not "want to have to hurt" her. It was only after being informed that the victim's father was a federal judge that defendant abandoned the rape attempt. Up to that point, the evidence is sufficient from which a jury could find that defendant intended to have sexual intercourse with the victim notwithstanding the resistance that she offered and that the acts of ordering her to disrobe, blocking her exit from the bathroom, kissing her and displaying the knife were sufficient "overt acts" to complete the crime of attempted first degree rape. For these reasons, it was not error for the trial court to deny defendant's motions for directed verdict and to set aside the jury's verdict.

II

[2] Defendant next assigns as error the admission of his record of a prior conviction of assault with intent to commit rape during the State's case-in-chief. We find no error.

At trial, the State offered into evidence a certified copy of a judgment showing that defendant pleaded guilty to assault on a female with intent to commit rape in 1967. Defendant received a sentence of 12 to 15 years imprisonment.

Defendant argues on appeal that since defendant did not testify at trial, evidence concerning his bad character or prior criminal convictions was not admissible against him. *See State v. Sills*, 311 N.C. 370, 317 S.E. 2d 379 (1984); *State v. Wilson*, 311 N.C. 117, 316 S.E. 2d 46 (1984). The general rule is that in a prosecution for a particular crime, the State cannot offer evidence tending to show that defendant has committed another separate offense. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). However, the general rule is subject to certain well-recognized exceptions. In *McClain, supra*, Justice Ervin quoted with approval the test articulated by the South Carolina Supreme Court for determining the admissibility of evidence of other crimes.

> The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. 240 N.C. at 177, 81 S.E. 2d at 368.

Evidence of acts of the accused which tend to establish the requisite mental intent to commit the crime charged is a well-recognized exception to the general prohibition against the admission of evidence of prior offenses. *Id.* at 175, 81 S.E. 2d at 366. Though we note that a 1967 conviction for a similar crime may be too remote in time to tend to establish the requisite mental intent of defendant to commit the crime with which he is now charged, the prior conviction is logically pertinent in that it reasonably tends to prove a material fact in issue; i.e., why defendant abandoned his rape attempt when confronted with the fact that the victim's father was a federal judge. At trial the prosecutor stated that defendant's record was being introduced to show that he had

spent time in prison and was therefore acutely sensitive to the subject of judges and that he did not carry through with his intention to rape the victim because she told him that her father was a federal judge. In this context we believe that the prior conviction, though not necessary to prove the element of intent, is nevertheless relevant to show that defendant intended to rape the victim but abandoned his attempt only when told her father was a federal judge and is admissible under the general rule stated in *McClain, supra.*

III

[3] Defendant next assigns as error the trial court's refusal to instruct the jury on the limited use of defendant's prior record as evidence. We find no error.

Defendant argues that the trial court committed reversible error because it failed to give a limiting instruction to the jury with respect to the evidence that defendant had been convicted of a prior crime. At the time defendant's record was introduced into evidence, however, no request for a limiting instruction was made. Furthermore, at the conference on jury instructions pursuant to G.S. 15A-1231, defendant failed to comply with the requirements of Rule 21 of the General Rules of Practice in that defendant did not submit a proposed limiting instruction to the trial court for its consideration even after the trial court requested that he do so:

> *Defense Attorney*: The last thing that I requested [sic] the Court is that there be a limited instruction in the charge to the jury concerning the admission into evidence of the defendant's prior conviction for assault on a female with intent to commit rape.
>
> *Court*: In response to that . . . in accordance with Rule 21 I request that you submit your proposed limited instructions in writing so I can look at them and digest them and pass upon your motion.
>
> *Defense Attorney*: Your honor, I'm unable to comply with that request for the reason that I cannot find any case which would aid me in doing any limited instructions concerning that piece of evidence. I do not know why it has been admit-

ted and cannot put in writing how it should therefore be limited.

G.S. 1-181 requires that requests for special instructions must be submitted to the trial judge in writing, entitled in the cause, signed by counsel and submitted before the judge's charge to the jury. Rule 21 of the General Rules of Practice requires that special instructions be submitted in writing to the trial judge at or before the jury instruction conference. In violation of Rule 21 of the General Rules of Practice and G.S. 1-181, defendant failed to apprise the trial court in writing of the nature and language of the instruction he sought to be given to the jury. When pressed to do so, defendant said he was "unable" to. Accordingly, it was not error for the trial court to refuse to give the orally requested instruction. *State v. McLawhorn*, 43 N.C. App. 695, 260 S.E. 2d 138 (1979), *cert. denied*, 299 N.C. 123, 261 S.E. 2d 925 (1980); *State v. Ervin*, 26 N.C. App. 328, 215 S.E. 2d 845 (1975).

IV

[4] Defendant next assigns as error the imposition of an active term of imprisonment in excess of the presumptive term. We find no error.

During the sentencing hearing, the trial court made a finding in aggravation that defendant had a prior conviction of a criminal offense punishable by more than 60 days confinement. The trial court further found that the factor in aggravation outweighed the factor in mitigation that defendant suffers from some psychiatric or psychological disturbance. The basis of defendant's argument is that the use of evidence of defendant's prior conviction during the State's case-in-chief as an element of the offense charged prohibits that same evidence from being used to prove a factor in aggravation at sentencing. G.S. 15A-1340.4(a)(1) provides in pertinent part: "Evidence *necessary* to prove an element of the offense may not be used to prove any factor in aggravation." (Emphasis added.) While we agree that this is the law as to evidence necessary to prove an element of the crime charged, the evidence of defendant's prior conviction, while some evidence of intent, is not necessary to prove the intent element. The evidence was offered and admitted to show a material fact in issue; why defendant abandoned his attempt to rape the victim when he did. G.S. 15A-1340.1(a)(1) contemplates that it is not the use of evidence

which is merely inherent in the offense, but the use of evidence necessary to prove an element of the offense which is proscribed. *See, State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983); *State v. Thobourne*, 59 N.C. App. 584, 297 S.E. 2d 774 (1982), disagreed with on other grounds in *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). Accordingly, it was not error for the trial court to use evidence of defendant's prior conviction as a factor in aggravation at sentencing.

For the reasons herein stated, we find no error in the trial of this case. Defendant's remaining assignments of error are without merit.

No error.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. EARL McLEAN

No. 8411SC771

(Filed 16 April 1985)

1. **Criminal Law § 118.2— instructions—contentions relating to self-defense**

The trial court in a felonious assault case sufficiently stated the contentions of defendant relating to self-defense based on the evidence offered by defendant.

2. **Criminal Law § 138— felonious assault—improper finding of heinous, atrocious or cruel aggravating factor**

In imposing a sentence for assault with a deadly weapon inflicting serious injury, the trial court erred in finding as an aggravating factor that the offense was especially heinous, atrocious or cruel based on evidence that the victim received fifty stitches, was hospitalized two weeks, lost the sight in one eye and had some amnesia, since the evidence did not show that defendant's conduct was more brutal than that inherent in any assault with a deadly weapon resulting in serious bodily injury.

3. **Criminal Law § 138— separate aggravating factors—prior convictions—defendant on probation**

The trial court could properly find as separate aggravating factors that defendant had prior convictions for offenses punishable by more than sixty days imprisonment and that defendant committed the crime while under a probationary sentence. G.S. 15A-1340.4(a).

4. Criminal Law § 138— aggravating factors based on same evidence

The trial court improperly based two aggravating factors on the same evidence when it found that defendant had prior convictions punishable by more than sixty days imprisonment and that defendant had a prior record involving the use of violence covering a span in excess of ten years. G.S. 15A-1340.4(a)(1); G.S. 15A-1340.4(a)(1)(o).

Judge ARNOLD concurring in part and dissenting in part.

APPEAL by defendant from *Smith, Judge*. Judgment entered 4 January 1983 in Superior Court, LEE County. Heard in the Court of Appeals 7 March 1985.

Defendant, Earl McLean, was indicted 11 October 1982 for assault with a deadly weapon inflicting serious injury upon the victim, Fredrick Wayne McLucas. Events giving rise to the indictment occurred on 6 July 1982 at approximately 11:00 p.m. at the American Legion Post in Sanford.

McLucas and his wife arrived at the post and parked in front of the building. State's evidence tended to show that defendant came over to McLucas' car and slammed his hand on the hood. Defendant was sweating and had his shirt off. McLucas knew defendant and testified that he had never before seen him in such an agitated state. McLucas offered to take defendant to the hospital. Defendant then accused McLucas of trying to run over him with his car and told him to get out of his car. Defendant opened the car door and McLucas closed it. McLucas reached down to release the car's emergency brake so he and his wife could leave and defendant struck him across the face. Defendant then opened the door to the car and McLucas attempted to get out. As he was attempting to get out, defendant cut him with something shiny. Defendant then proceeded to strike blows to McLucas' back and head. McLucas managed to get back into the car while his wife called the police. As McLucas was being taken to the hospital, defendant threatened to kill him.

McLucas received approximately 50 stitches on his face as a result of the two cuts inflicted by defendant. He was hospitalized for two weeks, lost sight in one eye and developed some amnesia. At the time of trial McLucas was still undergoing treatment to regain his memory.

Defendant testified that he was at the American Legion Post on the date in question and was standing on the sidewalk with one foot in the parking area. Defendant stated that he saw McLucas pull into the parking area and that he stepped up onto the sidewalk. When McLucas stopped his car, defendant put one foot back down onto the parking area. McLucas then allegedly started his car, moved forward and struck defendant on the leg.

Defendant accused McLucas of hitting him with the car whereupon McLucas allegedly informed defendant he would do it again.

A bystander, Charles Cameron, came to defendant and told him that McLucas would take defendant to a hospital if he had hit him with his car. Defendant testified that he attempted to get into McLucas' car, but he slammed the car door on defendant's hand. McLucas then allegedly leaned down to get something under the seat of the car and kicked the car door open striking defendant. Defendant testified that McLucas got out of his car holding a piece of metal pipe and struck defendant in the cheek. Defendant stated that he did not have a weapon but merely caught McLucas' hand, pushed it back and then hit him. Defendant denied that he was drunk or that he had threatened to kill McLucas. Defendant was taken to the hospital by his wife.

The jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury.

At the sentencing hearing the trial court found as factors in aggravation that the offense was especially heinous, atrocious and cruel; that defendant had prior convictions punishable by more than 60 days imprisonment; that defendant committed the crime charged while under a probationary sentence; and that defendant had a prior record involving the use of violence covering a span in excess of 10 years. The trial court found as factors in mitigation that defendant was highly intoxicated at the time of the offense and that defendant had been gainfully employed full time. The trial court then found that factors in aggravation outweighed factors in mitigation and sentenced defendant to 10 years imprisonment, the maximum allowable for a Class H felony.

Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General James Peeler Smith, for the State.

Nora Henry Hargrove, for defendant-appellant.

EAGLES, Judge.

I

[1] Defendant first assigns as error the trial court's omission of his evidence of self-defense from the jury charge. We find no error.

The basis of defendant's assignment of error is that in the trial court's summary of the evidence to the jury, the trial court omitted mentioning that McLucas was exchanging blows with defendant and that McLucas had a metal object in his hand as they struggled. The trial court's summary stated, *inter alia*, that McLucas "reached either under the dash or under the seat and that he got some type of metal object and that defendant then hit or struck . . . McLucas."

We note that the trial court must declare and explain the law arising on the evidence, state the evidence to the extent necessary to explain the application of the law thereto, and refrain from expression of an opinion whether a fact has been proved. G.S. 15A-1232. The trial court is not required to fully recapitulate all the evidence. The trial court complies with G.S. 15A-1232 by presenting the principal features of the evidence relied on by the prosecution and the defense. *State v. Thompson*, 257 N.C. 452, 126 S.E. 2d 58, *cert. denied* 371 U.S. 921 (1962); *State v. Spicer*, 299 N.C. 309, 261 S.E. 2d 893 (1980). We believe, based on our examination of the record, that the trial court correctly stated the contentions of defendant based on the evidence offered by defendant. As to whether or not McLucas struck defendant, the following testimony of defendant is pertinent:

Q: What happened after the door hit you?

A: I fell back against a car, I staggered against a car that was parked behind me and he jumped out of his car and I seen something in his hand, I don't know what it was.

Q: Describe what you saw.

A: It was some kind of a piece of metal, I don't know what kind of metal it was, but when I was up against the car, my hand was up like that. When he swung at me, he came down on me and I caught his hand and I pushed it back and I hit him.

Q: What did you hit him with?

A: I hit him with my fist.

This testimony is consistent with the trial court's summary that McLucas "got some type of metal object and that defendant hit or struck . . . McLucas." The jury heard the evidence and was fully advised by the trial court that the court did not purport to charge on all the evidence. The trial court's summary of defendant's contentions was sufficient to bring to the jury's attention his claim that he acted in self-defense.

We also note that there is no indication in the record that defendant presented requested instructions to the trial court or that he called the purported errors to the trial court's attention as is required by Rule 10(b)(2), Rules of Appellate Procedure. Even though this assignment of error is not properly before us, our examination of the entire record reveals no prejudicial error.

II

Defendant next assigns as error the trial court's finding as a factor in aggravation that the offense was especially heinous, atrocious and cruel and the trial court's finding of two nonstatutory factors in aggravation: defendant committed this offense while under a probationary sentence for assault with a deadly weapon and that defendant has a prior record involving the use of violence covering a span in excess of 10 years. We agree that there is error.

[2] As to whether an offense is committed in an especially heinous, atrocious and cruel manner, the trial court at sentencing must determine the appropriateness of finding this factor in aggravation focusing on "whether the facts of the case disclose excessive brutality, physical pain, psychological suffering, or dehumanizing aspects not normally present in that offense." *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E. 2d 783, 786 (1983).

Here, the record disclosed that defendant's conduct was not any more brutal than the brutality inherent in any assault with a deadly weapon which results in serious injury. In *State v. Medlin*, 62 N.C. App. 251, 302 S.E. 2d 483 (1983) we held that defendant's conduct, hitting his wife and then shooting her five times, was not especially heinous, atrocious or cruel for sentencing purposes, despite the fact that victim there was hospitalized for 10 weeks, her face was partially paralyzed, she could not hear out of one ear, could no longer drive a car and was out of work for months. Similarly we find no evidence in the record before us to indicate that where the victim received 50 stitches, was hospitalized for two weeks, lost the sight in one eye and had some amnesia, the conduct of defendant was any more brutal than that inherent in any assault with a deadly weapon resulting in serious bodily injury. Accordingly, it was error for the trial court to find as a factor in aggravation that the offense was especially heinous, atrocious or cruel.

[3] Defendant next argues that the trial court used defendant's past convictions as the basis to find three separate aggravating factors, i.e., that defendant had convictions for offenses punishable by more than 60 days imprisonment, that defendant committed the offense charged while on probation for assault with a deadly weapon and that defendant has a prior record involving the use of violence covering a span of 10 years. The basis of defendant's argument is that since defendant had convictions for offenses punishable by more than 60 days imprisonment as a properly found factor in aggravation, it was error to base the finding of two non-statutory factors in aggravation upon those convictions. We agree in part and disagree in part. Defendant was in fact on probation for a prior conviction of assault with a deadly weapon. This fact is unrefuted. Accordingly, it is not error for the trial court to base a factor in aggravation upon evidence that defendant is in fact on probation as long as the finding of such a factor in aggravation is reasonably related to sentencing. G.S. 15A-1340.4(a).

[4] However, the fact that defendant has prior convictions for criminal offenses punishable by more than 60 days imprisonment and that *defendant has a prior record* involving the use of violence covering a span in excess of 10 years are too similar, the latter being based upon the former, to be considered as separate

factors for purposes of sentencing. G.S. 15A-1340.4, by its terms, prohibits the use of the same item of evidence to prove more than one factor in aggravation. While the legislature obviously intended that a person's past record could be used to aggravate a sentence (G.S. 15A-1340.4(a)(1)(o)), the legislature only intended that the past record be used once (G.S. 15A-1340.4(a)(1)). For these reasons, it was error for the trial court to find as a factor in aggravation that defendant has a prior record involving the use of violence covering a span in excess of 10 years.

In the trial of this action we find no error. Because there was error in the sentencing phase, defendant is entitled to a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

Remanded for resentencing.

Judge PARKER concurs.

Judge ARNOLD concurs in part and dissents in part.

Judge ARNOLD concurring in part and dissenting in part.

I do not agree with the majority that the trial judge erred in finding statutory aggravating factor G.S. 15A-1340.4(a)(1)(f), that defendant committed the offense in an especially heinous, atrocious or cruel manner.

The jury found defendant guilty of assault with a deadly weapon inflicting serious injury. The evidence which tended to support that verdict was that defendant first struck Mr. McLucas across the face, then cut him with a shiny object, and then proceeded to strike him repeatedly on the back and head. The severity of the attack is reflected in the fact that McLucas received approximately fifty stitches on his face from the two cuts inflicted by defendant, that he (McLucas) was hospitalized for two weeks, and that he lost sight in one eye and developed amnesia.

The evidence that defendant cut McLucas twice with a shiny object, causing injury requiring fifty stitches, is sufficient to support the jury's verdict on the crime charged. Evidence that the defendant struck McLucas repeatedly on the head and face, caus-

ing amnesia and loss of sight in one eye is surely strong evidence of "excessive brutality," *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E. 2d 783, 786 (1983).

I believe that the legislature intended that in cases where the defendant is found guilty of assault with a deadly weapon which results in serious injury the crime can be aggravated and the punishment increased when the offense is committed in a manner which goes beyond what is needed to justify conviction and can be described as especially heinous, atrocious or cruel. The fact that the legislature provided a maximum sentence and that it did not restrict the application of this statutory aggravating factor are good indications of that intent.

In the present case, I believe that a preponderance of the evidence supports the conclusion that defendant committed the offense in a heinous, atrocious or cruel manner. The trial court did not err in making this finding.

BETTY YOUNG ATWELL v. GARY HUGH ATWELL

No. 8426DC525

(Filed 16 April 1985)

1. Divorce and Alimony § 24.9— child support order—findings of parties' income—insufficient

The trial court erred in its award of child support in that the order contained insufficient factual findings as to the income of the parties in that the court found that the wife had an income of $800 per month when the only evidence of her income was her affidavit showing $650 per month, and the finding addressing the husband's income took into account his projected earnings in addition to his actual earnings.

2. Divorce and Alimony § 24.9— child support order—insufficient finding of parties' estates

An order awarding child support did not contain sufficient findings as to the parties' estates where the court found only that the parties owned a house with $25,000 equity but did not find the fair market value, and found only that there were substantial family obligations reflected in the affidavits of the parties.

3. Divorce and Alimony § 24.9— child support order—insufficient findings as to needs and expenses of parties

A child support order contained insufficient findings as to the needs and expenses of the parties in that the court failed to make any findings as to the wife's individual needs apart from fixed household expenses, although she itemized those expenses in her affidavit. The wife's fixed expenses were not divided into amounts attributable to the wife, the minor child, and the wife's two daughters from her previous marriage; the husband's fixed expenses were not taken into account; there was no evidence that the husband no longer incurred fixed expenses even though he was living with his parents; and part of his itemized expenses were for life insurance and his automobile, which would be unaffected by a change in residence.

4. Divorce and Alimony § 24.9— child support order—reasonable needs of child—findings insufficient

A child custody order did not contain sufficient findings upon which the court could reach a conclusion as to the reasonable needs of the child where the record was devoid of any finding relating to the actual past expenditures of the minor child. A finding that the wife's needs for maintenance of the child were no less than $500 per month was not supported by the evidence. Moreover, the conclusion that the parents should share equally in the expense of maintaining their child did not support setting defendant husband's support obligation at greater than a one-half share.

5. Divorce and Alimony § 27— child support order—attorneys' fees awarded—abuse of discretion

The trial court in a child support action abused its discretion by ordering that the husband pay attorneys' fees based on a finding that the wife had insufficient means to defray the expenses of the suit when the finding was in reality a conclusion of law.

6. Divorce and Alimony § 27— child support order—award of attorneys' fees—insufficient findings

An award of counsel fees in an action for child support was vacated where findings that the wife's counsel had spent six hours working on the case and that the value of such services was $200 were wholly unsupported by the evidence.

APPEAL by defendant from *Cantrell, Judge*. Order entered 26 March 1984 in District Court, MECKLENBURG County. Heard in the Court of Appeals 11 January 1985.

No brief filed for plaintiff appellee.

Ronald Williams, P.A., by Ronald Williams, for defendant appellant.

BECTON, Judge.

I

We must determine whether the trial court's awards of child support and counsel fees were proper.

Plaintiff wife, Betty Young Atwell, and defendant husband, Gary Hugh Atwell, were married on 29 October 1976. One child was born of the marriage, Gary Michael, aged 6 at the time of the child support hearing. The parties separated in September 1983. The husband testified that he paid the wife $108 per month in child support from the time of separation until the time of the hearing.

On 17 November 1983 the wife filed a Complaint seeking alimony *pendente lite*, permanent alimony, custody and support of the minor child, the use and possession of the marital home, and counsel fees. In his Answer, the husband sought to have all relief denied the wife save custody and a reasonable amount of child support. Both parties submitted affidavits of financial standing and the husband also submitted his 1981 and 1982 tax returns.

A hearing was held in Mecklenburg County District Court on 28 February 1984. The trial court stated it would only hear evidence on the issue of child support, reserving the issue of alimony. The husband testified, *inter alia*, that he was a self-employed carpenter's helper, that it had been three years since he was employed full time, and that he had earned $1,400 net profit between 1 January 1984 and the date of the hearing. He also testified that he was currently living with his parents in Tennessee.

The trial court entered an order awarding the wife custody, setting child support at $300 per month, and ordering the husband to pay counsel fees of $200. The court also awarded the wife use and possession of the marital home and the parties' 1977 Chevrolet. The husband appeals, assigning error to those portions of the order concerned with the awards of child support and counsel fees. For the reasons stated below, we agree with the husband that the trial court erred in making these awards. We therefore vacate the order in question, and remand the cause for entry of a proper order.

II

We turn first to the child support portion of the order.

The legal principles which govern the determination of child support have been frequently stated and summarized as recently as the Supreme Court's opinion in *Plott v. Plott*, 313 N.C. 63, 326 S.E. 2d 863 (1985) at 7-9. Briefly, under N.C. Gen. Stat. Sec. 50-13.4(c) (1984), "an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to 'meet the reasonable needs of the child' and (2) the relative ability of the parties to provide that amount." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980). These conclusions must be based upon factual findings sufficiently specific to indicate that the trial court took "due regard" of the factors enumerated in the statute, namely, the "estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." G.S. Sec. 50-13.4(c); *Coble; Byrd v. Byrd*, 62 N.C. App. 438, 303 S.E. 2d 205 (1983).

These findings must, of course, be based upon competent evidence, and "[i]t is not enough that there may be evidence in the record sufficient to support findings which *could have been made*. The trial court must itself determine what pertinent facts are actually established by the evidence before it. . . ." *Coble*, 300 N.C. at 712, 268 S.E. 2d at 189. In short, the evidence must support the findings, the findings must support the conclusions, and the conclusions must support the judgment; otherwise, effective appellate review becomes impossible. *Coble.*

[1] Applying these principles to the case before us, we discover that the order contains insufficient factual findings as to the incomes, estates, and present reasonable expenses of the parties upon which the trial court could have adequately determined the relative abilities of the parties to provide support. As to the parties' incomes, the court found that the wife has a net income of approximately $800 per month, and that the husband

> is self-employed as a carpenter, . . . and expects net profits of between $700.00 and $800.00 per month until he gets his business built up; further, that the [husband] has actually had

net earnings of $1,400.00 as [a] result of being self-employed . . . from January 1, 1984 through the date of this hearing [28 February 1984]. That the [husband] is capable of being employed on a regular and ongoing basis. . . .

Although no error is assigned thereto, we note that the only evidence as to the wife's income appears in her affidavit, where she states that her net income is $650 per month, and thus the finding as to the wife's income is not supported by the evidence. The finding addressing the husband's income took into account his projected earnings, in addition to his actual earnings. This was improper. The general rule is that the ability of a party to pay child support is determined by that person's income at the time the award is made. *Holt v. Holt*, 29 N.C. App. 124, 223 S.E. 2d 542 (1976). Only when there are findings based on competent evidence to support a conclusion that the supporting spouse or parent is deliberately depressing his or her income or indulging in excessive spending to avoid family responsibilities, can a party's capacity to earn be considered. *Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976); *Whitley v. Whitley*, 46 N.C. App. 810, 266 S.E. 2d 23 (1980). The court made no such findings, and it therefore committed error in considering the husband's capacity to earn in computing his income.

[2] The findings as to the parties' estates are also inadequate. *See Newman v. Newman*, 64 N.C. App. 125, 306 S.E. 2d 540, *disc. rev. denied*, 309 N.C. 822, 310 S.E. 2d 351 (1983) ("estates" refers to, *inter alia*, "savings; real estate holdings, including fair market value and equity; stocks; and bonds"). Although the court found that the parties owned a house as tenants by the entireties, with equity of $25,000, it failed to find the fair market value. It also found that there are "substantial family obligations outstanding, which are as reflected in the affidavits of the parties. . . ." Both parties' financial affidavits contain detailed lists of debt obligations, specifying creditors and the dollar amount owed on each debt. Indeed, the husband's affidavit reflects debts totalling over $14,000. In our opinion, the trial court's broadly worded finding that the parties had incurred debts falls short of the specificity requirement for findings of fact in child support orders.

[3] The trial court made the following findings as to the needs and expenses of the parties:

> That the [wife's] fixed expenses for the maintenance of her household are approximately $861.00 per month.
>
> That the [husband] presently lives with his parents in Burns, Tennessee and has monthly financial needs of approximately $475.00 per month.

These findings are insufficient.

The trial court failed to make any findings as to the wife's individual needs apart from fixed household expenses, although she itemized these needs, which included clothing and food expenses, in her affidavit. Furthermore, the $831 of fixed expenses was not divided into the amounts attributable to the wife, the minor child, and to the wife's two daughters from her previous marriage, who apparently reside with the wife. As to the husband, although the record supports the finding that the husband's monthly individual needs are approximately $475, the trial court failed to take his fixed expenses into account, which expenses the husband lists as $695 monthly. Although the husband testified, and the trial court found, that he is currently living with his parents, no evidence was produced indicating that the husband no longer incurs fixed monthly expenses. Significantly, $268 of the husband's itemized fixed monthly expenses are for life insurance, and for expenses connected with his automobile, and would clearly be unaffected by a change in residence.

[4] Nor does the order contain proper findings upon which the trial court could reach a conclusion as to the reasonable needs of the child. In order to determine the reasonable needs of the child, the trial court must hear evidence and make findings of specific fact on the child's actual past expenditures and present reasonable expenses. *Newman v. Newman.* The record is devoid of any finding relating to the actual past expenditures of the minor child. Although there is a finding ostensibly relating to the present reasonable expenses of the child, *i.e.*, that the wife's needs for "maintenance" of the child are "no less than $500.00 per month," this finding is not supported by the evidence. The wife's affidavit sets the child's individual monthly needs at $308.63. There is no other evidence regarding the child's individual financial needs. Perhaps the trial court was estimating what portion of the fixed household expenses was attributable to the child. However, as discussed, there is no evidence apportioning the expenses, and

factual findings must be supported by evidence, and not based on speculation.

In summary, although the trial court made conclusions concerning the child's reasonable needs, and the parents' relative abilities to pay, that "it is appropriate for them to share equally the expenses of maintaining the minor child," both of which are improperly denominated findings of fact, these conclusions are not supported by proper findings based on competent evidence. Therefore, the award of child support cannot stand. Even if the conclusions had been properly substantiated, the judgment does not follow therefrom. The court concluded that the parents should "share equally" in the expense of maintaining their child, which expense it found to be $500 per month, yet it set the amount of defendant's child support obligation at $300 per month, a greater than one-half share.

III

[5] The husband also assigns error to the trial court's award of $200 counsel fees, which is based on the following finding:

> That the [wife's] attorney has spent in excess of 6 hours working on [wife's] behalf in this action, and that the value of said legal services exceeds $200.00; further, that the [wife] is entitled to an award from the [husband] as counsel fees. [The wife] being an interested party acting in good faith with insufficient means to defray the expenses of this suit.

N.C. Gen. Stat. Sec. 50-13.6 (1984) provides, in pertinent part, that

> [i]n an action or proceeding for the custody or support . . . of a minor child, . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit.

In a custody and support action, the trial judge has the discretion to award attorney's fees once the statutory requirements of G.S. Sec. 50-13.6 (1984) have been met. While whether the statutory requirements have been met is a question of law, reviewable on appeal, the amount of attorney's fees is within the sound discretion of the trial judge and is only review-

able for an abuse of discretion. *Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980). We find that the trial court's order was not in compliance with the statutory requirements.

The trial court found that the wife was an interested party, and acting in good faith, and the husband does not challenge these findings. The trial court also found that the wife had insufficient means to defray the expenses of the suit. This "finding" is, in reality, a conclusion of law. *See Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982). However, no factual findings support it. *See id.* This constitutes an abuse of discretion. *Rogers v. Rogers*, 39 N.C. App. 635, 251 S.E. 2d 663 (1979). On remand, the court must make findings to support the conclusion that the wife does not have the means to defray her legal expenses, that is, it must find she is unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant. *Quick; Hudson.*

[6] Finally, a proper order under G.S. Sec. 50-13.6 (1984) must contain factual findings upon which a determination of the reasonableness of the counsel fees might be based, *e.g.*, findings as to the nature and scope of the legal services rendered, and the time and skill required. *Austin v. Austin*, 12 N.C. App. 286, 183 S.E. 2d 420 (1971). The only applicable findings in the order, that the wife's counsel had spent six hours working on the case, and the value of such services was $200, were wholly unsupported by any evidence. As no evidence supports the award of attorney's fees, that portion of the order must also be vacated. *See Rogers v. Rogers* (although counsel submitted detailed affidavit concerning legal services at court's request, order vacated because court failed to make findings as to reasonableness of fees).

IV

In conclusion, both the amount of child support and the award of attorney's fees were arrived at improperly. We therefore vacate the order and remand the cause for findings of fact on the matters discussed in this opinion, for evidence on the portion of the wife's fixed expenses attributable to the child, and for the entry of an order determining child support.

Vacated and remanded.

Judges JOHNSON and MARTIN concur.

IN RE SWISHER: KATRINA SUE SWISHER, JOHN THOMAS SWISHER, AND SAMANTHA KAY SWISHER

No. 8410DC834

(Filed 16 April 1985)

1. **Parent and Child § 1.6— termination of parental rights—child neglect**

The evidence and findings supported the trial court's order terminating respondent mother's parental rights in her three children on the ground of neglect. G.S. 7A-289.32(2); G.S. 7A-278(4) (now G.S. 7A-517(21)).

2. **Parent and Child § 1.5— termination of parental rights—effect of failure to conduct periodic custody reviews**

A petition to terminate parental rights was not subject to dismissal because the periodic custody reviews required by G.S. 7A-657 were not conducted, especially where the absence of periodic reviews was not prejudicial to respondent because at the times the reviews should have been held she was separated from the children because of her alcoholism or because she had chosen to abandon the children by leaving her place of residence without providing an address where she might be contacted regarding the children.

APPEAL by respondent from *Bason, Judge*. Judgment entered 14 March 1984 in District Court, WAKE County. Heard in the Court of Appeals 4 April 1985.

The Wake County Department of Social Services filed a petition to terminate the parental rights of Merle F. Swisher and Mary L. Swisher Willis as to the three named minor children. Merle Swisher was served by publication but made no appearance in this action. Mrs. Willis appeared and contested the action. At the hearing on the matter the petitioner offered evidence which tended to show the following facts. In April 1980, Mrs. Willis moved from Indiana to North Carolina with her three minor children. Shortly thereafter she voluntarily placed the children with Social Services because she was unable to care for them. On 2 July 1980, the children were returned to the mother's physical custody. When the children were returned, the Department of Social Services paid the first month's rent and a deposit for electricity and heat for Mrs. Willis. At this time Mrs. Willis was employed. During the time the children were in her custody Mrs. Willis drank to excess, nearly a six pack of beer a day, and slept a lot during the day. The children were not fed regular meals and the residence was not cleaned properly. In August 1980, Mrs.

Willis and the children were evicted for nonpayment of rent. On or about 11 September 1980, the children were returned to foster care and Mrs. Willis entered the Alcoholic Treatment Center in Raleigh. Shortly after her release from the treatment center Mrs. Willis entered Dorothea Dix Hospital where she stayed for three or four weeks. While at the hospital the respondent met George Willis. After she left the hospital, Mrs. Willis moved into a half-way house in Raleigh. In December 1980, Mrs. Willis left the half-way house without leaving a forwarding address. In January 1981, she married Mr. Willis. Following the marriage the Willises lived in Fuquay-Varina, Stedman and Fayetteville. Following her departure from the half-way house the only contacts Mrs. Willis had with the children were Easter cards in April 1981 and a birthday card to Katrina in September 1981. Social Services attempted unsuccessfully to contact Mrs. Willis on several occasions. In November 1981, the petitioner contacted Mrs. Willis and informed her that it was going to seek to have her parental rights terminated. Mrs. Willis made no attempts to see the children until after the petition to terminate was filed on 9 August 1982.

The trial court found that respondent's rights should be terminated on three grounds: (a) neglect, (b) leaving the children in foster care for more than two consecutive years without showing positive response to the petitioner's efforts to encourage her to strengthen the parental relationship and failing to make constructive plans for the children's future, and (c) for failing to pay a reasonable portion of the cost of care for the children for a continuous period of six months preceding the filing of the petition to terminate her rights. From this judgment, Mrs. Willis appealed.

James R. Fullwood for petitioner appellee.

Boyce, Mitchell, Burns & Smith, by Carole S. Gailor, for respondent appellant.

ARNOLD, Judge.

[1] G.S. 7A-289.32 sets forth six distinct and separate grounds upon which an order terminating parental rights may be based. In the case *sub judice* the court based its order upon three of these grounds. If either of these grounds is based upon findings of fact supported by clear, cogent and convincing evidence the order appealed from should be affirmed. *In the Matter of Moore*, 306 N.C.

394, 293 S.E. 2d 127 (1982), *appeal dismissed* 459 U.S. 1139, 74 L.Ed. 2d 987, 103 S.Ct. 776 (1983). The trial court found pursuant to G.S. 7A-289.32(2) that the parents were subject to having their rights terminated because their children were neglected children within the meaning of G.S. 7A-278(4) (now G.S. 7A-517(21)). This conclusion is supported by the following pertinent findings of fact:

. . . .

10. That the children came to North Carolina from Indiana with their mother in April of 1980. That Mrs. Willis testified on direct examination that she came to North Carolina to seek employment. That she had told a social worker for Petitioner that she came to North Carolina to find her brother, in Raleigh, North Carolina and that Indiana Social Services had harassed her. That in fact, she had located her brother in Newport News, Virginia, prior to coming to Raleigh, North Carolina.

11. That upon arriving in Raleigh, Mrs. Swisher quickly found employment at Mail-Sort, that Petitioner helped her locate housing at the Raleigh Rescue Mission, and provided and offered other supportive services to Mrs. Swisher. That the children were placed in foster care as dependent juveniles.

. . . .

16. That on July 2, 1980, following a court hearing, the care of the children was returned to Mrs. Willis while custody remained in the Petitioner, as Mrs. Willis had made significant progress. That Petitioner continued to help Mrs. Willis to continue to care for her children.

17. That on July 29, 1980, Mrs. Norwood visited Mrs. Willis and Mrs. Willis had slurred speech, puffy eyes, and was disoriented and unsteady. Mrs. Norwood did not smell the odor of alcohol. The home was very messy and old food was on the floor.

18. In July, 1980, Mrs. Willis told Social Worker Norwood that the house rent was current, that she had to pay her CP&L bill and could catch it up, that she had paid

babysitters, and that she had not paid one babysitter, Mrs. Cross and Mrs. Cross would no longer keep the children.

19. When Mrs. Willis moved into the house, the Petitioner paid the first month's rent and the deposit on the electric and heat bills.

20. Petitioner attempted to help Mrs. Willis with budgeting and finding volunteer babysitters, but Mrs. Willis declined this help. Mrs. Willis said she had enough money to take care of the children.

21. That while the children were with Mrs. Willis in Raleigh, she had an income of approximately $230.00 per week.

22. During an August 11, 1980, visit to the home of Mrs. Willis, Mrs. Norwood found the house to be very messy, bottles, clothing and other things laying around. The only food in the house was some baloney, drinks, and crackers. On August 11, 1980, Mrs. Willis told Mrs. Norwood that she was behind in the rent and was being evicted. That the mother had previously said she was not behind in the rent. Mrs. Willis said on August 11, 1980, that she did not know where the money had gone and that she also owed the electric and gas bills. That the only rent paid was that paid by the Petitioner. Mrs. Norwood suggested that part of the money had gone to purchase alcoholic beverages and Mrs. Willis denied this totally and regularly denied drinking. Mrs. Norwood offered budgeting and homemaker services to Mrs. Willis and Mrs. Willis refused this assistance. That in August, 1980, Mrs. Willis was employed at Royal Villa and as a security guard at Brendles. That the mother did not pay rent, electricity or gas. There was little food in the home. That Mrs. Willis worked, had money and said she did not know where it went.

23. On September 5, 1980, at Dell Adams Street, Mrs. Norwood visited Mrs. Swisher and observed that broken Coke bottles were on the floor, glass and things were thrown all around the house. John had a cut on his foot. That the house was not clean.

24. In September, Mrs. Willis moved to Six Forks Road in Raleigh, North Carolina. That this home was never fixed up for a residence for the children.

25. On or about September 8, 1980, Mrs. Willis returned the children to the Beckwith foster home.

26. That while the children were with their mother in Raleigh from July 2, 1980 until September 8, 1980, Mrs. Willis was regularly drinking, that nearly every day she would drink a six pack of beer and then sleep, that she acted drowsy and dizzy and slept a great deal of the time that she was at home as a result of her drinking. That Katrina fixed coffee for her mother and helped to care for the other two children. That the mother did not provide for the regular feeding of the children. No one cleaned up the house. That through her drinking, Mrs. Willis neglected the children.

27. That on September 10, 1980, Mrs. Willis advised Mrs. Norwood that Mrs. Willis was arranging to enter the Alcohol Treatment Center. She was admitted on September 22, 1980 for approximately two weeks. Upon release, Petitioner helped Mrs. Willis locate a place to stay.

28. That on October 29, 1980, Mrs. Norwood found Mrs. Swisher to be disoriented and assisted in having her voluntarily admitted to Dorothea Dix Hospital, where Mrs. Willis stayed for three to four weeks.

29. That while at Dorothea Dix Hospital, Mrs. Willis met Mr. George Willis who she married in January, 1981.

30. Upon release from Dorothea Dix Hospital, Mrs. Willis resided at a half-way house on Boylan Avenue in Raleigh, North Carolina.

31. On December 11, 1980, Mrs. Norwood spoke with Mrs. Willis about planning a Christmas visit with the children.

32. On December 21, 1980, Mrs. Norwood again spoke to Mrs. Willis and prior to Christmas, Mrs. Willis left the half-way house without notifying the Petitioner. That Petitioner did not hear from Mrs. Willis and did not know her where-

abouts. That Mrs. Willis did not contact the children about her leaving.

33. That following December, 1980, Petitioner made diligent efforts to locate Mrs. Willis by contacting the Police and through other efforts.

34. In April, 1981, Mrs. Willis sent Easter cards to the children with a return address of Fuquay-Varina. Social Worker Paige Robinson wrote to Mrs. Willis at the Fuquay-Varina address. No reply was received. The letter was not returned. That this constituted the first information Petitioner had as to Mrs. Willis' whereabouts and was Mrs. Willis' first contact with the children since December of 1980.

35. In June, 1981, Mrs. Robinson got a new address through the post office for Mrs. Willis in Stedman, North Carolina, and wrote to that address in June and August asking Mrs. Willis to contact her. The June letter was not returned and the August letter, a certified letter, was returned unclaimed.

36. That in August of 1981, Mrs. Robinson obtained a Fayetteville address for Mrs. Willis. That in September, 1982, Katrina received a birthday card and $10.00 from her mother with a return address of 313 Cool Springs Street, Fayetteville, North Carolina. Mrs. Robinson wrote Mrs. Willis in Fayetteville the first letter of August 27, 1981 which was returned unclaimed and a second letter was sent in September, 1981, and on October 29, 1981, Mrs. Willis telephoned Mrs. Robinson. This was the first contact Mrs. Willis had made with Petitioner since December of 1980.

37. Mrs. Willis says she got the letters in Stedman and in Fayetteville.

38. That during the absence of their mother, the children had been worried, concerned, and upset as to what had happened to their mother. That the children were confused by the absence of their mother.

39. Mrs. Robinson met with Mr. and Mrs. Willis on November 5, 1981, in Raleigh, North Carolina. Mrs. Swisher had left Raleigh in December, 1980, and married George Willis

whom she met while they were both patients at Dorothea Dix Hospital. The marriage was in Dillon, South Carolina in January of 1981. Mr. and Mrs. Willis lived in Fuquay-Varina, Stedman, and Fayetteville. Mrs. Willis said she had not called Petitioner because she could not remember Mrs. Norwood's name and she lived in the country in Stedman and had to drive into town to telephone. She said she had not come to see the worker due to car trouble.

40. Mrs. Swisher was in Raleigh in April of 1981 to get her driver's license and in June of 1981. She did not contact the Petitioner. After moving to Fayetteville, North Carolina, Mrs. Willis and her husband would from time-to-time drive to Fuquay, North Carolina and Raleigh, North Carolina to visit relatives. They did not visit the Petitioner or the children.

41. On November 6, 1981, when asked about her plans for the children, Mrs. Willis gave no plans to Ms. Robinson. Mrs. Willis said she did not have any plans. Mrs. Willis was living in a two bedroom home in Fayetteville, North Carolina. In November of 1981, Mrs. Willis did not complain of any physical difficulty that would prevent her from working.

42. Mrs. Willis, in November of 1981, said she was not employed and Mr. Willis had an income of about $643.00 per month. Mrs. Willis was looking after Mr. Willis' uncle in Fayetteville during the day while the uncle's wife worked. Mrs. Willis testified that during the day she stays home, goes grocery shopping, goes to the laundromat, writes checks and goes to the bank. Mr. and Mrs. Willis own furniture and a car. They go places together.

43. That Mr. Willis' physical condition is such that he does not need Mrs. Willis' attention.

44. That on November 30, 1981, Petitioner wrote Mrs. Willis and explained that it was to seek to terminate her rights and that she might wish to retain an attorney. Petitioner heard nothing further from Mrs. Willis until after the petition was filed in this case.

45. That Mrs. Willis did not visit the children between December, 1980, when she left Raleigh, North Carolina, and the date of the filing of the petition.

46. That other than the $90,000 initially paid for child support in 1980, Mrs. Willis paid nothing in support for the three children. That after leaving Raleigh, North Carolina in December of 1980, Mrs. Swisher was able to marry, move from home to home and town to town, travel around on her personal business, conduct her financial affairs and the financial affairs of her husband.

. . . .

Although the respondent has failed to except to any of these findings of fact as required by Rule 10(b) of the Rules of Appellate Procedure, nevertheless we have examined the record and determined that these findings are supported by clear, cogent and convincing evidence. Furthermore, we hold that these findings support the court's conclusion that Mrs. Willis was subject to having her parental rights terminated because her children were neglected children as defined by G.S. 7A-278(4) (now G.S. 7A-517(21)). Having determined that the court's order is supported by one of the grounds set forth in G.S. 7A-289.32, we need not reach respondent's contention that the other two grounds relied upon by the court were not supported by clear, cogent and convincing evidence.

[2] Finally, we consider the respondent's contention that the court erred by failing to dismiss the petition to terminate Mrs. Willis' parental rights in the children for failure of the petitioner to comply with the review requirements set forth in G.S. 7A-657. The statute in pertinent part provides:

> In any case where custody is removed from a parent, the judge shall conduct a review within six months of the date the order was entered, and shall conduct subsequent reviews at least every year thereafter. The Director of Social Services shall make timely requests to the clerk to calendar the case at a session of court scheduled for the hearing of juvenile matters within six months of the date the order was entered. The Director shall make timely requests for calendaring of the yearly reviews thereafter. The clerk shall give 15 days' notice of the review to the parent or the person standing in loco parentis, the juvenile if 12 years of age or more, the guardian, foster-parent, custodian or agency with

custody, the guardian ad litem, and any other person the court may specify, indicating the court's impending review.

While the evidence shows that the petitioner failed to comply with the terms of the statute with regards to hearing on the placement of the children, we are convinced that this omission was not sufficient to defeat the petition to terminate the parental rights of Mrs. Willis. The respondent has not cited any authority for the proposition that the failure to conduct the periodic reviews required by statute can be pleaded as a bar to the termination of a parent's rights. Furthermore, we note that the court's failure to conduct periodic reviews of the children's placement was not prejudicial to Mrs. Willis because at the times the review should have been held she was either separated from the children because of her alcoholism or because she had chosen to abandon the children by leaving her place of residence without providing an address where she might be contacted regarding the children. Thus, we find no merit in respondent's argument.

The judgment appealed from is

Affirmed.

Judges PHILLIPS and COZORT concur.

DOROTHY LESNIAK COLE v. DONALD SCOTT COLE

No. 8415DC779

(Filed 16 April 1985)

1. Bastards § 10— paternity of child—blood test results—finding of successful vasectomy

A finding that blood tests showed a 95.98% probability that defendant was the father of a child but that undisputed evidence of infertility would drop the possibility to 0% was insufficient to support the court's conclusion that defendant was the father of the child where the court also found that medical evidence showed that defendant was infertile due to a successful vasectomy before the time of conception of the child.

2. Bastards § 10— paternity of child—failure to state doubt and to undergo counseling—irrelevancy

Findings that the court took into consideration defendant's failure to state his doubt that a child was his until this suit was commenced and defendant's failure to undergo counseling were not relevant to the issue of whether defendant was the biological father of the child.

3. Bastards § 10— paternity of child—finding of possibility of impregnation after vasectomy—finding of successful vasectomy

A finding that after a vasectomy "each sexual act would give a very small possibility of impregnation" would not support a conclusion that defendant was the father of a child conceived after defendant had a vasectomy where the court also found that medical evidence showed that defendant had had a successful vasectomy before the time of conception of the child.

Judge PHILLIPS dissenting.

APPEAL by defendant from *Peele, Judge*. Judgment entered 8 March 1984 in District Court, ORANGE County. Heard in the Court of Appeals 14 March 1985.

The main issue in this case is whether defendant is the father of Jonathan Derrick Cole.

Plaintiff and defendant were married on 19 April 1970. They bore one child on 19 August 1971 and another on 29 September 1975. Defendant had a bilateral vasectomy on 20 February 1976. On 20 May 1976, the physician who performed the vasectomy made a sperm count on a specimen brought by defendant, and it was negative. Also, a pathology test was performed on the sections of the vasa deferentia removed from defendant, and the tests confirmed that the vasectomy had been successful.

On 10 September 1982 the plaintiff gave birth to a son, Jonathan Derrick Cole. The defendant acknowledged that he was the child's father on the child's birth certificate. In the Spring of 1983 the parties' marriage deteriorated. They separated on 9 July 1983. On 18 August 1983 the plaintiff filed a complaint requesting alimony, temporary alimony, custody of the children, child support and attorney's fees. The defendant filed an answer denying he was the father of Jonathan Derrick Cole.

On 15 September 1983, Dr. John Grimes performed a semen analysis on defendant and determined that he was sterile. Dr. Grimes found no evidence of any vasectomy performed on defend-

ant except for the one of 20 February 1976. Dr. Grimes testified that he believed defendant was sterile during the years 1981-82 and that the likelihood of defendant becoming fertile after his vasectomy was "one in a million and probably less than that now."

A blood test was performed on defendant, on the child Jonathan Cole, and on plaintiff. The test indicated that the probability of defendant being Jonathan's father was 95.98%, assuming that defendant "was a fertile male at the time of presumed conception, [sic] Undisputed evidence to the contrary would drop the probability of paternity to 0%."

The district judge ruled that the defendant is the biological father of Jonathan Derrick Cole.

Defendant appeals this judgment.

Hogue & Strickland, by Lucy D. Strickland, for plaintiff appellee.

Clayton, Myrick & McClanahan, by Robert D. McClanahan, for defendant appellant.

ARNOLD, Judge.

[1] The issue which determines this appeal is whether the district judge's findings of fact support his conclusion of law that the defendant is the biological father of Jonathan Derrick Cole. *See Moore v. Deal*, 239 N.C. 224, 228, 79 S.E. 2d 507, 510 (1954). We hold that they do not.

The findings of fact read, in pertinent part:

> 4. Jonathan Derrick Cole was born to Dorothy Lesniak Cole [plaintiff] on September 10, 1982; present age approx. 1½ yrs. old.
>
> . . . .
>
> 7. The parties were married on April 19, 1970.
>
> . . . .
>
> 12. Husband noticed, with at first annoyance and later with strong objection, that sometimes when he was away from home the wife had a male visitor. The children were present, and there was no reason for him to believe that the relationship between his wife and this male visitor, Mr. X,

was anything more than friends. But it began to worry him, burrowing within. But he said nothing.

13. Sometime in November or December, 1981, the wife became pregnant.

. . . .

38. On February 20, 1976, the husband had a vasectomy.

39. On May 20, 1976, a sperm count was taken on the husband to check and seek [sic] if the vasectomy was working. It was. The sperm count was zero, meaning in the opinion of the doctor, no sperm was getting through.

40. On Sept. 15, 1983, a sperm count was again taken of the husband. A fresh semen specimen was obtained, 30 to 40 specimens of which were examined under the microscope. No sperm were found. The opinion of the medical expert was that the husband is nonfertile at the present time.

41. As to the possibility of the husband becoming fertile during the period of November-December, 1981, the medical expert appeared to be certain and confident that the husband was not fertile. He expressed the odds against the father having been fertile as a million to one.

42. On or about October 13, 1983 a blood testing for paternity was done. It showed that the probability of paternity of the father was 95.98%.

43. The above test also stated: "This probability of paternity assumes that (husband) was a fertile male at time of conception. Undisputed evidence to the contrary would drop the possibility to 0%."

44. The husband has had no other vasectomy.

. . . .

50. When asked by the judge if she saw any similarity of movement or expression as between the baby Derrick and the husband, she said yes, that sometimes when he looked at her they had a similar characteristic.

51. When asked the same question by the judge, the husband said no. (That is, no similarity). However the husband has not had a lot of opportunity to observe him, because, once he became convinced that Derreck [sic] was not his son, he stopped seeing him.

52. In making this decision, this judge is taking into consideration the fact that the husband failed to clearly state his doubt that he was the father until this suit was instituted; and then never became convinced in his own mind until he found out the results of the Sept. 1983 sperm test. The fact that he was not willing to attend counseling (e.g. state plainly to a counselor his worry that the child might not be his—and deal honestly with the issue) weighs against his position. If he wanted to protect the reputation of his wife, yet communicate this to her, then counseling would have been the ideal way. He could have stated in the presence of the counselor: "I have some doubts that I am the father of Derrick, but I do not want to say this to my wife because it might make her more upset, and I do not want to ruin her reputation—but this doubt is worrying me to death." And then the counselor would have seen this vital factor affecting the marriage, and dealt with it. Also, the father did not clearly state when he left that one of the reasons he was leaving was that he had doubts as to parentage. After having specifically on one occasion told his wife he had no doubts, indicating repeatedly in public that he had no doubts, appearing from his fatherly reactions to accept parentage, and allowing his name to be put on the birth certificate, he had the duty of revelation prior to separation, because each day that passed made the consequences of a possible question of paternity more damaging to the children. After a vasectomy, each sexual act would give a very small possibility of impregnation. But with a couple with an active sex life, each act of sexual intercourse makes the impossible a little more possible. I find find [sic] that in November or December, 1981 that little Derrick was conceived by the union of Dorothy and Donald Cole.

The district judge thus found that the defendant had a vasectomy in 1976. Several months after the vasectomy, his semen was analyzed, yielding a sperm count of zero. In 1982, Jonathan Cole was born to plaintiff. In 1983, defendant's sperm count again was

found to be zero. The judge found that a medical expert was "certain and confident" that defendant was not fertile at the time Jonathan Cole was conceived, the odds against this being a million to one.

The district judge also found that in 1983 a blood test was done which showed that the probability of defendant's paternity of Jonathan Cole was 95.98%. The district judge found that the test results had the following condition: "This probability of paternity assumes that (husband) was a fertile male at time of conception. Undisputed evidence to the contrary would drop the possibility to 0%."

Evidence that the defendant was not a fertile male at the time of conception was presented at trial and, as noted above, was adopted by the district judge in his findings of facts. This evidence was not contradicted at trial, and the judge gave no indication that he doubted the accuracy of the sperm counts or the credibility of the expert testimony.

It cannot be assumed, then, that defendant was a fertile male at the time of conception. Without this assumption, the probability that defendant fathered Jonathan Cole, calculated on the basis of the blood test, is therefore very small, or nil. Taken together, the judge's findings as to the medical evidence suggest that defendant has been sterile since 1976 and could not have fathered Jonathan Cole.

In this case, we are presented with what appears to be a sharp contrast in the medical evidence, between the results of fertility tests done on defendant, and blood tests done on defendant, plaintiff and Jonathan Cole. Because the results of the blood test appear to suggest such a high probability of paternity, we believe it is necessary to discuss how that probability is calculated, and why it should be discounted in cases where there is strong evidence of the father's infertility.

While much progress has been made in the blood tests used in cases of disputed paternity, by expanding the number of antigens examined, the test's greatest value still lies primarily in excluding falsely accused fathers. A "probability of paternity" can now be calculated for alleged fathers not excluded, and this is admissible on the issue of paternity, but it is not conclusive.

Serious questions have been raised about the validity of the method used to calculate the probability. I. Ellman and D. Kaye, Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity? 54 N.Y.U. L.Rev. 1131 (1979); Jaffee, Comment on the Judicial Use of HLA Paternity Test Results and Other Statistical Evidence: A Response to Terasaki, 17 J. Fam. L. 457 (1978-79). Critics of the probability of paternity calculation have focused on the assumptions made in the calculations, which greatly limit the usefulness of the probability in certain cases. For example, the calculation generally assumes that all possible fathers are unrelated. If the alleged father and the true father are related, then their HLA and red blood cell antigen profiles are likely to be very similar. Even the strongest proponent of the probability of paternity calculation admits it cannot be used in the case where potential fathers are related. P. Terasaki, Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing, 16 J. Fam. L. 543, 549 (1977-78).

Further, the calculation assumes that all possible fathers are fertile. In a case like the present, where there is strong evidence that the defendant is not fertile, the calculation, if it does not take into account this information, is likely to overestimate substantially the probability of paternity.

The source of much controversy is the statistical formula generally used to calculate the probability of paternity: the Bayes Theorem. Terasaki, *supra* at 544. Briefly, the Bayes Theorem shows how new statistical information alters a previously established probability. Ellman and Kaye, *supra* at 1147-48. When a laboratory uses the Bayes Theorem to calculate a probability of paternity it must first calculate a "prior probability of paternity," *i.e.*, a probability that the alleged father is the true father, based on information other than that gotten from the blood test. This prior probability usually has no connection to the case at hand. Sometimes it reflects the previous success of the laboratory at excluding falsely accused fathers. Traditionally, laboratories use the figure 50%, which may or may not be appropriate in a given case. E. G. Reisner and T. A. Bolk, A Layman's Guide to the Use of Blood Group Analysis in Paternity Testing, 20 J. Fam. L. 657, 673-74 (1981-82).

Critics suggest that this prior probability should take into account the circumstances of the particular case. Ellman and Kaye, *supra* at 1151. For example, if the woman has accused three men of fathering her child, or if there are reasons to doubt her credibility, or if there is evidence that the husband is infertile, as in the present case, then the prior probability should be reduced to less than 50%. Most laboratories, however, do not do this.

The importance of the prior probability to the final probability cannot be overemphasized. The Bayes Theorem calculates a final probability only by applying new statistical information to the prior probability. In paternity cases, where the defendant has not been previously excluded as the father, and where 50% is used as the prior probability, the Bayes Theorem ensures that every alleged father is "probably" the father, *i.e.*, the blood test results only improve upon the 50% prior probability of paternity.

Thus, the probability of paternity is generally probative, at best, where it is 90%, or as some have suggested 95%. *See* Joint AMA—ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage, 10 Fam. L.Q. 247, 262 (table IV) (1976-77). And this assumes, of course, that potential fathers are not related, and that there is no evidence that the alleged father is infertile. In the present case, then, what appears to be a very high probability of paternity based on blood tests actually indicates that it is "likely" to "very likely" that defendant fathered Jonathan Cole. Moreover, if the overwhelming evidence of defendant's infertility is factored in, this apparently high probability drops dramatically. This is why the laboratory test result sheet in the present case contained the proviso that "undisputed evidence [of infertility] would drop the possibility to 0%." If the district judge relied on the probability of paternity, despite the evidence of defendant's successful vasectomy, then he erred.

[2] We now deal with the other findings of fact that might have supported the district judge's conclusion that defendant fathered Jonathan Cole. In finding of fact 52, the district judge states that he took into consideration defendant's failure to state his doubt that the child was his until this suit was commenced and defendant's failure to undergo counseling. These considerations are not relevant to the issue of whether defendant was actually the biological father of Jonathan Cole.

[3] Finally, we deal with the district court judge's finding that after a vasectomy, "each sexual act would give a very small possibility of impregnation." Even if this were true, it is apparently based on a statistical generalization about all couples in which the husband has had a vasectomy, and not about the much smaller group of couples in which the husband has had a vasectomy and has had subsequent sperm counts and a pathology test showing complete sterility. Given that the judge has made much more specific findings about the success of defendant's vasectomy, his general finding that "each sexual act would give a very small possibility of impregnation" is not pertinent to the circumstances of this case and does not support the conclusion that defendant fathered Jonathan Cole.

Thus in light of the district judge's findings that scientific evidence demonstrated that defendant was sterile at the time Jonathan Cole was conceived, and that if defendant was sterile, the blood grouping probability of paternity was reduced to 0%, his conclusion that defendant fathered Jonathan Cole is erroneous. Rather, the judge's findings compel the conclusion that defendant did not father Jonathan Cole.

We see no need to reach defendant's other contentions.

Reversed.

Judge COZORT concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

My reading of the record leaves me doubtful that findings of fact adequate to support any order have been made by the trial judge. I see neither clarity nor coherence in them, but confusion and contradiction, and am of the opinion that the matter should be remanded to the trial court for a new start.

IN THE MATTER OF: OXFORD PLASTICS, A DIVISION OF PLASTICS ENGINEERING CORP. v. MARION GOODSON, JR., ANDREW WHITLEY AND McTHADEUS CARPENTER D/B/A WHITLEY TELEPHONE DEVICES

No. 849SC748

(Filed 16 April 1985)

1. **Rules of Civil Procedure § 60.2— failure to appear—trial calendar not received**

On a Rule 60 motion for relief from a judgment, a reasonable application of Rule 60(b)(6) requires that defendants be excused from trial where the court's finding that defendant's general counsel and partner received notice of the calendar was not supported by any evidence in the record, which clearly established that the trial calendar was never received.

2. **Rules of Civil Procedure § 60.2; Partnership § 4— meritorious defense—agreement signed individually rather than in partnership name**

On a Rule 60 motion for relief from a judgment, defendants presented a meritorious defense to plaintiff's civil action where defendants' partnership entered into a contract with plaintiff; a check from defendants' partner and general counsel, Goodson, was returned for insufficient funds; plaintiff's general manager subsequently met with another of the defendants and forwarded two documents proposing certain modifications and price adjustments, including the cessation of production until the adjusted balance was paid; defendant never signed the documents; and Goodson entered into a written agreement with plaintiff which included plaintiff's agreement to have criminal charges for the returned check dismissed and which confirmed the earlier unsigned documents, but Goodson signed his individual name and not the partnership name. G.S. 59-39(a).

Chief Judge HEDRICK concurs in the result.

APPEAL by defendants from *Clark, Judge*. Judgment entered 18 January 1984 in GRANVILLE County Superior Court. Heard in the Court of Appeals 11 March 1985.

This case arises from denial of defendants' motion for relief from and stay of a judgment entered by the Granville County Superior Court. The facts pertinent to this appeal are as follows.

On 2 March 1981, defendants' agent, in the partnership name, entered into a contract with plaintiff to design and build an injection mold and progressive dyes necessary for production of telephone number display devices for $13,900; one-third down, one-third upon delivery and one-third upon acceptance of parts. Plaintiff agreed to produce and assemble the telephone device at a cost of $370 per thousand. In accepting the contract, defendants'

agent acknowledged that design changes could be necessary requiring renegotiation of the contract.

Several design changes were made orally by defendants. Plaintiff requested an additional payment of $5,000 and defendant Goodson issued his check for $5,000, but the check was returned for non-sufficient funds. On 23 April 1982, plaintiff wrote defendant Whitley, co-partner, confirming his visit to their facility. In two accompanying documents, plaintiff proposed modification of the price for impact mold, dyes, and battery holder development to $21,650, less the $4,634 previously paid, leaving a balance of $17,016. Plaintiff offered to continue product development under the contract when the entire adjusted purchase price was paid by check and it had cleared payment. A new unit pricing schedule was proposed and plaintiff agreed to deliver 100 sample devices upon payment. The letters proposing modifications of the original contract were to be signed by defendant Whitley, in the partnership name, but were never executed by him.

In September 1982, defendant Goodson, an attorney then licensed in the State of North Carolina, delivered another $5,000 check to plaintiff to replace his previous check returned for non-sufficient funds. Goodson also signed a written agreement in which he acknowledged that plaintiff would not be obligated to proceed with the production of the telephone devices until the $17,016 was paid in full to plaintiff in accordance with its letters to defendant Whitley. Defendant Goodson's check was honored, leaving an unpaid purchase price of $12,016.

Plaintiff instituted a civil action on 1 March 1983 to recover the $12,016 alleged due on the revised contract. Defendant Goodson, as attorney for the partnership, filed an answer denying the complaint's material allegations and counterclaimed for lost profits due to plaintiff's alleged delay in production. On 2 December 1983, the Clerk of the Granville County Superior Court mailed Goodson a notice that a trial calendar meeting would be held on 13 December. Goodson did not attend the trial calendar conference and the case was scheduled for the 16 January 1984 session of superior court. On 14 December 1983 a trial calendar was mailed to defendant Goodson. In March 1984 both letters were returned to the Granville County Superior Court with notations

that the addressee had moved and had left no forwarding address.

On 18 January 1984, the civil action was called for trial, but none of the defendants appeared. The trial court took evidence without a jury and entered a judgment awarding plaintiff the relief requested in the complaint, and dismissing defendants' counterclaim for lack of evidence and failure to prosecute.

Defendants Whitley and Carpenter filed a motion for relief from and stay of the judgment entered against them. From a denial of their motion, defendants appealed.

Watkins, Finch & Hopper, by William L. Hopper, for plaintiff.

Edmundson & Catherwood, by John W. Watson, Jr., for defendants.

WELLS, Judge.

Defendants bring forth two assignments of error in which they contend that the trial court erred in denying their motion for relief from the 18 January 1984 judgment by (1) finding that defendants had not shown excusable neglect and (2) finding that defendants had failed to produce evidence of a meritorious defense. For the reasons stated below we reverse the trial court's order.

Relief from a judgment or order may be granted by the trial court "[o]n motion and upon such terms as are just" when there has been a

> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60(b) of the Rules of Civil Procedure. "If a movant is uncertain whether to proceed under clause (1) or (6) of Rule 60(b), he need not specify [which subsection] . . . if his motion is timely and the reason justifies relief. . . . Under either clause the movant must show that he has a meritorious defense,"

Sides v. Reid, 35 N.C. App. 235, 241 S.E. 2d 110 (1978) (citations omitted); *see generally* 7 Moore's Federal Practice § 60.27(1) (2d ed. 1983); W. Shuford, *N.C. Civ. Prac. & Proc.* § 60-11 (2d ed. 1981 & Supp. 1984), as it would be a waste of judicial economy to vacate a judgment or order when the movant could not prevail on the merits of the civil action. *Doxol Gas v. Barefoot*, 10 N.C. App. 703, 179 S.E. 2d 890 (1971). The motion for relief from a judgment or order made pursuant to Rule 60(b) is within the sound discretion of the trial court, *e.g., Harris v. Harris*, 307 N.C. 684, 300 S.E. 2d 369 (1983), and the trial court's decision will not be disturbed absent an abuse of that discretion, *e.g., Harrington v. Harrington*, 38 N.C. App. 610, 248 S.E. 2d 460 (1978). The court's findings of fact are conclusive on appeal when there is any competent evidence supporting the findings.

When relief is sought under Rule 60(b)(1), the trial court first determines if there has been a mistake, inadvertence, surprise, or excusable neglect. Whether the facts found constitute excusable neglect or not is a matter of law and reviewable on appeal, *Doxol Gas v. Barefoot, supra; Mason v. Mason*, 22 N.C. App. 494, 206 S.E. 2d 764 (1974), when the trial court's findings are made under a misapprehension of the law, and when the findings are insufficient to support the trial court's conclusion of law. *Dishman v. Dishman*, 37 N.C. App. 543, 246 S.E. 2d 819 (1978); *Mason v. Mason, supra.* If the motion does not allege factual allegations corresponding to the specific situations contemplated in clauses (1) through (5), subsection (6) serves as a "grand reservoir of equitable power" by which a court may grant relief from an order or judgment. *Equipment Co. v. Albertson*, 35 N.C. App. 144, 240 S.E. 2d 499 (1978). The expansive test by which relief can be given under subsection (6) is whether "(1) extraordinary circumstances exist and (2) there is a showing that justice demands it." *Baylor v. Brown*, 46 N.C. App. 664, 266 S.E. 2d 9 (1980). Trial courts are to consider:

> [T]he general desirability that a final judgment not be lightly disturbed, . . . where relief is sought from a judgment of dismissal or default, the relative interest of deciding cases on the merits and the interest in orderly procedure, . . . the opportunity the movant had to present his claim or defense, and . . . any intervening equities.

Id. (quoting *Equipment Co. v. Albertson, supra*).

The trial court, after determining if movants have shown grounds for relief under subsection (1) or (6), next considers whether the movant has demonstrated a meritorious defense. The court:

> [S]hould determine whether the movant has, in good faith, presented by his allegations, *prima facie*, a valid defense. . . . 'Where a party, in good faith, shows facts which raise an issue sufficient to defeat his adversary, if it be found in his favor, it is for the jury to try the issue and not for the judge, who merely finds whether on their face the facts show a good defense in law; otherwise, the defendant, though he establish ever so clear a case of excusable neglect entitling him to have the judgment set aside, would be deprived of the right of trial by the jury of the issue thus raised.' . . .

Bank v. Finance Co., 25 N.C. App. 211, 212 S.E. 2d 552 (1975) (citations omitted) (emphasis in original); *see also Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611, 219 S.E. 2d 787 (1975). While *Bank* involved a motion for relief under Rule 60(b)(1), the principles established for determining the existence of a meritorious defense would also be applicable to subsection (6).

[1] In the case before us, the court made the following findings of fact:

> 1. That the defendant, Marion Goodson, Jr., who was formerly counsel of record for the parties in this matter, and who was a party defendant hereto, received notice of the calendaring of this action for the January 16, 1984 term of Granville County Civil Superior Court.
>
> 2. That the defendant, Marion Goodson, Jr., was a general partner along with McThadeus Carpenter and Andrew Whitley in the partnership known as Whitley Telephone Devices and that notice to one partner of the calendaring of this matter for trial during the January 16, 1984 term of Granville County Civil Superior Court, constitutes notice to all of the partners.

The court's finding of fact that Marion Goodson "received" notice of the court calendar is not supported by any evidence in the rec-

ord, which clearly establishes that Goodson never received the trial calendar mailed to him in accordance with Rule 2(b) of the General Rules of Practice of the Superior and District Courts. We hold that under these circumstances, a reasonable application of the provisions of Rule 60(b)(6) require that defendants be excused from attendance at trial, and, if defendants have shown a meritorious defense, require reversal of the trial court's judgment.

[2] The trial court found and concluded that movants' allegations did not present a meritorious defense to plaintiff's civil action. Movants contend that their pleadings and affidavits present a meritorious defense because Goodson's actions were not authorized by the partnership and they were unaware of Goodson's actions. The record before us reveals that the partnership entered into a contract with plaintiff on 2 March 1981 in which the latter agreed to design and produce production molds and progressive dyes for the partnership, who agreed to pay one-third of the purchase price with the contract, one-third upon delivery, and one-third on acceptance. Subsequently, defendants requested design modifications and plaintiff required further payment. After Goodson's check for $5,000 was returned for non-sufficient funds, Whitley met with David Ratcliff, plaintiff's general manager, on 13 April 1982. As a result, Ratcliff forwarded two documents to Whitley proposing certain modifications in the original contract; price adjustments, cessation of production until the adjusted balance of $17,016 was paid, and delivery of 100 sample units within sixty days after payment of the adjusted contract price. Whitley never signed the documents and, in his affidavit, he stated that he "did not execute and return the letter to signify my agreement."

On 8 September 1982, Goodson entered into a written agreement with plaintiff in which plaintiff agreed to have criminal charges for the check returned for non-sufficient funds dismissed when Goodson's second check for $5,000 had cleared the bank. Goodson agreed to hold plaintiff harmless for having instituted the criminal prosecution, and confirmed that plaintiff would not be responsible for proceeding with production of the telephone devices until the adjusted balance of $17,016 had been paid in accordance with Ratcliff's letters to Whitley. Goodson signed the contract in his individual name, not in the partnership name.

N.C. Gen. Stat. § 59-39(a) provides:

> (a) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

Brewer v. Elks, 260 N.C. 470, 133 S.E. 2d 159 (1963) makes it clear that in order for a written instrument to be binding on a partnership, the instrument must be executed in the partnership name and that where the instrument was not signed in the partnership name, as was the case here, the burden would be on plaintiff to show that defendants Whitley and Carpenter authorized Goodson to modify the original agreement. *See also Bank v. Wallens*, 31 N.C. App. 721, 230 S.E. 2d 690 (1976). We hold that defendants presented a *prima facie* defense.

For the reasons stated, the judgment of the trial court must be vacated and the cause remanded for trial on the merits.

Vacated and remanded.

Judge MARTIN concurs.

Chief Judge HEDRICK concurs in the result.

Snow v. Dick & Kirkman

ANN H. SNOW, WIDOW, THOMAS EDWARD SNOW AND HEATHER DEEANNE SNOW, MINOR CHILDREN OF DAVID R. SNOW, DECEASED EMPLOYEE, PLAINTIFFS v. DICK & KIRKMAN, INC., EMPLOYER; BITUMINOUS CASUALTY INSURANCE CO., CARRIER, DEFENDANTS

No. 8410IC160

(Filed 16 April 1985)

Master and Servant § 56— workers' compensation—electric shock as cause of death—sufficient evidence

The Industrial Commission's finding that an electrician's death was caused by an electrical shock accidentally sustained in his employment was supported by evidence tending to show that decedent was twenty-nine years old and in good health and physical condition; decedent was sitting on a wire spool and working on an electrical control panel with a screwdriver when he suddenly fell over in a cramped, clinched position; after falling, decedent had an erratic, disorganized heartbeat and died without uttering a word; and one doctor was of the opinion that electric shock rather than sudden heart failure was the more likely cause of death. Evidence that decedent's coronary arteries were mildly hardened, that the left ventricular area of his heart was mildly enlarged, and that a second doctor thought sudden, spontaneous heart failure was the more likely cause of death merely presented a question for the Industrial Commission as to the cause of death.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission entered 20 December 1983. Heard in the Court of Appeals 26 October 1984.

On 28 April 1981, while working for defendant Dick & Kirkman, Inc., an electrical contractor, David R. Snow, a twenty-nine year old electrician, fell over dead. The claim of his widow and minor children for Workers' Compensation benefits, after being heard by a Deputy Commissioner of the North Carolina Industrial Commission, was approved. Upon defendants appealing to the Full Commission the opinion and award of the Deputy Commissioner was affirmed in all respects and defendants then appealed to this Court. The opinion and award appealed from is based on a finding of fact that Snow's death resulted from an electrical shock accidentally received during the course of his work, which caused his heart to beat in an erratic, unrhythmical, disorganized way, known as a ventricular fibrillation, and then stop. The evidence relating to this central and controlling finding, when favorably viewed for the plaintiffs, was to the following effect:

Defendant employer was doing the electrical work on a factory building that was being constructed in Durham County for SCM/Glidden Metals. The project was nearing completion, virtually all the wiring had been done, the production machinery had been installed, and the electrical equipment and facilities were being checked and made ready for productive use. On the morning involved Snow was working on a cabinet-sized Sunbeam control panel that supplied electricity to a furnace and conveyor system. Four wires, which were not then energized, stuck out from the front of the panel and Snow was instructed to put insulating nuts on their ends. The panel had about a hundred screw-type terminals altogether, some of which were energized with 277 volts of electricity as wires from them went to machines that were then being test operated by Kline Proud, a Sunbeam Equipment Corporation field service representative and Tom Murphy, the factory owner's engineer. Snow was seated on a wire reel spool in front of the panel, William Terry, a co-worker, was working at the panel next to him, and they were talking to each other as they worked. Terry's view was obstructed and in order to see Snow he had to lean back. Proud and Murphy, the only other people in the room, were not looking at Snow at this time. Terry was talking and when Snow did not respond Terry leaned back and saw Snow on the cement floor in front of the panel; his jaw was clinched tightly and his right leg was drawing up as though he had a cramp. His jaws were clinched so tightly they had to be forcibly pried apart before mouth-to-mouth resuscitation could be administered.

No one had seen what Snow was doing immediately before he fell and no one had heard any popping noises or seen a flash of sparks. No burn marks were found on his tools or on his body. Following Snow's collapse the four wires he had been directed to put insulating nuts on had such nuts on them; and the last tool seen in Snow's hands by anyone on the scene was a screwdriver, which is not used in putting insulating nuts on wires. Archie Emory, Snow's foreman, and Doug Overcash, a professional electrician who had worked with Snow for several years before this incident, both testified that it is normal procedure to make sure that wires are labeled and that screws are tight before closing a panel and that Snow, a good worker with initiative, customarily and habitually went on to the next task required after completing

the one assigned. Overcash also testified that in operating and testing electrical equipment he had been shocked many times, a few times seriously, without ever being burned, and that on one occasion, although a charge of 277 volts knocked him off a ladder and caused heart palpitations which rendered him immobile and incapable of speech for some fifteen minutes it did not burn him. Dr. Yancey Mebane noted that low-voltage shocks from 110 to 440 volts most commonly do not leave burns.

As to Snow's health, condition, activities and living habits, the evidence was that: He had worked regularly for years but had done no strenuous work that morning. His personal physician, Dr. Walter C. Mahaffee, described his physical condition as "excellent," and a fellow worker said that he was in good physical condition and "never got tired." But an electrocardiogram of Snow's heart about six months earlier was "abnormal," and the autopsy done on his body revealed that his heart was mildly enlarged in the left ventricular area and showed "miscroscopically some foci of scarring." A cardiologist consulted by the autopsy pathologist, though expressing the opinion that the probable cause of death was heart disease, testified that such scarring of the heart as was found in Snow's heart was "fairly mild" compared to the sort of things that are commonly found in the hearts of people who die from heart trouble. Dr. Mahaffee, who had been Snow's family doctor for ten years, testified that Snow's blood pressure was on the low side of normal, he did not have diabetes, was a non-smoker, and that he took the electrocardiogram because Snow reported having pain in the lower chest and abdomen for the preceding five weeks, and the electrocardiogram, in his opinion, showed no significant heart condition. He also testified that Snow's ailment was diagnosed as being a gastric disturbance and treated as such with favorable results almost immediately. The Rescue Squad members who took Snow to the hospital noted that his heart was undergoing ventricular fibrillation, which condition continued until death came shortly after he was taken to the Durham County Hospital. The death certificate by the autopsy pathologist attributed Snow's death to cardiac arrest caused by disorganized, unrhythmical contractions of the heart muscles, the cause of which was deemed to be unknown; but it was thought significant, according to the report, that "the investigation of the scene of death does not indicate that he was in contact

with electrical current." Dr. Mebane, plaintiffs' expert medical witness, attached little significance to the electrocardiogram because, in his opinion, the condition it indicated was mild and could be due to the pain that Snow was then having or to the leads being improperly affixed on his body by the technician. In his view abnormal laboratory tests to have value must be repeated in order to minimize the possibility of such mistakes and verify the indications; but he agreed that the electrocardiogram indicating mild arteriosclerosis was compatible with the autopsy findings. Both in response to a hypothetical question and also in response to various other questions put to him by plaintiffs' lawyers, Dr. Mebane also testified in substance that: It was much more likely that the disorganized, unrhythmical contractions of Snow's heart muscles, which resulted in death, were caused by an electrical shock than a diseased heart. His reasons for this opinion included the absence of diabetes, high blood pressure, and of any signs or symptoms of illness immediately preceding his collapse; Snow's youth, vigor, and good living and working habits; and the wire reel spool that Snow was sitting on and the relatively new concrete floor his feet were on, both of which, in his opinion, enhanced the chances of an electrical shock occurring upon any contact with an energized part of the panel.

Douglas S. Harris for plaintiff appellees.

Horton and Michaels, by John A. Michaels, for defendant appellants.

PHILLIPS, Judge.

The crucial and determinative question raised by this appeal is whether the Commission's finding that decedent's death was precipitated by an electrical shock accidentally sustained in his employment is supported by competent evidence. Defendants' several other assignments of error raise questions that are either subordinate or immaterial to this one, and will be addressed only as the disposition of this question requires. The competent evidence before the Commission was sufficient to support the finding made in our opinion, and we affirm the opinion and award appealed from. The credibility and weight of the evidence was for the Commission to determine and the Commission's findings, if supported by competent evidence, are conclusive. *Watson v. Clay*

Co., 242 N.C. 763, 89 S.E. 2d 465 (1955). That other findings could have been properly made from the evidence is irrelevant. *Fields v. Tompkins-Johnston Plumbing Co.*, 224 N.C. 841, 32 S.E. 2d 623 (1945). Nor did accident and effect have to be established by eye witnesses or to a mathematical or scientific certainty, as is implicit in defendants' arguments. Inferences from circumstances when reasonably drawn are permissible and that other reasonable inferences could have been drawn is no indication of error; deciding which permissible inference to draw from evidentiary circumstances is as much within the fact finder's province as is deciding which of two contradictory witnesses to believe. *Blalock v. City of Durham*, 244 N.C. 208, 92 S.E. 2d 758 (1956). In this instance the inferences as to accident and effect that the Commission drew from the wealth of competent evidence presented were both factually reasonable and legally permissible in our opinion.

The evidence shows that a young man—with a statutory life expectancy of approximately forty-three years, in vigorous health with no sign or symptom of illness, in a place that contained no hazard whatever except electricity, and definitely did contain that in the uncompleted control panel in which he was working with a screwdriver in his hand and before which he was sitting on a wire reel spool—suddenly fell over in a cramped, clinched position, with a wildly disorganized and erratic heartbeat and died without ever uttering a sound or a word, which, in one doctor's opinion, is not characteristic of heart failure. The only medical certainties of any possible significance that evolved from an autopsy of his body were that all of his vital organs were in normal condition except that the coronary arteries were mildly hardened or arteriosclerotic, the left ventricular area of the heart was mildly enlarged and contained some "foci of scarring," and that death resulted from his heart stopping to beat. The autopsy pathologist and the two qualified, experienced medical doctors who testified as to the cause of death unanimously agreed that what caused the heart to cease beating was almost certainly the disorganized, erratic way that it reportedly was beating immediately before death ensued. The two doctors who testified as to the cause of death also agreed that under the evidence recorded the disorganized, erratic heartbeat was caused by one of only two things—sudden heart failure or an electrical shock. Thus, that an electrical shock *could* have been the cause of the disorganized, erratic heartbeat which

resulted in death was competently testified to by both doctors; their disagreement was only as to whether electric shock or sudden heart failure was the more likely cause. One doctor was of the firm and positive opinion that the chances of Snow having died from an electrical shock "are far greater than the chances of sudden death due to fairly minimal coronary arteriosclerosis he had." Both the Deputy Commissioner who presided at the hearing and the members of the Full Commission who heard the appeal decided that this testimony was more credible than that of the medical expert who was of the opinion that sudden, spontaneous heart failure was the more likely cause of the disorganized heartbeat and Snow's ensuing death. That was their province and we cannot say that it was error to do so.

That no one saw any flash or heard any popping sound or that no burn marks were on Snow's body or tools is neither surprising nor decisive in our view. As is commonly known, electricity is usually invisible, and it was testified to that electricity of the relatively low voltage involved here often works silently and leaves no telltale clues behind. Furthermore, just before Snow was stricken, Sunbeam's field representative, Kline Proud, after telling him he was going to energize a part of the panel so that he could check the furnace's loading table about 15 steps away, reached inside the panel and flipped a breaker switch, and before Proud walked halfway to the furnace loading table Snow was stricken, and very shortly thereafter, in recognition of the hazard known to exist, Proud and Glidden's engineer, Murphy, closed the doors to the control panel. To reverse the Commission's decision on this point, we would have to be of the opinion that the only inference that the Commission could reasonably draw from this and the other evidence presented was that at that particular time and in that evidentiary setting Snow's heart suddenly and spontaneously failed, thereby causing his heart to beat in a disorganized way until it stopped. We hold no such opinion.

Affirmed.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. DONALD W. HERRING AND JOSEPH MEYER

No. 8413SC888

(Filed 16 April 1985)

1. **Robbery § 4.3— items taken after occupant fled vehicle—evidence of armed robbery sufficient**

There was sufficient evidence to go to the jury on the charge of armed robbery where the evidence tended to show that defendant Herring discharged a gun into a vehicle, that the occupant fled the scene, and that several items of personal property were missing from the vehicle when he returned.

2. **Robbery § 4.6— acting in concert—evidence sufficient**

In a prosecution for two armed robberies, there was sufficient evidence that defendant Herring took property from the victims where there was an abundance of evidence that he had acted in concert with defendant Meyer and others in perpetrating the robberies.

3. **Criminal Law § 92.3— armed robbery—consolidation of separate offenses—harmless error**

The trial court erred in allowing the State's motion for joinder of two armed robbery charges where the charges were of the same nature and involved similar facts but were separated by a significant period of time and had no connection apart from factual similarities; however, there was no prejudice because evidence of offenses occurring on one date would have been admissible on the issue of intent for offenses occurring on the other date. G.S. 15A-926(a).

4. **Criminal Law § 79.1— armed robbery—joinder of parties—testimony by one defendant—no prejudice**

There was no abuse of discretion in granting the State's motion for joinder of parties where both defendants were indicted for the same offenses stemming from the same incidents and one defendant volunteered on cross-examination that he had been charged with shooting into an occupied vehicle but denied doing it. This evidence was offered solely to impeach the testifying defendant's credibility and the other defendant did not show that his case was irreparably prejudiced.

5. **Criminal Law § 86.4— prior acts of misconduct by a defendant—motion for mistrial denied**

There was no error in the denial of defendants' motions for a mistrial after the State was allowed to ask about prior acts of misconduct by one defendant.

6. **Constitutional Law § 30— failure to disclose evidence prior to trial—recess granted—no error in admitting evidence**

There was no error in admitting into evidence a "lead deposit of a slug" when such evidence had not been disclosed to defense counsel prior to trial

despite their request for discovery because the court declared a fifteen-minute recess to allow defense counsel to examine the slug. G.S. 15A-910.

7. Criminal Law § 50— nonexpert expression of opinion—no error

In a prosecution for two armed robberies and for conspiracy to commit armed robberies, there was no error in allowing a witness to explain what was meant by "roll a queer." Assuming the answer was an expression of opinion, defendants did not show that a different result would have been reached without the testimony.

8. Criminal Law § 138— aggravating factor—commission of offenses while on pretrial release—no error

The court did not err by considering as an aggravating factor the fact that one defendant had committed the offenses with which he was charged while on pretrial release for another felony charge. G.S. 15A-1340.4(a)(1)k.

Judge WELLS dissenting.

APPEAL by defendants from *Watts, Judge.* Judgments entered 12 April 1984 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 1 April 1985.

Defendants were each charged in proper bills of indictment with armed robbery and conspiracy to commit robbery on 19 July 1983 and with armed robbery and conspiracy to commit robbery on 29 August 1983. Defendant Herring was convicted of common law robbery and conspiracy to commit robbery in connection with the 19 July 1983 incident, and of armed robbery and conspiracy to commit robbery in connection with the 29 August 1983 incident. Defendant Meyer was convicted of the same offenses. From judgments entered on the verdicts sentencing them to imprisonment, both defendants appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas J. Ziko, for the State.

Alexander M. Hall and Stephen B. Yount for defendants, appellants.

HEDRICK, Chief Judge.

Defendants argue that the trial court erred in denying their motions to dismiss the charges against them based on insufficiency of the State's evidence. Viewed in the light most favorable to the State, the evidence tends to show that on 19 July 1983, the defendants, along with Mark Watts, David Stowell and Darrell

Wooten, met in defendant Meyer's home in Leland, North Carolina. Defendant Meyer suggested going to Wilmington to "roll a queer." Departing in three vehicles, the men proceeded to the Front Street area. Mark Watts met the victim, Donnie Canady, in this area, and suggested that Mr. Canady follow him home. Watts then drove toward the Leland community and turned off the paved road onto a dirt road, with Canady following behind. Defendants Herring and Meyer then pulled in behind Canady. Canady attempted to turn around and pull back onto the paved road when the second vehicle pulled in behind his car, but Herring discharged a gun into his vehicle. Canady was pulled from his car and both Herring and Meyer struck him. Canady fell down an embankment and ran into the woods. When Canady returned to his vehicle with a Deputy Sheriff, he discovered that several items of personal property had been removed from his vehicle.

On the evening of 29 August 1983, the defendants, along with Darrell Wooten and Timothy Efird, again met in Meyer's home. Defendant Meyer suggested going to Wilmington to "roll a queer." Departing in two cars, the men proceeded to the Front Street area. Defendants Meyer and Herring met James Hayes, the victim, in this area and suggested that he follow them toward Southport. Defendants then drove toward Southport and turned off the paved road onto a dirt road. The two remaining men pulled in behind Hayes. Defendant Herring pulled out a gun and fired into the vehicle. When Hayes got out of his vehicle, the entire group struck him until he was unconscious. Hayes eventually regained consciousness to discover his wallet, checkbook, diamond ring, gold necklace and car keys were missing.

[1] Both defendants contend that "there exists no evidence that any force or intimidation by the use of firearms was used for the purpose of taking personal property from the person or presence of Donnie Canady." This contention is untenable. The evidence tends to show that defendant Herring discharged a gun into the Canady vehicle, that the occupant fled the scene, and that several items of personal property were missing from the vehicle when he returned. "[I]f the force or intimidation by the use of firearms for the purpose of taking personal property has been used and caused the victim in possession or control to flee the premises and this is followed by the taking of the property in a continuous course of conduct, the taking is from the 'presence' of the victim."

State v. Clemmons, 35 N.C. App. 192, 196, 241 S.E. 2d 116, 119, *disc. rev. denied*, 294 N.C. 737, 244 S.E. 2d 155 (1978). We hold there was sufficient evidence to go to the jury on the charge of armed robbery allegedly occurring on 19 July.

[2] Defendant Herring contends there was no evidence that he ever took any property from either Canady or Hayes. This contention is meritless. There was an abundance of evidence from which the jury could conclude that defendant Herring acted in concert with defendant Meyer and others in perpetrating the robberies charged. Defendant Herring was present at the scene and actively participated in the events leading up to the robberies. *State v. Dowd*, 28 N.C. App. 32, 220 S.E. 2d 393 (1975). This assignment of error is overruled.

[3] Defendants next contend the court erred in allowing the State's motion for joinder of offenses and in denying defendants' motions for severance of offenses. G.S. 15A-926(a) provides that offenses may be joined for trial if they 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.

Defendants concede that the offenses arising out of the events occurring 19 July 1983 were properly joined for trial, and that the offenses alleged to have occurred on 29 August 1983 also could be properly tried together. Defendants argue, however, that the offenses occurring on these two dates, forty-one days apart, were improperly joined, to their prejudice. We do not agree.

We note at the outset that all of the charges did not arise out of "the same act or transaction," and thus joinder on this basis would be improper. Nor did the offenses constitute "parts of a single scheme or plan." Indeed, if the evidence unequivocally disclosed a *single* scheme or plan, defendants' convictions of two counts of conspiracy could not stand. We thus turn our consideration to whether the offenses in question may be said to have arisen out of "a series of acts or transactions connected together."

Our courts have repeatedly held that offenses are properly joined under G.S. 15A-926(a) only when there exists a "transactional connection" among the charges. *See, e.g., State v. Powell*, 297 N.C. 419, 255 S.E. 2d 154 (1979); *State v. Greene*, 294 N.C. 418,

241 S.E. 2d 662 (1978). While the court's ruling on a motion for joinder is reviewable only for abuse of the court's discretion, *State v. Clark*, 301 N.C. 176, 270 S.E. 2d 425 (1980), "where there is a serious question of prejudice resulting from consolidation for trial of two or more offenses, the appropriate function of appellate review is to determine whether the case meets the statutory requirements." *State v. Wilson*, 57 N.C. App. 444, 448, 291 S.E. 2d 830, 832, *disc. rev. denied*, 306 N.C. 563, 294 S.E. 2d 375 (1982). In considering whether a "transactional connection" exists among offenses, our courts have taken into consideration such factors as the nature of the offenses charged, *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983), "commonality of facts," *State v. Bracey*, 303 N.C. 112, 117, 277 S.E. 2d 390, 394 (1981), the lapse of time between offenses, *State v. Clark*, 301 N.C. 176, 270 S.E. 2d 425 (1980), and the unique circumstances of each case, *State v. Boykin*, 307 N.C. 87, 296 S.E. 2d 258 (1982).

In the instant case, the record discloses that the charges joined for trial are of the same nature, and that the offenses occurring on 19 July and on 29 August involved similar facts. We note, however, that unlike virtually all of the cases in which joinder has been upheld by our courts, the offenses are separated by a significant period of time. We note further that the record reflects no *connection* between the offenses apart from the factual similarities. While factual similarities, and the nature of the offenses charged as being of the same class, was once all that was required for joinder, *see* former G.S. 15-152 (repealed 1973), this is no longer the case. *State v. Corbett*, 309 N.C. 382, 307 S.E. 2d 139 (1983). Because we find the offenses occurring on 19 July 1983 and those occurring on 29 August 1983, although factually similar, to be separate and distinct in time and circumstance, and thus without transactional connection, we hold the court erred in granting the State's motion to join the offenses for trial. We do not agree, however, with defendants' contention that joinder was prejudicial to defendants. Had the error not occurred, evidence of the offenses occurring on one date would clearly have been admissible, on the issue of intent, at trial on the offenses occurring on the other date. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). Because evidence of each offense would have been admissible at trial of the others, the record does not reveal that defendants were unjustly and prejudicially hindered or deprived of their

ability to defend the charges. *See Corbett*, 309 N.C. 382, 307 S.E. 2d 139.

[4] Defendant Meyer next claims the court erred in granting the State's motion for joinder of parties. Both defendants were indicted for the same offenses stemming from the same incidents. "Ordinarily, unless it is shown that irreparable prejudice will result therefrom, consolidation for trial rather than multiple individual trials is appropriate when two or more persons are indicted for the same criminal offense." *State v. Jones*, 280 N.C. 322, 333, 185 S.E. 2d 858, 865 (1972). Defendant Meyer claims that such prejudice occurred when defendant Herring was asked on cross-examination, in an attempt to impeach his credibility, whether or not he (Herring) had shot into an occupied vehicle on a separate occasion. Defendant Herring denied that he had, but volunteered that he had been charged with such an offense. Defendant Meyer has failed to show that the presentation of this evidence, offered solely to impeach defendant Herring's credibility, "irreparably prejudiced" his case, and we detect no abuse of the judge's discretion in joining the parties for trial. This assignment of error is overruled.

[5] Defendants next maintain the court erred in denying their motions for mistrial after the State was allowed to ask about prior acts of misconduct by Herring. One of the most common methods of impeachment is by eliciting on cross-examination specific incidents tending to reflect upon the witness's integrity. *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972). This assignment of error is overruled.

[6] Defendants next assert the court erred in admitting into evidence "a lead deposit of a slug" when such evidence had not been disclosed to defense counsel prior to trial, despite their request for discovery. G.S. 15A-910 provides for the regulation of discovery, and gives the court broad and flexible powers. One of the sanctions available to the court when one party fails to comply with discovery procedures, is set out in G.S. 15A-910(2), which provides that the court may "[g]rant a continuance or recess." In the instant case, when the court discovered the State had failed to disclose to defendants the existence of the slug, Judge Watts declared a fifteen minute recess to allow defense counsel to examine the slug. "The choice of sanction, if any, rests within the

discretion of the trial court and will not be disturbed on appeal absent a showing of abuse." *State v. Carter*, 55 N.C. App. 192, 196, 284 S.E. 2d 733, 736 (1981). We find no abuse of discretion in the court's choice of sanction.

[7] Defendants next insist the court erred when the following testimony, offered by a witness for the State, was admitted:

> Q. [A]nd when you say, "roll a queer" what, explain to the Jury what you meant by roll a queer.
>
> MR. YOUNT: Objection.
>
> MR. HALL: Objection.
>
> THE COURT: [O]ver ruled. If he knows.
>
> A. It's said to roll a queer is to try to entice one to follow you out of the city limits to a location, and there is to harrass [sic] him and beat him and take what ever he had.

Defendants contend the answer is an impermissible expression of an opinion. Assuming *arguendo* that this answer was an expression of an opinion by the witness, we can perceive no prejudice to defendants. "In order to obtain a new trial it is incumbent on a defendant to not only show error but also to show that the error was so prejudicial that without the error it is likely that a different result would have been reached." *State v. Loren*, 302 N.C. 607, 613, 276 S.E. 2d 365, 369 (1981). *See also* G.S. 15A-1443(a). Defendants have failed to meet this burden. The assignment of error is overruled.

[8] By his last assignment of error, defendant Herring contends the court erred in considering as an aggravating factor, pursuant to G.S. 15A-1340.4(a)(1)k, the fact that he had committed the offenses with which he was charged while on pre-trial release on another felony charge, and that such consideration violated his constitutional rights. Our Supreme Court expressly rejected this argument in *State v. Webb*, 309 N.C. 549, 308 S.E. 2d 252 (1983). This assignment of error is overruled.

No error.

Judge MARTIN concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

I dissent on the issue of joinder of offenses. I agree with the majority that joinder of offenses for trial in this case was error, but do not agree that such error was non-prejudicial. I vote for a new trial.

STATE OF NORTH CAROLINA v. NORMAN GILBERT SANMIGUEL AND TIMOTHY WILLIAM SCHWANZ

No. 843SC864

(Filed 16 April 1985)

1. **Criminal Law § 138— inducing others to participate—leading or dominating other participants—separate aggravating factors**

If evidence is presented showing that a defendant induced another or others to participate in the commission of an offense, and separate evidence is presented showing that the defendant also led or dominated another or others during the commission of the offense, the court may find two separate aggravating factors. G.S. 15A-1340.4(a)(1)(a).

2. **Criminal Law § 138— aggravating factors—inducing and leading others—failure to specify persons induced and led**

In finding the aggravating factors that defendants induced others to participate in the commission of an offense and led or dominated other participants during the offense, the court was not required to specify whom defendants induced and led in the commission of the offenses.

3. **Criminal Law § 138— aggravating factor—inducement of others—sufficient evidence**

The evidence supported the court's finding of the aggravating factor that defendants induced another or others to participate in the commission of a conspiracy to sell and deliver LSD and the sale and delivery of LSD where the preponderance of the evidence showed that one defendant brought about or caused another person's participation in the conspiracy and drug sale and that the second defendant brought about or caused the participation of two other persons. Moreover, evidence necessary to prove this aggravating factor was not necessary to prove an essential element of the conspiracy offense.

4. **Criminal Law § 138— aggravating factor—position of leadership or dominance—insufficient evidence**

The evidence was insufficient to support a finding of the aggravating factor that defendants occupied a position of leadership or dominance over another participant in the commission of a conspiracy to sell and deliver LSD and sale and delivery of LSD where it tended to show only that all offenders,

once involved, were co-participants in the commission of the offenses. Moreover, the only evidence from which the court could speculate that either defendant might have led or dominated one or more of the other participants is the same evidence necessary to support another aggravating factor found, viz, inducement of others, and it thus could not be used to support an additional factor in aggravation. G.S. 15A-1340.4(a)(1)(a).

APPEAL by defendants from *Winberry, Judge*. Judgments entered 8 December 1983 in Superior Court, PITT County. Heard in the Court of Appeals 13 March 1985.

Attorney General Edmisten, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Appellate Defender Adam Stein, by First Assistant Appellate Defender Malcolm Ray Hunter, Jr., and Assistant Appellate Defender Leland Q. Towns, for defendant appellant SanMiguel.

Hugh D. Cox, Jr., for defendant appellant Schwanz.

WHICHARD, Judge.

Defendants pled guilty to sale and delivery of lysergic acid diethylamide ("LSD") and conspiracy to sell and deliver LSD. They were sentenced to imprisonment in excess of the presumptive terms.

In sentencing defendant SanMiguel the court found as factors in aggravation of both offenses that "1. [t]he defendant induced another to participate in the commission of the offense," and "2. [t]he defendant occupied a position of leadership or dominance of another participant in the commission of the offense." SanMiguel appeals from the sentences pursuant to G.S. 15A-1444(a1).

In sentencing defendant Schwanz the court found as factors in aggravation of both offenses that "1. [t]he defendant induced others to participate in the commission of the offense," and "2. [t]he defendant occupied a position of leadership or dominance of other participants in the commission of the offense." Schwanz claims that he gave timely notice of appeal from the sentences; however, the record does not contain a copy of the notice of appeal or an appeal entry showing that appeal was taken orally. *See* N.C. R. App. P. 9(a)(3)(viii). In our discretion we treat the pur-

ported appeal as a petition for writ of certiorari and pass upon the merits of the questions raised. *See* N.C. R. App. P. 21.

Defendants contend the court erred by dividing the statutory aggravating factor in G.S. 15A-1340.4(a)(1)(a) into two parts and finding each part as a separate factor. G.S. 15A-1340.4(a)(1)(a) establishes, as one of the aggravating factors a court must consider in sentencing, that "[t]he defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants." The focus of this factor is on the role of a defendant in inducing others to participate in the commission of an offense or in leading or dominating other participants during the commission of an offense. *See State v. Lattimore*, 310 N.C. 295, 299, 311 S.E. 2d 876, 879 (1984). The conduct referred to is of two types—first, inducing others and, second, leading or dominating others. The words used are not generally synonymous. *See* Black's Law Dictionary 697 (rev. 5th ed. 1979) ("induce"); Webster's New Collegiate Dictionary 653 (1977) ("lead"); *see also* Black's Law Dictionary, *supra*, at 436 ("dominate"). Since G.S. 15A-1340.4(a)(1)(a) is stated in the disjunctive, proof of either type of conduct, by the preponderance of the evidence, is sufficient to support the finding of an aggravating factor. *See In Re Duckett*, 271 N.C. 430, 437, 156 S.E. 2d 838, 844 (1967) ("the disjunctive . . . 'or' is used to indicate a clear alternative"); *Davis v. Granite Corporation*, 259 N.C. 672, 675, 131 S.E. 2d 335, 337 (1963); *see also* G.S. 15A-1340.4(a).

[1] Defendants argue that even if the preponderance of the evidence shows both types of conduct, such evidence only supports a single aggravating factor. We disagree. One of the primary purposes of sentencing is to impose punishment commensurate with the injury caused, taking into account the factors which diminish or increase the offender's culpability. *See* G.S. 15A-1340.3. Both inducing others to commit an offense and leading others during the commission of an offense constitute conduct which increases a defendant's culpability. Since proof of either type of conduct, by the preponderance of the evidence, is sufficient to support the finding of an aggravating factor, proof of both types of conduct should suffice to support the finding of two aggravating factors so as to reflect the defendant's greater culpability. However, since the same evidence may not be used to prove more than one aggravating factor, two aggravating factors

may be found only if there is separate evidence supporting each. *See* G.S. 1340.4(a)(1).

We conclude that if evidence is presented showing that a defendant induced another or others to participate in the commission of an offense, and separate evidence is presented showing that the defendant also led or dominated another or others during the commission of the offense, the court may find two separate aggravating factors. We take judicial notice that the "Felony Judgment Findings Of Factors In Aggravation And Mitigation Of Punishment" form prepared by the Administrative Office of the Courts divides G.S. 15A-1340.4(a)(1)(a) into two aggravating factors, and we find this division proper. *See State v. Smith*, 73 N.C. App. 637, 328 S.E. 2d 326 (1985).

[2] Defendants contend the court erred in failing to specify whom they induced and led in the commission of the offenses. While such specification would aid appellate review, it is not required. *See State v. Abee*, 60 N.C. App. 99, 103, 298 S.E. 2d 184, 186 (1982), *modified and affirmed*, 308 N.C. 379, 302 S.E. 2d 230 (1983). All that is necessary is that the record support the factors found by a preponderance of the evidence. *Id.*

Defendants contend the evidence presented at the sentencing hearing was not sufficient to support the aggravating factors found. The evidence tends to show the following:

On 4 August 1983 S.B.I. Agent R. E. Jackson purchased LSD from defendant Schwanz and informed Schwanz that he and his people would like to purchase a larger quantity of the drug. Schwanz replied, "No problem." Subsequently Jackson told Schwanz he would like to buy some cocaine and possibly 10,000 dosage units of LSD from him. Schwanz said he would have to contact his man in Virginia Beach and would get back in touch with Jackson but that he felt confident he could deliver five to ten thousand dosage units of LSD. The next day Schwanz told Jackson he could get the LSD and that his man from Virginia Beach would be coming to Greenville with it to meet him. Jackson and Schwanz arranged to meet on 31 August 1983 at the Carolina East Mall in Greenville for the transaction.

On 31 August 1983 Schwanz and defendant SanMiguel drove up beside Jackson at the Carolina East Mall. Schwanz got into

Jackson's car and told him they had the LSD but not with them. He told Jackson that SanMiguel was with him because he was the man with the LSD. He indicated that SanMiguel had been late in delivering the LSD because he had to transact another deal on the way down. Schwanz and SanMiguel then left the area. Soon after, Schwanz returned alone and sold the LSD to Jackson. Subsequently Schwanz, SanMiguel, and three others involved in the transaction—Paul Andrew Thompson, Ronald Michael Jones, and John Joseph Barr—were arrested.

Schwanz testified that he had been selling drugs for approximately three or four months prior to his arrest. Although he sold drugs other than LSD, he only obtained LSD from SanMiguel. His relationship with SanMiguel was friendly and businesslike. Whenever Schwanz needed LSD to sell, he figured out the quantity and the costs involved, initiated the contact with SanMiguel, and drove to Virginia Beach to pick up the drugs. He paid SanMiguel as he instructed by telegraphing money to a woman who was either SanMiguel's girlfriend or wife. Schwanz asked SanMiguel to drive to Greenville with the LSD for the 31 August 1983 transaction so that Schwanz, who lived in Jacksonville, would not have to drive to Virginia Beach and back in one day. SanMiguel agreed to accommodate him. Schwanz testified that he had asked co-defendants Jones and Thompson, who were fellow Marines, to accompany him to Greenville for protection.

Co-defendant Barr, who worked for SanMiguel, drove SanMiguel to Greenville. SanMiguel either asked Barr to drive him to Greenville or Barr volunteered to drive him down because he had a brother in Goldsboro. In exchange SanMiguel agreed to pay for gas and beer. Barr was not aware that a drug transaction was planned until the trip had begun. After he learned this he proceeded nevertheless.

[3] We first consider whether the evidence supports the finding that defendants induced another or others to participate in the commission of the offenses. In the absence of a contrary indication, it is presumed that the legislature intended that a term used in a statute be given its natural and ordinary meaning. *Transportation Service v. County of Robeson*, 283 N.C. 494, 500, 196 S.E. 2d 770, 774 (1973); *In re Trucking Co.*, 281 N.C. 242, 252, 188 S.E. 2d 452, 458 (1972). The court may properly look to dictionaries for

a definition. *See State v. Ludlum*, 303 N.C. 666, 671, 281 S.E. 2d 159, 162 (1981). Induce is defined by Black's Law Dictionary, *supra*, at 697, as "[t]o bring on or about, to affect, cause, to influence to an act or course of conduct, lead by persuasion or reasoning, incite by motives, prevail on." Webster's New Collegiate Dictionary, *supra*, at 587, similarly defines induce as "to lead on: move by persuasion or influence," to "bring about by influence," and to "effect, cause."

We believe the preponderance of the evidence shows that SanMiguel brought about or caused co-defendant Barr's involvement in the conspiracy and drug sale and that Schwanz brought about or caused Thompson's and Jones' participation. We thus find that the evidence supports the finding as factors in aggravation that SanMiguel induced another and Schwanz induced others to participate in the commission of the offenses.

Defendants contend that evidence necessary to prove this aggravating factor is also necessary to prove an essential element of the conspiracy offense. A conspiracy is an agreement to do an unlawful thing or to do a lawful thing in an unlawful way by unlawful means. *See State v. Looney*, 294 N.C. 1, 11, 240 S.E. 2d 612, 617-18 (1978). Because inducement to enter an agreement necessarily precedes the agreement itself, and only the agreement itself is an element of the conspiracy offense, we find no merit to this contention.

[4] We do not believe, however, that the evidence shows that either SanMiguel or Schwanz occupied a position of leadership or dominance over any of the participants in the commission of the offenses. The evidence shows that SanMiguel and Schwanz acted as co-participants in the drug transaction; it does not show that either directed, led, or dominated the other. Nor is there evidence that either of them led or dominated any of the other co-defendants. The aggravating factors set forth in G.S. 15A-1340.4(a)(1)(a) cannot be proven by conjecture. *See State v. Gore*, 68 N.C. App. 305, 307, 314 S.E. 2d 300, 301 (1984). Evidence presented at the sentencing hearing does not show or in any way tend to show anything other than that the offenders, once involved, were co-participants in the commission of the offenses. To conclude that these defendants led or dominated the others in the commission of the offenses thus requires pure conjecture, which is imper-

missible. *Gore, supra.* Moreover, the only evidence from which the court could speculate that either defendant might have led or dominated one or more of the other participants is the same evidence necessary to support the other aggravating factor found, viz, inducement of others; thus, it cannot be used to support an additional factor in aggravation. *See* G.S. 15A-1340.4(a)(1).

We thus hold that the court erred in finding as a factor in aggravation that each defendant occupied a position of leadership or dominance of another participant or other participants in the commission of the offenses. The case therefore must be remanded for a new sentencing hearing. *See State v. Ahearn*, 307 N.C. 584, 602, 300 S.E. 2d 689, 701 (1983).

Remanded for resentencing.

Judges JOHNSON and EAGLES concur.

J. EARL GRIFFIN, GEORGE V. GRIFFIN, ELIZABETH GRIFFIN PARKER, ALMA GRIFFIN BROOKS, FAE GRIFFIN PURSER, FRANCES GRIFFIN HELMS, MADGE CHANEY JARVIS, WANDA CHANEY HOLBROOK, HUBERT C. CHANEY, JR., MYRTLE C. MYERS AND BARBARA GRIFFIN ELLIS v. BEULAH R. BAUCOM, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF OTHA L. GRIFFIN, AND EUNICE R. GRIFFIN

Nos. 8420SC736 and 8420SC962

(Filed 16 April 1985)

1. Wills § 8— maliciously inducing revocation of a will—summary judgment for defendants improper

The trial judge should not have entered summary judgment for defendants in an action for maliciously inducing the revocation of a will by undue influence where Mr. Griffin, who died intestate, was diagnosed as having cardiovascular disease and senility; he was old, feeble, and on occasion had failed to recognize close friends; defendants had both expressed their dissatisfaction with the will along with the knowledge that revocation of the will would result in Mr. Griffin's estate passing entirely to Mrs. Griffin, a result defendants preferred to the existing will; and the will was destroyed in the presence of Mrs. Griffin, with Mrs. Griffin handing her husband scissors with which to destroy the will and requesting from the attorney all existing copies of the will and notes made in regard to the will's creation. G.S. 1A-1, Rule 56(c).

2. Wills § 8— tortious interference with a will—will destroyed—initial proceeding in probate not required

Plaintiffs were not required to seek to prove a revoked will in probate before pursuing a tortious interference claim where there was evidence indicating that inadequate relief was available in probate in that defendants destroyed all existing copies of the will and notes made in regard to the will's creation.

3. Wills § 8; Rules of Civil Procedure § 15.2— amendment of pleadings to conform to evidence denied—failure to state grounds upon which relief could be granted

In an action for maliciously inducing the revocation of a will by undue influence, the court properly denied plaintiffs' Rule 15(b) motion to amend the complaint to conform with the evidence and allege that one defendant had destroyed written evidence of the contents of the will and that the deceased lacked the testamentary capacity to revoke the will. Spoilation of notes pertaining to the will is not a destruction of the will itself and is not an actionable wrong, and proof of lack of testamentary capacity to revoke the will does not state a claim upon which relief may be granted in a tort action, but represents an attempt to prove the will, a remedy properly obtained through probate proceedings.

APPEAL by plaintiffs from *Wood, William Z., Judge*. Judgment entered 24 May 1984 in Superior Court, UNION County. Appeal also by plaintiffs from *Helms, Judge*. Order entered 23 July 1984 in Superior Court, UNION County. Heard in the Court of Appeals 7 March 1985.

In this civil action, plaintiffs seek, in the alternative, a conveyance to them of certain real property which they contend they would have received under a 1973 will of Otha L. Griffin, deceased, or a money judgment in the amount equal in value to that property. They also seek a judgment impressing a constructive trust for plaintiffs' benefit on the realty and punitive damages. Plaintiffs, who are brothers, sisters, nephews and nieces of Otha L. Griffin, deceased, allege in their complaint that the deceased, who died intestate in 1983, did not possess sufficient testamentary capacity to revoke his will on 18 August 1976. They further allege that they were beneficiaries under Mr. Griffin's will, and that the defendants, the wife and sister-in-law of the deceased, exercised undue influence upon the deceased in procuring the revocation of his will and that they intentionally destroyed all known written evidence regarding the contents of the will with the intent to deprive plaintiffs of their expectancy thereunder.

Defendants answered, denying the material allegations of the complaint. Defendants' subsequent motion for summary judgment was granted. Immediately prior to the filing of the notice of appeal from the entry of summary judgment against them (Case No. 8420SC736), plaintiffs moved to amend their complaint to conform to the evidence pursuant to Rule 15(b) of the North Carolina Rules of Civil Procedure. The motion was denied and plaintiffs gave notice of appeal (Case No. 8420SC962).

Berry, Hogewood, Edwards & Freeman, P.A., by Mark B. Edwards and Dean Gibson, for plaintiff appellants.

Griffin, Caldwell, Helder & Steelman, P.A., by C. Frank Griffin and Thomas J. Caldwell, for defendant appellees.

MARTIN, Judge.

Plaintiffs assign as error on appeal the entry of summary judgment against them and the denial of their motion to amend their complaint to conform to the evidence. We agree that summary judgment for defendants was improvidently granted, but uphold the order denying plaintiffs' motion to amend their complaint.

[1] We first address plaintiffs' contention that summary judgment was improperly allowed. Summary judgment should be rendered upon motion "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." G.S. 1A-1, Rule 56(c). In ruling on a motion for summary judgment, the trial judge does not decide issues of fact but merely determines whether a genuine issue of fact exists. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980). Plaintiffs contend that through their depositions and affidavits of record they came forward with evidence from which a jury could find that (1) Mr. Griffin lacked the testamentary capacity to revoke his will, (2) defendants exercised undue influence over Mr. Griffin to engender such revocation, and (3) defendants intentionally destroyed all known written evidence regarding the contents of the will with the intent to deprive plaintiffs of their expectancy thereunder.

Plaintiffs' forecast of the evidence tended to show that in 1973 Otha L. Griffin, through an attorney, prepared a will which devised one-half of his estate to defendant Eunice Griffin and the remaining half, including the Griffin homeplace, to the plaintiffs. Eunice Griffin expressed dissatisfaction with the will, stating to Mr. Griffin's sister-in-law that "she wanted her husband to leave everything to her and that she could not get him to do this."

In 1975 Mr. Griffin entered a hospital for heart treatment and shortly thereafter was transferred to a nursing home facility. While there, Mr. Griffin took therapeutic drugs and sleeping aids, spent a large amount of time in bed, and was described by one doctor as being both feeble and senile, unable on occasion of recognizing friends.

Around this same time, defendant Beulah Baucom, sister of Eunice Griffin and legal secretary to the law firm which prepared the will, expressed her dissatisfaction with the will to an attorney in the firm since, in her opinion, the will was unfair to her sister. In 1976 she advised the attorney that Mr. Griffin wanted to see him at the nursing home to discuss real estate matters. When the attorney arrived at the nursing home, Eunice Griffin was in her husband's room. Mr. Griffin inquired as to whether he could do with his property what he wished. Upon being advised by his attorney that he could, he then asked for the will; Mrs. Griffin handed him a pair of scissors, and he proceeded to cut the will into several pieces. Mrs. Griffin then asked the attorney for the copies of the will and the notes regarding its preparation which he handed to her. Mr. Griffin gave no reasons for his destruction of the will.

The foregoing evidence from plaintiffs' depositions and affidavits reveals that there is a genuine issue of material fact as to whether defendants exerted undue influence over the deceased with the tortious intent to deprive the plaintiffs of their expectancy under the will. North Carolina recognizes the existence of the tort of malicious and wrongful interference with the making of a will. *See Bohannon v. Trust Co.*, 210 N.C. 679, 188 S.E. 390 (1936). "It is true that such a cause of action may be difficult to prove —but that does not touch the existence of the cause of action, but only its establishment." *Id.* at 685, 188 S.E. at 394. If one maliciously interferes with the making of a will, or maliciously in-

duces one by means of undue influence to revoke a will, to the injury of another, the party injured can maintain an action against the wrongdoer. Undue influence is defined as "a fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result." *In re Estate of Loftin and Loftin v. Loftin*, 285 N.C. 717, 722, 208 S.E. 2d 670, 674-75 (1974). There are four general elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence; and (4) a result indicating undue influence. *See* 25 Am. Jur. 2d *Duress and Undue Influence* § 35, p. 397; *see also Curl v. Key*, 64 N.C. App. 139, 306 S.E. 2d 818 (1983), *rev'd on other grounds*, 311 N.C. 259, 316 S.E. 2d 272 (1984). Among the factors taken into consideration in determining the existence of undue influence are the age and physical and mental condition of the one alleged to have been influenced, whether he had independent or disinterested advice in the transaction, distress of the person alleged to have been influenced, his predisposition to make the transfer in question, the extent of the transfer in relation to his whole worth, active persuasions by the other party, and the relationship of the parties. *See* 25 Am. Jur. 2d *Duress and Undue Influence, supra.*

Applying this standard to the case under review, we find that plaintiffs have produced sufficient facts to withstand defendants' motion for summary judgment. The deposition of Mr. Griffin's treating physician and affidavit of his notes tend to show that Mr. Griffin was susceptible to undue influence. Mr. Griffin was diagnosed as having cardiovascular disease and senility; he was old, feeble, and on occasion had failed to recognize close friends. Defendants, on the other hand, were under no physical or mental disability and both had expressed their dissatisfaction with the will along with the knowledge that the revocation of the will would result in Mr. Griffin's estate passing entirely to Mrs. Griffin, a result the defendants preferred to the existing will. Additionally, the result of the will's destruction in the presence of Mrs. Griffin, with Mrs. Griffin handing her husband scissors with which to destroy the will and requesting from the attorney all existing copies of the will and notes made in regard to the will's creation, was indicative of undue influence. Plaintiffs produced facts sufficiently supportive of the exertion of undue influence by

the defendants over the deceased with the intent to deprive plaintiffs of their expectancy under the will, mandating the determination that a genuine issue of fact existed for the jury to decide.

[2] Defendants argue that since plaintiffs ask for the property which they allege they would have received under the will and for a constructive trust, plaintiffs are seeking to prove the will; therefore, plaintiffs were obligated to proceed by way of *caveat* in a probate proceeding. However, plaintiffs also pursue a tort remedy; their complaint seeks money damages "in an amount equal in value to that certain property known as the Homeplace and other real property which the plaintiffs would have received under the deceased's 1973 will." While we agree that where a will has been submitted for probate, a plaintiff must avail himself of the statutory remedy of a will contest to prove or set aside the instrument, *see Johnson v. Stevenson*, 269 N.C. 200, 152 S.E. 2d 214 (1967), where no will has been submitted, as in the case *sub judice*, plaintiff may pursue a tort remedy and is not limited to the remedy of a probate proceeding. *See Bohannon v. Trust Co., supra.* Defendants cite cases from other jurisdictions as recognizing the doctrine that an attempt to pursue a remedy in probate proceedings or a showing that a remedy is unavailable or inadequate through probate proceedings is a prerequisite to maintaining an action for damages for interference with an expected inheritance. *See* Annot., 22 A.L.R. 4th 1229, 1235 (1983). In this case, in addition to evidence of undue influence exercised by the defendants, there was evidence that the defendants destroyed all existing copies of the will and notes made in regard to the will's creation, evidence indicative that the relief available in a probate proceeding was inadequate or even nonexistent. Thus, we hold that in the case under review where no will was submitted for probate and where facts exist indicating that inadequate relief was available in a probate proceeding, plaintiffs were not required to first seek to prove the revoked will in a probate proceeding before pursuing their tortious interference claim.

[3] Plaintiffs also contend the trial court erred in denying plaintiffs' motion to amend the complaint to conform to the evidence pursuant to Rule 15(b) of the North Carolina Rules of Civil Procedure. Plaintiffs' amended complaint alleges (1) that defendant Eunice Griffin destroyed written evidence of the contents of the will, and (2) that at the time he destroyed the will, the deceased

lacked the testamentary capacity to revoke the will. This amended complaint fails to state a claim upon which relief may be granted. There is no evidence of fraudulent spoilation of Mr. Griffin's will; spoilation of notes pertaining to the will is not a destruction of the will itself and is not an actionable wrong. Likewise, seeking to prove Mr. Griffin's lack of testamentary capacity to revoke his will does not state a claim upon which relief may be granted in the tort action, but rather represents an attempt to prove the will, a remedy properly obtained through probate proceedings. Lack of testamentary capacity is only relevant as it may show Mr. Griffin's subjectivity to undue influence in plaintiffs' action for tortious interference with his will. Because the amended complaint fails to state a claim upon which relief may be granted, the trial court did not abuse its discretion in denying plaintiffs' Rule 15(b) motion.

In conclusion, we hold that plaintiffs' Rule 15(b) motion was properly denied, but that because a genuine issue of material fact exists in regard to undue influence perpetrated upon the deceased, summary judgment was not appropriate. Summary judgment for defendants is thus vacated and the cause remanded to Superior Court for further proceedings.

Case No. 8420SC962—affirmed.

Case No. 8420SC736—vacated and remanded.

Judges WEBB and PHILLIPS concur.

JERRY WAYNE SURRATT AND LINDA S. SURRATT v. GRAIN DEALERS MUTUAL INSURANCE COMPANY

No. 8422SC719

(Filed 16 April 1985)

1. Insurance § 136— loss of dwelling by fire—coinsurance clause not effective

In an action to recover under a homeowner's insurance policy for loss by fire, the court did not err in awarding plaintiffs the full amount of the policy for the loss of their dwelling. Defendant was not entitled to any reduction of its liability pursuant to policy provisions that plaintiffs could collect the full

cost of repair or replacement of their dwelling only if they had insured the dwelling for at least 80% of its full replacement cost because the replacement cost provisions were essentially coinsurance provisions as defined in G.S. 58-30.1 and the words "coinsurance contract" were not printed or stamped on the policy. Moreover, the replacement cost provisions were not relevant to the determination of the amount which plaintiffs were entitled to recover because plaintiffs elected to recover the actual cash value of the dwelling. G.S. 58-158.

2. Insurance § 136— loss of home by fire—finding sufficient for award of full policy amount

In an action in which the court awarded plaintiffs the full policy amount under a homeowner's policy for loss of their dwelling by fire, the court's findings of fact were sufficient to support the conclusion that plaintiffs were entitled to recover $30,000, although the words "actual cash value" were not used, where the court found that immediately before the fire plaintiffs' dwelling was at least fifty years old; that it was in moderate condition; that in the opinion of the male plaintiff the dwelling was worth approximately $30,000 before the fire and approximately $2,000 after the fire; that an expert in the home construction business testified that he believed the fair market value of the dwelling prior to the fire was between $30,000 and $35,000; that the dwelling could not be replaced because of its style, its manner and method of construction, the materials used, current building methods, and the requirements of electrical and building codes; and that any attempt to repair the dwelling would be impractical.

APPEAL by defendant from *Wood, William Z., Sr., Judge.* Judgment entered 28 March 1984 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 6 March 1985.

Plaintiffs seek to recover proceeds allegedly due under a homeowner's insurance policy issued by defendant for loss by fire of their home and personal property. The face amount of the policy was $30,000 for loss to the dwelling, $15,000 for personal property loss, and $6,000 for living expenses. Plaintiffs sought to recover the full amount of the policy. Judgment was entered for plaintiffs in the amount of $30,000 for loss of their dwelling. Plaintiffs also were awarded amounts within the policy limits for their living expenses and loss of personal property, and interest at the legal rate until the judgment is paid in full. Defendant appeals.

Wilson, Biesecker, Tripp and Sink, by Joe E. Biesecker, for plaintiff appellees.

George C. Collie and Charles M. Welling for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court erred in awarding plaintiffs the full amount of the policy for loss of their dwelling. First, defendant argues the court erred in failing to conclude that plaintiffs were underinsured as defined by the replacement cost provisions of the policy and that therefore defendant was only liable for the cost to repair the dwelling minus the amount plaintiffs were underinsured. Under the policy issued by defendant, plaintiffs were insured to the extent of the actual cash value of the property covered therein at the time of loss in an amount not exceeding the limit of liability specified on the face of the policy. In addition, the policy contained the following replacement cost provisions:

> 1. Replacement Cost—Coverages A and B:
>
> This condition shall be applicable only to a building structure covered hereunder excluding . . . .
>
> a. If at the time of loss the whole amount of insurance applicable to said building structure for the peril causing the loss is 80% or more of the full replacement cost of such building structure, the coverage of this policy applicable to such building structure is extended to include the full cost of repair or replacement (without deduction for depreciation).
>
> b. If at the time of loss the whole amount of insurance applicable to said building structure for the peril causing the loss is less than 80% of the full replacement cost of such building structure, this Company's liability for loss under this policy shall not exceed the larger of the following amounts (1) or (2):
>
> (1) the actual cash value of that part of the building structure damaged or destroyed; or
>
> (2) that proportion of the full cost of repair or replacement without deduction for depreciation of that part of the building structure damaged or destroyed, which the whole amount of insurance applicable to said building structure for the peril causing the loss bears to 80% of the full replacement cost of such building structure.

c. This Company's liability for loss under this policy shall not exceed the smallest of the following amounts (1), (2), or (3):

(1) the limit of liability of this policy applicable to the damaged or destroyed building structure;

(2) the replacement cost of the building structure or any part thereof identical with such building structure on the same premises and intended for the same occupancy and use; or

(3) the amount actually and necessarily expended in repairing or replacing said building structure or any part thereof intended for the same occupancy and use.

. . . .

f. The Named Insured may elect to disregard this condition in making claim hereunder, but such election shall not prejudice the Named Insured's right to make further claim within 180 days after loss for any additional liability brought about by this policy condition.

G.S. 58-158 provides that fire insurance policies issued on property within this State may contain replacement cost provisions. That statute provides, in relevant part:

[A]ny fire insurance company authorized to transact business in this State may, by appropriate riders or endorsements or otherwise, provide insurance indemnifying the insured for the difference between the actual value of the insured property at the time any loss or damage occurs, and the amount actually expended to repair, rebuild or replace on the premises described in the policy, or some other location within the State . . . with new materials of like size, kind and quality, such property as has been damaged or destroyed by fire or other perils insured against.

G.S. 58-30.1, however, specifically prohibits the inclusion of coinsurance clauses in insurance policies covering property in this State. That statute provides, in part:

No insurance company or agent licensed to do business in this State may issue any policy or contract of insurance

> covering property in this State which shall contain any clause or provision requiring the insured to take or maintain a larger amount of insurance than that expressed in such policy, *nor in any way provide that the insured shall be liable as a coinsurer with the company issuing the policy for any part of the loss or damage to the property described in such policy*, and any such clause or provision shall be null and void, and of no effect: Provided, the coinsurance clause or provision may be written in or attached to a policy or policies issued when there is printed or stamped on the filing face of such policy or on the form containing such clause the words "coinsurance contract," and the Commissioner may, in his discretion, determine the location of the words "coinsurance contract" and the size of the type to be used. (Emphasis supplied.)

Coinsurance has been defined as a relative division of risk between the insurer and the insured, dependent upon the relative amount of the policy and the actual value of the property insured. Black's Law Dictionary 236 (rev. 5th ed. 1979); 44 Am. Jur. 2d *Insurance* Sec. 1510, at 505 (1982). "Coinsurance clauses in substance require the insured to maintain insurance on the property covered by the policy in a certain amount, and stipulate that upon his failure to do so, the insured shall be a coinsurer and bear his proportionate part of the loss on the deficit." 44 Am. Jur. 2d, *supra*, at 505-06. For example,

> [i]nsurance policies that protect against hazards such as fire or water damage often specify that the owner of the property may not collect the full amount of insurance for a loss unless the insurance policy covers at least some specified percentage, usually about 80 percent, of the replacement cost of the property.

Black's Law Dictionary, *supra*. Coinsurance clauses are designed to induce the insured to carry full, or nearly full coverage, *id.*, and are generally held enforceable unless they are specifically prohibited by statute in the jurisdiction. 44 Am. Jur. 2d, *supra*, at 506.

Under the replacement cost provisions of the policy here, plaintiffs could only collect the full cost of repair or replacement of their dwelling if they had insured the dwelling for at least 80%

of its full replacement cost. If the insurance maintained on the dwelling was for less than 80% of its full replacement cost, defendant admits that under the policy plaintiffs become coinsurers or self-insurers for the difference between the amount of coverage and 80% of the full replacement cost. Thus, the policy's replacement cost provisions are essentially coinsurance provisions as defined in G.S. 58-30.1. The words "coinsurance contract" are not printed or stamped on the policy; therefore, the coinsurance provisions are not allowable under the proviso in G.S. 58-30.1. We conclude that to the extent the policy's replacement cost provisions provide for coinsurance they are null and void, and that defendant was not entitled to any reduction of its liability pursuant to those provisions in the event plaintiffs were underinsured. *See* G.S. 58-30.1.

Moreover, plaintiffs did not seek to recover under the policy's replacement cost provisions but instead elected to recover the actual cash value of the dwelling. Thus, the replacement cost provisions were not relevant to the determination of the amount which plaintiffs were entitled to recover. *See Edmund v. Insurance Co.*, 42 N.C. App. 237, 239, 256 S.E. 2d 268, 269 (1979).

[2] Second, defendant contends the court's findings of fact are not sufficient to support the conclusion that plaintiffs are entitled to recover the $30,000 policy limit for loss of their dwelling because there are no findings of fact as to the dwelling's actual cash value. The term "actual cash value" means "[t]he fair or reasonable cash price for which the property could be sold in the market in the ordinary course of business, and not at forced sale," or "[w]hat property is worth in money, allowing for depreciation." Black's Law Dictionary, *supra*, at 33. The terms "actual cash value," "fair market value," and "market value" are generally synonymous. *Id.; see, e.g., Insurance Co. v. Lumber Co.*, 186 N.C. 269, 271, 119 S.E. 362, 364 (1923); *Grubbs v. Insurance Co.*, 108 N.C. 472, 480, 13 S.E. 236, 238 (1891); *Jefferson Ins. Co. of N.Y. v. Superior Court*, 90 Cal. Rptr. 608, 610, 475 P. 2d 880, 882 (1970). The proper test of actual cash value in a particular case depends upon the nature of the property insured, its condition, and other circumstances existing at the time of the loss. 44 Am. Jur. 2d *Insurance* Sec. 1504, at 498; Annot., 61 A.L.R. 2d 711, 715 (1958). The tests generally used to determine actual cash value are the

market value of the property, the reproduction or replacement cost of the property, and the broad evidence rule. 44 Am. Jur. 2d, *supra*, Sec. 1504, at 498. Under the broad evidence rule, any evidence logically tending to the formation of a correct estimate of the value of the insured property at the time of the loss, including evidence of the fair market value and the replacement cost of the property, may be considered. 44 Am. Jur. 2d, *supra*, Sec. 1507, at 502-03; *see also, Group Von Graupen v. Employers Mutual Fire Ins. Co.*, 259 F. Supp. 934, 936 (1966).

The court here found: that immediately before the fire plaintiffs' dwelling was approximately fifty years of age or older; that it might have been constructed in 1920 or earlier; that it was in moderate condition; that in the opinion of the male plaintiff the dwelling was worth approximately $30,000 before the fire and approximately $2,000 after the fire; that an expert in the house construction business testified that in his opinion the fair market value of the dwelling prior to the fire was $35,000; and that a second expert in the house construction business testified that he believed the fair market value of the dwelling prior to the fire was between $30,000 and $35,000. The court found that the dwelling could not be replaced because of its style, its manner and method of construction, the materials used in constructing it, current building methods, and the requirements of electrical and building codes. In addition, the court made findings as to the cost of repairing the dwelling but found that the dwelling was a total loss and that any attempt to repair it would be impractical. Based on these findings, the court concluded that the dwelling was a total loss and that plaintiffs were entitled to recover the $30,000 limit of the policy.

Although the court did not use the words "actual cash value" in its findings, it did make findings of fact, supported by competent evidence, as to the actual cash value of the dwelling. The findings show that plaintiffs' dwelling had an actual cash value of $30,000 or more and they thus support the court's conclusion that plaintiffs are entitled to recover the full amount of the policy for loss of their dwelling. Accordingly, we affirm the judgment of the trial court.

Affirmed.

Judges WELLS and BECTON concur.

STATE OF NORTH CAROLINA v. JIMMIE RICHARD JENKINS

No. 846SC948

(Filed 16 April 1985)

1. Narcotics § 4.3— manufacturing marijuana—sufficiency of evidence

The State's evidence placed defendant in such close juxtaposition to growing marijuana as to justify a jury finding that defendant was engaged in its manufacture where it tended to show that six patches of marijuana, some visible from defendant's mobile home, were growing in the environs of defendant's home; defendant acknowledged the presence of "a lot of marijuana" around his home; paths led from defendant's home to these fields; defendant acknowledged being in one of the marijuana patches; a shoeprint similar to the print of a shoe defendant was wearing was found in that patch, which had been watered; defendant's shoes were muddy although the weather had been dry; defendant had a water tank on his truck underneath a shed behind his home; manure had been spread on the fields; a bucket of manure was found beside defendant's home; shavings of the same material as five-gallon buckets of marijuana plants were found in the shed behind defendant's home; and defendant stated that he was custodian of the property and worked there.

2. Criminal Law § 42.6— marijuana plant—failure to show chain of custody—harmless error

The admission of a marijuana plant into evidence when a chain of custody had not been adequately established was harmless error where other samples of marijuana taken from the same fields were analyzed and admitted into evidence after a proper chain of custody had been established.

3. Narcotics § 3.3— acceptance of chemist as expert in marijuana identification

The trial court did not err in accepting an S.B.I. chemist as an expert in marijuana identification where the chemist testified that her duties with the S.B.I. consisted of analyzing substances for the presence of controlled substances, including marijuana, that she had been so employed for almost two years, and that she had had special training in the analysis of controlled substances.

4. Narcotics § 1.3— manufacturing and possession of marijuana—neither lesser offense of the other

Manufacturing marijuana and possession of marijuana are separate and distinct statutory offenses, neither of which is a lesser-included offense of the other.

State v. Jenkins

APPEAL by defendant from *Watts, Judge*. Judgment entered 16 March 1984 in Superior Court, HALIFAX County. Heard in the Court of Appeals 15 March 1985.

Defendant was tried and convicted on an indictment charging him with manufacturing marijuana. The State presented evidence tending to show the following:

On 8 September 1983, the State Bureau of Investigation, while conducting an aerial search for marijuana fields, found several fields of marijuana near a mobile home in Halifax County. Deputies from the Halifax County Sheriff's Department were dispatched to investigate these fields. The first deputy on the scene, Palmer Aycock, drove into the yard of the mobile home, saw defendant in the backyard, stopped and told defendant that he was looking for fields of marijuana. Defendant told him that there was "a lot of marijuana" behind his mobile home and wanted to know if he was under arrest. With defendant's permission, Deputy Aycock, following the instructions of a pilot flying overhead, searched the area behind defendant's house.

In the backyard behind the defendant's mobile home stood a shed. Behind the shed was a garden. About 25 yards below the garden, Deputy Aycock found, in a pit, 42 five gallon buckets containing plants which were subsequently identified as marijuana plants. Twenty yards to the east of the pit, Deputy Aycock found approximately one hundred plants growing in raised, bedded rows. The soil in this patch was wet, although the weather had been dry and no rain had fallen for approximately one month and a half. A path from defendant's mobile home ran to this patch. Deputy Aycock returned towards the mobile home and found a third patch of marijuana, consisting of five plants, growing 125 steps from defendant's mobile home. About this time, other officers arrived. They went across the backyard eastward and followed a path which led to a fourth patch of marijuana, which too was in bedded rows. A path led from this field to a fifth field, from which a path led to a sixth field of marijuana. Altogether, 621 marijuana plants were seized by the deputies. Some of the fields were visible from defendant's mobile home.

Manure had been spread on some of the patches. A five gallon bucket containing manure was found beside the well on the west side of defendant's home. In the second patch, where the soil

was wet, a shoeprint had been left in the mud. This shoeprint had diamond shaped designs on the sole. At the request of the officers, defendant showed them the bottom of his shoes, which had diamond shaped designs on the soles. The tops of defendant's shoes were also muddy. Defendant initially denied the footprint was his or ever being in the field, but he later told the officer that he could have been in the field, but that he did not know what marijuana looked like.

Underneath the shed behind defendant's mobile home, the officers found a pickup truck with a large water tank, with two water hoses connected to it in the back. Defendant told the officers that the truck was his and that he had been using it to water the garden, which was behind the shed. However, beside the shed was a water spigot to which a 30 to 40 foot long garden hose was attached. The garden was approximately 20 feet behind the shed. The garden soil was dry.

Inside the shed officers found small plastic shavings, five gallon containers similar to the ones in which the marijuana plants were found and a drill. Holes had been bored in the bottoms and sides of the five gallon containers containing marijuana plants. Laboratory tests conducted on the shavings and containers in which the plants were found revealed that they were composed of the same material, polyethylene, and that the shavings could have come from the five gallon plant containers.

Defendant told the officers that the property was owned by a third person, but that he was custodian of the property and worked there.

Defendant presented no evidence.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Fred R. Gamin and Associate Attorney Victor H. E. Morgan, Jr., for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defenders Robin E. Hudson and Geoffrey C. Mangum, for defendant appellant.

JOHNSON, Judge.

Defendant first contends that the court erred in denying his motion to dismiss at the close of the evidence.

Upon a motion to dismiss, all of the evidence favorable to the State, whether competent or incompetent, must be considered and taken as true, giving the State every inference of fact which may be deduced from the evidence. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). The court is not required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a motion to dismiss. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). If more than a scintilla of evidence is presented to support the indictment, the case must be submitted to the jury. *State v. Agnew*, 294 N.C. 382, 241 S.E. 2d 684, *cert. denied*, 439 U.S. 830, 58 L.Ed. 2d 124, 99 S.Ct. 107 (1978). The rule is the same whether the evidence is circumstantial, direct or a combination of both. *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956).

G.S. 90-95(a)(1) makes it a crime for one to manufacture a controlled substance. Marijuana is a controlled substance. G.S. 90-94. The manufacture of a controlled substance consists of its "production, preparation, propagation, compounding, conversion, or processing . . . by any means." G.S. 90-87(15). The evidence in the present case clearly showed marijuana was being produced. The question is whether the State presented sufficient evidence to show defendant was involved in its production.

[1] The evidence in the present case shows that six patches of marijuana, some visible from defendant's home, were growing in the environs of defendant's home; that defendant acknowledged the presence of "a lot of marijuana" around his home; that paths led from defendant's mobile home to these fields; that defendant acknowledged being in one of the marijuana patches; that a shoeprint similar to defendant's was found in that patch, which had been watered; that defendant's shoes were muddy, although the weather had been dry; that defendant had a water tank on his truck underneath the shed; that manure had been spread on the fields; that a bucket of manure was found beside defendant's mobile home; that shavings of the same material as the five gallon buckets of marijuana plants were found in the shed; and that defendant stated he was custodian of the property and worked there. We hold the foregoing evidence placed defendant in such "close juxtaposition" to the marijuana as to justify a jury finding that defendant was engaged in its manufacture. *State v. Shufford*, 34 N.C. App. 115, 237 S.E. 2d 481, *disc. rev. denied*, 293 N.C. 592,

239 S.E. 2d 265 (1977). The evidence amounted to more than just a mere suspicion or conjecture.

[2] Defendant next contends that the court erred in admitting one four foot high marijuana plant into evidence because a complete chain of custody was not shown. Assuming *arguendo* that the chain of custody was not adequately established, we think the admission of the plant was harmless error. Other samples of marijuana taken from these fields were analyzed and admitted into evidence after a proper chain of custody had been established. There was also plenary evidence that many of the marijuana plants seized were four to five feet tall. Defendant has thus failed to show that a different outcome might have occurred if the plant had not been received into evidence. G.S. 15A-1443(a).

[3] Defendant next contends that the court erred in accepting a chemist as an expert witness in the field of marijuana identification, and in admitting her opinion as to the nature of the material seized from the fields. As defendant correctly states, the general rule is that the determination of whether a witness qualifies as an expert is a factual one which is ordinarily within the exclusive province of the trial judge whose finding will not be disturbed unless there is no competent evidence to support it or an abuse of discretion. 1 H. Brandis on North Carolina Evidence sec. 133 (1982). One is qualified as an expert if, through study or experience, he is better qualified than the jury to form an opinion on the particular subject. *Id.* The witness in the present case testified that she was a chemist with the State Bureau of Investigation, whose duties consisted of the analysis of substances for the presence of controlled substances, including marijuana; that she had been so employed for almost two years; and that she had had special training in the analysis of controlled substances. The foregoing evidence was sufficient to support the trial court's acceptance of the witness as an expert. Her opinion, therefore, was properly admitted. This contention is overruled.

[4] Defendant's remaining contention is that the court erred in refusing to submit to the jury the offense of possession of marijuana. He argues that possession of marijuana, which is a crime under G.S. 90-95(a)(3), is a lesser included offense of manufacturing marijuana. This contention has no merit. Manufacturing marijuana and possession of marijuana are separate and distinct statutory offenses, neither of which is a lesser included offense of

the other. *State v. Rosser*, 54 N.C. App. 660, 662, 284 S.E. 2d 130, 131 (1981).

For the foregoing reasons, we find no error in defendant's trial or conviction.

No error.

Judges WHICHARD and EAGLES concur.

F. WILLIAM GANEY v. S. S. KRESGE COMPANY

No. 8410IC583

(Filed 16 April 1985)

1. **Master and Servant § 65.2— finding of 25% permanent partial disability of back and no other permanent impairment—supported by findings**

The Industrial Commission's finding that plaintiff had sustained a 25% permanent partial disability to his back and no other permanent impairment was supported by the evidence where plaintiff's neurosurgeon testified that plaintiff had a permanent partial disability of approximately 25% of his spine, that he had reached maximum medical improvement, and that he did not suffer any disability to his arms and legs; an orthopedic surgeon testified that in his opinion plaintiff had reached maximum medical improvement and could work because there was no evidence of muscle weakness and plaintiff "would not harm himself by standing, sitting, stooping, lifting, bending, or pushing." A finding as to plaintiff's disability in his arms and legs was not required, despite evidence regarding loss of function in his arms and legs, because there was medical testimony that plaintiff did not suffer any disability to his arms or legs. G.S. 97-29.

2. **Master and Servant § 66— finding that psychological problems not disabling—supported by evidence**

The Industrial Commission's finding that plaintiff's psychological problems were not in themselves disabling was supported by testimony from plaintiff's psychiatrist that he had reached maximum medical improvement and that plaintiff was functioning better, had gotten what he wanted from therapy, and had decided to stop treatment. Plaintiff presented no evidence that he was disabled from psychological problems.

3. **Master and Servant § 99— award of attorney's fees—discretion of Commission**

There was no error in the Industrial Commission's failure to award attorney's fees in a workers' compensation case; award of counsel fees is in the discretion of the Commission.

Ganey v. S. S. Kresge Co.

APPEAL by plaintiff from the opinion and award of the Industrial Commission entered 12 March 1984. Heard in the Court of Appeals 5 February 1985.

Plaintiff, an employee of defendant S. S. Kresge Company, slipped and fell at work on 19 January 1978. He experienced back pain immediately after the fall. The following day plaintiff fell down the stairs at work. Plaintiff reported both injuries to his employer. Plaintiff's back pain continued, and he developed pain in his neck, arms, and legs. Plaintiff was treated by Dr. William Parker, a neurosurgeon, who performed surgery on plaintiff to remove a ruptured disc. Dr. Parker later performed a second operation to decompress nerve roots in plaintiff's cervical spine.

Defendant, who had been paying compensation since April 1978, filed an application to stop payment of compensation on 30 June 1982. Plaintiff requested a hearing alleging his benefits were discontinued despite his continued disability. The Deputy Commissioner made the following pertinent findings of fact:

> 3. Dr. Parker continued to follow plaintiff's progress after surgery and observed that plaintiff had pain with prolonged activity. A second operation was performed on June 11, 1979 to decompress the nerve roots in the cervical spine. Plaintiff reached maximum medical improvement with respect to the second surgery on January 27, 1980, but he had not yet recovered from his lumbar spine problems and Dr. Parker did not release him to return to work. Although he received further treatment for cervical problems several months later, the problems were caused by an unrelated automobile accident which aggravated his condition.
>
> 4. Plaintiff reached maximum medical improvement with respect to his lower back problems by July 20, 1980 although Dr. Parker did not rate his permanent disability until two years later. He continued to have intermittent pain in his back and leg which would prevent him from returning to his former job with defendant.
>
> 5. As a result of his injury by accident on January 19, 1978 plaintiff sustained an injury to his lower back and an injury to his cervical spine which aggravated his preexisting osteoarthritic ridges so that he developed symptoms and

nerve root irritation. He was temporarily totally disabled until July 20, 1980 when he had reached maximum medical improvement with respect to both conditions.

6. As a result of the injury by accident giving rise to this claim, plaintiff sustained a 25 percent permanent partial disability to his back. He has no other permanent impairment except to his back.

7. Plaintiff was also treated by Dr. Weinstein, a psychiatrist, for depression and other problems arising from the accident and the resulting disability. His psychological problems were not in themselves disabling, and he reached maximum medical improvement with respect to these problems by June 18, 1982.

8. Defendant has paid compensation to plaintiff for 209 weeks.

Based upon these findings, Deputy Commissioner Morgan R. Scott made the following conclusions of law:

1. Plaintiff is entitled to compensation at the rate of $125.33 for 119 4/7 weeks for the temporary total disability he sustained as a result of the injury by accident giving rise to this claim. Defendant has previously paid this compensation. G.S. 97-29.

2. Plaintiff is entitled to compensation at the rate of $125.33 per week for 75 weeks for the 25 percent permanent partial disability he sustained to his back as a result of the aforesaid injury by accident. Defendant has previously paid this compensation. G.S. 97-31(23).

The Deputy Commissioner found that no award need be made:

1. In that defendant has overpaid compensation due to plaintiff, no compensation is awarded herein.

2. Defendant shall pay all medical expenses incurred as a result of the injury by accident giving rise hereto when bills for the same have been submitted through the defendant to the Industrial Commission and approved by said Commission.

3. In that no compensation is awarded, an attorney's fee is not approved.

4. Defendant shall pay expert witness fees in the amounts of $130.00 to Dr. Weinstein, $175.00 to Dr. Parker and $170.00 to Dr. Azzato.

5. Defendant shall pay the costs.

Plaintiff appealed to the Full Commission alleging the Deputy Commissioner erred in failing to award him compensation for permanent partial disability to his arms and legs, or permanent total disability under G.S. 97-29. The Full Commission adopted and affirmed the Deputy Commissioner's opinion and award.

Shipman and Lea by Gary K. Shipman for plaintiff appellant.

Hedrick, Eatman, Gardner, Feerick and Kincheloe by Mel J. Garofalo and John F. Morris for defendant appellee.

PARKER, Judge.

The scope of review of a worker's compensation award by the Industrial Commission is limited to (i) whether there was competent evidence to support the findings of fact, and (ii) whether such findings support the conclusions of law. *Perry v. Hibriten Furniture Company*, 296 N.C. 88, 249 S.E. 2d 397 (1978). This is the case even if there is sufficient evidence to support a contrary finding. *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981). The plaintiff has the burden of proving both the existence of his disability and its degree. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982).

[1] Plaintiff assigns error to the Commission's finding that he sustained 25% permanent partial disability to his back and no other permanent impairment. Plaintiff contends the Commission erred in not finding that he was disabled in his arms and legs as a result of his injury, or that he was permanently totally disabled under G.S. 97-29.

The Commission's finding was, however, supported by competent evidence. Dr. Parker testified that, in his opinion, plaintiff had permanent partial disability of approximately 25% of the spine. According to Dr. Parker, plaintiff reached maximum medi-

cal improvement with respect to his cervical spinal injury in January 1980, and he reached maximum medical improvement with regard to his lumbar injury in the summer of 1980. Dr. Parker further testified that, in his opinion, plaintiff did not suffer any disability to his arms and legs.

Dr. John Azzato, an orthopedic surgeon, testified that in his opinion plaintiff reached maximum medical improvement on 25 March 1982. He also testified that he was of the opinion that plaintiff could work because, objectively, he had no evidence of muscle weakness and plaintiff "would not harm himself by standing, sitting, stooping, lifting, bending, or pushing."

Clearly this evidence supports the Commission's finding that "plaintiff sustained a 25 percent permanent partial disability to his back. He has no other permanent impairment except to his back."

Defendant argues that as there was extensive evidence regarding his loss of function of his arms and legs, there should be a finding as to his disability in his arms and legs. To support this proposition defendant cites *Little v. Anson County Schools Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978) and *Fleming v. K-Mart Corp.*, 312 N.C. 538, 324 S.E. 2d 214 (1985). These cases do not, however, support plaintiff's argument. In *Little*, the uncontradicted medical testimony was that the injury to plaintiff's spinal cord resulted in weakness in all her extremities, numbness throughout her body, diminished mobility and difficulty with position sense and with recognition of things in her hands. The Full Commission had affirmed the Deputy Commissioner's finding that plaintiff suffered permanent partial disability of 45% of her back. Our Supreme Court reversed, holding as the uncontradicted medical evidence showed disability to compensable parts of plaintiff's body other than her back, if, on rehearing, the Commission determined that plaintiff in fact suffered these impairments, the award must take them into account. *Little* clearly does not support plaintiff's argument because in *Little*, the uncontradicted medical testimony showed disability to other parts of plaintiff's body. In the instant case, there was medical testimony that plaintiff did not suffer any disability to his arms or legs, but only to his back.

In *Fleming*, the plaintiff injured his back while lifting heavy boxes of paint in the course of his employment with defendant.

The Commission found that plaintiff's orthopedic surgeon and neurologist had concluded that plaintiff had developed arachnoiditis as a result of the treatment for his occupational injury, and the arachnoiditis was responsible for plaintiff's disabling pain in his back and leg. The Commission found that plaintiff was totally unable to pursue work of any kind and was incapable of earning any wages. The Commission concluded that plaintiff was totally disabled and awarded compensation for permanent total disability. Our Supreme Court reviewed the entire record, found that all the Commission's findings of fact were supported by the evidence, and affirmed the Industrial Commission's opinion and award. *Fleming* does not support plaintiff's argument; in *Fleming*, unlike the instant case, there was medical testimony that plaintiff's arachnoiditis caused his disabling back and leg pain, and this was found by the Commissioner.

[2] Plaintiff further argues that he should be compensated for his disabling emotional and psychological problems and the Commissioner's finding that "[h]is psychological problems were not in themselves disabling, and he reached maximum medical improvement with respect to these problems by June 18, 1982" was not supported by the evidence. We do not agree. Plaintiff's psychiatrist, Dr. Robert Weinstein, testified that when he last saw plaintiff on 18 June 1982, plaintiff had reached maximum medical improvement. Plaintiff was "functioning better. He decided to stop treatment. He had gotten what he wanted from therapy." Plaintiff presented no evidence that he was disabled from psychological problems. As the Commission's finding was supported by the evidence, this assignment of error is overruled.

[3] In his last assignment of error plaintiff argues that the Commission erred in failing to award him attorney's fees. An award of attorney's fees is within the Commission's discretion. *Taylor v. J. P. Stevens Co.*, 307 N.C. 392, 298 S.E. 2d 681 (1983). This assignment of error is overruled.

For the reasons stated the Opinion and Award of the Industrial Commission is

Affirmed.

Judges ARNOLD and EAGLES concur.

REBA C. SMITH, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF ARCHIE WAYNE SMITH v. JOHNNIE WADE STARNES

No. 8422SC367

(Filed 16 April 1985)

Rules of Civil Procedure § 4— failure to deliver summons to sheriff—discontinuance of action—statute of limitations

Where decedent was killed in an accident on 7 August 1980, and the original summons and subsequent alias and pluries summonses in a wrongful death action were never delivered to a sheriff or other process officer for service except the last pluries summons which was served on defendant on 26 July 1985, the action was discontinued 30 days after the issuance of the original summons, and the two-year statute of limitations of G.S. 1-53 had run at the time defendant was eventually served with process. G.S. 1A-1, Rules 4(c) and (d).

APPEAL by plaintiff from *Helms, Judge.* Order entered 1 February 1984 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 30 November 1984.

Wilson, Biesecker, Tripp & Sink, by Joe E. Biesecker, for plaintiff appellant.

Brinkley, Walser, McGirt, Miller & Smith, by Charles H. McGirt and Stephen W. Coles, for defendant appellee.

PHILLIPS, Judge.

Plaintiff's appeal is from an order dismissing her wrongful death action against defendant upon the ground that it is barred by the statute of limitations. The action arose out of an automobile collision that occurred on 7 August 1980 in which plaintiff's intestate was immediately killed. Suit was duly commenced "by filing a complaint with the court," Rule 3, N.C. Rules of Civil Procedure, on 6 August 1982. This was within the two-year period allowed by G.S. 1-53 for the bringing of wrongful death actions and tolled the statute of limitations only for a time, since the statute is indefinitely or permanently tolled by a lawsuit only when jurisdiction is obtained over the defendant. Until jurisdiction is so obtained, either by service of process or a voluntary appearance, other steps must be taken to keep the statute tolled. Before this suit was filed, according to the briefs of both parties,

plaintiff filed an earlier suit against defendant on this same claim, also in the Davidson County Superior Court, and took a voluntary dismissal. The record is silent as to this and it is relevant only because the same lawyers that represented the parties in the preceding action—James W. Armentrout for the plaintiff and Charles H. McGirt for the defendant—also represent them in this action, though Joe E. Biesecker has also represented plaintiff since 22 July 1983, and because of the communications that the lawyers exchanged shortly after that suit was filed. Plaintiff does not contend that the period for instituting this action was extended because of the previous action and its voluntary dismissal [*see* Rule 41(a), N.C. Rules of Civil Procedure], but concedes that the straight two-year limitations period applies.

At the time this suit was commenced summons was also duly issued by the court in compliance with the provisions of Rule 4(a), N.C. Rules of Civil Procedure; which is to say the summons was duly filled out, dated and signed by an authorized officer. But the summons was never delivered to a sheriff or other process officer, as Rule 4(a) also requires, and the next step taken by plaintiff's attorney toward obtaining jurisdiction over the defendant was on 13 August 1982 when a copy of the complaint and summons was mailed to Mr. McGirt, defendant's attorney in the original action, with the request that defendant accept service. But Mr. McGirt returned the papers to Mr. Armentrout on 23 September 1982 by a letter stating that he had been unable to locate the defendant. On 4 November 1982, within ninety days from the time the original summons was issued as permitted by Rule 4(d)(2) of the N.C. Rules of Civil Procedure, plaintiff's attorney obtained an alias summons from the court but did not forward it to a sheriff or process officer for service on the defendant. Timely pluries summonses were also obtained on 2 February 1983, on 2 May 1983, and on 22 July 1983, but none of them were delivered or forwarded to a sheriff or other process officer except the last one, which was served on defendant by the Sheriff of Davidson County on 26 July 1983.

Defendant moved for an order of summary judgment and after the foregoing stated facts were established by plaintiff's answers to defendant's requests for admission and interrogatories and by an affidavit of a member of the Davidson County Sheriff's Department, the motion was allowed. In our opinion the judgment

of the trial court dismissing the action was correct and we affirm it. Though the action was timely instituted and the statute of limitations was tolled for a time thereby, plaintiff's failure to get the original summons into the hands of a sheriff or other process officer caused the action to discontinue.

Rule 4(a) of the N.C. Rules of Civil Procedure requires that after an action has been commenced and a summons has been issued "[t]he complaint and summons shall be delivered to some proper person for service." This was not done and the summons lost its vitality when the period passed when it could have been delivered to a sheriff or process officer for possible service on the defendant. That period was "30 days after the date of the issuance of summons," since Rule 4(c) provides that the service of the summons must be made within that time, if at all. Though an action in which the summons is unserved can continue in existence beyond 30 days after the date the summons was issued, for it to do so two things must happen according to Rules 4(c) and (d) of the N.C. Rules of Civil Procedure. First, the unserved original summons must be returned to the court by the officer it was delivered to with an explanation as to why it was not served. Second, the original summons must be supplemented by either a timely endorsement thereto or a timely sued out alias or pluries summons. That the first step is no less essential in maintaining the existence of the action than is the second is plainly indicated by the following provisions of Rule 4 of the N.C. Rules of Civil Procedure: The directive in Rule 4(a) that the complaint and summons "be delivered to some proper person for service"; the provisions in Rule 4(c) that "[i]f the summons is not served within the time allowed . . . it shall be returned immediately upon the expiration of such time by the officer to the clerk of the court who issued it with notation thereon of its nonservice and the reasons therefor as to every such party not served"; and by the provisions of Rule 4(d) permitting the action to be continued in existence "[w]hen any defendant in a civil action is not served within the time allowed for service" by obtaining either an endorsement of summons or an alias or pluries summons and that those supplementary summonses are returnable "in the same manner as the original process." Thus, under the facts recorded the action discontinued on 5 September 1982 and the statute of limitations had long since run when defendant was eventually

served with process several months later. The recent holding in *Adams v. Brooks*, 73 N.C. App. 624, 327 S.E. 2d 19 (1985), which involved similar circumstances, was to the same effect.

Plaintiff's argument that her effort to get defendant to accept service was a substantial and satisfactory compliance with the rules is rejected. The requirements of the rules are too plain to permit substitution in our opinion, and we see no need for any since an action can be continued in existence indefinitely by complying with their simple requirements, which are not without a purpose. Implicit in the requirement that a summons be delivered to an officer and returned to the court at a fixed time is that prompt attempt to serve the defendant will be made and a record thereof will be given to the court. In this instance, no attempt to serve the defendant was made and the record contains no entry by an officer with respect thereto.

Affirmed.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. RICHARD MARK SWIMM

No. 8418SC458

(Filed 16 April 1985)

1. **Criminal Law § 138— sentence in excess of presumptive term—court's comments—no error**

The trial court did not impose a sentence in excess of the presumptive term because of dissatisfaction with the Fair Sentencing Act where it was clear that the court's comments were in direct response to defense counsel's statements and were simply to explain that whatever sentences were imposed, defendant would be entitled to have his sentences reduced for good time and gain time credits.

2. **Criminal Law § 138— resentencing—failure to consider defendant's good prison conduct—no error**

The trial court did not err on resentencing by failing to consider defendant's good prison conduct as a mitigating factor because defense counsel's reference to defendant's good prison conduct did not constitute evidence;

moreover, good prison conduct is a matter to be dealt with under the regulations of the Department of Correction and is administrative and not judicial.

APPEAL by defendant from *Albright, Judge.* Judgment entered 15 December 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 4 February 1985.

On 12 August 1982, defendant entered a plea of guilty to obtaining property by false pretense, five counts of conspiracy to file false insurance claims and two counts of filing false insurance claims. The court imposed a ten year sentence on the charge of obtaining property by false pretense and upon various consolidations of the other charges. Defendant also received a total of four years to run at the expiration of the ten year sentence. Defendant appealed from the imposition of the ten year sentence. In a nonpublished opinion, *State v. Swimm*, 64 N.C. App. 210, 307 S.E. 2d 222 (1983), this Court found error in the sentencing phase; vacated the sentence and remanded for resentencing.

At the resentencing hearing on 15 December 1983, the court found factors in aggravation and mitigation and again imposed a ten year sentence, seven years greater than the presumptive, after finding that the factors in aggravation outweighed the factors in mitigation. Defendant again appeals from the imposition of the ten year sentence.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Lucien Capone III, for the State.

Assistant Public Defender Frederick G. Lind, for appellant.

JOHNSON, Judge.

Defendant contends the sentence should be vacated and a resentencing hearing required because (1) the record affirmatively discloses that the trial judge imposed a sentence greater than the presumptive term because of his dissatisfaction with the length of time a prisoner is required to serve under the Fair Sentencing Act, and (2) that the court erred by failing to find defendant's good prison conduct as a mitigating factor.

[1] In support of his argument that the court imposed the ten year sentence because of the court's dissatisfaction with the Fair Sentencing Act, defendant relies upon *State v. Snowden*, 26 N.C.

App. 45, 215 S.E. 2d 157, *cert. denied*, 288 N.C. 251, 217 S.E. 2d 675 (1975). In *Snowden*, this Court ordered a new sentencing hearing on the ground that the following comments by the court affirmatively disclosed that the severity of the sentences imposed was based upon the court's dissatisfaction with the length of time committed offenders remained in prison.

> . . . [D]efendant shall be confined in the State's prison for a term of not less than 2 nor more than 4 years, . . . That's worth six months. . . . [I]n order to sentence a man to one year in prison and feel any confidence that he will serve one year in prison you have to give him four.

Id. at 46-47, 215 S.E. 2d at 158.

In the case *sub judice*, defendant, on 12 August 1982, was also sentenced to four years on additional charges to run at the expiration of the ten year sentence. The four year sentence was not affected by this nor the prior appeal. At the resentencing hearing before Judge Albright on 15 December 1983, the following colloquy occurred:

> [Defense counsel]: . . . Judge, it has come out that it was a mitigating circumstance that other people were apprehended and did come to court. We were hoping—we were hoping the first time that your Honor would impose the presumptive sentence. He doesn't want this case in court anymore. I can't understand—I couldn't understand the 10 year sentence on that at the time and I still can't. The other sentences were stacked up at the expiration. They were all presumptives. *I want your Honor to keep in mind whatever sentence your Honor gives him, he has a four year active sentence at the expiration of it.* (Emphasis added.)
>
> [Court]: . . . he has good time, gain time, all these other matters for which that sentence gets cut drastically.
>
> * * *
>
> [Court]: My point is, under the Fair Sentencing Act, the way the Legislative set that thing up now, it's a quick release option; the whole emphasis is on quick release, so that 14 years —if he had to serve 14 years—that was the theory under which originally the Fair Sentence Act was being sold across

> the State, in which he got the sentence—that's what you would serve. There was no uncertainty; everybody would know that the judge's sentence meant what it said. Well, that's not the case the way this matter is construed now, *my point only being that any sentence the court hands down by operation of law is reduced in half by good time and then reduced* further *by gain time* and all these other things they are doing that I read about where it's presenting a defendant with a quick release option if he behaves himself. Of course, he doesn't have to get that good credit. (Emphasis added.)
>
> [Defense Counsel]: . . . [T]hat depends on his behavior; and of course, we submit he would be good and he would get that.
>
> [The Court]: I am told they are letting them out fast, real fast.

Judge Albright's comments, when read in context do not affirmatively show that he imposed the ten year sentence because of any dissatisfaction with the length of time defendant would be required to serve under the Fair Sentencing Act. Rather, it is clear that his comments were in direct response to defense counsel's statements and were simply to explain that whatever sentences were imposed, defendant, depending on his behavior, would be entitled to have his sentences reduced for good time and gain time credits.

The sole basis for the sentence in excess of the presumptive term was the four aggravating factors which were found by the court to outweigh the mitigating factors. The sentence imposed is within the statutory limit. This assignment of error is without merit.

[2] Defendant next contends the court erred by failing to find defendant's good prison conduct as a mitigating factor.

Defense counsel in argument at the sentencing hearing stated that defendant had been incarcerated since 12 August 1982; that defendant informed him that he did not acquire any prison infractions while in custody. Defense counsel stated further that a parole officer also informed him that defendant did not have any prison infractions.

For the following reasons, we hold that the trial court properly refused to consider these statements of defendant's good prison conduct as a mitigating factor. First, defense counsel's references to defendant's good prison conduct did not constitute evidence. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). In *Jones*, defense counsel, during sentencing hearing argument, made reference to the contents of a presentencing report which he contended supported a statutory mitigating factor. The Court held that mere reference in counsel's argument to the presentencing report did not constitute evidence. This holding is applicable in the case *sub judice*.

Second, even if defendant had presented evidence to the effect of showing his good prison conduct, such evidence would not have been appropriate for consideration as a non-statutory mitigating factor affecting defendant's sentence. Good prison conduct is a matter to be dealt with under the regulations of the Department of Correction and is administrative and not judicial. *State v. Stone*, 71 N.C. App. 417, 322 S.E. 2d 413 (1984) (Prison rules and regulations respecting rewards and privileges for good conduct are strictly administrative and not judicial).

In the trial of defendant's case we find

No error.

Chief Judge HEDRICK and Judge COZORT concur.

In re Helmandollar v. M.A.N. Truck & Bus Corp.

IN THE MATTER OF: BILLY R. HELMANDOLLAR, ROUTE 1, BOX 750, ROCKWELL, NORTH CAROLINA 28138, CLAIMANT-APPELLANT v. M.A.N. TRUCK & BUS CORPORATION, BOX 319, CLEVELAND, NORTH CAROLINA 27013, EMPLOYER-APPELLEE, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, POST OFFICE BOX 25903, RALEIGH, NORTH CAROLINA 27611, DOCKET NO. 83(B) 4359, APPELLEE

No. 8419SC700

(Filed 16 April 1985)

Master and Servant § 108.1— unemployment compensation—violation of call-in rule—no misconduct

Claimant's violation of a company rule requiring employees who are absent due to illness to call in by 7:30 a.m. did not constitute misconduct within the meaning of G.S. 96-14(2) so as to disqualify him from receiving unemployment compensation when he was discharged for three violations of the rule where claimant was absent from work for four consecutive days because of illness; claimant did not have a telephone in his home, drove himself two to three miles to use a pay telephone, and made long distance calls to his employer on three of those days; claimant experienced operator assistance difficulties because of a labor strike at the telephone company; and as a result thereof, two of claimant's calls were received by the employer at 7:40 a.m. and were treated as failures to call. Claimant made a good faith effort to comply with his employer's rules, and his conduct cannot be construed to have been a willful or wanton disregard of the employer's standards.

APPEAL by claimant from *Davis, Judge*. Judgment entered 27 February 1984 in Superior Court, ROWAN County. Heard in the Court of Appeals 14 February 1985.

This is an action to obtain unemployment insurance benefits pursuant to G.S. 96-13(a)(3). Claimant, Billy R. Helmandollar, filed for unemployment insurance benefits after he was terminated on 28 August 1983 by his employer, M.A.N. Truck and Bus Corporation. An Employment Security Commission hearing officer determined that claimant was discharged for work-connected misconduct and accordingly denied claimant's claim. G.S. 96-14(2). The hearing officer's decision was affirmed by the Employment Security Commission on 9 November 1983 and on 27 February 1984, the decision of the Employment Security Commission was affirmed by the Superior Court, Rowan County. Claimant appeals the denial of unemployment insurance benefits.

Rebecca Bosley, for claimant-appellant.

C. Coleman Billingsley, Jr., Staff Attorney, for the Employment Security Commission-appellee.

EAGLES, Judge.

Claimant assigns as error the denial of unemployment insurance benefits. We agree that there is error.

Beginning 11 August 1983, claimant was absent from work for four consecutive days due to illness. Employer's policy, posted as well as published in a handbook provided to all employees, requires employees who are absent due to illness to call in by 7:30 a.m. for the 7:00 a.m. shift. A call after 7:30 a.m. is treated as "no call." Written warnings are issued for the first two violations of this rule and a third occurrence is a dischargeable offense.

Uncontroverted evidence showed that claimant's first day of absence due to illness was Thursday, 11 August 1983 and that he did not call in on that day. The hearing officer found as a fact that claimant called in at 7:40 a.m. on Friday, 12 August 1983. There was uncontroverted evidence that claimant called in at 7:30 a.m. on Monday, 15 August 1983 and the hearing examiner found as a fact that claimant called in at 7:40 a.m. on Tuesday, 16 August 1983. The record indicates that the employer treated the calls made by claimant after 7:30 a.m. as a failure to call in and claimant was summarily discharged.

Claimant, who was not represented by counsel at the hearing before the Employment Security Commission's hearing officer or the appeals referee, testified that he was unable to go to work due to illness, including high blood pressure and a virus and that he was finally taken to a medical doctor 18 August 1983. Claimant testified that he had no telephone, that it was two or three miles to the nearest pay telephone and that he had to drive himself since his wife could not drive his truck. Claimant further testified that he had difficulty completing any call to his employer because it was long distance and there was a telephone company worker's strike in progress at that time.

Written warnings about his failure to call in were placed in claimant's file while he was absent due to illness, but he never

saw them since he was discharged and could not return to work. The employer testified, "as far as we're concerned also, a person who does not report to work three consecutive days is discharged at will."

At all levels of the hearing process it was determined that claimant was discharged from his job for remaining away from work without notification and that this lack of notification constituted misconduct connected with his work. G.S. 96-14(2).

This court has defined the term misconduct as it applies to the termination of employment as:

> [C]onduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect . . . or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer.

In re Collingsworth, 17 N.C. App. 340, 343-44, 194 S.E. 2d 210, 212-13 (1973). The question to be resolved here is whether claimant's conduct could be construed to have been a "willful or wanton disregard of the employer's standards." We think not.

A violation of a company rule will not be construed as misconduct within the meaning of G.S. 96-14(2), if the evidence shows that the actions of the employee were reasonable and were taken with good cause. *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 289 S.E. 2d 357 (1982). Good cause is a reason which would be deemed by reasonable men and women as valid and not indicative of an unwillingness to work. *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968); *In re Cantrell*, 44 N.C. App. 718, 263 S.E. 2d 1 (1980).

Here, the evidence shows that claimant was ill, did not have a telephone in his home, drove himself two to three miles to use a pay telephone, made three long distance toll calls on 12, 15 and 16 August 1983 and experienced operator assistance difficulties because of a labor strike at the telephone company. As a result, two phone calls were made at 7:40 a.m. rather than 7:30 a.m. and were treated as "no calls." We hold that these facts certainly are not indicative of a willful and deliberate disregard of company policy or an unwillingness to work which would disqualify claimant from unemployment insurance benefits by reason of G.S. 96-14(2).

While it is clear that claimant failed to comply with the literal dictates of the company rule regarding notification of absence from work, this violation is not, as a matter of law, misconduct. *See, Kahl v. Smith Plumbing Co.*, 68 N.C. App. 287, 314 S.E. 2d 574 (1984). Here, a combination of unfortunate circumstances prevented claimant from meeting the strict requirements of his employer's rule. The evidence from the record is clear that claimant made a good faith effort to comply. The facts here are totally opposite from *Butler v. J. P. Stevens & Co., Inc.*, 60 N.C. App. 563, 299 S.E. 2d 672, *rev. denied*, 308 N.C. 191, 302 S.E. 2d 242 (1983), cited and relied on by the Employment Security Commission. In *Butler*, the claimant accumulated four unrelated unexcused absences within a six month period and was discharged. However, unlike the claimant here, Butler made essentially no attempt to contact his employer when he was absent. There was willful misconduct in *Butler*.

By contrast, claimant here was absent four consecutive days after a twenty-month infraction-free period of employment and he made good faith efforts to comply with his company's rule regarding notification of absences. The facts and circumstances here do not support the Employment Security Commission's finding of misconduct. Accordingly, the judgment of the superior court in 83CVS1247 affirming the decision of the Employment Security Commission in its entirety is vacated and the case remanded for entry of an award of benefits.

Vacated and remanded.

Judges ARNOLD and PARKER concur.

WILLIAM S. BROWER v. ROBERT CHAPPELL & ASSOCIATES, INC.

No. 8420SC772

(Filed 16 April 1985)

Negligence §§ 1.3, 35.1; Intoxicating Liquors § 24— sale of alcohol to intoxicated customer—customer injured—contributorily negligent

Defendant was entitled to summary judgment based on the contributory negligence of plaintiff in an action in which plaintiff alleged that defendant was

negligent in continuing to serve him alcoholic beverages after he became intoxicated in violation of G.S. 18B-305 and sought to recover damages incurred when a glass door he was attempting to open shattered. Plaintiff's responses to requests for admissions established that he was voluntarily intoxicated and that his intoxication was at least one of the proximate causes of his injuries; contributory negligence is available as a defense in an action which charges defendant with the violation of a statute or negligence *per se*.

APPEAL by plaintiff from *Rousseau, Judge*. Judgment entered 25 June 1984 in Superior Court, MOORE County. Heard in the Court of Appeals 13 March 1985.

In this action plaintiff seeks to recover damages for injuries allegedly sustained from defendant's negligence in selling alcoholic beverages to plaintiff despite plaintiff's state of intoxication. From entry of summary judgment in defendant's favor, plaintiff appeals.

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

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Richard T. Boyette and H. Lee Evans, Jr., for defendant appellee.

MARTIN, Judge.

The sole issue for determination is whether the trial court erred in granting defendant's motion for summary judgment. We find that defendant was entitled to judgment as a matter of law based on the contributory negligence of the plaintiff.

In this action plaintiff alleges that on 10 February 1983 while he was a patron at "J. Albert's," a nightclub operated by defendant at the Holiday Inn in Moore County, he was injured when a glass door shattered as he was attempting to push it open. Plaintiff contends that defendant was negligent in continuing to serve alcoholic beverages to him after he had become intoxicated, in violation of G.S. 18B-305, and in failing to provide a safe exit or to put adequate warnings on the door, and in failing to take precautions for his safety after he had become intoxicated. Defendant answered, denying negligence and asserting plaintiff's contributory negligence as a defense. Discovery was conducted and it was established that plaintiff had consumed eleven beers, two glasses of wine and one mixed drink between the hours of noon

and ten p.m., when he arrived at defendant's nightclub. During the hour and a half after his arrival and prior to his being injured, he was served approximately five black russian drinks. After his injury, his blood alcohol level was measured at 333.4 milligrams percent. Requests for Admission were filed by defendant and answered by plaintiff as follows:

> 1. You were intoxicated from the consumption of alcoholic beverages at the time of the incident resulting in the injuries alleged in your Complaint.
>
> Answer: Request for Admission #1 is admitted.
>
> . . .
>
> 3. You voluntarily consumed the alcoholic beverages which led to your intoxication on the evening of the incidents described in your Complaint.
>
> Answer: Request for Admission #3 is admitted.
>
> . . .
>
> 5. Your intoxication was at least one of the proximate causes of the injuries which are the subject of your Complaint.
>
> Answer: Request for Admission #5 is admitted.

Defendant moved for summary judgment and the motion was allowed, the court concluding that plaintiff was contributorily negligent as a matter of law.

A violation of G.S. 18B-305 by "a permittee or his employee or . . . an ABC store employee . . . knowingly sell[ing] or giv[ing] alcoholic beverages to any person who is intoxicated" constitutes negligence per se. *See Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E. 2d 584, *disc. rev. denied*, 309 N.C. 191, 305 S.E. 2d 734 (1983). However, the nature of the alleged negligence of the defendant does not alter the effect of plaintiff's contributory negligence.

> Contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care concurring and cooperating with some negligent act or omission on the part of the defendant as makes the act or omission of the plaintiff a proximate cause or occasion of the injury complained of.

Adams v. Board of Education, 248 N.C. 506, 511, 103 S.E. 2d 854, 857 (1958). Defendant established by the responses to request for admissions that plaintiff was voluntarily intoxicated on the evening in question and that his intoxication was at least one of the proximate causes of his injuries. Plaintiff's act of consuming sufficient quantities of intoxicants to raise his blood alcohol content to the dangerous level approaching a comatose state amounts to "a want of ordinary care" which proximately caused plaintiff's injuries constituting contributory negligence as a matter of law.

Plaintiff asserts that since defendant's violation of G.S. 18A-305 would, if proven, constitute negligence per se, his own contributory negligence in consuming excessive quantities of alcohol is not a bar to his recovery. It is a well-established precedent in this State that contributory negligence on the part of the plaintiff is available as a defense in an action which charges the defendant with the violation of a statute or negligence per se. *See, e.g., Poultry Co. v. Thomas*, 289 N.C. 7, 220 S.E. 2d 536 (1975); *Stone v. Texas Co.*, 180 N.C. 546, 105 S.E. 425 (1920). In view of this precedent, we conclude that because plaintiff's actions constituted contributory negligence as a matter of law, defendant was entitled to judgment as a matter of law. The summary judgment appealed from is

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

STATE OF NORTH CAROLINA v. ALBERT EUGENE ALSTON

No. 8418SC784

(Filed 16 April 1985)

Criminal Law § 34— prior convictions—inadmissible to show intent

In a prosecution for larceny of a vehicle, evidence of defendant's convictions of automobile larceny three, four and fourteen years earlier was not admissible to establish defendant's intent on the date of the crime charged. Rather, such evidence tended to show defendant's propensity or predisposition to commit the type of offense with which he is presently charged and its admission was prejudicial error.

State v. Alston

APPEAL by defendant from *Watts, Judge.* Judgment entered 26 January 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 7 March 1985.

Defendant was arrested for the felonious larceny of a truck valued at $6,900.00. The State presented evidence that a 1983 Dodge truck owned by Genuine Auto Parts disappeared from the store on 30 July 1984. Officer J. E. Hoover testified that he observed the truck being operated by the defendant on the afternoon of the same day. The truck was swerving and running stop signs, crossed a concrete median and eventually crossed a field and collided with a utility pole.

Defendant, through the testimony of his sister and a patrolman, presented evidence of defendant's intoxication, tending to negate the specific intent of permanently depriving the owner of the vehicle. Defendant did not testify.

On rebuttal the State presented testimony, over objection, from one former and one present prosecutor that defendant had been convicted in 1970, 1979, and 1980 of automobile larceny. The evidence was admitted to show defendant's intent on 30 July 1983.

Defendant was found guilty and sentenced to ten years imprisonment. He appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney J. Allen Jernigan, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Robin E. Hudson, for defendant appellant.

MARTIN, Judge.

Defendant assigns error to certain testimony elicited on rebuttal by the State. The State on rebuttal introduced evidence that defendant had been convicted in 1970, 1979, and 1980 of larceny of an automobile. The rebuttal evidence was admitted by the court "for no other purpose than as it might bear upon the defendant's intent on July 30, 1983." Defendant argues that this evidence had no logical relevancy to the issue of defendant's intent on 30 July 1983, and the trial court committed prejudicial error in allowing its admission. We find the admission of this

evidence to be error, and because we cannot say that the error was harmless to the defendant beyond a reasonable doubt, we hold there must be a new trial.

Among the exceptions to the general rule that evidence of another crime is inadmissible even though the other offense is of the same nature as the crime charged is the "intent" exception.

> Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused.

State v. McClain, 240 N.C. 171, 175, 81 S.E. 2d 364, 366 (1954). However, evidence of separate criminal activity should be excluded when its only logical relevance "is to suggest defendant's propensity or predisposition to commit the type of offense with which he is presently charged." *State v. Hunt*, 305 N.C. 238, 246, 287 S.E. 2d 818, 823 (1982), *quoting, State v. Shane*, 304 N.C. 643, 654, 285 S.E. 2d 813, 820 (1982), *cert. denied*, --- U.S. ---, 80 L.Ed. 2d 134, 104 S.Ct. 1604 (1984).

We believe the evidence of defendant's prior criminal conduct in this case at best "suggest[ed] defendant's propensity or predisposition to commit the type of offense with which he is presently charged." *Id.* Defendant's convictions of automobile larceny three, four, and fourteen years earlier had no concrete bearing on or logical tendency to establish the requisite mental state on 30 July 1983. The only logical relevancy these prior convictions had to the crime for which defendant was being tried was that they were "similar" and arguably, albeit attenuated, "not too far removed from the crime with which defendant was charged," a standard of admission expressly disavowed by our Supreme Court in *State v. Byrd*, 309 N.C. 132, 141, 305 S.E. 2d 724, 731 (1983).

Because the jury was permitted to find the requisite mental intent to permanently deprive the owner of his vehicle from defendant's prior instances of larceny, we are precluded from saying the admission of the evidence of these prior crimes was harmless error. We do not discuss the defendant's other assignments of error as they may not recur at a new trial.

New trial.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. THOMAS EDGAR ROBINSON

No. 8426SC687

(Filed 16 April 1985)

Criminal Law § 102.8— comment on wife's failure to testify

In a prosecution for second-degree murder, the trial court erred during closing arguments by not giving a curative instruction after sustaining defendant's objection to a comment by the prosecutor on defendant's wife's failure to testify.

APPEAL by defendant from *Saunders, Judge*. Judgment entered 15 December 1983 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 14 February 1985.

On 16 August 1983 at approximately 9:30 p.m. T. C. Bowden, III, age 15, was stabbed to death. Thomas Edgar Robinson, age 33, was found guilty at a jury trial of second degree murder and was sentenced to forty years imprisonment.

The State's evidence tended to show that at approximately 7:30 p.m. on 16 August 1983, defendant and the deceased were involved in a fight at the Pine Manor apartment complex where both resided. This fight was halted by the apartment manager.

About 9:30 p.m. the deceased and one of his friends, Trent Surratt, were walking around the apartment complex. They saw defendant sitting on his car in front of his apartment. While the deceased and Surratt were talking to James Green, defendant walked down the hill and from behind, hit the deceased in the stomach. Surratt testified that afterwards the deceased slumped over and that defendant had a knife in his hand. Surratt testified that after the defendant stabbed the deceased he said: "I told that damn nigger I was going to get him." An investigator testified that a knife was found on defendant's doorstep.

The evidence for defendant tended to show that the defendant and James Green were together on 16 August 1983 drinking some home brew. Defendant testified that he saw the deceased choking a little girl and when he told him to leave her alone the deceased started hitting defendant in the face. Defendant testified that he "had to fight him back" and that the deceased "beat me up pretty good." After the apartment manager halted the fight, defendant's wife helped him into their apartment.

Defendant testified that he went to sleep on his couch and was awakened by the sound of the windows in the house breaking. His wife and children went out of the back door and he ran out of the front door. He was arrested as he reached his car. Defendant testified that he had never seen the knife that was introduced by the State and that he was not aware of the stabbing until informed by police. Defendant's sister, Frances Greenart, who recently had lived in defendant's home for three months, testified that she had not seen any knives that looked like the one introduced by the State while living with defendant's family.

From the judgment and sentence of forty years imprisonment, defendant appeals.

Attorney General Edmisten, by Associate Attorney David R. Minges, for the State.

Brenda S. McLain, for the defendant-appellant.

EAGLES, Judge.

Defendant first contends that prejudicial error was committed when the district attorney, during his closing argument to the jury, commented on the fact that the defendant's wife did not testify. We agree.

During his closing argument, the district attorney argued in part as follows:

> The defendant said, and I asked him on cross examination, "Was your wife there right after the fight at the apartment?" "Yes. She helped me into the apartment." "Was the wife there when you went to sleep?" "Yes." "Was your wife there when you woke up?" "Yes." Where is the wife? She's the one person who can corroborate the defendant's story.

She didn't testify. I cannot compel a wife to testify against her husband. Mr. White could have put her on the stand—

MR. WHITE: Now, I OBJECT to that.

COURT: SUSTAINED. Move along, counsel.

MR. YOUNG: All right, sir.

In *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976), the Supreme Court held:

> The provisions of G.S. 8-57, and decisions of this court, interpreting and applying them, impel the conclusion that where evidence is rendered incompetent by statute, it is the duty of the trial judge to exclude it, and his failure to do so is reversible error, whether objection is interposed and exception noted or not. *Hooper v. Hooper*, 165 N.C. 605, 81 S.E. 933 (1914). In such case it is the duty of the judge to act on his own motion. [Citations omitted.] The rule applies with equal force to the argument of counsel when evidence forbidden by statute is argumentatively placed before the jury and used to the prejudice of the defense. When this occurs it is the duty of the judge *ex mero motu* to intervene and promptly instruct the jury that the wife's failure to testify and the improper argument concerning that fact must be disregarded and under no circumstances used to the prejudice of the defendant.

Id. at 447, 226 S.E. 2d at 496-97. *See also State v. McCall*, 289 N.C. 570, 223 S.E. 2d 334 (1976); *State v. Ward*, 34 N.C. App. 598, 239 S.E. 2d 291 (1977).

In the instant case, when the objection was made the judge merely sustained the objection and did not make a curative instruction to the jury. His failure to do so was error and, on the record before us, we cannot say the error was harmless. *State v. Thompson, supra.* There must be a new trial.

Our resolution of this issue disposes of the appeal and makes it unnecessary to consider appellant's remaining assignments of error.

New trial.

Judges ARNOLD and PARKER concur.

STATE OF NORTH CAROLINA v. THOMAS ALBERT TAYLOR

No. 8420SC482

(Filed 16 April 1985)

Criminal Law § 138— joinable offense as aggravating factor

In sentencing defendant for the murder of his sister-in-law, the trial court erred in finding as an aggravating factor that the murder "was a course of conduct in which defendant committed an act of violence against another person," *i.e.*, the murder of his wife, because the wife's murder was joinable with the crime for which defendant was being sentenced. G.S. 15A-1340.4(a)(1)(o).

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 6 January 1984 in Superior Court, ANSON County. Heard in the Court of Appeals 5 February 1985.

The facts involved in this case are undisputed. Defendant met his estranged wife at a diner. They discussed the payment of automobile insurance, and defendant's wife told defendant to bring her the premium notice and the money to pay the premium. Defendant went home, picked up his mail, and brought it to his wife at her sister's house. Not finding the insurance notice, she threw the mail back through the window of defendant's truck. Defendant went home again, found the insurance notice, and brought it to his wife. When defendant got out of the truck, his wife picked up a loaded pistol that was sitting in the front seat. Defendant grabbed the pistol, shot his wife, followed her into the house, shot his sister-in-law twice, and shot his wife again. Later defendant voluntarily confessed to both homicides.

Defendant was indicted for first degree murder and pled guilty to second degree murder of his wife and sister-in-law. At his first sentencing hearing he was sentenced to the presumptive term, fifteen years, for the murder of his wife, and he received a sentence of life imprisonment for the murder of his sister-in-law. Defendant appealed from the verdict and judgment imposing the life sentence. Our Supreme Court, in *State v. Taylor*, 309 N.C. 570, 308 S.E. 2d 302 (1983), held that to find as an aggravating factor that defendant was armed with or used a deadly weapon at the time of the crime was, under *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983), improper because it was the use of evidence necessary to prove an element of the offense to prove an

aggravating factor. The case was remanded for a new sentencing hearing.

On resentencing the trial judge found the following aggravating factors:

> The murder was a course of conduct in which the defendant committed an act of violence against another person.
>
> The defendant's ability to exercise judgment is impaired under stress such that he has a tendency to react impulsively and violently and needs restraining to protect the public.

The trial judge found the following factors in mitigation:

> The defendant has no record of criminal convictions.
>
> The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense; to wit: chronic brain syndrome.
>
> 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.

The court found the aggravating factors outweighed the mitigating factors and imposed a sentence of fifty years.

Attorney General Edmisten by Assistant Attorney General Thomas J. Ziko for the State.

Taylor and Bower by H. P. Taylor, Jr., and George C. Bower, Jr., for defendant appellant.

PARKER, Judge.

Defendant assigns as error the finding in aggravation that "[T]he murder was a course of conduct in which defendant committed an act of violence against another person."

General Statute 15A-1340.4(a)(1)(o) prohibits, as an aggravating factor, convictions for offenses "joinable, under G.S. Chapter 15A, with the crime or crimes for which the defendant is currently being sentenced." This prohibits the trial judge from considering that defendant committed the joinable offense as an

aggravating factor. *State v. Lattimore*, 310 N.C. 295, 311 S.E. 2d 876 (1984); *State v. Puckett*, 66 N.C. App. 600, 312 S.E. 2d 207 (1984); *State v. Winnex*, 66 N.C. App. 280, 311 S.E. 2d 594 (1984).

In *State v. Lattimore, supra*, the defendant pled guilty to attempted robbery with a firearm and second degree murder. Both sentences exceeded the presumptive term, and defendant appealed his life sentence for second degree murder pursuant to G.S. 15A-1444(a1). Defendant assigned as error the trial court's finding in aggravation that the victim of the attempted armed robbery was killed. Our Supreme Court agreed, holding that to permit the trial judge to find, as an aggravating factor, that defendant had committed the joinable offense would "virtually eviscerate the purpose and policy of the statutory prohibition." *State v. Lattimore*, 310 N.C. at 299, 311 S.E. 2d at 879. Similarly, in the instant case, the "act of violence against another person," i.e., the murder of defendant's wife, cannot be considered an aggravating factor in sentencing defendant for the murder of his sister-in-law. For this reason we remand the case for resentencing.

Defendant brings forward several other assignments of error which are either without merit or relate to clerical errors which are not likely to reoccur on resentencing.

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 instant case, however, where an 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).

Vacated and remanded for resentencing.

Judges ARNOLD and EAGLES concur.

In re Thompson

IN THE MATTER OF: RICHARD ALLAN THOMPSON

No. 8412DC908

(Filed 16 April 1985)

Infants § 20— juvenile delinquent—commitment to consecutive terms of detention

The trial court had common law authority to commit a juvenile to consecutive terms of detention.

APPEAL by respondent from *Guy, Judge.* Order entered 31 May 1984 in District Court, CUMBERLAND County. Heard in the Court of Appeals 14 March 1985.

On 14 October 1983, the respondent was committed to a maximum security detention facility of the Department of Human Resources Division of Youth Services for a term of two years. On or about 14 April 1984, while he was in detention at the C. A. Dillon School, the respondent assaulted an employee of the training school and damaged the certain real property belonging to the school. He was adjudicated to be a delinquent juvenile because of these actions. On 31 May 1984, at his disposition hearing the court committed the respondent to the Department of Human Resources for an indefinite period. The court further ordered that this commitment was to run consecutively to the commitment which the respondent was already serving. From the dispositional order, respondent appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Robert E. Cansler, for the State.

Assistant Public Defender Michael J. O'Foghludha for respondent appellant.

ARNOLD, Judge.

The sole question presented for review is whether the court erred in the disposition of the respondent's case by committing him to the residential facilities provided by the division of youth services for a term commencing at the expiration of the commitment which he was serving at the time the offense was committed. Finding no error in the court's order, we affirm.

The respondent argues that he cannot be committed to confinement for consecutive terms because such a commitment is not authorized by G.S. 7A-647, 648, 649, or 652. He also contends that "to permit consecutive commitments would run counter to much of the philosophy of the juvenile code."

In North Carolina the common law is controlling unless it has been repealed or modified by statute. *Hoke v. Greyhound Corp.*, 226 N.C. 332, 38 S.E. 2d 105 (1946). Our court's authority to commit offenders to consecutive terms of confinement is well established under the North Carolina common law. *See State v. Mosteller*, 3 N.C. App. 67, 164 S.E. 2d 27 (1978). The juvenile code does not contain any provision which prohibits the commitment of a juvenile to consecutive terms of detention. Absent an express prohibition we find the common law rule controlling.

Furthermore we reject respondent's contention that consecutive commitments are contrary to the philosophy of the juvenile code. If the reasoning urged by the respondent was accepted it would mean that once a juvenile had been committed to a detention facility or training school he would be free to commit whatever other illegal acts he so chose knowing that he could not receive any additional punishment for his action. We do not believe that this was the intention of the legislature when it adopted the juvenile code.

For the above stated reasons we hold that the order appealed from is

Affirmed.

Judges PHILLIPS and COZORT concur.

R. MARIE SIDES v. DUKE UNIVERSITY, GLORIA FARMER, MEREL HARMEL, AND JOHN MILLER

No. 8314SC1308

(Filed 7 May 1985)

1. Master and Servant § 10.2— employment at will—action for wrongful discharge recognized

Plaintiff's complaint stated an enforceable claim against defendant Duke Hospital, but not against two other parties who did not employ her, for wrongfully discharging plaintiff from her employment in retaliation for her refusal to testify falsely or incompletely in a medical malpractice case. Plaintiff alleged that she had been a nurse anesthetist at Duke University Medical Center; she had refused to administer drugs she considered dangerous; the doctor ordering the drugs administered them personally; the patient suffered permanent brain damage and a lawsuit was filed by his estate; plaintiff was advised by physicians who worked for Duke and by Duke's attorneys that she should not tell all of what she had seen; plaintiff testified fully and truthfully at her deposition and at trial; another nurse anesthetist who had withheld information at her deposition testified more fully at trial; the jury returned a verdict for the estate; the doctors involved in the lawsuit encouraged hostile attitudes toward plaintiff and many of the doctors at Duke became hostile toward plaintiff; plaintiff's supervisor refused to help her deal with these hostilities; plaintiff was told that she had an abusive attitude and that her work would be closely monitored; plaintiff was not given specific examples of her poor performance, despite her repeated requests; and plaintiff was finally discharged.

2. Master and Servant § 10.2— wrongful discharge—action for breach of contract

Plaintiff's complaint stated a claim for breach of contract where she alleged that she came to Duke University Medical Center from Michigan to accept a position as a nurse anesthetist because she was assured that nurse anesthetists at Duke could not be discharged for reasons other than incompetence and that she was discharged in retaliation for her refusal to testify falsely or incompletely in a medical malpractice case. Even if the employment contract was at will, plaintiff sufficiently alleged a claim for breach of contract because Duke had no right to terminate it for the unlawful purposes alleged in the complaint.

3. Master and Servant § 13— interference with employment by third party—allegations sufficient

Plaintiff stated a claim against two doctors for wrongfully interfering with her contractual relationship with Duke University Medical Center where her complaint alleged that the doctors maliciously undertook to have her discharged because she would not be intimidated into testifying favorably to them in a malpractice case and left no grounds for supposing that she was fired for any other reason. Plaintiff was not required to use the magic words "but for"; moreover, although defendants did have status as "non-outsiders" to

some extent because of their work at Duke University Medical Center and their professional interests in the quality of medical care at that facility, the complaint shows that their actions had no conceivable relationship to their legitimate interests.

4. Master and Servant § 10.3— wrongful discharge and malicious interference with contract—punitive damages

Plaintiff's complaint stated a claim for punitive damages against Duke University Medical Center and two doctors based on wrongful discharge and malicious interference with contract where she alleged wanton and reckless disregard of her rights by Duke and actual malice by the doctors. However, plaintiff's punitive damages claim against one of the doctors and her supervisor based on wrongful discharge could not stand because there was no enforceable claim for wrongful discharge against those defendants.

Judge ARNOLD concurring in the result.

APPEAL by plaintiff from *Lee, Judge.* Orders entered 14 October 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 27 September 1984.

In this civil action plaintiff seeks damages from the several defendants for terminating, or for wrongfully bringing about the termination of, her employment with Duke University. In the complaint several different claims for relief are asserted against various of the defendants, and all of the defendants moved to dismiss the complaint pursuant to Rule 12(b)(6) of the N.C. Rules of Civil Procedure on the grounds that it failed to state a claim upon which relief could be granted. After a hearing on the motions orders were entered dismissing the complaint against each of the defendants, from which the plaintiff appeals. Plaintiff's complaint contains the following allegations of fact:

Until 9 February 1982 plaintiff was employed as a nurse anesthetist at Duke University Medical Center (DUMC), a hospital operated by defendant Duke University (Duke). Defendant Gloria Farmer was the chief nurse anesthetist at DUMC and was plaintiff's immediate supervisor. Defendants Merel Harmel and John Miller were both physicians specializing in anesthesiology, and were also partners in Surgical Private Diagnostic Clinic. Dr. Harmel was also chief of the anesthesiology department at DUMC. Plaintiff began work as a nurse anesthetist at DUMC on 1 November 1970. Before then she worked as a nurse anesthetist in Michigan, and one of the primary inducements for plaintiff leaving Michigan and taking the job at DUMC was job security. She

was assured by Duke agents both at her job interview and again when the job was offered to her that nurse anesthetists at DUMC could only be discharged for incompetence. This understanding of Duke's policy was shared by various other DUMC employees who commented on numerous occasions throughout her more than eleven years of employment at Duke that nurse anesthetists could only be discharged for incompetence.

On or about 22 May 1980 the estate of one Larry Downs initiated a lawsuit against Duke Hospital, Dr. Harmel, Dr. Miller, and others. In that action the plaintiff alleged that Larry Downs when a patient at DUMC had suffered permanent brain damage resulting from the negligent administration of anesthetics by Dr. Miller. Mr. Downs had entered DUMC for cleft palate surgery, and when he came out of the surgery plaintiff was on duty in the recovery room and Dr. Miller instructed her to administer certain anesthetics to Mr. Downs to immobilize him. Plaintiff refused to administer the anesthetics directed by Dr. Miller because she thought those anesthetics would harm the patient and possibly cause his death. Dr. Miller nevertheless personally administered the drugs to Mr. Downs, who stopped breathing, went into cardiac arrest for a time, and suffered permanent brain damage. During the course of pretrial discovery in that case attorneys for Downs' estate took plaintiff's deposition. Before her testimony was taken plaintiff was advised by several physicians who worked at DUMC and by attorneys for Duke and other defendants in that suit that she should not tell all that she had seen relating to Mr. Downs' treatment; some of the doctors warned her that if she did so she "would be in trouble." Pressures like that had already caused another nurse anesthetist at DUMC to withhold information at her deposition. In spite of this when her testimony was taken plaintiff testified fully and truthfully.

After the deposition many of the physicians at DUMC, particularly Doctors Harmel and Miller, began to adopt hostile attitudes toward her. When the case was tried in November 1981 plaintiff again testified fully and truthfully and the nurse anesthetist who earlier withheld some information testified more fully. The jury returned a verdict in favor of Mr. Downs' estate in the amount of $1,750,000. Dr. Harmel viewed plaintiff as the person who had caused them to lose the case. Concerned that her testimony in the case might cause difficulties in her work with

some of the doctors at Duke, plaintiff asked chief nurse Farmer to inform her of any complaints about her work so that she could address them. Ms. Farmer refused to do this. After the Downs trial some physicians displayed a hostile attitude toward plaintiff and some refused to work with her. Dr. Miller told other physicians that they should have nothing to do with her, and Dr. Harmel encouraged these hostile attitudes toward plaintiff. These hostilities made the performance of plaintiff's job duties almost impossible and she asked her chief, Ms. Farmer, to assist her in dealing with them, but she again refused. On 20 January 1982 Ms. Farmer called plaintiff into a meeting with Dr. Lennart Fagreus; at that meeting plaintiff was advised that her job performance was poor in several respects, that she had "an abusive attitude," and that her work would be closely monitored for three months. Since her practices then were substantially no different from what they had been during her preceding eleven years at Duke, she asked for specific examples of the poor performance generally alluded to, but none were given. On or about 22 January 1982 Ms. Farmer wrote plaintiff a letter reiterating the complaints and offered to help her improve her work. This offer of help was accepted by plaintiff in a return letter, in which she again requested that specific instances of her poor performance be given to her; but Ms. Farmer never informed her of any specific instances of poor job performance. On 9 February 1982 Ms. Farmer called plaintiff into a meeting with Dr. Harmel and informed her that she was discharged immediately.

In her complaint plaintiff also claims that: In discharging her Ms. Farmer acted as an agent of Duke; Dr. Harmel encouraged, supported and approved the discharge and was an agent of Duke in so doing; the efforts of Doctors Miller and Harmel to discredit her with other doctors were substantial contributing factors to her discharge; she always performed her work competently and responsibly; her discharge was in retaliation for her testifying truthfully and completely in the Downs lawsuit; and as a result of her discharge plaintiff has not been able to find similar work at other medical facilities and has lost income and fringe benefits of substantial value.

Based on the foregoing allegations, plaintiff seeks to enforce five claims for relief, as follows: *First Claim*—that there was a contract with Duke not to discharge her for any cause other

than incompetent performance of her duties, and the discharge breached the contract, for which she is entitled to compensatory damages from defendants Duke, Farmer and Harmel; *Second Claim*—that her discharge in retaliation for testifying fully and truthfully in court was a wrongful discharge in violation of public policy, entitling her to compensatory damages from defendants Duke, Farmer and Harmel; *Third Claim*—that the acts and efforts of Doctors Harmel and Miller were carried out for the malicious purpose of accomplishing her discharge and interfering with her contractual and economic relations with Duke, for which she is entitled to compensatory damages from them; *Fourth Claim*—that her wrongful discharge in retaliation for truthfully testifying in court was a wanton and reckless violation of public policy and her rights, for which punitive damages should be assessed against defendants Duke, Farmer and Harmel; and *Fifth Claim*—that the acts and efforts of Doctors Miller and Harmel to bring about her wrongful discharge and interfere with her contractual relations were done with actual malice, thereby entitling her to punitive damages from them.

Edelstein, Payne and Jordan, by M. Travis Payne, for plaintiff appellant.

Powe, Porter & Alphin, by N. A. Ciompi and William E. Freeman, for defendant appellees Duke University and Gloria Farmer.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James G. Billings, Susan M. Parker, and Susan E. Rector, for defendant appellees Merel Harmel and John Miller.

The North Carolina Academy of Trial Lawyers, by Kathy A. Klotzberger, as amicus curiae.

PHILLIPS, Judge.

Does the complaint which alleges that plaintiff was discharged from her job at Duke University Medical Center in retaliation for her refusal to withhold testimony or testify untruthfully in a lawsuit against some of the defendants state a claim for relief against any of the defendants? That is the only question presented by this appeal. Plaintiff contends that she has pleaded legally enforceable claims for relief in both tort and con-

tract against various of the defendants. We consider first whether plaintiff has pleaded a claim for relief in tort for wrongful discharge.

WRONGFUL DISCHARGE

[1] At the threshold we are confronted by the decision of this Court in *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E. 2d 272, *disc. rev. denied*, 295 N.C. 465, 246 S.E. 2d 215 (1978). In that case, speaking through Judge Mitchell, now Justice Mitchell, this Court held that an employee at will in this State has no enforceable claim against his employer for "retaliatory discharge," an action that many courts in this country have recognized and enforced under various circumstances. The plaintiff in that case, so he alleged, was discharged in retaliation for filing a workers' compensation claim against his employer. The general common law rule, of course, in this and other jurisdictions, as the plaintiff recognized, is that when a contract of employment does not fix a definite term the employment is terminable without cause at the will of either party. *Bishop v. Wood*, 426 U.S. 341, 48 L.Ed. 2d 684, 96 S.Ct. 2074 (1976); *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976). The plaintiff in *Dockery* argued that notwithstanding the general rule the Court should and could recognize plaintiff's wrongful discharge action either on the ground that it was authorized by statute or on the ground that public policy required it. His main reliance was on the case of *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E. 2d 425 (1973), where, on facts similar to *Dockery*, the Indiana Supreme Court carved out a "retaliatory discharge" exception to the common law doctrine that contracts of an indefinite duration are terminable at will and without legal recourse. Plaintiff pointed out that the Indiana Workers' Compensation Law provided, as did the North Carolina Workers' Compensation Act through G.S. 97-6, that no employer could avoid its obligation under the law by any agreement, rule, regulation or other device; and that the *Frampton* court viewed the discharge by the employer in retaliation for the employee filing a workers' compensation claim as a "device" for avoiding its obligations under the law, since its inevitable effect would be to discourage other injured workers from filing claims, and therefore wrongful and actionable.

In rejecting this argument the *Dockery* court noted that: The decision of the Indiana Supreme Court in *Frampton* was based upon its approval of the retaliatory eviction defense which many courts permit in tenancy at will eviction cases and that this defense had been disapproved by this Court in *Evans v. Rose*, 12 N.C. App. 165, 182 S.E. 2d 591, *cert. denied*, 279 N.C. 511, 183 S.E. 2d 686 (1971). The Court concluded that "failure of the General Assembly to specifically provide the claim for relief alleged by the plaintiff was an indication of its intent that no such claim be created." 36 N.C. App. at 300, 244 S.E. 2d at 277. In so concluding, the Court may not have read the legislative intent as to retaliatory discharge actions aright. In all events at the next session after the *Dockery* decision came down the General Assembly expressly authorized actions by employees demoted or discharged in retaliation for instituting a workers' compensation proceeding in good faith or for testifying in regard to it. G.S. 97-6.1. At that same session the General Assembly also authorized the affirmative defense of retaliatory eviction in certain summary ejectment cases. G.S. 42-37.1. The alacrity with which the legislature acted in both of these fields after that deficiency in the statutes was pointed out tends to show, we think, that the legislature is not at all adverse to courts of this State entertaining actions based on a violation of policies that have been enacted or otherwise established for the protection and benefit of the public. And we must say that no rational reason for the legislature generally opposing the enforcement of its enactments by the civil courts occurs to us, and would think that in the absence of a declaration to the contrary it should be assumed that the legislature favors the enforcement of the law by all legitimate and customary means, including suits in the civil courts in proper cases.

But whether or not the *Dockery* refusal to recognize an action for retaliatory discharge has been undermined by those enactments of the General Assembly, the public policy considerations that affect this case are much more compelling than those that affected that case. Though the public has a strong interest in allowing workers to pursue their statutory remedies for workers' compensation without being in fear of losing even greater benefits—their jobs and means of livelihood—if they do, the public interest in preventing the obstruction of justice is greater still. Perjury and the subornation of perjury were both felonies at com-

mon law and are so punishable by G.S. 14-209 and G.S. 14-210. The intimidation of witnesses was an offense at common law and is punishable by G.S. 14-226 as a misdemeanor. These offenses are also an affront to the integrity of our judicial system, an impediment to the constitutional mandate of the courts to administer justice fairly, and a violation of the right that all litigants in this State have to have their cases tried upon honest evidence fully given. Indeed, as every citizen of ordinary intelligence must surely know, under our law before any witness can testify in any civil or criminal case he must solemnly affirm or swear that the evidence given by him "shall be the truth, the whole truth, and nothing but the truth." G.S. 11-11. Because of these distinctions we do not view *Dockery* as controlling this case, and believe that to deny that an enforceable claim has been stated in this instance would be a grave disservice to the public and the system of law that we are sworn to administer, no principle of which requires that civil immunity be given to those who would defile or corrupt it.

It is generally agreed that the terminable-at-will doctrine was the prevailing common law in the latter part of the nineteenth century:

> With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . [I]t is an indefinite hiring and is determinable at the will of either party. . . .

H. G. Wood, *Master and Servant* § 134 (1877) *quoted in* Feinman, *The Development of the Employment at Will Rule*, 20 Am. J. of Legal History, 118, 126 (1976). But this represented a departure from the earlier English common law rule that contracts of indefinite duration were presumed to be for a year, 2 W. Blackstone, *Commentaries*, 425; Feinman, *supra* at 119-22; and at least one court has questioned whether Wood's statement was supported by the authority it cited and was accurate when written. *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W. 2d 834 (1983).

The common law of North Carolina is the common law of England as it existed when independence was declared in 1776. *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E. 2d 239

(1971). Inasmuch as the terminable-at-will doctrine may not have been a part of the English common law, it is thus possible that the pedigree of our common law rule is questionable. Nevertheless, the rule was well suited to the socio-economic climate that necessitated its development, *see* Comment, *A Common Law Action for the Abusively Discharged Employee*, 26 Hastings Law Journal, 1434, 1440-41 (1975), and, correctly or not, our courts have long adhered to the rule. *E.g. Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971); *Tuttle v. Kernersville Lumber Co.*, 263 N.C. 266, 139 S.E. 2d 249 (1964); *May v. Tidewater Power Co.*, 216 N.C. 439, 55 S.E. 2d 308 (1939). *See generally*, Note, *Workers' Compensation—Retaliatory Discharge—The Legislative Response to Dockery v. Lampart Table Co.*, 58 N.C. L. Rev. 629 (1980).

In recent years, the rule has come under increasing criticism from scholars, *e.g.* Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum. L. Rev. 1404 (1967); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481 (1976); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 Ohio St. L. J. 1 (1979); Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Exception*, 96 Harv. L. Rev. 1931 (1983); Note, *Continued Resistance to the Inclusion of Personnel Policies in Contracts of Employment: Griffin v. Housing Authority of Durham*, 62 N.C. L. Rev. 1326 (1984); Note, *Workmen's Compensation—No Private Right of Action for Retaliatory Discharge in North Carolina*, 15 Wake Forest L. Rev. 139 (1979), as being unfair and no longer suited to the evolving economic relations between employer and employee. Similarly, courts have begun to respond to a perceived need to protect non-contract employees from abusive practices by the employer. *See* Comment, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 Harv. L. Rev. 1816, 1818-24 (1980).

The California case of *Petermann v. International Brotherhood, etc.*, 174 Cal. App. 2d 184, 344 P. 2d 25 (1959), was the seminal case in recognizing a limitation on the common law doctrine. There, in a situation involving policy considerations similar to the present one, an employee who had been discharged from his job for refusing to give false answers to a legislative committee attempted to sue his employer. The trial court, relying on the

terminable at will doctrine, granted the employer's motion for non-suit. The California Court of Appeals reversed, recognizing the doctrine but holding that an employer's right thereunder to discharge an employee "may be limited by statute or by considerations of public policy." 174 Cal. App. 2d at 188, 344 P. 2d at 27 (citations omitted). That court expressed the applicable public policy considerations as follows:

> The presence of false testimony in any proceeding tends to interfere with the proper administration of public affairs and the administration of justice. *It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.* The threat of criminal prosecution would, in many cases, be a sufficient deterrent upon both the employer and employee, the former from soliciting and the latter from committing perjury. However, in order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury. *To hold otherwise would be without reason and contrary to the spirit of the law. The public policy of this state as reflected in the penal code sections referred to above would be seriously impaired if it were to be held that one could be discharged by reason of his refusal to commit perjury. To hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and would serve to contaminate the honest administration of public affairs.* This is patently contrary to the public welfare. The law must encourage and not discourage truthful testimony. The public policy of this state requires that every impediment, however remote to the above objective, must be struck down when encountered. (Emphasis added.)

174 Cal. App. 2d at 188-89, 344 P. 2d at 27. Subsequent cases from other states have recognized a common law cause of action in tort

for employees at will who are discharged for reasons that are in some way wrongful or socially undesirable. *See, e.g., Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A. 2d 385 (1980) [quality control director discharged for insistence that employer comply with federal and state food, drug and cosmetics laws]; *Parnar v. Americana Hotels, Inc.*, 65 Hawaii 370, 652 P. 2d 625 (1982) [employee discharged to prevent testimony before grand jury or any subsequent criminal trial]; *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E. 2d 876 (1981) [employee discharged for informing police of crimes of another employee and agreeing to testify against him]; *Trombetta v. Detroit, Toledo & Ironton R.R. Co.*, 81 Mich. App. 489, 265 N.W. 2d 385 (1978) [employee discharged for refusing to alter results of tests on pollution control reports]; *Nees v. Hocks*, 272 Or. 210, 536 P. 2d 512 (1975) [employee discharged for failure to refuse jury duty]; *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A. 2d 119 (1978) [employee discharged for serving jury duty]; *Harless v. First National Bank*, 246 S.E. 2d 270 (W.Va. 1978) [employee discharged for efforts to make employer comply with state and federal consumer protection credit laws].

Cases from other jurisdictions have recognized a cause of action when the discharge was in violation of a statute. *E.g. Frampton v. Central Indiana Gas Co., supra; Murphy v. City of Topeka-Shawnee County*, 6 Kan. App. 2d 488, 630 P. 2d 186 (1981); *Lally v. Copygraphics*, 85 N.J. 668, 428 A. 2d 1317 (1981); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E. 2d 353 (1978); *Sventco v. Kroger Co.*, 69 Mich. App. 644, 245 N.W. 2d 151 (1976); *Texas Steel Co. v. Douglas*, 533 S.W. 2d 111 (Tex. Civ. App. 1976). All of the above cases involve employees discharged for asserting their rights under workers' compensation laws in the particular states. It should be noted, however, that not all of the compensation laws involved in these cases specifically provide a remedy, as North Carolina now does.

Some courts have recognized the need for a common law cause of action for wrongful discharge, but have not met with appropriate facts for applying it. *E.g. Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P. 2d 54 (1977); *Scroghan v. Kraftco Corp.*, 551 S.W. 2d 811 (Ky. 1977); *Adler v. American Standard*, 291 Md. 31, 432 A. 2d 464 (1981); *Keneally v. Orgain*, 606 P. 2d 127 (Mont. 1980); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A. 2d

505 (1980); *Ward v. Frito-Lay, Inc.*, 95 Wis. 2d 372, 290 N.W. 2d 536 (1980). Still other courts have flatly refused to recognize a limitation or modify the common law doctrine. *E.g. Griffith v. Sollay Foundation Drilling, Inc.*, 373 So. 2d 979 (La. App. 1979); *Jones v. Koegh*, 137 Vt. 562, 409 A. 2d 581 (1979). Some have refused to do so absent a statutory mandate. *Lampe v. Presbyterian Medical Center*, 41 Colo. App. 465, 590 P. 2d 513 (1978). *Dockery v. Lampart Table Co., supra*, appears to fall into this last category.

But none of the foregoing discussions of the at will doctrine, or any others that we have seen, focuses on what we believe is the fundamental fact upon which the at will doctrine rests, a fact that is crucial to this case, in our judgment. We refer to the obvious and indisputable fact that in a civilized state where reciprocal legal rights and duties abound the words "at will" can never mean "without limit or qualification," as so much of the discussion and the briefs of the defendants imply; for in such a state the rights of each person are necessarily and inherently limited by the rights of others and the interests of the public. An at will prerogative without limits could be suffered only in an anarchy, and there not for long—it certainly cannot be suffered in a society such as ours without weakening the bond of counterbalancing rights and obligations that holds such societies together. Thus, while there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent. We hold, therefore, that no employer in this State, notwithstanding that an employment is at will, has the right to discharge an employee and deprive him of his livelihood without civil liability because he refuses to testify untruthfully or incompletely in a court case, as plaintiff alleges happened here. One of the merited glories of this country is the multitude of rights that its people have, rights that are enforced as a matter of course by our courts, and nothing could be more inimical to their enjoyment than the unbridled law defying actions of some and the false or incomplete testimony of others. If we are to have law, those who so act against the public interest must be held accountable for the harm

inflicted thereby; to accord them civil immunity would incongruously reward their lawlessness at the unjust expense of their innocent victims.

We hold, therefore, that plaintiff's complaint, the allegations of which need not be repeated, states an enforceable claim against the defendant Duke for wrongfully discharging her from her employment in retaliation for her refusal to testify falsely or incompletely in the case referred to, and that part of the order appealed from is reversed. But this claim was properly dismissed as to Ms. Farmer and Dr. Harmel, since it is alleged that her employment contract was with Duke University, rather than either of them, and that part of the order is affirmed.

Even if the step we now take should be regarded as a departure from common law and clear precedent, and we do not believe that it is, it would not be the first such step that has been properly taken by the Courts of this State. In *Rabon v. Rowan Memorial Hospital, Inc.*, 269 N.C. 1, 152 S.E. 2d 485 (1967), our Supreme Court abolished the common law immunity that had unjustly and irrationally protected charitable institutions from liability for negligently injuring patients in hospitals operated by them. This was done, so the Court said, because the rule could not be supported by either law or logic and public policy and the interests of justice required its abolition. Because the language there used is appropriate to the situation now before us, we quote the following from Justice Sharp's opinion:

> This Court has never overruled its decisions lightly. No court has been more faithful to *stare decisis*. In matters involving title to property, its policy has been to leave changes in the law to the legislature. And always it has recognized "the gravity of the proposition that we shall reverse a decision of this court" as Connor, J., said in *Mial v. Ellington*, 134 N.C. 131, 139, 46 S.E. 961, 963-64, reversing *Hoke v. Henderson*, 15 N.C. 1. Nevertheless, when the duty has seemed clear, it has done so, recognizing that the membership of succeeding courts may well regard its membership as no less fallible. . . . As Stacy, J. (later C.J.), said in *Spitzer v. Comrs.*, 188 N.C. 30, 32, 123 S.E. 636, 638: "There is no virtue in sinning against light or in persisting in palpable error, for nothing is settled until it is settled right." Almost a quarter

> of a century later, Ervin, J., said: "The doctrine of *stare decisis* will not be applied in any event to preserve and perpetuate error and grievous wrong." *State v. Ballance*, 229 N.C. 764, 767, 51 S.E. 2d 731.

269 N.C. at 20-21, 152 S.E. 2d at 498. And in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979), for the good and sufficient reasons stated therein, our Supreme Court recognized that under certain circumstances the law authorizes an action for intentionally inflicting emotional distress.

While it is the function of courts to interpret rather than make law, it must nevertheless be borne in mind that the common law is not a collection of archaic, abstract legal principles as the briefs of the defendants imply—it is a living system of law that, like the skin of a child, grows and develops as the customs, practices and necessities of the people it was adopted for change. The common law had its genesis in the customs and practices of the people, and its genius, as many of the country's greatest jurists and legal scholars have pointed out, is not only its age and continuity, but its vitality and adaptability.

> If one were to attempt to write a history of the law in the United States, it would be largely an account of the means by which the common-law system has been able to make progress through a period of exceptionally rapid social and economic change. Law performs its function adequately only when it is suited to the way of life of a people. With social change comes the imperative demand that law shall satisfy the needs which change has created, and so the problem, above all others, of jurisprudence in the modern world is the reconciliation of the demands, paradoxical and to some extent conflicting, that law shall at once have continuity with the past and adaptability to the present and the future.

Harlan F. Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 11 (1936). *See also* O. W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

BREACH OF CONTRACT

[2] Even if the employment contract was at will, for the same public policy reasons stated above, we hold that defendant Duke had no right to terminate it for the unlawful purposes alleged in

the complaint, and that plaintiff's claim for breach of contract with resulting damages has been sufficiently alleged against the defendant Duke. Thus, this part of the order is reversed, but as with plaintiff's claim for wrongful discharge the trial court's dismissal of this claim as to the defendants Harmel and Farmer is affirmed, because it is not alleged that plaintiff was employed by either of them.

But, according to the complaint, the employment contract may not have been at will, since it alleges that plaintiff was assured by Duke that she could only be discharged for incompetence, these assurances induced her to move here from Michigan in order to accept the job offer, and were part of her employment contract. In *Tuttle v. Kernersville Lumber Co.*, 263 N.C. 216, 139 S.E. 2d 249 (1964), our Supreme Court by quoting with apparent approval certain provisions of 56 C.J.S. *Master and Servant*, appeared to recognize that the giving of a consideration by the employee in addition to the usual obligation of service can give rise to a contract for as long as the services are satisfactorily performed even though no definite term is agreed to. And this Court, citing *Tuttle*, said this in *Burkhimer v. Gealy*, 39 N.C. App. 450, 454, 250 S.E. 2d 678, 682, *disc. rev. denied*, 297 N.C. 298, 254 S.E. 2d 918 (1979):

> Generally, employment contracts that attempt to provide for permanent employment, or "employment for life," are terminable at will by either party. Where the employee gives some special consideration in addition to his services, such as relinquishing a claim for personal injuries against the employer, *removing his residence from one place to another in order to accept employment*, or assisting in breaking a strike, such a contract may be enforced. (Emphasis added.)

The additional consideration that the complaint alleges, her move from Michigan, was sufficient, we believe, to remove plaintiff's employment contract from the terminable-at-will rule and allow her to state a claim for breach of contract since it is also alleged that her discharge was for a reason other than the unsatisfactory performance of her duties.

INTERFERENCE WITH CONTRACT

[3] We now consider whether plaintiff's complaint alleges a claim for relief against Doctors Harmel and Miller for wrongfully

interfering with her contractual relationship with Duke. This cause of action is recognized in North Carolina, *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176 (1954), and will lie even though the contract of employment is terminable at will. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976); *Fitzgerald v. Wolf*, 40 N.C. App. 197, 252 S.E. 2d 523 (1979). The elements of this action are: (1) that a valid contract existed between the plaintiff and a third person; (2) that an outsider to the contract had knowledge of the contract; (3) that the outsider intentionally induced the third person not to perform his or her contract with the plaintiff; (4) that the outsider had no justification for so doing; and (5) that the plaintiff suffered damages as a result. *Smith v. Ford, supra.* Plaintiff's complaint clearly meets these requirements. It alleges that she had a contract with Duke and had worked in her position for more than eleven years. Though not specifically alleged, that Doctors Harmel and Miller knew about the contract is clearly established by other allegations. And it alleges that: (a) the actions of Doctors Harmel and Miller, already described, were taken for the purpose and with the intention of causing her discharge; (b) they sought to have her discharged in retaliation for her truthful testimony in a lawsuit involving them; (c) their actions were "material" and "substantial contributing factors" in her discharge; and (d) she has suffered damages as a result of the discharge.

Defendants Harmel and Miller contend that the complaint against them is deficient in several respects. They contend that plaintiff must allege that her damages would not have occurred "but for" their actions and that her complaint is fatally defective for failing to so allege. In support of this contention they cite us to the cases of *Smith v. Ford Motor Co., supra, Spartan Equipment Co. v. Air Placement Equipment Co.*, 263 N.C. 549, 140 S.E. 2d 3 (1965), and *Lloyd v. Carnation Co.*, 61 N.C. App. 381, 301 S.E. 2d 414 (1983), among others. This contention is rejected. In our reading of the cited cases and others, we detect no mandate for the use of the magic words "but for," the *dicta* in *Lloyd* notwithstanding. Rather, we read those cases to say that the complaint in an action for malicious interference with contract must clearly allege that the actions of the defendant were the cause of the plaintiff's damages and that the complaint admits of no other motive for those actions than malice. *Childress v. Abeles, supra*

requires only that "the outsider's act *caused* the plaintiff actual damages." *Id.* at 674, 84 S.E. 2d at 182. (Emphasis added.) This may be compared with actions for negligence where the defendant's actions need only be *a proximate cause* of plaintiff's alleged injury. *Hester v. Miller*, 41 N.C. App. 509, 255 S.E. 2d 318, *disc. rev. denied*, 298 N.C. 296, 259 S.E. 2d 913 (1979). While the words "but for" are in wide usage and undoubtedly meet the requirements for sufficiently pleading this cause of action, they are not the exclusive means of doing so. Plaintiff's complaint clearly alleges that Doctors Harmel and Miller maliciously undertook to have her discharged from her job because she would not be intimidated into testifying favorably to them in the Downs case and leaves no ground for supposing that she was fired for any other reason. If plaintiff can prove her allegations the defendants should not be allowed to escape liability because plaintiff's attorneys did not say "but for." To hold otherwise would be to return to the type of hypertechnical pleading that our Rules of Civil Procedure, G.S. 1A-1, and Rule 1 *et seq.* replaced. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

Defendants Harmel and Miller further contend that plaintiff's action for malicious interference with contract against them was properly dismissed because of their status relative to plaintiff's contract with Duke. Arguing that the "primary prerequisite" in a cause of action for malicious interference with contract is that the defendant be an "outsider" to the contract, they contend that their interest in the contract gives them the status of non-outsiders and precludes the maintenance of this action against them by plaintiff. We disagree. In *Smith v. Ford Motor Co., supra*, our Supreme Court noted that the use of the term "outsider" was "peculiar to this jurisdiction," 289 N.C. at 87, 221 S.E. 2d at 292. The Court further noted that the term "appears to connote one who was not a party to the terminated contract and who had no legitimate business interest of his own in the subject matter thereof." *Id.* The *Smith* Court went on to hold that the non-outsider status of a defendant was immaterial where the allegations in the complaint showed that defendants' motives for procuring the termination of the employment contract were not related to his business interest in the contract. That Court distinguished the case of *Wilson v. McClenny*, 262 N.C. 121, 136 S.E. 2d 569 (1964), wherein plaintiff, the president of a corpora-

tion, was dismissed and brought an action against four of the corporate directors. The *Smith* Court noted that the defendants in *Wilson* had a financial interest as stockholders in the corporation and therefore had a fiduciary duty to insure proper management. The case of *Dawson v. Radewicz*, 63 N.C. App. 731, 306 S.E. 2d 171 (1983) is distinguishable from the present case for the same reason. There, the defendant sheriff recommended against the local ABC board employing plaintiff, who had been a deputy in the sheriff's department but supported another candidate for sheriff in the election that put defendant in office. In making his views known to the Board, the Sheriff stated that it would be difficult for him and the plaintiff to work together, as law enforcement officers in the same area must, because of their political differences. These differences though largely personal were viewed by the Court as justifying defendant's interference with plaintiff's prospective employment, since he was the chief law enforcement officer in the county and he had a legitimate interest in promoting effective law enforcement.

Here, though defendants did have status as "non-outsiders" to some extent because of their work at Duke University Medical Center and their professional interest in the quality of medical care at that facility, the complaint shows that their actions resulting in plaintiff's discharge had no conceivable relationship to their legitimate interests, whatever they were. The complaint alleges that defendants were motivated neither by their legitimate professional interests nor by any deficiency on plaintiff's part to properly perform her duties as a nurse anesthetist, but by their malicious and wrongful desire to retaliate against her because of her truthful testimony against them in the Downs lawsuit. Taking these allegations as true for the purposes of this appeal, as we are required to do, plaintiff's complaint states a claim for relief for malicious interference with contract against both Doctors Miller and Harmel and this part of the order is also reversed.

PUNITIVE DAMAGES

[4] In this State, punitive damages can be recovered only for tortuous conduct and then only on proof that the defendant acted to cause plaintiff's injury wilfully, with malice, or with a reckless disregard for plaintiff's rights. *Hardy v. Toler*, 288 N.C. 303, 218

S.E. 2d 342 (1975); *Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 88 S.E. 2d 333 (1955). *See generally*, 5 Strong's N.C. Index 3d, *Damages* §§ 11-11.2 (1977 and Supp. 1984). Thus, plaintiff's plea for punitive damages in the claims for wrongful discharge and malicious interference with contract was appropriate, since both claims sound in tort and Duke's wanton and reckless disregard of her rights is pleaded in the former and the actual malice of Doctors Harmel and Miller is pleaded in the latter. But plaintiff's plea for the award of punitive damages from the defendants Farmer and Harmel in the wrongful discharge claim cannot stand in view of our ruling that no enforceable claim for wrongful discharge has been stated against these defendants.

CONCLUSION AND MANDATE

The order dismissing the complaint against the defendant Gloria Farmer is affirmed.

The order dismissing the complaint against the defendant Duke University is reversed.

The order dismissing the complaint against Dr. Harmel is affirmed as to the claims asserted against this defendant in plaintiff's *First*, *Second*, and *Fourth Claims*; but it is reversed as to the claims stated in plaintiff's *Third* and *Fifth Claims*.

The order dismissing the complaint against the defendant Dr. Miller is reversed.

Affirmed in part; reversed in part.

Judge JOHNSON concurs.

Judge ARNOLD concurs in the result.

Judge ARNOLD concurring in the result.

I concur in that portion of the majority opinion which holds that the trial court properly dismissed the plaintiff's complaint against the defendant Farmer. I also concur in those portions which hold that the plaintiff has stated a claim for breach of contract and for tortious interference with contract.

While I do not agree with the reasoning found in the wrongful discharge portion of the majority's opinion, I do believe that under the peculiar facts of this case the plaintiff has arguably stated a claim based upon her discharge by the defendant Duke Hospital. While I would reach this result through a different approach, inasmuch as this case involves such important issues and since it has been before this Court for over seven months, more than twice as long as allowed by our rules, I will not delay it any longer by writing an in-depth concurring opinion. I will simply state that I concur in the result.

GILBERT ENGINEERING COMPANY v. CITY OF ASHEVILLE, NORTH CAROLINA, A MUNICIPAL CORPORATION, AND O'BRIEN & GERE, INC., A CORPORATION

No. 8428SC547

(Filed 7 May 1985)

1. **Contracts § 21.2— construction contract—responsibility for defects in plans or specifications**

A construction contractor who has followed plans and specifications furnished by the owner or his architect or engineer will not be responsible for consequences of defects in those plans or specifications. Absent an agreement to the contrary, there is an implied warranty by the owner that the plans and specifications are suitable for the particular purpose and that if they are complied with the completed work will be adequate to accomplish the intended purpose.

2. **Contracts § 21.2— implied warranty of suitability of plans and specifications—burden of proving breach**

In order to establish a breach of an implied warranty of suitability of plans and specifications, the contractor has the burden of proving that the plans and specifications were adhered to, that they were defective, and that the defects were the proximate cause of the deficiency in the completed work.

3. **Contracts § 21.2; Professions and Occupations § 1— breach of warranty of suitability of plans and specifications—absence of ultimate findings and conclusion**

The trial court erred in failing to make ultimate findings and a conclusion of law as to whether defendant city breached an implied warranty of suitability of the plans and specifications for a key wall between the filter building and filter beds of a water and sewer treatment facility constructed by plaintiff for defendants. The trial court's findings that the design work was done in accordance with accepted standards and that neither the designer nor defendant city

was negligent in designing the facility were insufficient to resolve the issue of implied warranty.

4. **Contracts § 21.2— breach of warranty of suitability of plans and specifications—damages**

If, upon remand, the trial court should determine that an implied warranty of suitability of the plans and specifications of a key wall constructed by plaintiff existed and that defendant city breached such warranty, resulting in leakage in the wall, plaintiff would be entitled to recover damages for its work performed to correct the leaks without complying with contract requirements for payment for extra work. However, should the trial court find that the leakage did not result from any deficiency in the plans and specifications and that the waterproofing was required by plaintiff's obligations under the contract to construct a watertight wall, plaintiff's failure to comply with provisions of the contract pertaining to compensation for extra work would bar its recovery for additional expenses incurred in waterproofing the key wall.

5. **Contracts § 21.2— delay in completion of project—acts of contractor rather than unsuitable plans—no recovery of withheld liquidated damages and overhead expenses**

Where the trial court made findings supported by competent evidence that the delay in completion of a waste treatment facility resulted from acts and omissions of plaintiff contractor rather than from defendant city's breach of an implied warranty of suitability of the plans and specifications for a key wall, plaintiff was not entitled to recover liquidated damages and engineering fees withheld by defendant or plaintiff's extended overhead expenses.

APPEALS by plaintiff and defendant O'Brien & Gere, Inc., from *Allen, C. Walter, Judge.* Judgment entered 24 March 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 16 January 1985.

Plaintiff Gilbert Engineering Company (hereinafter referred to as "Gilbert") is a North Carolina corporation engaged in business as a heavy construction contractor, particularly in construction of water and waste treatment facilities. On 17 June 1975 defendant City of Asheville (hereinafter referred to as "City") received bids for the construction of improvements to its water filtration and distribution facilities. The project, known as "Water Facilities, Phase II," had been designed by defendant O'Brien & Gere, Inc. (hereinafter referred to as "O'Brien & Gere"), a North Carolina corporation specializing in engineering and design of water and sewage treatment facilities. Under its contract with City, O'Brien & Gere was also responsible for supervision of construction of the project. Gilbert submitted a low bid of $5,177,398.00 and was awarded the contract on 26 June 1975. The

contract required that the project be completed within 600 days after Gilbert was given a notice to proceed with the work, and provided for liquidated damages in the amount of $200.00 per day for each calendar day the work was not completed beyond that time. The contract further provided that if the work was not completed within the time provided, additional engineering and inspection fees incurred by City from the specified time of completion to the time the project was actually completed would be charged to Gilbert and deducted by City from the final payment. Gilbert was directed to proceed with the work on 11 August 1975; completion was required by 3 April 1977. During the course of construction, five extensions of time, aggregating 98 days, were granted which extended the date for completion to 10 July 1977.

Generally, the project called for construction of several structures including a filter plant and filter beds, a pumping station, a clear well tank and back wash tank, as well as flow monitoring stations throughout Buncombe County, piping, equipment, instrumentation, landscaping and paving. The major issue in this litigation arises out of the construction of the filter plant, which consists essentially of two components: (1) the filter beds and (2) the main filter building. These two components are joined by a common wall, referred to as the "key wall," which is approximately 102 feet in length, 28 feet high and 1 and ½ feet thick. The filter beds are four rectangular concrete tanks into which raw water is piped, and is filtered by passing downward through several different types of filtering materials in order to remove impurities. Adjacent to these filter beds, separated by the key wall, is the main filter building. The key wall, interior and exterior walls of the filter beds, and the floors of the filter bed and filter building are constructed of poured concrete, reinforced with steel.

A number of pipes pass through sleeves in the key wall between the filter beds and the filter building in order to permit the flow of raw water into, and filtered water out of, the filter beds. The key wall between the filter beds and the filter building was required, by its nature, to be watertight. The contract between Gilbert and City provided, *inter alia*:

MP-250.01. GENERAL. All structures required to be watertight and all pressure and gravity piping and pipe lines shall be tested by the Contractor as directed by the Engineer. All tests shall be conducted in a manner to minimize interference with the progress of the work.

The Contractor shall notify the Engineer when the work is ready for testing and tests shall be conducted as soon as possible thereafter under the direction of the Engineer. Personnel for reading meters, gauges or other measuring devices will be furnished by the Engineer. All other labor, equipment, water and materials, including meters and gauges shall be furnished by the Contractor at his own expense.

MP-250.02. TESTS OF STRUCTURES. Tanks, vaults, wells, and other fluid containing structures shall be tested before backfilling by filling the structure with water to overflowing, or other level as directed by the Engineer, and observing the water surface level twenty-four hours thereafter. Exterior surfaces shall be examined for leakage, especially at construction joints. Leakage will be considered to be within the allowable limits for structures when there is no visible sign of leakage and where the water surface does not drop more than ½ inch during the twenty-four hours leakage test. A slight dampness in the exterior wall surface during the test period will not be considered as leakage, except in the case of pre-stressed concrete structures. All wall castings, sleeves, and other openings shall be plugged temporarily during the test period.

If the leakage exceeds the allowable limit, the work shall be repaired by removing and replacing the defective portions, waterproofing the inside or outside or by other methods as approved by Engineer.

In designing the project, O'Brien & Gere caused an investigation of subsurface soil conditions to be made. The results indicated that the "footings for the filter plant will be placed on stiff to very stiff residual soil." These results were furnished to Glenn A. Eason, a professional engineer employed by O'Brien & Gere to design the key wall and its foundation. Eason's design was incorporated into O'Brien & Gere's plans and specifications.

In February, 1976 Gilbert began excavating for the foundation of the key wall. In the course of excavation, Gilbert discovered that approximately one-third of the total length of the key wall would be founded on rock; the remaining two-thirds of the length of the wall would be founded on soil. This condition was made known to O'Brien & Gere, which instructed Gilbert to proceed according to the original plans and specifications, except for the instruction to pour lean Class D concrete to bring over excavated portions of the foundation up to subgrade.

Gilbert proceeded with construction of the key wall and on or about 10 May 1977 conducted the initial leakage test on the key wall. When the filter beds were filled with water, leakage was observed at various places in the key wall as well as from and around the sleeves through which the pipes passed. Waterproofing efforts were undertaken by Gilbert and by a subcontractor, Western Waterproofing Company. These repairs continued periodically until 11 June 1978.

Through periodic payment requests, Gilbert estimated its progress in completion of the project. During the period of time when the leaks in the key wall were first discovered, other aspects of the project, which were not associated with the filter building and key wall, were substantially incomplete. As of 30 April 1977, according to Gilbert's estimates, 73% of the total project had been completed. By 31 July 1977, after the extended completion date had passed, Gilbert estimated that the project was 85% complete.

On 1 December 1977 Gilbert notified O'Brien & Gere of its contention that the leaks in the key wall had been caused by differential settlement of the wall due to its being founded partially on rock and partially on soil, and requested additional compensation of $36,960.56 and an extension of contract time of 92 calendar days for repair of the leaks. The request was denied. On 28 June 1978, before the project had been finally accepted, Gilbert filed a claim with O'Brien & Gere for additional compensation and extension of contract time which included, among other items, a request for additional compensation of $100,703.32 and additional contract time of 187 days for repairs to the key wall. The total extension of contract construction time requested was 486 calendar

days, and the total extra compensation requested was $176,173.93. These requests were also denied.

The project was certified by O'Brien & Gere as being substantially completed on 19 April 1978, and final acceptance of the project by City was on 17 August 1978. When final payment was made by City, liquidated damages of $56,600.00 ($200.00 per day for 283 days from 10 July 1977 until 19 April 1978) and engineering expenses of $26,038.73 incurred by City during the 283 day period were withheld. Legal fees of $2,000.00 were also withheld, but were later paid to Gilbert by City.

On 21 February 1979 Gilbert presented a claim to City for the total amount of $128,884.33. The amount included a claim for payment of the liquidated damages and engineering fees withheld by City, $33,088.62 for extra work involved in repairing leaks in the key wall and an alternate method of caulking the sleeves and $11,156.98 for services which Gilbert asserted it had performed at the request of City, but which were not required by the contract. In addition, Gilbert made a claim for an extension of contract time of 405 days to off-set any claim by City of liquidated damages and additional engineering fees.

Gilbert then filed this suit, alleging, among other things, that City had breached an implied warranty of suitability of the plans and specifications for the key wall. The City answered, denying that Gilbert was entitled to additional compensation and asserting its right to withhold the liquidated damages and engineering fees because of plaintiff's failure to prosecute the work diligently and to complete the work within the time provided by the contract.

Approximately ten months after filing its original complaint, Gilbert filed an amended complaint joining O'Brien & Gere as a defendant. Gilbert alleged that O'Brien & Gere had been negligent in designing the key wall and its foundation. O'Brien & Gere denied negligence and pleaded the statute of limitations as a bar to plaintiff's claim. O'Brien & Gere, by amended answer, also pleaded Gilbert's Application for Final Payment, and the final payment by City, as a release of all claims except the amounts withheld as liquidated damages and engineering fees.

This case was called for trial at the 14 December 1981 Civil Session. At that time, Gilbert was permitted to amend its com-

plaint to assert an additional claim against City for extended overhead in the amount of $163,282.79. Jury trial was waived and Judge Allen heard extensive oral testimony and received in evidence a number of documentary exhibits.

Judgment was entered 25 March 1983 containing, inter alia, the following findings of fact:

> 14. The key wall was poured in sections, both vertically and horizontally upward from the foundation as provided by the plans and specifications. Construction joints were placed between the vertical sections as they were erected. A construction joint or water stop consisted of a thin piece of steel one-half of which is imbedded in the face of the first section poured and the other half which extrudes out of such section along its entire vertical height and then the next section is poured over and around the water stop such that one-half of the stop is in the first section and one-half is in the second section providing a barrier along the entire vertical height of the joint to prevent the passage of water through it. Steel rods or reinforcing steel were placed vertically and horizontally in the forms into which the concrete to form the walls was poured, the reinforcing rods extending outward from each section of wall into the area where the next section would be poured thereby tying together each section of the wall.
>
> 15. The openings in the wall through which the pipes passed from the filter bays into the pipe gallery necessitated the caulking around the pipes and the specifications called for it to be done through the use of hemp and poured packed lead. Because of the manner in which the pipes were placed and the distances of the flanges of the pipes from the wall, Gilbert employed a third party to apply an alternate method of caulking to prevent leakage.
>
> 16. On or about May 10, 1977, Gilbert had completed construction of the filter bays and filter building to a point where the water leakage test required under the contract section MP-250.02 could be conducted. The filter beds were filled with water and the following day Gilbert observed various leaks in hairline cracks at random places in the key wall and radiating from sleeves in the key wall and around

the sleeves. Western Waterproofing Company, a company employed by Gilbert to correct the leaks, and Gilbert began to attempt to seal the leaks in the wall. After the wall had been treated through the joint repair efforts of Western Waterproofing Company and Gilbert, the filter beds would be refilled to determine if the leaks had been stopped. This remedial work was begun on May 29, 1977, and continued up and through June 11, 1978, with leaks developing each time the bays were refilled.

17. At the time Gilbert commenced the leakage test of the filter bays, Gilbert was four (4) months behind its own revised schedule for completion of the entire project and six (6) months behind its original schedule for completion.

18. Gilbert made a claim for extra compensation and extra time to complete the contract as a result of the leaks on approximately June 28, 1978.

19. Western Waterproofing Company worked on the key wall leak repairs approximately twenty weeks of the sixty-two weeks involved in the repairs and charged Gilbert approximately $4,900.00 for the repair work it did in connection with both the key wall and the caulking of the area between the sleeves and the pipes in the key wall. The most significant leaks in the key wall were situated around the pipe sleeves and several horizontal and vertical construction joints. Random cracks and damp spots appeared in various areas of the key wall and water leaked through the key wall from the area between the pipes and sleeves which had been caulked. There were no cracks in the key wall which extended from the catwalk vertically to the base of the key wall where the rock underlying the key wall foundation merged with the stiff to very stiff residual soil.

20. Gilbert and the Engineer knew through their experience and expertise that concrete walls designed in the manner of the subject key wall could be expected to leak and that it is the nature of concrete walls to shrink as moisture created by the water in the concrete escapes resulting in the development of cracks in the concrete.

21. Differential settlement can occur when a structure is placed over two (2) different types of material with each of the materials having a different compressibility rate.

22. No cracks were evident in the catwalk nor was any settlement measured along the key wall.

. . .

26. Throughout the course of the construction project, Gilbert submitted periodic estimates for partial payments. In the four (4) requests for payment submitted by Gilbert between April 30, 1977 and July 31, 1977, Gilbert acknowledged that the installation of the chain link fencing had not begun, the seeding and mulching was only 60% complete; that the installation of the guardrail had not commenced, the curb and guttering, paved ditch concrete flume was only 30% complete; that the asphalt paving was only 11% complete; that the masonary [sic.] work ranged between 55% and 95% complete; that the tile and eppoxy [sic.] flooring ranged from being 3% to 50% complete; that the acoustical tile ranged from not having been started to being 80% complete; that the miscellaneous steel roofing and glass and glazing were only 45% complete; that the miscellaneous building specialty items ranged from being 25% to 45% complete; that the painting throughout the project ranged from being 15% to 40% complete and that such other items as site grading, site work, storm drain piping, structual [sic.] steel, roll up doors, yard piping, plant piping, plant valves, raw water pumps, high service pumps and instrumentation were not complete as of July 31, 1977. The majority of these incomplete items had no relation to or connection with and were not dependent upon the completion of the filter building and by July 31, 1977, the completion date of July 10, 1977 had already passed. On approximately September 26, 1977, the Engineer received a revised progress schedule from Gilbert indicating that all work on the project would be completed within five (5) weeks or by approximately November 1, 1977.

27. On November 17, 1977, Gilbert acknowledged its responsibility for lack of progress and the failure to have the contract completed by July 10, 1977. Some of that blame was placed on the City's request for additional work which Gil-

bert contended was not a part of the contract, contingency work and weather. Gilbert did not cite or refer to the efforts to correct the leaks in the key wall of the filter building as a cause of any delay at that time. Gilbert made its first retroactive request for an addition of time of 212 calendar days to complete the contract. This request pertained to work which had already been completed and no request for additional time had been made contemporaneously with the performance of the work as required by the contract. Gilbert, for the first time on December 1, 1977, blamed the cracks and leaks in the key wall of the filter building for the delays associated with the entire project. This claim was made by Gilbert more than four (4) months after the general contract was to have been completed with the inclusion of the 98 calendar days having previously [been] granted by the Change Orders.

28. All Change Orders dealt with various portions of the project and on occasion reflected work that had already been done by Gilbert before the Change Order was formally executed; however, Gilbert, the Engineer and the City had agreed by written memorandum or orally on all occasions on the nature of the work to be done by Gilbert and the amount of compensation and extra time it would receive and Gilbert commenced the work reflected by the Change Orders after receiving instructions from the Engineer to proceed with the work. The manner of dealing with extra work, extra compensation and additional time was governed by the contract provisions, section G-9.01, section G-3.03, section G-7.08 and G-5.04 and the terms were substantially complied with.

. . .

31. The contract between the parties provided that Gilbert's application for final payment would constitute a release of City from all claims of Gilbert except the claim for final payment. The application for final payment was made on August 17, 1978 wherein it was requested that City pay the sums withheld as liquidated damages in the amount of $56,600.00, the Engineer fees of $26,038.73 and the $2,000.00 sum withheld for legal expenses was later repaid to Gilbert.

32. The Engineer's design work was done in accordance with the accepted standards and practices of engineers working in and around Buncombe County, North Carolina.

33. Gilbert was requested by either Asheville or Gere to perform work on the site which Gilbert was not required to perform under the base contract. No Change Orders were either issued or required for this work and as requested by City or Gere, Gilbert performed the following work:

a. Gilbert repaired the leaks in two (2) existing underground pipes at a cost of $3,058.50 at the request of City;

b. Gilbert lowered underground electric cables passing beneath a roadway in order to avoid traffic damage to the line at a cost of $284.70, at the request of Engineer;

c. Gilbert painted certain portions of the buildings at a cost of $55.80, at the request of City;

d. Gilbert repaired and replaced certain pipes and valves which carried water and chemicals, at Gere's request at a cost of $7,073.00.

Based on his findings of these and other facts, the trial judge made the following conclusions:

1. The causes in this action alleged by Gilbert, Gere and the City are not barred by the contractual provisions of the contract entered into between the parties, by the statutes of limitation, or by law;

2. The Engineer and the City were not negligent by reason of the design of the water treatment facility or any part thereof, nor of the Engineer's decision not to redesign the filter building when subsurface rock was discovered in the area where the eastern foundation of the key wall was to be constructed;

3. The cause for the delay in completion of the contract by July 10, 1977 was a direct and proximate result of the acts and omissions of Gilbert;

4. Gilbert's failure to make timely requests for extensions of time or timely requests for extra compensation for

services required by the contract, prevents Gilbert from retroactively obtaining any extension of the completion date on the contract past July 10, 1977, and prevents Gilbert from recovering any amounts from the City or the Engineer for repair work associated with leaks in the key wall and with caulking the pipe sleeves and its claim for extended overhead. In this regard Gilbert failed to comply with the terms of the contract or any procedures or standards which had been adopted or established by practice by the parties outside the terms of the contract.

5. That the City was entitled to withhold from its final payment to Gilbert the sum of $56,600.00 as liquidated damages and $26,038.73 for Engineering fees;

6. Gilbert is entitled to recover of the City the sum of $3,058.50 for services rendered in repairing two (2) underground pipes which developed leaks, pipes not having been damaged by Gilbert or its sub-contractors and having been in place prior to the beginning of any construction by Gilbert;

7. Gilbert is entitled to recover from the City the sum of $55.80 for painting work done by Gilbert which was outside the scope of the contract;

8. Gilbert is entitled to recover of Gere the sum of $284.70 for relocating an electric line passing beneath the roadway, said work having been done at Gere's request.

9. Gilbert is entitled to recover of Gere the sum of $7,073.00 for reinstalling a waterline, chemical feedline, valves and paving the roadway across the work to the waterline, chemical line and valves. All work having been done upon Gere's request and not being chargable [sic.] to the City since the leaks which had developed at the junction of the lines was caused by fault in the design which was Gere's responsibility.

Gilbert was awarded a recovery against City in the amount of $3,114.30 and against O'Brien & Gere in the amount of $7,357.70. Gilbert appeals from the denial of its claims for expenses incurred in connection with the repairs to the key wall and for the payment of the liquidated damages and engineering

fees withheld by City. O'Brien & Gere appeals from judgment against it.

Raymer, Lewis, Eisele, Patterson and Ashburn, by Douglas G. Eisele, for plaintiff appellant.

Bennett, Kelly and Cagle, by Harold K. Bennett, and William F. Slawter, City Attorney, for defendant appellee City of Asheville.

Kennedy, Covington, Lobdell and Hickman, by Wayne Huckel for defendant appellee/cross appellant, O'Brien & Gere, Inc.

MARTIN, Judge.

I. GILBERT'S APPEAL

The dispositive question presented by Gilbert's appeal is whether the trial court's findings of fact and conclusions of law are sufficient to support its judgment denying Gilbert recovery against City on its claims relating to repairs to the key wall. Because the trial court failed to address an essential issue raised by the pleadings and the evidence, we conclude that the judgment is deficient and remand the case to the trial court.

In its amendment to the complaint, Gilbert alleged that City, in presenting the plans and specifications for the key wall, impliedly warranted that if Gilbert constructed the key wall as required by the plans and specifications, that it would be fit for the purposes intended, i.e., the containment of water in the filter beds. Gilbert further alleged that it constructed the key wall as required and that, nevertheless, the key wall permitted the leakage of water. Thus, Gilbert alleged, the City breached its implied warranty causing Gilbert to incur expense in repairing the leaks and delaying its completion of the project. City denied the existence of any warranty and denied the allegations of breach.

[1, 2] The general rule is that a construction contractor who has followed plans and specifications furnished by the owner, or his architect or engineer, will not be responsible for consequences of defects in those plans or specifications. Annot., 6 A.L.R. 3d 1344 (1966). North Carolina has expressly adopted the general rule. *Bd. of Education v. Construction Corp.*, 50 N.C. App. 238, 273 S.E. 2d 504, *aff'd*, 304 N.C. 187, 282 S.E. 2d 778 (1981). The basis for the

rule is that, absent an agreement to the contrary, there is an implied warranty by the owner that the plans and specifications are suitable for the particular purpose, and that if they are complied with the completed work will be adequate to accomplish the intended purpose. *See United States v. Spearin*, 248 U.S. 132, 63 L.Ed. 166, 39 S.Ct. 59 (1918); Annot., 6 A.L.R. 3d *supra*. In order to establish a breach of such an implied warranty, the burden of proof is on the contractor to prove that the plans and specifications were adhered to, that they were defective, and that the defects were the proximate cause of the deficiency in the completed work.

The evidence presented with respect to these facts was conflicting. Gilbert's evidence tended to show that it constructed the key wall in strict compliance with the plans and specifications, but that cracks developed at construction joints and around pipe sleeves, causing leakage. Gilbert also offered evidence that due to the design of the piping, the flanges on the filter building side of the key wall were located too near the wall to permit the conventional method of caulking provided for by the plans, so that an alternative, and more expensive, method of caulking had to be employed. A structural engineer testified for Gilbert that, in his opinion, the leakage was caused by differential settlement of the key wall due to its being founded partially in rock and partially on soil, and that the design did not include provisions for differential settlement or varying subsoil conditions. Gilbert's project manager testified that had the leakage problems not been encountered, Gilbert could have achieved substantial completion by 14 October 1977, 187 days earlier than it was actually achieved. Defendants O'Brien & Gere and City offered evidence tending to show that throughout the project, Gilbert's rate of progress fell progressively behind the contract schedule due to Gilbert's failure to assign sufficient men and equipment to the project, so that the problems experienced by Gilbert with the key wall leakage had no effect on the overall completion date. Defendants also offered evidence that Gilbert had not installed the piping according to the specifications, that the conventional method of caulking the pipes in the sleeves could have been accomplished, and that a number of the leaks were due to improper caulking. They also offered evidence that a concrete wall, such as this key wall, cannot be designed to avoid all leakage and that Gilbert

knew or should have known, when it submitted its bid and entered the contract, that waterproofing would be necessary in order to comply with the contract requirement for a water tight structure. The engineer who designed the wall testified that he provided for settlement in design of the key wall. Both he and another engineer testified that, in their opinion, differential settlement had not occurred.

In cases where the trial judge sits as the trier of facts, he is required to (1) find the facts on all issues joined in the pleadings; (2) declare the conclusions of law arising on the facts found; and (3) enter judgment accordingly. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E. 2d 149 (1971); G.S. 1A-1, Rule 52(a). The facts required to be found are the ultimate facts established by the evidence which are determinative of the questions involved in the action and essential to support the conclusions of law reached. *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982). The requirement is designed to "dispose of the *issues raised by the pleadings*" and to permit "a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980) (emphasis supplied). The court's findings of fact are conclusive on appeal if supported by competent evidence, even though there may be evidence to the contrary. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975).

[3] In the case before us, the issue of implied warranty of the plans and specifications and the issue of breach of such warranty were clearly raised by the amended pleadings and by conflicting evidence in the record. Specifically, then, the trial court was required to determine whether such a warranty existed (in view of City's assertion that the contract disclaimed warranties), and, if so, whether it had been breached by City. The court's findings and conclusions do not address these issues.

The court found that the key wall was constructed as provided by the plans and specifications, and that by reason of the placement of the pipes, and distances of the flanges from the wall, it was necessary for Gilbert to employ an alternative method of caulking the sleeves. The court also found that random cracks appeared in various areas of the key wall, resulting in leaks, and

that there were leaks from the area between the pipes and the sleeves which had been caulked. These evidentiary findings support Gilbert's contention that the leakage was due to no fault of its own. On the other hand, the court found that Gilbert knew that concrete walls designed in the manner in which the key wall was designed could be expected to develop cracks and to leak. The court also found that no differential settlement "was measured along the key wall." These evidentiary findings support City's contention that the plans and specifications were sufficient for the intended purpose, that leakage could be expected and that Gilbert's obligations under the contract to build a water tight structure contemplated the necessity for waterproofing after the wall was constructed. Thus, though there were evidentiary findings made which could have supported either contention, the court failed to resolve the issue; the judgment contains no specific ultimate finding whether, if an implied warranty did exist in this case, there was a breach of it. The absence of these findings precluded the trial court from determining their legal effect in its conclusions of law as is evident by its failure to include in the judgment any conclusion of law addressing the issue of warranty. In the absence of such findings and conclusion, this court has no means of determining whether the trial court's judgment denying Gilbert's claims against City, based on breach of implied warranty, was correct.

Appellees argue that the trial court's Finding of Fact No. 37, to the effect that O'Brien & Gere's design work was done in accordance with accepted standards, and Conclusion of Law No. 2, that neither O'Brien & Gere nor City were *negligent* in designing the facility, are sufficient to negate the issue of breach of implied warranty and to support the trial court's judgment. We disagree. The cited finding of fact and conclusion of law address the wholly separate issue of negligence, which was raised in the pleadings and decided in favor of appellees. Gilbert has abandoned its exception to the court's resolution of that issue. However, the court's ruling on the issue of negligence in design does not resolve the issue of implied warranty. Although the existence or non-existence of negligence may be pertinent to the issue of breach of implied warranty, it is not conclusive. Damages for breach of implied warranty may be recovered without proof of negligence.

[4] We must, therefore, remand the case to the trial court for a determination of the issues relating to implied warranty. Should the trial court determine that such a warranty existed, and that it was breached by City, resulting in leakage in the key wall, Gilbert would be entitled to recover damages, upon proper proof, for its work performed in order to correct the leaks. Since the repairs would have been necessitated by a breach of implied warranty of the plans, they could not be considered items of extra work or a change in the plans. The trial court's Findings of Fact Nos. 27 and 28, and Conclusion of Law No. 4, relating to Gilbert's failure to comply with contract requirements for payment for extra work, would not bar Gilbert's recovery. On the other hand, should the trial court find that the leakage did not result from any deficiency in the plans and specifications, and that the waterproofing was required as a part of Gilbert's obligations under the contract to construct a water tight structure, Gilbert's failure to comply with the provisions of the contract pertaining to compensation for extra work, as found by the trial court and supported by competent evidence, bars its recovery for additional expenses incurred in waterproofing the key wall.

[5] Our holding, however, does not entitle Gilbert to recover the liquidated damages and engineering fees withheld by City, or to recover for extended overhead expenses. The recovery of these amounts is sought by Gilbert upon its claim that at least a portion of the delay in completing the project was due to the repair of the key wall. That issue has been properly resolved against Gilbert by the trial court. The court's Conclusion of Law No. 3, excepted to by Gilbert, finds that the cause for delay in completion of the contract resulted from the acts and omissions of Gilbert. Although denominated a conclusion of law, it is, in reality, an ultimate finding of fact by the court in that it was "reached by processes of logical reasoning from the evidentiary facts" and not by application of fixed rules of law. *Quick, supra* at 451, 290 S.E. 2d at 657-58, *quoting Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E. 2d 639, 645 (1951). Although the evidence on this point was conflicting, the finding is supported by competent evidence. Don Griffin, project manager for O'Brien & Gere, testified at length about the various delays by Gilbert in completion of the project due to causes not associated with the problems encountered with the key wall, and rendered his opinion that the key wall problems

did not delay the overall completion of the project. The finding is therefore conclusive and Gilbert's exception is overruled. *Williams v. Insurance Co., supra.* We affirm the holding of the trial court denying Gilbert's recovery in these claims.

II. O'BRIEN & GERE'S APPEAL

O'Brien & Gere appeal from the trial court's judgment awarding Gilbert recovery of $284.70 for relocating an electric line and $7,073.00 for repairs to chemical feedlines and valves, made necessary by fault in design. O'Brien & Gere contends that there was no evidence to support the court's Conclusion of Law No. 8, that the electric line was relocated at O'Brien & Gere's request, or Conclusion of Law No. 9, that the repairs to the chemical line and valves were done at Gere's request and were occasioned by fault in design. At oral argument, Gilbert conceded that O'Brien & Gere was entitled to prevail on these points. We have examined the record and agree that neither of these conclusions are supported by the findings of fact or by evidence in the record.

As to Gilbert's appeal, the judgment of the trial court is:

Affirmed in part and remanded for further proceedings consistent with this opinion.

As to O'Brien & Gere's appeal, the judgment of the trial court is:

Reversed.

Judges BECTON and JOHNSON concur.

LOIS RAWLS, ELLA V. JOYNER, GEORGE N. VAUGHAN, FANNIE LEE HASSETT, BLANCHE V. WHITEHEAD, J. T. VAUGHAN AND CHARLES N. VAUGHAN v. ALMA RUTH V. RIDEOUT, J. GUY REVELLE, JR., EXECUTOR OF THE ESTATE OF JESSIE MAE V. HARRISON, ROBERT A. PARKER AND MARGARET LEE PARKER

No. 846SC295

(Filed 7 May 1985)

1. Wills § 43— heirs and relatives distinguished

The court will construe the words "heirs" and "relatives" in a will in the technical sense, absent evidence of the testatrix's contrary intent. "Heirs" are people entitled to take under the Intestate Succession Act, while "relatives" means either all those persons related by consanguinity or the class of relatives entitled to take under the intestacy statutes, excluding the husband or wife. G.S. 29-2(4) (1984).

2. Wills § 43— devise to nearest (relatives) heirs—construed as nearest heirs with husband excluded

The phrase ". . . nearest (relatives) heirs" in a will left a remainder interest to the testatrix's heirs with her life tenant husband excluded. "Nearest heirs" is the controlling phrase because "relatives" is minimized by its enclosure in parentheses; however, "relatives" does exclude her husband because it refers either to those persons related by consanguinity or to those entitled to take under the Intestate Succession Act, excluding the husband or wife. G.S. 41-6.1 (1984), G.S. 29-2 and -14 (1984), G.S. 29-15(4) and -16 (1984).

3. Wills § 44— per stirpes distribution erroneous

A remainder interest in a testatrix's estate was to be distributed to the estates of her sisters and brother or to her nieces or nephews where the will left a lifetime interest to her husband and the remainder to ". . . my nearest (relatives) heirs." The estate of the one sister living at the time of the testatrix's death receives one-third of the remainder interest. Each child of the other sister and brother who were alive at the time of the testatrix's death, or their estates, would receive one-eighth of the two-thirds remainder, or a one-twelfth interest. G.S. 29-15(4) and -16(b) (1984).

APPEAL by plaintiffs from *Brown, Judge.* Order entered 20 December 1983 in Superior Court, HERTFORD County. Heard in the Court of Appeals 27 November 1984.

Perry W. Martin and Donnie R. Taylor for plaintiff appellants.

Revelle, Burleson, Lee & Revelle, by L. Frank Burleson, Jr., for defendant appellee J. Guy Revelle, Jr., Executor of the Estate of Jessie Mae V. Harrison.

Cherry, Cherry, Flythe and Overton, by Thomas L. Cherry, Larry S. Overton and Ernest Rawls Carter, Jr., for defendant appellees Alma Ruth Rideout, Robert A. Parker, and Margaret Lee Parker.

BECTON, Judge.

This declaratory judgment action involves the construction of the phrase "to my nearest (relatives) heirs" in the remainder clause of a devise, a determination of the class closing date, and a distribution of the shares under the Intestate Succession Act scheme. The parties are the nieces, nephews, and grandnephews of the testatrix.

On 1 July 1982 the plaintiffs, the five remaining children and the two grandchildren of Brownie Irene Vaughan Liverman's only brother, Roy Vaughan (deceased 1958), petitioned the trial court to construe the provisions of Mrs. Liverman's will. The defendants in this declaratory judgment action are the children of Mrs. Liverman's two sisters, Sally Vaughan Parker (deceased 1949) and Hattie Bell Vaughan (deceased 1965). Mrs. Liverman died testate on 22 May 1962. She had executed her will on 25 November 1939. Apparently, she and her husband, Therrell Liverman, had no children. Under the terms of her will, her husband, Therrell Liverman, received a life estate in the "house and tract of land" on which Mrs. Liverman had lived and in all the "household and kitchen furniture" she owned. Therrell Liverman died on 10 September 1980. The contested remainder interest in the second clause of the will is underlined below:

> Second, I give and devise to my beloved husband, Therrell Liverman, the house and tract of land on which I now reside, and all household and kitchen furniture which I now own are [sic] may own at the time of my death, for his natural life and then said property shall pass to my nearest (relatives) heirs.

After a bench trial, the trial court concluded that the plaintiffs and the defendants, Mrs. Liverman's nieces, nephews and two grandnephews, were "the owners of the house and tract of land . . . *per stirpes*, and the proceeds derived from the sale of said land should be divided *per stirpes*." The parties had agreed

to sell the devised property and to hold the proceeds in trust awaiting the court-ordered disposition.

The plaintiffs appeal from the *per stirpes* distribution. We vacate and remand.

I

In construing the provisions of a will, the court is guided by the intent of the testatrix, as expressed in her will. *Wachovia Bank & Trust Co. v. Livengood*, 306 N.C. 550, 294 S.E. 2d 319 (1982). Ordinary words are to be given their ordinary meaning and technical words are presumed to have been used in a technical sense. *Clark v. Connor*, 253 N.C. 515, 117 S.E. 2d 465 (1960).

[1] The word "heirs" has a long-established technical meaning. "'An heir, therefore, is he upon whom the law of inheritance casts the estate immediately on the death of the ancestor.'" 4 W. Bowe & D. Parker, *Page on the Law of Wills* Sec. 34.4, at 407 (rev. ed. 1961) (quoting 1 W. Blackstone, Commentaries *201). In other words, "heirs" were generally the persons entitled to take under the intestacy laws. Since the repeal of the former intestacy laws, the Rules of Descent, N.C. Gen. Stat. Chap. 29 (1950), and the statute of Distribution, N.C. Gen. Stat. Sec. 28-149 (1950), and the enactment of the Intestate Succession Act (the Act), as codified at N.C. Gen. Stat. Chap. 29 (1984), an "heir" is technically defined as "any person entitled to take real or personal property upon intestacy" under the Act. G.S. Sec. 29-2(4) (1984); 1 N. Wiggins, *Wills and Administration of Estates in North Carolina* Sec. 134, at 241 (2d ed. 1983); *see* 4 Bowe & Parker, *supra*, at 409. The Act became effective 1 July 1960 and applies to estates of persons dying on or after that date. 1959 N.C. Sess. Laws Ch. 879 Sec. 15. Thus, absent words expressing the testatrix' contrary intent, the court will construe the word "heirs" in a will in the technical sense. 1 Wiggins, *supra; Stephens v. Clark*, 211 N.C. 84, 189 S.E. 191 (1937) (decided under repealed statutes); 3 Restatement of the Law of Property Sec. 305 (1940).

"Relatives," when used in a will, has two alternative technical meanings, absent evidence of the testatrix' intent to have the popular meaning govern. Annot., 5 A.L.R. 3d 715 (1966). "Relatives," in the popular sense, refers to all those persons related by consanguinity *or* affinity. 4 Bowe & Parker, *supra*, Sec.

34.25. When used in a will, "relatives" generally means either all those persons related by consanguinity or, more frequently, the narrower class of relatives entitled to take as heirs under the intestacy statutes, excluding the husband or wife. 1 Wiggins, *supra*, Sec. 134; 4 Bowe & Parker, *supra*, Sec. 34.25; Annot., 5 A.L.R. 3d 715 (1966).

[2] In the case *sub judice*, the word "nearest" precedes both "relatives" and "heirs" in the remainder clause. We must decide whether the presence of "nearest" reveals the testatrix' intent to circumvent the technical meanings of "relatives" and "heirs." We conclude that it does not.

From the common law it is clear that the phrase "nearest heirs" is itself a technical phrase synonymous with "heirs." *Ratley v. Oliver*, 229 N.C. 120, 47 S.E. 2d 703 (1948). The *Ratley* Court restated the long-standing principle that "the words 'nearest heirs,' standing alone, should be understood in their technical sense as denoting an indefinite succession of lineal descendants who are to take by inheritance. . . ." 229 N.C. at 121, 47 S.E. 2d at 704. *See also Cox v. Heath*, 198 N.C. 503, 152 S.E. 388 (1930) ("those who are heirs are therefore necessarily nearest heirs").

In *Fields v. Rollins*, 186 N.C. 221 (1923), our Supreme Court held that "nearest relatives" is likewise a synonym for the technical phrase "next of kin." Under the common law, the phrase "next of kin" in a will has a narrower technical meaning than "heirs" or "nearest heirs." Instead, it signifies the extremely limited class of the nearest blood relations, thereby excluding those persons related by marriage and prohibiting the principle of representation, unless there is evidence in the will of the testatrix' intent to avoid the technical meaning. *In re Cobb*, 271 N.C. 307, 156 S.E. 2d 285 (1967); *Wallace v. Wallace*, 181 N.C. 158, 106 S.E. 501 (1921); 4 Bowe & Parker, *supra*, Sec. 34.25. In enacting N.C. Gen. Stat. Sec. 41-6.1 in 1967, the Legislature made "next of kin" synonymous with "heirs." G.S. Sec. 41-6.1 (1984) reads: "A limitation by deed, will, or other writing, to the 'next of kin' of any person shall be construed to be to those persons who would take under the law of intestate succession. . . ." (Effective 27 June 1967.) We note, though, that a will takes effect and speaks as of the testatrix' death. *Wachovia Bank & Trust Co. v. McKee*, 260 N.C. 416, 132 S.E. 2d 762 (1963). Mrs. Liverman died 22 May

1962. Therefore, at the time of her death, "next of kin" and, by implication, "nearest relatives," still retained their very narrow technical common-law meaning.

From the above analysis, we conclude that the word "nearest" in the remainder clause at hand is only an additional element of technical language, rather than a signal of Mrs. Liverman's contrary intent. Having explored the varying technical meanings of "nearest heirs" and "nearest relatives" in effect at the time Mrs. Liverman's will took effect, we must next determine which phrase controls.

In Mrs. Liverman's will, "relatives" appears in parentheses between "nearest" and "heirs." This Court has the discretion to transpose words, phrases or clauses and to supply or disregard punctuation to effectuate the intent of the testatrix. *Entwistle v. Covington*, 250 N.C. 315, 108 S.E. 2d 603 (1959); *Mewborn v. Mewborn*, 239 N.C. 284, 79 S.E. 2d 398 (1954) ("When the sense of the phrase or clause . . . manifestly requires it"). According to commonly-accepted rules of punctuation, parentheses are used to set off supplementary or illustrative material; they "tend to minimize the importance of the elements they enclose." J. Hodges & M. Whitten, *Harbrace College Handbook* 162 (7th ed. 1977). Thus, the word "relatives" is minimized by its enclosure in parentheses. We therefore are persuaded that "nearest heirs" is the controlling phrase. For greater clarity, we transpose "(relatives)" and "heirs." "([R]elatives)" modifies "nearest heirs"; the segment should read "nearest heirs (relatives)." Moreover, the words are to be given their technical meanings.

We believe that our transposition of Mrs. Liverman's words effectuates her intent to leave a remainder interest to her heirs, while excluding her life-tenant husband, Therrell, a non-relative, from the class of remaindermen, for the reasons discussed in II, *infra*.

II

Our courts have long since adopted the general rule of testamentary construction that a remainder interest to a class described as the testatrix' "heirs," "next of kin," or other relatives vests immediately upon the testatrix' death and the class is to be fixed and determined at that time. *White v. Alexander*, 290 N.C.

75, 224 S.E. 2d 617 (1976); *Central Carolina Bank & Trust Co. v. Bass*, 265 N.C. 218, 143 S.E. 2d 689 (1965); *Witty v. Witty*, 184 N.C. 375, 114 S.E. 482 (1922). However, the intent of the testatrix, as expressed in the will, remains the cardinal principle of will constructions. *Id.*

As discussed in I, the testatrix' "nearest heirs" consist of those persons entitled to take upon her intestacy. In construing a will with a remainder interest to a class of the testatrix' "heirs," our courts look to the intestacy laws in effect at the testatrix' death to determine who the "heirs" are and, equally important, the shares they are entitled to take, unless the language of the will reveals a contrary intent. *Stephens v. Clark*, 211 N.C. 84, 189 S.E. 191 (1937); *Freeman v. Knight*, 37 N.C. (2 Ired. Eq.) 72 (1841) (both decided under earlier statutes); 1 Wiggins, *supra*, Sec. 134; *Wachovia Bank & Trust Co. v. McKee; see also* L. Simes & A. Smith, *The Law of Future Interests* Sec. 747 (2d ed. 1956); Restatement, *supra*, Secs. 305 and 310; *In re Koch*, 282 N.Y. 462, 27 N.E. 2d 10 (1940); 80 Am. Jur. 2d *Wills* Sec. 1422 (1975). At the time of Mrs. Liverman's death, the Intestate Succession Act had already become effective.

Under the Act, the "surviving spouse" is an "heir," and if the couple was childless, the "surviving spouse" is the sole "heir," taking all the real and personal property. G.S. Secs. 29-2 and -14 (1984). Thus, at the time of Mrs. Liverman's death, her husband, Therrell, was her sole "heir." Applying the general rule of testamentary construction, Mr. Liverman apparently receives both the life estate and the remainder. In *Central Carolina Bank & Trust Co. v. Bass*, the court reviewed the various approaches taken by other jurisdictions when faced with a life tenant being the sole remainderman at the death of the testatrix:

> 1) the will created a vested remainder subject to the life estate, but excluding the life tenant, . . . 2) the will created a vested remainder, the remaindermen being determined at the testat[rix]' death, with no exclusion of the life tenant, and the mere circumstance that the devisee of the precedent estate is the sole heir is not sufficient to show that the testat[rix] intended heirs or next of kin to be ascertained at any time other than [her] death, . . . 3) the will created a contingent

> remainder in those who answered the roll call at the death of the life tenant. . . .

265 N.C. 218, 241, 143 S.E. 2d 689, 705 (citations omitted). *See also* Simes & Smith, *supra*, Sec. 735; Restatement, *supra*, Sec. 308 comment K; Annot., 30 A.L.R. 2d 393, 435-442 (1953).

The testator in *Bass* had set up a complex testamentary trust. The testator's son, an alcoholic, was to receive the income for life and whatever percentage of the principal the trustee in its discretion saw fit to invade. At the son's death, the principal was to be distributed to the testator's next of kin. The Court concluded that the testator, by providing so well for his son, did not intend to include him in the class of his next of kin. Moreover, since next of kin signifies nearest of kin, and the son was the testator's sole nearest of kin during his lifetime, the Court concluded that the class of next of kin, excluding the son, could only be ascertained as if the testator had died immediately after his son. Thus, the class closing was postponed until the life tenant's death.

Similarly, we conclude that the testatrix intended to exclude her husband from the class of her heirs. However, we do not base our decision on the adequacy of the life estate alone, but rather on the testatrix' express intent. The remainder was devised "to my nearest heirs (relatives)." As we noted earlier, in its technical sense, "relatives" either refers to those persons related by consanguinity or those persons entitled to take under the Intestate Succession Act, excluding the husband or wife. Mr. Liverman is not a "relative" in the technical sense. By modifying "nearest heirs" with "(relatives)," the testatrix intended to exclude her husband from taking as a remainderman.

We are not faced with a devise to the testatrix' next of kin as was the case in *Bass*. In *White v. Alexander*, Justice Exum construed the provisions of a will devising a life estate to the testatrix' son

> and if he shall die without heirs of his body, then it is my will and devise, and I hereby direct that at the death of my son, without heirs, if his wife, Emma Stokes, shall be living that she shall use and enjoy the said land during her widowhood, and at her death or remarriage, the same shall go to my heirs.

290 N.C. at 76, 224 S.E. 2d at 618. The Court held that the son's interest was limited to a life estate; the testatrix impliedly intended her son's children to take a vested remainder. The testatrix' heirs received a contingent remainder. In distinguishing *Bass*, the *White* Court focused on the existence of other heirs besides the son at the testatrix' death, before concluding that the class of heirs taking the contingent remainder was to be ascertained at the testatrix' death. As in *White v. Alexander*, if we exclude Mr. Liverman from the class of "heirs," others step forward to qualify as heirs at Mrs. Liverman's death: her sister, Hattie Belle Vaughan and the lineal descendants of her deceased sister, Sally Vaughan Parker and her deceased brother, Roy Vaughan, as discussed in III, *infra*. G.S. Sec. 29-15(4) and -16 (1984). The class of the testatrix' heirs can be ascertained at her death. Thus, we need not take the *Bass* Court's approach and postpone the class closing until the life tenant's death.

Consequently, we hold that the testatrix intended to exclude her husband, Therrell, from the class of "heirs" taking a remainder interest, and further, we hold that the class was to be ascertained at the testatrix' death.

III

[3] When a gift is made to a class of "heirs," the intestacy laws govern not only the identification of the "heirs," but also the shares to which they are entitled. *Freeman v. Knight*; Simes & Smith, *supra*, Sec. 747; Restatement, *supra*, Sec. 310. The Act calls for a *per capita* distribution of the decedent's real and personal property to all surviving persons in the same degree of relationship to the decedent. McCall, *North Carolina's New Intestate Succession Act*, 39 N.C. L. Rev. 1, 12 (1960). The distribution scheme is commonly referred to as "*per capita* at each generation."

Once we exclude Mr. Liverman from the class of the testatrix' heirs, we are left to divide her property among her remaining potential heirs—her sisters and brother or, depending on the dates of her siblings' deaths, their lineal descendants. G.S. Sec. 29-15(4) and -16(b) (1984). Their respective interests vested at the time of her death, 22 May 1962. At that time, only one sister, Hattie Belle Vaughan (deceased 1965), was still alive. Under G.S. Sec. 29-16(b)(1) (1984), Hattie Belle's share is calculated by dividing

"the property by the number of surviving brothers and sisters plus the number of deceased brothers and sisters who have left lineal descendants surviving the [testatrix] within the fifth degree of kinship to the [testatrix]." Mrs. Liverman, the testatrix, had three siblings: Hattie Belle, Roy, and Sally. Roy and Sally each had children alive at the testatrix' death. Therefore, the estate of Hattie Belle Vaughan receives a one-third share. G.S. Sec. 29-15(4) and -16(b) (1984). There is no evidence as to whether Hattie Belle Vaughan died testate or intestate in 1965. Her daughter, Alma Ruth V. Rideout and the estate of her other daughter, Jessie Mae V. Harrison (deceased 1982), receive nothing directly under the terms of Mrs. Liverman's will. Their shares, if any, are dependent on their status as heirs or devisees of their mother.

The remaining two-thirds of Mrs. Liverman's property is to be distributed among the next generation—the testatrix' nieces and nephews, the lineal descendants of her deceased brother and sister, who were alive at the time of her death. G.S. Sec. 29-16 (b)(2) (1984). Again, each surviving niece's or nephew's share is calculated by dividing the property "by the number of such surviving nephews or nieces plus the number of deceased nephews and nieces who have left lineal descendants surviving the [testatrix] within the fifth degree of kinship to the [testatrix]." G.S. Sec. 29-16(b)(2) (1984). At the time of the testatrix' death all eight nieces and nephews by her deceased brother and sister were alive: Robert A. Parker, Margaret L. Parker, Ella V. Joyner, George N. Vaughan, Fannie Lee Hassett, Blanche V. Whitehead, and Nellie B. Vaughan (deceased between 1966 and 1980). Each niece or nephew or his or her estate, if since deceased, is entitled to one-eighth of the two-thirds remaining, a one-twelfth share. Again, the record does not reflect whether Nellie B. Vaughan died testate or intestate. As with Hattie Belle's children, Nellie B. Vaughan's two children, the testatrix' grandnephews, J. T. Vaughan and Charles N. Vaughan, do not take a share directly under Mrs. Liverman's will. They can only share as heirs or devisees of their mother.

The trial court erred in making a *per stirpes* distribution to all of Mrs. Liverman's nieces and nephews, as well as her two grandnephews. The order is vacated, and the case is remanded for the entry of an order consistent with this decision.

Vacated and remanded.

Judges ARNOLD and WELLS concur.

THE TOWN OF WEST JEFFERSON v. LENNA H. EDWARDS, RONALD C. EDWARDS, JAMES L. POINDEXTER, AND ELLEN C. POINDEXTER

No. 8423SC618

(Filed 7 May 1985)

1. **Evidence § 32.6— intent of parties—parol evidence inadmissible**

Parol evidence was not admissible to show that a contract was not intended to be valid and binding where the contract was clear and unambiguous and defendant did not allege fraud or mistake.

2. **Evidence § 32.5— reimbursement after payment—parol evidence inadmissible**

Evidence that an agreement between defendants and plaintiff town was signed by defendants only on the condition that any payments made by defendants under the agreement would be reimbursed to them by plaintiff town did not come within the exception to the parol evidence rule allowing parol evidence to show conditional delivery of a contract.

3. **Municipal Corporations § 23.3— water and sewer services—agreement to extend outside town limits**

Plaintiff town had the authority to enter into a contract to extend water and sewer lines to defendants' property outside the town limits upon the agreement of defendants to pay the town $6,400 for each acre developed by them to be served by the water and sewer system up to a total payment of $36,000.

APPEAL by defendants from *Rousseau, Judge.* Judgment entered 4 April 1984 in Superior Court, ASHE County. Heard in the Court of Appeals 7 February 1985.

Plaintiff, a municipal corporation, brought this action against defendants for breach of contract. In its complaint plaintiff alleged that pursuant to a contract signed on 30 September 1981 (hereinafter "1981 Agreement") defendants agreed to pay plaintiff $6,400 for each acre developed by them to be served by the municipal water and sewer system of plaintiff, up to a total payment of $36,000. The payments were to be made upon the execution of leases or sales of all or portions of the 12.9 acres of land owned by defendants Edwards and Poindexter. By deeds dated 26 May

1982 and 1 December 1982, James and Ellen Poindexter sold two parcels of land from the 12.9 acres, but did not pay plaintiff $36,000 which they owe pursuant to the contract.

In their answer defendants admitted the existence of the 1981 Agreement, but alleged it was unenforceable. As defenses they alleged, *inter alia*, that pursuant to a 1979 contract (hereinafter "1979 Agreement") plaintiff agreed to construct sewer and water mains to serve the 12.9 acres; that the 1981 Agreement was conditioned on plaintiff agreeing that payments under the 1981 Agreement would be treated as expenses under the 1979 Agreement and reimbursable by plaintiff; that the 1981 Agreement was entered into solely to bolster plaintiff's chances of obtaining an Urban Development Action Grant from the United States Department of Housing and Urban Development; that there was no consideration for the 1981 Agreement; and that the 1981 Agreement was *ultra vires*.

After reviewing the pleadings, affidavits and interrogatories, the trial judge granted plaintiff's motion for summary judgment and entered a $36,000 judgment with interest thereon against defendants. Defendants appealed.

Vannoy and Reeves by Jimmy D. Reeves for plaintiff-appellee.

Petree, Stockton, Robinson, Vaughn, Glaze and Maready by Dudley Humphrey and Rodrick J. Enns for defendant-appellants.

PARKER, Judge.

The question before this court is whether plaintiff is entitled to summary judgment as a matter of law.

General Statute 1A-1, Rule 56(c) provides that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." The moving party has the burden of clearly establishing the lack of any triable issue of fact; his papers are carefully scrutinized while those of the nonmoving party are indulgently regarded. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E.

2d 419 (1979). This burden may be met by proving that the opposing party either cannot produce evidence to support an essential element of his or her claim or cannot surmount an affirmative defense which would bar the claim. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981). If the moving party meets this burden, the opposing party must either assume the burden of showing that a genuine issue of material fact exists or provide an excuse for not so doing. *Moore v. Fieldcrest Mills, Inc., supra.* Summary judgment forces the nonmoving party to produce a forecast of evidence which he has available for presentation at trial to support his claim or defense. *Id.*

[1] The first question before us is whether defendants' evidence regarding execution of the 1981 Agreement, which they contend presents a genuine issue of material fact as to the nature of the contract, would be admissible at trial. For the reasons set forth in this opinion we find that this evidence would be barred by the parol evidence rule.

Parol testimony of prior or contemporaneous negotiations inconsistent with a written contract, or which tends to substitute a new or different contract for the one evidenced by the writing, is incompetent. *Craig v. Kessing*, 297 N.C. 32, 253 S.E. 2d 264 (1979). As our Supreme Court explained in *Neal v. Marrone*, 239 N.C. 73, 77, 79 S.E. 2d 239, 242 (1953):

> A contract not required to be in writing may be partly written and partly oral. However, where the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing. Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed merged in the written agreement. And the rule is that, in the absence of fraud or mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent.

Defendants' first argument is that the 1981 Agreement was never intended to be a valid, binding contract. The 1981 Agreement is as follows:

AGREEMENT

NORTH CAROLINA
ASHE COUNTY

This Agreement, dated as of the 30 day of September, 1981, by and between THE TOWN OF WEST JEFFERSON, a municipal corporation organized and existing under and by virtue of the laws of the State of North Carolina, hereinafter referred to as "Town"; and LENNA H. EDWARDS and JAMES L. POINDEXTER, hereinafter referred to as "Edwards-Poindexter";

WITNESSETH:

WHEREAS, Edwards-Poindexter desires to develop for commercial shopping purposes that certain tract of land containing approximately 12.9 acres, located in West Jefferson Township, Ashe County, North Carolina, approximately .5 mile South of the municipal limits of the Town, and being a portion of that land fully described in that certain deed of record in the Ashe County Public Registry in Book 130, at pages 1827-1831; and being those certain lands adjacent to that approximate 9.05 acres of land which is being developed by Ingles Market, Incorporated, for a location for a shopping center to be known as Ashemont Shopping Center; and

WHEREAS, the Town desires to provide water and sewer service to said lands to be developed once said area has been annexed by the Town; and

WHEREAS, the Town has obtained an Urban Development Action Grant ("UDAG") from the Department of Housing and Urban Development, the terms of which required the Town and Edwards-Poindexter to enter into an agreement with provisions which are consistent with the grant.

NOW, THEREFORE, for good, sufficient and valuable considerations, the receipt of which is hereby acknowledged, the parties hereby covenant and agree as follows:

1. The Town agrees to use the sum of approximately $333,350 of the UDAG funds to install an eight inch (8") water and eight inch (8") sewer service (of approximately 5200 linear feet of water line and 3300 linear feet of sewer line) to the aforesaid property of Edwards-Poindexter.

2. In consideration of the Town extending water and sewer service to the aforesaid property belonging Edwards-Poindexter, Edwards-Poindexter agrees to pay to the Town the sum of Six Thousand Four Hundred ($6,400) Dollars for each acre developed which will be served by sewer service up to a total payment by Edwards-Poindexter to the Town of Thirty-Six Thousand ($36,000) Dollars. All payments shall be made upon the execution of leases or upon sales of all or portions of the approximately 12.9 acres of land owned by Edwards-Poindexter.

3. In addition to the payments required in Paragraph 2 above, Edwards-Poindexter shall pay to the Town the normal sewer tap fees.

4. Edwards-Poindexter agrees to pay the cost of extending water and sewer service from any portion of Edwards-Poindexter site to the main water and sewer lines which the Town agrees to place at a point on the edge of the land being developed for the Ashemont Shopping Center.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

TOWN OF WEST JEFFERSON

by: s/ Virginia H. Myers (SEAL)

ATTEST:

s/ PAUL E. TAYLOR, JR.

s/ LENNA H. EDWARDS (SEAL)
s/ RONALD C. EDWARDS (SEAL)
s/ JAMES L. POINDEXTER (SEAL)
s/ ELLEN C. POINDEXTER (SEAL)

NORTH CAROLINA
ASHE COUNTY

Defendants contend that they had an oral understanding with plaintiff that plaintiff would install water and sewer lines to the 12.9 acres, and defendants would incur no expenses. According to defendants, when plaintiff discovered that to obtain the HUD grant they would need the developers' promise to contribute to the cost, plaintiff asked defendants to sign the agreement with the intention that it would not be binding.

The apparent mutual assent of the parties to a contract must be gathered from the language of the contract; an undisclosed intention is immaterial in the absence of mistake or fraud, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. *Howell v. Smith*, 258 N.C. 150, 128 S.E. 2d 144 (1962); *Salvation Army v. Welfare*, 63 N.C. App. 156, 303 S.E. 2d 658 (1983), *review denied*, 311 N.C. 306, 317 S.E. 2d 682 (1984). Thus, to introduce their extrinsic evidence of intent, defendants would have to allege either fraud or mistake. Defendants allege neither; instead they rely on *Borden, Inc. v. Brower*, 284 N.C. 54, 199 S.E. 2d 414 (1973), to support their argument that parol evidence should be admitted to show the intent of the parties, even when, as in the instant case, the agreement is unambiguous.

In *Borden*, plaintiff sought to recover the balance due on a promissory note. Our Supreme Court, reversing summary judgment for plaintiff, observed that since promissory notes are often intended only as a partial integration of the agreement between the parties, parol evidence as between the parties may be admissible if it is not in direct contradiction with the terms of the note.

Unlike *Borden*, the instant case does not involve a promissory note, and the more liberal rules generally followed in promissory note cases are not applicable. We decline to allow parol evidence to explain the parties' intent in the instant case where the contract is in clear and unambiguous terms, and defendant has not alleged fraud or mistake.

[2] Defendants' second argument is that parol evidence should be admissible to prove that the 1981 Agreement, which is absolute on its face, was executed and delivered conditionally. Defendants alleged, in their answer:

> The 1981 Agreement was executed by Defendants and delivered by them to Plaintiff upon the express condition, which was communicated to Plaintiff on several occasions, that said Agreement would be valid and effective only if Plaintiff entered into a binding and enforceable agreement to forgive any monies which Defendants might become obligated to pay under the 1981 Agreement, or to reimburse Defendants for all amounts so paid.

Defendants rely on *Jefferson Standard Life v. Morehead*, 209 N.C. 174, 183 S.E. 606 (1936), to support their contention that parol evidence can be used to prove the conditional nature of a contract. In *Jefferson*, a loan from plaintiff was secured by deed of trust on real estate, and there was an understanding that the promissory note would not be delivered until twenty-five members of a fraternity had endorsed the note. The note was delivered even though it was endorsed by only seven people. The trial court directed verdict for plaintiff on the theory that defendants' testimony was inadmissible under the parol evidence rule. Our Supreme Court disagreed, observing that one of the many "seeming exceptions" to the parol evidence rule was that parol testimony may be introduced to vary, modify, or contradict the terms of a written instrument by showing a conditional delivery of the instrument.

Defendants argue that even though *Jefferson* involves a promissory note, the principle applied therein should be applied to the instant case.

Defendants are correct that our Supreme Court has also allowed parol evidence to show a written contract, purporting to be a definite contract, was not to be operational until the happening of some contingent event. *See Bowser v. Tarry*, 156 N.C. 35, 72 S.E. 74 (1911). In *Bowser*, defendant signed a contract with plaintiff to buy a gasoline storage tank for $140. Plaintiff delivered the tank, but defendant refused to pay. Defendant testified on cross-examination that when he entered into the contract, plaintiff had agreed that the contract would be conditional upon the town giving defendant permission to bury the tank; plaintiff had delivered the tank one month early; the street commissioner had refused defendant's request to store the tank underground; and defendant had sent the tank back to plaintiff. Plaintiff objected, the trial

judge sustained the objection and excluded the evidence. Our Supreme Court disagreed with the trial judge's ruling and ordered a new trial. The Court recited the parol evidence rule and then explained this exception:

> [I]t is also fully understood that although a written instrument purporting to be a definite contract has been signed and delivered, it may be shown by parol evidence that such delivery was on condition that the same was not to be operative as a contract until the happening of some contingent event, and this on the idea, not that a written contract could be contradicted or varied by parol, but that until the specified event occurred the instrument did not become a binding agreement between the parties. It never in fact became their contract.

Bowser v. Tarry, 156 N.C. at 38, 72 S.E. at 76.

In the instant case, however, defendants have not produced a forecast of evidence to support their contention that the 1981 Agreement was conditional. Defendants' only affidavit in opposition to plaintiff's motion is that of defendant Lenna H. Edwards who stated that she executed and delivered the 1981 Agreement only upon the following express condition:

> [T]hat it would not bind me or any of the other individuals who signed the Agreement to make any payments thereunder to the Town of West Jefferson which would not be reimbursed to us by the Town, either pursuant to a prior agreement dated December 6, 1979, a copy of which is attached to the Answer as Exhibit 1, or otherwise.

In short, Edwards understood that defendants would be reimbursed by plaintiff after defendants had paid plaintiff pursuant to the 1981 Agreement. Reimbursement after payment would not be a contingent event as contemplated by *Bowser*. Operation of the 1981 Agreement was not, therefore, conditioned upon the happening of some contingent event subsequent to the signing of the contract. Defendants' evidence does not bring this case within the exception to the parol evidence rule for conditional delivery of a contract.

Defendants' third argument is that the 1981 Agreement is unenforceable due to lack of consideration. We do not agree.

Before 30 September 1981 neither plaintiff not defendant had installed water or sewer lines. The 1981 Agreement provided that plaintiff would spend $333,350 to install water and sewer lines on the property, which was not within the city limits, and defendants would pay plaintiff $6,400 for each acre developed and sold. Defendants contend there was no consideration because plaintiff had already promised, in the 1979 Agreement, to attempt to install the water and sewer lines by 31 December 1980. Any obligation on the part of plaintiff under the 1979 Agreement to attempt to install the water and sewer lines ended on 31 December 1980 almost nine months before the 1981 Agreement was executed. Plaintiff's promise, in the 1981 Agreement, to install water and sewer lines was valid consideration for defendants' promise to pay $6,400 per acre developed and sold.

[3] In their last argument defendants contend the 1981 Agreement is unenforceable and void because it is *ultra vires*. We do not agree. A municipal corporation is under no duty to furnish water or sewer service to persons outside the city limits, but has the discretionary power to do so. *City of Randleman v. Hinshaw*, 2 N.C. App. 381, 163 S.E. 2d 95 (1968). Before the 1981 Agreement, defendants' property was outside the city limits, and plaintiff was under no obligation to provide water and sewer services to defendants' property. The authority of cities to execute powers conferred upon them by law shall be broadly construed. G.S. 160A-4. A city may fix the terms upon which water and sewer service is rendered outside the city limits. *Atlantic Construction Co. v. City of Raleigh*, 230 N.C. 365, 53 S.E. 2d 165 (1949). Plaintiff had the authority to enter into the 1981 Agreement and complied with the terms by subsequently annexing defendants' property and providing water and sewer services.

Plaintiff's forecast of evidence shows a clear, unambiguous contract and no triable issues of fact; defendants have failed to raise the existence of any genuine issue of material fact or a defense precluding plaintiff's recovery as a matter of law. The trial court's entry of summary judgment for plaintiff is

Affirmed.

Judges ARNOLD and EAGLES concur.

In re Estate of Longest

IN THE MATTER OF THE ESTATE OF HUBBARD HARVEY LONGEST, DECEASED

No. 8418SC607

(Filed 7 May 1985)

1. **Executors and Administrators § 5; Courts § 6.1— probate—appeal from Clerk to Superior Court—type of review**

In an appeal from an order of the Clerk in a probate matter, the Superior Court is not required to conduct a *de novo* hearing, but will review and affirm, reverse, or modify findings of the Clerk properly challenged by a specific exception. Respondent was not entitled to present his evidence again before the Superior Court judge on appeal unless the judge deemed it advisable where he had been given two opportunities to present evidence before the Clerk. G.S. 1-276, G.S. 7A-241, G.S. 28A-2-1.

2. **Executors and Administrators § 37.1— amount of attorney's fees and commissions not settled in hearing before Assistant Clerk**

The question of attorney's fees and commissions due a co-executor was not determined at a hearing before an Assistant Clerk because the only purpose of the hearing was to decide the best course to follow to close the estate and the Assistant Clerk stated in a memo that the co-executor was to file his petition and order for attorney's fees and that another hearing would then be held.

3. **Executors and Administrators § 5— petition to revoke letters testamentary—properly verified—claim upon which relief could be granted stated**

A petition to have a co-executor's letters testamentary revoked was properly verified and stated a claim upon which relief could be granted where the petitioner signed the petition before a notary public under oath, having sworn that the matters stated in the petition upon her information and belief were true, and where petitioner clearly alleged that the respondent failed to file on time the accountings of the estate with the Clerk's office and paid himself from the estate an amount in excess of that which he could legally be allowed for his commission and attorney's fees without the approval of the clerk. G.S. 28A-9-1.

4. **Executors and Administrators § 5.5— revocation of letters testamentary—findings supported by evidence**

In an order revoking respondent's letters testamentary, the Clerk's finding that respondent filed the estate's accounts late was supported by the evidence where the record was replete with notices issued by the Clerk's office that the time for filing the estate's accounts was past due. Findings that respondent had improperly advanced himself the sum of $32,950 from the estate prior to the Clerk's approval were supported by the evidence where the Clerk alone has the jurisdiction to fix an executor's compensation and attorney's fee and respondent did not contend that he did not pay himself a commission prior to the Clerk's approval. G.S. 28A-19-12, G.S. 28A-23-3 and -4.

In re Estate of Longest

APPEAL by C. Leroy Shuping, Jr., from *Walker (Hal Hammer), Judge.* Order entered 17 January 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals on 6 February 1985.

Smith, Moore, Smith, Schell & Hunter by Vance Barron, Jr., and A. Harrell Pope for petitioner appellee, Virginia L. Burroughs.

C. Leroy Shuping, Jr., appellant, pro se.

COZORT, Judge.

The opponents in this case were co-executors of the estate of Hubbard Harvey Longest. Executrix Virginia L. Burroughs, sought to have the estate's other executor, C. Leroy Shuping, Jr., removed. Mrs. Burroughs' petition to have Shuping's letters testamentary revoked was before the Guilford County Clerk of Superior Court three times and appealed to the Superior Court three times. The matter was finally disposed of on 16 January 1984 by Superior Court Judge Hal Hammer Walker, who affirmed the Clerk of Court's revocation of Shuping's letters testamentary as a co-executor. The major issue on appeal is the scope of review a Superior Court Judge must give an order of the Clerk in probate matters. For the reasons that follow, we affirm the Superior Court order upholding the revocation of Shuping's letters.

Hubbard Harvey Longest died on 30 January 1979. His Last Will and Testament named his sister, Virginia L. Burroughs, and his attorney, C. Leroy Shuping, Jr., as co-executors of his estate. Letters testamentary were properly issued to them on 6 March 1979 by the Guilford County Clerk of Superior Court. On 3 January 1983, Shuping petitioned the Clerk of Court to allow him the sum of $14,254.70 for compensation [plus an additional sum for services to be performed] as a co-executor and to approve the payment of the sum of $23,591.55 [plus a sum for additional services to be rendered] for legal services performed on behalf of the Longest estate. Mrs. Burroughs, on 4 February 1983 petitioned the Clerk to revoke Shuping's letters testamentary, to deny Shuping compensation, and to order him to repay the estate all amounts received by him.

On 4 March 1983, the matter was heard before the Guilford County Clerk of Superior Court, James Lee Knight. Mrs. Burroughs and Mr. Shuping both presented evidence on the issue of whether Mr. Shuping should be removed. Mr. Shuping on 7 March 1983 resigned as executor and withdrew as attorney for the Longest estate. The Clerk of Court on 14 March 1983 issued an order finding that although sufficient grounds under G.S. 28A-21-4 and G.S. 28A-9-1(a)(3) existed to remove Shuping as a co-executor, the revocation proceedings had been rendered moot due to resignation. The Clerk thereupon ordered resignation proceedings to commence immediately. Mrs. Burroughs appealed this ruling to the Superior Court. Judge Peter W. Hairston ordered that the cause be remanded to the Clerk of Court because the matter was "not ripe for appeal since the Clerk of Superior Court has not ruled on the question of whether the letters of the Co-Executor should be revoked."

On 1 August 1983, the Clerk of Court entered a second order approving the resignation of Shuping as a co-executor and approving fees and commissions for Shuping in the amount of $25,696.69. The Clerk further found that Shuping had overpaid himself $7,253.31 and ordered him to repay to the estate this amount. Mrs. Burroughs and Mr. Shuping both appealed the Clerk's ruling to the Superior Court. Judge Hal Hammer Walker issued an order on 12 September 1983 finding that "the Order Approving Resignation and Payment of Fees and Commissions entered by the Clerk of Superior Court . . . did not comply with the earlier Order entered by Judge Peter W. Hairston . . . in that the Clerk . . . has not ruled on the question of whether the letters testamentary of the Co-Executor should be revoked." Judge Walker again remanded the case to the Clerk for a decision on this issue.

The matter was heard before the Clerk of Superior Court again on 12 September 1983 on "the specific question of whether the Letters Testamentary of the Co-Executor C. Leroy Shuping, Jr. should be revoked." "[A]fter hearing argument and testimony of counsel and parties to this matter," the Clerk of Court based on findings of fact and conclusions of law ordered that Shuping's letters testamentary be revoked pursuant to G.S. 28A-9-1(a)(3).

Shuping appealed the Clerk's order revoking his letters testamentary. Judge Walker refused to hear any evidence or ar-

gument from the parties. The order entered by Judge Walker on 16 January 1984 contained the following finding of fact and conclusion of law:

FINDINGS OF FACT

The Court has reviewed the matters of record and all documents in the file in the estate of Hubbard Harvey Longest, 79-E-200, and finds that all the Findings of Fact in the Order of the Clerk of Superior Court of September 20, 1983, are supported by sufficient evidence and the same are hereby affirmed and adopted herein by reference.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court concludes as a matter of law that the Conclusions of Law in the Order of the Clerk of Superior Court of September 20, 1983, are correct as a matter of law and the same are hereby affirmed and adopted herein by reference.

The order then revoked Shuping's letters testamentary and required him to account to Mrs. Burroughs for all the assets of the estate.

[1] On appeal to this Court, Shuping contends that the trial court committed reversible error in denying him a trial *de novo* and an opportunity to be heard on appeal in Superior Court. The question for our consideration is the type of review to which a party appealing from an order of the Clerk of Court in probate matters is entitled.

The Supreme Court in *In Re Estate of Lowther*, 271 N.C. 345, 348, 156 S.E. 2d 693, 696 (1967), explained that "[a]lthough the office of probate judge was abolished, the special probate powers and duties of the clerk continued distinct and separate from their general duties as clerk of the courts to which they belong." Civil actions and special proceedings, as contemplated by the terms of G.S. 1-276, which originate before the Clerk of Court are heard *de novo* when appealed to the Superior Court. However, a proceeding to remove an executor is not a civil action or a special proceeding. *Id.* at 350, 156 S.E. 2d at 698. Moreover, G.S. 1-276 does not apply to any probate matters. *In re Estate of Swinson*, 62 N.C. App. 412, 415, 303 S.E. 2d 361, 363 (1983).

Although G.S. 7A-241 provides that exclusive original jurisdiction in probate matters is vested in the "superior court division," G.S. 28A-2-1 specifies that the *Clerk* is given exclusive original jurisdiction in the administration of decedents' estates except in cases where the clerk is disqualified to act. *In re Estate of Adamee*, 291 N.C. 386, 398, 230 S.E. 2d 541, 549 (1976). In most instances, therefore, the Superior Court Judge's probate jurisdiction is, in effect, that of an appellate court because his jurisdiction is derivative and not concurrent. *Id.* Thus, in an appeal from an order of the Clerk in a probate matter, the Superior Court is not required to conduct a *de novo* hearing. Rather, as *In re Estate of Lowther, supra*, at 356, 156 S.E. 2d at 702, clearly sets forth, when a finding of fact by the Clerk of Court is properly challenged by specific exception, the Superior Court "judge will review those findings, and either affirm, reverse, or modify them. If he deems it advisable, he may submit the issue to a jury. Obviously, he could not follow this latter course without hearing evidence."

In the case *sub judice*, Mr. Shuping has been given two opportunities before the Clerk of Court to present evidence. Although he did specifically except to all of the Clerk's findings, he is not entitled, unless the Judge, in his discretion, deems it advisable, to present his evidence again before the Superior Court Judge on appeal. As the record reflects, Judge Walker clearly reviewed the Clerk's findings, determined that they were supported by sufficient evidence, and affirmed them. We hold that Mr. Shuping was given the review to which he was entitled.

[2] Grouping five questions presented together, Mr. Shuping further argues that "the same rules which prohibit one Superior Court or District Court Judge from modifying, overruling, changing or vacating the action of another apply equally to Probate Court Judges." Shuping contends that when he and Mrs. Burroughs' attorney met with Mrs. Bettie B. Clark, Assistant Clerk of Superior Court, on 14 December 1982, the subject matter of Mrs. Burroughs' petition for revocation was determined, making subsequent actions by the Clerk of Superior Court invalid. Besides the fact that Mrs. Burroughs' petition was not filed until 4 February 1983, this argument is without merit because this "hearing's" only purpose and result was to decide the best course to follow in order to close the estate. The record contains a

memorandum of this meeting wherein Mrs. Clark states that Mr. Shuping is to file his Petition and Order for attorney's fees and commissions within two weeks and that when this has been done, "we are to hold another hearing with all 3 parties re: the attorney's fee and commissions for Mr. Shuping." Obviously, no agreement was reached and the matter concerning attorney's fees and commissions was not determined. These assignments of error are overruled.

[3] Mr. Shuping also contends that Mrs. Burroughs' petition for revocation "does not state a claim . . . upon which relief can be granted" because the petition was not duly verified.

Initially, we note that Mr. Shuping's objection to the petition has been raised for the first time on appeal. In any event, the petition itself shows that Mrs. Burroughs signed the petition before a notary public under oath, having sworn that the matters stated in the petition upon her information and belief were true. We hold that the petition was sufficiently verified as required by G.S. 28A-9-1.

Mr. Shuping further contends that the petition does not state a claim upon which relief can be granted because it does not allege that the estate has been damaged in any way or that any court orders have been disobeyed. This contention is without merit. In the first place, the petition clearly alleges that Mr. Shuping has failed to file on time the accountings of the estate with the Clerk's office, disregarding notices issued by the Clerk that such accountings were due. The petition also states that Mr. Shuping has paid himself approximately $32,900 from the estate for his commission and attorney's fees without the approval of the Clerk and that this amount was in excess of any amount which he could legally be allowed for commissions and legal fees. These allegations plus the allegation that through his default and misconduct he has violated his fiduciary duty as a co-executor of the estate constitute sufficient grounds on which Mrs. Burroughs could petition for the revocation of Mr. Shuping's letters under G.S. 28A-9-1(a)(3). If these allegations were proven true, the possible damage to the estate is obvious. This assignment of error is overruled.

[4] Next, Mr. Shuping contends that certain findings of fact and conclusions of law contained in the Clerk of Court's order revok-

ing his letters testamentary are not supported by the evidence. These findings of fact in part state that Mr. Shuping filed late the 90-day inventory, the first annual account, the second annual account, and the third annual account. Although the record does contain notations in the Clerk's file of phone calls from Mr. Shuping explaining delays in filing these accounts, these notations do not represent extensions of time allowed. Rather, the record is replete with notices issued by the Clerk's office that the time for the filing of the estate's accounts was past due. Thus, we hold that from our review of the record the findings of fact and corresponding conclusions of law dealing with late account filings are supported by the evidence.

Two other findings to which Mr. Shuping has excepted concern the unauthorized payment of fees and commissions by Mr. Shuping to himself. These findings provide:

> (9) That Mr. Shuping has, during the pendency of this estate, advanced to himself without approval of the Clerk of Superior Court the sum of $32,950.00 from this estate;
>
> (10) That Mr. Shuping was notified by Notice dated November 10, 1980, by the Clerk of Superior Court that the first annual account filed on October 22, 1980, could not be accepted or approved until he exhibited to and filed with the office of the Clerk of Superior Court a petition and order for the fees which he was withdrawing from the estate; that even though other notices and letters were sent to Mr. Shuping advising him that he should immediately present a petition and order for the fees that he was withdrawing from the estate to the Clerk of Superior Court, Mr. Shuping continued to advance fees to himself from the estate and continued his failure to comply with notices and orders of the office of Clerk of Superior Court pertaining to the administration of this estate;

These findings of fact are also the subject of Mr. Shuping's next assignment of error in which he contends that prior approval from the Clerk is not statutorily required before the payment of his fees and commission could be made.

His contentions rest on the fact that G.S. 28A-19-12, which requires prior written approval from the Clerk, applies only to the

administration of estates of decedents dying on or after 8 May 1979. 1979 N.C. Sess. Laws ch. 525. The decedent in this case died on 30 January 1979. G.S. 28A-19-12, prior to the 1979 amendment, provides that

> No property or assets of the decedent shall be retained by the personal representative or collector in satisfaction of his own claim, in preference to others of the same class; but such claim must be established upon the same proof and paid in like manner and order as required by law in case of other debts.

1973 N.C. Sess. Laws ch. 1329. However, this statute, regardless of the version in effect, does not apply to the payment of attorney's fees and commissions. G.S. 28A-19-12 applies to "claims" against the estate, such as liens against property, funeral expenses, taxes, and judgments, where the claimant also happens to be the personal representative of the estate. The applicable statutes are instead G.S. 28A-23-3 and G.S. 28A-23-4.

It has long been the rule in North Carolina that "an executor has no right to fix and determine the compensation to be received by him." *Trust Co. v. Waddell*, 237 N.C. 342, 345, 75 S.E. 2d 151, 153 (1953). The allowance of a commission to an executor is a matter within the original jurisdiction of the Clerk of Superior Court and it is within his discretion to fix the amount, subject to the maximum provided by statute. *In re Green*, 9 N.C. App. 326, 176 S.E. 2d 19 (1970). In order to determine the amount of an executor's commission, the Clerk "shall consider the time, responsibility, trouble and skill involved in the management of the estate." G.S. 28A-23-3(b). However, this amount may not "exceed five percent (5%) upon the amounts of receipts . . . and upon the expenditures made in accordance with law." G.S. 28A-23-3(a). Thus, it is first necessary for the executor to file a petition for commissions and fees along with the annual accountings to enable the Clerk to determine the amount of the commission and attorney's fees. As the record indicates, Mr. Shuping failed to file the required petition until 3 January 1983. He retained approximately $32,950.00 based on an hourly rate, not upon receipts and disbursements pursuant to G.S. 28A-23-3.

Mr. Shuping does not contend that he did not pay himself a commission prior to the Clerk's approval. Rather his argument is

couched on the premise that his actions were not contrary to the applicable statutes. However, we hold that because the Clerk alone has the discretion to fix an executor's compensation and an attorney's fee, Mr. Shuping improperly advanced himself the sum of $32,950.00 from the estate. We in turn hold that Findings of Fact Nos. 9 and 10 and their corresponding conclusions of law are supported by the evidence.

Mr. Shuping's remaining assignments of error, including his contentions that the commission allowed Mrs. Burroughs was excessive and that the forfeiture of his fee and commission under G.S. 28A-23-3(e) is unconstitutional, are without merit.

For the foregoing reasons, the order revoking Mr. Shuping's letters testamentary is affirmed.

Affirmed.

Chief Judge HEDRICK and Judge BECTON concur.

STATE OF NORTH CAROLINA v. CLARENCE LEE WILLIAMS AND STATE OF NORTH CAROLINA v. CLARENCE PERRY

No. 846SC668

(Filed 7 May 1985)

1. **Criminal Law § 99.2— court's clarification of testimony—no expression of opinion**

The trial court did not express an opinion on the evidence in clarifying a witness's testimony by stating, "One man had marijuana on him that was in there. I think that's what he said."

2. **Criminal Law § 102.4— comment by prosecutor not improper**

The prosecutor's comment to the trial court in support of his motion to strike a defense witness's testimony after the witness asserted his privilege against self-incrimination did not improperly convey to the jury that the witness was guilty of drug crimes for which he had not been tried.

3. **Criminal Law § 87.4— new matter on redirect examination**

Even if an officer's testimony on redirect examination concerning the chain of custody of marijuana was "new matter," the trial court did not abuse its discretion in allowing the testimony since it could have been properly admitted on direct examination.

4. Criminal Law § 86.3— denial of conviction—further sifting of witness—specific acts of misconduct

When a defense witness denied on cross-examination that he had been convicted of communicating a threat to his seventy-three-year-old mother, the trial court did not abuse its discretion in permitting the prosecutor to "sift the witness" by asking further questions about specific acts of misconduct during the witness's alleged attack on his mother.

5. Criminal Law § 86.4— impeachment—specific acts of misconduct—bias or interest—improper question about arrest not prejudicial

The State was properly permitted to impeach a defense witness by cross-examining him about specific acts of misconduct and about his bias or interest in the litigation. However, a question as to whether the witness was on bond after his arrest for a cocaine sale was improper, but defendant was not prejudiced by the question where the trial court sustained defendant's objection thereto and the witness had already volunteered that the specific acts of misconduct being referred to were "things I am accused of, not convicted of."

APPEAL by defendants from *Reid, Judge.* Judgments entered 18 January 1984 in Superior Court, HALIFAX County. Heard in the Court of Appeals 13 February 1985.

Attorney General Rufus L. Edmisten by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Hux, Livermon & Armstrong by James S. Livermon, Jr., for defendant appellants.

COZORT, Judge.

The defendants, father and son, operated "Nooney's Pool Hall" in Scotland Neck, North Carolina. As a result of an undercover operation conducted by the Halifax Alcohol Beverage Control Board, they were indicted and later convicted of various drug offenses. Their assignments of error on appeal concern allegedly prejudicial comments made by the trial judge and the prosecution and the scope of cross-examination and redirect examination afforded the State in its questioning of various witnesses. Our review of the record reveals no prejudicial error.

At trial, the State's principal witness was Clarence Cox, Jr., an officer with the Winston-Salem Alcohol Beverage Control Board. In August of 1983, Cox was sent to assist the Halifax ABC Board in an undercover drug and alcohol operation.

On 6 August 1983, Cox went to "Nooney's" and saw the defendant Williams, known as Nooney, playing cards at a pool table in the back of the pool hall. Cox observed several black males approach Nooney and ask to purchase "some nickel bags" of marijuana. Nooney told one of his sons to go get his other son, the defendant, Perry, from the arcade to handle the sales. When Perry returned to the pool hall, Cox watched Perry exchange money for little brown bags with at least twelve people.

During this time, Cox had entered the card game where Nooney was also playing. As the card game was ending, Cox told Nooney he wanted to purchase two nickel bags and a beer, even though the establishment did not have a liquor license. Nooney replied that his sons had left in his car to retrieve more marijuana for sale and would return shortly. Later, when Perry and his brother returned, Perry gave Nooney two brown envelopes. Nooney then approached Cox and sold him the two brown envelopes, containing marijuana, and a beer. Cox further testified that subsequent to 6 August 1983 he made other beer buys and observed Perry selling other brown envelopes.

The defendants offered evidence, denying the allegations that they sold marijuana or beer at the pool hall. Nooney testified that the beer consumed on the premises was purchased next door at "Joe's Cafe" and that Cox on 6 August 1983 pulled out a bag of marijuana and gave everybody in the card game a joint. Perry also testified that he has never sold marijuana or beer for himself or for his father.

The jury convicted Williams of possession of marijuana with the intent to sell and deliver, the sale and delivery of marijuana, maintaining a place of business for the purpose of selling or delivering controlled substances, and maintaining a motor vehicle for the purpose of selling or delivering controlled substances. Perry was convicted of possession of marijuana with the intent to sell and deliver and the sale and delivery of marijuana.

[1] The defendants' first assignment of error contends that the trial court erred by making improper comments concerning the substance of a witness's testimony. During the cross-examination of Officer Cox by the defendants, the following discourse occurred:

Q. [Defense Counsel]: Will you tell this jury or will you show this jury what marijuana was found when it was raided?

A. If I'm not mistaken there was a party—a black male charged with misdemeanor possession of marijuana.

Q. I didn't ask you that. I asked you would you show what was found when they tore up the pool tables, went all over the whole premises.

A. I just told you what was found. It was found on a black—

Q. Can you show it to the jury?

A. I don't have it with me.

Q. Do you know where it is?

A. The officer that did the arrest should have it.

Later, Cox testified that when they searched the pool hall, they found empty beer cans and liquor bottles. Defense counsel then added:

Q. But you didn't find any marijuana.

[Prosecutor]: Objection, that's not what he said.

[Defense Counsel]: That's not what he said?

Q. Did you find any marijuana?

THE COURT: One man had marijuana on him that was in there. I think that's what he said.

This clarification by the trial judge did not amount to an improper expression of an opinion. The trial court did not state or imply that the witness's testimony was true or credible evidence. We hold the trial court's restatement of a portion of the witness's testimony for the benefit of trial counsel did not constitute prejudicial error.

[2] The defendants also assert that they were prejudiced by alleged improper comments by the prosecution. On direct examination, defense witness Eddie Wilkins testified that he observed Officer Cox on 6 August 1983 take a bag of marijuana out

of his pocket and told others sitting at the table to roll themselves a joint. This story substantiated the defendants' version of the events on that day. On cross-examination, the State asked Wilkins if he wasn't the person from whom Cox bought cocaine on several occasions. In response to these questions, Wilkins asserted his right against self-incrimination and refused to answer. The State attempted to impeach Wilkins further by showing that Wilkins had an interest in discrediting Cox in this case in the hope that Cox would be discredited in his own case.

The State moved to strike all of Wilkins' testimony on the grounds that it had not been allowed to effectively cross-examine Wilkins by his constant assertion of the Fifth Amendment. The court denied the motion, stating that "[t]he only thing he took the Fifth on were things you [the State] asked him for impeachment purposes," and that "he answered the questions you put to him about the substantive matters." Asking to be heard further on the motion, the prosecution explained:

> Those questions that I asked him about were things that took place when this officer was working. Those had to do with him and this officer at the time that this officer was working, the same thing—
>
> THE COURT: I think it was August the twelfth or sometime after this event that you asked him about.
>
> MR. BEARD: Three occasions, your Honor, October the first, October the twentieth and I believe there was one other occasion. If I may say so, your Honor, I was asking questions that had to do with his relationship with this officer, not about the things that he's done.

Again, we hold that the comments by the prosecution did not amount to prejudicial error. The district attorney did not express an opinion as to the truthfulness of the evidence before the jury. The record further reveals that the defendants did not object to these comments or make a motion for a mistrial. "In order to seek appellate review of conduct of adverse counsel, counsel must object to the conduct at the time of its occurrence." *State v. Mitchell*, 20 N.C. App. 437, 439, 201 S.E. 2d 720, 722 (1974). Because of the defendants' failure to make a timely objection and to demonstrate how they were prejudiced by the prosecutor's remarks, this assignment of error is overruled.

[3] The defendants' three remaining assignments of error deal with the scope of redirect and cross-examinations given to the State by the trial court. In the first instance, the defendants argue that the trial court improperly allowed Officer Cox to testify on redirect examination that the green vegetable matter that he obtained from the defendants was marijuana, and to the chain of custody of that marijuana. Generally, redirect examination cannot be used to repeat direct testimony or to introduce entirely new matter. However, "the trial judge has discretion to permit counsel to introduce relevant evidence which could have been, but was not brought out on direct." *State v. Locklear*, 60 N.C. App. 428, 430, 298 S.E. 2d 766, 767 (1983). The fact that Cox had purchased marijuana from the defendants had been discussed on direct and cross-examination. Even if Cox's testimony with regard to the marijuana's chain of custody was "new matter," we hold the trial court did not abuse his discretion in allowing this testimony since it could have been properly admitted on direct examination. We also find it important to note that the defendants' only objection to the chain of custody line of questioning was that it was repetitious. This assignment of error is overruled.

[4] Secondly, the defendants object to the scope allowed the State in its cross-examination of Benjamin Franklin Doyle. The district attorney asked this defense witness what crimes he had been convicted of. Doyle replied: "Shoplifting . . . [and] [d]riving under the influence." The district attorney then asked whether he had been convicted of communicating a threat to his seventy-three-year-old mother. When Doyle denied such a conviction, the following exchange occurred:

> Q. I'll ask you if you weren't convicted of unlawfully, willfully threatening physical injury to your mother, Pauline Doyle, on October the thirteenth, 1981?
>
> A. That was throwed out.
>
> Q. I'll ask you again if you were not convicted of communicating a threat to your mother?
>
> A. Not as I knows of.
>
> Q. I'll ask you if on October thirteenth, 1981, if you didn't knock her—is she crippled?

MR. ROSSER: Objection, Judge, he's answered the question.

MR. BEARD: I'll withdraw that question, your Honor.

Q. I'll ask you if you didn't knock her down on October the thirteenth, 1981, on the bed, knocking her glasses off, and shove her up against the door, Mr. Doyle.

MR. ROSSER: Objection.

THE COURT: Wait just a minute. Is that the same thing that he was convicted of?

MR. BEARD: Your Honor, I have the conviction here, your Honor—

THE COURT: What I'm saying is you can ask him about specific acts—

MR. BEARD: That's exactly what I'm asking about at this time, your Honor. I'm asking him about the specific act on October thirteenth, 1981, if he didn't knock his mother down, knocking her glasses off, and push her up against the door.

THE COURT: Did you do those things?

WITNESS: No, sir.

THE COURT: All right.

On cross-examination, a witness may be impeached with regard to his prior convictions or specific acts of misconduct. "The witness may be asked all sorts of disparaging questions and he may be particularly asked whether he has committed specific criminal acts or has been guilty of specified reprehensible or degrading conduct." *State v. Waddell*, 289 N.C. 19, 26, 220 S.E. 2d 293, 298 (1975), *death penalty vacated*, 428 U.S. 904, 96 S.Ct. 3211, 49 L.Ed. 2d 1210 (1976). The district attorney's question concerning Doyle's alleged attack on his mother was proper for purposes of impeachment through specific acts of misconduct.

The district attorney's persistence on this matter was not improper in light of the witness's evasive responses. The district attorney may "sift the witness" in such situations. The district attorney may phrase his questions emphasizing the specific acts

of misconduct even though the witness has been convicted of offenses resulting from the misconduct. *State v. Herbin*, 298 N.C. 441, 451, 259 S.E. 2d 263, 270 (1979). Thus, as a part of the "sifting" process, the prosecutor could properly use the subject matter of the communicating threats conviction which Doyle had denied as a basis for his question concerning the specific bad act of attacking his mother. "Whether the cross-examination goes too far or is unfair is a matter resting within the sound discretion of the trial judge." *Id.* at 452, 259 S.E. 2d at 270. We hold that the trial judge did not abuse his discretion in this case.

One futher qualification in the area of impeachment through specific acts of misconduct is that the questions regarding the acts must be asked in good faith. *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972). In the present case, the prosecutor's question about the witness's attack on his mother was asked in good faith because the prosecutor had in his possession a copy of Doyle's conviction. Although the district attorney should have been more careful in revealing in front of the jury his basis for the questions, the defendants did not object to his statement. Furthermore, we fail to hold that his remark constituted prejudicial error in view of the trial court's willingness to allow the witness to clarify that he did not commit the acts mentioned by the State.

[5] Similarly, in the final assignment of error the defendants contend that the trial court erred in the scope allowed the district attorney during his cross-examination of defense witness, Eddie Wilkins. In its cross-examination, the State attempted to impeach Wilkins in three respects: (1) that he had committed specific acts of misconduct such as possessing and selling cocaine to Officer Cox; (2) that he had been arrested as a result of his commission of these acts; and (3) that since Officer Cox would be the testifying officer in the case against him, Wilkins had an interest in seeing Cox discredited.

The first and third methods of impeachment were properly allowed by the trial court. As discussed above, Wilkins could be questioned about these specific acts of misconduct. When asked about specific occasions Wilkins had allegedly sold cocaine to Officer Cox, he invoked his right against self-incrimination. The State could also properly cross-examine Wilkins for the purpose

of showing his bias or interest in the litigation. *State v. Miller*, 282 N.C. 633, 642, 194 S.E. 2d 353, 358 (1973).

However, a witness may not be impeached by cross-examination as to whether he has been arrested or accused of an unrelated criminal offense. *State v. Waddell, supra.* As the district attorney was asking Wilkins about an alleged cocaine sale to Cox on 1 October 1983, the prosecutor also added:

> Q. [Y]ou are on bond on this occasion, aren't you?
>
> [Defense Counsel]: Objection.
>
> THE COURT: Sustained.

The defendants made no motion to strike. Because the witness had already volunteered that the specific acts of misconduct being referred to were "things I'm accused of, not convicted of" and because the trial judge properly sustained the defendants' objection, we fail to see how defendants were prejudiced. We hold that the trial court did not abuse its discretion in the latitude it allowed the State in the cross-examination of Wilkins.

As reasoned above, we hold the defendants' trial was free from prejudicial error.

No error.

Chief Judge HEDRICK and Judge JOHNSON concur.

WAYNE E. WARREN v. CITY OF ASHEVILLE

No. 8428SC507

(Filed 7 May 1985)

1. Municipal Corporations § 11.1— dismissal of police officer—trial de novo in superior court

In a trial de novo in the superior court from a Civil Service Board's affirmance of plaintiff's dismissal as a police officer by the Chief of Police, the Board's decision is to be given no presumption of validity, and the jury is to make its own determination, under proper instructions by the trial court, on whether the Chief of Police had justification for his dismissal of plaintiff.

2. Municipal Corporations § 11— dismissal of police officer for soliciting fellatio—absence of justification—sufficient evidence

There was sufficient evidence to support a jury finding that the Chief of Police was not justified in finding that plaintiff had committed an act unbecoming to a police officer by soliciting the act of fellatio with another officer where plaintiff testified that his statement that he wanted to perform oral sex on the other officer was merely a test to determine whether the other officer was a homosexual.

3. Municipal Corporations § 11— dismissal of police officer—refusal to submit to polygraph examination

A law enforcement officer may be discharged from employment because of his refusal to submit to a polygraph examination if the officer has been informed (1) that the questions will relate specifically and narrowly to the performance of official duties, (2) that the answers cannot be used against the officer in any subsequent criminal prosecution, and (3) that the penalty for refusal is dismissal.

4. Municipal Corporations § 11— officer's refusal to take polygraph examination—justification

Plaintiff police officer was justified in refusing to take a polygraph examination where plaintiff learned through counsel that the polygraph operator planned to inquire whether plaintiff was a homosexual and whether he had ever had a homosexual encounter in the Asheville area since neither of those questions related specifically and narrowly to plaintiff's official duties and the charge being investigated that plaintiff solicited an act of fellatio with another officer.

5. Rules of Civil Procedure § 32— erroneous reading of deposition—harmless error

The trial court erred in permitting plaintiff's counsel to read a portion of an officer's deposition to the jury where the officer had been subpoenaed and was available to testify. However, such error was not prejudicial where the reading of a portion of the deposition served only to corroborate competent evidence already before the jury. G.S. 1A-1, Rule 32.

APPEAL by defendant from *Howell, Judge*. Judgment entered 28 July 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals on 11 February 1985.

J. Lawrence Smith for plaintiff appellee.

Victor W. Buchanan for defendant appellant.

COZORT, Judge.

Plaintiff was dismissed from his employment as a police officer by defendant City of Asheville on 25 February 1981. He ap-

pealed his dismissal to the Civil Service Board of Asheville which upheld his discharge. Plaintiff instituted this civil action in accordance with the Asheville Civil Service Law. At trial the jury found that the Chief of Police had acted without justification in firing the plaintiff. Defendant appealed, contending that the trial court erred by allowing plaintiff's counsel to read a portion of a deposition to the jury and that, as a matter of law, the evidence was insufficient to support the jury's verdict. We find no prejudicial error. The facts follow.

Plaintiff was employed by Asheville Police Department on 1 March 1975 as a patrolman, and as such, was subject to the Asheville Civil Service Law. He owned his own home and, beginning in 1977, had a business arrangement with another police officer, Robert G. Warlick, whereby Warlick stayed in plaintiff's house, working around the house and the yard instead of paying rent, and paid half of all other general expenses, such as heating oil, groceries, property taxes and electricity.

In the late evening hours of 5 January 1981 or early morning of the next day, plaintiff stated to Warlick that he wanted to perform oral sex on Warlick. Warlick said no. Plaintiff contends that he made the statement, on advice of others, to determine whether Warlick was homosexual. Warlick moved out of plaintiff's home the next day. Plaintiff and Warlick agree that there was no physical contact between them and that plaintiff made no further reference to oral sex to Warlick after this incident.

Warlick reported the incident to his superior officers, and on 23 January 1981, Police Chief F. W. Hensley ordered the Department's office of Internal Affairs to conduct an investigation. Plaintiff defended his statement to Warlick as a test to determine whether Warlick was a homosexual. Plaintiff was ordered to take a polygraph examination on 20 February 1981. On that day, the examination was postponed for four days. On the 24th, plaintiff reported to the Police Department, accompanied by his attorney, Marvin Pope. Pope discussed the tentative polygraph questions with Sergeant Gary Foster, the police officer assigned to administer the polygraph to plaintiff. Pope then advised plaintiff not to take the polygraph. Plaintiff told Chief Hensley he would not take the polygraph. Chief Hensley then suspended plaintiff and terminated his employment the next day. Plaintiff appealed his

dismissal to the Civil Service Board of Asheville, which affirmed his firing. In accordance with the Civil Service Law of the City of Asheville, plaintiff appealed the final decision of the City by filing this action in Superior Court in Buncombe County for a trial *de novo*. The jury found that the Chief of Police acted without justification: (1) in finding that plaintiff violated the rules of conduct of the Department by engaging in unbecoming conduct; (2) in finding that plaintiff violated the rules of conduct by willfully refusing to submit to a polygraph test; and (3) in taking disciplinary action against plaintiff. The trial court ordered the plaintiff reinstated with full back pay and benefits. Defendant City of Asheville appealed.

In three of its assignments of error, the City calls upon this Court to review the sufficiency of the evidence to send the case to the jury and to support the verdict rendered by the jury. The City argues that the trial court erred by denying its Motion for Directed Verdict, Motion for Judgment Notwithstanding the Verdict, and Motion for a New Trial. The City contends that allowing the jury's verdict to stand would allow the jury to substitute its judgment for that of the Chief of Police. We find no error in the trial court's denial of the City's motions.

Chapter 415 of the 1977 N.C. Session Laws, amending the Civil Service Law of the City of Asheville (1953 N.C. Sess. Laws ch. 757), provides, in pertinent part, as follows:

> Within 10 days of the receipt of notice of the decision of the board, either party may appeal to the Superior Court Division of the General Court of Justice for Buncombe County *for a trial de novo*. . . . If the petitioner desires a trial by jury, the petition shall so state. . . . Thereafter, the matter *shall proceed to trial as any other civil action.* (Emphasis ours.)

That law clearly provides for trial *de novo* in Superior Court. When a law so provides, the scope of the trial is as follows:

> "Power to try a case *de novo* vests a court with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court." (Citation omitted.) . . . "This means that the court must hear or try the case on its merits from beginning to end

as if no trial or hearing had been held by the Board and without any presumption in favor of the Board's decision." (Citation omitted.)

In re Hayes, 261 N.C. 616, 622, 135 S.E. 2d 645, 649 (1964).

[1] Thus, the Civil Service Board's affirmance of the Police Chief's dismissal of plaintiff is to be given no presumption of validity, and the jury is to make its own determination, under proper instructions from the trial court, on whether the Police Chief had justification for the actions he took against the plaintiff. If there was evidence when considering it in the light most favorable to the plaintiff, which supported the verdict, then there was no error in the trial court's denial of defendant's motions. *Wallace v. Evans*, 60 N.C. App. 145, 298 S.E. 2d 193 (1982).

There were four "Charges and Specifications" upon which Chief Hensley relied in dismissing plaintiff. Plaintiff was charged with: (1) Unbecoming Conduct by "[o]n January 6, 1981 you actively committed a Common Law Offense by soliciting another officer to commit a felony, namely North Carolina General Statute 14-177"; (2) Insubordination by "[o]n two occasions you refused to follow legal orders to submit to a polygraph examination"; (3) a violation of Department Rule of Conduct Number 36 which directs employees to submit to polygraph examinations "specifically directed and narrowly related to a particular internal investigation being conducted by the Department"; and (4) a violation of Department Rule of Conduct Number 1 which provides that employees shall obey all Rules of Conduct. At the trial below, the court correctly submitted three issues to the jury: (1) Was Chief Hensley justified in finding and concluding that plaintiff had committed an act unbecoming to an officer by soliciting the act of fellatio? (2) Did the Chief of Police act without justification in finding and concluding that plaintiff willfully refused to submit to a polygraph test? and (3) Was the disciplinary action taken by the Chief justified? The trial court properly instructed the jury that the plaintiff had the burden of proof on all issues.

[2] There was sufficient evidence for the trial court to submit to the jury the issue of whether plaintiff committed an act of unbecoming conduct by soliciting fellatio. The plaintiff's testimony, if believed by the jury, established that his question to Warlick was, instead of a true solicitation of fellatio, merely a test to

determine whether Warlick was homosexual. Thus, there was evidence to support the jury's verdict on the first issue.

On the issue of refusing to take the polygraph test, the plaintiff's evidence tended to show that he refused to take the polygraph examination upon advice of counsel after his counsel had reviewed the tentative questions with Sergeant Foster. Plaintiff's counsel testified that the three questions he was shown by Foster were: "The first relevant questions [*sic*] was: Did you make the statement to the effect that would you like to have oral sex. And the second questions [*sic*] was: Are you a homosexual. And the third question: Have you ever had a homosexual encounter in the Asheville area."

Plaintiff's counsel further testified:

> I explained to Chief Hensley at the second meeting that there was no point in the first question on his examination because we had already admitted that the statement was made, and Officer Warlick admitted that the statement was made about the oral sex and the reasoning behind it. So there was nothing that I felt there to test the truthfulness of whether both of the men admitted, you know, that the statement was made.
>
> The second question was about: Are you a homosexual. . . .
>
> * * * *
>
> I told him there was no basis for the question, because there was no physical contact between Wayne and Warlick, and there was no—that it was not something for dismissal, disciplinary action. If there had have been, but there was not—there was no evidence that there was any at all, and both men, again, admitted this too.
>
> * * * *
>
> And the same applied to the third question about the homosexual encounter in the Asheville area. There was nothing in Warlick's statement that I had been allowed to see to indicate that Wayne had ever had any type of homosexual encounter in Asheville. So there was no basis for that question

at all. I explained this to Chief Hensley, and that was why I was refusing to allow Wayne to take this test.

[3] The question of whether a law enforcement officer can be discharged from his employment because of his refusal to submit to a polygraph examination has not been decided in this State. Some states have answered in the affirmative and others in the negative. *See* Annot., 15 A.L.R. 4th 1207 (1982). At least one state, Florida, has held that the "same unreliability which prevents the polygraph's admissibility in court should preclude the dismissal of a police officer for failure to take a test." *Farmer v. City of Fort Lauderdale*, 427 So. 2d 187, 190 (Fla.), *cert. denied*, --- U.S. ---, 104 S.Ct. 74, 78 L.Ed. 2d 86 (1983). Of those decisions approving dismissal, the basic rules are that the officer must be informed: (1) that the questions will relate specifically and narrowly to the performance of official duties; (2) that the answer cannot be used against the officer in any subsequent criminal prosecution; and (3) that the penalty for refusal is dismissal. *See*, for example, *Rivera v. City of Douglas*, 132 Ariz. 117, 644 P. 2d 271 (1982). We think the better view is that discharge is permissible upon refusal to take the polygraph if the three requirements set forth above are followed, and we so hold.

[4] In the case *sub judice*, plaintiff learned through counsel that the Department planned to inquire during his polygraph examination whether he was a homosexual and whether he had ever had a homosexual encounter in the Asheville area. Neither of these questions related specifically and narrowly to plaintiff's official duties and the charge which was being investigated. As a matter of law, plaintiff was justified in refusing to take a polygraph examination which included those questions. Therefore, there was sufficient evidence upon which the jury could find that the Police Chief was not justified in disciplining the plaintiff for refusing to take that polygraph examination.

In summary, the evidence supported the jury's verdict, and the City's motions directed to the sufficiency of the evidence were properly denied.

[5] We now consider whether the trial court erred by allowing plaintiff's counsel to read to the jury a portion of Sergeant Foster's deposition which supported the plaintiff's contention that the tentative polygraph questions were too general and not rele-

vant to the specific charges against the plaintiff being investigated by Internal Affairs. Foster had been subpoenaed and was available to testify.

It was error for the trial court to allow plaintiff's counsel to read a portion of the deposition under these circumstances. The use of depositions at trial is governed by G.S. 1A-1, Rule 32. Generally, "testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is not available to testify in person." Wright & Miller, Federal Practice and Procedure: Civil § 2142. "Although the North Carolina Rules of Civil Procedure provide extensive rights of discovery to any party, the use of a deposition in a civil case at the trial stage is sharply limited." *Maness v. Bullins*, 11 N.C. App. 567, 568, 181 S.E. 2d 750, 751, *cert. denied*, 279 N.C. 395, 183 S.E. 2d 242 (1971). All or part of a deposition may be used only if the provisions of G.S. 1A-1, Rule 32(a) are met. *See Nytco Leasing v. Southeastern Motels*, 40 N.C. App. 120, 252 S.E. 2d 826 (1979).

We have carefully examined the provisions of G.S. 1A-1, Rule 32(a) and find none under which the reading of the deposition should have been allowed. Therefore, the trial court erred in allowing the reading of a portion of the deposition. However, an error in the admission of evidence is not grounds for granting a new trial or for setting aside a verdict unless the admission amounts to the denial of a substantial right. G.S. 1A-1, Rule 61. "The burden is on the appellant not only to show error, but also to enable the Court to see that he was prejudiced and that a different result would have likely ensued had the error not occurred. (Citations omitted.) 'The admission of incompetent testimony will not be held prejudicial when its import is abundantly established by other competent testimony, or the testimony is merely cumulative or corroborative. (Citations omitted.)' " *Hasty v. Turner*, 53 N.C. App. 746, 750, 281 S.E. 2d 728, 730-31 (1981).

The portion of Foster's deposition read to the jury showed that Foster planned to ask a question on the polygraph examination which the plaintiff alleged was not relevant to the charges against him. Plaintiff had already elicited the same evidence from one of his witnesses and from cross-examining the Chief of Police. The reading of Foster's deposition thus served only to corroborate competent evidence already before the jury. Plaintiff

cannot show prejudice, and we hold that the admission of the evidence was harmless error.

Having carefully considered all of the plaintiff's assignments of error, we find no prejudicial error.

No error.

Judge JOHNSON concurs.

Chief Judge HEDRICK concurs in result.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 16 APRIL 1985

BOWMAN v. BOWMAN No. 8418DC740	Guilford (83CVD5707)	Affirmed
BRESHEARS v. TURNER No. 8414SC352	Durham (77SP246)	Dismissed
DAWSON v. CHRISCOE No. 8420SC795	Moore (82CVS95)	Affirmed
IN RE WHITFIELD v. NC FARM BUREAU No. 849DC558	Person (81CVD372)	No Error
LOVINGOOD v. FOX No. 8429SC872	McDowell (83CVS510)	Affirmed
MADDOX v. GLASGOW No. 8414DC1143	Durham (83CVD2611)	Affirmed
PLANT v. PLANT No. 8422DC1140	Alexander (83CVD204)	Dismissed
SHIELDS v. SHIELDS No. 8415SC914	Chatham (82CVS271)	Affirmed
STAR AUTOMOBILE v. SAAB-SCANIA No. 8410SC823	Wake (83CVS6049)	Vacated & remanded with instructions
STATE v. BONHAM No. 8421SC895	Forsyth (83CRS57329)	No Error
STATE v. BYRD No. 8418SC655	Guilford (83CRS15595) (83CRS15596) (83CRS15597) (83CRS15598) (83CRS15599)	Vacated & remanded for new hearing
STATE v. CASHWELL No. 8422SC902	Davie (84CRS0766) Davidson (83CRS13416)	Affirmed
STATE v. DAVIS No. 8429DC1151	McDowell (83CRS4799)	No Error
STATE v. GARNER No. 844SC1012	Onslow (84CR322) (84CR323)	No Error

STATE v. HARRISON No. 8412SC930	Cumberland (83CRS47633)	No Error
STATE v. KORNEGAY No. 848SC1208	Lenoir (83CRS7799) (83CRS7800)	No Error
STATE v. LOVE No. 8410SC875	Wake (83CRS51580) (83CRS51581)	Affirmed
STATE v. MALONE No. 844SC922	Onslow (83CRS18453)	No Error
STATE v. PATTERSON No. 8426SC1009	Mecklenburg (83CRS54758)	No Error
STATE v. PEACE No. 849SC1001	Vance (84CRS155)	No Error
STATE v. RICHARD No. 8422SC894	Davidson (83CRS7622)	No Error
STATE v. WRIGHT No. 8427SC1079	Gaston (84CRS2524) (84CRS2525) (84CRS2529) (84CRS2530)	No Error
VADEN v. CHAMBERLAIN No. 8417DC890	Stokes (80CVD137)	Affirmed
WATTS v. WATTS No. 8426DC601	Mecklenburg (84CVD2903)	Dismissed

GEORGANNE SMITH v. WILLIAM GEORGE PRICE

No. 8421DC764

(Filed 7 May 1985)

1. **Rules of Civil Procedure § 50.3— motion for directed verdict—statement of specific grounds**

While the better practice is to state specific grounds for a directed verdict motion, a statement of specific grounds is not necessary where the issue is identified and the grounds for the motion are apparent to the court and the parties.

2. **Rules of Civil Procedure § 50— motion for directed verdict or judgment n.o.v. —credibility of movant's evidence**

Ordinarily, the question of credibility is one for the jury and, where the movant's case depends to any extent on witness credibility, a directed verdict or judgment n.o.v. is rarely proper. However, there is no constitutional or procedural impediment to granting a directed verdict in favor of the party with the burden of proof when the credibility of the movant's witnesses is "manifest as a matter of law."

3. **Bastards § 10; Rules of Civil Procedure § 50.4— judgment n.o.v. for plaintiff on issue of paternity**

In a civil paternity action, defendant raised only latent doubts as to the credibility of plaintiff mother's evidence, and the trial court properly entered judgment n.o.v. for plaintiff on the issue of paternity, where defendant corroborated most of plaintiff's testimony and refuted none of it in that defendant admitted at trial that he had sexual relations with plaintiff three times during one weekend and another time a week later without using contraception, and that a full-term baby was born to plaintiff some nine months later; based on defendant's admissions concerning sexual contact with plaintiff, blood grouping tests showed that the statistical possibility is less than one-half of one percent that defendant is not the father of the child; and even if plaintiff's testimony is discounted entirely and none of defendant's admissions of sexual contact considered, the blood test would show a 96.42% probability that defendant is the father of the child.

4. **Bastards § 10— paternity action—dismissal of counterclaim based on fraud**

The trial court in a paternity action properly dismissed defendant's counterclaim seeking damages in the amount of child support he would pay during the child's minority on the ground that he was fraudulently tricked into having sex with plaintiff since defendant in effect sought to avoid his legal obligation to support the child he fathered and to impede enforcement of the child's legal and constitutional rights to support.

5. **Attorneys at Law § 7.5; Divorce and Alimony § 27— attorney fees—civil paternity action—child custody and support actions**

The trial court was authorized to award reasonable attorney fees for child custody and support actions but not for a civil action to establish paternity

under G.S. 49-14. Furthermore, the court's order awarding attorney fees was insufficient in that it contains no finding that plaintiff was acting in good faith as required by G.S. 50-13.6.

APPEAL by defendant from *Tanis, Judge.* Judgments entered 13 December 1983 and 30 December 1983 in District Court, FORSYTH County. Heard in the Court of Appeals 13 March 1985.

In this civil action, plaintiff seeks a judicial determination that defendant is the father of her child, an order awarding custody of the child to her, and reasonable child support from defendant. Briefly summarized, the evidence shows the following:

Plaintiff and defendant were casual acquaintances who met in December of 1980. On or about 20 February 1981, plaintiff telephoned defendant and arranged a dinner date with him. This was their first date. After dinner, the two went to defendant's house for drinks. Defendant made a fire in the fireplace and he and plaintiff began to hug and kiss on the floor in front of the fire. Plaintiff suggested that they move to a more comfortable location in order to have sex. Plaintiff and defendant moved to defendant's bed and they had sexual intercourse. Plaintiff spent the night with defendant. They had sexual intercourse again the next morning. Defendant used no birth control method or device. That afternoon, defendant asked plaintiff what method of birth control she used. She indicated that she used the rhythm method but that she was in the "safe" part of her cycle. Plaintiff spent the night of 21 February 1981 with defendant and they had sexual intercourse again.

Plaintiff testified that she had a regular menstrual cycle and that her menstrual period began around the end of each month. In practicing the rhythm method, plaintiff did not use the recommended techniques of checking her basal temperature and the sugar content of her cervical mucous. Instead, she used a calendar, determining the "safe" part of her menstrual cycle by counting back from the approximate beginning of her next menstrual period. According to plaintiff's method, her next menstrual period should have started on 26 or 27 February 1981. It did not.

Plaintiff and defendant had sex again on 1 March 1981. Plaintiff underwent a pregnancy test and on or about 19 March 1981

determined that she was pregnant. Sometime thereafter, she had sexual intercourse with another man.

In April of 1981, plaintiff told defendant that she was pregnant and that she thought that he was the father. Though marriage and abortion were discussed, neither occurred and plaintiff gave birth to a healthy 9 pound, 1 ounce baby boy. Blood grouping tests were performed on plaintiff, defendant and the child. These tests showed a strong probability that defendant was the father.

Additional facts will be discussed where pertinent in the body of the opinion.

On 3 August 1983, plaintiff filed a complaint in district court for Forsyth County seeking to have defendant declared the father of her child, to have custody of the child placed with her, and to have defendant ordered to pay reasonable child support.

Defendant responded, denying plaintiff's allegations of paternity and denying any financial responsibility for the child. Defendant counterclaimed against plaintiff for fraud, alleging that plaintiff had intentionally deceived him regarding birth control in order to persuade him to engage in sex with her. He claimed that she seduced him and had intercourse with him for the sole purpose of procreation. Defendant claimed compensatory damages for the alleged fraud in the amount of $85,000.

The matter was tried before a jury. At the close of the evidence plaintiff moved for a directed verdict as to defendant's counterclaim and the court allowed the motion. Plaintiff's motion for directed verdict was denied and the jury returned a verdict for defendant. On the motion of plaintiff, however, the court entered judgment n.o.v. on 13 December 1980, determining defendant to be the father of the child. The court initially denied plaintiff's alternative motion for a new trial, but later allowed plaintiff's amended motion, granting plaintiff a new trial if the judgment n.o.v. was reversed or vacated on appeal. Defendant gave oral notice of appeal from the entry of judgment n.o.v. for plaintiff on the paternity issue.

A subsequent hearing was held before the court on the issues of child custody and support on 30 December 1980. Plaintiff was awarded custody of the child and defendant was ordered to pay

child support and attorney fees. Defendant gave oral notice of appeal from this order. Written orders were prepared and signed by Judge Tanis on 27 and 29 February 1984.

Pettyjohn and Molitoris, by Anne Connolly, for plaintiff-appellee.

David B. Hough for defendant-appellant.

EAGLES, Judge.

I

[1] In his first assignment of error, defendant contends that the trial court should not have entertained plaintiff's motion for judgment n.o.v. because plaintiff had not made the prerequisite motion for directed verdict in accordance with the North Carolina Rules of Civil Procedure. G.S. 1A-1, Rule 50. Defendant correctly notes that a directed verdict made at the close of the evidence is an absolute prerequisite to a motion for judgment n.o.v. *Gibbs v. Duke*, 32 N.C. App. 439, 232 S.E. 2d 489, *disc. rev. denied*, 292 N.C. 640, 235 S.E. 2d 61 (1977); *Glen Forest Co. v. Bensch*, 9 N.C. App. 587, 176 S.E. 2d 851 (1970). Rule 50(a) provides that "[a] motion for a directed verdict shall state the specific grounds therefor." Because plaintiff's counsel indicates that the directed verdict motion was made "for record purposes only," because no specific grounds were stated, and because counsel for plaintiff chose not to argue it, defendant contends that the motion was not a proper motion under Rule 50(a) and that the later motion for judgment n.o.v. was thus not properly before the trial court. This contention is without merit.

Although plaintiff raised three issues in her complaint —paternity, custody and support—only the paternity issue was before the jury. *Searcy v. Justice*, 20 N.C. App. 559, 202 S.E. 2d 314, *cert. denied*, 285 N.C. 235, 204 S.E. 2d 25 (1974). Defendant had raised by counterclaim the issue of fraud. When plaintiff made her motion, evidence had been presented only on these two issues. Obviously, the paternity issue had to be decided before the court could decide the issue of fraud. Just as obviously, it was the paternity issue that was the focus of plaintiff's motion. Counsel indicated as much when the motion was made. The obvious, if unstated, grounds for plaintiff's motion, as with any

directed verdict motion made by a party with the burden of proof, was that the evidence established the fact in issue so clearly that no inference to the contrary could be drawn by a jury. *Snipes v. Snipes*, 55 N.C. App. 498, 286 S.E. 2d 591, *aff'd per curiam*, 306 N.C. 373, 293 S.E. 2d 187 (1982). While the better practice is to state specific grounds for a directed verdict motion, it is not necessary where, as here, the issue is identified and the grounds for the motion are apparent to the court and the parties. *Humphrey v. Hill*, 55 N.C. App. 359, 285 S.E. 2d 293 (1982). Even if the grounds were not apparent, we note that defendant waived his objection to the form of the motion by failing to note an objection at trial. *Id.; Byerly v. Byerly*, 38 N.C. App. 551, 248 S.E. 2d 433 (1978). Plaintiff's motion for judgment n.o.v. was properly entertained by the trial court and defendant's first contention is without merit.

II

The same grounds, more specifically stated, were raised in plaintiff's written motion for judgment n.o.v. That motion read in part as follows:

> 5. This verdict and the judgment entered thereon should be set aside for the following reasons:
>
> a. That while the plaintiff has burden of proof, plaintiff's right to judgment is established by defendant's evidence and her right of judgment, therefore, does not depend upon the credibility of her witnesses;
>
> b. That an examination of all of the evidence demonstrates that there is no conclusion to be drawn other than that the defendant is the father of plaintiff's child, William George Price, and, therefore, there is no genuine issue of fact.

In his second assignment of error, defendant contends that the court erred in allowing plaintiff's motion for judgment n.o.v. His argument is twofold: first, he argues that the pertinent statute, G.S. 49-14, imposes a heavy burden of proof on the plaintiff in that it requires that paternity be established beyond a reasonable doubt; second, he argues that a motion for judgment n.o.v. likewise puts a heavy burden on the plaintiff, requiring her to establish the fact in issue as a matter of law, leaving no room

for doubt as to defendant's paternity of the child. By either standard, defendant contends that plaintiff's evidence was insufficient and that her motion for judgment n.o.v. should not have been allowed. We disagree.

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 clearly established in our law.

> A motion for judgment notwithstanding the verdict presents the question of whether the evidence was sufficient to entitle the plaintiff to have a jury pass on it. *Hunt v. Montgomery Ward and Co., Inc.*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980). The evidence must be considered in the light most favorable to the party opposing the motion, and the opponent is entitled to the benefit of every reasonable inference which may legitimately be drawn from the evidence, and all conflicts in the evidence are resolved in favor of the opponent. *Potts v. Burnette*, 301 N.C. 663, 273 S.E. 2d 285 (1981).

Morrison v. Kiwanis Club, 52 N.C. App. 454, 462, 279 S.E. 2d 96, 101, *disc. rev. denied*, 304 N.C. 196, 285 S.E. 2d 100 (1981). This assignment of error raises the issue of whether a judgment n.o.v. in favor of the party with the burden of proof is appropriate, especially where the proof depends in part on the credibility of witnesses.

[2] Ordinarily, the question of credibility is one for the jury and, where the movant's case depends to any extent on witness credibility, a directed verdict or judgment n.o.v. is rarely proper. *See, e.g., Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971); *Stutts v. Green Ford*, 47 N.C. App. 503, 267 S.E. 2d 919 (1980); *Ludwig v. Hart*, 40 N.C. App. 188, 252 S.E. 2d 270, *disc. rev. denied*, 297 N.C. 454, 256 S.E. 2d 807 (1979). It used to be the rule that a directed verdict was never proper in those circumstances. *Cutts v. Casey, supra.* However, our Supreme Court pointed out in *NCNB v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979), that there is no constitutional or procedural impediment to granting a directed verdict in favor of the party with the burden of proof when the

credibility of the movant's witnesses was "manifest as a matter of law." *Id.* at 537, 256 S.E. 2d at 396. Although unable to formulate a general rule, the court noted three "recurrent situations" where the credibility of a movant's evidence was manifest:

> (1) Where non-movant establishes proponent's case by admitting the truth of the basic facts upon which the claim of proponent rests. [Citations.]
>
> (2) Where the controlling evidence is documentary and non-movant does not deny the authenticity or correctness of the documents. [Citations.]
>
> (3) Where there are only latent doubts as to the credibility of oral testimony and the opposing party has "failed to point to specific areas of impeachment and contradictions."

Id. at 537-38, 256 S.E. 2d at 396, *quoting Kidd v. Early*, 289 N.C. 343, 370, 222 S.E. 2d 392, 410 (1976). Especially where credibility is concerned, the distinction between issues of law and issues of fact is difficult to draw precisely. "[W]hile credibility is generally for the jury, courts set the outer limits of it by preliminarily determining whether the jury is at liberty to disbelieve the evidence presented by movant." *Id.* at 538, 256 S.E. 2d at 396. *See generally*, 9 Wright and Miller, Federal Practice and Procedure, Section 2535 (1971 and Supp. 1983); Note, 16 Wake Forest L. Rev. 607 (1980).

[3] Though the *NCNB v. Burnette* court speaks of three situations where the credibility of a movant's evidence may be manifest, those situations are not limitations, merely observations drawn from reported cases. The evidence in this case does not fit neatly into any one of the three situations noted in *NCNB v. Burnette*. It is nevertheless manifestly credible in our opinion.

Most of the evidence in this case is not in dispute. Though his response denies it, defendant admitted at trial that he had sexual relations with plaintiff three times over the weekend of 20 and 21 February 1981 and again on 1 March 1981. He did not use any birth control method and did not ascertain whether plaintiff was using any birth control method before having sex with her. A nine pound, one ounce healthy baby was born to plaintiff nearly nine months later. Defendant's own expert, Dr. Meis, expressed his opinion on cross examination that plaintiff's baby was prob-

ably full term. He performed a standard gestation period calculation, based on plaintiff's testimony regarding her menstrual cycle and assuming sexual contact on 20 February 1981, that put an estimated date of birth at 11 November 1981, only two days later than plaintiff's child was actually born. Plaintiff's uncontradicted testimony was that defendant was the only man with whom she had sexual contact between December 1980 and late March 1981, when her tests revealed she was pregnant. Blood grouping tests performed on plaintiff, defendant, and the child showed a high probability that defendant was the father.

Clearly, plaintiff in this case is an interested witness and her testimony would ordinarily be subject to question on that ground. By his own testimony, however, defendant corroborates most of plaintiff's testimony and refutes none of it. He does not point to specific inconsistencies in plaintiff's evidence nor does he attempt to impeach her expert witness. Defendant does not question the authenticity of the document showing the results of the blood test. He does not pursue or support with any authority the questions he purports to raise concerning the reliability of the tests or the credibility of plaintiff's expert witness. At best, defendant raises only latent doubts as to the credibility of plaintiff's evidence. This is clearly not enough to defeat her case. *Conner v. Spanish Inns*, 294 N.C. 661, 242 S.E. 2d 535 (1978).

Relying on uncontradicted facts and drawing all permissible inferences in defendant's favor, the evidence admits of only a bare statistical possibility that defendant is not the father of the child. Based on defendant's admissions concerning sexual contact with plaintiff, that statistical possibility is less than one-half of one percent. Even if plaintiff's testimony is discounted entirely and none of defendant's admissions of sexual contact considered, the tests alone would show a 96.42% probability that defendant was the father of the child. *See* Comment, 16 Wake Forest L. Rev. 591 (1980). We are aware that blood test results are not absolutely conclusive and that they have been held insufficient, without more, to establish non-paternity. *State v. Camp*, 286 N.C. 148, 209 S.E. 2d 754 (1974) (different type of test). *See* Comment, 16 Wake Forest L. Rev. 591 (1980). We note also that G.S. 8-50.1 does not require a peremptory jury instruction where the results of blood tests tend to establish paternity nor does the statute indicate how much weight is to be attached to blood test results.

However, when combined with facts that are conclusively established by the evidence and defendant's admissions, the test results leave no reasonable question as to the paternity of the child. Defendant here has done no more than raise latent doubts or mere conjecture regarding the credibility of the evidence. We think that the court properly allowed plaintiff's motion for judgment n.o.v.

III

a.

[4] Defendant next contends that it was error for the trial court to allow plaintiff's motion for directed verdict on the counterclaim of fraud. The basis of defendant's counterclaim was that plaintiff had tricked him into having sex with her so that plaintiff could have the baby. Rather than denying financial responsibility for the child, however, defendant seeks damages from plaintiff based on estimates of the total child support he would pay during the child's minority.

We note first, in response to plaintiff's argument, that defendant's appeal on this issue is properly before us. Defendant gave oral notice of appeal from the trial court's judgment on the paternity issue in accordance with N.C. App. Rule 3(a)(1). Having given notice of appeal, defendant is entitled to argue to this court the correctness of any ruling by the trial court provided that his exception to that ruling is preserved for appeal in accordance with N.C. App. Rule 10(b). Since the directed verdict on defendant's counterclaim did not finally determine the action or preclude a judgment from which an appeal could be taken, an immediate appeal from the court's order would likely have been dismissed as premature. G.S. 1A-277, 7A-27. Defendant has properly excepted and assigned error to the trial court's ruling; he is entitled to challenge that ruling on appeal from the final judgment of the court.

b.

Though defendant is entitled to make arguments in support of his assignment of error, we find them to be without merit. The law imposes a support obligation on the biological parents of a child born out of wedlock; the child has a right to that support. *Cogdell v. Johnson*, 46 N.C. App. 182, 264 S.E. 2d 816, 16 A.L.R. 4th 919 (1980). The purpose of an action under G.S. 49-14 is to

establish the identity of the biological father of an illegitimate child so that the child's right to support may be enforced and the child will not become a public charge. *Id.; Wright v. Gann*, 27 N.C. App. 45, 217 S.E. 2d 761, *cert. denied*, 288 N.C. 513, 219 S.E. 2d 348 (1975); G.S. 49-2. *See generally*, Lee, N.C. Family Law, Section 251 (1981). Once paternity is established, the proper custody and amount of support are determined in the same manner as for a legitimate child. G.S. 49-15. In making this determination, the court has considerable discretion but the welfare of the child is the primary consideration. *Holt v. Holt*, 29 N.C. App. 124, 223 S.E. 2d 542 (1976). To determine the rights of an illegitimate child any differently would violate the illegitimate child's constitutional right to equal protection of the law. *Levy v. Louisiana*, 391 U.S. 68, 20 L.Ed. 2d 436, 88 S.Ct. 1509 (1968); *Cogdell v. Johnson, supra.*

By counterclaiming against plaintiff for fraud, defendant seeks to avoid his legal obligation to provide his share of support for the child he fathered. The fact that he seeks damages from plaintiff rather than avoidance of the obligation altogether does not disguise his underlying intention to evade his responsibility to his child and to impede our enforcing of the child's legal and constitutional rights to support. Defendant's argument that he was tricked into fathering a child and should not bear the financial responsibility for it might be appropriate in some circumstances. However, the argument is simply not appropriate in a civil action to establish paternity, either as a defense or a counterclaim. *See L. Pamela P. v. Frank S.*, 59 N.Y. 2d 13, 449 N.E. 2d 713 (1983). The counterclaim was subject to dismissal under Rule 12(b), but plaintiff made no motion. It was not error for the trial court to allow plaintiff's directed verdict motion and dismiss the counterclaim at the close of the evidence.

c.

Because we have determined that defendant could not properly assert his counterclaim in this action, we do not consider whether the trial court erred in excluding certain testimony pertaining to that issue.

IV

[5] Defendant's final assignment of error concerns the trial court's award of attorney fees. Defendant contends that neither

G.S. 49-14 nor G.S. 49-15 contains a specific provision authorizing the award of attorney fees and argues that, without specific statutory authorization, the court may not award them. Defendant argues that even if attorney fees may be awarded in this action, the trial court's findings are not sufficient to support the award and that the evidence in any case would not support the required findings.

As noted above, G.S. 49-15 provides that issues of custody and support of illegitimate children are to be determined just as for legitimate children, once paternity has been established. No other procedure is specified or provided. In actions for custody and support of minor children, the court is clearly authorized to award attorney fees. G.S. 50-13.6 provides in part as follows:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order of custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit.

This statute does not apply to civil actions to establish paternity under G.S. 49-14. We can perceive no reasonable construction of G.S. 50-13.6 that would extend its coverage that far. Accordingly, the trial court in this case was authorized to award reasonable attorney fees for the custody and support actions, but not for the paternity action.

We note that any award of attorney fees must be supported by appropriate findings based on competent evidence. *Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980); *Gibson v. Gibson*, 68 N.C. App. 566, 316 S.E. 2d 99 (1984). Here, the order awarding attorney fees to plaintiff contains no finding that plaintiff was acting in good faith, as required by G.S. 50-13.6, *supra*.

For the reasons stated, that part of the court's order of 30 December 1980 awarding attorney fees to plaintiff must be vacated and the cause remanded for further proceedings on the issue of attorney fees. An additional evidentiary hearing may be required. In all other respects, the judgment of the trial court is affirmed.

Affirmed in part; vacated and remanded in part.

Judges WHICHARD and JOHNSON concur.

GREAT AMERICAN INSURANCE COMPANY v. C. G. TATE CONSTRUCTION COMPANY

No. 8410SC743

(Filed 7 May 1985)

1. **Insurance § 96.1— delayed notice of accident—insurer's duty to defend—factors determining**

There is a three-step test for determining whether an insurer is obligated to defend when the insurer claims that notice of the claim was not timely given. Where the court concluded that notice was not given as soon as practicable and that the failure to notify the insurer "lacked good faith," then there was no need to proceed to the third step and determine whether the insurer was prejudiced by the delay.

2. **Insurance § 96.1— notice of claim to insurer—timeliness—tests for bad faith**

Where the insured did not notify the insurer of an accident, the trial court improperly substituted an objective test of good faith by allowing unreasonable or unfair dealings to constitute bad faith by the insured. Bad faith is to be measured by its objective standard, based upon actual knowledge and an intentional, *i.e.*, purposeful and knowing, failure to notify the insured.

Judge WELLS concurring.

APPEAL by plaintiff from *Bailey, Judge*. Judgment entered 6 June 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 8 March 1985.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert W. Sumner, for plaintiff appellant.

Nye, Mitchell and Jarvis, by Charles B. Nye, for defendant appellee.

BECTON, Judge.

I

Great American Insurance Company (Great American) instituted this declaratory judgment action to determine its liability

under a general liability insurance policy issued to C. G. Tate Construction Company (Tate) for damages arising out of an accident occurring on 6 April 1978. This action has already been the subject of two prior reported cases, both appearing as *Great American Insurance Company v. C. G. Tate Construction Company*, at 46 N.C. App. 427, 265 S.E. 2d 467 (1980) and 303 N.C. 387, 279 S.E. 2d 769 (1981).

The central issue involved in these extended proceedings is whether the failure of an insured to comply with a policy provision which requires the insured, as a condition precedent to coverage, to give the insurer notice "as soon as practicable," releases the insurer from its obligations under the policy. The trial court originally entered judgment in favor of Great American, after concluding that Tate failed to give notice to Great American "as soon as practicable" and that such failure was unjustified and inexcusable. Tate appealed to this Court, and we reversed, holding that an insured's failure to comply with a notice provision will not relieve the insurer from its duty to defend and indemnify unless the notice was not given within a reasonable time, and the insurer suffered prejudice from the delay. We remanded for a determination on the issue of prejudice.

The Supreme Court modified and affirmed the Court of Appeals' decision, holding that an unexcused delay by the insured in giving notice to the insurer of an accident does not relieve the insurer of its obligation to defend and indemnify unless the delay materially prejudices the insurer. The Supreme Court further held that the delay must be shown by the insured to have been made in good faith, and it also placed the burden of showing material prejudice on the insurer. The Supreme Court remanded the cause to superior court to allow the parties to present additional evidence on the issues of good faith and prejudice. Upon remand, a new judgment was entered in which the trial court concluded that Tate failed to notify Great American as soon as practicable, that such failure was not in good faith, and that Great American was not prejudiced by Tate's failure to give it timely notification. The trial court held that Great American is liable on the policy of insurance it issued to Tate. Great American has appealed, and Tate cross-appeals.

On this appeal, Great American contends that the trial court erred in reaching the issue of prejudice once it determined the insured's failure to give timely notice was in bad faith. On this issue, we agree with Great American. Tate argues that the trial court improperly used an objective, rather than a subjective, standard in determining good faith, and on this issue we agree with Tate. We therefore reverse, and remand this cause to superior court for entry of a new order consistent with this opinion.

II

Factual Background

Detailed renditions of the facts are set out in the two previously reported opinions, and we give only a brief summary here. On 6 April 1978, Tate was engaged in a construction project on U.S. Highway 221 in South Carolina. That afternoon, a collision occurred between a car operated by Norma Pegg and a tractor-tanker petroleum truck operated by Robert Thomas and owned by State Petroleum, Inc. Both drivers were seriously injured, although they managed to escape before the truck exploded and burst into flames. The heart of the legal controversy in this case derives from two completely divergent descriptions of the accident given by various witnesses. The operators of the vehicles and one other witness testified that the vehicles were travelling in opposite directions, and that the head-on collision occurred when the truck swerved to avoid hitting one of Tate's bulldozers, which had suddenly backed into the truck's lane of travel on the highway. Other witnesses, including several of Tate's employees, gave an entirely conflicting version. These witnesses testified that when Pegg stopped or slowed her car, the truck, which was travelling directly behind her, braked, jackknifed, and rolled over her car. According to these witnesses, at the time of the collision Tate's bulldozer was parked off the highway nearby, and was not directly involved in the accident. The bulldozer was, however, extensively damaged by the fire; both Tate's job site foreman, A. G. Foster, and Tate's general job superintendent testified to that effect.

Tate's position throughout these proceedings has been that it never reported the accident to Great American because it believed it was neither responsible for nor involved in the accident. Although the investigating police officer testified to a conversa-

tion he had with Foster the night of the accident, in which he informed Foster of the conflicting versions of the accident, Foster testified that he did not recall having this conversation. Foster does admit, however, that he was aware of media reports assigning blame to Tate.

Great American first learned of Tate's potential involvement in the accident on 3 May 1978, when it was contacted by both Thomas' attorney and Thomas' employer, Space Petroleum. Great American is also the workers' compensation carrier for Space Petroleum, and these communications involved a workers' compensation claim on Thomas' behalf. Great American then contacted Tate, which informed the insurer that it had not notified Great American because of its belief that Tate was not involved in the accident. Shortly thereafter, Great American instituted this declaratory judgment action.

III

[1] We agree with Great American that once the trial court concluded that Tate had not acted in good faith when it failed to notify Great American of the accident "as soon as practicable," it was error for the trial court to address and decide the issue of prejudice.

In its opinion, the Supreme Court abandoned the traditional contractual approach, by which an insured's failure to strictly comply with the condition precedent of a notice provision releases an insurer from its obligations to defend and indemnify. In its place, the Court adopted the modern view that such a notice provision, "although denominated by the policy as a condition precedent, should be construed in accord with its purpose and with the reasonable expectations of the parties." 303 N.C. at 390, 279 S.E. 2d at 771. The specific holding was that "an unexcused delay by the insured in giving notice to the insurer of an accident does not relieve the insurer of its obligation to defend and indemnify unless the delay operates materially to prejudice the insurer's ability to investigate and defend." *Id.* In order that its decision not result in insureds taking advantage of insurers by engaging in "dilatory tactics," the court imposed the additional requirement that "any period of delay beyond the limits of timeliness be shown *by the insured* to have been in good faith." *Id.* at 399, 279 S.E. 2d at 776.

The court concluded that the effect of its decision was to "create a three-step test for determining whether the insured is obliged to defend," particularizing the test as follows:

> When faced with a claim that notice was not timely given, the trier of fact must first decide whether the notice was given as soon as practicable. If not, the trier of fact must decide whether the insured has shown that he acted in good faith, *e.g.*, that he had no actual knowledge that a claim might be filed against him. If the good faith test is met the burden then shifts to the insurer to show that its ability to investigate and defend was materially prejudiced by the delay.

Id.

This passage shows that whether the trial court should proceed to the second and third steps in a given case is dependent on the answer given at the previous stage. The three-step test may be diagrammed thus:

Question 1: Was notice given as soon as practicable?

a. If the answer is *yes*, the inquiry is ended, and the insurer is liable on the policy.

b. If the answer is *no*, the trier of fact proceeds to question 2.

Question 2: Did the insured act in good faith?

a. If the answer is *no*, the inquiry is ended, and the insurer is not liable on the policy.

b. If the answer is *yes*, the trier of fact proceeds to question 3.

Question 3: Was the insurer materially prejudiced by the delay?

a. If the answer is *yes*, the inquiry is ended, and the insurer is not liable on the policy.

b. If the answer is *no*, the inquiry is ended, and the insurer is liable on the policy.

In its order, after making extensive findings of fact, the trial court articulated three questions as guidelines to making its conclusions of law:

> 1. Did C. G. Tate Construction Company, Inc., fail to comply with a condition precedent to coverage under the policy when it did not notify Great American Insurance Company as soon as practical [sic]?
>
> 2. Was C. G. Tate Construction Company, Inc., acting in good faith when it failed to comply with the condition precedent to coverage?
>
> 3. Was Great American Insurance Company prejudiced by Tate's failure to give notification of the accident as soon as practical [sic]?

Although these questions are framed substantially in accordance with the test enunciated by the Supreme Court, the trial court erred by answering all three questions.

The trial court answered the first question of the three-step test by concluding that notice was not given as soon as practicable. It then properly proceeded to the second step involving "good faith" and concluded that Tate's failure to notify Great American of the accident "lacked good faith." Clearly, this conclusion of bad faith should have ended the inquiry. There was no need to proceed to the third step of the analysis. When the insured is guilty of bad faith, whether the insurer is prejudiced by the delay is immaterial, and the insured is barred from enforcing the policy. The trial court, of course, must use the proper standard in deciding the good faith issue. We discuss the proper standard in IV, *infra.*

IV

[2] Tate contends the trial court applied the wrong standard in determining whether Tate acted in good faith. We agree with Tate, and conclude that the error lay in the trial court's applying an objective standard, rather than the subjective standard mandated by the Supreme Court.

The Supreme Court held that once a delay in notification has been established, the insured has the burden of proving that such delay was in good faith, "that [the insured] had no actual knowl-

edge that a claim might be filed against [the insured]." 303 N.C. at 399, 279 S.E. 2d at 776. The Supreme Court articulated the specific test as follows:

> Anyone who knows that he may be at fault or that others have claimed he is at fault and who purposefully and knowingly fails to notify ought not to recover even if no prejudice results.

Id. This language makes it clear that bad faith is to be measured by a subjective standard, based upon actual knowledge, and an intentional, *i.e.*, purposeful and knowing, failure to notify by the insured. It does not establish an objective standard based upon the conduct of a reasonable person. Our conviction that bad faith is not to be exemplified by objectively "unjustified," unreasonable or unfair behavior is strengthened by the Supreme Court's statement that "while Judge Bailey found that the delay was 'unjustified,' there is no finding concerning defendant's good faith." 303 N.C. at 400, 279 S.E. 2d at 777. *See B & H Supply Co. v. Ins. Co. of North America*, 66 N.C. App. 580, 311 S.E. 2d 643 (1984) (trial court apparently applied a subjective measure in determining insured's good faith).

Returning to the facts *sub judice*, we find that the trial court erroneously applied an objective standard in determining that Tate did not act in good faith. As stated in the judgment:

> A bad motive or specific intent is not required. . . . [W]here two business entities deal at arms length, unreasonable or unfair dealings can amount to a lack of good faith. . . . [I]t is clear that [Tate's] failure to notify [Great American] of this accident as soon as practical [sic] lacked good faith.

Although we agree with the trial court insofar that bad faith in this context does not require that the insured possess a bad motive or a specific ill intent, *i.e.*, some equivalent of legal malice, nonetheless, the Supreme Court has indicated that the failure to notify must be purposeful and knowing. By allowing unreasonable or unfair dealings to constitute bad faith, the trial court improperly substituted an objective test of good faith.

V

Based on our conclusions that the trial court did not apply the proper standard in determining the good faith of Tate, the in-

sured, and also that the trial court erred in addressing the issue of prejudice to Great American once it had determined that Tate was guilty of bad faith, this cause must be remanded for further proceedings. On remand, the trial court is to apply the subjective standard for determining good faith as enunciated by the Supreme Court, and in addition, it shall only reach the question of prejudice upon a proper conclusion that the insured acted in good faith in its failure to timely notify the insurer.

Reversed and remanded.

Judges WELLS and WHICHARD concur.

Judge WELLS concurring.

While I concur in the result reached by the majority, I have a somewhat different view of the test established by our Supreme Court in its previous opinion in this case. It appears to me that the Supreme Court constructed a two-part good faith test, one part objective, the second subjective.

As to whether an insured knows, or reasonably should have known, that he was involved in an accident; or knew, or reasonably should have known, that a claim would or might be made against him is a reasonable man question, to be objectively determined.

As to whether an insured purposefully and knowingly fails to notify his insurance company of the accident, is a part of the good faith issue which should be determined upon a subjective standard.

Hooks v. Eastway Mills, Inc. and Affiliates

EDWARD C. HOOKS, EMPLOYEE, PLAINTIFF v. EASTWAY MILLS, INC. & AFFILIATES, EMPLOYER, FIREMAN'S FUND INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8410IC397

(Filed 7 May 1985)

Master and Servant § 69— *employee's refusal to sign form—refusal to submit to tests*

A worker's compensation plaintiff was not prejudiced by an erroneous order of the Industrial Commission suspending payments until plaintiff signed Industrial Commission Form 21 because plaintiff received payments to which he was not entitled during the period when he refused tests, including a myelogram, requested by defendants' doctor. There is no provision in the Workers' Compensation Act allowing suspension of compensation for failing to sign Form 21, but G.S. 97-27(a) required that plaintiff submit to the tests or request that the Commission find the tests to be unreasonable.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from the opinion and award of the North Carolina Industrial Commission filed 1 November 1983. Heard in the Court of Appeals 4 December 1984.

On 15 December 1980, while on the job in the employment of defendant Eastway Mills, Inc., plaintiff suffered a disabling back injury. For several months thereafter he was treated conservatively by his orthopedic surgeon, Dr. King, who limited his prescriptions to bed rest, muscle relaxants, traction for a brief period, and a non-strenuous course of life. Plaintiff's claim under the Workers' Compensation Act was denied by defendants, but following a hearing an opinion and award was entered on 31 July 1981 establishing the compensability of the injury. At that time plaintiff had not returned to work because he was able to do only light work and no work of that type was then available for him; and in the hope that the amount of compensation due plaintiff could be agreed on by the parties that issue was not adjudicated at the hearing.

On 24 August 1981, defendants mailed plaintiff a draft in the amount of $6,416.55 in payment of the temporary total disability compensation that was due up to that time; an Industrial Commission Form 21 for plaintiff's signature was also enclosed and request was made that he submit to a physical examination by Dr.

Caughran, a physician designated by defendants. Plaintiff did not sign the Form 21 at that time, but on 27 August 1981 he did submit to a physical and neurological examination by Dr. Caughran, who proposed to also admit plaintiff to the hospital and test him by various diagnostic procedures, including a myelogram. At first plaintiff agreed to this proposal, but changed his mind the next day after Dr. King examined him again and advised against a myelogram being done at that time. On 11 November 1981 defendants wrote a letter to the Industrial Commission, stating that the temporary total disability payments due plaintiff through 19 August 1981 had been sent to him along with a Form 21 which had not been returned, and that plaintiff had been examined by Dr. Caughran at their request, but had refused to enter the hospital for a complete diagnostic work-up, as Dr. Caughran proposed. Attached to the letter was a copy of Dr. Caughran's report of the physical and neurological examination that he made of plaintiff, which stated that the tests that he proposed to administer included a pentothal pain study, lumbar myelography, CT scan of the lumbar spinal canal, electromyography, and an epidural steroid injection or facet blocks under fluoroscopy. Following the receipt of defendants' letter Industrial Commission Chairman William H. Stephenson issued an *ex parte* order on 18 November 1981 directing defendants to make no further payments to plaintiff until the Form 21 was approved by the Commission and plaintiff submitted to the hospital work-up recommended by Dr. Caughran.

On 21 December 1981 plaintiff was again examined by Dr. King who determined that further tests were advisable and on 5 January 1982 he admitted plaintiff to the hospital where a myelogram and other diagnostic procedures were done. From these studies Dr. King concluded that plaintiff had a herniated disc at the L4-5 interspace but that surgery would probably provide only temporary relief, and therefore was inadvisable. On 15 March 1982, after examining the plaintiff again and also studying the reports of the tests that Dr. King conducted, Dr. Caughran also concluded that surgery on plaintiff's back was inadvisable, recommended that he get a job that involved no strain, and expressed the opinion that plaintiff had a fifteen percent permanent partial disability of the back. Meanwhile plaintiff had signed the Form 21

sent to him earlier by the defendants and forwarded it to the Industrial Commission, which approved it on 1 April 1982.

A hearing was then held to determine the remaining compensation due plaintiff and an opinion and award was entered by Deputy Commissioner Morgan R. Scott, in which it was found and concluded that plaintiff was temporarily and totally disabled from the date of the injury until 10 June 1982, he had been paid for such disability through 19 August 1981 and was entitled to further such payments only for the period from 20 August 1981 to 18 November 1981 and from 1 April 1982 to 10 June 1982. Upon plaintiff appealing to the Full Commission this award was affirmed and is the subject of this appeal. The other part of the Deputy Commissioner's award—that plaintiff has a fifteen percent permanent partial disability of the back and is entitled to be compensated therefor—was not appealed to the Full Commission by either party and is not involved in this appeal.

W. David McSheehan for plaintiff.

Hedrick, Eatman, Gardner, Feerick & Kincheloe, by Mel J. Garofalo, for defendants.

WELLS, Judge.

We decide two issues. First, that Chairman Stephenson was without statutory authority to suspend plaintiff's compensation payments for plaintiff's failure to sign the Industrial Commission Form 21, and therefore the Commission's conclusion that plaintiff was not entitled to compensation for that reason was in error. Second, plaintiff was not entitled to compensation during the period of time he refused to submit to the examinations requested by defendants' physician Dr. Caughran.

We are unable to find any provision in Chapter 97 of the General Statutes of North Carolina, the Workers' Compensation Act, which would allow the Chairman of the Commission, or the Full Commission to suspend compensation to which a worker would otherwise be entitled for the worker's failure to sign an Industrial Commission Form 21.

On the other hand, the provisions of N.C. Gen. Stat. § 97-27 (a), in pertinent part, are quite explicit as to the requirement for a

claimant for compensation to submit to an examination by a physician designated by his employer. We quote:

> After an injury, and so long as he claims compensation, the employee, if so requested by his employer or ordered by the Industrial Commission, shall . . . submit himself to examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the Industrial Commission. . . . If the employee refuses to submit himself to or in any way obstructs such examination requested by and provided for by the employer, his right to compensation and his right to take or prosecute any proceedings under this Article shall be suspended until such refusal or objection ceases, and no compensation shall at any time be payable for the period of obstruction, unless in the opinion of the Industrial Commission the circumstances justify the refusal or obstruction. . . .

We hold that the statute required that plaintiff undergo the diagnostic tests requested by Dr. Caughran, or, in the alternative, request the Commission to find such test to be not reasonable, in which case the Commission would be required to decide the matter. Plaintiff did neither, but simply unilaterally refused the tests. Plaintiff was therefore not entitled to compensation for the period 27 August 1981, when he refused the tests, until 15 March 1982, when he submitted to further examination by Dr. Caughran.

In summary, plaintiff was erroneously denied compensation between 15 March 1982 and 1 April 1982, but received compensation to which he was not entitled between 27 August 1981 and 18 November 1981. Under these circumstances, plaintiff has not been prejudiced by the Commission's order, and it is therefore

Affirmed.

Judge ARNOLD concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

The decision of the majority, which approves the forfeiture of substantial disability benefits due plaintiff, is erroneous for two reasons in my opinion and I dissent from it.

First, G.S. 97-27(a) in express terms authorizes the suspension of benefits only when the claimant *refuses to submit himself for an examination* by defendants' doctor and the Commission's findings show that plaintiff did not refuse to submit himself for examination, but promptly and cooperatively submitted himself for examination and Dr. Caughran conducted a complete physical and neurological examination. What plaintiff did not submit to, as the Commission's findings also show, was the administration of a myelogram and other diagnostic procedures upon his body; procedures that are beyond the scope of an examination, in my opinion, and thus not within the purview of the statutory language. A myelogram is the making of an X-ray record of the spinal cord, an internal structure of the body; it requires hospitalization, involves injecting a contrast dye between the delicate membranes which cover the spinal cord, is very painful, and entails some risk of great harm to the patient. In my view the legislature has not required employees to submit to this procedure at the mere request of their employers and the Commission was not authorized to suspend plaintiff's benefits when he refused. A majority of courts in this country interpreting similar statutes have reached the same conclusion "because of the graver character of the procedure involved." 1 Larson, Workmen's Compensation Law § 13.22(c) (1985). Another reason, I think, for not interpreting G.S. 97-27(a) as broadly as the majority does is that the law does not favor forfeitures.

Second, even if a myelogram is deemed to be an examination under the authority of the statute, instead of the invasive procedure that it really is, the Commission's failure to award benefits to plaintiff for the period involved was still erroneous. The statute expressly permits uncooperative or obstructive employees to receive compensation for the period of the refusal or obstruction when in the opinion of the Commission "the circumstances justify the refusal or obstruction," and under the record in this case no other rational opinion is possible, I believe, than that plaintiff's refusal to submit to the procedure was justified by the

circumstances. The Commission found as a fact that plaintiff refused to enter the hospital for the tests upon the advice of his own doctor, "and because he preferred for his doctor to perform them since he did not know Dr. Caughran." Since no other finding in opposition to or compromise of this finding was made, or could have been made from the evidence, the Commission was bound to conclude therefrom, I think, that plaintiff's refusal to undergo the tests was justified under the circumstances. Plaintiff had been under Dr. King's care for several months and was clearly justified in following his recommendation, rather than that of Dr. Caughran, who he had never seen before and who was there to assist the defendants, rather than protect plaintiff's health. Sensible people do not disregard the advice of their own doctors and follow that of strangers, and our workers' compensation law does not require them to under circumstances such as those recorded here.

My vote, therefore, is to reverse the Commission's decision denying plaintiff temporary total disability benefits for the period involved and to remand the case to the Industrial Commission for the entry of a decision awarding the plaintiff such benefits.

STATE OF NORTH CAROLINA v. TOMMIE LEE CARTER

No. 843SC997

(Filed 7 May 1985)

1. Criminal Law § 113.1— evidence elicited by defendant on cross-examination— failure to summarize

The trial court did not err in failing to summarize evidence elicited by defendant on cross-examination where such evidence tended merely to impeach or show bias and did not constitute substantive evidence tending to exculpate defendant.

2. Criminal Law § 68; Rape and Allied Offenses § 5— identification of defendant —bite marks and other evidence— sufficiency of evidence

The State's evidence of defendant's identity as the perpetrator of a first-degree burglary, second-degree rape and attempted second-degree sexual offense was sufficient to support defendant's conviction of those crimes where it tended to show: defendant's car was parked near the victim's home on the morning of the crimes; a witness saw defendant standing on the grass near the victim's front door on the morning in question and saw defendant get into his

car and drive away; semen found on a rug in the victim's home and blood samples taken from defendant both contained blood type O, type 1 secretor, a blood type found in 28% of the population in North Carolina; and, based on comparisons of photographs of bite marks on the victim's body with casts of defendant's teeth and with the teeth themselves, bite marks on the victim's body were made by defendant's teeth.

APPEAL by defendant from *Reid, Judge*. Judgment entered 2 June 1984 in Superior Court, PITT County. Heard in the Court of Appeals 3 April 1985.

This is a criminal case in which defendant, Tommie Lee Carter, was convicted at a jury trial on 2 June 1984 of first degree burglary, second degree rape and attempted second degree sexual offense. Defendant's first trial on these same charges had ended in a mistrial based upon the jury's inability to reach a verdict.

The charges arose out of the sexual assault of the victim in her home at 91B Howell Street in Greenville on 4 October 1983.

The State's evidence tended to show that the victim was awakened early in the morning hours of the day in question by a man squatting on the window ledge of her bedroom. The man wore a jacket, trousers, tennis shoes, a black scarf, gloves and a black mask on his face. The victim attempted to run from the room but the man caught her by placing his arm around the victim's neck. The man then bit the victim several times on the left shoulder and left side of her neck, took money from her purse and forced her into her living room. The man forced the victim to lie down on the rug. He attempted to have anal intercourse with the victim, had vaginal intercourse with the victim and ejaculated on the living room rug. The victim testified that her assailant left her home through the front door and she watched him walk south on Green Street. The victim then called police who interviewed her and had her taken to a local hospital.

At the hospital emergency room, medical personnel observed bite marks on the victim. A physician ordered the marks cleaned with iodine. After the victim returned home, a police photographer took photographs of the bite marks in question. These photographs were taken approximately three hours after the bites were inflicted.

Police cut out the damp section of the victim's living room rug and sent it to the SBI laboratory in Raleigh for testing. An SBI forensic serologist compared semen taken from the rug and blood samples taken from defendant. The report of the testing indicated that the semen and blood samples were blood type "O", type 1 secretors, a blood type found in 28% of the population.

Prior to defendant's arrest, a Greenville dentist had made casts of defendant's teeth. The photographs of the bite marks on the victim and the casts of defendant's teeth were submitted to two experts in the field of forensic odontology, Dr. William P. Webster, a professor in the Schools of Dentistry and Medicine at the University of North Carolina in Chapel Hill and Dr. Richard Souviron, a dentist and assistant medical examiner in Coral Gables, Florida. Dr. Webster was able to identify a total of seventeen common points of identification, eight of which came from a shoulder wound of the victim. Dr. Souviron testified that he had highlighted ten of the most obvious points of identification. Both medical experts testified that the casts of defendant's teeth and the bite marks revealed in the photographs were consistent. Dr. Webster had also examined defendant's teeth and testified that the dental casts were identical representations of the defendant's teeth and that the bite marks in the photographs were "similar and identical" to the dental casts.

A State's witness, Robert Lee Jenkins, Sr., testified that on the morning in question he saw a red and white Grand Prix automobile parked at the Howell Street stop sign near the victim's home. He did not notice the license plate, but testified that he recognized the automobile as belonging to defendant. Mr. Jenkins' 13 year old son, Robert, testified that while walking near the victim's home on the morning in question, he saw defendant standing in the victim's yard near her front door and then driving away down Howell Street, turning up Green Street.

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

Appellate Defender Stein, by First Assistant Appellate Defender Malcolm Ray Hunter, Jr., for defendant-appellant.

EAGLES, Judge.

I

[1] Defendant first assigns as error the trial court's summation of the evidence in its jury instructions. We find no error.

The basis of defendant's argument is that the trial court gave the jury a detailed summary of the State's evidence, but failed to summarize any evidence favorable to defendant elicited by defendant on cross examination.

The trial court is not required to fully recapitulate all the evidence, but when it does, the trial court must summarize the evidence in the case that is favorable to defendant even though defendant presents no evidence. *State v. Sanders*, 298 N.C. 512, 259 S.E. 2d 258 (1979), *cert. denied*, 454 U.S. 973 (1981). G.S. 15A-1232 requires the trial court to summarize the evidence of both parties only to the extent necessary to explain the application of the law to the evidence. *State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242 (1980). Evidence favorable to defendant elicited on cross examination that tends to exculpate defendant is substantive evidence. *State v. Sanders, supra.* A trial court cannot adequately explain the application of the law to the evidence in such a case without mentioning the exculpatory evidence elicited by defendant on cross examination. *State v. Moore, supra.*

Here, defendant presented no evidence at trial and claims that the trial court failed to summarize evidence favorable to defendant elicited from State's witnesses on cross examination. However, our examination of the record indicates that defendant on cross examination did not elicit substantive evidence tending to exculpate himself. Rather, defendant's cross examination attempted to impeach the testimony of the State's witnesses. Testimony which merely tends to impeach or show bias is not substantive in nature and need not be summarized. *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983). Here, the evidence defendant claims is favorable to him includes the inability of an expert witness to positively conclude that defendant made the bite marks in question and prior inconsistent statements by other witnesses. This is all testimony which tends to impeach or show bias in the State's witnesses. It is not substantive in nature and would not exculpate defendant if believed. Accordingly, the trial

court adequately related the application of the law to the evidence without being required to mention the evidence elicited by defendant on cross examination.

II

[2] Defendant next assigns as error the sufficiency of the evidence to support a finding beyond a reasonable doubt that defendant was the perpetrator of the crimes. We find no error.

Defendant argues that the State's evidence failed to establish the identity of the assailant and that, at best, the State's evidence raises only a "suspicion or conjecture" that defendant was the assailant. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 155 (1967); *State v. White*, 293 N.C. 91, 235 S.E. 2d 55 (1977); *State v. Bell*, 65 N.C. App. 234, 309 S.E. 2d 464 (1983), *aff'd*, 311 N.C. 299, 316 S.E. 2d 72 (1984). The identity of defendant as the assailant is, of course, a necessary element of each crime charged and must be proven by the State beyond a reasonable doubt. Before submitting the evidence to the jury, the trial court must consider whether there is substantial evidence of each element of the crimes charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984); *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980).

Defendant only assigns as error the element of identity of defendant as the victim's assailant. Based on the record before us, we hold that there was substantial evidence from which the jury could conclude that defendant was, in fact, the assailant.

The evidence presented by the State, although circumstantial, tends to identify defendant as the perpetrator. The victim described the assault and identified her assailant's race, height and clothing. One State's witness testified that he saw defendant's car parked near the victim's home on the morning of the attack. Another witness testified that he saw defendant standing on the grass near the victim's front door on the morning in question and that he saw defendant get into his car and drive away. Further evidence showed that the semen left on the rug and a blood sample taken from defendant revealed that both samples were from an individual who was a blood type "O", type 1 secretor, a blood type found in 28% of the population in North Carolina. In

addition, the State presented evidence from two forensic odontologists. Dr. Webster testified that he was able to identify a total of seventeen points of bite identification, eight of which came from the victim's shoulder wound. Dr. Souviron testified that he noted ten of the most obvious points of identification. Bite mark identification, approved in other jurisdictions, was first approved in North Carolina in *State v. Temple*, 302 N.C. 1, 273 S.E. 2d 273 (1981). In that case, Dr. Webster, the same expert who testified here, testified as to eight points of identification between overlays of defendant's teeth and bite marks on the victim. Here, Dr. Webster identified a total of seventeen common points of identification, eight of which were from one wound. In *State v. Green*, 305 N.C. 463, 290 S.E. 2d 625 (1982), Dr. Webster again testified as to bite marks, finding fourteen common points of identification between defendant's teeth and the bite marks on the victim's arm. Our Supreme Court stated in *Green*, "we find no reason to suspect that the methodology employed by this expert witness [Dr. Webster] was anything less than scientifically sound and reliable." *Id.* at 471, 290 S.E. 2d at 630. We agree. Here, the evidence shows that in addition to a positive comparison of defendant's teeth with the bite marks by Dr. Webster, there is evidence that the dental casts were identical representations of the teeth of defendant and testimony that the bite marks, represented in photographs of the victim, were "similar and identical" to the dental cast. Based on the record before us, we cannot say that the State's evidence raised "only a suspicion or conjecture that the accused was the assailant." *State v. Cutler, supra; State v. Bell, supra.* Rather, we believe that when taken together and considered in the light most favorable to the State, there is substantial evidence from which the jury could conclude that defendant was the assailant and committed the crimes charged. Accordingly, we find that defendant received a fair trial free of prejudicial error.

Defendant's assignments of errors numbered 1, 2, 3, 4, 5, 9 and 10 were not brought forward and argued in defendant's brief and are therefore deemed abandoned. *State v. Franks*, 300 N.C. 1, 265 S.E. 2d 177 (1980). Rules 28(a), 28(b)(5), Rules of Appellate Procedure.

No error.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. DAVID STEVIE LEONARD

No. 8422SC681

(Filed 7 May 1985)

1. Criminal Law § 98— failure of defense witness to appear—mistrial denied

There was no abuse of discretion in the denial of defendant's motion for a mistrial, which was based on the failure of one of his witnesses to appear, where the witness would have been used in an improper attempt to impeach a testifying codefendant on a collateral matter. G.S. 15A-261.

2. Robbery § 4.6— armed robbery—evidence sufficient

Defendant's motions to dismiss and for appropriate relief on an armed robbery charge were properly denied where the evidence, viewed in the light most favorable to the State, was that defendant, his brother, and an accomplice each held a firearm, threatened the victim, tied him up, and stole his money. The unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the accused.

3. Burglary and Unlawful Breakings § 5.2— breaking during nighttime—sufficiency of evidence

There was sufficient evidence that an unauthorized entry occurred during the nighttime where the victim testified that it was dark in his room and dark outside when the men entered his bedroom, and an accomplice testified that they arrived at the victim's house at 9:10 p.m. and waited outside until the victim turned the light off.

4. Criminal Law § 86.10— corroboration of accomplice—no prejudice

In a prosecution for first-degree burglary and armed robbery, defendant was not prejudiced when the prosecutor questioned an officer about whether a testifying accomplice had given evidence about other break-ins. Defendant's objections were sustained, no limiting instruction was requested, and defendant did not show that he was prejudiced in any way.

APPEAL by defendant from *Albright, Judge*. Judgment entered 15 February 1984 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 14 February 1985.

Defendant was charged in bills of indictment, proper in form, with first degree burglary and armed robbery.

The evidence for the State tended to show the following. Julius Zeb Hege testified that on 27 July 1980 he had gone to bed at 8:00 p.m. and was awakened by three men who were standing in his bedroom, wearing ski masks and holding weapons. The men demanded money. At gunpoint they forced Hege into the kitchen, took one hundred and fifty dollars, and tied Hege up. They threatened to kill Hege's daughter if he did not give them more money. Hege told them where he had two hundred dollars in his bedroom. The three men threatened to kill Hege, searched the house, took Hege's wife's jewelry and left.

Tony Walser, who had confessed that he was involved in the robbery, testified that he, defendant and defendant's brother went to Hege's house at about 9:10 p.m. with two pistols and a sawed-off shotgun. Defendant was holding the shotgun. Walser's version of the robbery essentially corroborated Hege's testimony.

Lieutenant David Hege and Captain Bill Nail from the Sheriff's Department testified that no fingerprints were found at the scene of the crime. The only physical evidence found was a piece of the tape used to tie up the victim. There were no leads on the robbery until Walser confessed.

Defendant did not testify.

Defendant was found guilty of first degree burglary and armed robbery and received two consecutive sentences of twenty-five years. From this judgment defendant appeals.

Attorney General Edmisten by Assistant Attorney General Robert R. Reilly for the State.

Sherrill and Sherrill by Carlyle Sherrill for defendant-appellant.

PARKER, Judge.

[1] Defendant's first assignment of error is that the trial court erred in denying his motion for a mistrial when one of his witnesses, James Garrison, failed to appear. Garrison was served with a subpoena on 10 February 1984 to appear at defendant's trial on 13 February 1984. The trial judge adjourned court at

noon until 2:00 p.m. and allowed defendant additional time to find Garrison. The court issued a subpoena and an order to show cause for failure of Garrison to appear and testify in obedience to a duly served subpoena. Deputy Sheriff Mike Fritts attempted to serve the show cause order. Fritts testified that he went to Garrison's house, and Garrison's father said Garrison had come by approximately a week earlier, picked up his clothes and left. Garrison's father did not know where Garrison was. Sherry Koontz, a probation officer, testified that Garrison was on probation and had last been seen by the probation department on 3 February 1984.

Defendant moved for a mistrial contending Garrison was a material witness and his testimony would tend to impeach Walser's testimony. After hearing statements from the State and defendant, the trial judge made the following findings:

> 1. The witness Garrison is not an alibi witness and the defendant has present in open Court a separate witness as to the alibi issue.
>
> 2. The purported testimony of Garrison, even if the witness was present, would be testimony tending to impeach the testimony of the State's witness Walser, and the purported testimony of the witness Garrison does not relate to the guilt or innocence question on the present charges, and does not tend to represent substantive evidence on those issues.
>
> 3. The history of this case heretofore shows that at a previous session of Court this case was continued after a jury had been selected but before the jury was empanelled because a defense witness was not available; thus, this latest witness dilemma is not a new occurrence in the history of this case.
>
> 4. The last known person to see this witness was the defendant himself on Sat. night, Feb. 11, 1984 when the witness came to the defendant's home at approximately 10 P.M. and no other identified person has seen the witness since.
>
> ACCORDINGLY, IT IS ORDERED, ADJUDGED, AND DECREED that the motion for mistrial be and the same is hereby denied.

It is ordered further that the trial continue.

After his motion for a mistrial was denied, defendant stated that he would not call his other witnesses who were present in the courtroom.

A mistrial must be declared upon a defendant's motion "if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." G.S. 15A-1061. Whether a motion for mistrial should be granted is a matter which rests in the sound discretion of the trial judge, and allowance of the motion is appropriate only when there are such serious improprieties as would make it impossible for defendant to have a fair and impartial verdict under the law. *State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622 (1982). The trial judge's ruling on the motion will not be disturbed on appeal absent a gross abuse of discretion. *State v. Allen*, 50 N.C. App. 173, 272 S.E. 2d 785 (1980), *appeal dismissed* 302 N.C. 399, 279 S.E. 2d 353 (1981).

According to defendant's counsel, Garrison would have testified that Walser had previously tried to implicate him in another breaking or entering charge, and the charge had been dismissed. At trial Walser testified that he had not made any statements concerning Garrison while in the Ashe County jail; Garrison's testimony would have been offered to contradict this. An attempt to impeach Walser on a collateral matter by the use of extrinsic testimony would have been improper. *State v. Dawson*, 302 N.C. 581, 276 S.E. 2d 348 (1981); 1 Brandis on North Carolina Evidence § 48 (2d ed. 1982). We find no abuse of discretion in the trial court's denial of defendant's motion for a mistrial. This assignment of error is overruled.

[2] In his second assignment of error defendant argues that the trial court erred in denying his motion to dismiss and motion for appropriate relief on the armed robbery charge. Defendant challenged the sufficiency of the State's evidence by moving to dismiss at the close of the State's evidence and moving for appropriate relief for insufficiency of the evidence pursuant to G.S. 15A-1414(b)(1)(c).

On a motion to dismiss, the evidence is to be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978).

The elements of the offense of armed robbery under G.S. 14-87 are the unlawful taking or attempt to take personal property from the person or in the presence of another by use or threatened use of a firearm or other dangerous weapon where the life of a person is endangered or threatened. *State v. Beaty*, 306 N.C. 491, 293 S.E. 2d 760 (1982).

Defendant's motion to dismiss is properly denied if there is substantial evidence of each essential element of the offense charged and that defendant committed the offense. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). Substantial evidence is evidence that is existing and real, not just seeming or imaginary. *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). Or, put another way, substantial evidence is the amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553 (1982).

The evidence, viewed in the light most favorable to the State, was, in summary, that defendant, his brother and Walser, each held a firearm, threatened Hege, tied him up, and stole his money. Defendant argues that Walser's testimony, which is the only evidence linking defendant to the crime, should not be considered substantial evidence because he was an accomplice; he was serving time for over twenty breaking or entering and larceny convictions; and he was charged, but not yet tried, for several other offenses. We do not agree. The unsupported testimony of an accomplice should be received by the jury with caution, but is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the accused. *State v. Tilley*, 239 N.C. 245, 79 S.E. 2d 473 (1954). The fact that the accomplice's testimony is induced by a promise of leniency goes only to his credibility as a witness. *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976). Walser was a competent witness, his testimony provided substantial evidence which tended to support the State's case, and his credibility was for the jury to determine. Upon a complete review of the evidence in the record, we find

that the State offered substantial evidence on every element of the offense charged.

[3] In his next assignment of error defendant argues that the trial court erred by denying his motion to dismiss and motion for appropriate relief for insufficiency of the evidence on the first degree burglary charge.

Defendant contends that the State did not present substantial evidence that the unauthorized entry into Hege's residence was during the nighttime. To support the charge of first degree burglary, the State must present substantial evidence that there was a breaking and entering during the nighttime of an occupied dwelling or sleeping apartment with intent to commit a felony. *State v. Person*, 298 N.C. 765, 259 S.E. 2d 867 (1979). There is no statutory definition of nighttime in North Carolina. *State v. Frank*, 284 N.C. 137, 200 S.E. 2d 169 (1973). "The law considers it to be nighttime when it is so dark that a man's face cannot be identified except by artificial light or moonlight." *Id.*, 284 N.C. at 145, 200 S.E. 2d at 175. *See State v. Garrison*, 294 N.C. 270, 240 S.E. 2d 377 (1978). Hege testified that it was dark in his room and dark outside when the men entered his bedroom. Walser testified that when they arrived at Hege's residence, it was about 9:10 p.m., and they waited outside until Hege turned the light out. Viewed in the light most favorable to the State, there was substantial evidence that the unauthorized entry was during the nighttime. The trial judge properly denied defendant's motions.

[4] In his last assignment of error defendant argues that he was prejudiced by the improper questions the District Attorney asked Lieutenant Hege of the Sheriff's Department.

> Q. [District Attorney]: Beside the Hege robbery, did Mr. Walser give you any information on other robberies or any other crimes?
>
> A. [Lt. Hege]: Yes, sir.
>
> Q. Probably how many?
>
> A. Approximately twenty some breaking, enterings and larcenies in Davidson County.
>
> Q. Did he provide you with names of other individuals involved in those?

A. Yes, sir.

Q. Have those individuals been charged with those crimes?

A. Yes, sir.

Q. What if anything happened to those cases at this time to your knowledge?

OBJECTION: SUSTAINED.

Q. The information Mr. Walser gave you on other crimes, has it proved to be accurate or inaccurate?

OBJECTION: SUSTAINED.

Defendant's objections were sustained, no limiting instruction was requested, and defendant has not shown that he was prejudiced in any way. This assignment of error is overruled.

We have carefully considered all assignments of error brought forward and find

No error.

Judges ARNOLD and EAGLES concur.

STATE OF NORTH CAROLINA v. VANCE STERLING ALLEN

No. 842SC1085

(Filed 7 May 1985)

1. Criminal Law § 75.15— voluntariness of confession

The evidence supported the trial court's determination that defendant's in-custody statement was voluntary where the only evidence tending to show that defendant may have been impaired was his bare assertion to an officer that he was "on coke," and where the State's evidence tended to show that defendant was out of breath and perspiring when apprehended because he had been running, and that when his statement was taken defendant had cooled down, was very composed, and answered questions intelligently.

2. Robbery § 4.3— evidence of inoperable weapon or cap pistol—sufficiency of evidence of armed robbery

While the evidence that defendant was found with an inoperable pistol or that he used a cap pistol removed the mandatory presumption of danger or threat to life, allowing the jury to consider the lesser included offense of common law robbery, the evidence was not so compelling as to prevent a permissive inference of danger or threat to life or to require a directed verdict in defendant's favor as to the charge of robbery with a dangerous weapon.

3. Robbery § 5.2— instruction on cap pistol as dangerous weapon

The trial court did not err in instructing the jury that a cap pistol could be a dangerous weapon if it is apparently capable of inflicting a life threatening injury.

APPEAL by defendant from *Bruce, Judge*. Judgment entered 12 June 1984 in Superior Court, MARTIN County. Heard in the Court of Appeals 5 April 1985.

This is a criminal case in which defendant, Vance Sterling Allen, was convicted at a jury trial for the felony of robbery with a dangerous weapon. From a judgment imposing the mandatory minimum fourteen year prison sentence, defendant appeals.

The State's evidence tended to show that on 10 September 1983, Dorothy Davenport was employed by the Quick Snack store in Williamston. Shortly before 11:00 p.m., a black male wearing a mask entered the store, pointed what appeared to be a gun at Ms. Davenport and ordered her to give him the money in the cash register. Ms. Davenport handed the money which included "one or two twenties" to the man, later identified as defendant, as a car drove up to the store.

Mr. Rudy Brown drove up to the Quick Snack at approximately 11:00 p.m. As he approached the door, he met a man wearing a ski mask holding in his hand what appeared to Mr. Brown to be a revolver. The masked man ordered Mr. Brown to stop and then fled on foot, running east along U.S. Highway 64. Mr. Brown got back into his car and followed the fleeing man who entered a wooded area near Martin General Hospital. Mr. Brown then stopped at the residence of Chief Deputy Sheriff Jerry Beach, who lived nearby on U.S. Highway 64, and told him of the incident. Mr. Brown then drove back to Martin General Hospital where he observed a gray Ford Granada parked on a dirt path nearby. Mr. Brown pulled his car in front of the Ford Granada

and observed a man he identified as the defendant sitting behind the steering wheel.

At about this same time, Williamston City Police officers and Deputy Beach arrived, took defendant into custody and conducted a search in which they found the rear portion of a revolver and a crumpled twenty dollar bill on defendant's person and another twenty dollar bill in the passenger compartment of the Ford Granada.

Defendant told Deputy Beach that he was "on coke" and Deputy Beach observed that defendant was sweating and completely out of breath and that defendant smelled of alcohol but was not intoxicated. Deputy Beach took defendant to the Martin County Sheriff's Department where defendant gave a statement. A search of the area where defendant was arrested produced a yellow ski mask. Neither the front portion of the revolver nor any other money was recovered.

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

Griffin, Martin and Cannon, by Glen E. Cannon, for defendant-appellant.

EAGLES, Judge.

I

[1] Defendant first assigns as error the trial court's denial of his motion to suppress his inculpatory statement to police on the grounds that the statement was not made freely, voluntarily and understandingly and was taken in violation of defendant's constitutional rights. We find no error.

Defendant contends that his physical and mental condition immediately prior to and at the time of the making of inculpatory statements "calls into serious question" the voluntariness of his statement to police. We disagree.

Our examination of the record reveals that a *voir dire* was held as to the voluntariness of the inculpatory statement given by defendant to police. Evidence offered at *voir dire* tended to show that defendant, rather than being incoherent when apprehended, was out of breath and had been perspiring heavily because he had

been running. The only evidence tending to show that defendant may have been impaired was his bare assertion to Deputy Beach that he was "on coke." When defendant's statement was taken, defendant had "cooled down" and was "very composed," answering questions "very intelligently" after being advised of his rights to remain silent and to have an attorney present. At the conclusion of the evidence on *voir dire*, the trial court made appropriate findings of fact and conclusions of law that defendant "freely, voluntarily and understandingly waived his constitutional right to remain silent and his right against self-incrimination by agreeing to answer questions after having been fully informed of said constitutional rights and others." Accordingly, the trial court ruled that defendant was "not entitled to suppress" the inculpatory statements he made to police on 11 September 1983 at 12:15 a.m.

Findings of fact made by the trial court following a *voir dire* hearing on the voluntariness of a defendant's confession are conclusive on appeal if supported by competent evidence in the record. *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983); *State v. Oxendine*, 305 N.C. 126, 286 S.E. 2d 546 (1982); *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982). The trial court's findings of fact and conclusions of law as to the voluntariness of defendant's inculpatory statement to police are supported by competent evidence and are binding on this court. Accordingly, the trial court did not err in denying defendant's motion to suppress.

II

[2] Defendant next assigns as error the trial court's denial of his motion to dismiss the charge of robbery with a dangerous weapon made at the close of the State's evidence and at the close of all the evidence. We find no error.

Defendant argues that since defendant stated to police that the weapon he used was a "cap pistol" and since the only weapon found in the possession of defendant was the rear portion of a revolver which alone was incapable of firing, there was insufficient evidence that the weapon used by defendant in the robbery was a dangerous weapon. We disagree. Our examination of the record reveals that the victim of the robbery and the witness both testified they thought defendant was holding a real gun during the robbery.

In *State v. Joyner*, 67 N.C. App. 134. 312 S.E. 2d 681 (1984), *aff'd* 312 N.C. 779, 324 S.E. 2d 841 (1985), the Supreme Court explained:

> When a person commits a robbery by the use or threatened use of an implement which appears to be a firearm or other dangerous weapon, *the law presumes*, in the absence of any evidence to the contrary, that the instrument is what his conduct represents it to be—an implement endangering or threatening the life of the person being robbed. [Citations omitted.] Thus, where there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon *and nothing to the contrary appears in evidence*, the presumption that the victim's life was endangered or threatened is mandatory.

Id. at 782, 324 S.E. 2d at 844 (1985).

> [W]hen *any evidence* is introduced tending to show that the life of the victim was not endangered or threatened, "the mandatory presumption disappears, leaving only a mere permissive inference" . . . which . . . permits but does not require the jury to infer the elemental fact (danger or threat to life) from the basic fact proven (robbery with what appeared to the victim to be a firearm or other dangerous weapon). [Citations omitted.]

Id. at 783, 324 S.E. 2d at 844 (1985).

As applied here, there was proof of a robbery with what appeared to the victim to be a dangerous weapon. However, since there was evidence introduced by the State tending to show that the victim's life was not actually endangered or threatened, i.e. defendant had in his possession an inoperable weapon when arrested and stated to police that he had, in fact, used a cap pistol, there survived only a permissive inference of the elemental fact of danger or threat to life. *State v. Joyner, supra.* While the evidence that defendant was found with an inoperable pistol or that he used a cap pistol removed the *mandatory presumption* of danger or threat to life, allowing the jury to consider the lesser included offense of common law robbery, the evidence was not so compelling as to prevent a *permissive inference* of danger or threat to life or to require a directed verdict in defendant's favor as to the charge of robbery with a dangerous weapon. *Id.*

We note that defendant was arrested about twenty minutes after the robbery. This was ample time in which defendant could have discarded the barrel portion of the pistol which was found in his possession. Further, testimony at trial clearly shows that a gun barrel was seen in defendant's hand at the time of the robbery. Here, the trial court correctly instructed the jury on the crimes of robbery with a dangerous weapon and common law robbery. The jury inferred that the element of danger or threat to life was present and entered its verdict accordingly.

III

[3] Defendant next assigns as error the trial court's instruction that a cap pistol was included in and met the definition of the term "dangerous weapon."

In its charge to the jury, the trial court stated:

> The sixth thing the State must prove to you beyond a reasonable doubt for you to return a verdict of guilty of robbery with a dangerous weapon is that the defendant had a firearm or other dangerous weapon in his possession at the time he obtained the currency. The term "dangerous weapon" includes firearms. A .22 caliber pistol is a firearm within the meaning of the law as it applies to this case. The term "dangerous weapon" also includes pistols which look like firearms such as cap pistols.
>
> An instrument is a dangerous weapon if it is apparently a weapon capable of inflicting a life threatening injury.

At the time of the robbery, there was no basis for the victim or the witness to conclude that the metal object with a protruding barrel brandished by defendant was anything other than a gun, a dangerous weapon. Further, the jury instruction here fully comports with the holding in *State v. Quick*, 60 N.C. App. 771, 299 S.E. 2d 815 (1983):

> Whether an instrument is a dangerous weapon or a firearm can only be judged by the victim of a robbery from its appearance and the manner of its use. We cannot perceive how the victims in [the] instant case could have determined with certainty that the firearm was real unless the defendant had actually fired a shot. We would not intimate, however, that a

robbery victim should force the issue merely to determine the true character of the weapon.

Id. at 771, 772, 299 S.E. 2d at 816 (1983).

The evidence is clear that the object used by defendant in the commission of the robbery, notwithstanding the fact that it may have been an inoperable pistol or a cap pistol, was perceived by the victim to be a real gun. Accordingly, the trial court's instruction to the jury that a cap pistol could be a dangerous weapon if it is apparently capable of inflicting a life threatening injury, was not error.

Since there is substantial evidence of each element of robbery with a dangerous weapon, we find in the trial

No error.

Judges WHICHARD and JOHNSON concur.

ROBERT C. CECIL v. MARY A. CECIL

No. 8419DC578

(Filed 7 May 1985)

1. **Divorce and Alimony § 19.5— separation agreement incorporated into consent decree—alimony provisions not separable—no modification of alimony**

The evidence supported the trial court's findings and conclusions that the support provisions of a separation agreement incorporated into a 1975 consent decree were not separable but were reciprocal with the property settlement provisions. Therefore, the support provisions of the separation agreement were not modifiable.

2. **Divorce and Alimony § 20.3— proceeding to modify alimony—no right to attorney fees**

The trial court erred in awarding attorney fees to defendant in a proceeding in which defendant sought modification of alimony subsequent to divorce where defendant was not entitled to the relief sought.

APPEAL by plaintiff and defendant from *Warren, Judge*. Order entered 6 December 1983 in District Court, ROWAN County. Heard in the Court of Appeals 4 February 1985.

This is the second time this case has been before this Court. In the first appeal, we remanded the case for a hearing and findings as to whether the support provisions of a separation agreement incorporated into a consent judgment were separable or reciprocal from provisions dividing property. *Cecil v. Cecil*, 59 N.C. App. 208, 296 S.E. 2d 329 (1982), *disc. rev. denied*, 307 N.C. 468, 299 S.E. 2d 220 (1983). On remand, the trial court found and concluded that the support provisions were reciprocal and inseparable, and consequently denied Mrs. Cecil's request for a modification of the support provisions. Mrs. Cecil appeals from that order. Mr. Cecil appeals from an award of counsel fees to Mrs. Cecil's attorney.

Robert M. Davis, for plaintiff.

Mona Lisa Wallace, for defendant.

JOHNSON, Judge.

[1] Again we are presented with the question of the modifiability of the support provisions of a separation agreement made a part of a consent order. *See Cecil v. Cecil, supra; see also, Doub v. Doub*, 68 N.C. App. 718, 315 S.E. 2d 732 (1984), *modified and affirmed*, 313 N.C. 169, 326 S.E. 2d 259 (1985); *Acosta v. Clark*, 70 N.C. App. 111, 318 S.E. 2d 551 (1984). We note first that the rule of *Walters v. Walters*, 307 N.C. 381, 298 S.E. 2d 338 (1983), in which the Supreme Court held that separation agreements presented to the court for inclusion into consent orders were modifiable by the courts does not apply to this case. The rule of that case was expressly limited to that case and to consent judgments entered after the date of that opinion. Since the consent order in the present case was entered in 1975, this case is governed by the law before the *Walters* decision. Before *Walters*, separation agreements made a part of a consent judgment or order were modifiable only if the parties' agreement was adopted by the court as its own order. *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964). Further, even if the agreement was adopted by the court as its own order, the support provisions of an agreement were not modifiable if they were reciprocal with, and inseparable from, provisions for settling property matters. *Id.; White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979). There is a presumption that the

support provisions are separable from the property division provisions; the burden is upon the party opposing modification to show that these provisions are reciprocal and inseparable. *White v. White, supra.*

In the first opinion in this case, we held the separation agreement in this case merged into the consent order and was made a decree of the court. *Cecil v. Cecil, supra* at 210, 296 S.E. 2d at 331. Relying upon *White v. White, supra,* we remanded the case for a hearing to determine whether the support provisions were separable. The question now before us is whether there was evidence to support the court's findings and conclusion that the support provisions were not separable but were reciprocal with the property settlement provisions. *Allison v. Allison,* 51 N.C. App. 622, 628, 277 S.E. 2d 551, 555, *disc. rev. denied,* 303 N.C. 543, 281 S.E. 2d 660 (1981).

The court made findings of fact, *inter alia,* that the parties entered into a separation agreement on 11 September 1975, which contained provisions for the payment of alimony and the division of property, including the marital home; that the support provisions and alimony provisions were interrelated and reciprocal; that the separation agreement was a full and complete settlement of all matters between the parties; that the parties entered into another agreement on the same date in which they agreed that Mrs. Cecil was to make the house payments and car payments from the amounts designated as alimony; that the parties subsequently amended the separation agreement on 3 June 1976 to provide that Mr. Cecil would convey his interest in the marital home to Mrs. Cecil for $2,000; that the divorce judgment recited that the consent order, separation agreement and agreement dated 11 September 1975 and property settlement dated 3 June 1976 would survive the granting of an absolute divorce; that the separation agreement was negotiated and agreed to by the parties, acting through their attorneys; that Mr. Cecil offered the amount in full settlement of all claims and division of property and that Mrs. Cecil accepted the amount tendered as a complete settlement of all property rights between the two.

At the hearing, the court had before it all agreements between the parties and orders entered in the case. The court also

heard testimony from the parties and their attorneys at the time these agreements and orders were entered into.

The consent order entered on 25 September 1975 required Mr. Cecil to pay alimony in the amount of $550 per month, which was to be reduced to $400 per month at the expiration of one year, to be reduced further by the amount of any disability insurance Mrs. Cecil might receive, according to paragraph one of the separation agreement. Paragraph one of the separation agreement further provided that if Mr. Cecil's Railroad Health & Accident Insurance policy did not cover Mrs. Cecil, then Mrs. Cecil would be "able to deduct from the credit which the husband received for her disability $200 per year to cover her insurance"; and that Mr. Cecil agreed to pay the house payment, light bill and car payment for the month of September and to pay Mrs. Cecil $200 for support upon the execution of the agreement. Hence, insurance and property matters were included in the same paragraph as the alimony payments. The consent order further provided, paralleling the separation agreement, that Mr. Cecil was to make his health and accident insurance policy available to Mrs. Cecil; that Mr. Cecil was to pay certain family bills; that Mrs. Cecil was to have possession and ownership of all the household furnishings and appliances, with the exception of a vacuum cleaner and floor polisher; and that Mrs. Cecil was to have possession of the house and to be responsible for the house payments until it was sold upon the parties' divorce, with the proceeds to be divided equally between the two of them. The separation agreement further provided that Mr. Cecil was to transfer title in an automobile to Mrs. Cecil and that she would be responsible for payments on the automobile. The parties specified in another agreement on the same date that the house and car payments were to be made from the sums designated as alimony. The evidence therefore supported a finding that the support provisions and property division provisions were interrelated and reciprocal.

The evidence also supported a finding that the parties intended the settlement to be a permanent settlement of all matters between the parties. The separation agreement provided that the parties "agreed that this is a permanent settlement of all marital claims" and that the "purpose and intent" of the agreement was "to separate the lives and estates of the parties hereto to the end that each of the parties may go his or her way, and each live his

or her own personal life, unmolested, unhampered and unrestricted by the other, just the same as if the parties had never been married to each other." The foregoing language evidences the parties' intent that the agreement be a permanent property settlement. *See Barr v. Barr*, 55 N.C. App. 217, 284 S.E. 2d 762 (1981).

Another factor which tends to show the parties did not intend for the alimony payments to be true alimony, but to be a permanent settlement, is the lack of language in the separation agreement or consent order that the payments would terminate upon Mrs. Cecil's remarriage or that Mrs. Cecil was a dependent spouse. *See, Barr v. Barr, supra; Allison v. Allison, supra.* The mere fact the parties labelled the payments as alimony did not make them alimony. *White v. White, supra.*

[2] Mr. Cecil has cross appealed from the award of counsel fees to Mrs. Cecil. In order to obtain an award of counsel fees in a proceeding seeking a modification of alimony subsequent to divorce, the party seeking the fees must show: (1) that he or she is a dependent spouse; (2) that he or she is entitled to the relief demanded based upon all the evidence; and (3) that he or she has insufficient means to defray the expenses of the proceeding. *Broughton v. Broughton*, 58 N.C. App. 778, 294 S.E. 2d 772, *disc. rev. denied*, 307 N.C. 269, 299 S.E. 2d 214 (1982). In the instant case, Mrs. Cecil was not entitled to the relief sought. The court therefore erred in awarding attorney's fees to her attorney. The award of counsel fees consequently must be vacated.

For the foregoing reasons, the portion of the order denying a modification of alimony is affirmed. The portion of the order awarding attorney's fees is vacated.

Affirmed in part; vacated in part.

Chief Judge HEDRICK and Judge COZORT concur.

STATE OF NORTH CAROLINA v. DENNIS LOMBARDO

No. 842SC553

(Filed 7 May 1985)

Criminal Law § 143.5— probation revocation hearing—exclusionary rule not applicable—inquiry into officers' knowledge of probationary status not required

The trial court did not err in a probation revocation proceeding by denying defendant's motion to suppress marijuana obtained in an airport search and seizure. The exclusionary rule does not apply to probation revocation hearings, and the court was not required to determine whether the law enforcement officers knew of defendant's probationary status.

APPEAL by defendant from *Bruce, Judge*. Order entered 25 January 1984 in Superior Court, HYDE County. Heard in the Court of Appeals 7 February 1985.

This is an appeal from an order revoking defendant's probation and activating a five year sentence for violating a special condition of probation, which was imposed upon defendant's conviction of felonious sale and delivery of marijuana, a violation of G.S. 90-95(a)(1). This condition of probation stated that defendant was not to have in his possession or control during the five years of probation any controlled substance as defined in Chapter 90 of the North Carolina General Statutes, unless prescribed by a medical doctor and dispensed by a physician or pharmacist.

Fifteen days after defendant's conviction and the entry of judgment suspending his five year sentence, defendant was arrested at Miami International Airport for possession of marijuana. The stipulated facts leading up to the arrest are as follows: On the afternoon of 28 August 1979, Officer William Johnson of the Dade County Public Safety Department observed defendant standing on the sidewalk outside the National Airlines terminal at the Miami International Airport. Defendant was holding a suitbag and briefcase in one hand and an airlines ticket in the other; he appeared nervous and impatient. Defendant put his luggage on the sidewalk and began talking with the porter. At this point Officer Johnson observed defendant's baggage claim check and learned that he had checked a suitcase onto a flight and that defendant himself was en route to New Orleans. Defendant was concerned that one particular suitcase might not get aboard the

plane in time. Defendant proceeded into the terminal, carrying his briefcase, suitbag and ticket. Defendant stopped to examine his ticket and Officer Johnson thought he saw defendant put the claim check "either down the front of his pants or in his watch pocket." Defendant nervously continued through the airport.

Officer Johnson then pointed defendant out to Detective D'Azevedo of the Dade County Public Safety Department, and they followed defendant to the boarding area. D'Azevedo displayed his badge to defendant and requested to speak to him; he asked for defendant's ticket and identification. Defendant nervously complied, giving D'Azevedo his ticket and his Florida driver's license. As D'Azevedo turned to write down this information, Officer Johnson, who had remained behind defendant, observed defendant placing his hand first into the front of his pants, and then, with what appeared to be a baggage claim check in his hand, into the back of his pants. Officer Johnson grabbed defendant's arms and secured the baggage claim check. When D'Azevedo observed that the name on defendant's ticket did not match the name on defendant's driver's license, Officer Johnson left to obtain the suitcase corresponding to the claim check. D'Azevedo at this point told defendant he was not free to leave.

Officer Johnson procured the services of the U.S. Customs narcotic detector dog unit, resulting in a detector dog "alerting" to the presence of a narcotic odor coming from defendant's suitcase. Defendant was arrested for possession of an unknown controlled substance of unknown quantity. Defendant along with his luggage was transported to the airport police service office where another dog "alerted" to a narcotic odor emanating from defendant's suitbag and briefcase. Defendant refused D'Azevedo's request to search his luggage; a search warrant was obtained, and twenty grams of marijuana were found in the suitcase, although none was found in the briefcase and suitbag. The defendant was charged with a misdemeanor in Florida, but the county court of Dade County, Florida, granted defendant's motion to suppress the evidence "on the ground that there was insufficient articulable facts to constitutionally justify defendant's detention and subsequent seizure of his person."

Defendant's probation officer filed a probation violation report in North Carolina based on defendant's arrest for drug

possession in Miami. At the revocation hearing, defendant's motion to suppress any evidence obtained from that arrest on constitutional grounds was granted, and the State appealed. This Court, without determining whether the exclusionary rule applied in a probation revocation hearing, reversed and remanded, holding that the trial court erred in treating the matter as a warrantless search when the record disclosed that the search was made pursuant to a search warrant. *State v. Lombardo*, 52 N.C. App. 316, 278 S.E. 2d 318 (1981). The Supreme Court, on discretionary review, modified and affirmed the Court of Appeals' decision, holding that the exclusionary rule does not apply to probation revocation hearings, and remanded the case to the Court of Appeals with instructions to remand to the trial court for further proceedings. *State v. Lombardo*, 306 N.C. 594, 295 S.E. 2d 399 (1982). Upon further hearing, the trial court denied defendant's renewed motion to suppress, revoked defendant's probation and imposed an active five year prison term. 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.

Purser, Cheshire, Manning & Parker, by Joe Cheshire, Gaskins, McMullan & Gaskins, P.A., by Herman E. Gaskins, and Joel Hirschhorn, P.A., by Joel Hirschhorn for defendant appellant.

MARTIN, Judge.

In *State v. Lombardo*, 306 N.C. 594, 295 S.E. 2d 399 (1982), our Supreme Court held, without qualification, that the fourth amendment exclusionary rule does not apply in probation revocation hearings. In so doing, the Supreme Court expressly overruled *State v. McMilliam*, 243 N.C. 775, 92 S.E. 2d 205 (1956), holding that illegally seized evidence cannot be used to revoke probation, and held that "evidence which does not meet the standards of the fourth and fourteenth amendments to the United States Constitution *may be admitted in a* probation revocation hearing." *Lombardo, supra* at 602, 295 S.E. 2d at 404 (original emphasis). Defendant's sole contention on appeal is that the trial court misapplied the law of the *Lombardo* decision rendered by the Supreme Court and therefore erred in denying defendant's re-

newed motion to suppress any evidence obtained from his arrest. Defendant maintains that based on the *Lombardo* decision, the issue of whether the law enforcement officers had knowledge of defendant's probationary status was relevant to the trial court's determination of his motion to suppress; that defendant was prepared to assert that the law enforcement officers did know that defendant was on probation; and that therefore, the evidence obtained from defendant was subject to the exclusionary rule. A careful analysis of the opinion reveals that while knowledge of the probationer's status by the law enforcement official who conducted the illegal search would tend to undermine the rationale of holding the exclusionary rule inapplicable to probation revocation hearings, the Court's decision was not qualified upon the law enforcement official's unawareness of the probationer's status. We therefore hold that the trial court did not misapply the law of *Lombardo* and affirm its order.

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. *Bruce v. Flying Service*, 234 N.C. 79, 66 S.E. 2d 312 (1951). The law of the case doctrine does not apply to dicta, but only to points actually presented and necessary to a determination of the case. *Hayes v. Wilmington*, 243 N.C. 525, 91 S.E. 2d 673 (1956).

In *Lombardo*, the Court noted:

> If the officer knows that the defendant is on probation the officer may not be deterred from conducting an illegal search or seizure of the defendant unless he knows the evidence obtained from such illegal conduct is excluded at a probation revocation hearing.

Lombardo, supra at 600, 295 S.E. 2d at 403. This statement represents one factor the Court considered in analyzing the overall deterrent effectiveness of the exclusionary rule as relating to probation revocation hearings; the Court did not expressly qualify its holding to exclude the rule's application to such proceedings upon the law enforcement official being unaware of the probationer's status. The Court gave additional reasoning for its holding: application of the exclusionary rule to revocation hearings would damage the viability of the probation system "by

allowing those like Lombardo, who show a total disregard for the system, to exclude evidence of their personal probation violations." *Id.* at 600-01, 295 S.E. 2d at 404. "For *all the reasons* articulated . . . we hold that the exclusionary rule should not be applied in revocation hearings." *Id.* at 604, 295 S.E. 2d at 406 (emphasis added).

We are bound by the ruling of our Supreme Court: the exclusionary rule is not applicable to revocation hearings. The trial court therefore was not required to determine whether the law enforcement officers had knowledge of defendant's probationary status; it did not err in denying defendant's motion to suppress any evidence obtained from the search and seizure. The order of the trial court is

Affirmed.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. JACKIE DARRELL MOORE

No. 8415SC967

(Filed 7 May 1985)

Kidnapping § 1.3— instruction on theory not supported by evidence

The trial court erred in instructing the jury that defendant could be found guilty of kidnapping on the theory that he confined, restrained or removed the victim for the purpose of holding her as a hostage where there was no evidence that defendant's purpose was to hold the victim as security for the performance or the forbearance of some act by some third person.

APPEAL by defendant from *Lee, Judge.* Judgments entered 12 December 1983 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 2 April 1985.

Defendant was charged in proper bills of indictment with first degree kidnapping and an assault with a deadly weapon with intent to kill inflicting serious injury. At trial, the State presented evidence which tended to show the following facts. The defendant and the victim were married on 29 January 1973. Three children were born of the marriage. In September 1983, the par-

ties separated and the victim and two of the couple's children moved into her parents' home. On 3 October 1983 at approximately 5:10 p.m. as the victim was leaving her place of employment, she saw the defendant sitting in his car in her employer's parking lot. Also in the car was the couple's son who had been residing with the defendant. The victim approached the vehicle and lifted the child out of the back seat. When she attempted to leave with the child, defendant ordered her to put the child back into the car and to get in the front seat. The victim placed the child back into the car but refused to get into the vehicle. Defendant then reached for a rifle, pointed it at the victim and again ordered her into the car. The victim refused and ducked beside the car. Defendant then exited the vehicle and attempted to push the victim into the car. When she continued to resist, defendant struck her in the head with the butt of the rifle. The victim then got into the car. As the defendant was getting back into the car, the victim attempted to flee, but the defendant caught her, struck her with the rifle again and returned her to the car. These blows opened a wound in the victim's head which required nine stitches to close.

Defendant drove the victim to their former marital home. The victim entered the residence after defendant threatened to shoot her if she tried to run away. Once inside the residence, defendant fixed an ice pack for the victim and allowed her to call her parents. While the parties were inside the residence defendant threatened to kill himself on several occasions. During one of several telephone calls which he received, defendant stated the victim was trying to take his children away from him and he wasn't going to let her. He also said he would not come out of the trailer unless someone promised him that he would not be sent to jail.

After the authorities arrived, the defendant allowed a detective, dressed as an ambulance attendant, to enter the residence and care for the victim. After the detective had dressed the wound, the defendant ordered him to leave. A short time later the victim talked the defendant into giving up and they left the residence together.

Defendant testifying in his own behalf admitted striking the victim and removing her to the residence, but he stated that the

only reason he had gone to the victim's place of employment was to talk to her about coming back to live with him.

Defendant was convicted of first degree kidnapping and assault with a deadly weapon inflicting serious injury. From judgments sentencing him to twelve years for the kidnapping and three years for the assault, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Dennis P. Myers, and Assistant Attorney General Roy A. Giles, Jr., for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Gordon Widenhouse, for defendant appellant.

ARNOLD, Judge.

The record reflects that the defendant appealed from his conviction for assault with a deadly weapon inflicting serious injury. He has failed, however, to bring forth in his brief any assignments of error to support his appeal. Therefore, his appeal from the assault conviction is deemed abandoned. Although this issue was not raised in defendant's brief, it could be argued that the defendant should not have been convicted of an assault with a deadly weapon inflicting serious injury and of first degree kidnapping because the serious injury requirement found in both these crimes caused a merger of these offenses; however, on oral argument the defendant conceded that no merger of these offenses occurred under the facts of this case.

In his appeal from the kidnapping conviction defendant contends the court erred by "instructing on purposes of kidnapping which were not supported by the evidence. . . ." We agree, and award defendant a new trial.

G.S. 14-39 in pertinent part provides:

> (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, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for ransom or as a hostage or using such other person as a shield; or

(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, restrained or removed or any other person;

(4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

(b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class D felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

This statute makes it a crime for a person to confine, restrain or remove a person for any of the eight separate purposes set forth therein. In order to be guilty of kidnapping the defendant must have formed the intent to do one of these eight purposes at the time he confined, restrained or removed the victim. *See State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984). It is error, generally prejudicial, for the court to instruct upon those purposes which are not supported by the evidence. *State v. Dammons*, 293 N.C. 263, 237 S.E. 2d 834 (1977).

In the case *sub judice* the court instructed in part as follows:

Third, the State must prove beyond a reasonable doubt that the defendant, Jackie Darrell Moore, did this, that is, that he unlawfully confined Priscilla Moore or unlawfully removed her from one place to another for one or more of the following purposes: For the purpose of holding Priscilla Moore as a hostage. To hold a person as a hostage means to hold her as security for the performance or the forbearance of some act by some third person. The State contends, and

the defendant denies, that the defendant held Priscilla Moore as security for the purpose of preventing or delaying law enforcement officers to make a lawful arrest of the defendant. The second purpose that you may consider is for the purpose of terrorizing Priscilla Moore. Terrorizing means more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension. And the third purpose that you may consider is for the purpose of doing serious bodily injury to Priscilla Moore. Serious bodily injury is defined in the law as such physical injury as causes great pain or suffering. If you rely on this purpose to satisfy the third element, you must also be satisfied beyond a reasonable doubt that the unlawful confinement in the automobile or trailer or the unlawful removal from the parking lot to the trailer was a separate complete act independent of and apart from the infliction of the serious bodily injury.

So the third element, members of the jury, to summarize, requires that the State prove beyond a reasonable doubt that the unlawful confinement or removal of Priscilla Moore by the defendant was for one of those—one or more of those three purposes, for the purpose of holding her as a hostage as that has been defined for you or for the purpose of terrorizing Priscilla Moore or for the purpose of doing serious bodily injury to Priscilla Moore, and in which case if you rely on that purpose you must also be satisfied beyond a reasonable doubt that the unlawful confinement in the automobile or trailer or the unlawful removal from the parking lot to the trailer was a separate and complete act independent of and apart from the infliction of serious bodily injury upon Priscilla Moore.

All that is required, members of the jury, for the State to satisfy the third element is that the defendant's purpose was to hold Priscilla Moore as a hostage or terrorize her or inflict upon her serious bodily injury. You need not find, to satisfy the third element beyond a reasonable doubt, that any of those three purposes were actually accomplished.

In its charge the court correctly stated that to convict under the hostage theory the jury must find that the defendant con-

fined, restrained or removed the victim for the purpose of holding her as security for the performance or the forbearance of some act by some third person. Our examination of the record reveals no evidence to support a finding that at the time the defendant originally confined, restrained and removed the victim he did so for the purpose of holding her as a hostage within the meaning of the North Carolina law. Thus, we hold that the defendant is entitled to a new trial. Having awarded a new trial we need not reach the other issues brought forth by the defendant.

No error as to the assault with a deadly weapon inflicting serious injury.

New trial as to kidnapping.

Judges PHILLIPS and COZORT concur.

STATE OF NORTH CAROLINA v. RAPHEL SCOBER

No. 844SC541

(Filed 7 May 1985)

1. **Criminal Law §§ 34, 60.2— fingerprint card—reference to prior arrest concealed—admissible**

In a prosecution for breaking and entering and felonious larceny, there was no error in the admission of defendant's 1979 fingerprint identification card with all information relating to his prior arrest concealed.

2. **Criminal Law § 93— defendant's exhibition of palm to jury—not allowed during State's case in chief**

In a prosecution for breaking and entering and felonious larceny, the trial court did not err by denying defendant permission to exhibit his palm to the jury immediately after the State introduced a latent fingerprint and a fingerprint identification card during its case in chief. Defendant was attempting to exhibit his palm so the jury could determine whether it corroborated the State's evidence, and the trial judge correctly ruled that exhibiting defendant's palm would constitute presenting evidence.

3. **Criminal Law § 138; Constitutional Law § 48— effective assistance of counsel—failure to argue mitigating factors**

Defendant was not denied effective assistance of counsel because his attorney did not argue mitigating factors at sentencing where he did not bring forth on appeal any evidence of factors in mitigation which should have been argued.

State v. Scober

APPEAL by defendant from *Allsbrook, Judge.* Judgment entered 6 January 1984 in Superior Court, DUPLIN County. Heard in the Court of Appeals 7 February 1985.

Defendant was charged on an indictment, proper in form, with felonious breaking or entering and felonious larceny. He was found guilty and sentenced to consecutive terms of ten and five years.

The State's evidence tended to show the following. A. J. Cavenaugh, owner of a retail jewelry store, testified that when he entered his jewelry store on 15 September 1983 two of his display cases, which had been on the counter, were on the floor, empty. The window in the back of the store was broken. Missing were eighty chains, half of which were fourteen carat gold overlay, five high school class rings, a cigarette lighter and ten dollars in quarters. Cavenaugh estimated the value of the chains to be approximately $3,000. The chains were manufactured by Krementz, and Cavenaugh did not believe any other store in Duplin or Pender counties sold Krementz chains. The display cases had been cleaned every two or three days. After Cavenaugh saw that the chains were missing he notified Richard Honeycutt, the owner of a pawn shop, to look out for the chains. Cavenaugh later identified three chains, which had been pawned in Honeycutt's shop, as identical to the stolen chains.

Leon Sloan testified that on 18 September 1983 defendant gave him a gold chain, which he then pawned at Honeycutt's shop. Autry Stevens testified that on 22 September 1983 defendant sold him a gold chain for ten dollars and the following day, another chain for seven dollars. Stevens pawned the first chain and gave Jeffrey Carter the second chain to pawn. Honeycutt testified he received the three chains from Sloan, Stevens and Carter and gave them to the police.

Detective N. E. "Tom" Rich of the Wallace Police Department dusted Cavenaugh's display cases for fingerprints and placed the latent prints on a card. Rich interviewed Sloan and Stevens and then arrested defendant. After Rich read defendant his rights, defendant signed a waiver of rights form and denied selling jewelry or being in Cavenaugh's Jewelry Store within the past two months.

Wallace Police Chief Roscoe Rich, testifying as an expert witness in fingerprint and palm print identification, compared the latent prints taken from Cavenaugh's display box with the prints from a fingerprint identification card made of defendant's prints in 1979 and stated that, in his opinion, defendant had made the prints on the display case. Rich found seventeen points of similarity, more than required for positive identification. Rich testified that fingerprints and palm prints do not change from birth to death.

Defendant did not testify.

The jury returned a verdict of guilty of felonious breaking or entering and felonious larceny.

From the judgment and sentences of five and ten years, to run consecutively, defendant appeals.

Attorney General Edmisten by Assistant Attorney General Thomas H. Davis, Jr., for the State.

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

PARKER, Judge.

[1] In his first assignment of error defendant argues that admitting into evidence a 1979 fingerprint identification card, with all information relating to defendant's prior arrest concealed, was prejudicial error because it suggested prior criminal misconduct. We do not agree.

Defendant had previously been arrested and fingerprinted on 2 March 1979 by Detective Baker of the Duplin County Sheriff's Department. On voir dire, out of the presence of the jury, Baker explained how he fingerprinted defendant and testified that the 2 March 1979 fingerprint identification card had not been altered except for some notations on the margin. The trial judge covered the information on the top and back of the card and instructed the District Attorney not to mention the occasion of taking the fingerprints on 2 March 1979. At trial Detective Baker identified the fingerprint card as the card he rolled with defendant's prints on 2 March 1979. No mention was made of defendant's arrest on that date.

The question of admissibility of a fingerprint identification card made pursuant to a prior, unrelated arrest was addressed by our Supreme Court in *State v. Jackson*, 284 N.C. 321, 200 S.E. 2d 626 (1973). In *Jackson* the State's evidence tended to show that the defendant entered the victim's house through her kitchen window and raped her. A latent fingerprint was found on the windowsill. The trial judge admitted into evidence a fingerprint identification card made in 1962, introduced for the purpose of identifying the latent fingerprint on the victim's windowsill. The fingerprint identification card was altered so that it did not list an arrest, indictment or conviction. The defendant argued that the admission of the fingerprint identification card was prejudicial error because it constituted evidence of another separate crime. Our Supreme Court held that the 1962 fingerprint identification card was admissible, and any inference arising from testimony that fingerprinting is customary when someone is arrested was not of such force as to prejudicially influence the jury. *Accord, State v. Gainey*, 32 N.C. App. 682, 233 S.E. 2d 671, *review denied* 292 N.C. 732, 235 S.E. 2d 786 (1977); *State v. McNeil*, 28 N.C. App. 347, 220 S.E. 2d 869, *review denied*, 289 N.C. 618, 223 S.E. 2d 395 (1976). *Cf. State v. Hatcher*, 277 N.C. 380, 177 S.E. 2d 892 (1970), which held that the admission into evidence of a mug shot of defendant, with police identification information obliterated, was permissible.

Applying *Jackson*, we do not believe admission of the fingerprint identification card in the instant case in any way violated the longstanding general rule in North Carolina that "in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense." *State v. McClain*, 240 N.C. 171, 173, 81 S.E. 2d 364, 365 (1954).

[2] In his second assignment of error defendant argues that the trial court erred in ruling that defendant's exhibition of his palm print would constitute his having presented evidence.

When the State offered into evidence the latent fingerprint, the fingerprint identification card and photographic enlargements, defendant's counsel requested permission for defendant to exhibit his own palm to the jury. The State objected to defendant's exhibiting evidence during the State's case in chief; the trial judge

sustained the objection and explained that defendant could offer evidence at the close of the State's evidence, at which time the State's exhibits could be recirculated among the jury. Defendant contends the trial judge erred in ruling that presenting his palm print to the jury would be offering evidence. We do not agree. In *State v. Hall*, 57 N.C. App. 561, 564, 291 S.E. 2d 812, 814 (1982), this court formulated the following rule for determining whether an object has been put into evidence:

> [T]he proper test as to whether an object has been put in evidence is whether a party has offered it as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of a witness. If the party shows it to a witness to refresh his recollection, it has not been offered into evidence.

Clearly, defendant was attempting to exhibit his palm so the jury could examine it to determine whether it corroborated the State's evidence, and the trial judge ruled correctly.

[3] In his last assignment of error defendant argues that he was denied effective assistance of counsel because his counsel did not present any factors in mitigation at the sentencing hearing.

Defendant's right to assistance of counsel in a noncapital felony case is guaranteed by the Sixth Amendment to the United States Constitution applied to the States by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963), and Article 1, Sections 19 and 23 of the North Carolina Constitution. The standard for determining whether there has been effective assistance of counsel set forth by the United States Supreme Court in *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed. 2d 763 (1970), was adopted in North Carolina in *State v. Vickers*, 306 N.C. 90, 291 S.E. 2d 599 (1982). Under *McMann* the test is whether the assistance given was "within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. at 771, 90 S.Ct. at 1449, 25 L.Ed. 2d at 773.

Defendant contends his counsel should have argued factors in mitigation at the sentencing hearing. Defendant, however, has not brought forth any evidence of factors in mitigation which should have been argued. Absent some evidence of mitigating factors, we

cannot say defendant was denied effective assistance of counsel. Defendant has failed to meet the "stringent standard of proof on the question of whether an accused has been denied Constitutionally effective representation." *State v. Sneed*, 284 N.C. 606, 613, 201 S.E. 2d 867, 871 (1974).

We have carefully considered defendant's assignments of error and find

No error.

Judges ARNOLD and EAGLES concur.

STATE OF NORTH CAROLINA ON RELATION OF THE BANKING COMMISSION, PLAINTIFF APPELLEE v. CITICORP SAVINGS INDUSTRIAL BANK OF NORTH CAROLINA (PROPOSED), DEFENDANT-CROSS-APPELLANT AND APPELLANT v. THE NORTH CAROLINA BANKERS ASSOCIATION, INC., INTERVENOR/PLAINTIFF-APPELLANT

No. 8410SC591

(Filed 7 May 1985)

1. Banks and Banking § 1.1— industrial bank—no vested right to operate

Citicorp, a subsidiary of a Delaware corporation, did not have a vested right to operate an industrial bank because it had filed an application to establish an industrial bank before the enactment of the statute prohibiting the acquisition or control of an industrial bank by any company, G.S. 53-229. Although Citicorp had the right to have the applicable law applied to it, it did not have a right that the law not be changed.

2. Banks and Banking § 1.1— industrial bank—control by any company prohibited—constitutionality of statute

The statute proscribing the acquisition or control of an industrial bank by any company, G.S. 53-229, does not discriminate against out-of-state bank holding companies in violation of the commerce clause, Art. I, § 8, of the U.S. Constitution. Nor does the statute violate Art. I, §§ 19, 32 and 34 of the N.C. Constitution.

APPEALS by applicant Citicorp Savings Industrial Bank of North Carolina (Proposed) and by intervenor North Carolina Bankers Association, Inc. from *Beaty, Judge.* Judgment entered 13 January 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 5 February 1985.

This appeal arises from a ruling by the State Banking Commission on an application by Citicorp Savings Industrial Bank of North Carolina (Proposed) to establish an industrial bank in Charlotte, North Carolina. On 26 May 1983 Citicorp, a wholly owned subsidiary of a Delaware corporation, applied to establish an industrial bank. On 13 July 1983 the Commissioner of Banks recommended the approval of the application and referred the matter for review by the State Banking Commission.

On 20 July 1983 the matter was heard by the State Banking Commission. Citicorp presented evidence and the North Carolina Bankers Association was allowed to make a motion to continue although it was not a party to the proceedings. The matter was continued and on 22 August 1983 a second hearing was held. The Association presented evidence in opposition to the application and Citicorp presented additional evidence. At the conclusion of the hearing the members of the Commission who were present deliberated in closed session and then announced they had voted to deny the application. On 21 September 1983 the Commission met and adopted an order denying the application.

Citicorp petitioned the Superior Court to review the decision of the Commission and reverse it. The Association intervened in the proceedings in Superior Court. The Superior Court held that there was not a quorum at any of the meetings of the Commission and remanded the matter for further hearings by the Commission. Citicorp and the Association appealed. The Commission filed a motion in this Court which asks that the appeal be dismissed on the ground the issues have become moot after the adoption of G.S. 53-229.

Attorney General Edmisten, by Special Deputy Attorney General Reginald L. Watkins, and Chief Counsel of the State Banking Commission Robert L. Anderson, for the State on Relation of the Banking Commission for appellee State Banking Commission.

Jordan, Brown, Price & Wall, by John R. Jordan, Jr., Robert R. Price, and Henry W. Jones, Jr., and General Counsel Edmund O. Aycock for intervenor appellant North Carolina Bankers Association, Inc.

Fleming, Robinson, Bradshaw, and Hinson, by Robin L. Hinson, A. Ward McKeithen, Dan T. Coenen and Mark W. Merritt, and Leboeuf, Lamb, Leiby and McRae, by Joseph E. Johnson, for applicant appellant Citicorp Savings Industrial Bank of North Carolina (Proposed).

WEBB, Judge.

G.S. 53-229 which became effective on 7 July 1984 while this case was on appeal to this Court provides in part:

> Notwithstanding any other provision of this Article or any other provision of the General Statutes of this State, no bank holding company or any other company may acquire or control any banking institution that:
>
> (1) Has offices located in this State; and
>
> (2) Is not a bank as defined in G.S. 53-226(1) of this Article.
>
> . . . .
>
> Provided, the provisions of G.S. 53-229 shall not apply to applications by any company which is chartered by the Congress of the United States and which application is pending before the Commissioner on July 7, 1984.

G.S. 53-226(1) defines a bank as an institution that accepts demand deposits, which the proposed industrial bank could not do. It would be a banking institution which is not a bank as defined in G.S. 53-226(1). Citicorp's parent corporation is not a corporation chartered by the Congress. The proviso clause does not apply to it. It is barred from owning a bank in this state if G.S. 53-229 applies to it.

[1] Citicorp argues that G.S. 53-229 applies prospectively and it is not barred from operating in this state. We do not believe the question of whether the statute applies prospectively or retroactively is determinative. Citicorp had not been given permission to operate an industrial bank at the time G.S. 53-229 became effective. Assuming the statute was intended to apply prospectively at the time of its effective date, Citicorp had the right to have the applicable law applied to it. It did not have a right that the law not be changed. When the law was changed so that Citicorp no

longer has the right to operate an industrial bank in this state it may not have its application approved. *See Lee v. Penland-Bailey Co.*, 50 N.C. App. 498, 274 S.E. 2d 348 (1981) for a case which holds the prospective application of a statute can require remedial action for something that occurred before the adoption of the statute.

Citicorp replies on *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E. 2d 415 (1982); *Smith v. Mercer*, 276 N.C. 329, 172 S.E. 2d 489 (1970) and *Wilson v. Anderson*, 232 N.C. 212, 59 S.E. 2d 836 (1950) and argues that at the time the application was filed it had a vested right to have the then applicable law applied which gave it the right to operate an industrial bank in this state. *Wilson* deals with intestate succession rights of adopted children. It holds that a change in the intestate succession act did not apply to persons adopted before the effective date of the change. We do not believe it is applicable to this case. *Bolick* and *Smith* involve tort claims. We believe there is a distinction between a vested tort claim and the right not to have a statute changed. A tort claim is a form of property right. The right to operate a bank is governed by statute. No one has the right for the General Assembly not to change a law. Citicorp did not have a vested right to operate a bank when G.S. 53-229 was adopted.

[2] Citicorp contends that if G.S. 53-229 does apply it is unconstitutional under Article I, sec. 8 of the Constitution of the United States which provides in part

> The congress shall have the power
>
> . . . .
>
> (3) To regulate commerce with foreign nations, and
>
> among the several states and among the indian tribes.

The Commerce clause has been interpreted to limit the power of the states to erect barriers against interstate trade except as allowed by Congress. See *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 64 L.Ed. 2d 702, 100 S.Ct. 2009 (1980).

Citicorp, relying on *Lewis*, argues that although G.S. 53-229 is neutral on its face its purpose and practical effect is to keep out of state bank holding companies from acquiring or operating industrial banks in this state. Although the statute applies to

North Carolina bank holding companies Citicorp argues that it has no practical effect as to them because they can own full service banks. Citicorp says that for this reason the only purpose and effect of G.S. 53-229 is to exclude out of state bank holding companies from acquiring industrial banks in this state, which violates the commerce clause.

We do not believe *Lewis* governs this case. In *Lewis* the State of Florida adopted a statute which prohibited out of state bank holding companies from owning or controlling a business furnishing investment advisory services to the general public. The United States Supreme Court held that any state interest that may be served was not sufficient under the commerce clause to justify prohibiting out of state bank holding companies from operating a business in Florida which an in state bank holding company is allowed to own and operate. The Court also held that Congress had not authorized the State to make this type of discrimination. In this case the General Assembly has proscribed the acquisition or control of an industrial bank by any company. This act does not discriminate against out of state bank holding companies.

The General Assembly has the power to regulate the banking industry in this state. *See Pue v. Hood, Com'r of Banks*, 222 N.C. 310, 22 S.E. 2d 896 (1942). It has proscribed the acquisition or control of an industrial bank by any company, which it has the power to do. If out of state holding companies may be the only companies who want to own industrial banks in this state we do not believe this prevents the General Assembly from legislating as to this legitimate state interest. Nor do we believe, as Citicorp argues, that the fact that the Bankers Association may have supported the legislation makes it unconstitutional.

Citicorp contends finally, based on *In re Hospital*, 282 N.C. 542, 193 S.E. 2d 729 (1973), that G.S. 53-229 violates Article I, Sections 19, 32, and 34 of the Constitution of North Carolina. In *Hospital* our Supreme Court held that those sections of the North Carolina Constitution were violated by the requirement of a certificate of need before a corporation could construct a hospital. *Hospital* did not mention *Pue v. Hood, Com'r of Banks, supra.* Whatever precedent *Hospital* may be for the regulation of other types of business we believe *Pue* is still the law as to the right of

the State of North Carolina to regulate the banking industry. *Pue* was not overruled by *Hospital.*

We have held that Citicorp does not have the right to own or operate an industrial bank in this state. We do not pass on other assignments of error brought forward by the parties. For the reasons stated in this opinion we remand to the Superior Court for the purpose of dismissing Citicorp's petition.

Remanded.

Judge PHILLIPS concurs.

Judge PARKER concurs in the result.

STATE OF NORTH CAROLINA v. LINDA RAYFIELD SIGMON

No. 8425SC989

(Filed 7 May 1985)

1. Automobiles and Other Vehicles § 129.3— breathalyzer reading of .06—instructions on per se impairment

Although defendant's failure to object at trial to the omission of any instructions precluded review of an assignment of error regarding the court's instructions under App. Rule 10(b)(2), it was noted that there was no basis in statutory or case law for arguing that a breathalyzer reading of .06 creates a presumption that a defendant is not impaired. Furthermore, the court was not required to instruct the jury on its own motion on the .10 per se theory of G.S. 20-138.1(a)(2) where there was insufficient evidence of a per se .10 violation in that the breathalyzer result was .06 and where there was substantial evidence apart from the breathalyzer that defendant was impaired in that the arresting officer testified that in her opinion, defendant was under the influence of alcohol.

2. Automobiles and Other Vehicles § 130.1— limited driving privilege denied—no abuse of discretion

There was no abuse of discretion in denying a defendant convicted of driving while impaired a limited driving privilege for the purpose of maintaining her household and her son's activities. G.S. 20-179.3(a) and (d).

3. Automobiles and Other Vehicles § 130.1; Criminal Law § 134— determination of sentencing factors form—signed out of term and out of district

There was no error in signing the impaired driving determination of sentencing factors form out of term and out of district where a sentencing

hearing was held immediately after the verdict, the court dictated to the assistant clerk findings and conclusions, and the assistant clerk typed them later and mailed them to the judge for her signature. G.S. 20-179.

APPEAL by defendant from *Pope, Judge.* Judgment entered 13 June 1984 in Superior Court, CATAWBA County. Heard in the Court of Appeals 3 April 1985.

In this criminal case defendant, Linda Rayfield Sigmon, was convicted at a jury trial of driving while impaired in violation of G.S. 20-138.1.

The jury returned its verdict on 13 June 1984. The Honorable Mary McLaughton Pope, Superior Court Judge, then orally found that this was a level 5 offense with a mitigating factor, i.e. defendant has a safe driving record, having had no convictions of any serious traffic violation within five years of the date of this offense. Finding that mitigating factors substantially outweighed the aggravating factors (none were found), Judge Pope sentenced defendant to 60 days in jail suspended for two years, placed defendant on supervised probation for 2 years and ordered payment of a fine of $100 and costs of court. Defendant's request for a limited driving privilege was denied. Defendant appeals.

Judge Pope did not sign the "Impaired Driving Determination of Sentencing Factors" form on 13 June 1984 as indicated on the document. An affidavit, signed by Kay C. Sherrill, Assistant Clerk of Superior Court, tends to show that the document in question was mailed to Judge Pope in another county after the week of 11 June 1984 and was received in the office of the Clerk of Superior Court of Catawba County during the week of 3 September 1984.

Attorney General Edmisten, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Randy D. Duncan, for defendant-appellant.

EAGLES, Judge.

I

[1] Defendant first assigns as error the trial court's failure to instruct the jury that a breathalyzer result of less than 0.10 creates

a presumption that the person is not under the influence of alcohol and that G.S. 20-138.1 is a "two fold statute."

Appellant's failure to comply with Rule 10(b)(2), Rules of Appellate Procedure precludes our review of this assignment of error. Rule 10(b)(2) provides:

> No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make objection out of the hearing of the jury and, on request of any party, out of the presence of the jury . . . An exception to the failure to give particular instructions to the jury . . . shall identify the omitted instruction . . . by setting out its substance immediately following the instructions given.

Rule 10(b)(2) is mandatory and not merely directory. *State v. Fennell*, 307 N.C. 258, 297 S.E. 2d 393 (1982). The purpose of Rule 10(b)(2) is to encourage the parties to inform the trial court promptly of alleged errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates and thereby eliminate the need for a new trial. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

The record reveals the following exchange at the instruction conference at the close of all the evidence:

> *The Court*: [D]oes the defendant have any special requests for instructions?
>
> *Defense Attorney*: No, Your Honor, except reasonable doubt.
>
> *The Court*: Other than those instructions that I have just indicated, I will give, do you all want to make any additions or corrections or any special requests now?
>
> *Assistant District Attorney*: No, Your Honor.
>
> *The Court*: For the defendant?
>
> *Defense Attorney*: No, Your Honor.

The trial court then instructed the jury on the State's theory of "under the influence of an impairing substance" pursuant to

G.S. 20-138.1(a)(1). After the jury was instructed, but before deliberation began, the following exchange took place:

> *The Court*: The jury has been excluded from the courtroom. Are there any requests for additions or corrections on behalf of the defense?
>
> *Defense Attorney*: No, Your Honor.

Defendant, after being given every reasonable opportunity to do so, failed to object to the omission of any instruction as required by Rule 10(b)(2).

Nevertheless, we note that defendant's contention that because a blood alcohol concentration of 0.10 or more is illegal per se under G.S. 20-138.1(a)(2), a breathalyzer reading of 0.06 must create a presumption that the defendant is not impaired is totally without merit and has no basis in statutory or case law.

Defendant also argues that since G.S. 20-138.1 is a "two fold statute," i.e. one may be convicted for driving a vehicle on a public street or highway while (1) under the influence of an impairing substance or (2) after having consumed sufficient alcohol that he has, at any relevant time after driving, a blood alcohol concentration of 0.10 or more—the trial court should have instructed the jury on the 0.10 per se theory on its own motion. This argument is without merit.

Before permitting the jury to consider a particular offense, the trial court must decide whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). Here, the evidence at trial tended to show that defendant had a blood alcohol content of 0.06. Defendant was arrested by a police officer who testified that in her opinion, defendant was under the influence of alcohol. The officer's opinion was based on observation of defendant, defendant's driving on the occasion in question, the odor of alcohol about her person and her inability to perform satisfactorily certain sobriety tests. This constituted substantial evidence, separate and apart from the breathalyzer result, that defendant's mental and physical faculties were appreciably impaired. G.S. 20-138.1(a)(1). Conversely, there was not sufficient evidence of a per se 0.10 violation under G.S. 20-

138.1(a)(2) to submit to the jury where the breathalyzer result indicated a blood alcohol content of 0.06. Accordingly, it was not error for the trial court to fail to instruct the jury concerning G.S. 20-138.1(a)(2) on its own motion.

II

[2] Defendant next assigns as error the trial court's refusal to grant defendant a limited driving privilege. We find no error.

The granting or denying of a limited driving privilege pursuant to G.S. 20-179.3(a) is for good cause shown, the decision resting in the sound discretion of the trial court. Defendant has no entitlement to a limited driving privilege.

Our examination of the record indicates that when seeking the limited driving privilege, defendant's attorney informed the court:

> [Defendant] is presently separated. Her minor son lives with her. We ask that she be considered for a restrictive privilege for the purpose of maintaining her household and her son's activities.

From our review of the record it is clear that defendant has shown no abuse of discretion or prejudice in the trial court's refusal to issue a limited driving privilege.

Parenthetically, we note that G.S. 20-179.3(d) permits defendant to make a subsequent application for a limited driving privilege. At that time, defendant will have opportunity to marshal her evidence tending to show "good cause" for the issuance of the limited driving privilege.

III

[3] Defendant next assigns as error the making and signing of written findings of sentencing factors in aggravation or mitigation out of term and out of district. We find no error.

The record reveals that a sentencing hearing was held immediately after verdict, without objection by defendant. There, the trial court dictated to the Assistant Clerk of Superior Court the findings of fact and conclusions of law which appear at pages 65-67 of the transcript which is before us by agreement of counsel

pursuant to Rule 9 of the Rules of Appellate Procedure. Apparently, the Assistant Clerk of Superior Court typed the "Impaired Driving Determination of Sentencing Factors" (AOC Form CR-311) later and mailed them to Judge Pope for her signature. We find no requirement in the sentencing provisions of the Safe Roads Act, G.S. 20-179, requiring sentencing forms to be signed at the time of sentencing. We find no indication that the procedure utilized here is inappropriate. Finally, defendant has shown no prejudice. Accordingly, this assignment of error is overruled.

No error.

Judges WHICHARD and JOHNSON concur.

VERONICA KEETER BREVARD v. DAVID HAROLD BREVARD

No. 8429DC891

(Filed 7 May 1985)

Divorce and Alimony § 24; Social Security and Public Welfare § 1— Social Security benefits for children—payment to father—no authority to order payment to mother

Where the children of the parties became eligible to receive Social Security benefits when defendant father became disabled, and the Social Security Administration paid such benefits to the father on behalf of the children, the courts of North Carolina did not have the authority to order the Social Security Administration and the defendant to pay those benefits directly to plaintiff mother who has custody of the children. Nor do such courts have the authority to require defendant to account for the Social Security benefits paid to him on behalf of the children.

APPEAL by defendant from *Greenlee, Judge.* Judgment entered 28 June 1984 in District Court, HENDERSON County. Heard in the Court of Appeals 16 April 1985.

The plaintiff, Veronica Brevard, and the defendant, David Brevard, married on 4 November 1972. Two children were born to the marriage: David Rusty Brevard, born on 23 October 1973, and Tracy Paul Brevard, born on 14 September 1974. The Brevards' marriage deteriorated, and they separated on 5 November 1980.

The Brevards entered into a separation agreement on 13 November 1980. This agreement provided that plaintiff would have custody of the children and that defendant would be entitled to visitation at certain specified times. The agreement also provided that defendant would pay for the children's medical and health insurance, medical expenses, and clothing.

Sometime after the execution of the separation agreement, the defendant became paralyzed. Due to his disability, his children became eligible for benefits under the federal Social Security Act.

On 31 March 1982, a judgment of absolute divorce was entered on grounds of one-year separation, dissolving the parties' marriage. This judgment awarded custody of the two children to plaintiff, subject to defendant's visitation rights. The judgment also "ordered and/or requested" the Social Security Administration (SSA) of the United States Department of Health, Education and Welfare to send the children's Social Security checks, payable due to defendant's disability, directly to plaintiff for use in supporting the children.

The SSA did not make the children's checks payable directly to the plaintiff. Rather, defendant continued to receive the checks. From 30 March 1982 until June of 1984, defendant received $10,301.20 in Social Security benefits. During this same period, defendant spent $98.67 for the children's medical expenses and paid plaintiff seventy weekly payments of $70 each pursuant to a child support order of 6 December 1982.

On 9 August 1982, plaintiff made a motion for an accounting by defendant of the amounts received by him from the SSA on behalf of the children. Defendant objected to the jurisdiction of the court. The court ruled that it had jurisdiction, and defendant gave notice of appeal, but failed to perfect that appeal.

The district court held a hearing on plaintiff's motion for an accounting, and entered a judgment on 28 June 1984, ordering defendant to pay into the court $5,302.53, the difference between the total amount received from the SSA on the children's behalf since 30 March 1982 and the amount expended for the children's medical expenses and paid to plaintiff pursuant to the court order of 6 December 1982. The court also ruled that any and all sums

received for the use and benefit of the children as a result of defendant's disability should be transferred to plaintiff as support for the minor children.

At the hearing, the district court ruled inadmissible as self-serving hearsay a letter from the SSA, explaining that the SSA had decided to pay the checks to the children's father, rather than to their mother, and that under federal law these sums were not subject to legal process.

The defendant now appeals the order and the district court's ruling on the letter from the SSA.

Jack H. Potts for plaintiff appellee.

Waymon L. Morris for defendant appellant.

ARNOLD, Judge.

This case concerns the question of whether a North Carolina district court properly ordered the Social Security Administration (SSA) and the defendant, a representative payee receiving Social Security disability payments for the benefit of his children, to pay those benefits directly to the plaintiff. The plaintiff and defendant are divorced, and the plaintiff, the children's mother, has custody of the children.

The case reaches us as an appeal from an order of 28 June 1984, which followed a motion by the plaintiff for an accounting of the benefits defendant had received on the children's behalf from the SSA. In this order, the district judge found:

> That by order of the Honorable Zoro J. Guice, Jr., District Court Judge, dated March 31, 1982, the United States Department of Health, Education and Welfare, Social Security Administration is hereby ordered and/or requested to send the children's Social Security checks, payable due to Mr. Brevard's physical disability, directly to the plaintiff for use in supporting the children born of the marriage.

The district court found further that the defendant failed to perfect an appeal of an order denying his objection to the court's jurisdiction. The court concluded that this matter was properly before it for an accounting.

The district court found that the defendant is indebted to plaintiff for the difference between the Social Security benefits received from 30 March 1982 and the amount defendant paid for the children's medical bills and paid into court pursuant to a child support order (of 6 December 1982). The defendant received $10,301.20 in benefits, spent $98.67 on the children's medical bills, and $4,900 for the use and benefit of the children pursuant to the court order. The amount found due, then, was $5,302.53.

The district court also found that defendant's mother, who acted as custodian of the Social Security funds, testified that the sums received had all been spent for the use and benefit of the children except for $2,000 she had used to reimburse herself for funds she previously had spent on the children when they were residing with her.

The court concluded that the defendant should pay into court the $5,302.53 due, which would be disbursed to the plaintiff for the use and benefit of the children, and concluded also that "any and all sums received for the use and benefit of the children as a result of the defendant's disability be transferred to the plaintiff as support for the minor children."

Both the order of 28 June 1984 and that of 31 March 1982 assume that the district court has the power to order the SSA and the defendant to transfer Social Security benefits to the plaintiff. In this case, we believe that this is an erroneous assumption, one crucial to the disposition of this case.

In general, Social Security benefits are neither assignable nor subject to legal process. 42 U.S.C. 407; *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed. 2d 608 (1973). Yet, Congress has enacted an exception to this general bar in the case of Social Security benefits paid to individuals obligated to provide alimony or child support. *See* 42 U.S.C. § 659; 20 CFR § 404.1820(b) (1984).

In the present case, although the entitlement to benefits is determined in part upon their father's disabled status, the children and not the father are entitled to the funds. They are the beneficiaries, while the father is the representative payee. The exception to 42 U.S.C. § 407 does not apply to the present case, because the children are not individuals obligated to pay child

support under state law. *Hennagin v. County of Yolo*, 481 F. Supp. 923, 924 (E.D. Cal. 1979). The district court thus had no power to order on 31 March 1982 that the SSA pay the children's benefits to someone other than their father, who had been designated the representative payee.

We note two other defects in that order: (1) at that point, even if he had been the beneficiary, the defendant had not been subjected to a child support order, and so 42 U.S.C. § 659 had not come into play, and (2) the district court had not acquired jurisdiction over the SSA by making it a party to the action.

In its order of 28 June 1984, the district court therefore erred to the extent it relied upon the 31 March 1982 order to the SSA to transfer benefits to plaintiff. Further, the district court had no power in its 28 June 1984 judgment to order the defendant to pay over to the court or to plaintiff any part of the Social Security benefits he had received, or might receive in the future, as payee for the children. 42 U.S.C. 407 applies not only to funds in the hands of the SSA, which have not yet been paid out, but also to funds that have been disbursed. *See* 42 U.S.C. 407(a) ("none of the moneys *paid or payable* or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process . . . ." (emphasis added)); *Anderson v. First National Bank of Atlanta*, 151 Ga. App. 573, 260 S.E. 2d 501 (1979) (involving attempted garnishment of bank account containing Social Security funds).

In enacting Title 42, Chapter 7, Congress provided that the use or misuse of federal Social Security benefits would be a federal matter, entrusted primarily to the SSA. It created an exception in the case of a beneficiary obligated to pay alimony or child support, but that does not apply in this case, where the beneficiaries are the children and the benefits were not made subject to a child support order. The SSA is responsible to see that defendant is spending the disability payments for the children's benefit. Plaintiff may have an administrative remedy, through petitioning the SSA to remove defendant as representative payee or to conduct an inquiry into his use of the children's funds. *See* 20 C.F.R. 404.2001 *et seq.*; *see also* 18 U.S.C. § 641 (which the SSA might invoke if defendant has misused federal moneys). The courts of North Carolina, however, do not possess the power to compel the

SSA to transfer the children's benefits to someone other than the designated payee, nor do they have the power to determine that defendant is misusing Social Security benefits paid to him on behalf of the children and to direct that he account for them to some other person.

This is not to say, however, that the courts of North Carolina may not enter a child support order after making the findings required under our statutes, and hold the defendant responsible to pay the amount he has been found capable of paying. This the district court properly did in its order of 6 December 1982.

We see no need to reach defendant's other assignments of error.

The order of 28 June 1984 is vacated; the order of 31 March 1982 is vacated insofar as it orders the SSA to pay Social Security checks directly to plaintiff.

Vacated.

Judges PHILLIPS and COZORT concur.

BANK OF ALAMANCE v. WILLIAM LEE ISLEY, SR. AND JAMES SAMMY KERNODLE

No. 8415SC739

(Filed 7 May 1985)

1. **Automobiles and Other Vehicles § 5.2; Uniform Commercial Code § 42— security interest in automobile—certificate of title statutes govern**

Where an automobile is sold in contemplation of regular use on the highway, the vehicle is subject to the certification of title statute, G.S. 20-58 *et seq.*, and the provisions of Art. 9 of the U.C.C. pertaining to the filing, perfection and priority of security interests do not apply. G.S. 25-9-302(3)(b).

2. **Automobiles and Other Vehicles § 5.2— sale of automobile—delayed perfection of security interest—subsequent innocent purchaser for value**

The trial court properly concluded that defendant Kernodle has the superior right and title to the subject vehicle over plaintiff Bank of Alamance where defendant Isley, from whom defendant Kernodle purchased the car, had financed the vehicle through plaintiff but plaintiff had failed to take possession of the manufacturer's certificate of origin and did not perfect its security in-

terest until after defendant Kernodle purchased the vehicle from Isley for value. A late perfected security interest is not retroactively valid against an innocent third party who acquired the automobile for value. G.S. 20-52.1(c), G.S. 20-58.2, G.S. 25-9-307(1).

APPEAL by plaintiff from *Lee, Judge.* Judgment entered 6 April 1984 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 7 March 1985.

In this civil action, the plaintiff, Bank of Alamance, sues for claim and delivery, asking for the return of an automobile in the possession of defendant James Sammy Kernodle and a money judgment against defendant William Lee Isley, Sr. The uncontroverted facts may be summarized as follows: On 28 September 1981, Nissan Motor Corporation issued a manufacturer's statement of origin to Billy Gordon Datsun, Inc., for a 1981 Datsun 280ZX automobile. On 24 February 1982, Billy Gordon Datsun sold the automobile to Bill Isley Auto Sales, Inc., for the purchase price of $13,679.00. The original manufacturer's certificate of origin for the automobile was given to defendant Isley, owner of Bill Isley Auto Sales, by Billy Gordon Datsun, with the first assignment on the back thereof incomplete.

Later that same day, defendant Isley took the automobile to a loan officer of the Bank of Alamance and requested the plaintiff bank to lend him the sum of $11,743.00 to purchase the automobile from his dealership. Isley produced the original manufacturer's statement of origin with the incomplete assignment, a non-negotiable copy of a check drawn on the account of Bill Isley Auto Sales, payable to Billy Gordon Datsun, for $14,679.00, $1,000.00 greater than the sale price from Billy Gordon Datsun, and the window sticker. The plaintiff bank made the loan and executed a cashier's check for $11,743.00 to William L. Isley and Bill Isley Auto Sales. The bank did not retain the manufacturer's certificate of origin; instead, Isley was allowed to retain the title documents for the purpose of obtaining execution by Billy Gordon Datsun and taking them to the Department of Motor Vehicles. The bank sent two notices, 2 April and 30 April 1982, requesting Isley to deliver the title certificate with the bank's lien recorded thereon. Isley obtained a duplicate manufacturer's certificate of origin from Nissan Motor Corporation and sent it to the Department of Motor Vehicles, and title documents noting William Lee

Isley, Sr., as owner with a lien in favor of the Bank of Alamance were issued on 20 May 1982.

Meanwhile, Bill Isley Auto Sales offered the automobile for sale as a new car, and on 29 March 1982, defendant Kernodle and his wife purchased the automobile from Bill Isley Auto Sales for $14,200.00. Isley, who handled the paperwork with regard to the sale and transfer of title, sent the original certificate of origin to the Department of Motor Vehicles after having changed, on the original certificate of origin, one digit of the serial number. Kernodle did not check the serial number on the car against the number on the sales documents. Kernodle paid $700.00 down with the balance of the financing assigned to Wachovia Bank and Trust Company. The Kernodles' title was based on this original manufacturer's statement of origin which was assigned on 24 February 1982 from Billy Gordon Datsun to Bill Isley Auto Sales. The second assignment noted on the title transfer form was from Bill Isley Auto Sales to James Sammy Kernodle and wife with a lien in favor of Wachovia Bank and Trust Company.

Isley made the monthly payments to plaintiff Bank until 26 December 1982 at which time plaintiff made demand for payment or return of the automobile. Upon discovering that the automobile was not in Isley's possession, the bank instituted a civil action seeking a return of the automobile from Kernodle and a money judgment against Isley. Defendant Isley did not answer and summary judgment was entered against him; no appeal was taken. Defendant Kernodle filed an answer denying plaintiff's title to the automobile. A non-jury trial was held on the claim and delivery proceeding, and judgment was entered in favor of defendant Kernodle. Plaintiff appealed.

Craig T. Thompson, for plaintiff appellant.

Holt, Spencer, Longest & Wall, by Frank A. Longest, Jr., for defendant appellee.

MARTIN, Judge.

Plaintiff's contentions on appeal challenge the trial court's findings of fact and conclusions of law which determine that defendant Kernodle has superior right and title to the automobile in his possession over the plaintiff bank. As such, the sole question presented by this appeal is one of priority of claims. Because

a late-perfected security interest is not retroactively valid against an innocent third party who acquired the automobile for value, we affirm the judgment of the trial court.

[1] The Uniform Commercial Code, as adopted in North Carolina, provides the general law for transactions in consumer goods and the creation of security interests in those goods. G.S. 25-2-102; G.S. 25-9-102. However, the provisions of Article 9 of the Uniform Commercial Code pertaining to the filing, perfection and priority of security interests do not apply to a security interest in any personal property required to be registered pursuant to Chapter 20 of the General Statutes, entitled "Motor Vehicles," unless such property is held as inventory and the security is created by the inventory seller. G.S. 25-9-302(3)(b). The automobile in this case was sold in contemplation of regular use on the highway. Once a sale of an automobile has occurred contemplating regular use, whether it be a sale of a complete or limited interest, the vehicle is then subject to North Carolina's certificate of title statute, G.S. 20-58 et seq. "[A] security interest in a vehicle of a type for which a certificate of title is required shall be perfected only as" provided in this statute. G.S. 20-58. This statute provides a comprehensive system for central recordation of ownership, security interests and liens in all motor vehicles registered and regularly in use in this State. Thus, Chapter 20 of the General Statutes is applicable in determining any issues regarding the perfection of a security interest in the automobile in this case.

[2] Since filing under the provisions of Article 9 is neither necessary nor effective to perfect a security interest in this case, we turn to an examination of priorities as governed by Chapter 20 on motor vehicles. G.S. 20-52.1(c) provides that

> where a security interest is obtained in the motor vehicle from the transferee in payment of the purchase price or otherwise, the transferor shall deliver the manufacturer's certificate of origin to the lienholder and the lienholder shall forthwith forward the manufacturer's certificate of origin together with the transferee's application for certificate of title and necessary fees to the Division.

According to G.S. 20-58.2, perfection of the security interest in a motor vehicle occurs when the application and proper fee are delivered to the Department of Motor Vehicles. *See also Fer-*

guson v. Morgan, 282 N.C. 83, 191 S.E. 2d 817 (1972). In order to obtain protection of a lien as of the lien date, the application must be delivered to the Department of Motor Vehicles within ten days; if the delivery is not made within the ten day period, the security interest is perfected as of the date of delivery. G.S. 20-58.2.

The evidence revealed that the loan officer of the Bank of Alamance failed to take possession of the manufacturer's certificate of origin upon making the loan to defendant Isley on 24 February 1982. As a result, plaintiff's lien was not perfected until the date of delivery of the application to the Department of Motor Vehicles, 20 May 1982, a time subsequent to defendant Kernodle's purchase of the automobile for value and Wachovia Bank and Trust Company's perfection of its security interest in the automobile. It follows that at the time defendant Kernodle purchased the vehicle from Bill Isley Auto Sales, the Bank of Alamance had not perfected its lien. In fact, plaintiff bank had provided Bill Isley Auto Sales, through defendant Isley, with possession of the vehicle and all ownership documents which were incomplete as to a transfer of title and which did not show that the bank was a lienholder when defendant Kernodle purchased the vehicle for value.

While G.S. 25-9-307(1) provides that "[a] buyer in ordinary course of business . . . takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence," we believe this provision of the Uniform Commercial Code is not applicable in this case. This provision is not operative in instances where perfection of the security interest is required under Chapter 20 on motor vehicles. The operation of G.S. 25-9-307(1) in this case is expressly excluded by G.S. 25-9-302(3)(b). *See* Amended Official Comment 3, G.S. 25-9-307. The security interest in a vehicle for which a certificate of title is required under Chapter 20 shall be perfected and valid against subsequent creditors of the owner, transferees, and holders of security interests and liens on the vehicle by compliance with the provisions of G.S. 20-58 et seq. While we believe these provisions adhere to the protection of security interests against third parties who acquire rights in a vehicle with actual notice of the security interest or without giving value in the interim period between creation of a security

interest and late perfection of the interest, we hold that a late-perfected security interest is not retroactively valid against an innocent third party who acquired the automobile for value. (For other cases so holding, *see* 79 C.J.S. Supp., *Secured Transactions*, § 59, p. 63.)

The evidence showed without dispute that defendant Kernodle had no actual knowledge of plaintiff's security interest until the Bank of Alamance demanded possession of the car. His constructive notice dated from 20 May 1982 when the application for a certificate of title was belatedly delivered to the Department of Motor Vehicles and the security interest thus perfected. G.S. 20-58.2. Under our interpretation of G.S. 20-58.2, defendant Kernodle, whose rights in the vehicle dated from 29 March 1982, had priority, and the trial court properly concluded that "the Defendant, James Sammy Kernodle, has superior right and title to subject vehicle in his possession over the Bank of Alamance." Its judgment is

Affirmed.

Judges WEBB and PHILLIPS concur.

MARILYN SUE RUDD COLEMAN v. THOMAS VESTAL COLEMAN, SR.

No. 8415DC707

(Filed 7 May 1985)

1. **Rules of Civil Procedure § 16— relief from order—child support order as final order—alimony pendente lite order not final**

A child support order was a "final" order within the purview of G.S. 1A-1, Rule 60(b) even though it could be modified upon a showing of changed circumstances. However, an order for alimony pendente lite is not a "final" order that can be a proper subject of a G.S. 1A-1, Rule 60(b) motion for relief from judgment.

2. **Rules of Civil Procedure § 60.3— insufficient evidence to support finding—no ground for relief from judgment**

Defendant's contention that the evidence did not support a finding by the trial court concerning defendant's ability to pay child support does not amount to a showing of mistake, misrepresentation, or any of the other grounds stated in G.S. 1A-1, Rule 60(b) for granting relief from a judgment.

3. Divorce and Alimony § 21.5— ability to pay support while in prison—rental property—contempt of court

The evidence supported the trial court's finding that defendant owned a house by an unrecorded deed and was entitled to rents and profits from the house. Moreover, evidence that the house generated $200 per month in rental income established defendant's ability to pay $200 per month for child support and alimony pendente lite while he was in prison and supported the trial court's determination that defendant's failure to pay was willful and in contempt of court.

4. Divorce and Alimony § 18.16— alimony and child support action—attorney fees—insufficient findings

The trial court's findings were insufficient to support its award of attorney fees to plaintiff in an action for alimony and child support where the court failed to make findings as to the attorney's skill, his hourly rate, its reasonableness in comparison with that of other attorneys, what he did, and the hours he spent.

5. Appeal and Error § 1— contentions not cross-assignments of error—failure to give notice of appeal—absence of jurisdiction in appellate court

The Court of Appeals had no jurisdiction to review plaintiff's contentions with respect to visitation rights granted to defendant since (1) the contentions are not cross-assignments of error because they do not concern an alternative basis for supporting the judgment, and (2) plaintiff failed to give any notice of appeal. App. Rule 10(d).

APPEAL by defendant from *Harris, W. S., Jr., Judge.* Order entered 6 October 1983 in District Court, ALAMANCE County. Heard in the Court of Appeals 14 February 1985.

Plaintiff filed a complaint on 17 December 1982 in which she asked for, *inter alia,* alimony, custody of the parties' minor child, and child support. Eleven days later defendant went to plaintiff's residence and shot her, causing serious injury. Defendant received a twenty-year prison sentence in May of 1983 upon his plea of guilty to assault with a deadly weapon with intent to kill inflicting serious injury.

On 28 July 1983 the trial court ordered that plaintiff have custody of the parties' minor child, that defendant pay plaintiff $150 per month for child support, and that defendant pay plaintiff $50 per month as alimony pendente lite. On 20 September 1983 the defendant moved for relief from judgment pursuant to G.S. 1A-1, Rule 60(b), and he also moved to be allowed visitation with his child. Plaintiff moved for an order to require defendant to show cause why he should not be held in contempt for failure to

pay child support and alimony pendente lite as previously ordered. The trial court heard all three motions on 6 October 1983, and after making findings of fact and conclusions of law, entered an order that (1) denied defendant's motion for relief from judgment, (2) found defendant in contempt for willful failure to pay $600 in child support and $200 in alimony that were in arrears, (3) required defendant to pay $880 toward plaintiff's attorney fees, (4) directed that defendant's personal property be sold and the proceeds applied toward payment of child support, alimony, and attorney fees for plaintiff, and (5) allowed defendant visitation once a month with his daughter. Defendant appeals.

John P. Paisley, Jr., for plaintiff appellee.

Grady Joseph Wheeler, Jr., for defendant appellant.

WEBB, Judge.

Defendant contends the trial court erred in denying his G.S. 1A-1, Rule 60(b) motion for relief from the judgment ordering him to pay child support, alimony pendente lite, and attorney fees. We note initially that the 28 July 1983 order that was the subject of the motion for relief from judgment did not require payment of attorney fees—it only ordered defendant to pay child support and alimony pendente lite. Nor did defendant's motion ask for relief from any order of attorney fees. Therefore no review of the denial of defendant's motion is necessary with respect to attorney fees.

[1] Plaintiff argues that G.S. 1A-1, Rule 60(b) applies by its terms only to "final" orders of judgments, and an order for payment of child support and alimony is not final since it may be subsequently modified, so defendant had no legal basis to seek relief from judgment under G.S. 1A-1, Rule 60(b). However, *Dishman v. Dishman*, 37 N.C. App. 543, 546, 246 S.E. 2d 819, 822 (1978) held that a custody order was a "final" order within the meaning of G.S. 1A-1, Rule 60(b) even though it could be modified subsequently upon a proper showing of change of circumstances under G.S. 50-13.7. The same rationale applies to orders for child support. Like custody orders, child support orders are not "final" orders only in the sense that they may be modified subsequently upon a motion in the cause and a showing of change of circumstances as provided in G.S. 50-13.7. Like custody orders, a party may seek

relief from a child support order pursuant to G.S. 1A-1, Rule 60(b). *See Walker v. Walker*, 59 N.C. App. 485, 297 S.E. 2d 125 (1982) and *Boyd v. Marsh*, 47 N.C. App. 491, 267 S.E. 2d 394 (1980) (both implicitly recognizing the appropriateness of a G.S. 1A-1, Rule 60(b) motion for relief from a child support order, but denying such relief on the particular facts involved).

An order for alimony pendente lite is also not "final" in the sense that it is subject to modification upon a motion in the cause and a showing of change of circumstances. G.S. 50-16.9. However, alimony pendente lite has another interlocutory aspect that distinguishes it from awards of custody, child support, and alimony that are not pendente lite. By definition alimony pendente lite is a temporary award made during the pendency of a judgment that will be final except for the possibility of modification for change of circumstances. G.S. 50-16.1(2). For this reason, pendente lite awards have been held to be nonappealable interlocutory orders. *Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E. 2d 281 (1981). Given the interlocutory nature of an order for alimony pendente lite, which allows correction of any error at the district court's final hearing on the matter, we hold that such an order is not a "final judgment, order, or proceeding" that can be the proper subject of a G.S. 1A-1, Rule 60(b) motion. *See Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975). Thus, the denial of defendant's motion pursuant to G.S. 1A-1, Rule 60(b) was correct as to the award of alimony pendente lite.

[2] With respect to the award of child support, we must assume the order was final, although subject to modification for change of circumstances, rather than pendente lite since there is no indication in the order that it is temporary or pendente lite. Thus, the child support order was properly the subject of G.S. 1A-1, Rule 60(b) motion by defendant. Nonetheless, defendant has failed to show an abuse of discretion in the trial court's denial of his motion. Defendant maintains that he does not possess the means to pay child support. The trial court's conclusion to the contrary was based on a finding that defendant owned a house that generated $200 per month in rental income. Defendant argues that the weight and sufficiency of the evidence were inadequate to support such a finding. This argument does not amount to a showing of "mistake," "misrepresentation," or any of the other grounds stated in G.S. 1A-1, Rule 60(b) for granting relief from an order.

This assignment of error has no merit for the reason set forth in *Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E. 2d 115, 117, *appeal dismissed and disc. rev. denied*, 303 N.C. 319, 281 S.E. 2d 659 (1981): "It is settled law that erroneous judgments may be corrected only by appeal, and that a motion under G.S. 1A-1, Rule 60(b) of the Rules of Civil Procedure cannot be used as a substitute for appellate review." (Citations omitted.)

[3] Defendant next contends that the trial court erred in finding him in willful contempt for nonsupport and in concluding that he owned rental property. The parties stipulated that the last recorded deed for the property in question granted it to defendant's brother. Yet defendant lived in the house up to the time of his incarceration, paid for a homeowner's insurance policy covering the house, and never paid his brother rent for it. Plaintiff testified that defendant had admitted to her that the house had been put in his brother's name in 1974 to prevent his first wife from acquiring an interest in the house when she left defendant. Plaintiff further testified that defendant admitted that the house had been conveyed back to him. Additional evidence showed that the house had been rented for $200 per month since March of 1983. This evidence supported the trial court's finding and conclusion to the effect that the house had been deeded back to defendant after he transferred it to his brother in the 1974 recorded deed, that defendant owned the house by unrecorded deed, and that he was entitled to the rent and profits from the house. Defendant's failure to record his deed invalidates it only as against lien creditors and purchasers for a valuable consideration from his brother—neither of which are involved in this case. G.S. 47-18. Defendant's ownership of rental property generating $200 per month in income establishes his ability to pay $200 per month for child support and alimony pendente lite while he is in prison. The trial court properly concluded that defendant's failure to pay was willful, wanton and in contempt of court.

[4] Defendant last contends the trial court erred in ordering him to pay a partial allowance of attorney fees for the plaintiff in the amount of $880. The trial court made both a finding and a conclusion to the effect that plaintiff's attorney provided her with "valuable legal services" in the prosecution of this action. While the trial court's findings otherwise may be sufficient to support an award of attorney fees under G.S. 50-13.6 and 50-16.4, *see Hud-*

son v. Hudson, 299 N.C. 465, 263 S.E. 2d 719 (1980), the order fails to satisfy this Court's requirement of "findings as to the lawyer's skill, his hourly rate, its reasonableness in comparison with that of other lawyers, what he did, and the hours he spent." *Falls v. Falls*, 52 N.C. App. 203, 221, 278 S.E. 2d 546, 558, *disc. rev. denied*, 304 N.C. 390, 285 S.E. 2d 831 (1981). Therefore the case must be remanded for appropriate findings as to attorney fees.

[5] Plaintiff contends the trial court erred in several respects when it granted visitation rights to defendant. These contentions are not cross-assignments of error because they do not concern an alternative basis in law for supporting the judgment. N.C. Rules of Appellate Procedure, Rule 10(d). The trial transcript and record on appeal contain no indication that plaintiff gave notice of appeal within ten days of the order, or defendant's notice of appeal, or any other time. Accordingly, we have no jurisdiction to review the plaintiff's contentions. G.S. 1-279; N.C. Rules of Appellate Procedure, Rule 3(c).

Affirmed in part; remanded for additional findings.

Judges PHILLIPS and MARTIN concur.

RICHARD M. HAWKINS AND R. M. WILLIAMS v. STATE CAPITAL INSURANCE COMPANY

No. 846SC852

(Filed 7 May 1985)

1. Insurance § 128— fire insurance—property vacant—directed verdict for defendant proper

There was no reversible error where the trial court erroneously directed a verdict for defendant insurance company in an action to recover under a fire insurance policy on the grounds that the hazard of fire was increased by means within the control and knowledge of the insured. A condition of the policy was that insurance coverage was suspended if the building was vacant or unoccupied for a period of sixty consecutive days and the uncontroverted evidence was that the house had been unoccupied for more than ninety days prior to the fire. G.S. 58-176(c).

2. Insurance § 128— fire insurance—vacancy clause—no waiver

A provision in a fire insurance policy providing for suspension of coverage if the building was unoccupied for more than sixty days could not be waived as a matter of law as to subsequent vacancies where the defendant's agent had knowledge that the property was vacant when the policy was issued but two different tenants occupied the premises before the fires. G.S. 1A-1, Rule 8(c).

APPEAL by plaintiffs from *Walker, Judge.* Judgment entered 19 March 1984 in Superior Court, HALIFAX County. Heard in the Court of Appeals 5 April 1985.

This is a civil case in which plaintiffs, Richard M. Hawkins and R. M. Williams, seek to recover benefits pursuant to a fire insurance policy issued to them by defendant, State Capital Insurance Company.

The essential facts are:

Plaintiffs were owners of several rental houses in and around Roanoke Rapids in Halifax County. In January, 1979, plaintiff Hawkins contacted defendant's agent, Mr. Roy Wilkins, for the purpose of obtaining insurance on a rental house located on Wood Street, approximately one-half mile west of Roanoke Rapids. Hawkins and Wilkins visited the property prior to the issuance of the policy. The property was insured in the amount of $6,000 under a policy issued for the period of 16 January 1979 to 15 January 1982 for a yearly premium of $48.00.

On 13 May 1981 at 11:55 p.m., the Davie Fire Department responded to a small fire at the rental house. The fire was extinguished and the firemen found the windows and doors closed, but the doors were not locked. The fire department estimated the damage caused by the fire to be $250.00. The cause of the fire was listed as undetermined. Plaintiff Hawkins received telephone notification of the fire at approximately 1:00 a.m. on 13 May 1981 and went to the property. Finding the fire department already departed, Hawkins left and did not attempt to secure the house.

At approximately 4:15 a.m. on 14 May 1981, the fire department again responded to a fire at the property in question. This time, the house was totally destroyed. Again, the cause of the fire was listed as unknown. Hawkins was notified of the second fire and went to the house. Hawkins told Assistant Fire Chief David

Padgette that the house had been empty "for the last twelve months."

Plaintiffs' claim under the policy was denied by defendant. Plaintiffs filed suit and the case was tried before the Honorable Russell G. Walker, Jr. and a jury. At the close of all the evidence, the trial court directed verdict for defendant. In his judgment, Judge Walker stated:

> The Court being of the opinion that the motion should be allowed on the basis of Defendant's THIRD DEFENSE, suspension of the coverage while the hazard of the fire was increased by means within the control and knowledge of the insureds, and that a directed verdict may be appropriate on some or all of Defendant's other affirmative defenses but that rulings thereon are now unnecessary.

Plaintiffs appeal and defendant cross assigns as error the trial court's failure to rule on defendant's other affirmative defense of vacancy or unoccupancy of the insured premises for more than 60 days.

Cranford and Whitaker by Dwight L. Cranford, for plaintiff-appellants.

Young, Moore, Henderson and Alvis, by Walter E. Brock, Jr., for defendant-appellee.

EAGLES, Judge.

The issue here is whether the trial court erred in entering a directed verdict in favor of defendant at the close of all the evidence presented. We find no reversible error.

[1] On appeal from the granting of a motion for directed verdict, all the evidence tending to support plaintiff's claim must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference which legitimately may be drawn therefrom, with contradictions, conflicts and inconsistencies therein being resolved in plaintiff's favor. *Adler v. Insurance Co.*, 10 N.C. App. 720, 179 S.E. 2d 786, *aff'd*, 280 N.C. 146, 185 S.E. 2d 144 (1971). If the evidence thus considered is insufficient to go to the jury, the granting of the motion for a directed verdict must be upheld. *Id.*

The policy in question provides in a section entitled "Conditions suspending or restricting insurance":

> Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring
>
> (a) While the hazard is increased by any means within the control or knowledge of the insured; or
>
> (b) While a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days.

This language is required by G.S. 58-176(c).

Here, the trial court granted a directed verdict for defendant on the grounds that the hazard of fire was increased by means within the control and knowledge of the insured. Our examination of the record indicates that plaintiffs made some attempts to safeguard the premises in question including going to the house to check doors and windows and placing a "posted" sign on the premises. While there is strong evidence in the record to indicate actual abandonment of the premises in question, we cannot say that if plaintiffs' evidence had been believed, a jury could not have found for plaintiffs on the issue of increased hazard. Accordingly, we hold that the trial court erred in entering a directed verdict in favor of defendant on its defense of increased hazard. However, as a condition of the policy in question, we note that insurance coverage is suspended if the described building is vacant or unoccupied for a period of sixty consecutive days. On this issue, the following testimony by plaintiff Hawkins is determinative:

> Q: Now, Mr. Hawkins, there really is no question in your mind that there was no tenant in this house [nor] any amount of furniture for use by tenants for a period of ninety days or more before the fire occurred?
>
> A: No sir, that's correct.
>
> Q: In other words, to ask you differently, the house was vacant and it was unoccupied for more than ninety days prior to this fire.
>
> A: Yes, sir. To be honest with you, yes, sir.

Q: Of course, you knew that before the fire, that is, that [it] was vacant during that period of time?

A: Yes sir, uh-huh.

We also note that Assistant Fire Chief Padgette testified that Hawkins told him at the time of the second fire that the house in question "had been empty for the last twelve months." This evidence is uncontroverted. Accordingly, unless there is a waiver of this condition by defendant, plaintiffs are barred as a matter of law from recovering under their policy of insurance and a directed verdict for defendant is proper.

[2] Waiver and estoppel must be pleaded as affirmative defenses. G.S. 1A-1, Rule 8(c). *Laughinghouse v. Insurance Co.*, 200 N.C. 434, 157 S.E. 131 (1931). *Cf., Stuart v. Insurance Co.*, 18 N.C. App. 518, 197 S.E. 2d 250 (1973) (not necessary to plead waiver where case tried on that theory and written notice to agent of non-occupancy admitted at trial). Here, waiver was never pleaded by plaintiffs.

However, there could be no waiver as a matter of law for the vacancy that occurred prior to the fires that ultimately destroyed the rental house. In *Fire Fighter's Club v. Casualty Co.*, 259 N.C. 582, 131 S.E. 2d 430 (1963), our Supreme Court noted that policy provisions which merely suspend the insurance during an unpermitted vacancy period, as is the case here, have been held not to provide a waiver of the policy provision entirely where the property is vacant at the issuance of the policy, but only a waiver during that particular vacancy. A waiver is applicable to conditions known at the inception of the policy because policy provisions restricting the power of an agent to waive conditions are construed to apply to occurrences after the policy is issued. *Johnson v. Insurance Company*, 172 N.C. 142, 90 S.E. 124 (1916). Vacancies which occur after the policy has been issued cannot be waived by the issuing agent. *Greene v. Insurance Co.*, 196 N.C. 335, 145 S.E. 616 (1928).

Here, the evidence is uncontroverted that the insurer's agent had knowledge that the property in question was vacant when the policy was issued because of renovations to the property. However, two different tenants had occupied the premises since the policy was issued and before the fires. Accordingly, any

subsequent vacancies could not be waived by defendant's agent under our law. *Greene v. Ins. Co., supra.*

Our court's holding in *Wells v. Insurance Company*, 43 N.C. App. 328, 258 S.E. 2d 831 (1979), *cert. denied*, 299 N.C. 124, 261 S.E. 2d 926 (1980), does not apply where the evidence is uncontroverted, as it is here, that there was no expectation that the property would remain vacant when the policy was issued.

For the reasons herein stated, we hold that a directed verdict for defendant is proper because there was a vacancy in the insured premises for more than sixty consecutive days in violation of a condition of the insurance policy in question. The order of the trial court is modified accordingly. The remaining assignments of error are without merit.

Modified and affirmed.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. BONNIE DAIL WHITE

No. 841SC735

(Filed 7 May 1985)

1. **Arson § 4.1— procuring burning of house—interests of others—showing of wantonness**

In a prosecution for wantonly procuring the burning of, and conspiracy to burn, an uninhabited house, evidence that defendant's sister and her husband had an interest in the house, that defendant had the house burned to solve a problem of divided ownership, and that a bank had a security interest in the house was sufficient to permit the jury to find that defendant conspired to burn and procure the burning of the house wantonly in that she did so in conscious disregard of and indifference to the rights of her sister, her sister's husband and the bank.

2. **Arson § 3; Criminal Law § 80.1— wantonly procuring burning of property—copy of deed of trust—authenticity—relevancy**

In a prosecution for wantonly procuring the burning of, and conspiracy to burn, an uninhabited house, the authenticity of a copy of a deed of trust was sufficiently established for its admission into evidence when defendant identified an exhibit as the deed of trust she and her husband signed in which they pledged the house as security for a bank loan. Moreover, the deed of trust

was relevant to show the interest of the bank in the burned property and thus to prove that defendant acted wantonly in procuring the burning.

APPEAL by defendant from *Phillips, Herbert O., III, Judge.* Judgments entered 9 December 1983 in Superior Court, PERQUIMANS County. Heard in the Court of Appeals 6 March 1985.

Defendant was convicted of unlawfully, willfully, and wantonly procuring the burning of an uninhabited house in violation of G.S. 14-62 and of conspiracy to unlawfully, willfully, and wantonly burn an uninhabited house. She was sentenced to imprisonment for less than the presumptive terms, the sentences to run concurrently. Defendant timely filed a motion for appropriate relief pursuant to G.S. 15A-1401, *et seq.*, in which she sought to have the convictions set aside or, in the alternative, a new trial. The motion was denied. From the judgments entered and the order denying her motion for appropriate relief, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Charles H. Hobgood, for the State.

Trimpi, Thompson and Nash, by Thomas P. Nash, IV, and John G. Trimpi, for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court erred in denying her motion to dismiss and her motion for appropriate relief. She argues that insufficient evidence was presented to show that she wantonly procured the burning of, or conspired to burn, the house.

In determining the sufficiency of the evidence to take the case to the jury, the evidence must be viewed in the light most favorable to the State. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E. 2d 649, 652 (1982). So viewed, the evidence here tends to show the following:

The house which was burned was located primarily on land owned by defendant and her husband. The property had been deeded to them by defendant's father when he divided his property among his children. Defendant's sister and her husband were deeded an adjoining tract of land. The boundary line between the tract owned by defendant and that owned by her sister ran through the house, so that approximately four feet of the house

frontage was on the land owned by defendant's sister. Prior to the fire, defendant and her husband, along with four other persons, executed a deed of trust in favor of the Bank of North Carolina in which they pledged the property given them by defendant's father, as well as other property, as security for a loan in the amount of $250,000. Defendant admitted that the bank had an interest in the house because of this deed of trust. The house was used as rental property but was uninhabited at the time of the fire. Defendant and her husband maintained insurance on the house and collected $20,000 under the insurance policy because of the fire loss.

In August 1982 defendant asked Larry Sanders, a co-employee, to burn the house for her in exchange for ten percent of the $20,000 insurance proceeds. Sanders testified that defendant told him she wanted the house burned because "the house set two foot on her—I believe she told me her sister's land. The farm had been split up at her parents' death is the way I understood it, and she was having some kind of problems there." Defendant showed Sanders where the house was located and told him she wanted it completely burned down. Defendant's employer, Luckie Cartwright, who owed defendant some money, agreed to help Sanders burn the house. Defendant, Sanders, and Cartwright discussed the details of burning the house and agreed that the best time to burn it would be on a night when defendant was out of town so she would have an alibi.

On 12 August 1982 defendant told Sanders she was going out of town and she wanted him to make sure he did a good job. That night Sanders and Cartwright set fire to defendant's house. A passerby saw the fire and notified the fire department, which extinguished the fire. After the firemen left, the fire restarted and the house burned down completely. The next day defendant indicated to Sanders and Cartwright that she was pleased with the burning.

Defendant concedes that sufficient evidence was presented to warrant a jury finding that she procured the burning of her house and that she did so for an unlawful purpose, viz, to defraud the insurance company. She argues, however, that no evidence was presented which showed that she did so wantonly, citing *State v. Brackett*, 306 N.C. 138, 291 S.E. 2d 660 (1982). In *Brackett* the de-

fendant was indicted and convicted of willfully and wantonly burning her house in violation of G.S. 14-65. She was not charged with burning for a fraudulent purpose. The defendant argued that the State did not present sufficient evidence of willfulness and wantonness to support the conviction. In addressing the issue presented, the Supreme Court noted the following definitions of "wilful" and "wanton":

> Ordinarily, " '[w]ilful' as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law." *State v. Arnold*, 264 N.C. 348, 141 S.E. 2d 473 (1965). "Wantonness . . . connotes intentional wrong-doing . . . . Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others." *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E. 2d 393, 396-97 (1956).

State v. Brackett, 306 N.C. at 142, 291 S.E. 2d at 662. The Court concluded:

> Thus, for a burning of a dwelling to be criminal under G.S. 14-65 as a willful and wanton burning, it must be shown to have been done intentionally, without legal excuse or justification, and with the knowledge that the act will endanger the rights or safety of others or with reasonable grounds to believe that the rights or safety of others may be endangered.

Id.

The Court found that although the evidence tended to show that the defendant set fire to her house for the fraudulent purpose of collecting insurance proceeds worth more than her house, this intent was not wanton. *State v. Brackett*, 306 N.C. at 143, 291 S.E. 2d at 663. Since no other evidence was presented to show that the defendant acted willfully and wantonly in burning the house, the Court reversed the conviction. *Id.*

We find *Brackett* distinguishable from this case. The evidence there did not show that a third party had an interest in the property which was burned or that the defendant burned the house to solve a problem of divided ownership. Here, however, the evidence shows that defendant's sister and her husband had

an interest in the house which was burned because part of it was located on their real property. Real property includes not only the face of the earth but also everything under or over it, whether put there by nature, such as trees and grass, or by people, such as houses and other buildings. J. Webster, *Real Estate Law in North Carolina* Sec. 313, at 377-78 (1971). The evidence further shows that the Bank of North Carolina had an interest in the house because it had been pledged as security for a loan, as defendant admits. Defendant was aware of these interests but nevertheless proceeded to procure the burning. In fact, the evidence tends to show that defendant procured the burning because of the interest of her sister and her sister's husband and because problems had arisen in connection with their interest in the house. We conclude that the evidence was sufficient to permit the jury to find that defendant conspired to burn and procured the burning of the house in conscious and intentional disregard of and indifference to the rights of her sister, her sister's husband, and the bank, and thus that she did so wantonly. Accordingly, we find no error in the denial of defendant's motion to dismiss and motion for appropriate relief.

[2] Defendant contends the court erred in admitting into evidence a copy of the deed of trust she and her husband executed in which they pledged the house in question as part of the security for a loan. She argues that the authenticity of the copy was never established, that the deed of trust was not relevant to the issues presented, and that its admission constituted prejudicial error. We find this contention meritless. Defendant identified the exhibit as the deed of trust she and her husband signed, in which they pledged the property in question as security. They thereby sufficiently established its authenticity. *See* 2 H. Brandis, *North Carolina Evidence* Sec. 195, at 119-21 (rev. 2d ed. 1982). The deed of trust was clearly relevant to show the interest of the bank in the burned property and thus to prove that defendant acted wantonly in procuring the burning. Assuming, *arguendo*, that it was error to admit the copy of the deed of trust, we find the error clearly harmless.

No error.

Judges WELLS and BECTON concur.

DEPARTMENT OF TRANSPORTATION v. JAMES C. KIVETT, H. L. LAWTON, III, TRUSTEE; JAMES T. STAPLES, TRUSTEE; AND FIRST UNION NATIONAL BANK

No. 8422SC773

(Filed 7 May 1985)

Highways and Cartways § 5.3— condemnation of right of way—no presumption of DOT ownership—no dedication to DOT

In an action to procure a right of way to widen a highway, the trial court erred by concluding that the Department of Transportation had a right of way over the portion of defendants' land in question based either on a presumption that the Department of Transportation owned the right of way or on an express or implied dedication of the right of way to the Department of Transportation by defendant Kivett or his predecessor in title. There was no law or finding to support the presumption that the Department of Transportation owned the right of way, there was nothing in the record remotely tending to show an express dedication, and, while there was evidence which might support an implied dedication, the court failed to make definitive findings or to draw a proper conclusion therefrom.

APPEAL by defendant James C. Kivett from *Helms, Judge.* Order entered 12 April 1984 in Superior Court, IREDELL County. Heard in the Court of Appeals 13 March 1985.

The Department of Transportation instituted this action to procure a right of way over land needed to widen U.S. Highway #21 from two to five lanes. The original complaint filed by the Department of Transportation alleged that the parties were unable to agree as to the purchase price of the property appropriated. Defendant moved the court to appoint commissioners to appraise the property subject to the condemnation. Prior to the trial to determine just compensation, the defendant made a motion that a hearing be had before a superior court judge to determine the area of land for which defendant should be compensated. The Department of Transportation used approximately 22,000 square feet of land measured from the original roadbed into defendant's property. The Department claimed it already owned the right of way over 11,000 square feet of this land, and it needed to compensate defendant only for what remained. Defendant claimed he was due compensation for the total 22,000 square feet.

A hearing was held on the motion on 26 March 1984 before Judge Helms wherein the court made the following findings of fact and conclusions of law, and entered the following order:

(1) That the defendant, James C. Kivett's father, W. S. Kivett, executed two (2) written driveway permit agreements with the State Highway Department on July 8, 1958 and April 5, 1971, respectively, that directly involved the service station property which is the subject of this condemnation action;

(2) That James C. Kivett acknowledged during the hearing of this matter that he was aware of these two (2) driveway permits executed by his father who was his immediate predecessor in title;

(3) That James C. Kivett further testified as a witness during the hearing of this matter that, while his family had made certain driveway paving expenditures upon the premises, he did not deny the plaintiff's evidence that the several concrete-rimmed traffic islands lying adjacent to the paved portion of U.S. Highway #21 directly in front of his service station property had been constructed there by State forces entirely at taxpayer expense;

(4) That, as a result of the construction of said traffic islands, the visual notice of the Department of Transportation's right-of-way claims was constantly impressed upon James C. Kivett and his father, W. S. Kivett, through the continuous occupation of said claimed right-of-way area by the paved shoulders and concrete-rimmed traffic islands;

(5) That as further support of its right-of-way claim, the plaintiff, Department of Transportation, gave evidence at the hearing on this matter of the content of the driveway permits which instruments contained;

a. A written request to construct driveways within the public right of way;

b. An agreement to keep the public right of way clear;

c. A raised-print description in the 1971 driveway permit agreement indicating that the overall street pavement width

and the right-of-way width were twenty-two (22) feet and sixty (60) feet respectively; and, finally

d. A sketch referred to and made a part of both driveway permit agreements clearly setting forth a marked thirty-foot right-of-way line drawn directly behind the concrete-rimmed traffic islands (from the highway centerline) as also shown on said sketch and actual on-the-ground construction of said traffic islands at said widths from the highway centerline in exact conformance to said sketches as attached and made a part of the driveway permit agreements (said sketch designated said right-of-way line by the number thirty (30) feet along with the arrowed symbolled initials R.O.W.);

(6) That, further, during the hearing of this matter, the Department of Transportation introduced into evidence a set of 1958 Highway Project Plans which detailed the last major roadway construction on U. S. Highway #21 adjacent to the subject property prior to the current 1981 project which plans show an existing right of way width which scaled to a width of sixty (60) feet at the James C. Kivett service station property;

(7) That, finally, this Court finds from an examination of the defendants' Exhibit "1" (a photograph of the subject premises taken immediately before the current roadway construction), that there is an absence of any permanent structures owned by the defendants located upon the traffic islands or claimed right of way other than a "narrow bridge" highway warning sign and what appears to be a Duke Power Company easement—the permanent Union 76 sign being positioned at the back of the traffic island curbline; and

BASED UPON THESE FINDINGS, THIS COURT CONCLUDES AS A MATTER OF LAW:

That the defendant has confirmed the presumption of a sixty-foot wide right of way on U. S. Highway #21 adjacent to the subject premises as scaled on the Department of Transportation's project plans by his clear dedicatory acts both express and implied in that:

1. The defendant, James C. Kivett, and his precessor [sic] in title made a firm written request to construct driveways (and traffic islands) "within public right of way";

2. The defendant promised to keep the public right of way clear (said right-of-way area being clearly defined on the face of the 1971 driveway permit agreement and on a referenced sketch); and

3. The defendants allowed the State to take actions inconsistent with their unrestricted ownership of the right-of-way area by allowing the State to enter the premises and thereafter accepting the dedication through the construction of the concrete-rimmed traffic islands; and

4. Finally, this Court holds that the defendant could not equitably retain the benefits of the expenditure of State taxpayer money in the form of traffic islands constructed at the defendant's request while denying the public right-of-way interest that the agreements clearly set forth;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff, the Department of Transportation, immediately caused to be filed in the Office of the Clerk of Superior Court of Iredell County, a plat reflecting preexisting State right of way measuring an overall width of sixty (60) feet or thirty (30) feet from each side of the centerline of U. S. Highway #21 as the same abutted the property which is the subject of this condemnation action prior to the Department of Transportation's highway condemnation action filed in the Office of the Clerk of Superior Court of Iredell County on December 7, 1981.

From the order entered, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas B. Wood, for the Department of Transportation.

Hunton & Williams, by Odes L. Stroupe, Jr., and Julius A. Rousseau, III, for defendant, appellant.

HEDRICK, Chief Judge.

Defendant's sole assignment of error based upon an exception to the judgment raises the question whether the trial court's

findings of fact support its conclusion that the property at issue was dedicated to the Department of Transportation as a right of way. Defendant argues that in order to sustain a judgment that the Department of Transportation owned a right of way over defendant's property, the court must make findings that either defendant or his predecessor in title, through his words or acts, manifested an intent to dedicate the property.

The trial judge apparently concluded that the Department of Transportation had a right of way over the 11,000 square feet in question based on three theories: 1) there was a presumption that the Department of Transportation owned the right of way; 2) the defendant or his predecessor in title expressly dedicated the right of way to the Department of Transportation; or 3) the defendant or his predecessor in title, by his words or deeds, impliedly dedicated the right of way to the Department of Transportation. We find no law or finding of fact to support the conclusion by the trial judge that the Department of Transportation was presumed to own the right of way in question. Although counsel for the Department of Transportation in his oral argument before this Court stated that the Department of Transportation was relying upon an express dedication of the property, we find nothing in this record remotely tending to show that the defendant or his predecessor in title expressly dedicated the property to the Department of Transportation for public use.

The final theory adopted by the trial court was that the defendant or his predecessor in title had impliedly dedicated the property to public use. As defined in *Spaugh v. Charlotte*, 239 N.C. 149, 79 S.E. 2d 748 (1954), dedication is the intentional appropriation of land by the owner to some proper public use. An implied dedication is one arising by operation of law from the acts of the owner. When proving implied dedication, where no actual intent to dedicate is shown, the manifestation of implied intent to dedicate must clearly appear by acts which to a reasonable person would appear inconsistent and irreconcilable with any construction except dedication of the property to public use. *Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E. 2d 248 (1967).

While there is evidence in the record that might support findings of fact which in turn might support a conclusion that the

property in question was impliedly dedicated to public use, the trial judge's failure to make definitive findings from the evidence, and to draw a proper conclusion therefrom, requires that there be a new trial to determine the issue as to the precise amount of defendant's land taken by the Department of Transportation. Thus the order dated 12 April 1984 is vacated, and the cause is remanded for a new trial.

Vacated and remanded.

Judges WELLS and MARTIN concur.

STATE OF NORTH CAROLINA v. JAMES LAMONT SMITH

No. 848SC616

(Filed 7 May 1985)

1. **Arson § 4.1— feloniously burning uninhabited house—sufficiency of evidence**

The State's evidence, including testimony that defendant was seen behind a house just minutes before flames were seen coming from the house, was sufficient to support defendant's conviction of feloniously burning an uninhabited dwelling house.

2. **Criminal Law § 122.1— questions by jury—reiteration of State's burden of proof not required**

The trial judge did not err in failing to reiterate the State's burden of proof when he answered questions by the jury about the evidence it could consider and whether the fact that defendant lied proved his guilt.

3. **Arson § 6— feloniously burning uninhabited dwelling house—sentence**

Where the indictment, evidence, instructions and verdict were for burning an uninhabited dwelling house in violation of G.S. 14-67.1, and the presumptive term for such offense is three years, the trial court erred in imposing a presumptive sentence of nine years for a violation of G.S. 14-59, and the case must be remanded for entry of a proper sentence.

APPEAL by defendant from *Barefoot, Judge*. Judgment entered 19 January 1984 in Superior Court, WAYNE County. Heard in the Court of Appeals 12 February 1985.

Defendant was charged in a proper bill of indictment with feloniously burning an uninhabited dwelling house in Mt. Olive,

North Carolina. From judgment imposing the presumptive sentence of nine years, defendant appeals.

Attorney General Edmisten by Associate Attorney General, Doris J. Holton, for the State.

Hulse & Hulse by H. Bruce Hulse, Jr., for defendant-appellant.

PARKER, Judge.

[1] The first issue presented on this appeal is whether the trial court erroneously denied defendant's motion to dismiss based upon the insufficiency of the evidence. In *State v. Green*, 310 N.C. 466, 312 S.E. 2d 434 (1984), our Supreme Court restated the well established rules governing the sufficiency of the evidence to carry a case to a jury, as follows:

> When a defendant in a criminal case moves to dismiss or for judgment as of nonsuit, the trial judge must determine whether there is substantial evidence of each element of the offense charged and whether defendant was the perpetrator of the offense. If there is such evidence, a motion to dismiss must be denied. . . .
>
> The function of the trial judge is to determine as a matter of law whether the evidence permits a reasonable inference of defendant's guilt of the crime charged. The test is the same whether the evidence is direct, circumstantial or combination of both. In ruling upon a motion to dismiss, the trial judge must consider all the evidence admitted, whether competent or incompetent, in the light most favorable to the State and he must give the State every reasonable inference to be drawn from that evidence. Contradictions and discrepancies in the evidence do not require dismissal and such matters are for resolution by the jury. The defendant's evidence, unless favorable to the State, is not to be considered in ruling on the motion. (Citations omitted.)

The essential elements of the crime charged are: (i) the house was uninhabited, (ii) a fire occurred in it, (iii) the fire was of incendiary origin, and (iv) the defendant unlawfully and wilfully started it. *State v. Tew*, 62 N.C. App. 190, 193, 302 S.E. 2d 633, 635 (1983); G.S. 14-62.

The evidence tended to show that an uninhabited dwelling house located at 107 Cobb Street, Mt. Olive, North Carolina, burned during the early morning hours of 10 July 1983 between 12:01 a.m. and 3:00 a.m.

Tim Owens testified that as he was walking down the street, he saw a person who appeared to be the defendant behind the burned house just minutes before the fire started. Owens stated that he had seen defendant the day before the fire, 9 July 1983, and that defendant had been wearing a red cap and dark jacket. The person he saw behind the house was wearing a red cap and dark jacket. Owens testified that although he did not get a "real close look," he "knew" it was the defendant. Owens continued walking, and when he looked back, he saw flames coming from the house.

State's witness, Johnny Davis, testified that defendant usually came by his house at 4:00 a.m. to accompany him to work, but that on 10 July 1983 defendant came by his house at 3:00 a.m. wearing a red cap and dark jacket. When Davis discovered the house was on fire, he suggested the two should walk by to look. Davis testified that defendant said he didn't want to go by there; that defendant talked about waiting until they got off work; and defendant said if they went by there the police might think he [defendant] did it.

Officer Larry Riggle testified that while he was investigating the fire, he received the names of three people, including the defendant, who had been seen around the house prior to the day of the fire. Riggle testified that defendant made a statement implicating the others, but subsequently retracted it. Defendant indicated in his second statement that he had made the first statement "to get the blame off him." Riggle also testified that the house was uninhabited.

Larry Pierce of the Wayne County Sheriff's Department testified that although he did not know the cause of the fire, he found nothing of an accidental nature as a cause.

Viewed in the light most favorable to the State, there was sufficient evidence from which the jury could find that the house was uninhabited, a fire occurred in it, the fire was of incendiary origin, and defendant started the fire. Admittedly, the State

relied on circumstantial evidence in the trial below. "However, in criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E. 2d 506, 513 (1965). The evidence permitted a reasonable inference of defendant's guilt, and the motion to dismiss was properly denied.

[2] Defendant next contends the court erred during the following exchange when the jury had a question during deliberations:

> JUROR: I can try. Can we—all right, the understanding I got was that he was innocent unless the State proved beyond a reasonable doubt that he was guilty. Can we consider other things besides, or does it have to just go by the State proving?
>
> THE COURT: What you have to do, Members of the Jury, is to determine from all the evidence whether or not he is guilty beyond a reasonable doubt. Does that answer your question? You take all the evidence into consideration, as I have told you, to weigh all the evidence in the light of your common sense and as best you can to determine what the truth is. . . .

Defendant contends the court erred by failing to reiterate that the State had the burden of proof in its response to the question. In *State v. Howard*, 305 N.C. 651, 290 S.E. 2d 591 (1982), our Supreme Court addressed a similar argument as follows:

> When the trial court has once instructed the jury in such manner as to declare and explain adequately the law arising on the evidence, there is no requirement that complete instructions be given again each time the jury returns to ask a specific question. In such instances, the trial court properly may answer the question asked without resorting to repetition of all of the instructions previously given.

The argument is meritless also when it is clear from the juror's question that he knew "he [defendant] was innocent unless the State proved beyond a reasonable doubt that he was guilty."

Defendant further contends the court erred when the juror questioned: "Just because you believe that the defendant lied,

does that go as far as proving he's guilty?" The court responded: "I also told you that you could believe all of what a witness said, part of what a witness said or none of what a witness said on the stand." Defendant's contention that the court's failure to answer the question directly and to reiterate the State's burden in its response constitutes reversible error is meritless. The court correctly instructed that one of the functions of the jury is to determine the credibility of the witnesses, including that of the defendant. *Coach Co. v. Lee*, 218 N.C. 320, 11 S.E. 2d 341 (1940). This assignment of error is overruled.

[3] Although no error occurred in the trial portion of this case, the case must be remanded on account of error in the judgment and commitment. The indictment, the evidence, the jury instructions and the verdict were for burning an uninhabited dwelling house, which constitutes violation of G.S. 14-67.1, a Class H felony carrying a presumptive term of three years. The judgment states that this offense was in violation of G.S. 14-59, a Class E felony, and defendant received a nine year term, the presumptive term for violation of G.S. 14-59. General Statute 14-59 prohibits the burning of certain public buildings. The uninhabited dwelling house defendant was convicted of burning does not constitute a public building as defined by G.S. 14-59.

The judgment must be vacated and the case remanded for entry of a proper judgment consistent with a conviction for violation of G.S. 14-67.1. *State v. McWhorter*, 34 N.C. App. 462, 238 S.E. 2d 639 (1977), *disc. review denied*, 294 N.C. 443, 241 S.E. 2d 844 (1978).

No error in trial; remanded for judgment.

Judges ARNOLD and EAGLES concur.

JAMES L. HERBERT AND WIFE, MINNIE Q. HERBERT v. VIVIAN H. BABSON AND HUSBAND, WINFORD BABSON; NELDA C. HERBERT; AND HENRY COY HERBERT

No. 846SC677

(Filed 7 May 1985)

1. **Adverse Possession § 7— cotenants—actual ouster—insufficient evidence**

There was not enough evidence to submit actual ouster of plaintiff cotenants to the jury where defendants entered the premises more than thirty years prior to the filing of this petition, went into possession of the house and lot, used it exclusively for their family, made substantial improvements to the house, and paid no rent on the property. During this time, there was a presumption that defendant Vivian Babson was holding for her cotenants.

2. **Adverse Possession § 7— cotenants—no presumption of constructive ouster**

The presumption of constructive ouster did not arise, and there was insufficient evidence to submit respondents' claim of adverse possession to the jury, where the property was listed for taxes in the name of the "heirs of Henry Herbert" which includes all the tenants in common, and taxes and insurance premiums were paid by all the tenants in common. The presumption of constructive ouster arising from sole and undisturbed possession and use by one tenant in common for twenty years without any demand for rents, profits or possession by the cotenants does not arise if the tenant in possession does anything to recognize the title of the cotenants.

APPEAL by petitioners from *Reid, Judge.* Judgment entered 16 March 1984 in Superior Court, HALIFAX County. Heard in the Court of Appeals 12 February 1985.

This appeal involves a petition for a sale for partition by alleged tenants in common. The petitioners alleged they are tenants in common with the respondents as to a certain tract of land in Halifax County. Respondents Vivian H. Babson and Winford Babson filed an answer in which they alleged that they had acquired title to the property by adverse possession. They also alleged they had made improvements to the property in the amount of $22,070.00. The Babsons prayed that the Court declare the title to the property was vested in them or in the alternative that they be awarded $22,070.00 out of the proceeds from the sale for improvements to the property.

The case was tried by a jury. The evidence showed that Henry Herbert, the father of James L. Herbert, H. Marvin Herbert, Vivian H. Babson and Martha Frances H. Hux, died intes-

tate in 1952. He was survived by his widow Katherine Keaton Herbert and his four children. Henry Herbert owned several tracts of real estate including a house and lot which is the subject of this dispute. The Babsons lived in the house prior to the time of Henry Herbert's death and continued to live in it until this proceeding was filed. Henry Herbert also owned a farm which James L. Herbert and H. Marvin Herbert operated from the death of their father until the death of H. Marvin Herbert in 1979. The two brothers paid rent for the farm into an account for the "Heirs of Henry Herbert." Taxes and insurance were paid from this account on the property owned by the heirs of Henry Herbert including the taxes and insurance on the house and lot occupied by the Babsons.

After the death of H. Marvin Herbert, James L. Herbert operated the farm. Taxes and insurance on the farm and the house and lot involved in this case were paid from the "Heirs of Henry Herbert" account with H. Marvin Herbert's widow Nelda C. Herbert and his son Henry Coy Herbert receiving a share of the rent. In 1980 the house and lot were first listed for town taxes in the appellee's name and the appellees paid the town taxes. In 1980 the appellees began paying the insurance on the house. In September 1982 Martha Frances H. Hux conveyed her interest in the property to James L. Herbert. At that time Katherine Keaton Herbert conveyed her dower interest to her three living children and the heirs of her deceased son.

The appellees offered evidence as to repairs and improvements they had made on the house. They testified that Henry Herbert gave them the house and lot before he died but no deed to them has been recorded. They have never paid rent on the house and lot.

The petitioners moved for a directed verdict on the respondents' adverse possession claim which was denied. The jury returned a verdict in favor of the Babsons on the adverse possession claim and the Court entered a judgment that they have title to the property. The petitioners appealed.

Josey, Josey, Hanudek and Jordan, by C. Kitchin Josey for petitioners appellants.

Hux, Livermon, and Armstrong by H. Lawrence Armstrong for respondents appellees Vivian H. Babson and Winford Babson.

WEBB, Judge.

In making the motion for a directed verdict the appellants did not state the grounds therefor contrary to the requirement of G.S. 1A-1, Rule 50(a). It was obviously made on the ground of the insufficiency of the appellees' evidence. We shall consider the appeal on its merits. *See Collier v. Walker*, 19 N.C. App. 617, 199 S.E. 2d 691 (1973).

This case brings to the Court the question of adverse possession between tenants in common. This question has recurred in our courts for many years. A tenant in common can gain title against his cotenants by actual ouster followed by the requisite years of adverse possession. An actual ouster requires some clear, positive and unequivocal act equivalent to an open denial of the rights of the cotenants and putting them out of seisin. *See Watson v. Chilton*, 14 N.C. App. 7, 187 S.E. 2d 482 (1972). A tenant in common may also acquire the title of cotenants by constructive ouster. *See Brewer v. Brewer*, 238 N.C. 607, 78 S.E. 2d 85 (1979); *Dobbins v. Dobbins*, 141 N.C. 220, 53 S.E. 2d 870 (1906); *Casstevens v. Casstevens*, 63 N.C. App. 169, 304 S.E. 2d 623 (1983); *Sheets v. Sheets*, 57 N.C. App. 336, --- S.E. 2d --- (1982); *Collier v. Walker, supra* and Webster's Real Estate Law in North Carolina sec. 301, page 327. If a cotenant occupies the entire property for twenty years to the exclusion of a cotenant it is presumed there was an ouster at the time of the entry and it is presumed the action of the occupying cotenant during this period includes everything necessary to establish adverse possession. This rule has been criticized since the entry and possession of a tenant in common is presumed not to be adverse to the cotenants. If the occupation of the premises for twenty years gives rise to a presumption, as does the rule of presumptive or constructive ouster, that during the twenty year period the possession was adverse it has been said that this presents an anomaly. *See* "Adverse Possession between Tenants in Common and the Rule of Presumptive Ouster," 10 Wake Forest Law Review, page 300.

[1] The appellees argue that there was an actual ouster when they entered the premises more than thirty years prior to the filing of this proceeding. They contend that the evidence that they went into possession of the house and lot and used it exclusively for their family, that they made substantial improvements to the

house, and paid no rent on the property is evidence from which the jury could find the appellees had performed clear, positive and unequivocal acts which put the petitioners on notice more than twenty years before the petition was filed that the respondents claimed sole seisin to the house and lot. During this time there was a presumption that the respondent Vivian H. Babson was holding for her cotenants. We hold there was not enough evidence of an actual ouster to be submitted to the jury.

[2] The question of a constructive ouster presents a more difficult problem. If one tenant in common has been in sole and undisturbed possession and use of the property for twenty years, without any demand for rents, profits or possession by the cotenants, constructive ouster of the cotenants is presumed, and the ouster relates back to the initial taking of possession by the tenant in possession. *Collier v. Walker, supra.* However, if the tenant in possession does anything to recognize title of the cotenants during the twenty-year period, the presumption of ouster does not arise. *Mott v. Land Company*, 146 N.C. 525, 60 S.E. 423 (1908); *Sheets v. Sheets, supra; Hi-Fort, Inc. v. Burnette*, 42 N.C. App. 428, 257 S.E. 2d 85 (1979). We hold that the listing of the property for county taxes in the name of the "Heirs of Henry Herbert" which includes all tenants in common, and the payment of taxes and insurance premiums by all the tenants in common are acts sufficient to show recognition of the title of the petitioners by the respondent appellees so as to prevent the presumption of constructive ouster from arising. In the absence of such presumption, there was insufficient evidence to submit the respondents' claim to the property by adverse possession to the jury.

We hold there must be a new trial on the respondents' claim for the value of the improvements.

New trial.

Judges PHILLIPS and MARTIN concur.

LINDA JOHNSON KEENE, AND CHARLES C. KEENE v. WAKE COUNTY HOSPITAL SYSTEMS, INC., D/B/A WAKE MEDICAL CENTER; BETTY ELLIS, R. N.; REBECCA GRIFFIN STEPHENSON, L.P.N. AND O. P. MILLER, M.D.

No. 8410SC815

(Filed 7 May 1985)

1. **Trial § 33.4— attributing testimony to wrong witness—error corrected—absence of prejudice**

Plaintiffs were not prejudiced when the trial court in its instructions mistakenly attributed testimony to plaintiffs' expert witness which was in fact offered by defendant's expert witness where the error was immediately pointed out by counsel, and the court corrected its error and directed the jury to use their own recollection.

2. **Physicians, Surgeons and Allied Professions § 20.2— physician not insurer instruction—harmless error**

Even if the trial court erred in instructing the jury that a physician is not an insurer of the results absent some guarantee because there was insufficient evidence to show that defendant provided plaintiff patient with a guarantee, such error was not prejudicial where plaintiffs failed to show any other error in the court's instructions.

3. **Trial § 11— limitation of opening arguments**

The trial court had the authority to limit opening statements by counsel to five minutes. Rule 9 of the General Rules of Practice for the Superior and District Courts.

4. **Witnesses § 5.2— evidence of reputation—rehabilitation of witness**

Where plaintiffs made numerous attempts to impeach defendant's expert witness, testimony by two other expert witnesses that the first expert had the reputation of being the "premier hip surgeon" in North Carolina was properly admitted to rehabilitate the witness.

5. **Appeal and Error § 24; Physicians, Surgeons and Allied Professions § 15— motion in limine—preventing testimony on informed consent—failure to object—failure to question witness**

The plaintiffs in a medical malpractice case were not prejudiced by the court's allowance of defendant's motion in limine preventing testimony by plaintiff patient about whether she would have consented to surgery "had she been properly informed of the usual and most frequent risks of surgery" where the record reveals that at no time, either when the court indicated that it was tentatively allowing defendant's motion, or when the court entered a final ruling on the matter, did plaintiffs object or indicate in any way that they disagreed with the ruling, and at no time did plaintiffs' counsel offer or attempt to question plaintiff patient about whether she would have consented to surgery if fully informed.

APPEAL by plaintiffs from *Herring, Judge*. Judgment entered 9 February 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 3 April 1985.

This is a civil action wherein plaintiffs alleged that Dr. O. P. Miller was negligent in the performance of surgery and his post-operative care of Mrs. Keene, and that defendant Miller did not obtain her informed consent due to his failure to disclose the most frequent risks of this particular surgery.

In February 1979, Mrs. Keene consulted defendant, an orthopedic surgeon, about pain in her left hip. Defendant subsequently hospitalized her to remove a bone tumor from her femur neck. On 20 March 1979, defendant performed a biopsy by cutting a window, or hole, in her femoral neck. After the surgery, defendant did not put internal fixation devices into Mrs. Keene's hip, nor did he immobilize her left leg with a spika cast. Defendant did fill in with a bone graft.

On 23 March 1979, while being moved about in bed by two nurses, Mrs. Keene's hip fractured through the biopsy site. Eventually, her left hip was replaced with an artificial hip joint.

At trial, the following issue was submitted to and was answered by the jury as indicated:

> 1. Was the Plaintiff Linda Johnson Keene injured as a proximate cause of the negligence of the Defendant Dr. O. P. Miller?
>
> ANSWER: No.

From a judgment dismissing plaintiffs' complaint, plaintiffs appealed.

Mast, Tew, Armstrong & Morris, P.A., by George B. Mast and John W. Morris, for plaintiffs, appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Samuel G. Thompson and William H. Moss, for defendant, O. P. Miller, M.D., appellee.

HEDRICK, Chief Judge.

Plaintiffs first contend the court made five errors in the instructions to the jury. Only two of these alleged errors have been

properly preserved for appellate review. The other three present no question for review. N.C.R. App. Proc. 10(b)(2).

[1] Plaintiffs first argue that the court erred in its instructions when it mistakenly attributed testimony to plaintiffs' expert witness which was in fact offered by defendant's expert witness. The error was immediately pointed out by counsel, the court corrected its error, and directed the jury to use their own recollection. Thus this assignment of error has no merit. *Emerson v. Carras*, 33 N.C. App. 91, 98, 234 S.E. 2d 642, 648 (1977).

[2] Plaintiffs next assign error to the court's action in instructing the jury "in substantial conformity with North Carolina Pattern Jury Instructions 809.20 and 809.25, the Insurer instructions." These instructions embody the legal principle that a physician is not an insurer of results or of the correctness of his judgment, absent some guarantee or assurance by the physician to the patient. Plaintiffs do not contend that the court's statement of the law is incorrect, but argue instead that the instruction was improper because the record is devoid of evidence tending to show that defendant made any such guarantee; citing *Wall v. Stout*, 310 N.C. 184, 311 S.E. 2d 571 (1984), plaintiffs assert that such "unduly exculpative" instructions constitute reversible error. Assuming without deciding that the evidence introduced at trial falls short of raising an issue as to whether defendant provided Mrs. Keene with a guarantee, we hold such an error would not be prejudicial under the circumstances of this case. Contrary to the situation in *Wall*, plaintiffs here have failed to demonstrate any other error in the court's instructions. In *Wall* the Supreme Court said:

> [A]lthough many of the instructions when considered in isolation were either correct or, if erroneous, were not sufficiently prejudicial to constitute reversible error, . . . the instructions *in their totality* were so emphatically favorable to defendant that plaintiffs are entitled to a new trial.

Id. at 190, 311 S.E. 2d at 575 (emphasis added). Our examination of the instructions in their totality in the instant case persuades us that any error committed by the court was not prejudicial.

[3] Plaintiffs next assign error to the court's limitation of opening statements to five minutes. Rule 9 of the General Rules of

Practice for Superior and District Courts states: "Opening statements shall be subject to such time and scope limitations as may be imposed by the court." The trial court clearly had the authority to so limit these opening statements. This assignment of error is meritless.

[4] Plaintiffs next contend the court erred when two of defendant's expert witnesses were permitted to testify, over objection, that defendant's third expert witness, Dr. McCollum, has the reputation of being the "premier hip surgeon" in North Carolina. Evidence of the reputation of a person is admissible as affecting his credibility as a witness when a party has attempted to impeach that witness. *Wells v. Bissette*, 266 N.C. 774, 147 S.E. 2d 210 (1966). Because plaintiffs made numerous attempts to impeach Dr. McCollum, the court properly admitted evidence of reputation to rehabilitate the witness. *O'Quinn v. Dorman*, 35 N.C. App. 500, 241 S.E. 2d 722 (1978). This assignment of error is overruled.

By their next assignment of error plaintiffs contend the court erred in sustaining defendant's objection to a hypothetical question plaintiffs asked defendant's expert witness. "[A]n exception will not be considered on appeal where an objection has been sustained, unless the record discloses what the witness would have said if he had been permitted to answer." *State v. Poolos*, 241 N.C. 382, 384, 85 S.E. 2d 342, 344 (1955). Plaintiffs' failure to make an offer of proof "makes it impossible for us to know whether the ruling was prejudicial . . . or not." *State v. Rawls*, 70 N.C. App. 230, 236, 319 S.E. 2d 622, 626 (1984) (citation omitted). Therefore, plaintiffs will not now be allowed to assert error. This assignment of error is overruled.

[5] Plaintiffs' last assignment of error is set out in the record as follows:

> The court committed prejudicial error in allowing defendant's motion in limine thereby preventing plaintiff from testifying that had she been properly informed of the usual and most frequent risks of surgery, that she, subjectively, would not have consented to the surgery.

This assignment of error purports to be based on four exceptions. Exception No. 1 is set out in the transcript following the court's ruling tentatively allowing defendant's motion "at least insofar as

voir dire." Exception No. 2 appears in the transcript following the court's tentative in-chambers ruling to continue to allow defendant's motion in limine, "reserv[ing] the right to change the order." The following exchange then occurred between plaintiffs' counsel:

MR. MORRIS: Do you want to note an exception to it?

MR. MAST: I don't think at this point.

The next exception appears in the transcript after the jury had retired and the court entered a final order allowing defendant's motion. The last exception appears in the record immediately following defendant's written motion. Our examination of the record reveals that at no time, either when the judge indicated that he was tentatively allowing defendant's motion, or when he entered a final ruling on the matter, did plaintiffs object or indicate in any way that they disagreed with the ruling. More importantly, at no time did plaintiffs' counsel offer or attempt to question Mrs. Keene about whether she would have consented to surgery "had she been properly informed of the usual and most frequent risks of surgery." We hold the court did not err in allowing defendant's motion in limine and, assuming *arguendo* that any error was committed by the court in its rulings on the motion, the plaintiffs have shown no prejudice.

The judgment appealed from is

Affirmed.

Judges WELLS and MARTIN concur.

IN THE MATTER OF: JOHN SPENCER BAXLEY

No. 8412DC1025

(Filed 7 May 1985)

1. Infants § 20— juvenile recommitted—alternatives not considered—no error

The lack of findings as to alternatives to commitment in a juvenile order revoking a conditional release and ordering that respondent be recommitted to the Division of Youth Services does not constitute error. A juvenile on conditional release is still technically subject to the original order committing him to the Division of Youth Services; the original order provided authority for

recommittal without the findings required by G.S. 7A-652. G.S. 7A-655, G.S. 7A-656.

2. Infants § 21— Willie M. rights—under jurisdiction of federal court—appeal dismissed

An appeal as to whether the juvenile judge failed to heed the mandate of the Willie M. consent order was dismissed because that order established a Review Panel responsible to the federal court that has the duty of reviewing the services actually being provided each Willie M. child. Given the federal court's continuing jurisdiction and the role of the Review Panel, it would be inappropriate for the Court of Appeals to inquire into whether the respondent was denied his Willie M. rights.

APPEAL by respondent from *Guy, Judge.* Judgment entered 5 June 1984 in District Court, CUMBERLAND County. Heard in the Court of Appeals 4 April 1985.

This case concerns whether the juvenile court judge properly ordered that the respondent John Spencer Baxley be recommitted to the North Carolina Division of Youth Services, Department of Human Resources.

On 25 May 1982 respondent was placed on juvenile probation for a period of one year after admitting to allegations in a petition that he committed misdemeanor breaking and entering and damage to property.

On 24 August 1982, respondent admitted to allegations in new petitions that he violated G.S. 14-51, G.S. 14-72, and G.S. 90-95(a)(3). The court found also that respondent violated his probation. The court found that respondent met criteria for commitment to the Division of Youth Services and ordered that he be committed to the Division for an indefinite term not to exceed his eighteenth birthday. Respondent did not appeal this order.

On 13 January 1984, respondent was placed on conditional release from Samarkand Manor Training School. One of the conditions of his release was that he attend school regularly as required by law.

On 26 April 1984, a Motion for Review of respondent's conditional release was filed, alleging that respondent had violated his conditional release by fighting and by being truant from school. Respondent admitted the allegations and the court found them to be true. The court revoked the conditional release and ordered

that respondent be recommitted to the Division of Youth Services.

Respondent appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robert E. Cansler, for appellee Department of Human Resources.

Assistant Public Defender Jay Trehy for respondent appellant.

ARNOLD, Judge.

I.

Respondent contends that the juvenile judge erred by making insufficient findings of fact to support an order recommitting him to the Division of Youth Services. He contends also that the juvenile judge abused his discretion "by ignoring the mandate of the Willie M. settlement with the State of North Carolina, and by ordering the Respondent, a certified Willie M. child, to be recommitted to the Division of Youth Services." Neither of these contentions has any merit.

On 24 August 1982 respondent was committed to the Division of Youth Services. On 13 January 1984, he was placed on conditional release from Samarkand Training School. Respondent violated the conditions of his release by not attending school and by fighting. After hearings on a Motion for Review of his conditional release, respondent was recommitted.

The juvenile judge's order contained the following findings of facts and decisions.

> 1) That the allegations contained in the Motion for Review dated April 25th, 1984 alleging violation of Conditional Release are admitted in open court, thru counsel, and the court finds said allegations to be true.
>
> 2) That said child is now on Conditional Release from Samarkand Manor Training School.
>
> 3) That one of the conditions of his Conditional Release was that he attend school.

4) That said juvenile violated his Conditional Release on several occasions by being unlawfully absent from school and suspended several days for fighting.

5) That it is in the best interest of said juvenile that he be returned to the custody of the North Carolina Department of Human Resources.

IT IS THEREFORE ORDERED that said child be and remain a Ward of the Court and his custody is hereby recommitted to the North Carolina Department of Human Resources for an indefinite period not to exceed his eighteenth birthday for violation of Conditional Release.

[1] Under G.S. 7A-656, "[i]f the judge determines that the juvenile has violated the terms of his conditional release, the judge may revoke the conditional release or make any other disposition authorized by this Subchapter." The judge's findings in this case, then, that the respondent violated the conditions of his release, are sufficient to support his revocation of the conditional release.

We agree with the Department of Human Resources that a conditional release from the Division of Youth Services is not the same as probation or final discharge. A juvenile on conditional release is still technically subject to the original order committing him to the Division of Youth Services, which is the basis of whatever restrictions on his activity might be deemed appropriate as "aftercare supervision," G.S. 7A-655. When a juvenile judge revokes a conditional release, the previous order provides authority for recommittal to the Division of Youth Services; no new order with the findings required by G.S. 7A-652 is necessary. *In re Hughes*, 50 N.C. App. 258, 273 S.E. 2d 324 (1981), can therefore be distinguished.

Thus, in the present case, the lack of findings as to alternatives to commitment and as to whether respondent's behavior was a threat to the community does not constitute error in the order revoking respondent's conditional release.

II.

[2] Respondent also assigns as error the juvenile judge's failure to adhere to the Willie M. settlement entered into by the class of

Willie M. children on one side and the State of North Carolina on the other. Respondent says that the juvenile judge abused his discretion by ignoring the mandate of this settlement.

We agree that, as a certified Willie M. child, respondent has certain special constitutional rights to appropriate treatment by the State of North Carolina. These were established in the consent order in *Willie M. v. James B. Hunt*, No. CC79-0294 slip op. (W.D.N.C. 20 February 1981). Yet, the stipulations by the parties in that case, as adopted by the federal district court in its order, indicate that a Review Panel was established by the court and "shall be responsible to the Court and is created for the purpose of reviewing defendants' compliance with the decree entered in this action." This Review Panel has the duty of reviewing the services actually being provided for each Willie M. child and of determining whether they assure the child the rights he is accorded under the court's decree.

Given the federal district court's continuing jurisdiction over the question of appropriate treatment of Willie M. children, and the role of the Review Panel in evaluating the compliance of the State of North Carolina with the consent order, which was agreed to by the parties, we believe it would be inappropriate for this tribunal to inquire into whether the respondent in the present case was denied his Willie M. rights when the juvenile judge revoked his conditional release.

Respondent's appeal as to the juvenile judge's failure to heed the mandate of the Willie M. consent order is dismissed.

As to the juvenile judge's order revoking respondent's conditional release, we find no error.

Affirmed.

Judges PHILLIPS and COZORT concur.

W. G. IVEY v. JOHNNY M. WILLIAMS

No. 8412DC639

(Filed 7 May 1985)

1. **Trusts § 14.1— use of spouse's funds to improve land—no constructive trust**

The doctrine of constructive trust is inapplicable when it is alleged that a spouse's funds were used inequitably, not to acquire title to land, but to improve the land subsequent to the acquisition of title by the other spouse.

2. **Quasi Contracts and Restitution § 1.2— improvements to spouse's property—no unjust enrichment**

Defendant has no claim based on unjust enrichment for improvements to his wife's property without an allegation that his wife expressly promised that he would enjoy an ownership interest in the property, since a claim for unjust enrichment may not be based on a mere good faith belief or implied promise that ownership of the property would be joint.

3. **Ejectment § 1; Mortgages and Deeds of Trust § 1.1— equitable lien—no defense to ejectment action**

An equitable lien is not possessory in nature and, therefore, would not serve as a defense to an action for possession of property.

APPEAL by defendant from *Cherry, Judge.* Judgment entered 11 May 1984 in District Court, CUMBERLAND County. Heard in the Court of Appeals 8 February 1985.

Downing, David and Maxwell, by Harold D. Downing for plaintiff appellee.

Lumbee River Legal Services, Inc., by T. Diane Phillips, for defendant appellant.

BECTON, Judge.

I

This case began as a summary ejectment action in small claims court. Plaintiff, W. G. Ivey, asked the court to remove his former son-in-law, the defendant, Johnny M. Williams, from Ivey's property. Williams answered, asserting that by operation of the doctrines of constructive trust and/or unjust enrichment, he was entitled to the subject home and property or its value, or at least one-half the value of the home and property. After the action was transferred to district court, Ivey amended his Complaint to seek sole possession of the property and damages arising from Wil-

liams' unlawful occupancy. Ivey then moved for summary judgment. The trial court granted summary judgment for Ivey on the issue of ownership, reserving for a later date the determination of damages. Williams appeals. For the reasons stated below, we affirm the trial court.

II

Factual Background

Lilma Strickland acquired title to an undeveloped lot by warranty deed dated 11 October 1974. Ms. Strickland married Johnny Williams on 30 May 1975. During the marriage, the couple constructed a home on the property. Williams, a carpenter, claims to have built the house himself.

The house and lot were the subject of two deeds of trust executed by the couple, one on 8 April 1977, and another on 17 July 1978. Williams claims to have made all the mortgage payments and paid all the premiums on what was apparently a homeowner's insurance policy.

In 1979, a substantial portion of the house burned down. Contained in the record are copies of three checks drawn on Great American Insurance Company, totalling $39,810.39, made payable to Williams, his wife, and the mortgage holder. Although the checks were cashed in December 1979, Williams alleges that he never received any of the proceeds.

Ms. Williams was granted an absolute divorce from Williams on 12 April 1983. Williams alleges that this divorce was obtained without his knowledge, and also that in June 1983, Ms. Williams denied having divorced him when he asked her whether they had been divorced. Ms. Williams died intestate on 12 November 1983. After her death, defendant apparently took up residence in what remained of the burned-out dwelling. Ivey, Ms. Williams' father, and her sole heir at law, instituted the summary ejectment action on 15 December 1983.

III

A. Williams argues that summary judgment was improvidently granted because the materials presented to the court raised a genuine issue of fact as to whether Ivey is the sole owner

of the subject property. Williams contends that because he built the house, made the mortgage payments, and received none of the insurance proceeds, he is entitled to prove his ownership interest in the property and his right to possession based on theories of constructive trust and/or unjust enrichment.

[1] First, we conclude that the doctrine of constructive trust is not pertinent to the facts before us. When it is alleged, as here, that a spouse's funds are used inequitably not to acquire title to land, but to improve the land subsequent to the acquisition of title by the other spouse, the doctrine of constructive trust has been expressly held inapplicable. *Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965); *Richardson v. Carolina Bank*, 59 N.C. App. 494, 297 S.E. 2d 197 (1982).

[2] B. Williams' argument that Ivey offered no evidence tending to disprove Williams' ownership interest based on Williams' theory of unjust enrichment must also fail. "Unjust enrichment" is a legal term characterizing

> the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself [or herself] at the expense of another. . . .

66 Am. Jur. 2d *Restitution and Implied Contracts* Sec. 3, at 945 (1973). *See Parslow v. Parslow*, 47 N.C. App. 84, 266 S.E. 2d 746 (1980) (unjust enrichment founded upon equitable estoppel, and not on principles of quasi or implied contract). In *Fulp v. Fulp*, the plaintiff's evidence indicated that in consideration of defendant husband's oral promise to convey to her a one-half interest in the land, or to have her name put on the deed, plaintiff contributed approximately one-half the money needed to construct a house on the land, which was titled in the husband's name alone. The Supreme Court stated that although these facts did not give rise to a resulting or constructive trust, they did give rise to a claim of equitable lien.

In the instant case, unlike *Fulp*, Williams does not allege that his wife ever made an express promise to convey an interest in

the land, or to put his name on the deed. And although Williams contends that he and his wife had intended to own the property jointly, it has been held that a claim for unjust enrichment in these situations may not be based on a mere good faith belief or an implied promise.

In *Wright v. Wright*, 305 N.C. 345, 289 S.E. 2d 347 (1982), the Supreme Court stated that, when a husband and wife are involved,

> where the claim of unjust enrichment rests upon the owner's express, unenforceable promise to convey an interest in the land to the improver, the improver must prove the promise[,]
>
> . . . .
>
> not only because the plaintiff has both pleaded and attempted to prove an express promise but because of the relationship of husband and wife which exists between the parties. In cases not involving special relationships between the parties, the doctrine of unjust enrichment may be invoked upon a theory of an implied promise to pay.

Id. at 353-4 & n. 6, 289 S.E. 2d at 352-3 & n. 6. *See* 41 Am. Jur. 2d *Husband and Wife* Sec. 99 (1968). The Supreme Court reasoned that husband-wife situations are treated differently because any improvement to a spouse's property is presumed to be a gift. *See Mims v. Mims*, 305 N.C. 41, 286 S.E. 2d 779 (1982).

Without an allegation of his wife's express promise that he would enjoy an ownership interest in the property, Williams has no forecast of evidence allowing a recovery based on unjust enrichment. An implied promise is insufficient.

[3] We observe that even if Williams were to prevail on his theory of unjust enrichment, an equitable lien is not possessory in nature and, therefore, would not serve as a defense to Ivey's action for possession. *Fulp v. Fulp* (equitable lien is not an estate in land, but simply a charge upon the property).

IV

Before summary judgment may be entered, the record before the trial court must clearly establish that no material issue of fact exists, and that the movant is entitled to judgment as a matter of

law. *See A-S-P Assocs. v. City of Raleigh*, 38 N.C. App. 271, 247 S.E. 2d 800 (1978), *rev'd on other grounds*, 298 N.C. 207, 258 S.E. 2d 444 (1979).

In the case before us, no triable issues of fact remain as to Ivey's exclusive ownership interest in the subject property. The order granting summary judgment is therefore

Affirmed.

Judges WELLS and WHICHARD concur.

PAT PORET, EVELYN CARROLL, STELLA HERNDON, CHRISTINE McCALLUM, AND ANITA RIGGSBEE v. STATE PERSONNEL COMMISSION, E. R. CARRAWAY, CHAIRMAN, HAROLD H. WEBB, AS STATE PERSONNEL DIRECTOR, AND THE OFFICE OF STATE PERSONNEL

No. 8410SC874

(Filed 7 May 1985)

Appeal and Error §§ 6.2, 6.3; Administrative Law § 5; Master and Servant § 7.5 — discrimination in job reclassification by State agency — appeal from superior court review — interlocutory

An appeal from a superior court order in an action challenging a reclassification of nursing positions at North Carolina Memorial Hospital but not at the U.N.C. Student Health Service was dismissed as interlocutory where the superior court found that it had jurisdiction and remanded the case for a further hearing before the State Personnel Commission. Avoidance of a hearing does not affect a substantial right, appeal from a ruling denying a motion to dismiss for lack of subject matter jurisdiction is clearly interlocutory, and denial of a motion to dismiss for lack of personal jurisdiction gives rise to an interlocutory appeal allowed under G.S. 1-277(b) only where the authority of the court to exercise jurisdiction over the person is challenged. The State has consented to the supervisory jurisdiction of the General Court of Justice over appeals from administrative agencies by the passage of the Administrative Procedure Act, and petitioners had to follow the G.S. 126-34 grievance procedure, over which the State Personnel Commission has jurisdiction and in which appeal is to the Wake County Superior Court, because their discrimination claim did not allege one of the prohibited grounds. The question of whether the jurisdictional prerequisites of the Administrative Procedure Act have been met is one of ripeness, not personal jurisdiction.

Poret v. State Personnel Comm.

APPEAL by respondents from *Herring, Judge*. Order entered 4 June 1984 in WAKE County Superior Court. Heard in the Court of Appeals 15 April 1985.

This appeal arises from a 1983 job reclassification at North Carolina Memorial Hospital (NCMH) in Chapel Hill. At the time, pay for state employees was under a freeze. The Office of State Personnel (OSP), the administrative arm of the State Personnel Commission (SPC), conducted a reclassification study which resulted in upgrading of nursing positions at NCMH to a new "Clinical Nursing Series." Those reclassified received a ten percent pay raise. Petitioners worked for the University of North Carolina Student Health Services (SHS), which is part of the hospital complex, but technically separate from NCMH. They were not reclassified. Nurses at the UNC Medical School, which apparently has a similar relationship to NCMH, received reclassification. The net result was that the vast majority of nursing positions at the hospital complex, were reclassified, but petitioners were not. Petitioners were also blocked from transferring into the reclassified positions.

Petitioners instituted a grievance proceeding against OSP, exhausting their appeals within the University. They requested an appeal hearing from the SPC; the University, which has ultimate authority over both SHS and NCMH, supported petitioners. A hearing was scheduled, then cancelled. A pre-hearing conference took place, following which petitioners moved to disqualify OSP hearing officers from hearing the matter, on the grounds of bias. Further proceedings were suspended pending a decision by the SPC on the motion. On 12 December 1983 the SPC denied the motion and reversed its earlier position, denying petitioners a hearing "for reasons of legal precedence." Instead, the SPC directed that each side submit proposed findings for the hearing officer, who would prepare a report to the SPC. Based on that report, and optional fifteen minute presentations by the parties, the SPC would render a decision. The letter to petitioners stated that this approach was "the usual and customary procedure for handling classification reviews."

On 10 January 1984, petitioners filed a petition in the Superior Court of Wake County, seeking review of the SPC's decision. Petitioners sought orders directing a hearing and dis-

qualification of OSP officers as hearing officers. Respondents, the OSP and SPC, moved to dismiss on jurisdictional grounds and for failure to state a claim. The court denied the motion to dismiss, finding that it had jurisdiction over the matter. The court affirmed the SPC's refusal to disqualify the OSP's hearing officers, but ordered that petitioners receive a full hearing. Respondents appealed.

Beecher R. Gray for petitioners.

Hafer, Hall & Schiller, by Eugene Hafer and Marvin Schiller, for State Employees Association of North Carolina, Inc.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Lennon, for the Office of State Personnel.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Norma S. Harrell, for State Personnel Commission.

WELLS, Judge.

Neither side raises the issue, but we must first determine whether this case is presently appealable. *In re Watson*, 70 N.C. App. 120, 318 S.E. 2d 544 (1984), *disc. rev. denied*, 313 N.C. 330, 327 S.E. 2d 900 (1985). We conclude that the appeal is interlocutory and therefore must be dismissed.

The order of the superior court remanded the case for further hearing before the SPC. We have recently and expressly held that such an order by the superior court is interlocutory. *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E. 2d 777 (1983). Avoidance of a hearing does not affect a substantial right. *Id.* As in *Blackwelder*, there has been no hearing, and therefore no record has been created. *Edwards v. Raleigh*, 240 N.C. 137, 81 S.E. 2d 273 (1954) is accordingly distinguishable. The appeal is thus interlocutory and subject to dismissal.

Respondents argue that the court erred in denying their motions to dismiss for lack of personal and subject matter jurisdiction. As to the motion to dismiss for subject matter jurisdiction, an appeal from a ruling denying such a motion is clearly interlocutory. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E. 2d 182 (1982).

Denial of a motion to dismiss for lack of jurisdiction over the person does not give rise to an automatic right of appeal, despite statutory language appearing to have such effect. *See Love v. Moore*, 305 N.C. 575, 291 S.E. 2d 141, *reh'g denied*, 306 N.C. 393 (1982), *construing* N.C. Gen. Stat. § 1-277(b) (1983). Rather, G.S. § 1-277(b) allows interlocutory appeals only where the *authority* of the court to exercise jurisdiction over the person is contested. *Love v. Moore, supra.* Merely making a motion to dismiss for lack of such jurisdiction will not *ipso facto* make an otherwise interlocutory order appealable; substance, not form, controls. *Id.*

Respondents contend that the doctrine of sovereign immunity in fact raises such a question, and precludes exercise of jurisdiction over this case. Regardless of whether sovereign immunity is a defense involving subject matter or personal jurisdiction, however, the state, by the enactment of the Administrative Procedure Act, N.C. Gen. Stat. § 150A-1 *et seq.* (1983), has consented to the supervisory jurisdiction by the General Court of Justice over appeals from administrative agencies.

As the supreme court recognized in *Employment Security Commission v. Lachman*, 305 N.C. 492, 290 S.E. 2d 616 (1982), the jurisdiction of the SPC is not limited to those cases described in N.C. Gen. Stat. §§ 126-35 and 126-37 (1981), but may also arise, as it does here, under N.C. Gen. Stat. § 126-34 (1981) ("grievance" procedure). Respondents contend that petitioners may not challenge management business decisions such as reclassification through grievances under G.S. § 126-34. Merely denominating a decision a "reclassification" does not insulate it from all scrutiny, however; facially neutral job classifications can be and are used for improper discriminatory purposes. *See Armstrong v. Index Journal Co.*, 647 F. 2d 441 (4th Cir. 1981); *Claiborne v. Illinois Cent. R.R.*, 583 F. 2d 143, *reh'g denied*, 588 F. 2d 828 (5th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979). Petitioners' case is essentially a discrimination case, that they were arbitrarily selected for a pay freeze and prevented from transferring to reclassified positions. *See Dept. of Correction v. Gibson*, 308 N.C. 131, 301 S.E. 2d 78 (1983) (reasonable grounds for selection necessary). Since they did not allege one of the prohibited grounds of discrimination, they had to follow the G.S. § 126-34 grievance procedure, over which the SPC has jurisdiction. *Employment Security Commission v. Lachman, supra.* Appeal from the SPC lies by petition to

the Superior Court of Wake County. G.S. § 150A-45. Whether the jurisdictional prerequisites of the Administrative Procedure Act, G.S. § 150A-43, have been met is not a question of personal jurisdiction, but one of the ripeness, on a case by case basis, of the subject matter of administrative decisions for judicial review. *See Dyer v. Bradshaw*, 54 N.C. App. 136, 282 S.E. 2d 548 (1981); *Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 265 S.E. 2d 890, *disc. rev. denied*, 301 N.C. 94 (1980) (applying jurisdictional tests). Accordingly, no appealable question as to jurisdiction over the person is presented.

This appeal must therefore be and is hereby

Dismissed.

Chief Judge HEDRICK and Judge MARTIN concur.

ALEXANDER LYNCH, UNMARRIED v. JOSEPHINE LYNCH, UNMARRIED, FLORENE L. LYNCH AND HUSBAND, KINZIE LYNCH, STELLA L. RICHARDSON, WIDOW, ANNIE L. STALLINGS AND HUSBAND, JAMES STALLINGS, PERRY M. LYNCH AND WIFE, ZULENE LYNCH, JOHN N. LYNCH AND WIFE, MAGNOLIA LYNCH, VIOLET BATTLE MARSHALL, UNMARRIED, EMMA BATTLE BROWN AND HUSBAND, FRED BROWN, MATTHEW A. BATTLE, UNMARRIED, ANNIE BATTLE BULLUCK AND HUSBAND, GARLAND BULLUCK, SAMUEL BATTLE AND WIFE, LAURA BATTLE, JAMES EDWARD MITCHELL, UNMARRIED, JIMMY R. MITCHELL AND WIFE, LILLIAN MITCHELL, JOSEPH LEE MITCHELL AND WIFE, BESSIE MAE MITCHELL, WILLIE L. MITCHELL AND WIFE, MARY MITCHELL, ERNESTINE MITCHELL, UNMARRIED, DOROTHENE M. HUNTER AND HUSBAND, DAVID HUNTER, ELLAWESE HARRIS WALKER AND HUSBAND, FREDDIE D. WALKER, WILLIAM E. HARRIS, UNMARRIED, EUZELIA H. JOHNSON AND HUSBAND, AUTTIE JOHNSON, LONNIE F. HARRIS AND WIFE, RUTH HARRIS, RUTH H. SLADE, UNMARRIED, ESTELLA H. CONNOR, AND HUSBAND, PETER CONNOR, MARGARET H. SARGENT AND HUSBAND, ROBERT SARGENT, AND FLETCHER HARRIS AND WIFE, MARTHA HARRIS

No. 847SC863

(Filed 7 May 1985)

Judgments § 21.1— authority of attorney to consent to judgment

Proceeding must be remanded for a determination as to whether respondents authorized their attorney to consent to an order for the sale of lands owned by tenants in common. G.S. 1A-1, Rule 60(b)(4).

Lynch v. Lynch

APPEAL by respondents James and Annie Stallings from *Brown, Judge.* Order entered 17 May 1984 in NASH County Superior Court. Heard in the Court of Appeals 15 April 1985.

This proceeding was instituted by a petition seeking the sale of lands owned by tenants-in-common. Respondents answered, seeking to own their interest in severalty by having the land divided. Following a hearing, a consent order was entered by the Clerk of Nash County Superior Court on 13 February 1984, ordering the sale of the lands. On 16 March 1984, respondents filed a motion in the cause to set aside the Clerk's order of sale, alleging, *inter alia*, that respondents had not consented to the order, that they had not learned until 2 March 1984 that their attorney had consented to the order, and that their attorney gave consent without their authority. Respondents' motion was denied by the Clerk. Respondents then appealed the Clerk's order to the superior court. On 17 May 1984, Judge Brown entered his order affirming the Clerk's order denying respondents' motion. It is from Judge Brown's order that respondents appeal to this court.

James W. Keel, Jr. for petitioner.

Cedric R. Perry for respondents.

WELLS, Judge.

Although respondents filed their motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(1), (3) and (6) of the Rules of Civil Procedure, for reasons which we later state, the clerk and trial court should have considered respondents' motion under the provisions of Rule 60(b)(4) of the Rules of Civil Procedure, which empowers the trial court to set aside void judgments.

In their motion to the Clerk, respondents clearly alleged grounds for voiding the Clerk's order of sale, *i.e.*, that the order, entered by consent, was entered without their authorization and consent.

The subject of the validity of consent judgments entered without consent of the parties, or of a party, has been the subject of a number of opinions of our appellate courts. Perhaps the most instructive of these opinions are the opinions of our supreme court in *Overton v. Overton*, 259 N.C. 31, 129 S.E. 2d 593 (1963) and *Howard v. Boyce*, 254 N.C. 255, 118 S.E. 2d 897 (1961), both of

which opinions contain helpful reviews of the rules of law applicable in such cases. Those rules, in part, are:

> "The power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto, and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement of the parties and promulgates it as a judgment."

Overton v. Overton, supra (quoting *Ledford v. Ledford*, 229 N.C. 373, 49 S.E. 2d 794 (1948)); *Howard v. Boyce, supra.*

> When a party to an action denies that he gave his consent to the judgment as entered, the proper procedure is by motion in the cause. And when the question is raised, the court, upon motion, *will determine the question.*

Overton v. Overton, supra (emphasis added).

> "[A] judgment bearing the consent of a party's attorney of record is not void on its face. . . . [I]t is presumed to be valid; and the burden of proof is on the party who challenges its invalidity. . . . But if and when . . . the court *finds as a fact* that the attorney had no authority to consent thereto, the essential element upon which its validity depends is destroyed."

Howard v. Boyce, supra (quoting *Owens v. Voncannon*, 251 N.C. 351, 111 S.E. 2d 700 (1959) (citation omitted) (emphasis added).

For recent opinions of this court consistent with *Overton* and *Howard, see Tice v. Dept. of Transportation*, 67 N.C. App. 48, 312 S.E. 2d 241 (1984); *Briar Metal Products v. Smith*, 64 N.C. App. 173, 306 S.E. 2d 553 (1983).

In such cases, the party seeking to set a non-consented to judgment aside need not show a meritorious defense. *Overton v. Overton, supra* and *Howard v. Boyce, supra.*

In *Howard*, this statement appears relating to the supreme court's disposition of the appeal:

> The primary question for the court below was whether or not the attorney of record had authority from appellants to compromise and settle the matters in controversy and approve a judgment in retraxit disclaiming on their behalf any

right, title or interest in the land in question. There are no findings of fact determining this question. The judgment does not purport to determine this question. The cause must be remanded for this determination . . . . [Citation omitted.]

Such is the problem here. Neither the Clerk's order or Judge Brown's order addressed or dealt with respondents' allegations of lack of consent, which we note was supported by affidavits of both respondents. Accordingly, the order of Judge Brown must be reversed and this matter remanded to the Superior Court of Nash County for determination of the factual issue of whether respondents authorized their attorney to consent to the Clerk's order. Should this determination be made against respondents, the Clerk's order should again be affirmed. Should this determination be made in respondents' favor, the matter should then be remanded to the Clerk for a hearing on the merits of the petition for partition.

Reversed and remanded with instructions.

Chief Judge HEDRICK and Judge MARTIN concur.

JOHN THOMAS PEARCE, ADMINISTRATOR OF THE ESTATE OF LISA COLLEEN PEARCE v. RONNIE EARL FLETCHER

No. 8410SC768

(Filed 7 May 1985)

Rules of Civil Procedure § 59— denial of motion to set aside verdict as to damages —no abuse of discretion

There was no abuse of discretion in the denial of plaintiff's motion to set aside the verdict as to damages and for a new trial where the jury had found that plaintiff's decedent had died as a result of defendant's negligence and awarded damages of $5,000. The evidence at trial was that decedent was nineteen years old; had stopped attending school during her sophomore year in high school; had subsequently "picked up two credits" but was not attending school at the time of her death; had worked periodically as a waitress but did not hold a regular job; was unemployed at the time of her death, lived at home, and was supported by her parents; had been hospitalized for drug overdose treatment six days prior to her death; a urine drug screen showed evidence of alcohol, cocaine, amphetamines and methamphetamines, and she had evidence of marks on her arms consistent with intravenous consumption of

cocaine; decedent and her parents had told her physician that she had had a drug problem for four or five years; and decedent's funeral expenses totalled $4,092.00. G.S. 28A-18-2(c), G.S. 1A-1, Rule 59.

ON certiorari to review judgment entered 26 September 1983 by *Battle, Judge*, in Superior Court, WAKE County. Heard in the Court of Appeals 13 March 1985.

Plaintiff brought this action in his administrative capacity seeking damages for the wrongful death of his decedent in an automobile accident. The jury found that decedent died as a result of defendant's negligence and that she was not contributorily negligent. It awarded damages in the sum of $5,000.00.

This Court allowed plaintiff's petition for a writ of certiorari to review the judgment. Plaintiff appeals and defendant cross appeals.

Farris and Farris, P.A., by Thomas J. Farris and Robert A. Farris, Jr., for plaintiff appellant.

Merriman, Nicholls, Crampton, Dombalis & Aldridge, P.A., by Nicholas J. Dombalis, II, and W. Sidney Aldridge, for defendant appellee and cross appellant.

WHICHARD, Judge.

Plaintiff's sole contention is that the court abused its discretion in denying his motion "to set aside the verdict as to damages as being against the evidence and the greater weight." In light of the standard for appellate review and of the evidence presented at trial, we find no abuse of discretion.

The standard for review of a trial court's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is virtually prohibitive of appellate intervention. Appellate review "is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E. 2d 599, 602 (1982). The trial court's discretion is " 'practically unlimited.' " *Id.*, 290 S.E. 2d at 603, quoting from *Settee v. Electric Ry.*, 170 N.C. 365, 367, 86 S.E. 1050, 1051 (1915). A "*discretionary* order pursuant to G.S. 1A-1, Rule 59 for or against a new trial upon *any* ground may be reversed on appeal

only in those exceptional cases where an abuse of discretion is clearly shown." *Worthington*, 305 N.C. at 484, 290 S.E. 2d at 603. "[A] manifest abuse of discretion must be made to appear from the record as a whole with the party alleging the existence of an abuse bearing that heavy burden of proof." *Id.* at 484-85, 290 S.E. 2d at 604. "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.* at 487, 290 S.E. 2d at 605.

The "cold record" here reveals the following pertinent evidence:

On 20-21 June 1980 decedent and defendant spent most of the evening at a nightclub. A witness observed the defendant there drinking; she described his speech as "slurred" and his behavior as "rambunctious." Because of defendant's condition, the witness was concerned about decedent's plans to ride to the beach with him.

At approximately 3:00 a.m. decedent and defendant stopped by decedent's home. Decedent's mother observed defendant stumble at the foot of a bed and "surmised" that he had been drinking. She was concerned about decedent's leaving with defendant and she attempted to follow them.

Shortly after decedent and defendant departed from decedent's home the automobile owned and operated by defendant overturned. Decedent died from injuries sustained in the accident. When the investigating officer arrived at the scene, defendant had a strong odor of alcohol on his breath.

Decedent was nineteen years old at the time of her death. She had stopped attending school during her sophomore year in high school. She subsequently "picked up two credits" in summer school but was not attending school at the time of her death. She worked periodically as a waitress but did not hold a regular job and was unemployed at the time of her death. She lived at home and her parents supported her.

Six days before decedent's death she was hospitalized for drug overdose treatment. A urine drug screen showed evidence of alcohol, cocaine, amphetamines and methamphetamines. She had evidence of marks on her arms which were consistent with in-

travenous consumption of cocaine. She told her treating physician that she had been "using various types of drugs both injectable and orally and had been smoking marijuana approximately four or five years." Her parents told the physician that decedent "had been somewhat of a problem for four to five years with drug usage and alcohol."

Decedent's funeral bill totalled $4,092.00.

The evidence regarding decedent's low level of educational attainment, absence of regular employment, status of dependency, and history of alcohol and drug abuse was clearly relevant to a determination of her "present monetary value . . . to the persons entitled to receive the damages recovered." G.S. 28A-18-2(c). The jury could conclude that these negative factors offset, to the extent found, what decedent's present monetary value would have been in their absence. Our Supreme Court noted in *Worthington* that "trial judges . . . have traditionally exercised their discretionary power to grant a new trial in civil cases quite sparingly in proper deference to the finality and sanctity of the jury's findings." *Worthington*, 305 N.C. at 487, 290 S.E. 2d at 605. In light of the evidence here, we cannot conclude that the trial court's decision to defer to the finality and sanctity of the jury's findings was a manifest abuse of discretion or probably amounted to a substantial miscarriage of justice. We thus affirm the ruling.

At oral argument counsel for defendant stipulated to the dismissal of defendant's cross appeal in the event we affirmed in plaintiff's appeal. Accordingly, defendant's cross appeal is dismissed.

In plaintiff's appeal, affirmed.

In defendant's cross appeal, dismissed.

Judges JOHNSON and EAGLES concur.

Gupton v. McCombs

SHANE FOREST GUPTON, BY GEORGE EDWARD GUPTON, JR., G/A/L AND GEORGE EDWARD GUPTON, JR., INDIVIDUALLY v. SUE STANCIL McCOMBS AND WILLIAM F. McCOMBS D/B/A NORTH RIDGE 66

No. 8410SC789

(Filed 7 May 1985)

Automobiles and Other Vehicles § 90.7— sudden emergency—insufficient evidence for instruction

In an action to recover for injuries to a seven-year-old child who was struck when he stepped into the path of defendant's vehicle, the trial court erred in instructing the jury on the doctrine of sudden emergency where the evidence showed that defendant's negligence helped create the emergency situation in that defendant saw the child standing on the side of the road but failed to sound her horn or to keep a vigilant lookout for the child. G.S. 20-174(e).

APPEAL by plaintiffs from *Brewer, Judge.* Judgment entered 9 March 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 15 March 1985.

On 12 June 1982, plaintiff, Shane Forest Gupton, a seven-year-old child, was injured when he was struck by a pickup truck being operated by defendant, Sue Stancil McCombs (hereinafter Mrs. McCombs). His father, on behalf of Shane and individually, instituted this action seeking to recover damages arising out of Mrs. McCombs' alleged negligence and to recover for Shane's medical expenses. At the conclusion of trial, the jury found that Mrs. McCombs was not negligent. From a judgment entered upon the jury's verdict, plaintiffs appeal.

Blanchard, Tucker, Twiggs, Earls & Abrams, by Charles F. Blanchard and Irvin B. Tucker, Jr., for plaintiff appellants.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Ronald C. Dilthey and H. Lee Evans, Jr., for defendant appellees.

JOHNSON, Judge.

The dispositive issue on this appeal is whether the court erred in submitting an instruction on the doctrine of sudden emergency. For the following reasons, we conclude it did err and award plaintiffs a new trial.

At approximately 3:45 p.m. on 12 June 1982, Mrs. McCombs was traveling east at approximately 30 to 35 miles per hour on Spring Forest Road, a two lane road, in Raleigh, North Carolina when she observed a boy, plaintiff Shane Gupton, standing on the side of the road. When she saw the person was a child, she slowed down to approximately 25 to 30 miles per hour. As she neared the child, she noticed that the boy was looking at the westbound traffic as if he was preparing to cross the street. She assumed the boy would wait until she passed before crossing the street. Instead, the boy stepped into the path of her vehicle after the oncoming westbound vehicles had passed. There was a conflict in the evidence as to whether Mrs. McCombs saw the boy step in front of her vehicle. At the scene of the accident she gave a statement to the investigating police officer in which she indicated that she saw the boy step in front of her vehicle and that she swerved left in an unsuccessful attempt to avoid striking him. At trial, however, Mrs. McCombs testified that she did not see the boy step in front of her vehicle, but that she first felt a thud or something striking the side of her vehicle and then she saw the boy.

No visible marks were found on the side of Mrs. McCombs' vehicle. Two dents, however, were found around the right headlights. Hair and fragments of human skin were found in these dents.

The pavement was dry on the date of the accident. Mrs. McCombs' view of the boy was unobstructed from at least 400 feet away.

Mrs. McCombs did not sound her horn to warn the boy of her presence or approach.

The doctrine of sudden emergency states that one confronted with an emergency and compelled to act instantly to avoid a collision or injury is not liable if he acts as a reasonable man might have done in such a situation, even though his action may later prove not to have been the wisest choice. *Foy v. Bremson*, 286 N.C. 108, 209 S.E. 2d 439 (1974); *Rodgers v. Carter*, 266 N.C. 564, 146 S.E. 2d 806 (1966). One cannot receive the benefit of the sudden emergency doctrine, however, if the emergency was caused, wholly or in material part, by his negligence or wrongful act. *Foy v. Bremson, supra.* "One cannot, by his negligent conduct, permit

an emergency to arise and then excuse himself on the ground that he was called upon to act in an emergency." *Brunson v. Gainey*, 245 N.C. 152, 156, 95 S.E. 2d 514, 517 (1956). Moreover, one is not entitled to an instruction on the doctrine of sudden emergency if the injury was not caused by defendant's actions after the emergency arose. *Murchison v. Powell*, 269 N.C. 656, 153 S.E. 2d 352 (1967).

A motorist owes a special duty to children on or near a roadway:

> The duty the law imposes upon a motorist who sees, or by the exercise of reasonable care should see, children on or near the highway has been frequently declared by this Court. He must recognize that children have less discretion than adults and may run out into the street in front of his approaching automobile unmindful of the danger. Therefore, proper care requires a motorist to maintain a vigilant lookout, to give a timely warning of his approach, and to drive at such speed and in such a manner that he can control his vehicle if a child, in obedience to a childish impulse, attempts to cross the street in front of his approaching automobile. (Citations omitted.)

Wainwright v. Miller, 259 N.C. 379, 381, 130 S.E. 2d 652, 654 (1963). Furthermore, G.S. 20-174(e) requires a motorist to exercise due care to avoid colliding with any pedestrian and to warn the pedestrian by sounding the horn when necessary.

The evidence in the present case is uncontroverted that Mrs. McCombs never sounded her horn to warn the child of her approach. Moreover, she failed to keep a vigilant lookout for the child as she testified that she failed to see the child step in front of her vehicle, that she was looking at a tailgating vehicle, and that she was looking at oncoming traffic. She also testified that she assumed the child would wait for the oncoming cars and her vehicle to pass before crossing the street. She, however, could not make such an assumption. *Walker v. Byrd*, 258 N.C. 62, 127 S.E. 2d 781 (1962). By failing to sound her horn or to keep a vigilant lookout, Mrs. McCombs helped create the emergency situation. If she had sounded her horn, the child would have been made aware of her approach. If she had been maintaining a vigilant lookout, she could have seen the child step, or begin to step, in front of

her. The court, therefore, erred in submitting a sudden emergency instruction, and because the jury may have been misled or confused by the instruction, a new trial is necessary. *Rodgers v. Carter, supra.*

Because we are remanding this cause for a new trial, we need not consider plaintiffs' remaining assignments of error as they may not recur at the new trial.

New trial.

Judges WHICHARD and EAGLES concur.

BRANCH BANKING AND TRUST COMPANY v. BILLY J. WRIGHT AND MARY DIANNE WRIGHT

No. 843SC848

(Filed 7 May 1985)

Divorce and Alimony § 30— equitable distribution—effect of deed of trust on entireties property executed by one spouse only

The trial court erred by permanently enjoining plaintiff from foreclosing under a deed of trust where the wife was awarded the marital home in an equitable distribution order and the husband had previously borrowed $48,000 from plaintiff secured by a deed of trust on the marital home which the wife had neither signed nor consented to. The estate of a tenancy in common intervened between absolute divorce and award of title pursuant to equitable distribution and the wife took title in fee simple absolute subject to plaintiff's deed of trust on the husband's one-half undivided interest. The wife was protected from having received an inequitable share of the marital property by the court's additional order that the husband bear sole financial responsibility for this deed of trust and others on the property given without her consent. G.S. 50-20, G.S. 50-21(a).

APPEAL by plaintiff from *Freeman, Judge.* Judgment entered 2 May 1984 in Superior Court, CRAVEN County. Heard in the Court of Appeals 3 April 1985.

Lee, Hancock, Lasitter and King, by Moses D. Lasitter, for plaintiff appellant.

Voerman and Ward, by David P. Voerman, for defendant appellees.

WHICHARD, Judge.

This is an appeal from a judgment declaring that plaintiff has no interest in certain marital property awarded to defendant wife and enjoining plaintiff from foreclosing on said property. Defendants husband and wife owned a home as tenants by the entirety. On 3 December 1981 defendant husband borrowed $48,000 from plaintiff which was secured by a deed of trust on the property. Defendant wife neither signed nor consented to the note or the deed of trust.

Defendants husband and wife were divorced on 5 May 1982. Pursuant to G.S. 50-20 and 50-21 an equitable distribution proceeding was heard 6 May 1982. In an order distributing a business and other real and personal property, the court awarded the marital residence to defendant wife. The court decreed that "[t]he husband shall save and hold the wife harmless, for any additional deeds of trusts [sic] allegedly made on the property by him without the consent and permission of the wife."

Defendant husband deeded the marital residence to defendant wife on 9 July 1982. Upon default in the loan payments plaintiff instituted foreclosure proceedings against the property on 16 December 1982. In this declaratory judgment action the court concluded that plaintiff "acquired no interest or estate in the . . . property . . . upon which to foreclose . . . ." It therefore permanently enjoined plaintiff from foreclosing under the deed of trust executed by defendant husband.

Plaintiff appeals. We reverse.

The issues are: the effect of a deed of trust on entireties property executed by one spouse when the marriage is terminated by an absolute divorce and the estate is converted by operation of law into a tenancy in common; and the effect on the creditor's interest in the property of an action for equitable distribution awarding the property to the non-debtor spouse. Both issues appear to be raised here for the first time. Lee, *Tenancy by the Entirety in North Carolina*, 41 N.C. L. Rev. 67, 82 n. 81 (1962) (questions effect of divorce on a mortgage executed by one spouse on entireties property).

As to the first issue,

> under the laws of North Carolina, real property held by the entireties, unless the debt be joint, generally is not subject to the claims of the creditors of either party to the marriage. During coverture, neither party acting alone, may sell the land or his or her interest in it, and creditors of the husband, alone, or of the wife, may not levy upon the land or the single debtor's interest in it.

Stubbs v. Hardee, 461 F. 2d 480, 482 (1972) (citing *Turlington v. Lucas*, 186 N.C. 283, 119 S.E. 366 (1923), for a general discussion of the entireties estate). *See also Gas Co. v. Leggett*, 273 N.C. 547, 161 S.E. 2d 23 (1968).

Upon divorce, however, a tenancy by the entirety is converted into a tenancy in common, each former spouse holding an undivided one-half interest. *Kirstein v. Kirstein*, 64 N.C. App. 191, 193, 306 S.E. 2d 552, 553 (1983). *See also Smith v. Smith*, 249 N.C. 669, 107 S.E. 2d 530 (1959). In a tenancy in common, a mortgage or deed of trust executed by one tenant does not affect the title of the others. *Bailey v. Howell*, 209 N.C. 712, 715-16, 184 S.E. 476, 479 (1936). The grantee of one tenant can take only that tenant's share and step into that tenant's shoes. *Id.*

Here defendants owned the marital home as tenants by the entirety. The husband executed a deed of trust on the property without the joinder or consent of his wife, to the extent of his common law interest. As long as the property remained in the entireties, the lien of the deed of trust could neither encumber, interfere with, or defeat the wife's interest while she lived. Lee, *supra*, at 90. Plaintiff thus could not exercise its foreclosure right until the entireties property was converted into another form of estate. *See In re Foreclosure of Deed of Trust*, 303 N.C. 514, 519, 279 S.E. 2d 566, 569 (1981).

Defendants contend that, because the court awarded the property to defendant wife in an equitable distribution proceeding, "the property went from tenan[cy] by the entirety property to the vesting of title solely and exclusively in the wife." "There was never," defendants contend, "any estate recognizable in the law upon which [plaintiff] could seek to foreclose the deed of trust." We disagree.

When defendants were divorced the tenancy by the entirety became a tenancy in common. *Kirstein*, 64 N.C. App. at 193, 306 S.E. 2d at 553. Thus, as of 5 May 1982, the date of the divorce decree, one-half of the property became subject to the claims of the creditors of either spouse individually. *Stubbs*, 461 F. 2d at 482. On divorce the lien of the deed of trust upon which plaintiff seeks to recover attached to defendant husband's one-half undivided interest in the property. We thus hold that when the marital home was distributed pursuant to G.S. 50-20 defendant wife took title in fee simple absolute subject to plaintiff's deed of trust on defendant husband's one-half undivided interest.

We find no authority for using the Equitable Distribution Act to defeat the rights of creditors. To the contrary, we discern a legislative intent that rights of creditors without notice be protected in the equitable distribution of real property. *See* G.S. 50-20(h). Classification of property—whether real or personal—as marital should not exempt it from the normal restrictions on its use, enjoyment, and disposition. Thus, for example, a party who is awarded the family car takes it subject to existing liens, whether or not the car was purchased and the debt incurred by the other party.

While it is not argued here, we note that under the language of our statute which states that "equitable distribution of property *shall follow* a decree of absolute divorce" (emphasis added), G.S. 50-21(a), the estate of a tenancy in common of necessity intervenes between absolute divorce and award of title pursuant to equitable distribution when property was held by the entireties. This is so whether or not the divorce and the equitable distribution occur in a single proceeding.

While we hold that defendant wife has been awarded encumbered property, we note the court's additional order that defendant husband bear sole financial responsibility for this deed of trust and others on the property given without her consent. Defendant wife is thus protected from having received an inequitable share of the marital property.

Reversed.

Judges JOHNSON and EAGLES concur.

JOSEPH C. McINTOSH v. BARBARA D. McINTOSH

No. 8415DC546

(Filed 7 May 1985)

1. **Divorce and Alimony § 30— equitable distribution—requirements for stipulations**

The trial court erred in an action for divorce and equitable distribution by giving effect to the parties' oral stipulations relating to the distribution of the marital property without inquiring into the parties' understanding of the legal effect of their agreement or the terms of their agreement. Any agreement entered into by parties regarding the distribution of their marital property should be reduced to writing, duly executed and acknowledged; if oral stipulations are not reduced to writing it must affirmatively appear in the record that the trial court made contemporaneous inquiries of the parties at the time the stipulations were entered into, that the court read the terms of the stipulations to the parties, that the parties understood the legal effects of their agreement and the terms of the agreement, and that the parties agreed to abide by those terms of their own free will. G.S. 50-20(d).

2. **Divorce and Alimony § 30— equitable distribution—determined before alimony**

The trial court in a divorce action erred by hearing the issue of alimony before the issue of equitable distribution. Equitable distribution when properly demanded must be granted upon the divorce decree being entered; if alimony and child support have not been previously awarded, equitable distribution must be made first.

APPEAL by plaintiff from *Washburn, Judge.* Judgment entered 7 October 1983 in District Court, ALAMANCE County. Heard in the Court of Appeals 16 January 1985.

Plaintiff, on 19 October 1982, commenced this action seeking an absolute divorce based on one year's separation. Defendant answered and filed a counterclaim seeking alimony, an equitable distribution of the marital property and counsel fees. The parties were granted an absolute divorce on 12 January 1983. Thereafter, on 5 April 1983, defendant's claim for alimony came on for trial. Before the jury returned a verdict, the parties entered into stipulations before the court, settling the alimony issue and agreeing to an equal distribution of the marital property. Pursuant to the parties' stipulations, the trial court entered an order on 7 October 1983 dividing the marital property. From this order, plaintiff appeals.

Vernon, Vernon, Wooten, Brown & Andrews, P.A., by T. Randall Sandifer and Wiley P. Wooten, for plaintiff appellant.

Bryant, Drew, Crill & Patterson, P.A., by Victor S. Bryant, Jr., for defendant appellee.

JOHNSON, Judge.

[1] The threshold issue presented by this appeal is whether the trial court erred in giving legal effect to the parties' oral stipulations relating to the distribution of their marital property. The parties stipulated as follows: (1) that all property owned by them at the time they separated was marital property; (2) that the marital property was to be divided equally; (3) that the marital property was to be valued as of the date of their divorce; and (4) that they would each bear their own expense and costs of the proceedings. The parties were willing to leave the actual division of their property to the court, if necessary.

The parties' stipulations were informally dictated to the court reporter at a hearing to determine the amount of alimony to be awarded, if any. No inquiry was made by the court into the parties' understanding of the legal effect of their agreement or the terms of their agreement. The stipulations were not reduced to writing nor were they acknowledged by the parties as accurately reflecting their agreement. We believe that the failure of the trial court to make such inquiries and/or the parties' failure to reduce the stipulations to writing is inadequate to protect or safeguard the rights of the parties. We find support for this belief in G.S. 50-20(d).

G.S. 50-20(d) states:

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

We believe this section was enacted to insure against fraud and overreaching on the part of one of the spouses. It has often been stated that, "[t]he relationship between husband and wife is

the most confidential of all relationships, and transactions between them, to be valid, must be fair and reasonable. . . . To be valid, 'a separation agreement must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties.' " *Johnson v. Johnson*, 67 N.C. App. 250, 255, 313 S.E. 2d 162, 165 (1984) (quoting *Eubanks v. Eubanks*, 273 N.C. 189, 195-96, 159 S.E. 2d 562, 567 (1968)). Courts have thrown a cloak of protection about separation agreements and made it their business, when confronted, to see that they are arrived at fairly and equitably. *Id.*

We believe the same scrutiny which is applied to separation agreements must also be applied to stipulations entered into by a husband and a wife regarding the distribution of their marital property. Any agreement entered into by parties regarding the distribution of their marital property should be reduced to writing, duly executed and acknowledged. If, as in the case *sub judice*, oral stipulations are not reduced to writing it must affirmatively appear in the record that the trial court made contemporaneous inquiries of the parties at the time the stipulations were entered into. It should appear that the court read the terms of the stipulations to the parties; that the parties understood the legal effects of their agreement and the terms of the agreement, and agreed to abide by those terms of their own free will.

This procedure is not to discourage parties from entering into stipulations regarding the distribution of their marital property at a hearing for equitable distribution. On the contrary, we follow the trend of the case law in North Carolina that encourages stipulations because they tend to simplify, shorten, or settle litigation as well as save costs to the parties. *Rickert v. Rickert*, 282 N.C. 373, 193 S.E. 2d 79 (1972). This procedure is to insure that each party's rights are protected and to prevent fraud and overreaching on the part of either spouse.

[2] We also note the trial court's error in hearing the issue of alimony before hearing the issue of equitable distribution. Equitable distribution, when properly demanded, must be granted upon the divorce decree being entered; and if alimony and child support have not been previously awarded, equitable distribution

must be made first. *Capps v. Capps*, 69 N.C. App. 755, 318 S.E. 2d 346 (1984).

The judgment of the trial court is vacated and the case remanded for hearing consistent with this opinion.

Vacated and remanded.

Judges BECTON and MARTIN concur.

MICHAEL ANTHONY ESTRADA v. STEVEN J. BURNHAM

No. 8415SC664

(Filed 7 May 1985)

Rules of Civil Procedure § 41— voluntary dismissal before service attempted on defendant

By filing his complaint, having summons issued, and taking a voluntary dismissal two minutes later, plaintiff tolled the statute of limitations and effectively obtained the one year extension within which to commence a new action based on the same claim pursuant to G.S. 1A-1, Rule 41(a)(1) even though no service on defendant was attempted.

APPEAL by plaintiff from *Walker, Judge*. Order entered 5 April 1984 in Superior Court, ORANGE County. Heard in the Court of Appeals 12 February 1985.

The sole question presented on this appeal is whether the court erred in granting defendant's motion to dismiss pursuant to Rule 12(b)(6) on the basis that the action was barred by the three year statute of limitations.

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

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

PARKER, Judge.

On 18 June 1982, at 4:28 p.m., a complaint styled "Michael Anthony Estrada v. Steven J. Burnham" was filed in Durham

County Superior Court, and a civil summons was issued. The complaint alleged that defendant was negligent in his care and treatment of plaintiff during a 17 June 1979 through 7 July 1979 hospitalization at North Carolina Memorial Hospital, and that as a proximate result of defendant's negligence, plaintiff had to undergo amputation of his left leg and sustained medical expenses, lost wages, and pain and suffering. Two minutes after the complaint was filed, at 4:30 p.m., plaintiff filed a Notice of Dismissal, voluntarily dismissing the action without prejudice pursuant to G.S. 1A-1, Rule 41(a)(1).

On 16 June 1983 plaintiff filed his complaint in this action against defendant alleging injuries resulting from defendant's negligence during the same 17 June 1979 through 7 July 1979 hospitalization. Defendant was properly served with process and filed a motion to dismiss which is the issue on this appeal.

General Statute 1A-1, Rule 41 provides:

> (a) Voluntary Dismissal; effect thereof.
>
> (1) By Plaintiff; by Stipulation.—Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

There is no contention by defendant that the original complaint was not timely filed. Rather, defendant asserts that plaintiff must serve or attempt service upon defendant before plaintiff

can benefit from the "saving" provision of Rule 41(a) allowing an action to be refiled within one year after a voluntary dismissal. We do not agree.

Rule 41(a) does not require that plaintiff attempt service upon defendant before plaintiff can voluntarily dismiss his action. Nor does Rule 41(a) limit the reasons why plaintiff may take a voluntary dismissal. Rule 3 of the Rules of Civil Procedure provides that an action is commenced by filing a complaint. The commencement of an action normally tolls the statute of limitations.

This Court has previously held that once an action is timely filed, the giving of a notice of voluntary dismissal gives plaintiff an extension of time beyond the general statute of limitation and allows plaintiff an additional year from the date the notice was given to refile an action based on the same claim. *Freight Lines v. Pope, Flynn & Co.*, 42 N.C. App. 285, 256 S.E. 2d 522 (1979); *Whitehurst v. Transportation Co.*, 19 N.C. App. 352, 198 S.E. 2d 741 (1973); *See also Hailslip v. Riggs*, 534 F. Supp. 95 (W.D.N.C. 1981).

Defendant contends that the cases of *Adams v. Brooks*, 73 N.C. App. 624, 327 S.E. 2d 19 (1985), *Wheeler v. Roberts*, 45 N.C. App. 311, 262 S.E. 2d 829 (1980) and *Hall v. Lassiter*, 44 N.C. App. 23, 260 S.E. 2d 155 (1979), are controlling on the issue. These cases are distinguishable for the reason that plaintiffs in these cases failed to keep their original actions "alive." In *Wheeler* and *Hall*, the original actions had already been discontinued by operation of law under Rule 4(e) at the time plaintiff attempted to take a voluntary dismissal. The attempted voluntary dismissal was a nullity, and the one year extension under Rule 41(a) was not available. In the instant case, the original action was "alive" at the time of plaintiff's voluntary dismissal. Before plaintiff took his voluntary dismissal, no time period had lapsed during which plaintiff was required by the Rules of Civil Procedure to take further steps to keep his action viable. Plaintiff's original action ended when he filed his notice of voluntary dismissal.

By filing his complaint, having the summons issued, and taking the voluntary dismissal without prejudice, plaintiff tolled the statute of limitations and effectively obtained the one year extension within which to commence a new action based on the same claim pursuant to Rule 41(a)(1).

While the result may be harsh as to defendant because defendant is left subject to suit without notice for an additional year, modification, if any, of the Rules of Civil Procedure is within the province of the Legislature.

Defendant's contentions regarding Rule 11 are, in our judgment, inapplicable to the facts of this case.

The judgment appealed from is

Reversed.

Judges ARNOLD and EAGLES concur.

GENEVA COWART, EMPLOYEE, PLAINTIFF v. SKYLINE RESTAURANT, EMPLOYER, AND AETNA CASUALTY & SURETY COMPANY, CARRIER, DEFENDANTS

No. 8410IC792

(Filed 7 May 1985)

Master and Servant § 77.1 — change of condition within two years of last payment — insufficient evidence

The record did not support the Industrial Commission's finding that plaintiff had a substantial change of condition within two years of the last and final payment of compensation where the Commission based its finding on the testimony of plaintiff's treating physician, who examined plaintiff more than two years and seven months after the last payment and testified that she had a change of condition, but did not testify as to when it occurred.

Judge WELLS dissenting.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission entered 16 February 1984. Heard in the Court of Appeals 1 April 1985.

This is a worker's compensation proceeding wherein plaintiff's attorney, by letter dated 13 April 1981, notified the Commission that plaintiff wished to reopen her case for further review because of a substantial change in condition since the last payment of compensation to her on 7 November 1979.

On 4 May 1983 Deputy Commissioner Winston L. Page, Jr., after a hearing conducted on 16 June 1982, entered an opinion and award wherein he made a finding and conclusion that plaintiff had not "sustained a substantial change in her condition within two years of November 7, 1979, the date she last received compensation."

On appeal, the Full Commission, Chairman Stephenson dissenting, made a finding and conclusion that

> Plaintiff sustained a substantial change in her condition for the worse within two years of the date she last received compensation. She is entitled to compensation at the rate of $100.00 a week for 60 weeks for the 20 percent increase in her permanent partial disability of the back.

From an order requiring defendants to pay additional compensation in accordance with the conclusion set out above, defendants appealed.

Stepp, Groce & Cosgrove, by Edwin R. Groce, for plaintiff, appellee.

Russell & Greene, P.A., by J. William Russell, for defendants, appellants.

HEDRICK, Chief Judge.

The determinative question raised by this appeal is whether the Full Commission's finding of fact, labeled a conclusion of law, that the plaintiff had a substantial change of condition within two years of the last and final payment of compensation, is supported by any evidence in the record. We hold that it is not. Indeed, the evidence in the record compels the finding that plaintiff did not have a substantial change of condition within two years of the last and final payment of compensation.

The Commission obviously based its ultimate finding on the testimony of Dr. McConnachie, plaintiff's treating physician. We realize that, based on his examination of the plaintiff one day before the hearing and more than two years and seven months after the final payment of compensation, Dr. McConnachie testified that plaintiff had a change of condition; he did not, however, testify as to when such change occurred. Moreover, the same doctor wrote

a letter to defendant Aetna on 17 December 1981 stating that "Mrs. Cowart has not had a change in her condition." We point out that all of this occurred more than two years after the final payment of compensation.

In our opinion, no construction of the evidence contained in this record yields any support for the Commission's ultimate finding and conclusion. The decision of the Full Commission, dated 22 February 1984, must be reversed and the proceeding remanded to the North Carolina Industrial Commission for the entry of an order dismissing plaintiff's claim for further compensation.

Reversed and remanded.

Judge MARTIN concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

Implicit in the majority opinion is the requirement that plaintiff's change of condition must have actually occurred within two years of her final payment of compensation. In my opinion, the cases over the years reflect a requirement that when an injured worker seeks to establish a right to additional compensation based on a change of condition, the right must be asserted within two years of the last payment of compensation, but I have found no case which holds or even suggests that the worker must establish that the change of condition actually occurred within two years. Logically, once the claim is timely asserted, a worker should be as entitled to compensation for whatever degree of additional disability he may establish up to the time of hearing on his claim. In this case, Dr. McConnachie's testimony established that plaintiff suffered a change of condition for the worse within two years of her last payment of compensation.

For these reasons, I respectfully dissent and vote to affirm the Commission's award.

BETTY M. HUSTEAD v. ROSE'S STORES, INC.

No. 8412SC830

(Filed 7 May 1985)

Negligence § 57.10— sandals tied together—fall by customer—negligence by store

Plaintiff's forecast of evidence was sufficient to support an inference that plaintiff's injury was proximately caused by the negligence of defendant store and did not establish contributory negligence by plaintiff as a matter of law where it tended to show: defendant offered for sale sandals tied together in pairs so that anyone trying them on had limited mobility; as plaintiff tried on a pair of sandals, she was startled by defendant's clerk who was fast approaching her; in an effort to avoid a collision with defendant's clerk, plaintiff tried to move but was thrown off balance because her feet were hobbled by the sandals; and as a consequence plaintiff fell and was injured.

APPEAL by plaintiff from *Preston, Judge.* Judgment entered 12 June 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 3 April 1985.

This is a civil action wherein plaintiff seeks damages for injuries caused by the alleged negligence of defendant. The trial court granted defendant's motion for summary judgment from which plaintiff appealed.

Cooper, Davis & Eaglin, by Paul B. Eaglin, for plaintiff, appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Patricia L. Holland, for defendant, appellee.

HEDRICK, Chief Judge.

Plaintiff contends that the trial court erred in granting defendant's motion for summary judgment. The pleadings, depositions and interrogatories on file disclose the following: On 2 June 1982 plaintiff and her granddaughter went shopping at the Rose's store, Westwood Mall, Fayetteville. Plaintiff was looking for a pair of beach sandals, so after entering the store she walked to the shoe department. In the shoe department there was a table of plastic molded sandals tied together in pairs. As she stood in the aisle in front of the table, plaintiff picked up a pair of tied sandals and tried them on. While she was standing in the aisle with the sandals on she heard her granddaughter warn, "[w]atch out,

Grandma." Plaintiff turned and saw a store clerk with a box in her hands hurrying down the aisle toward her. Plaintiff, forgetting that her feet were hobbled by the tied sandals, attempted to move out of the clerk's way. Plaintiff lost her balance and fell, hitting her hand on the corner of the table. As a result of her fall, plaintiff suffered injury to her right hand manifested by pain and loss of function. Plaintiff stated that she did not see any chairs in the area where she could have sat and tried on the sandals.

The depositions of the Rose's clerks involved in the incident differ only in minor part from the testimony of plaintiff. Barbara R. Lewis, the clerk who passed plaintiff in the aisle before plaintiff fell, testified in her deposition that she approached plaintiff in the aisle walking at a slow pace and carrying a box of hangers. When she was about two or three feet away from plaintiff Ms. Lewis testified that she stopped and said "excuse me." After she excused herself the clerk walked on but turned and looked when she heard a noise behind her. Ms. Lewis said it appeared that plaintiff had grabbed a shelf and had her balance so the clerk continued on her way.

Summary judgment is rarely appropriate in negligence actions because ordinarily the jury has the duty to apply the reasonably prudent person standard of care to the facts presented. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982). The nonmovant is entitled to any reasonable inference in his favor to be drawn from the evidence. Summary judgment should be denied if those inferences suggest different material conclusions. *Wilson Brothers v. Mobil Oil*, 63 N.C. App. 334, 305 S.E. 2d 40, *disc. rev. denied*, 309 N.C. 634, 308 S.E. 2d 718, 719 (1983). *See also Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 279 S.E. 2d 559 (1981); *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979).

Here the evidence available to the court at the hearing on the motion for summary judgment gives rise to a reasonable inference suggesting that Rose's negligence proximately caused plaintiff's injury. The evidence also is sufficient to raise an inference that plaintiff's contributory negligence was a proximate cause of her injury, but the evidence is not sufficient for us to hold as a matter of law that plaintiff's claim was barred by her own contributory negligence. Plaintiff, the non-movant, has shown

that 1) defendant presented for sale a table of sandals that were tied together in pairs so that anyone trying them on had limited mobility; 2) as plaintiff tried on the sandals she was startled by defendant's clerk who was fast approaching; 3) in an effort to avoid a collision with defendant's clerk, plaintiff tried to move but was thrown off balance because her feet were hobbled by the sandals; and 4) as a consequence plaintiff fell and was injured. On the foregoing evidence reasonable men could differ as to whether defendant was negligent through its clerk and by tying the sandals together and its negligence was the proximate cause of plaintiff's injury or whether plaintiff was contributorily negligent in trying on the tied sandals as she stood in the aisle. It is for the jury to resolve these genuine issues of material fact. We therefore reverse the judgment of the trial court and remand this case for trial.

Reversed and remanded.

Judges WELLS and MARTIN concur.

STATE OF NORTH CAROLINA v. CURTIS S. CROUCH

No. 8412SC1006

(Filed 7 May 1985)

Criminal Law § 143.7— probation revocation—inability to comply with conditions—counsel's statements not evidence

The trial court was not under a duty to make specific findings with respect to defendant's alleged inability to comply with the terms of his probation where defendant's position was related through the statements of his counsel. Counsel's statements were not competent evidence; the burden is on defendant to present competent evidence of his inability to comply. G.S. 15A-1345(c), G.S. 8C-1, Rule of Evidence 1101 (Cum. Supp. 1983).

APPEAL by defendant from *Preston, Judge*. Judgment entered 24 May 1984 in CUMBERLAND County Superior Court. Heard in the Court of Appeals 3 April 1985.

Defendant was convicted of sale and delivery of a controlled substance. On 12 October 1981, the trial court entered a judgment

committing defendant to not less than one nor more than three years imprisonment, suspended the sentence and imposed conditions of probation. The terms of the probation judgment which are relevant to this appeal are:

. . .

(g) Report to the probation officer at reasonable times and in a reasonable manner, as directed by the court or the probation officer.

. . .

(n) Monies totalling $336.00 are to be paid into the Office of the Cumberland County Clerk of Superior Court under supervision of Probation at the rate of not less than $25.00 per month with first payment due on or before November 12, 1981 and each month thereafter until paid in full.

. . .

On 16 June 1983, defendant's probation officer filed a probation violation report in which he alleged that defendant had not reported to him on a monthly basis and that defendant had failed to make payments to the clerk of court as required.

A revocation hearing was held on 21 May 1984. Defendant's counsel stipulated that the allegations in the probation violation report were true, but defendant's counsel made representations to the court that the defendant had justifiable reasons for failing to comply. The court entered a judgment finding that defendant had willfully and without lawful excuse violated the terms of the probation judgment, revoked defendant's probation and committed defendant to the three year prison term imposed at defendant's trial.

Defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

K. Douglas Barfield for defendant.

WELLS, Judge.

By his single assignment of error, defendant contends that the trial court erred by revoking his probation. He argues that the court failed to make proper findings of facts to support its finding and conclusion that defendant's failure to comply with the terms of probation was willful or without lawful excuse. We do not agree.

Essentially, defendant's argument is to the effect that his evidence tended to establish defendant's inability to comply with the terms of his probation, and that the trial court's judgment fails to make the finding necessary to resolve the issue raised by that evidence.

In *State v. Young*, 21 N.C. App. 316, 204 S.E. 2d 185 (1974), this court held that where a defendant has presented competent evidence of his inability to comply with the terms of his probation, he is entitled to have that evidence considered and evaluated before the trial court can properly order revocation. *Accord State v. Sellars*, 61 N.C. App. 558, 301 S.E. 2d 105 (1983); *State v. Smith*, 43 N.C. App. 727, 259 S.E. 2d 805 (1979). *See also* N.C. Gen. Stat. § 15A-1345 (1983). In *Young*, this court also made it clear that the burden is on the defendant to present competent evidence of his inability to comply; and that otherwise, evidence of defendant's failure to comply may justify a finding that defendant's failure to comply was willful or without lawful excuse. It is this requirement that defendant failed to meet in this case.

Defendant presented no evidence. His position with respect to his inability to comply was related through the statements of his counsel. We hold that counsel's statements were not competent evidence, and that the trial court was not, therefore, under a duty to make specific findings with respect to defendant's alleged inability to comply. In reaching this position, we are aware that G.S. § 15A-1345(c) provides that formal rules of evidence do not apply at revocation hearings. *See also* N.C. Gen. Stat. § 8C-1, Rule of Evidence 1101 (Cum. Supp. 1983). Our review of representative cases discloses no circumstances where statements of counsel have been treated as evidence, while the cases repeatedly state that the findings and conclusions of the trial court in such hearings must be based on competent evidence.

Defendant having stipulated that the allegation as to his probation violations were true, and having presented no evidence as to his inability to comply with the terms of his probation, the judgment of the trial court must be and is

Affirmed.

Chief Judge HEDRICK and Judge MARTIN concur.

JACK A. LONDON, ADMINISTRATOR OF THE ESTATE OF MARTY ALLEN LONDON, DECEASED v. TIMOTHY RAY TURNMIRE

No. 8425SC961

(Filed 7 May 1985)

1. **Witnesses § 4.1— impeachment—witness's complaint not prior inconsistent statement**

In a wrongful death action arising out of an automobile accident, cross-examination of deceased's mother about a complaint she filed as guardian ad litem for her minor daughter in which she alleged that both deceased and defendant were negligent in causing the accident was not proper for impeachment under the theory of prior inconsistent statements where the witness's testimony dealt only with damages and not with how the accident occurred.

2. **Witnesses § 4.1— impeachment—inconsistent statement of another**

A witness may not be impeached by an inconsistent statement of another.

APPEAL by plaintiff from *Davis, James C., Judge*. Judgment entered 16 May 1984 in Superior Court, BURKE County. Heard in the Court of Appeals 18 April 1985.

This is a wrongful death action arising out of the death of Marty Allen London in an automobile accident involving cars driven by the deceased and the defendant. The defendant counterclaimed seeking damages for personal injuries. The evidence offered at trial tended to show that on 7 March 1982, a head-on collision occurred between the parties' vehicles in the deceased's lane of travel. The evidence as to what occurred immediately preceding the collision was in sharp conflict. The plaintiff's version of what occurred was told by the deceased's sister, Melissa Blackburn, a passenger in his vehicle. She testified that the vehi-

cle driven by the defendant swerved into the deceased's lane of traffic and that in spite of attempted evasive action on the part of the deceased the collision occurred. The defendant's evidence was that as he approached the vehicle driven by the deceased, the vehicle swerved into his lane, and that when he slammed on his brakes to attempt to avoid the deceased he slid into the other lane of traffic striking the deceased head-on. The jury found that neither the deceased nor the defendant was negligent. Based upon this verdict the court entered a judgment denying recovery to both parties. From this judgment, plaintiff appealed.

Byrd, Byrd, Ervin, Blanton, Whisnant & McMahon, by Robert B. Byrd and Sam J. Ervin, IV; and Todd, Vanderbloemen & Respess, by James R. Todd, Jr., for plaintiff appellant.

Patton, Starnes, Thompson & Aycock, by Thomas M. Starnes, for defendant appellee.

ARNOLD, Judge.

[1] The issue which is dispositive of this appeal is whether the trial court erred by allowing the defendant to cross-examine Pearline G. London, the deceased's mother, regarding allegations which the witness, acting as guardian ad litem for her daughter, made against the deceased in another action. Believing that this action was error, we award the plaintiff a new trial.

At trial the plaintiff offered evidence from Mrs. London which was designed to establish the damages which were caused by the deceased's death. On cross-examination the defendant was able to show, over plaintiff's objection, that the witness, as guardian ad litem for her minor daughter, had also signed a complaint in which she alleged that both the deceased and Turnmire were negligent in causing this accident. The court also allowed the defendant to introduce that complaint into evidence. From the record it appears that the court permitted this line of cross-examination upon the theory that this evidence might be used to impeach Mrs. London.

In North Carolina a witness's credibility may be attacked on cross-examination by showing *inter alia* prior bad acts, a bad moral character, a mental or physical condition affecting her memory, perception or veracity, or by evidence that the witness

has made other statements inconsistent with her testimony at trial. *See generally* 1 Brandis on North Carolina Evidence §§ 38, 42 (1982). The only one of these reasons which could possibly support the trial court's rulings allowing this line of cross-examination would be to impeach by a prior inconsistent statement. It is the general rule that a party may cross-examine a witness about statements which have been made either orally or in writing when those statements conflict with any portion of the witness's testimony. *State v. Penley*, 277 N.C. 704, 178 S.E. 2d 490 (1971); 1 Brandis on North Carolina Evidence § 46 (1982). In this case, however, the evidence of the prior suit which was elicited on cross-examination in no way contradicted the testimony which Mrs. London previously had given. The evidence which Mrs. London had given prior to the cross-examination did not deal with how the accident occurred but had instead focused on the damages which were caused by her son's death. Thus, it was improper to permit this line of questioning to impeach Mrs. London under the theory of prior inconsistent statements.

[2] The defendant also argues that this line of questioning was proper to impeach the credibility of Melissa Blackburn. This argument is without merit since a person may not be impeached by an inconsistent statement of another. *See* 1 Brandis on North Carolina Evidence § 46 (1982). Thus, we find that it was error to allow cross-examination regarding the prior complaint.

Having found error it must now be determined whether the error was prejudicial. We cannot say that the jury's verdict was not influenced by the admission of the improper evidence, therefore, we find that the erroneous admission constituted prejudicial error. For the above stated reasons we award the plaintiff a

New trial.

Judges PHILLIPS and COZORT concur.

STATE OF NORTH CAROLINA v. CARROLL NORMAN LANEY

No. 8427SC818

(Filed 7 May 1985)

1. **Criminal Law § 138— aggravating factor—explanatory note at bottom of form**

The trial judge intended to find only one aggravating factor where he placed three asterisks on the factors in aggravation and mitigation of punishment form beside the finding for an offense committed against law enforcement, judicial, or other officials, including witnesses, and noted at the bottom of the page that defendant had shot his wife, a witness against him.

2. **Criminal Law § 138— aggravating factor—shooting of witness—evidence sufficient**

The evidence was sufficient to permit the trial court to find by a preponderance of the evidence that defendant's offense was committed against a witness against him while engaged in the performance of her official duties or because of the exercise of her official duties where the evidence showed that the shooting occurred in close proximity to defendant's conviction in a trial in which his wife had been the sole witness against him; that in the setting of that trial he made veiled references to "doing something" to his wife; and that while he had threatened and harassed her on numerous prior occasions, he made a life-threatening assault upon her only in the immediate wake of that trial.

APPEAL by defendant from *Gaines, Judge.* Judgment entered 22 March 1984 in Superior Court, GASTON County. Heard in the Court of Appeals 8 March 1985.

Defendant appeals from a judgment of imprisonment entered upon his conviction of assault with a deadly weapon with intent to kill inflicting serious injury upon his wife.

Attorney General Edmisten, by Assistant Attorney General Floyd M. Lewis, for the State.

Rowell C. Cloninger, Public Defender, for defendant appellant.

WHICHARD, Judge.

Defendant contends only that the court erred in sentencing him to a term of imprisonment in excess of the presumptive. We find no error.

[1] The court marked the following on the form entitled "Felony Judgment Findings of Factors in Aggravation and Mitigation of Punishment":

> 5. The offense was committed against a present or former: law enforcement officer, employee of the Department of Correction, jailer, fireman, emergency medical technician, ambulance attendant, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duties.

Three asterisks appear beside this finding on the printed form, and at the bottom of the form the following appears beside three asterisks: "That immediately prior to the District Court trial, the defendant made veiled threats directed toward Frances Houser Laney, his wife, and after the trial the witness was shot while in an automobile at a shopping center where she drove on the way home from court." Defendant argues that the court found two separate factors in aggravation: the factor referred to by the language under "5" and the factor referred to at the asterisks at the bottom of the form. Defendant argues further that this was error because (1) the separate factors were supported by the same evidence and (2) the second factor, *i.e.*, the one at the bottom of the form, was not reasonably related to the purposes of sentencing.

We find the language at the bottom of the form explanatory of the finding numbered "5." It clearly was neither intended nor treated as a separate factor in aggravation. These contentions are without merit.

[2] Defendant contends the evidence was insufficient to prove the single aggravating factor found, *viz*, that the offense was committed against a witness against defendant while engaged in the performance of her official duties or because of the exercise of her official duties. The basis of his argument is that the State was unable to show by the preponderance of the evidence that defendant shot his wife because she was a witness against him.

The record establishes the following:

Defendant and his wife had been separated for approximately fourteen months before the shooting. During this period defendant had threatened and harassed his wife on numerous occasions. The threats generally related to what would happen to her if she did not come back to him. He had on prior occasions threatened to kill her.

On 17 January 1984 defendant was convicted of assault on a female and damage to personal property. His wife was the only witness against him. Shortly before the trial commenced defendant asked his mother-in-law to "go out in the hall and talk to him." In that conversation he raised the possibility of reconciliation with his wife. In response to his mother-in-law's expressions of doubt about such prospects, defendant stated: "I'm not going to have a suspended sentence. I'll just take an active." He also stated: "Do you think a suspended sentence would keep me from doing something to her if I wanted to?"

Defendant's wife and her parents left the courtroom at approximately 12:15 p.m. Defendant had left shortly before. The wife and parents went from the courthouse to a restaurant for lunch. They then went directly to a shopping center. As they looked for a parking space defendant's wife observed that defendant was following them. They made an effort to elude him, but he caught them and started shooting. He then jumped out of his car, pointed his gun "right at" his wife, and said, "Is she dead? Is she dead? If she's not, I'm going to shoot her again because I promised her I'd kill her."

This evidence shows: that the shooting occurred in close proximity to defendant's conviction in the trial in which his wife had been the sole witness against him; that in the setting of that trial he made veiled references to "doing something" to his wife; and that while he had threatened and harassed her on numerous prior occasions, he made a life-threatening assault upon her only in the immediate wake of that trial. We believe the distinctiveness of defendant's conduct on this occasion, combined with its proximity to the trial in which his wife testified against him and in the setting of which he made veiled references to "doing something" to her, permitted the court to find the aggravating factor in question by a preponderance of the evidence. We thus find no error in the sentence imposed.

No error.

Judges WEBB and BECTON concur.

STATE OF NORTH CAROLINA v. DANNY FRANKLIN WILLIAMS

No. 848SC969

(Filed 7 May 1985)

1. **Criminal Law § 138— statement in prior appellate decision—basis for aggravating factor**

A statement in a decision of the Supreme Court on defendant's prior appeal that a burglary victim was eighty-one years old was a sufficient basis for the trial court at a resentencing hearing to find that the victim of the crime was very old. G.S. 15A-1340.4(a).

2. **Criminal Law § 138— advanced age—aggravating factor for burglary**

It was proper for the trial court to conclude that the victim's advanced age (81) made her more vulnerable than most women to defendant's forcible and felonious invasion of her home and therefore was an aggravating factor for the crime of burglary. G.S. 15A-1340.4(a)(1)(j).

APPEAL by defendant from *Lewis, John B., Jr., Judge.* Judgment entered 31 May 1984 in Superior Court, LENOIR County. Heard in the Court of Appeals 2 April 1985.

Defendant was convicted of first degree rape and first degree burglary. A life sentence was imposed on the rape conviction and a forty year consecutive term imposed for the burglary conviction. In a prior appeal both convictions were affirmed. *State v. Williams*, 309 N.C. 170, 305 S.E. 2d 519 (1983). Defendant then moved for appropriate relief and pursuant thereto the trial court held a resentencing hearing on the burglary conviction only. After doing so the court found no factors in mitigation, found as a factor in aggravation that the victim of the crime was very old, and again sentenced defendant to a term of forty years to begin at the expiration of the life sentence for rape that he was then serving.

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

Appellate Defender Stein, by First Assistant Appellate Defender Malcolm Ray Hunter, Jr., for defendant appellant.

PHILLIPS, Judge.

[1] Defendant first contends that the aggravating factor found by the trial court was not "proved by the preponderance of the evidence," as required by G.S. 15A-1340.4(a). The record does show, as defendant points out, that at the resentencing hearing the State presented no evidence at all and the defendant stipulated to no facts. But this does not mean, as defendant's argument implies, that the court erroneously acted in a vacuum. Prosecutions and suits at law have records and 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). A part of the record of this case in the court below was the decision of the Supreme Court on defendant's previous appeal in which it is stated that the victim of defendant's crime was 81 years old. This is basis enough for the trial judge's finding that she was very old. Since the law does not require the doing of vain and superfluous things, when a defendant is resentenced it is not necessary to reestablish that which the court already knows. Our decision in *State v. Smith*, 73 N.C. App. 637, 327 S.E. 2d 44 (1985) was to the identical effect.

[2] Defendant's only other contention is that the victim's age was not reasonably related to the purposes of sentencing in this case. That the victim of a crime is either very young or very old, or mentally or physically infirm, is a statutorily authorized aggravating factor under G.S. 15A-1340.4(a)(1)(j) if it is reasonably related to the purposes of sentencing in the particular case. But as was held in *State v. Eason*, 67 N.C. App. 460, 313 S.E. 2d 221 (1984), a victim's age or condition is reasonably related to the purposes of sentencing only when it enhances the defendant's culpability. Vulnerability to the particular harm that defendant's crime entailed is the concern that this factor addresses, *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), and in *State v. Wheeler*, 70 N.C. App. 191, 319 S.E. 2d 631 (1984), where robbery at gunpoint was the offense and the circumstances did not show

that the victim's age or condition was relied upon or taken advantage of by defendant in committing the robbery, it was held that the victim's age was unrelated to the purposes of sentencing for that offense. But the situation is otherwise in this case and this contention is also overruled. The record in this case shows that: Defendant knocked on the victim's door, asked to use her phone to telephone a garage to pick up his car, which he claimed was stranded; she did not let defendant in the house, but did undertake to call a garage for him; defendant saw that she was an old lady, discerned that she was alone in the house, forcibly snatched the door open, physically overpowered her feeble resistance, and choked her to unconsciousness before raping her and stealing two heaters. Under the circumstances we believe it was appropriate for the judge to conclude that the victim's advancing years made her more vulnerable than most women to the defendant's forcible and felonious invasion of her home and was therefore related to the purposes of sentencing in this case.

No error.

Judges ARNOLD and COZORT concur.

ALMOND GRADING COMPANY, A CORPORATION v. KENNETH D. SHAVER, SR., AND WIFE, BERTIE T. SHAVER

No. 8426SC858

(Filed 7 May 1985)

Contracts § 21.2; Rules of Civil Procedure § 56.3— substantial performance—summary judgment on plaintiff's uncorroborated allegations improper

Summary judgment should not have been entered for plaintiff on an action in which plaintiff alleged that it had substantially performed a grading contract but had not been paid because there was only plaintiff's uncorroborated assertion that the work which remained was negligible. There were genuine issues of fact as to whether plaintiff substantially performed and as to the amount plaintiff was entitled to recover for its performance.

APPEAL by defendants from *Saunders (Chase B.), Judge.* Judgment entered 1 June 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 April 1985.

On 19 February 1982, plaintiff filed a verified complaint in which it alleged that defendants owed plaintiff $8,993.10 plus interest at a rate of 1.5% per month from 23 November 1981 on a substantially performed grading contract. Defendants answered and counterclaimed, admitting the contract but claiming that plaintiff had failed to comply with its terms. Plaintiff replied, denying the counterclaim. On 30 January 1984 plaintiff, seeking to establish a *prima facie* case for breach of contract, served a request for admissions on defendants which they failed to answer. On 20 April 1984 plaintiff moved for summary judgment. Plaintiff supported its motion with the verified complaint, an affidavit by the president of plaintiff corporation reiterating the claims in the complaint, and the unanswered request for admissions. Defendants relied on their pleadings and the evidence supplied by plaintiff in opposing the motion for summary judgment. After a hearing on the motion the court granted summary judgment for the plaintiff in "the sum of $8,993.10 together with interest thereon at 18% per annum from the 23rd day of November, 1981 until the date of this Judgment and at 8% per annum thereafter . . ." from which defendants appealed.

Newitt & Bruny, by Roger H. Bruny and John G. Newitt, Jr., for plaintiff, appellee.

Connelly, Karro, Blane & Sellers, by Seth H. Langson and Marshall H. Karro, for defendants, appellants.

HEDRICK, Chief Judge.

The only question raised and argued on appeal is whether the trial court erred in entering summary judgment for plaintiff with respect to its claim against the defendant. No question is raised or argued as to the propriety of summary judgment for plaintiff in regard to defendants' counterclaim. Thus summary judgment for plaintiff as to defendants' counterclaim will be affirmed.

Summary judgment must be granted, upon motion, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). The moving party has the burden of clearly establishing the lack of a

triable issue; his papers are carefully scrutinized and those of the opposing party indulgently regarded. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972). Should the moving party fail to carry his burden, the opposing party does not have to respond and summary judgment is not proper regardless of whether he responds. *Development Corp. v. James*, 300 N.C. 631, 268 S.E. 2d 205 (1980).

When the party with the burden of proof moves for summary judgment, a greater burden must be met. *Brooks v. Farms Center, Inc.*, 48 N.C. App. 726, 269 S.E. 2d 704 (1980).

> [S]ummary judgment may be granted for a party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize Rule 56(f); and (3) when summary judgment is otherwise appropriate.

Kidd v. Early, 289 N.C. 343, 370, 222 S.E. 2d 392, 410 (1976).

In the present case, plaintiff asserted it was entitled to summary judgment because it had substantially performed the contract and yet had not been paid as agreed. Plaintiff's pleadings, affidavit and the requests for admissions all assert that the contract was *substantially*, not completely, performed. Although plaintiff states that the work which remained was negligible, we have only his bald assertion uncorroborated by any objective evidence or testimony. Even if we should accept as true all the claims made by plaintiff in support of his motion we are left with the question of whether the incomplete performance by the plaintiff was substantial performance of the contract. There also remains for the jury's determination the material question of the amount plaintiff is entitled to recover for the work done in performing the contract. These questions are genuine issues of material fact that can only be resolved by an objective trier of fact. Therefore, summary judgment for the plaintiff as to its claim against the defendant must be reversed. Finally, we note the court appears to have erroneously calculated the interest that plaintiff was entitled to recover.

Affirmed in part, reversed and remanded in part.

Judges WELLS and MARTIN concur.

IN THE MATTER OF: RUBY BENNETT INGRAM

No. 8421DC763

(Filed 7 May 1985)

1. **Insane Persons § 1— involuntary commitment—petition not duly sworn**

A petition for involuntary commitment was insufficient where it was not confirmed by oath or affirmation before a duly authorized certifying officer as G.S. 122-58.3(a) requires.

2. **Insane Persons § 1— involuntary commitment—insufficiency of petition**

A statement in a petition for involuntary commitment that respondent "has strange behavior and irrational in her thinking" was a pure conclusion which was insufficient to establish reasonable grounds for issuance of the commitment order. Further statements that respondent "[l]eaves home and no one knows of her whereabouts, and at times spends the night away from home. Accuses husband of improprieties," did not establish facts tending to show that respondent is mentally ill or dangerous to herself or others and were also insufficient to establish reasonable grounds for issuance of a commitment order.

APPEAL by respondent from *Alexander, Judge*. Order entered 3 May 1984 in District Court, FORSYTH County. Heard in the Court of Appeals 6 March 1985.

Respondent's husband filed an unsworn petition for involuntary commitment alleging that respondent is "a mentally ill . . . person who is dangerous to [her]self or others." The "facts" on which the petition was based were stated as follows: "Respondent has strange behavior and irrational in her thinking. Leaves home and no one knows of her whereabouts, and at times spends the night away from home. Accuses husband of improprieties."

The district court, after receiving evidence from petitioner and respondent, made findings that respondent "has . . . acted in such manner as to evidence that [s]he would be unable without care, supervision, and the continued assistance of others to . . . satisfy [her] need for nourishment, personal or medical care, shelter, safety, and protection . . . in that [she] wanders away

from home, threatens violence to others[,] [d]oes not know her whereabouts." The court concluded that respondent is "mentally ill and dangerous to [her]self or others" and ordered her involuntarily committed to a mental health facility for a period not to exceed ninety days.

From the order of commitment, respondent appeals.

Attorney General Edmisten, by Associate Attorney Augusta B. Turner, for petitioner appellee.

Dawson & Mabe, by Kenneth Clayton Dawson, for respondent appellant.

WHICHARD, Judge.

[1] Respondent contends the court erred in denying her motion to dismiss on the ground that the petition was not duly sworn. We agree.

The space for the certifying officer's signature on the form "Petition for Involuntary Commitment" is blank. G.S. 122-58.3(a) provides that a person with "knowledge of a mentally ill . . . person who is dangerous to himself or others" may "execute an affidavit to this effect" which "shall include the facts on which the affiant's opinion is based." An affidavit is " '[a] written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.' " *Ogburn v. Sterchi Brothers Stores, Inc.*, 218 N.C. 507, 508, 11 S.E. 2d 460, 461 (1940) (quoting Black's Law Dictionary (2d Ed.) at 46). Documents which are not under oath may not be considered as affidavits. *Peace v. Broadcasting Corp.*, 22 N.C. App. 631, 634, 207 S.E. 2d 288, 290 (1974). The requirements of G.S. 122-58.3 must be followed diligently. *In re Hernandez*, 46 N.C. App. 265, 268, 264 S.E. 2d 780, 781 (1980). Because the statute "provides for a drastic remedy, it is encumbent upon all [who] use it to do so with care and exactness . . . ." *Samons v. Meymandi*, 9 N.C. App. 490, 497, 177 S.E. 2d 209, 213 (1970), *cert. denied*, 277 N.C. 458, 178 S.E. 2d 225 (1971) (decided under portion of statute since repealed). Where an involuntary commitment statute requires an oath and the requirement is not complied with, the person involuntarily committed is deprived of liberty without legal process. *Id.*

The petition for involuntary commitment could not be treated as an affidavit because it was not confirmed by oath or affirmation before a duly authorized certifying officer. It thus did not comply with the requirements of G.S. 122-58.3(a) and could not serve as a basis for respondent's involuntary commitment. The order of commitment therefore must be vacated.

[2] Respondent further contends the court erred in denying her motion to dismiss the petition for failure to state a claim upon which relief may be granted. We again agree.

"The statute clearly requires that the affidavit contain '*the facts* on which the affiant's opinion is based.' " *In re Reed*, 39 N.C. App. 227, 228, 249 S.E. 2d 864, 865 (1978). Mere conclusions of the affiant do not suffice. *Id.* The statement here that "[r]espondent has strange behavior and irrational in her thinking" is not a statement of fact but a pure conclusion of the affiant. It thus did not suffice to establish reasonable grounds for issuance of the commitment order. The remaining statements in the petition—"Leaves home and no one knows of her whereabouts, and at times spends the night away from home. Accuses husband of improprieties."—do not establish facts showing or tending to show that respondent is mentally ill or dangerous to herself or others. The petition thus satisfied neither statutory nor due process requirements; even if it had met the statutory requirement for an affidavit, which it did not, it was insufficient to establish reasonable grounds for issuance of a commitment order. *Reed*, 39 N.C. App. 227, 249 S.E. 2d 864.

Order vacated.

Judges WELLS and BECTON concur.

SAMUEL WAYNE PREVATTE v. BECTINA L. PREVATTE

No. 844DC678

(Filed 7 May 1985)

Divorce and Alimony § 24.5— modification of earlier child support order—no appeal from earlier order—no error

There was no error in a court's order that funds held in trust for a child's benefit be paid to defendant, the custodial parent, for the child's use and that plaintiff make support payments of $125 per month to the Clerk of Court for disbursement to defendant rather than to the trust account. An earlier order requiring defendant to pay $125 per month into the trust account was not appealed from, and these modifications of that order affect no legal right of plaintiff's and were clearly justified by findings which were not excepted to by plaintiff. G.S. 1-279, North Carolina Rules of App. Procedure, Rule 3(a) and (d).

APPEAL by plaintiff from *Martin, James N., Judge.* Order entered 12 March 1984 in District Court, ONSLOW County. Heard in the Court of Appeals 12 February 1985.

Plaintiff and defendant married in November, 1977 and separated on 7 June 1979. One child was born of the marriage in May, 1978 and this action for its custody was filed on 12 June 1979. The child was then residing with plaintiff, and upon the filing of the complaint an ex parte order was entered awarding plaintiff temporary custody and directing defendant not to interfere therewith until a hearing could be had. A few days later defendant got the child from the plaintiff's home in Onslow County and took it to Tennessee; but shortly thereafter plaintiff went to Tennessee and brought the child back with him. Custody was continued in the plaintiff by orders entered on 1 February 1980 and 11 June 1980. In March, 1981 the parties were divorced; in May, 1981 defendant married Richard E. Gasperson of Lenoir County; and on 21 October 1981 an order was entered transferring custody of the child to defendant. By that order the court found that plaintiff was able to pay $125 a month toward the child's support but that defendant was then able to take care of the child's immediate needs, and directed plaintiff to deposit $125 each month "into a trust account for the benefit of the minor child . . . to be invested and re-invested to the end that the accumulated sum may be used for whatever of the child's necessities may arise between now and the time that the child may

become eighteen (18) years of age, dies, marries or otherwise becomes emancipated." Plaintiff thereafter made deposits into the trust account in the total amount of $3,475.

By motion filed on 12 January 1984, defendant alleged that she and her husband were no longer able to support the child and asked that the trust funds be used to defray the cost of the child's necessities and that plaintiff's payments in the future be made to the Clerk of Court for disbursement to her. Following a hearing on the motion the court found that the child had recently incurred unexpected medical expenses because of a broken arm and would soon incur substantial dental expense because of needed teeth braces; that defendant was pregnant and her financial circumstances had changed since the previous order was entered; and that the best interest of the child required that the $3,475 then held in trust for the child's benefit be paid over to defendant for the child's use. And plaintiff was ordered to thereafter make the $125 monthly payments to the Clerk of Court for disbursement to defendant for the "use and benefit of the minor child." From this order the plaintiff appeals.

Gene B. Gurganus for plaintiff appellant.

Jeffrey S. Miller for defendant appellee.

PHILLIPS, Judge.

In appealing from the order entered 12 March 1984 plaintiff contends two things: First, that the judge had no legal authority to require him to set up the trust fund to start with; and, second, that the order requiring him to pay $125 a month for the child's use and benefit is supported by no proper findings as to the child's needs and plaintiff's ability to pay. Both of these contentions come too late. The child's needs, plaintiff's ability to pay $125 a month toward supplying them, and his legal obligation to do so were all established by the order entered on 21 October 1981 from which no appeal was taken. Thus, the legality of that order is not before us. G.S. 1-279; Rule 3(a) and (d), N.C. Rules of Appellate Procedure; *State v. Standard Oil Co. of N.J.*, 205 N.C. 123, 170 S.E. 134 (1933); *Hamlin v. Austin*, 49 N.C. App. 196, 270 S.E. 2d 558 (1980). All that is before us is an appeal from an order permitting funds already held for the child's benefit to be used for that purpose and requiring plaintiff in the future to make the

monthly payments to the Clerk of Superior Court, rather than depositing them in the trust account as in the past. These modifications of the earlier order affect no legal right of the plaintiff's, were clearly justified by the findings made, none of which were excepted to by plaintiff, and we see no error in them.

Affirmed.

Judges WEBB and MARTIN concur.

STATE OF NORTH CAROLINA v. ANTONIO VERNON POWELL

No. 845SC585

(Filed 7 May 1985)

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

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

2. **Burglary and Unlawful Breakings § 5.11 — first-degree burglary — intent to commit rape — sufficiency of evidence**

The State's evidence was sufficient to permit an inference that defendant broke into the victim's dwelling with the intent to commit rape so as to support his conviction of first-degree burglary where it tended to show that defendant entered the dwelling through a window and went into the victim's bedroom while she was asleep; defendant went to the head of the victim's bed, undressed, and began fondling his private parts and breathing heavily; the victim was awakened by defendant's heavy breathing; and defendant fled the premises when the victim threatened to call the police and picked up the telephone to do so.

APPEAL by defendant from *Reid, Jr., Judge*. Judgment entered 17 November 1983 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 11 February 1985.

Defendant was charged in a bill of indictment with first degree burglary in violation of G.S. 14-51. The indictment charged the defendant with breaking and entering the occupied dwelling of Patricia K. Johnson in the nighttime with the intent to commit felonies, to wit: larceny, felonious assault and rape. The trial judge instructed the jury only as to the intent to commit rape.

The jury returned a verdict finding defendant guilty of first degree burglary. Defendant was sentenced to fourteen years imprisonment. From the judgment, defendant appeals.

Attorney General Lacy Thornburg, by Assistant Attorney General Norma S. Harrell, for the State.

Fullwood & Morgan, by Thomas J. Morgan, for the defendant.

JOHNSON, Judge.

[1] Defendant seeks to challenge the sufficiency of the evidence to convict him, by motion to dismiss made at the close of the State's evidence and his motion to set aside the jury's verdict as contrary to the greater weight of the evidence. The record reveals that the defendant's motion to dismiss was made at the close of the State's evidence, but was not renewed at the conclusion of all the evidence. Defendant's motion to dismiss was denied, at which time he proceeded to put on evidence. By presenting evidence at trial, defendant waived his right to assert the denial of his motion for dismissal made at the close of the State's evidence as error on appeal. *State v. Boyd*, 61 N.C. App. 238, 300 S.E. 2d 578, *cert. denied*, 308 N.C. 545, 304 S.E. 2d 238 (1983).

[2] Defendant next contends that the trial court erred in denying his motion to set aside the jury's verdict as being contrary to the greater weight of the evidence. The evidence revealed that on 9 July 1983, defendant entered the victim's, Patricia Johnson, home by climbing through a downstairs window. Defendant then entered the bedroom of the victim while she was asleep. The victim was awakened by defendant's heavy breathing. Upon waking, the victim saw the defendant standing very close to her at the head of her bed. Defendant was totally naked, fondling his private parts and breathing heavily. The victim confronted the defendant, threatened to call the police and picking up the phone proceeded to call the police. Defendant then fled the premises.

Defendant cites several cases where the courts of this State found the evidence insufficient for a rational trier of fact to infer that the defendant intended to commit the felony of rape. *State v. Dawkins*, 305 N.C. 289, 287 S.E. 2d 885 (1982); *State v. Rushing*, 61 N.C. App. 62, 300 S.E. 2d 445, *aff'd*, 308 N.C. 804, 303 S.E. 2d

822 (1983); *State v. Hankins*, 310 N.C. 622, 313 S.E. 2d 579 (1984). We find these cases clearly distinguishable from the case at bar.

In *Dawkins*, defendant was wearing shorts, a raincoat, a knee-length cast and a gym shoe. The Court held that this evidence standing alone only raised a possibility or conjecture that the defendant had the intent to commit rape. In *Rushing*, the evidence revealed that the defendant entered the bedroom of a prosecutrix while she was asleep. After waking and asking his identity, the defendant said, "Don't holler, don't scream, I got a gun, I'll shoot you," and then came to the side of the bed at which time he seized the prosecuting witness' arm. She tried to turn on the light and the defendant told her not to move. She screamed, which woke her small child who also screamed. The defendant then fled. In *Hankins*, two females were in a downstairs room of a house when they heard a tap on the door. One of the females opened the door at which time the defendant pushed the screen door open and entered the house. Defendant stated that he had a knife and told the females to get up against the wall. One of the females ran into an adjoining bedroom of a male, followed by the other female. As the two females struggled to wake their male companion, another female came down the steps and was confronted by the defendant. He told her, "I've got a knife. This is no joke. Get up against the wall or I will kill you." The male came out of the bedroom and struggled with the defendant. The defendant then fled the house.

In the cases cited by the defendant, there was no evidence of any sexual behavior exhibited on the part of the defendants. In the present case, there is ample evidence of sexual behavior exhibited by the defendant from which a rational trier of fact could infer the intent to commit rape. After entering the victim's bedroom, defendant proceeded to the head of her bed, undressed, commenced fondling his private parts and breathing heavily. The evidence was sufficient for the jury to infer that the defendant had a sexual purpose when entering the victim's home.

A motion to set aside the verdict as being against the greater weight of the evidence is addressed to the trial judge's discretion and is not reviewable on appeal, in the absence of evidence of abuse of discretion. *State v. Puckett*, 46 N.C. App. 719, 266 S.E. 2d 48 (1980). Under the facts of this case, we fail to find

any abuse of discretion in the denial of defendant's motion to set aside the verdict.

In this trial we find

No error.

Chief Judge HEDRICK and Judge COZORT concur.

IN THE MATTER OF: SARAH ANN DULANEY

No. 841DC717

(Filed 7 May 1985)

Receiving Stolen Goods § 5.2— juvenile riding in stolen car—evidence insufficient

The trial court erred in denying a juvenile's motion to dismiss the charge of felonious possession of stolen property where the evidence showed that the juvenile was a passenger in a stolen vehicle and that at some point she learned that the vehicle was stolen but did not permit a finding that she possessed the vehicle knowing or having reasonable grounds to believe it to have been stolen, or that she acted with dishonest purpose. G.S. 14-71.1, G.S. 14-72, G.S. 7A-631.

APPEAL by juvenile from *Beaman, Judge*. Orders entered 11 April 1984 in District Court, PASQUOTANK County. Heard in the Court of Appeals 15 February 1985.

The juvenile was charged with being a delinquent child in that she did unlawfully, willfully, and feloniously possess a Volkswagen van, knowing and having reasonable grounds to believe it to have been feloniously stolen. The evidence tended to show that the juvenile was staying with two female friends, one an adult and the other a juvenile, during the weekend. At approximately 1:00 a.m. on Monday morning two adult males in possession of a Volkswagen van visited the juvenile and her friends. They invited them to accompany them to Florida. The females, including the juvenile, accepted and rode with the males to South Mills where they obtained additional clothing. They then proceeded to Robersonville where they stopped for the night and were subsequently arrested. The juvenile became aware that the van was stolen while en route to South Mills.

The court denied the juvenile's motions to dismiss, found that she had "committed the felonious offense of possession of stolen property in violation of G.S. 14-71.1," and adjudicated her a delinquent child as defined in G.S. Sec. 7A-517(12). It placed her on supervised probation for one year. The juvenile appeals from the adjudication and disposition orders.

Attorney General Edmisten, by Assistant Attorney General David Gordon, for the State.

White, Hall, Mullen, Brumsey & Small, by G. Elvin Small, III, for juvenile appellant.

WHICHARD, Judge.

The juvenile contends the court erred in denying her motions to dismiss. We agree.

The essential elements of felonious possession of stolen property are: (1) possession of personal property, (2) valued at more than $400.00, (3) which has been stolen, (4) the possessor knowing or having reasonable grounds to believe the property was stolen, and (5) the possessor acting with a dishonest purpose. G.S. 14-71.1, -72; *State v. Perry*, 305 N.C. 225, 233, 287 S.E. 2d 810, 815 (1982). One has possession of stolen property when one has both the power and intent to control its disposition or use. *See State v. Harvey*, 281 N.C. 1, 12, 187 S.E. 2d 706, 714 (1972).

With certain exceptions not pertinent here, a respondent in a juvenile adjudication hearing is entitled to "all rights afforded adult offenders." G.S. 7A-631. The juvenile respondent thus is entitled to have the evidence evaluated by the same standards as apply in criminal proceedings against adults. *In re Meut*, 51 N.C. App. 153, 155, 275 S.E. 2d 200, 201 (1981). The evidence must therefore be interpreted in the light most favorable to the State and all reasonable inferences favorable to the State must be drawn therefrom. *State v. Bridgers*, 267 N.C. 121, 125, 147 S.E. 2d 555, 557 (1966). However, "there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss." *State v. Stephens*, 244 N.C. 380, 383, 93 S.E. 2d 431, 433 (1956); *see also State v. Lanier*, 50 N.C. App. 383, 388, 273 S.E. 2d 746, 749-50 (1981).

Viewed by these standards, we find the evidence insufficient to withstand the motions to dismiss. It tended to show that the juvenile was a passenger in the stolen vehicle and that at some point while en route to South Mills she learned that the vehicle was stolen. No evidence in any way links her to the theft or tends to show that she had control or could have exercised control over the vehicle. She merely accepted a ride to Florida with friends without knowing or having reasonable grounds to believe that the travel would be by stolen vehicle. Her subsequent acquisition of knowledge that the vehicle was stolen did not suffice to give her actual or constructive possession of it. No evidence suggests any dominion or control on her part. The evidence thus did not permit a finding that she possessed the vehicle knowing or have reasonable grounds to believe it to have been stolen, or that she acted with a dishonest purpose. *Perry*, 305 N.C. 225, 287 S.E. 2d 810.

Two cases are particularly instructive:

In *State v. Hughes*, 16 N.C. App. 537, 192 S.E. 2d 626 (1972), the defendant Hughes was a passenger in an automobile that recently had been stolen by the individual who was driving when officers stopped the automobile and arrested the occupants. In reversing Hughes' conviction this Court stated:

> There is no evidence that defendant Hughes was acting in concert with [the driver] or that they were in *particeps criminis*. From the face of the record it could just as easily be inferred that defendant Hughes was a hitchhiker or an innocent friend just along for the ride. Therefore, the trial judge erred in denying defendant Hughes' motion [to dismiss].

Id. at 540-41, 192 S.E. 2d at 628.

In a similar juvenile case, *In re Owens*, 22 N.C. App. 313, 206 S.E. 2d 342 (1974), the juvenile was observed riding in the right front passenger seat of a stolen car. In reversing the denial of the motion to dismiss, this Court stated, "The evidence . . . merely shows that [the juvenile] was riding as a passenger in a stolen car. There was no evidence of conduct on his part that suggests a guilty mind. There is absolutely no evidence in this record that he was acting in concert with the driver . . . ." *Id.* at 315, 206 S.E. 2d at 344.

The evidence here, in the light most favorable to the State, also shows only that the juvenile was a passenger in a stolen vehicle. It fails to show that she possessed the vehicle knowing or having reasonable grounds to believe that it was stolen, or that she acted with a dishonest purpose. The court thus erred in denying the motions to dismiss.

Reversed.

Judges WELLS and BECTON concur.

STATE OF NORTH CAROLINA v. ELSIE M. ANTHONY

No. 843SC710

(Filed 7 May 1985)

1. **False Pretense § 2— indictments—allegations that defendant's misrepresentations deceived—sufficient**

Indictments which alleged that defendant obtained property by a false pretense which was intended to deceive and which did deceive in that she received and accepted delivery of candy by misrepresenting her identity sufficiently alleged that defendant's misrepresentations deceived the vendor of the candy and that the property was obtained as a result of the misrepresentation.

2. **False Pretense § 3.1— obtaining candy by false pretense—evidence sufficient**

In a prosecution for obtaining candy by false pretense, the court did not err by denying defendant's motion to dismiss at the close of all the evidence where the jury could have found that defendant's fictitious name was a false representation on which the candy vendor relied in delivering the candy because the vendor would want to know the correct name of a person to whom he sold candy on credit.

3. **Criminal Law § 75.7— obtaining property by misrepresenting identity—officer's routine identification question—no Miranda warning—admissible**

In a prosecution for obtaining candy by false pretense in which defendant's name was an important part of the evidence against her, there was no error in admitting the testimony of an officer who had recorded defendant's name prior to reading defendant her constitutional rights.

4. **False Pretense § 3.2— acting in concert—evidence sufficient**

There was sufficient evidence to support the court's instruction on acting in concert where an officer testified that defendant had told him that a man named Franklin Frisby had ordered candy from the vendor under the name of Barry Johnson, and that Mr. Frisby had instructed defendant to receive the candy using the name A. Johnson, which she did.

State v. Anthony

APPEAL by defendant from *Small, Judge*. Judgment entered 22 February 1984 in Superior Court, CRAVEN County. Heard in the Court of Appeals 14 February 1985.

The defendant was tried on four charges of obtaining property by false pretenses. The State's evidence showed that in June 1983 a man calling himself Barry Johnson called by telephone Maurice Hill, Jr., who sold candy for School Plan, Inc. and ordered peanut brittle and chocolate candy in the amount of $1,357.20. The man who called himself Barry Johnson represented to Mr. Hill that the candy would be used for charity fund raising. The man requested that Mr. Hill deliver the candy to 422 Holiday City and said his wife would accept the delivery. Mr. Hill delivered the candy to that address where the defendant Elsie M. Anthony identified herself as "Mrs. A. Johnson" and signed for the delivery of the candy. At this time Mr. Hill explained to the defendant that weekly payments would be required.

The defendant acknowledged receipt of three more orders of candy by the man who called himself Barry Johnson. Each order was delivered to 422 Holiday City and the defendant signed for each order with the name "Mrs. A. Johnson." Mr. Hill delivered candy worth a total of $3,996.72. The defendant paid $1,050.00 for the candy. On 11 July 1983 Mr. Hill made his last delivery to the defendant and told her he could deliver no more candy until the bills for the candy were paid. After the last delivery was made Mr. Hill could not find the defendant or the man calling himself Barry Johnson in spite of telephone calls and visits to 422 Holiday City.

Captain Michael Warren of the Craven County Sheriff's Department testified that he questioned the defendant and she told him a man named Franklin Frisby told her he had ordered candy from Mr. Hill, using the name Barry Johnson. He instructed her to receive the candy using the name Mrs. A. Johnson, which she did. The defendant was convicted of all charges and received a prison sentence. She appealed.

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

Voerman and Ward, P.A., by William F. Ward, III, for the defendant appellant.

WEBB, Judge.

[1] The defendant argues under her first assignment of error that the four indictments on which she was tried are defective. She says this is so because each of the indictments fails to allege that the defendant's representations deceived School Plans, Inc. or that the merchandise was obtained as a direct result of the misrepresentation of the identity of the defendant. The indictments allege the property was obtained "by means of a false pretense which was calculated to deceive and did deceive" and "[t]he false pretense consisted of the following: the defendant received and accepted delivery . . . by representing herself as 'Mrs. A. Johnson.'" We hold that these allegations sufficiently allege that the defendant's misrepresentations deceived School Plans, Inc. and the property was obtained as a result of the misrepresentation.

[2] The defendant next assigns error to the Court's failure to grant her motion to dismiss at the close of all the evidence. She bases this contention on what she says is the failure of proof that the victim relied on the false representation of her name to part with the property. She argues that a man representing himself as Mr. Johnson ordered the candy and told Mr. Hill that Mrs. Johnson would sign the receipt for it. Mr. Hill would have left the candy with whomever the person the putative Mr. Johnson told him would receive it. The defendant argues that for this reason Mr. Hill did not deliver the candy to the defendant in reliance on her misrepresentation of her name.

We believe the jury could find from the evidence that Mr. Hill would want to know the correct name of a person to whom he sold candy on credit. This is so because he would need the correct name to find the person in the event there was difficulty in collecting the account. For this reason the jury could find he relied on the name given him in delivering the candy. He would not have delivered it had he known the defendant had given him a fictitious name. The jury could find that this was a false representation on which Mr. Hill relied in delivering the candy. See *State v. Freeman*, 308 N.C. 502, 302 S.E. 2d 779 (1983) and *State v. Tesenair*, 35 N.C. App. 531, 241 S.E. 2d 877 (1978).

[3] The defendant next argues that the testimony of Captain Warren should have been excluded because of a violation of the

defendant's constitutional rights as defined in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). Prior to reading her constitutional rights to the defendant, Captain Warren recorded her personal history, including her name, age, and address. The defendant's name is an important part of the evidence against her and the defendant argues Captain Warren's testimony as to it should have been excluded. Pursuant to *State v. Sellers*, 58 N.C. App. 43, 293 S.E. 2d 226, *cert. denied*, 306 N.C. 749, 295 S.E. 2d 485 (1982) we overrule this assignment of error.

[4] The defendant's last assignment of error is to the Court's charging on acting in concert. The defendant contends there was not sufficient evidence to support this charge. Captain Warren testified that the defendant told him that a man named Franklin Frisby had ordered candy from Mr. Hill under the name of Barry Johnson. She told him Mr. Frisby had instructed her to receive the candy at 422 Holiday City using the name A. Johnson, which she did. This is evidence from which the jury could conclude the defendant was acting in concert with Franklin Frisby to obtain property by a false pretense.

No error.

Judges PHILLIPS and MARTIN concur.

RAYMOND LEE JOHNSON v. MIRIAM ELAINE JOHNSON

No. 848DC960

(Filed 7 May 1985)

Divorce and Alimony § 30— equitable distribution—vested military retirement benefits

The trial court properly held that plaintiff's vested military retirement benefits constituted separate property not subject to equitable distribution where plaintiff's divorce complaint was filed prior to 1 August 1983, the effective date of the 1983 amendment to G.S. 50-20(b)(1).

APPEAL by defendant from *Setzer, Judge*. Order entered 13 July 1984 in District Court, WAYNE County. Heard in the Court of Appeals 18 April 1985.

Barnes, Braswell & Haithcock by Tom Barwick for defendant appellant.

No counsel contra.

COZORT, Judge.

The sole issue to be determined in this case is whether the trial court erred by finding that the plaintiff's vested military retirement benefits was separate property not subject to equitable distribution under G.S. 50-20(a). For reasons which follow, we hold that, under the facts of this case, the trial court's finding was correct.

Plaintiff and defendant were married 21 May 1955 while the plaintiff was on active duty with the United States Air Force. Plaintiff retired and began drawing retirement benefits 1 May 1974. Plaintiff and defendant separated 8 January 1982, and the plaintiff filed a complaint for divorce on 10 January 1983. Divorce was granted 29 March 1983. A hearing to determine equitable distribution was conducted 10 July 1984, and the trial court's order of equitable distribution was filed 13 July 1984. The trial court found that plaintiff's military retirement was separate property not subject to equitable distribution. Defendant appealed.

The Equitable Distribution Act was enacted in 1981. 1981 N.C. Sess. Laws Ch. 815. As originally enacted, the last sentence of G.S. 50-20(b)(2) provided: "Vested pension or retirement rights and the expectation of nonvested pension or retirement rights shall be considered separate property." In 1983, the General Assembly rewrote that sentence to read: "The expectation of nonvested pension or retirement rights shall be considered separate property." 1983 N.C. Sess. Laws, Ch. 758. It added a new sentence to G.S. 50-20(b)(1): "Marital property includes all vested pension and retirement rights, including military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act." *Id.* The amendments in Chapter 758 were made "effective August 1, 1983, and shall apply only when the action for absolute divorce is filed on or after that date." 1983 N.C. Sess. Laws Ch. 811.

Thus, if the action for divorce is filed before 1 August 1983, all pension and retirement rights are considered separate proper-

ty for purposes of equitable distribution. If the divorce action is filed on or after 1 August 1983, vested pension and retirement rights are considered marital property, and the expectation of nonvested rights are considered separate property. In this case, plaintiff filed for divorce on 10 January 1983. The trial court correctly found plaintiff's retirement rights to be separate property.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. WALTER H. ROWELL

No. 8416SC912

(Filed 7 May 1985)

Larceny § 7.4— larceny of a dog—evidence sufficient

The evidence was sufficient to justify a conviction for larceny of a dog where it showed that the dog was taken from its lot without the owner's consent, defendant had the dog almost immediately thereafter, falsely claimed that the owner had given it to him, and then sold it to another. G.S. 14-84.

APPEAL by defendant from *Barnette, Judge*. Judgment entered 8 June 1984 in Superior Court, ROBESON County. Heard in the Court of Appeals 14 March 1985.

Defendant was charged with and convicted of larceny of a dog pursuant to G.S. 14-84. The State's evidence tended to show that: On 11 November 1983 Donald L. Phillips noticed that one of his seven beagles was missing from the pen behind his house and a hole had been dug under the pen big enough for the dog to get through. When last seen the dog was wearing a collar that had Phillips' name, address, and telephone number on it. The dog had unusually long legs for a beagle and was primarily black in color, with some white and brown colored patches. The dog was worth $200 and the owner had not given anyone permission to take it off his premises. A brother-in-law of defendant, Eugene Hutchinson, who lives in Nichols, South Carolina, found a beagle matching the description of the missing dog tied up in his front yard around 11 November 1983. A day or two later defendant came by his house

and told him that: "I have a beagle dog here for you . . . The man give him to me . . . All he wants is his collar back." The collar on the dog had Phillips' name and address on it. After the dog had been at Hutchinson's place for about two weeks defendant sold it to James Chestnutt of Marion, South Carolina.

Defendant testified that: Though he lived near Phillips he had never seen any of Phillips' dogs, and was working in Black Creek, Virginia on 11 November 1983, where he continued to work until about two weeks before Thanksgiving. His absence was corroborated by the testimony of his wife.

Attorney General Edmisten, by Assistant Attorney General Robert G. Webb, for the State.

Robert D. Jacobson for defendant appellant.

PHILLIPS, Judge.

Defendant's appeal is based on the solitary contention that the evidence was insufficient to justify his conviction, in that it showed no "taking" of the dog by him as the law requires. This contention is without merit and we overrule it. The State was obliged to prove that defendant took and carried away the dog without the owner's consent, and with the intent to deprive the owner of his property permanently. *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982). These elements were clearly and substantially covered by evidence which tended to show that the dog was taken from its lot without the owner's consent, defendant had the dog almost immediately thereafter, falsely claiming that the owner had given it to him, and then sold the dog to another.

No error.

Judges ARNOLD and COZORT concur.

GENEVA THOMPSON AND DAVID O. THOMPSON v. WILLIAM H. NEWMAN, INDIVIDUALLY, AND WILLIAM H. NEWMAN, M.D., P.A.

No. 8412SC898

(Filed 7 May 1985)

Appeal and Error § 6.6— dismissal of punitive damages and loss of consortium claims—denial of dismissal on basis of statute of limitations—no right of immediate appeal

Orders dismissing plaintiff wife's claim for punitive damages in a medical malpractice case and plaintiff husband's action for loss of consortium, leaving for trial only the wife's claim for compensatory damages, did not affect a substantial right and were not immediately appealable. Nor was an order denying defendants' motion to dismiss on the basis of the statute of limitations immediately appealable.

APPEAL by plaintiffs from *Bailey, Judge*. Order entered 3 April 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 16 April 1985.

Downing, David & Maxwell by Edward J. David for plaintiff appellants.

Anderson, Broadfoot, Anderson, Johnson & Anderson by Hal W. Broadfoot for defendant appellees.

COZORT, Judge.

In this civil action, the plaintiffs seek to recover damages from the defendants for a mastectomy performed on plaintiff Geneva Thompson allegedly without obtaining her informed consent. Plaintiff Geneva Thompson seeks compensatory damages based on the alleged negligence and further seeks punitive damages alleging that the negligence was gross and in reckless or wanton disregard of her rights. Plaintiff David O. Thompson, Geneva's husband, seeks compensatory and punitive damages, alleging the surgery caused a loss of consortium.

The defendants moved to dismiss the claims on the basis that the action as set forth by the plaintiffs sounds in assault and battery and was not timely filed within the applicable one year statute of limitations. At a hearing on the motion, Judge Edwin S. Preston, Jr., denied the defendants' motion. The defendants further moved to dismiss the claims for failure to state a claim

against the defendants upon which relief could be granted. After a hearing on the G.S. 1A-1, Rule 12(b)(6) motion, Judge James H. Pou Bailey dismissed the entire claim of plaintiff David O. Thompson and dismissed the claim for punitive damages of plaintiff Geneva Thompson, leaving for trial only her claim for compensatory damages. Plaintiffs appealed the dismissals by Judge Bailey. The defendants have cross-assigned as error Judge Preston's denial of their first motion.

The orders before this Court are plainly interlocutory and do not necessitate immediate review. "Pursuant to G.S. § 1-277 and G.S. § 7A-27, no appeal lies to an appellate court from an interlocutory order or ruling of a trial judge unless such order or ruling deprives the appellant of a substantial right which he would lose absent a review prior to final determination." *A.E.P. Industries v. McClure*, 308 N.C. 393, 400, 302 S.E. 2d 754, 759 (1983). Neither party has shown any deprivation of a substantial right. Furthermore, under G.S. 1A-1, Rule 54(b), in the absence of a determination by the trial judge that "there is no just reason for delay," there can be no appellate review of an order which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties. *Pasour v. Pierce*, 46 N.C. App. 636, 265 S.E. 2d 652 (1980). The record below contains no such determination by the trial court. Additionally, the defendants' first motion to dismiss is not immediately appealable. *Williams v. East Coast Sales*, 50 N.C. App. 565, 274 S.E. 2d 276 (1981).

Appeal dismissed.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA EX REL. JOSEPH B. BROWN, DISTRICT ATTORNEY FOR JUDICIAL DISTRICT 27-A v. THOMAS O. SMITH AND WIFE, DOLLY SMITH; JERRY JEROME WILKES; AND LYNN FLOYD, ALL DOING BUSINESS AS THE CAPTAIN'S CLUB

No. 8427SC853

(Filed 7 May 1985)

Nuisance § 10; Contempt of Court § 6— abatement proceeding—violation of prior order

A show cause order should have been dismissed where defendants had been dismissed from the 1982 abatement proceeding which resulted in the order they were charged with violating. G.S. 19-5 (1983).

APPEAL by defendants from *Gaines, Judge.* Order entered 14 March 1984 in GASTON County Superior Court. Heard in the Court of Appeals 15 April 1985.

Defendants Thomas Smith and Dolly Smith were ordered to show cause as to why they should not be held in contempt for violating a consent order entered on 16 December 1982, which enjoined the premises located at 911 North Marietta Street, Gastonia, from being used as a nuisance.

Following a hearing, the trial court entered an order in which it found that defendants were the owners of said premises, that defendants had permitted and consented to the operation of said premises as a nuisance, and that defendants had violated the order of 16 December 1982. The trial court ordered sanctions against defendants, and defendants have appealed from that order.

Joseph B. Roberts, III, for plaintiff.

Ferguson, Watt, Wallas & Adkins, P.A., by James E. Ferguson, II, for defendants.

WELLS, Judge.

Defendants first contend that the trial court erred in denying their motion to dismiss the show cause order against them. We agree and vacate the order appealed from.

Article 1 of Chapter 19 of the North Carolina General Statutes defines nuisance and provides for their abatement. N.C. Gen. Stat. § 19-5 (1983) is the particular statute which controls our decision in this case. In pertinent part, it provides:

> If the existence of a nuisance is admitted or established in an action provided for in this Chapter an order of abatement shall be entered as a part of the judgment in the case, which judgment and order shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of . . .

The trial court's order of 16 December 1982 was as follows:

> THIS CAUSE coming on to be heard and being heard before the undersigned Superior Court Judge upon request by counsel for the Plaintiff and counsel for the Defendants, Thomas O. Smith and wife, Dolly Smith, respectfully requesting that the undersigned Superior Court Judge enter this Consent Order in this cause;
>
> AND THE COURT having reviewed the file in this matter, and particularly the Order entered on September 27, 1982, is of the opinion that it would be in the best interest of all parties for this Order to be entered;
>
> THEREFORE, IT IS HEREBY ORDERED as follows:
>
> 1. That the premises located at 911 North Marietta Street, Gastonia, Gaston County, North Carolina, where the business known as The Captain's Club was conducted, be enjoined hereafter from being used as a nuisance, as the same is defined under Chapter 19 of the North Carolina General Statutes;
>
> 2. That this action is dismissed as to the Defendants Thomas O. Smith and wife, Dolly Smith, upon payment of $500.00 to counsel for the Plaintiff, Joseph B. Roberts, III;
>
> 3. That as to the other Defendants in this cause, this matter is left open. The Court notes that substantial personal property was stolen from said club by parties unknown at this time. Should said property be recovered, or the name or names of said individuals who removed said property from

said club be ascertained in the future, the Plaintiff shall be entitled to proceed in this matter as by law provided.

4. That as to all the property presently being held by the sheriff of Gaston County, the same can be returned to the Defendants, Thomas O. Smith and wife, Dolly Smith.

This, the 16 day of December, 1982.

Chase Saunders

JUDGE PRESIDING

Because defendants were not enjoined in the order of 16 December 1982, but were in fact dismissed as defendants in the abatement proceedings, the trial court should have allowed defendants' motion to dismiss the show cause order against them. Accordingly, the order of the trial court entered 14 March 1984 is

Vacated.

Chief Judge HEDRICK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. ARTHUR LEON MAYFIELD

No. 8426SC694

(Filed 7 May 1985)

1. Burglary and Unlawful Breakings § 7— first-degree burglary—instruction on felonious breaking or entering not required

The trial court in a first-degree burglary case was not required to instruct the jury on the lesser included offense of felonious breaking or entering where the evidence tended to show only that defendant forcibly entered the victim's apartment by breaking through a screened window and would not permit the inference contended by defendant that defendant entered the apartment without force through an open, unscreened window.

2. Criminal Law §§ 66, 111.1— instruction on identification testimony

The trial court's instruction on identification testimony was sufficient where it emphasized that proof of defendant's identity as the perpetrator of the crime was an essential element of the case which the State had to prove beyond a reasonable doubt.

APPEAL by defendant from *Downs, Judge.* Judgment entered 19 January 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 March 1985.

Defendant was charged with and convicted of first degree burglary in violation of G.S. 14-51 and second degree rape in violation of G.S. 14-27.3. The State's evidence tended to show that: The defendant climbed through Barbara Elizabeth Hoey's apartment window in the early morning hours of 10 July 1983, threatened to hurt her unless she stopped screaming, and had sexual intercourse with her against her will. Before defendant's entry into the apartment, the window that he used was up but it was covered with a screen that was locked in position within the frame of the window. Later that morning when the police came the screen was found bent out of shape lying on the ground under the window.

Attorney General Edmisten, by Assistant Attorney General Robert G. Webb, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Robin E. Hudson, for defendant appellant.

PHILLIPS, Judge.

[1] Both of defendant's assignments of error relate to the trial court's instructions to the jury. The first error assigned is the court's failure to instruct the jury on the lesser included offense of felonious breaking and entering when charging on the first degree burglary indictment. While felonious breaking or entering, which is the breaking *or* entering of *any building* with intent to commit any felony or larceny therein, G.S. 14-54(a), is a lesser included offense of first degree burglary, which is the breaking *and* entering of an occupied dwelling or sleeping apartment during the nighttime with the intent to commit a felony therein, the court was not required to charge on it, in our opinion. The trial judge is not required to submit an issue to the jury that the evidence does not raise. *See, State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889 (1963). The State's evidence, all that the jury had to go on since the defendant presented none, tended to show only that defendant forcibly entered the apartment by breaking through a screened window; it did not tend to show, as defendant contends, that defendant entered the apartment without force through an open,

unscreened window. Since the evidence tended to show only a burglarious breaking and entry that was the only kind of entry that the court was required to charge on.

[2] Defendant's other assignment, that the court erred in instructing the jury with regard to the identification testimony, is likewise without merit. The instruction given followed that approved in *State v. Martin*, 53 N.C. App. 297, 280 S.E. 2d 775 (1981) almost verbatim. There is no exact form in this state for instructing on the identification of one charged with crime. *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981). When a defendant's identity is questioned all that is required is that the court emphasize that proving the defendant's identity as the perpetrator of the crime is an essential element of the case, which the State must prove beyond a reasonable doubt. *State v. Green*, 305 N.C. 463, 290 S.E. 2d 625 (1982). This the court did.

No error.

Judges WEBB and MARTIN concur.

SERVOMATION CORPORATION, PLAINTIFF v. HICKORY CONSTRUCTION COMPANY, DEFENDANT AND THIRD PARTY PLAINTIFF v. MILLER-BROOKS ROOFING COMPANY, THIRD PARTY DEFENDANT

No. 8325SC1012

(Filed 7 May 1985)

Arbitration and Award § 2— waiver of arbitration

Upon reconsideration by the Court of Appeals in light of the Supreme Court decision in *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, the Court of Appeals was of the opinion that its previous decision should not be altered and that defendant had waived its right to compulsory arbitration. The circumstances showing waiver are more abundant here than in *Cyclone Roofing Co.*, and the law of waiver is part of the State's public policy. G.S. 1-567.1 *et seq.*

ON remand from the North Carolina Supreme Court by order dated 8 January 1985.

Rudisill & Brackett, by Keith T. Bridges, for plaintiff appellee.

Patrick, Harper & Dixon, by Stephen M. Thomas, for defendant appellant Hickory Construction Company.

PHILLIPS, Judge.

This appeal was the subject of a previous opinion of this Court reported at 70 N.C. App. 309, 318 S.E. 2d 904 (1984). Upon receiving a petition to review the appeal the North Carolina Supreme Court remanded it for our further consideration in light of its opinion in *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 321 S.E. 2d 872 (1984), handed down after our decision was arrived at. After reconsidering the appeal in that light we are of the opinion that the decision previously made should not be altered. In deciding the appeal we considered that the view expressed in the dissenting opinion in *Cyclone Roofing Co. v. LaFave Co.* [67 N.C. App. 278, 312 S.E. 2d 709 (1984)] might become the law of the case upon its appeal, as has happened, but were of the opinion that that case has no application to this one in any event, since the circumstances tending to show a waiver here are so much more abundant than they were there. We are still of that opinion. Also, in arriving at our previous decision we were aware that by virtue of G.S. 1-567.1 *et seq.* the public policy of the State favors the enforcement of contracts for arbitration and gave due consideration to that fact; but, as we understand it, the law of waiver is also a part of the State's public policy and it seems plain to us that under the circumstances recorded in this case defendant has waived its right to compulsory arbitration for the reasons heretofore stated.

Affirmed.

Judges WEBB and JOHNSON concur.

WHITE OAK PROPERTIES, INC., A NORTH CAROLINA CORPORATION v. TOWN OF CARRBORO, A MUNICIPAL CORPORATION; ROBERT W. DRAKEFORD, MAYOR; STEVE ROSE, AN ALDERMAN; JIM WHITE, AN ALDERMAN; JOHN BOONE, AN ALDERMAN; HILLIARD CALDWELL, AN ALDERMAN; ERNIE PATTERSON, AN ALDERMAN; AND JOYCE GARRETT, AN ALDERMAN

No. 8415SC123

(Filed 7 May 1985)

Municipal Corporations § 30.6— conditional use permit

The superior court did not err in ordering the Board of Aldermen of the Town of Carrboro to issue a conditional use permit for the development of a nineteen-unit townhouse project on a 3.3 acre site.

ON remand from the Supreme Court to determine the issue of whether the Superior Court erred by reversing the Board's denial of White Oak's application for a conditional use permit.

Jordan, Brown, Price & Wall, by Charles Gordon Brown and M. LeAnn Nease, for petitioner, appellant.

Michael B. Brough for respondents, appellees.

HEDRICK, Chief Judge.

On the 2nd day of April, 1985, the Supreme Court of North Carolina filed an opinion reversing and remanding this proceeding to the Court of Appeals for the determination of the issue of whether the Superior Court erred by reversing the Board's denial of White Oak's application for a conditional use permit.

The certification of the opinion of this Court to the trial tribunal filed the 20th day of November, 1984 is hereby vacated and the cause is hereby reset for further consideration of the said issue pursuant to the opinion of the Supreme Court before a panel consisting of Chief Judge Hedrick and Judges Arnold and Webb.

Upon further consideration pursuant to the opinion of the Supreme Court the panel consisting of Chief Judge Hedrick and Judges Arnold and Webb hereby determine that the Superior Court did not err in ordering the Board of Aldermen to issue a conditional use permit for the 3.3 acre site for the development of a nineteen unit townhouse project.

The judgment of the Superior Court dated 20 January 1984 is

Affirmed.

Judges ARNOLD and WEBB concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 MAY 1985

BORDEN v. ZUROFF No. 8412SC958	Cumberland (83CVS918)	Affirmed
CASSIDY v. CHEEK No. 8419SC576	Randolph (81CVS11)	Affirmed
CHAMPION MAP CORP. v. CAROLINA SQUIRE No. 8426SC1066	Mecklenburg (84CVS5658)	Dismissed
DEAN v. PURITAN LIFE INS. CO. No. 8418SC1077	Guilford (83CVS3176)	Affirmed
GASKINS v. THOMPSON No. 8421SC675	Forsyth (83CVS4204)	Affirmed
HANNA v. LILLIE-RUBIN No. 8418SC1129	Guilford (80CVS5048)	Affirmed
HIATT v. HIATT No. 8418DC935	Guilford (73CVD2660)	Vacated & Remanded
IN RE APPLICATION OF WATSON No. 8410SC701	Wake (84CVS660)	Affirmed
JOHNSON v. TOWN OF GARLAND No. 844SC884	Sampson (82CVS653)	Affirmed
JOHNSON v. TOWN OF GARLAND No. 844SC885	Sampson (83CVS691)	Affirmed
JONES v. NATIONAL SAVINGS LIFE INS. No. 8429DC1047	Henderson (83CVD422)	Affirmed
MARTIN v. THARPE No. 8423SC1007	Wilkes (81CVS1306)	Affirmed
NEWMAN v. NEWMAN No. 8419DC786	Rowan (83CVD776)	No Error
PARKER v. CHERRY No. 8422SC952	Davidson (83CVS0206)	Dismissed
RHONEY v. RHONEY No. 8425DC869	Burke (83CVD28)	Dismissed
ROBERTS v. ROBERTS No. 8410SC658	Wake (83CVS6398)	Affirmed

STATE v. BENNETT No. 848SC1027	Wayne (82CRS9897)	No Error
STATE v. BLAKNEY No. 8419SC688	Rowan (83CRS13418)	No Error
STATE v. BOYETTE No. 845SC1048	New Hanover (83CRS18974) (83CRS18979)	No Error
STATE v. DAVIS No. 8420SC1081	Richmond (84CRS860)	No Error
STATE v. GARVIN No. 8427SC1030	Gaston (84CRS983)	No Error
STATE v. GREEN No. 842SC1200	Beaufort (82CRS1550)	No Error
STATE v. HARRIS No. 8426SC1049	Mecklenburg (83CRS63336) (83CRS63338) (83CRS71359) (83CRS71362)	No Error
STATE v. HIGSON No. 843SC1110	Pitt (82CRS3119)	Affirmed
STATE v. JONES No. 842SC1116	Beaufort (84CRS2202)	No Error
STATE v. LATTIMORE No. 8419SC1102	Rowan (82CRS6835) (82CRS6836)	Affirmed
STATE v. LEDFORD No. 8425SC566	Burke (83CRS7052)	No Error
STATE v. LITTLE No. 8426SC849	Mecklenburg (83CRS30936) (83CRS30938) (83CRS30940) (83CRS4267) (83CRS4268) (83CRS4269)	Affirmed
STATE v. LYNN No. 8426SC1095	Gaston (84CRS7016)	No Error
STATE v. McKEITHAN No. 8412SC1094	Cumberland (83CRS47789)	No Error
STATE v. MILLS No. 842SC1022	Beaufort (84CRS1025) (84CRS1026)	No Error

STATE v. MURRAY No. 845SC1112	New Hanover (82CRS10111)	No Error
STATE v. SIDERS & BAKER No. 8414SC897	Durham (84CRS5725) (84CRS5726) (84CRS6035) (84CRS24768)	Affirmed
STATE v. STANLEY & MARKS No. 848SC780	Lenoir (81CRS7642)	Affirmed
STATE v. STEVENS No. 844SC1073	Duplin (84CRS507) (84CRS508)	Affirmed
STATE v. WILLIAMS No. 8415SC904	Chatham (83CRS4991)	No Error
STATE v. YORK No. 8421SC733	Forsyth (83CRS38520)	No Error
STATE v. YOUNG No. 8426SC1108	Mecklenburg (83CRS85286)	No Error
WEATHERMAN v. MARLOWE No. 8422SC746	Iredell (83CVS565)	Affirmed
WEATHERS v. BARNES No. 8410DC788	Wake (81CVD7603)	Vacated & Remanded
WELCH v. FAIN No. 8418DC915	Guilford (84CVD2465)	Affirmed
YOUNG ROOFING CO. v. NC DEPT. REVENUE No. 8410SC759	Wake (84CVS1142)	Affirmed

Hewes v. Wolfe and Hewes v. Johnston

MR. AND MRS. CHARLES F. HEWES v. W. B. WOLFE

MR. AND MRS. CHARLES F. HEWES v. HUGH W. JOHNSTON

No. 8427SC749

(Filed 21 May 1985)

1. Process § 19— abuse of process—sufficiency of complaint

Plaintiffs' complaint alleging that, through an action for misuse of partnership assets, defendants maliciously filed notices of *lis pendens* and notices of lien on property owned by plaintiffs "for the purpose of injuring and destroying the credit business of the plaintiffs and in general to oppress the plaintiffs" stated a claim for abuse of process.

2. Process § 19— abuse of process—sufficiency of evidence

Plaintiffs' evidence was sufficient for the jury in an action against defendant attorney for abuse of process in filing notices of liens and *lis pendens* on property owned by plaintiffs in an action in which defendant represented plaintiffs' opponents where it tended to show that defendant told plaintiffs that he was "going to ruin everything you've got if I can," that defendant said he would "get" the plaintiffs, and that defendant refused a request for assurances that additional liens would not be filed with regard to a proposed construction project by the male plaintiff which was unrelated to any business transactions with defendant's clients.

3. Witnesses § 9— excluding testimony on redirect

The trial court did not err in excluding redirect testimony similar to testimony already given by the witness on direct examination.

4. Process § 19— abuse of process—competency of evidence

In an action against defendant attorney for abuse of process in filing notices of lien and *lis pendens* against property owned by plaintiffs in an action in which defendant represented plaintiffs' opponents, the trial court properly admitted notices of liens filed by defendant, evidence relevant to damages incurred by plaintiffs because of the liens and *lis pendens*, and evidence tending to show defendant's motive and misuse of judicial process.

5. Trial § 11— jury argument—refusal to permit reading of irrelevant statute and case

The trial court in an action for abuse of process properly refused to permit defense counsel to read to the jury during closing argument a statute and a portion of a case opinion which involved principles of law that were irrelevant to the case at issue and had no application to the facts in evidence.

6. Process § 19— abuse of process—court's statement of evidence

In an action against defendant attorney for abuse of process in filing notices of lien and *lis pendens* against property owned by plaintiffs in an action in which defendant represented plaintiffs' opponents, evidence tending to

show that defendant researched the law prior to filing notices of lien and *lis pendens* was fairly stated to the jury by the trial court, and the court did not err in failing to summarize evidence as to specific statutes and cases which defendant researched.

7. Process § 19— abuse of process—punitive damages

Plaintiffs' evidence was sufficient to support an inference that defendant attorney's filing of notices of lien and *lis pendens* against plaintiffs' property on behalf of his clients was motivated by malice, a reckless indifference or willfulness so as to support submission of a punitive damages issue where it tended to show that defendant made statements to plaintiffs that he would "ruin everything" they had and would "get" them, and that defendant refused a request for assurances that additional liens would not be filed on a proposed construction project unrelated to any business transaction with defendant's clients.

8. Rules of Civil Procedure § 13— claim not compulsory counterclaim

Plaintiffs' claim for abuse of process in filing notices of lien and *lis pendens* in a prior action brought by defendants against plaintiffs alleging misuse of and failure to account for partnership assets did not arise "out of the transaction or occurrence that was the subject matter" of the prior action and was not a compulsory counterclaim which had to be asserted in that action. G.S. 1A-1, Rule 13(a) and (e).

9. Process § 19— liability of client for liens filed by attorney

Defendant was liable for abuse of process in the filing of notices of liens and *lis pendens* by his attorney in an action against plaintiffs where the attorney made malicious remarks to plaintiffs in defendant's presence that he would "ruin everything" plaintiffs had and would "get" plaintiffs; defendant had the liens filed, and was asked to remove them; and defendant never repudiated his attorney's statements nor told him to remove the liens.

APPEALS by defendant Wolfe and defendant Johnston from *Owens, Judge*. Judgment entered 7 February 1984 in Superior Court, GASTON County. Heard in the Court of Appeals 11 March 1985.

This civil action for abuse of process arose from an earlier suit in which defendant Johnston acted as attorney for Mr. and Mrs. Wolfe in an action alleging misuse of, and failure to account for, partnership assets by Charles Hewes. Two weeks after the complaint was filed, the Wolfes filed a notice of *lis pendens* on property owned by Mr. and Mrs. Hewes. The Hewes admitted the existence of a partnership with the Wolfes, but denied all other allegations and counterclaimed for certain monies allegedly due them from partnership projects and from services performed by Hewes Construction Company for the partnership. Defendant

Johnston, on behalf of the Wolfes, then filed notices of lien on property in two subdivisions, alleging that the properties were purchased by the Hewes with partnership funds. He also filed a notice of lien on property owned by Woodrow F. Laye and wife, alleging that partnership materials had been used by Mr. Hewes in construction of their dwelling. A subsequent lien was filed on property owned by the Hewes as tenants by the entirety seeking to have the property declared partnership property. The trial court ordered that the notices of lien and *lis pendens* be cancelled, and on appeal this Court held that the trial court had properly cancelled the notices of lien and *lis pendens*. *Wolfe v. Hewes*, 41 N.C. App. 88, 254 S.E. 2d 204, *disc. rev. denied*, 298 N.C. 206 (1979). The Hewes then filed suit against Mr. and Mrs. Wolfe and defendant Johnston, claiming their acts of filing notices of lien and *lis pendens* in the partnership action constituted an abuse of process. Defendant Johnston responded with a third-party complaint against the Hewes and their attorneys, claiming that the abuse of process action against him was itself an abuse of process. The trial judge dismissed his third-party complaint and on appeal the dismissal was affirmed. *Hewes v. Johnston*, 61 N.C. App. 603, 301 S.E. 2d 120 (1983).

The abuse of process suits against Mr. and Mrs. Wolfe and Johnston were consolidated for trial. The trial court with the Hewes' consent granted a directed verdict in favor of Mrs. Wolfe, but denied motions for directed verdicts made by defendant W. B. Wolfe and defendant Johnston. At the conclusion of the evidence, issues were submitted to the jury and answered as follows:

> 1. Did the Defendant W. B. Wolfe abuse the judicial process of the Court in the action instituted against the Plaintiffs . . . by having notices of lis pendens and notices of lien filed in that action?
>
> ANSWER: Yes
>
> 2. If the answer to Issue No. 1 is yes, what amount of compensatory damages are Plaintiffs entitled to recover of the Defendant W. B. Wolfe?
>
> ANSWER: $25,000.00

3. What amount of punitive damages, if any, does the jury in its discretion award to the Plaintiffs against the Defendant W. B. Wolfe?

ANSWER: -0-

4. Did the Defendant Johnston abuse the judicial process of the Court in the action the Defendant W. B. Wolfe instituted against the Plaintiffs . . . by having notices of lis pendens and notices of lien filed in that action?

ANSWER: Yes

5. If the answer to Issue No. 4 is yes, what amount of compensatory damages are Plaintiffs entitled to recover of the Defendant Johnston?

ANSWER: $25,000.00

6. What amount of punitive damages, if any, does the jury in its discretion award to the Plaintiffs against the Defendant Johnston?

ANSWER: $15,000.00

Judgment was entered upon the verdict from which defendants appealed.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by William L. Rikard, Jr., and Sally Nan Barber, for plaintiff appellees.

Basil L. Whitener and Anne M. Lamm for defendant appellant Wolfe.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Michael E. Weddington and Susan M. Parker, for defendant appellant Johnston.

MARTIN, Judge.

Defendants bring forth assignments of error relating to the denial of their motions, instructions to the jury, evidentiary rulings, and the submission of the issue of punitive damages to the jury. We have examined each of the assignments and find no basis for reversal.

I. JOHNSTON'S APPEAL

Defendant Johnston assigns error to the trial court's denial of his motions for a directed verdict and for judgment notwithstanding the verdict. Defendant Johnston's assignment is based on two contentions: (1) failure to state a claim of abuse of process, and (2) insufficiency of the evidence.

In order to state a claim for the tort of abuse of process, plaintiffs must sufficiently allege (1) an ulterior motive, and (2) an act in the use of the legal process not proper in the regular prosecution of the proceeding. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). The ulterior motive requirement is satisfied when the plaintiff alleges that the prior action was initiated by the defendant or used by him to achieve a purpose not within the intended scope of the process used. *Id.* The act requirement is satisfied when the plaintiff alleges that during the course of the prior proceeding, the defendant committed some wilful act whereby he sought to use the proceeding as a vehicle to gain advantage of the plaintiff in respect to some collateral matter. *Edwards v. Jenkins*, 247 N.C. 565, 101 S.E. 2d 410 (1958).

[1] Plaintiffs' amended complaint alleges that through the partnership action, defendants maliciously filed notices of *lis pendens* and notices of lien on property owned by plaintiffs "for the purpose of injuring and destroying the credit business of the plaintiffs and in general to oppress the plaintiffs." These allegations sufficiently allege an ulterior motive and a wilful act not proper in the regular course of defendants' civil proceeding, i.e., defendants allegedly filed the notices of *lis pendens* in order to coerce plaintiffs and to achieve a purpose for which *lis pendens* was never intended. "[O]ne who wantonly, maliciously, without cause, commences a civil action and puts upon record a complaint and a *lis pendens* for the purpose of injuring and destroying the credit and business of another" warrants the court to grant relief to the victim of such coercion through the tort of abuse of process. *Austin v. Wilder*, 26 N.C. App. 229, 233, 215 S.E. 2d 794, 797 (1975), *quoting Estates v. Bank*, 171 N.C. 579, 582, 88 S.E. 783, 784 (1916). Plaintiffs' complaint states a claim upon which relief may be granted.

[2] Defendant Johnston also contends that his motion for directed verdict should have been granted due to the insufficien-

cy of the evidence. This contention raises the question of whether the evidence, when considered in the light most favorable to the plaintiffs, is sufficient for submission to the jury. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). Plaintiff offered evidence through the testimony of Charles Hewes that defendant Johnston told the Hewes, "I'm going to ruin everything you've got if I can," and that defendant Wolfe stated at an earlier trial that he had the liens filed in order to "cut off my [Hewes'] money." An attorney who represented the Hewes in the earlier civil action brought against them by the Wolfes stated that defendant Johnston said he would "get" the Hewes, and defendant Johnston also refused a request for assurances that additional liens would not be filed regarding a proposed construction project by Mr. Hewes which was unrelated to any business transaction with the Wolfes. While it is true that defendant Johnston's evidence denied the testimony of plaintiffs' witnesses, "such variance presented issues of fact for the jury and not solely questions of law for the court." *Ellis v. Wellons*, 224 N.C. 269, 272, 29 S.E. 2d 884, 886 (1944). The evidence was sufficient for submission to the jury; defendant Johnston's motions for a directed verdict and judgment notwithstanding the verdict were properly denied.

[3] Defendant Johnston, through several assignments of error, contends the trial court erred in various evidentiary rulings. First, on redirect examination defendant Johnston was not permitted to testify about his method of doing legal research; defendant contends his defense of a good faith effort to protect partnership property was thereby thwarted. We disagree. On direct examination, defendant Johnston testified regarding his method of research and the steps he took in determining a course of action for Mr. Wolfe and the partnership. He claims that exclusion of this same testimony on redirect examination prevented him from showing his good faith. "A trial court has discretionary power to exclude or limit the repetition of questions and answers, however proper such questions and answers may have been in the first instance." *Spivey v. Newman*, 232 N.C. 281, 285-86, 59 S.E. 2d 844, 848 (1950). Defendant Johnston has failed to demonstrate prejudicial error by this contention.

[4] Defendant Johnston's remaining evidentiary assignments of error assert error in the admission of a notice of lien filed on a house owned by one Frank Laye, a notice of lien filed on plain-

tiffs' residence, testimony as to attorney fees for legal work performed to acquire removal of the liens, testimony as to costs incurred by plaintiffs for a land survey and plat in seeking another construction project, testimony as to expenses incurred by Hewes in starting a new business, testimony as to the amount of a proposed construction contract with one Mrs. Whitworth which was prevented because of defendant Johnston's refusal to agree not to place a lien, and previous orders by trial judges reciting that the notices of lien were without statutory authority. We have carefully examined these assignments and find that they involve exhibits which contain the very matters constituting the misuse of judicial process, evidence which is relevant to damages incurred by plaintiffs because of the liens and *lis pendens*, and evidence tending to show defendant Johnston's motive and misuse of judicial process. The evidence was therefore relevant and admissible, and the assignments are overruled.

[5] Next, defendant Johnston contends the trial court erred in precluding his counsel from reading to the jury, during closing argument, a portion of a statute and part of a case opinion. He argues that the jury, after hearing the law which he relied on, could have reasonably concluded his actions in filing the liens were based on a good faith effort to protect his client's interests. Arguments of counsel to the jury are within the discretion of the trial judge, and rulings regarding those arguments will not be disturbed in the absence of an abuse of discretion. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975); *State v. Small*, 31 N.C. App. 556, 230 S.E. 2d 425 (1976), *disc. rev. denied*, 291 N.C. 715, 232 S.E. 2d 207 (1977). The statute defendant Johnston sought to read to the jury set forth a partner's right to insist that partnership assets be applied in payment of partnership debts, not the allowance of the filing of notices of lien and *lis pendens* against real property when the action does not affect title to the real property of the partnership; and the case which he sought to read to the jury involved an attorney's liability for abuse of process from the filing of a malpractice suit, not the misuse of judicial process after the institution of an action. As such, both involved principles of law which were irrelevant to the case and had no application to the facts in evidence. *See State v. Crisp*, 244 N.C. 407, 94 S.E. 2d 402 (1956). Therefore, the trial judge did not abuse his discretion

in sustaining plaintiffs' objections to portions of defendant Johnston's closing argument.

[6] Defendant Johnston also contends the trial court erred in failing to summarize for the jury evidence with regard to the specific statutes and cases which defendant Johnston researched prior to filing the liens. This assignment of error is without merit. In his summary of the evidence, the trial judge instructed the jury

> [t]hat prior to filing liens and notices of lis pendens . . . Mr. Johnston did considerable research . . . . [H]e consulted the North Carolina Uniform Partnership Act and . . . he read numerous cases of the North Carolina Appellate Court.

Thus, the evidence tending to show that defendant Johnston researched the law prior to filing notices of lien and *lis pendens* was fairly stated to the jury. The jury was not precluded, as defendant Johnston contends, from finding a good faith effort on his behalf, nor was unequal emphasis placed on either party's contentions. The charge as a whole was adequate and free from prejudicial error.

[7] Defendant Johnston finally contends the trial court erred in submitting the issue of punitive damages to the jury due to insufficiency of the evidence. Punitive damages are allowable where a plaintiff has proved at least nominal damages and where an element of aggravation accompanying the tortious conduct causes the injury. *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976); *Worthy v. Knight*, 210 N.C. 498, 187 S.E. 771 (1936). The aggravation element was early defined to include "fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness . . . ." *Newton v. Insurance Co.*, 291 N.C. 105, 112, 229 S.E. 2d 297, 301 (1976). So long as there is "some fact or circumstance" in evidence from which one of these elements may be inferred, the issue of punitive damages is for the jury and not for the court. *Shugar v. Guill*, 304 N.C. 332, 340, 283 S.E. 2d 507, 511 (1981).

Applying these principles of law to the facts of this case, we believe that the evidence presented was sufficient to permit the jury reasonably to infer that defendant Johnston's actions were motivated by malice, a reckless indifference to consequences, or

wilfulness. Plaintiffs' evidence of motive contains statements by defendant Johnston to the Hewes that he would "ruin everything" they had and that he would "get" the Hewes. There was also evidence of defendant Johnston's refusal of a request for assurances that additional liens would not be filed on a newly proposed construction project unrelated to any business transaction with the Wolfes. The evidence is indicative of the filing, maliciously and falsely, of a document which clouded title and interfered with financing that caused injury. Defendant Johnston's actions possess the aggravation element necessary to submit the issue of punitive damages to the jury.

II. WOLFE'S APPEAL

Defendant Wolfe first assigns error to the trial court's denial of his motions to dismiss. His motions were made pursuant to Rule 12(b)(6) and Rules 13(a) and (e) of the North Carolina Rules of Civil Procedure.

Defendant's Rule 12(b)(6) contention asserts that the complaint failed to allege any specific wrongful conduct on his part. The complaint alleges that defendant Wolfe filed the liens "for the purpose of injuring and destroying the credit business of the plaintiffs and in general to oppress the plaintiffs," and that he knew they were without legal basis. These allegations state an ulterior motive and a wilful act not proper in the regular course of the earlier legal proceeding, and therefore, defendant Wolfe's Rule 12(b)(6) motion to dismiss was properly denied.

[8] Defendant Wolfe next contends his motion to dismiss should have been granted pursuant to Rules 13(a) and (e). Defendant Wolfe argues that plaintiffs' claim for abuse of process should have been asserted as a compulsory counterclaim in the *Wolfe v. Hewes* action.

Rule 13(a) of the North Carolina Rules of Civil Procedure defines a compulsory counterclaim as follows:

> [A]ny claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.

G.S. 1A-1, Rule 13(a). Rule 13(e) provides that "[a] claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading." G.S. 1A-1, Rule 13(e).

Plaintiffs' abuse of process claim does not arise "out of the transaction or occurrence that was the subject matter" of the *Wolfe v. Hewes* action. The *Wolfe v. Hewes* action claimed a diversion of partnership assets and sought a partnership accounting. Plaintiffs' abuse of process claim is that defendants for ulterior motives used the *Wolfe v. Hewes* action to file *lis pendens* and liens against plaintiffs' property. The two claims, while possessing similar factual bases, require different proof, and the Hewes by failing to plead the counterclaim will not be barred by res judicata from asserting their claim against the Wolfes and defendant Johnston. The claim for abuse of process was not a compulsory counterclaim which had to be asserted in the *Wolfe v. Hewes* action. This assignment of error is overruled.

[9] Defendant Wolfe further contends the trial court erred in denying his motions for directed verdict at the close of plaintiffs' evidence and at the close of all the evidence. This contention raises the issue of whether the evidence is sufficient for submission to the jury. *Kelly v. Harvester Co., supra.*

> A principal who authorizes a servant or other agent to institute or conduct such legal proceedings as in his judgment are lawful and desirable for the protection of the principal's interests is subject to liability to a person against whom proceedings reasonably adapted to accomplish the principal's purposes are tortiously brought by the agent.

Restatement (Second) of Agency § 253. In circumstances in which an attorney at law tortiously institutes or continues a civil proceeding or is guilty of oppressive or wrongful conduct during the course of the proceeding in order to enforce a claim of the principal, the principal is liable for the attorney's wrongful acts. *See id.*, comment (a). The record contains evidence of defendant Johnston's alleged malicious remarks made in defendant Wolfe's presence, and that defendant Wolfe had the liens filed. The record is clear that defendant Johnston was asked to remove the liens. Defendant Wolfe never repudiated defendant Johnston's statements nor told him to remove the liens. These actions manifest

wrongful conduct by defendant Johnston allegedly in order to "protect partnership property," and as such, defendant Wolfe may be held liable. This assignment of error is overruled.

Defendant's remaining assignments of error are similar, if not identical, to those of defendant Johnston. We have carefully reviewed them and find them to be without merit. For the reasons stated, the judgment of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

LETA PEARCE, ON HER OWN BEHALF AND IN HER CAPACITY AS ADMINISTRATRIX AND NORTH CAROLINA ANCILLARY ADMINISTRATRIX OF THE ESTATE OF DOUGLAS ALLEN PEARCE v. AMERICAN DEFENDER LIFE INSURANCE COMPANY

No. 8410SC1045

(Filed 21 May 1985)

1. Insurance § 14— life insurance—accidental death rider—exclusion for death in military aircraft—judgment n.o.v. for defendant proper

Judgment n.o.v. was properly granted in favor of defendant insurance company where plaintiff's husband had bought a $20,000 life insurance policy with a $40,000 accidental death rider; the rider contained exclusions for aircraft crew members and for military aircraft; plaintiff's husband inquired about his coverage after he joined the Air Force; a representative of defendant replied that the basic program was in effect regardless of occupation, that the accidental death rider would remain in effect while plaintiff's husband was in the Air Force but would not cover death resulting from an act of war, and did not mention other exclusions in the rider; plaintiff's husband died eight years later from an accident involving a military aircraft on which he was a crew member but not involving an act of war; and defendant paid the $20,000 basic coverage but refused payment on the accidental death rider. The application of the doctrines of waiver or estoppel on these facts would essentially rewrite the policy, extending coverage to a risk expressly excluded and obligating defendant to pay a loss for which it charged no premium.

2. Insurance § 8— life insurance—modification—authority of employee

Plaintiff did not introduce sufficient evidence that defendant's employee had actual or apparent authority to modify the contract to bring the death of plaintiff's husband within the coverage of an accidental death rider which contained an exclusion for military aircraft where plaintiff's husband had inquired about the extended coverage after he had joined the Air Force and an

employee of defendant responded that the basic policy was in full force and that the rider would be payable should death occur while in the armed forces but not if death occurred as the result of an act of war. The contract of insurance contained an express limitation on the authority of any person other than the president, vice president, or secretary of the company to modify or waive the contract provisions; consequently, the insured had notice of the extent and scope of the employee's authority.

3. Unfair Competition § 1— life insurance—inquiry into extent of coverage—exclusion not addressed

There was no error in the dismissal of plaintiff's claims based on fraud and unfair trade practices where plaintiff's husband had inquired into the extent of his coverage under a life insurance policy after he joined the Air Force; an employee of defendant replied that the basic policy for $20,000 was in full force, that an accidental death rider would be payable while he was in the armed forces but not if death occurred as a result of war, and did not mention other exclusions in the rider; defendant's husband died in a military aircraft accident not resulting from an act of war; and defendant paid the claim under the basic policy but denied coverage under the rider because of exclusions for crew members in military aircraft.

APPEAL by plaintiff from *Ellis (B. Craig), Judge*. Judgment entered 23 May 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 8 May 1985.

This is a civil action wherein plaintiff seeks to recover $40,000 pursuant to an insurance contract entered into by defendant and plaintiff's deceased husband. The record reveals the following undisputed facts:

On 4 June 1968 defendant issued a life insurance policy to Douglas Allen Pearce. The policy provided that plaintiff, as the designated beneficiary under the policy, would receive $20,000 in the event of her husband's death. Mr. Pearce purchased additional coverage in the form of an "Accidental Death Rider," which provided for payment of an additional $40,000 in the event of the insured's accidental death, subject to exceptions set out in the Accidental Death Rider as follows:

> EXCEPTIONS: This agreement does not cover death or injuries resulting directly or indirectly from: (a) travel or flight in or descent from any species of aircraft if (i) you are a pilot, officer, or other member of the crew of such aircraft, are giving or receiving any kind of training or instruction, or have any duties whatsoever aboard such aircraft while in flight, or (ii) the aircraft is maintained or operated for military or naval

purposes, or (b) military, naval, or air service or any allied branch thereof of any country at war, or (c) the commission of a felony, or (d) intentionally self inflicted injuries or suicide while sane or insane, or (e) war, participation in a riot, insurrection or any act incident thereto, either on land or water.

In 1971 Mr. Pearce entered the United States Air Force. In May, 1971, defendant received the following letter:

4 May 1971

American Defender Life Insurance Company
P. O. Box 2434
Raleigh, North Carolina 27602

Re: Douglas Allen Pearce, Pol. No. 82-0058

Gentlemen:

Lt. Pearce signed an application in 1968 for $20,000 and he is concerned as to whether or not he is fully covered now that he is in the USAF. He is a 2nd Lt. enrolled in The Navigation School at Mather, Ca. He is flying the T-29 which is a trainer for the Nav School. He has flown 6 hours so far and expects to fly approximately 250 hours during the next 12 months. After graduation he does not have any idea as to which plane he will be assigned.

Will you please check over his coverage and advise us. I feel sure that he is fully covered, however, to make him feel at ease and appreciate his policy and its protection—he would like to have it spelled out over the signature of one of your executives.

Thanks for your usual very prompt service.

Sincerely,

C. L. Dickerson

The letterhead of this letter indicates that Mr. Dickerson was employed by "Military Associates Incorporated," "Specialists in Military Financial Planning." The record contains no other information about Mr. Dickerson.

On 12 May 1971 defendant responded to Mr. Dickerson's letter by mailing the following letter to Mr. Pearce:

May 12, 1971

Mr. Douglas Allen Pearce
10484 Investment Circle, #40
Rancho Cordova, California 95610

Policy Number: 82-0058

Dear Mr. Pearce:

We have received Mr. C. L. Dickerson's letter of May 4, 1971, concerning the coverage of your above numbered policy.

Your policy has a $20,000.00 College Defender Program with a $40,000.00 Accidental Death and Dismemberment Rider, $10,000.00 Guaranteed Insurability Option. Your program does not contain a war clause. In other words, the basic program is in full force and effect regardless of your occupation. The Accidental Death Rider portion of the policy would not be payable should your death occur as the result of a direct act of war. However, in addition to the basic policy, this Accidental Death Rider would also be payable should his death occur while in the Armed Forces but not as the result of an act of war.

Should this letter not fully answer your questions or if you would like additional information, please write directly to us or call us collect.

Sincerely yours,

(Miss) Linda Wynne
Policyowners' Service

Mr. Pearce continued to make premium payments under the policy until his death on 24 July 1979. Mr. Pearce's death resulted from an accident involving a military aircraft on which he was a crew member; he did not die as the result of an act of war. Following the death of the insured, defendant paid plaintiff, as beneficiary, $20,000 under the basic policy; defendant has refused to pay plaintiff the additional $40,000 she claims under the Accidental Death Rider, asserting that the provision set out in subsection (a) of the Exceptions section of the policy relieves it of any obligation to make such payments.

On 25 February 1982 plaintiff instituted this action by filing a complaint in which she alleged nine claims for relief, including claims based on fraud, unfair trade practices, estoppel, waiver, and negligence. Defendant filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), N.C.R.C.P. Judge Brewer allowed defendant's 12(b)(6) motion by order entered 9 July 1982. This court "vacated" Judge Brewer's order and remanded the case for further proceedings in an opinion filed 21 June 1983. *See Pearce v. American Defender Life Ins. Co.*, 62 N.C. App. 661, 303 S.E. 2d 608 (1983). The matter came on for trial before a jury at the 14 May 1984 session of Superior Court, Wake County. At the close of plaintiff's evidence Judge Ellis granted defendant's motion for a directed verdict on plaintiff's claims based on fraud and unfair trade practices. At the close of all the evidence the following issue was submitted to and answered by the jury as indicated:

> Was the insured's death covered under that portion of the insurance policy issued by the defendant, which provided for the payment of $40,000 to the beneficiary in the event of the insured's accidental death?
>
> ANSWER: Yes.

By motion dated 17 May 1984 defendant moved for judgment notwithstanding the verdict pursuant to Rule 50, N.C.R.C.P. On 23 May 1984 Judge Ellis allowed defendant's motion and entered judgment in favor of the defendant. Plaintiff appealed.

Akins, Mann, Pike & Mercer, P.A., by J. Jerome Hartzell, for plaintiff, appellant.

Smith Moore Smith Schell & Hunter, by Ted R. Reynolds and Benjamin F. Davis, Jr., for defendant, appellee.

HEDRICK, Chief Judge.

We note at the outset that plaintiff relies heavily on this Court's prior decision, in which we "vacated" the order dismissing plaintiff's complaint for failure to state a claim, in support of her contention that the court erred in granting defendant's motion for judgment notwithstanding the verdict. Plaintiff contends that our holding in the first appeal of this case is binding on this Court on this second appeal, *citing N.C.N.B. v. Virginia Carolina Builders,*

307 N.C. 563, 299 S.E. 2d 629 (1983). "The doctrine of law of the case does not apply to dicta, [however,] but only to points actually presented and necessary to the determination of the case." *Waters v. Phosphate Corp.*, 61 N.C. App. 79, 84, 300 S.E. 2d 415, 418 (1983), *modified and aff'd*, 310 N.C. 438, 312 S.E. 2d 428 (1984). We have carefully scrutinized Judge Hill's opinion in this case, and note that this Court went to some length to clearly delineate what it was—and what it was not—deciding in holding that plaintiff's complaint, liberally construed, states a claim upon which relief might be granted:

> Both parties expend considerable effort in their respective arguments proceeding from the premise that the exchange of letters in May of 1971 somehow broadens the coverage of the policy, creating attendant problems of agency and contract law. *Without passing on the merits of these contentions*, our reading of plaintiff's Complaint and the letters therein establishes to our satisfaction that plaintiff has, at the very least, pleaded no insurmountable bar to her claim.

Pearce v. American Defender Life Ins. Co., 62 N.C. App. 661, 665, 303 S.E. 2d 608, 610 (1983) (emphasis added). While this Court has held that plaintiff's complaint discloses no insurmountable bar to recovery under at least one of her nine claims for relief, our inquiry in reviewing the court's entry of judgment notwithstanding the verdict in favor of defendant is a very different one: Is the evidence introduced at trial, viewed in the light most favorable to plaintiff, insufficient as a matter of law to support the jury's verdict in plaintiff's favor? *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). For the reasons set forth below, we hold that the court did not err in granting defendant's motion for judgment notwithstanding the verdict.

[1] We begin our analysis by pointing out that the policy provision in question, which excepts from coverage death resulting from travel in an aircraft if the insured is a flight crew member, is unambiguous. Plaintiff does not contend that the policy, considered as written, independent of the exchange of letters in 1971, obligates defendant to make payment to plaintiff under the Accidental Death Rider. Plaintiff's claim, instead, is that defendant is estopped from relying on the aircraft exception, or that defendant has waived that portion of the insurance contract, or that that

portion of the insurance contract was modified by the exchange of letters in 1971.

The doctrines of "waiver" and "estoppel," although related, are conceptually distinct. Waiver is "the voluntary, intentional relinquishment of a known right," Appleman 16B Insurance Law and Practice Sec. 9081 (1981), while estoppel "refers to an abatement raised by law of rights and privileges of the insurer where it would be inequitable to permit their assertion." *Id.* Waiver is available only when the evidence shows that the insurer *intentionally* relinquished its rights under the insurance contract. *Id.* Estoppel, on the other hand, "necessarily implies prejudicial reliance of the insured upon some act, conduct, or nonaction of the insurer." *Id.* Our courts have often held that forfeiture provisions in an insurance contract may be waived by the insurer, or that the company may, because of its conduct, be estopped from relying on such provisions so as to avoid its obligations under the policy. *See, e.g., Durham v. Cox*, 65 N.C. App. 739, 310 S.E. 2d 371 (1984); *Thompson v. Insurance Co.*, 44 N.C. App. 668, 262 S.E. 2d 397, *disc. rev. denied*, 300 N.C. 202, 269 S.E. 2d 620 (1980). While these doctrines sometimes have been relied upon to prevent forfeiture, the rule is well settled that

> The doctrines of implied waiver and of estoppel, based upon the conduct or action of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom; and the application of the doctrine in this respect is, therefore, to be distinguished from the waiver of, or estoppel to deny, grounds of forfeiture.

Hunter v. Insurance Co., 241 N.C. 593, 595, 86 S.E. 2d 78, 80 (1955) (quoting 29 Am. Jur. *Insurance* Sec. 903). "The theory underlying this rule seems to be that the company should not be required by waiver and estoppel to pay a loss for which it charged no premium. . . ." Annot., 1 A.L.R. 3d 1139, 1144 (1965).

In the instant case, the Accidental Death Rider provides for the payment of an additional $40,000 in the event the insured dies as the result of an accident, and expressly exempts from coverage death resulting from an accident involving an aircraft on which the insured serves as a crew member. We think it clear that application of the doctrines of waiver or estoppel on these facts

would essentially rewrite the policy, extending coverage to a risk expressly excluded therefrom, and obligating defendant to pay a loss for which it charged no premium. This we cannot do.

[2] We next consider whether plaintiff introduced sufficient evidence that defendant's agent, Miss Wynne, had actual or apparent authority to modify the insurance contract so as to bring Mr. Pearce's death within the scope of coverage. The following provision appears in the policy:

> No alteration of this Policy and no waiver of any of its provisions shall be valid unless made in writing by us and signed by our President, Vice President, or Secretary.

Assuming *arguendo* that the statements made by Miss Wynne in her letter of 12 May 1971 would, if made a part of the insurance contract, constitute a *modification* of the contract provisions, the record contains undisputed evidence showing that Miss Wynne had no actual authority to make such a modification. She was not the president, vice president, or secretary of defendant corporation at the time she wrote the letter in question, and she testified that she had no authority to extend coverage beyond that provided in the insurance contract. In her brief plaintiff concedes that "Miss Wynne may not have had actual authority to modify Plaintiff's decedent's insurance coverage," but contends that "Mr. Pearce could, in the exercise of reasonable care, have concluded Miss Wynne had authority to speak for and bind the company." Plaintiff further argues that the policy provision governing the manner in which the contract terms could be modified or waived "should not bar plaintiff's decedent from being able to rely on Miss Wynne's written explanation of the policy provisions."

"It is true that a principal, who has clothed his agent with apparent authority to contract in behalf of the principal, is bound by a contract made by such agent, within the scope of such apparent authority, with a third person who dealt with the agent in good faith, in the exercise of reasonable prudence and without notice of limitations placed by the principal upon the agent's authority." *Lucas v. Stores*, 289 N.C. 212, 220, 221 S.E. 2d 257, 262 (1976). "This rule, however, has no application where . . . the third party . . . knew or in the exercise of reasonable care should have known that the agent was not authorized to enter into the contract." *Id.* at 220-21, 221 S.E. 2d at 263. "Any apparent authority

that might otherwise exist vanishes in the presence of the third person's knowledge, actual or constructive, of what the agent is, and what he is not, empowered to do for his principal." *Rollins v. Miller Roofing Co.*, 55 N.C. App. 158, 161, 284 S.E. 2d 697, 700 (1981) (citation omitted). *See also Bynum v. Blue Cross and Blue Shield*, 28 N.C. App. 515, 519, 222 S.E. 2d 263, 266 (1976) (citation omitted) ("The authority of an agent with limited power to waive the terms and conditions of written policies of insurance in the absence of fraud or mistake or other compelling equitable principle is ordinarily restricted to negotiations connected with the inception of the contract and not to provisions of a written contract which has already taken effect and been in force for a period of time.").

In the instant case, the contract of insurance contains an express limitation on the authority of any person other than the president, vice president, or secretary of the company to modify or waive the contract provisions. Consequently, the insured had notice of the extent and scope of Miss Wynne's authority. While it is true that the written limitation of authority in question might itself have been waived or modified by "a subsequent parol agreement, or by conduct which naturally and justly [led] the other party to believe the provisions of the contract [were] modified or waived," *Childress v. Trading Post*, 247 N.C. 150, 154, 100 S.E. 2d 391, 394 (1957) (citation omitted), plaintiff introduced no evidence tending to show statements or conduct by defendant resulting in such waiver or modification. Mr. Pearce must therefore be held to have acted unreasonably in concluding that Miss Wynne had authority to bind the company in the face of clear written notice to the contrary. For this reason, plaintiff's claim in this regard must fail.

[3] Plaintiff next contends that the trial court erred in granting defendant's motion for a directed verdict on plaintiff's claims based on fraud and unfair trade practices under G.S. 75-1.1 and G.S. 58-54.1. Plaintiff's contentions as to fraud require little discussion: the record is entirely devoid of any evidence that defendant at any time made a false representation to Mr. Pearce. Scrutiny of the 12 May 1971 letter written by Miss Wynne reveals no statement that may be characterized as false. We need not discuss the remaining evidentiary gaps justifying the court's entry of a directed verdict in connection with this claim for relief.

Plaintiff's contentions in regard to her claim of unfair trade practices require more discussion. G.S. 75-1.1 in pertinent part provides: "[U]nfair or deceptive acts or practices in or affecting commerce . . . are declared unlawful." G.S. 58-54.4, on which plaintiff also relies, in pertinent part provides:

> The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:
>
> (1) Misrepresentations and False Advertising of Policy Contracts.—Making, issuing, circulating . . . any estimate, illustration, circular or statement misrepresenting the terms of any policy issued. . . .

In *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980), the Supreme Court said: "An act or practice is deceptive . . . if it has the capacity or tendency to deceive. . . . Proof of actual deception is unnecessary. . . . Though words and sentences may be framed so that they are literally true, they may still be deceptive. In determining whether a representation is deceptive, its effect on the average consumer is considered." *Id.* at 265-66, 266 S.E. 2d at 622. The question of whether a particular act or practice is unfair or deceptive is a matter of law, to be determined by the court. *Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 314 S.E. 2d 582, *disc. rev. denied*, 311 N.C. 751, 321 S.E. 2d 126 (1984).

When the statements made by defendant in its May 1971 letter are considered in connection with the letter written by Mr. Pearce's agent in light of the rules of law discussed above, we do not believe these statements are deceptive. We first note that Mr. Dickerson's letter refers to Mr. Pearce's "application in 1968 for $20,000," and thus appears to be an inquiry not about the Accidental Death Rider, but rather about the basic life insurance policy. We further note that Mr. Dickerson's letter does not specifically refer to or make inquiry about the aircraft exception contained in the Accidental Death Rider. The letter instead sets out facts about Mr. Pearce's military service, and inquires as to whether Mr. Pearce "is fully covered now that he is in the USAF." The letter written by defendant in response to Mr. Dickerson's inquiry states that "the basic program is in full force and effect regardless of your occupation." Although Mr. Dickerson

had not asked specifically about the provisions of the Accidental Death Rider, or the exceptions to coverage under that portion of the policy, defendant also explained that additional benefits for accidental death would not be payable should Mr. Pearce die as the result of a direct act of war. Then, in a statement asserted by plaintiff to be deceptive, defendant stated, "However, in addition to the basic policy, this Accidental Death Rider would also be payable should his death occur while in the Armed Forces but not as the result of an act of war."

We do not believe the average consumer would understand the above-quoted statement, considered in context, to mean that the remaining exceptions to coverage set out in the Accidental Death Rider no longer applied. In addition to the "aircraft exception," the Rider also excepts deaths resulting from the commission of a felony, intentionally self-inflicted injuries, and participation in a riot or insurrection. Defendant was not required to discuss all of these exceptions in its letter to Mr. Pearce in order to avoid being "deceptive" in discussing the "act of war" exception. We hold the court did not err in entering a directed verdict for defendant on these claims.

Plaintiff concedes that we need consider the remaining questions presented only if we hold that plaintiff is entitled to a new trial. Consequently, we do not consider the remaining assignments of error.

The judgment appealed from is

Affirmed.

Judges WEBB and WHICHARD concur.

Correll v. Boulware

HOWARD L. (DANNY) CORRELL, JR., CENTURY 21 BOXWOOD REALTY, PETITIONER v. SENORA L. BOULWARE, COMPLAINANT, AND NORTH CAROLINA REAL ESTATE LICENSING BOARD

No. 8410SC695

(Filed 21 May 1985)

1. **Brokers and Factors § 8— real estate broker—suspension of license—secretly acting for more than one party—dishonest dealing**

Findings that the owners of realty had listed their property with petitioner real estate broker for sale and that petitioner made a secret profit of $8,000 by purchasing the property and reselling it to a third party without disclosing his purchase price to the purchaser and without disclosing his selling price to the sellers supported conclusions by the Real Estate Licensing Board that petitioner was guilty of acting for more than one party in a transaction without the knowledge of all parties for whom he acted in violation of G.S. 93A-6(a)(4) and of conduct constituting improper, fraudulent or dishonest dealing in violation of G.S. 93A-6(a)(10).

2. **Brokers and Factors § 8— real estate broker—suspension of license—unworthy or incompetent to safeguard public interest**

Findings that petitioner real estate broker made a secret profit of $8,000 by buying a listed home with a bank loan and reselling it to a third party, that although petitioner received $18,720.44 from the third party he only paid $10,858.72 of these funds to the bank on his loan, and that the third party sustained the loss of money and her home supported a conclusion by the Real Estate Licensing Board that petitioner was guilty of "being unworthy or incompetent to act as a real estate broker or salesman in such manner as to safeguard the interest of the public" in violation of G.S. 93A-6(a)(8).

3. **Brokers and Factors § 8— real estate license—revocation for being unworthy or incompetent to safeguard public interest—constitutionality**

The statute permitting the revocation or suspension of the real estate license of a licensee found guilty of "being unworthy or incompetent to act as a real estate broker or salesman in such manner as to safeguard the interest of the public," G.S. 93A-6(a)(8), is not unconstitutionally vague.

APPEAL by petitioner, Howard L. Correll, Jr., from *Lee, Judge*. Judgment entered 30 April 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 13 February 1985.

Petitioner, Howard L. Correll, Jr., appeals from the suspension of his real estate license by the North Carolina Real Estate Licensing Board (hereinafter "Board"). In suspending petitioner's license, the Board made the following findings of fact following a hearing on 15 October 1982 upon proper notice:

(1) Howard L. (Danny) Correll, Jr., is, and was at all times material to this proceeding, licensed by the Board as a real estate broker, holding license number 45996, and received due and proper notice of this hearing.

(2) On November 27, 1978, Mr. and Mrs. Floyd Rickard listed their house and six acres of land on Daniels Road near Mocksville, North Carolina, with Respondent's firm with Respondent as agent. The listing price was $47,500.

(3) On May 28, 1979, Mrs. Senora L. Boulware offered to purchase the Rickards' property for $42,000, subject to obtaining conventional or Federal Land Bank financing. Mrs. Boulware's offer was prepared by Ms. Sheila Oliver, an agent of Boxwood Realty.

(4) Shortly thereafter, Respondent presented Mrs. Boulware's offer to the Rickards, who accepted the offer on May 29, 1979.

(5) The Boulware-Rickard contract did not result in a sale because Mrs. Boulware was unable to secure the financing required under the contract.

(6) The Rickards were anxious to sell their property so that they could purchase another house. Respondent was aware of this.

(7) Despite her inability to obtain financing, Mrs. Boulware still desired to purchase the Rickards' property, and requested Respondent to assist her in searching for alternative ways to acquire the property.

(8) Respondent presented the Rickards an offer from his firm, Boxwood Real Estate (hereinafter referred to "Boxwood") to purchase the property for $34,000. Respondent owns and controls Boxwood. Respondent explained to the Rickards that he could not afford to pay more as he felt it was necessary for him to make two or three times his normal commission when he resold the property. The Rickards accepted this offer.

(9) The Rickards knew that Respondent intended to sell the property to Mrs. Boulware for a profit, but he never disclosed his selling price to them.

(10) Respondent, acting for Boxwood, purchased the Rickards' property on or about July 5, 1979. On that same day, Boxwood also borrowed $34,000 from Branch Banking and Trust Company. Boxwood executed a deed of trust to Branch Banking and Trust to secure the loan. The loan, principal and interest, was to be paid within six months. Respondent did not disclose to Branch Banking and Trust Company his intent to sell the property to Mrs. Boulware.

EXCEPTION #1

(11) On or about July 11, 1979, Respondent entered into an installment land contract with Mrs. Boulware. Under the terms of this contract, Boxwood promised to sell the former Rickards property to Mrs. Boulware for $44,000. Mrs. Boulware paid $10,000 down and was obligated to pay the balance over twenty years at 12% interest per annum. When the full price, plus interest, was paid, Boxwood would deed the property to Mrs. Boulware. She took possession of the property at once. This contract was recorded on July 26, 1979.

(12) Respondent did not disclose to Mrs. Boulware what he had paid the Rickards for the property, nor did he discuss with her the possibility that she might purchase the property herself for much less than her original offer.

EXCEPTION #2

(13) Mrs. Boulware was unfamiliar with real estate transactions. She thought Respondent was acting in the capacity of a real estate agent and placed her trust in him. Mrs. Boulware believed that Respondent was purchasing the property only to facilitate her purchase of the property, and that the Rickards were the real sellers.

EXCEPTION #3

(14) Mrs. Boulware knew that Respondent had borrowed money in order to purchase the property, but she did not know that he had used the property to secure Boxwood's indebtedness, nor was she aware of the significance of this.

EXCEPTION #4

(15) After he paid Ms. Oliver $1,000 for her services and other closing expenses, Respondent and Boxwood made a secret profit in excess of $8,000 as a result of the two transactions.

EXCEPTION #5

(16) Mrs. Boulware's payment history was poor. Her payments to Boxwood were often tardy, and on several occasions her checks had to be presented twice.

(17) The history of Respondent's payments to Branch Banking and Trust Company was also poor. His short term note was restructured several times between January, 1980 and October, 1981. Respondent did not make his payments in a timely fashion. Although he received a total of $18,720.44 from Mrs. Boulware toward her obligation under the installment land contract, Respondent only paid Branch Banking and Trust Company $10,858.72.

(18) On October 27, 1981, Boxwood began foreclosure proceedings against Mrs. Boulware for her late payments and failure to maintain the property as required by the installment land contract. Boxwood's foreclosure was temporarily halted when Mrs. Boulware filed for personal bankruptcy.

(19) On October 24, 1981, Boxwood's note with Branch Banking and Trust Company became due and payable. The bank was aware that Boxwood and Respondent were in poor financial condition and decided not to renew Boxwood's loan. When Respondent could not satisfy Boxwood's obligation under the note, Branch Banking and Trust Company foreclosed on the property on November 20, 1981.

(20) The property was sold in foreclosure for $22,000. There was a deficiency in the principal amount of $12,000. Mrs. Boulware received nothing from the proceeds of the sale and was forced to move.

Based upon the foregoing findings of fact, the Board concluded that petitioner was guilty of violating G.S. 93A-6(a)(4) (1981) ("[a]cting for more than one party in a transaction without the knowledge of all parties for whom he acts"), G.S. 93A-6(a)(8) (1981) ("[b]eing unworthy or incompetent to act as a real estate broker

or salesman in such manner as to safeguard the interests of the public"), and G.S. 93A-6(a)(10) (1981) ("[a]ny other conduct whether of the same or a different character from that hereinbefore specified which constitutes improper, fraudulent or dishonest dealing").[1] The Board suspended petitioner's real estate license for a period of six months and placed him on probation for a period of two years. Pursuant to Chapter 150A of the General Statutes, petitioner filed a petition for judicial review of the Board's order in Wake County Superior Court. Following a review of the administrative record, the Wake County Superior Court ruled that the Board's findings of fact were supported by substantial evidence and that the Board's conclusions of law were not affected by any error of law. Petitioner appeals.

Henry P. Van Hoy, II, for petitioner appellant.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Harry H. Harkins, Jr., and Thomas R. Miller, Deputy Legal Counsel, North Carolina Real Estate Commission, for respondent North Carolina Real Estate Licensing Board.

JOHNSON, Judge.

Petitioner has excepted to several of the Board's findings of fact. He contends that these findings are not supported by substantial evidence in view of the entire record, and are arbitrary and capricious.

In reviewing the sufficiency of a board's findings of fact, the reviewing court must examine the "whole record" to determine if there is substantial evidence in the record to support the board's findings. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). Substantial evidence to support a finding is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Lackey v. Department of Human Resources*, 306 N.C. 231, 293 S.E. 2d 171 (1982). It is more than a scintilla or a permissible inference. *Id.* The whole record test does not allow a reviewing court to replace the board's judgment between two reasonably conflicting views, although the court could

1. G.S. 93A-6 was rewritten, effective 1 September 1983. 1983 Sess. Laws, c. 81, s. 13. Since the hearing and alleged violations occurred prior to 1 September 1983, the former version of G.S. 93A-6 applies to this case.

have justifiably reached a different result had the matter been before it *de novo. Thompson v. Board of Education, supra.* In applying the whole record test, the court must take into account evidence in the record which conflicts with or detracts from the board's decision. *Id.*

With these principles in mind, we examine petitioner's exceptions to the findings of fact. Petitioner conceded at the hearing that he did not tell Mrs. Boulware what he paid for the property, or that he was making a $10,000 profit on the deal, but he did tell her that he would have to have two to three times his normal commission "to take the risk." There is no evidence in the record that Mrs. Boulware knew what petitioner's normal commission was. She was not a party to the listing contract between Boxwood and the Rickards. Indeed, the evidence tends to show, as the Board found, that Mrs. Boulware was unfamiliar with real estate transactions. Mrs. Boulware did not know the difference between an installment land contract and a mortgage, she did not know what a closing or settlement statement was, and seemed to be unfamiliar with normal closing procedures. Although Mrs. Boulware had a college education, and had purchased a home before, the situation in the present case was unusual.

Petitioner also testified that the Rickards had an offer from their neighbors to purchase the property for $38,000, but that they wanted to sell to anyone but their neighbors, with whom they were having a dispute. Petitioner also testified that the Rickards were anxious to sell and move into another home. They were willing to sell for less than $38,000, as demonstrated by the sale of the property to petitioner for only $34,000. Petitioner did not tell the Rickards that he was selling the property for $44,000. He did not think he had a duty to tell the Rickards or Mrs. Boulware his selling and purchase price.

Mrs. Boulware testified that she did not know that petitioner was making a $10,000 profit on the transaction and that she had asked him to reduce the price. Despite her request to reduce the price and to help her purchase the property, there is no evidence that petitioner ever told her she could purchase the property for less. Mrs. Boulware also testified that she believed petitioner purchased the property to enable her to purchase the property and that she thought the Rickards were the sellers.

Based upon the foregoing, we hold the Board's findings of fact that petitioner did not disclose to Mrs. Boulware the amount he paid for the property or that she might be able to purchase the property for less than her original offer, that Mrs. Boulware was unfamiliar with real estate transactions, that Mrs. Boulware believed petitioner was purchasing the property to facilitate her purchase of the property and that the Rickards were the true sellers and that Petitioner and Boxwood made a secret profit of $8,000 were supported by substantial evidence and were not arbitrary and capricious.

Petitioner also excepts to the findings that petitioner failed to disclose to the bank his intent to sell the property to Mrs. Boulware and that Mrs. Boulware did not know the property had been pledged in a deed of trust as security for petitioner's borrowing of the purchase price. Even if it is assumed for the sake of argument that these findings are not supported by substantial evidence, the remaining findings support the court's judgment. *See Wachovia Bank & Trust Co. v. Bounous*, 53 N.C. App. 700, 281 S.E. 2d 712 (1981). G.S. 93A-6 allows the Real Estate Licensing Board to revoke or suspend a salesman's or broker's license for any one of several listed misdeeds. Only one violation of one section is needed to revoke or suspend one's license; one act may constitute a violation of more than one section of G.S. 93A-6. *Edwards v. Latham*, 60 N.C. App. 759, 299 S.E. 2d 819 (1983).

We now determine whether these findings support the court's conclusions, and whether these conclusions were affected by error of law or were arbitrary and capricious.

"A real estate broker is brought by his calling into a relation of trust and confidence. Constant are the opportunities by concealment and collusion to extract illicit gains." *State v. Warren*, 252 N.C. 690, 695, 114 S.E. 2d 660, 665 (1960). To protect the public from unscrupulous and dishonest real estate salesmen and brokers, the General Assembly enacted the Real Estate Law (Chapter 93A of the General Statutes) and established the Real Estate Licensing Board to license brokers and salesmen, "with due regard to the paramount interests of the public as to the honesty, truthfulness, integrity and competency of the applicant." G.S. 93A-4(b).

The general rule is that a broker can neither purchase from, nor sell to, his principal unless the principal expressly assents or acquiesces with full knowledge of all the facts and circumstances. *Real Estate Licensing Board v. Gallman*, 52 N.C. App. 118, 124, 277 S.E. 2d 853, 856 (1981). In *Gallman*, the seller listed property for sale with the agent for an asking price of $15,000. The seller subsequently gave the agent an option to purchase the property for $11,000. A third party subsequently made an offer to the agent to purchase the property for $15,000, after the agent had falsely represented to the third party that the owner-seller had an offer to purchase the property for $14,500. The agent did not disclose to the third party that he had an option to purchase the property for $11,000 nor did he disclose to the seller that he had an offer to purchase the property for $15,000. The agent purchased the property for $11,000 and then sold it to the third party for $15,000, thereby making a secret profit of $4,000. We upheld conclusions that the agent's actions constituted violations of G.S. 93A-6(a)(1) (making misrepresentations) and G.S. 93A-6(a)(4) (acting for more than one party without the knowledge of all). We observed with regard to the secret profit that "(t)he licensing act should not be interpreted to require a licensee to be honest as a broker or salesman while allowing him to be dishonest as an owner." *Id.* at 125, 277 S.E. 2d at 857.

[1] In the present case, the findings show that petitioner made a secret profit of $8,000, after the payment of expenses, by failing to disclose to Mrs. Boulware his purchase price of the property and by failing to disclose to the Rickards his selling price. By his concealments, petitioner made the illicit gains the Act was designed to prevent or regulate. We hold these findings support a conclusion that petitioner violated G.S. 93A-6(a)(4) and G.S. 93A-6(a)(10).

[2] We also hold the Board's findings support a conclusion that petitioner violated G.S. 93A-6(a)(8) ("[b]eing unworthy or incompetent to act as a real estate broker or salesman in such a manner as to safeguard the interest of the public"). In *Parrish v. Real Estate Licensing Board*, 41 N.C. App. 102, 254 S.E. 2d 268 (1979), we observed that "incompetency" is defined in Black's Law Dictionary (4th ed. 1957) as: "Lack of ability, legal qualification, or fitness to discharge the required duty," and that "unworthy" is defined as: "Unbecoming, discreditable, not having suitable

qualities or value." Petitioner's actions can hardly be called becoming or a credit to the real estate profession. Not only did petitioner make a secret profit by his concealments, the findings of fact show that he received $18,720.44 from Mrs. Boulware but only paid $10,858.72 of those funds to the bank on his loan. Unlike the complainant in *Parrish, supra*, Mrs. Boulware sustained the loss of money and her home.

[3] Petitioner contends that G.S. 93A-6(a)(8) is unconstitutionally vague and lacks the necessary explicitness to put reasonable persons on notice as to the conduct proscribed. We disagree. We do not think the section is so vague that "men of common intelligence must guess at its meaning." *In re Hawkins*, 17 N.C. App. 378, 394, 194 S.E. 2d 540, 550, *cert. denied*, 283 N.C. 393, 196 S.E. 2d 275, *cert. denied*, 414 U.S. 1001, 38 L.Ed. 2d 237, 94 S.Ct. 355 (1973), *quoting from Coates v. Cincinnati*, 402 U.S. 611, 614, 29 L.Ed. 2d 214, 217, 91 S.Ct. 1686, 1688 (1971).

For the foregoing reasons, we find the Board's decision to be supported by substantial evidence, to be unaffected by error of law, and not to be arbitrary or capricious. The judgment of the superior court affirming the decision of the Board is

Affirmed.

Chief Judge HEDRICK and Judge COZORT concur.

IN THE MATTER OF: THE APPEAL OF CHAMPION INTERNATIONAL CORPORATION FROM THE VALUATION AND TAXATION OF ITS INTEREST IN THE HOFMANN FOREST BY JONES COUNTY AND ONSLOW COUNTY FOR 1982

No. 8410PTC115

(Filed 21 May 1985)

1. Taxation § 25; Constitutional Law § 6.1— taxation of leased interest in State owned forestlands

Taxation of Champion's interest in the Hofmann Forest by the counties in which the forest is located does not violate the prohibition against taxing State, county, and municipal property in Sec. 2(3) of Article V of the North Carolina Constitution where Champion leased Hofmann from the State, owned

the exclusive right to timber in the forest, and used the forest as a commercial timber farm with the lessor having no control over the operation of the forest. The tax is on Champion's use of the property; it does not tax the State's property or make the State accountable therefor. G.S. 105-282.7.

2. **Taxation § 25— ad valorem taxation of leasehold interests in State timberland —"use" not unconstitutionally vague**

G.S. 105-282.7 is not unconstitutionally vague in its taxation of the user of State owned forestland. The general phraseology of "made available to and used by" will be limited to the preceding categories or like categories of land interest: "leased, loaned."

3. **Taxation § 2.2; Constitutional Law § 20— classification of use of public timberland for taxation—not unconstitutional**

G.S. 105-282.7(a) does not violate the North Carolina Constitution by taxing the use of public cropland or forestland as if the lessee or user owned it while other leasehold interests are taxed at true value. Classifying for taxation leasehold interests in government owned croplands and forestlands that are used in connection with a business conducted for profit is reasonable and within the Legislature's authority. Sec. 2(1) and Sec. 2(2) of Art. V of the North Carolina Constitution.

4. **Taxation § 2.3— taxation of leased interest in State forestland—no discrimination within class**

G.S. 105-282.7 is not unconstitutional in that it applies only to Champion because the statute by its terms uniformly operated without discrimination or distinction upon all members of the described class and Champion's own evidence established only that no one knew whether the statute had been applied to other taxpayers during the one year it had been in effect.

5. **Statutes § 8— G.S. 105-282.7 not retrospective**

G.S. 105-282.7 was not an unconstitutional retrospective tax because it was ratified in 1981, did not become effective until 1 January 1982, and Champion was not taxed under it for any period prior to the enactment. Sec. 16, Art. I of the North Carolina Constitution.

APPEAL by Champion International Corporation from the decision of the North Carolina Property Tax Commission. Decision entered 1 September 1983 in Raleigh, North Carolina. Heard in the Court of Appeals 24 October 1984.

The Hofmann Forest, a 78,927 acre tract of wood and swamp land situated in Jones and Onslow Counties, has been owned by the State of North Carolina since 1977. Since 1945 the forest has been leased to Champion International Corporation or its predecessor in interest, Halifax Paper Company, Inc., under leases executed by the former owner, The North Carolina Forestry Foundation, Inc. In its 1981 session the General Assembly enacted

G.S. 105-282.7, which permits counties and municipalities under certain circumstances to tax the use of certain government-owned forestlands and croplands when the lands are used in connection with a business conducted for profit. After the statute became effective in 1982 Jones County assessed ad valorem taxes against Champion's interest in the 31,075 acres of Hofmann Forest that are situated in that county, and Onslow County did likewise as to Champion's interest in the 47,852 acres of Hofmann Forest that are in that county. Champion's applications for exemption from the tax were denied and, except for certain modifications irrelevant to this appeal, the assessments made were approved by the Board of Equalization and Review of each county, and by the Property Tax Commission, following Champion's appeal to that body and extended hearings conducted by it.

The Property Tax Commission's comprehensive findings of fact include the following: Under its lease from the former owner of Hofmann Forest, Champion has the exclusive right to cut timber in the forest until the year 2044; Champion has the final say in determining when, where and how to plant seedlings and cut timber and uses Hofmann Forest as a commercial timber farm in the same manner that it uses timberland it owns in fee; it controls the hunting rights for the forest and leases them to hunting clubs and others as and when it sees fit; the lessor has no control over Champion's operation of Hofmann Forest. Champion relies on the Hofmann Forest for a consistent and dependable supply of pulpwood for its Roanoke Rapids plant, and in the past four years alone Champion has invested three million dollars in the forest. The fee value of Hofmann Forest for 1982 is $9,151,706. After making the above and other pertinent findings, the Commission concluded that the taxes against Champion's use of the Hofmann Forest have been validly assessed. Champion's appeal is from that determination.

Bailey, Dixon, Wooten, McDonald & Fountain, by David M. Britt, John N. Fountain and Gary K. Joyner, for taxpayer appellant Champion International Corporation.

Hunton & Williams, by David Dreifus, and William L. S. Rowe, Richmond, Virginia, for appellees Jones County and Onslow County.

PHILLIPS, Judge.

This appeal is based only on constitutional grounds. It is contended that taxing Champion's interest in the Hofmann Forest under the provisions of G.S. 105-282.7 violates the constitutions of both this State and the United States in several different respects. None of these contentions have merit in our opinion and we uphold the constitutionality of G.S. 105-282.7, which reads as follows:

> (a) When any cropland or forestland owned by the United States, the State, a county or a municipal corporation is leased, loaned or otherwise made available to and used by a person, as defined in G.S. 105-273(12), in connection with a business conducted for profit, the lessee or user of the property is subject to taxation to the same extent as if the lessee or user owned the property. As used in this section, "forestland" has the same meaning as in G.S. 105-277.2(2), and "cropland" means agricultural land and horticultural land as defined in G.S. 105-277.2(1) and (3) respectively.
>
> (b) This section does not apply to cropland or forestland for which payments in lieu of taxes are made in amounts equivalent to the amount of tax that could otherwise be lawfully assessed.
>
> (c) Taxes levied pursuant to this Article are levied on the privilege of leasing or otherwise using tax-exempt cropland or forestland in connection with a business conducted for profit. The purpose of these taxes is to eliminate the competitive advantage accruing to profit-making enterprises from the use of tax-exempt property.

I

Tax on an Exempt Fee

[1] Taxing State, county, and municipal corporation property is forbidden by Sec. 2(3) of Article V of the North Carolina Constitution and appellant argues that the effect of G.S. 105-282.7 in this instance is to impermissibly tax property that belongs to the State. In determining the constitutionality of a State tax we are concerned only with its practical operation. *Lawrence v. State Tax Commission*, 286 U.S. 276, 280, 76 L.Ed. 1102, 1106, 52 S.Ct.

556, 557 (1932). To determine whether this tax violates the State's Constitution we must look beyond the labels. *Detroit v. Murray Corp.*, 355 U.S. 489, 492, 2 L.Ed. 2d 441, 445, 78 S.Ct. 458, 460 (1958). The practical operation of the tax appears in the statute: "the lessee or user of the property is subject to taxation to the same extent as if the lessee or user owned the property." It taxes Champion's use; it does not tax the State's property or make the State accountable therefor. Taxing the beneficial use of property, as distinguished from taxing the property itself, has been common practice in this country for a long time. *Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577, 582-83, 81 L.Ed. 814, 818-19, 57 S.Ct. 524, 526-27 (1937).

In its brief on appeal, Champion euphemistically characterizes the agreements under which it uses the forest as a "management contract." But the Commission found and concluded that "under the terms of the Agreements to which Champion is a successor-party, Champion is a 'lessee or user' of Hofmann Forest" within the purview of G.S. 105-282.7. These findings and conclusions, supported by "competent, material and substantial evidence," are binding. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 561, 215 S.E. 2d 752, 761 (1975). Furthermore, the very two Agreements that the Commission found makes Champion a lessee or user of the forest were referred to by this Court in an earlier tax appeal by the former owner of Hofmann Forest, as follows: "In 1945, the Foundation signed a ninety-nine year lease with the Halifax Paper Company, Inc. . . ." *In re Forestry Foundation*, 35 N.C. App. 430, 431, 242 S.E. 2d 502, 502-503 (1978), *aff'd*, 296 N.C. 330, 250 S.E. 2d 236 (1979). Taxing the leasehold interests in exempted real property has long been approved. *See*, G.S. 105-273 (8); *Bragg Investment Co., Inc. v. Cumberland County*, 245 N.C. 492, 96 S.E. 2d 341 (1957); and *In re Forestry Foundation, supra.*

II

Tax on a "User" of Property

[2] Champion next contends that G.S. 105-282.7 by taxing the "user of the property" is unconstitutionally vague. This assertion is without merit. The statute itself sufficiently defines the term "user":

(a) When any cropland or forestland owned by the United States, the State, a county or a municipal corporation is *leased, loaned, or otherwise made available to and used by a person* . . . . (Emphasis added.)

Where general words follow a specific designation of subjects or things the statutory construction rule of *ejusdem generis* requires that the meaning of the general words will be construed as restricted by the particular designations and as including only things of the same kind, character, and nature. *State v. Fenner*, 263 N.C. 694, 140 S.E. 2d 349 (1965). In this instance, then, the general phraseology of "made available to and used by" will be limited to the preceding categories or like categories of land interest: "leased, loaned," and we see no unconstitutional vagueness therein.

III

True Value

[3] Champion next contends that G.S. 105-282.7(a), by taxing its interest "to the same extent as if the lessee or user owned the property," while other leasehold interests are taxed at true value, violates Sec. 2(1) and Sec. 2(2) of Article V of the North Carolina Constitution, which require that taxation be done in a just and equitable manner and that no class of property be taxed except by uniform rule and that every classification be made by general law. These constitutional provisions, in our view, are no bar to the tax assessed against Champion.

That the right to use property for one's own benefit and possible profit may have a value comparable to the value of the property itself was recognized in *U.S. v. City of Detroit*, 355 U.S. 466, 2 L.Ed. 2d 424, 78 S.Ct. 474 (1958); a case quite similar to this one. In that case the Michigan statute permitted lessees of government-owned property to be taxed to the same extent as if they owned the property when it was used by a business conducted for profit. In upholding the constitutionality of the statute as applied to a corporation that had leased a portion of a government-owned industrial plant and used it in connection with its business, the Supreme Court of the United States stated that:

> . . . use of exempt property is worth as much as use of comparable taxed property during the same interval . . . [It is a] permissible exercise of its taxing power for Michigan to compute its tax by the value of the property used.

355 U.S. at 470, 2 L.Ed. 2d at 427, 78 S.Ct. at 476. The requirement of G.S. 105-282.7 in this respect is that the tax exempt property be used "in connection with a business conducted for profit." Champion's is such a business and Hofmann Forest has certainly been used in connection with it. That Champion has not yet *actually made* a profit on it is irrelevant; it operates the Hofmann Forest as a commercial timber farm, rather than as an eleemosynary enterprise of some kind, and it is appropriate for the taxing authorities of the two counties to treat it accordingly. Like the Michigan statute, G.S. 105-282.7 applies to every party in the state that uses the property designated in connection with a business conducted for profit. The main difference between the two statutes is that the North Carolina statute applies to only cropland and forestland, whereas the Michigan statute applied to all real property.

The classification made here is clearly within the Legislature's authority, in our opinion. Sec. 2(2) of Article V of the North Carolina Constitution provides that "[o]nly the General Assembly shall have the power to classify property for taxation," and it has been held that the only limitation upon this power is that the classification "be founded upon reasonable, and not arbitrary, distinctions." *Clark v. Maxwell*, 197 N.C. 604, 606, 150 S.E. 190, 192 (1929), *aff'd*, 282 U.S. 811 (1931). Thus, the wisdom of the classification made is not for us to determine. Our duty is only to ascertain if the taxing power has been constitutionally exercised, and in this instance we are of the opinion that it has. Our Supreme Court has said "the power to classify subjects of taxation carries with it the discretion to select them, and . . . a wide latitude is accorded taxing authorities, . . ." *Charlotte Coca-Cola Bottling Co. v. Shaw*, 232 N.C. 307, 309, 59 S.E. 2d 819, 821 (1950). The constitutional requirements are met if it appears that the classification has "been made upon some 'reasonable ground—something that bears a just and proper relation to the attempted classification, and not a mere arbitrary selection.' " *Caldwell Land and Lumber Co. v. Smith*, 151 N.C. 70, 75, 65 S.E. 641, 643-44 (1909). Classifying for taxation leasehold interests in government-

owned croplands and forestlands that are used in connection with a business conducted for profit seems eminently reasonable to us.

IV

Champion as Sole Taxpayer

[4] Still another argument is that G.S. 105-282.7 is invalid because its effect is to tax only the appellant. This contention is without legal or factual support. On its face, G.S. 105-282.7 applies to all lessees or users of croplands or forestlands owned by the United States, the State, a county, or a municipal corporation that are used in connection with a business conducted for profit. Since the statute by its terms uniformly operates without discrimination or distinction upon all persons composing the described class, it meets the requirements of the Constitution of North Carolina above referred to. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E. 2d 481 (1971). Champion's own evidence at the Commission hearing did not show that the law applies only to it; its evidence established only that no one knew whether the statute had been applied to other taxpayers during the one year it had been in effect. We cannot assume that the statute unconstitutionally applies only to Champion.

V

Ex Post Facto Application

[5] Finally, it is contended that as to Champion G.S. 105-282.7 is a retrospective tax in violation of Sec. 16 of Article I of the Constitution of North Carolina. This contention has no merit. The statute was ratified in 1981, did not become effective until 1 January 1982, and Champion has not been taxed under it for any period prior to the enactment.

Affirmed.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. ELLIS A. COGDELL

No. 8412SC742

(Filed 21 May 1985)

1. **Assault and Battery § 14.3; Robbery § 4.3— identification at trial—sufficient evidence of armed robbery and assault**

A robbery and assault victim properly and positively identified defendant at trial as one of the three persons who robbed and assaulted him, and the trial court did not err in denying defendant's motion to dismiss charges of armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury.

2. **Criminal Law § 99.7— uncooperative prosecuting witness—informing of possibility of contempt**

When the prosecuting witness indicated that he would not testify, the trial court did not err in informing him that the alternative was to be jailed for contempt.

3. **Criminal Law § 99.9— defendant's decision not to testify—questions by trial court**

The trial court did not err in asking defendant questions out of the jury's presence concerning his decision not to testify.

4. **Constitutional Law § 48; Criminal Law §§ 99.8, 112.1— reasonable doubt instruction—court's calling of witnesses during sentencing—absence of objection—no ineffective assistance of counsel**

The trial court did not err in instructing the jury that a reasonable doubt is not a "doubt suggested by the ingenuity of counsel" and did not assume a prosecutorial role by calling two witnesses during the sentencing hearing. Therefore, defense counsel's failure to object to such actions by the trial court did not constitute ineffective assistance of counsel.

5. **Constitutional Law § 48— stipulation—failure to object to instruction—no ineffective assistance of counsel**

Defendant was not denied the effective assistance of counsel because his attorney stipulated that a bullet wound inflicted serious injury or because his attorney failed to object to the instruction that "he who hunts with the pack is responsible for the kill."

6. **Criminal Law § 138— victim's youth as improper aggravating factor**

The trial court erred in finding that the age of the seventeen-year-old victim was an aggravating factor in sentencing defendant for armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury since the victim was not so extremely young as to make his age reasonably related to the purposes of sentencing.

7. **Criminal Law § 138— consolidated sentence—aggravating factors unnecessary**

Under case law interpreting the pre-1983 version of G.S. 15A-1340.4(b), the trial court was not required to find any aggravating factors where defend-

ant received a consolidated twenty-year sentence for both offenses of armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury, and the presumptive sentence was fourteen years for the armed robbery and six years for the assault.

APPEAL by defendant from *Brannon, Judge*. Judgment entered 26 October 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 6 March 1985.

Attorney General Rufus Edmisten, by Assistant Attorney General Richard L. Griffin, for the State.

Beaver, Holt & Richardson, P.A., by H. Gerald Beaver, for defendant appellant.

BECTON, Judge.

On 26 October 1982, the defendant, Ellis A. Cogdell, was convicted of robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury. The trial court consolidated the charges for judgment and sentenced the defendant to an active sentence of twenty years in prison. Defendant was also required to pay $1,500 in attorney's fees and $5,000 restitution. Defendant presents the following questions on appeal:

1. Did the trial court err in denying defendant's motion to dismiss made at the end of the evidence?

2. Did the trial court, through its actions, so prejudice the course of these proceedings as to require a new trial?

3. Was counsel for the defendant's representation of the defendant so lacking so as to constitute ineffective assistance of counsel as a matter of law?

4. Did the trial court err in instructing the jury on principles of "reasonable doubt" and "acting in concert"?

5. Did the trial court err in determining aggravating circumstances and in imposing judgment?

For the reasons that follow, we conclude that defendant had a fair trial, free from prejudicial error.

I

On 12 April 1982, David Shelton, a 17-year-old high school student, was picked up by three men riding in a Cadillac in Fayetteville. The men drove David Shelton around for several hours, eventually taking him to a location in downtown Fayetteville, where, after removing him from the car, they robbed him of a ring, a bracelet, six dollars in currency, and other personal items. After the robbery, one of the three men shot David.

Later that evening, the defendant and two other men, Benny Bryant and Delton Tyler, were seen together at a bar in Fayetteville. Delton Tyler argued with, and pulled a pistol on, one of the patrons in the bar. Shortly thereafter, responding police officers noted Tyler and Bryant walking away from the bar at a distance approximately one-half a block from the bar, and also noticed defendant leaving the bar headed in a different direction. All three men were taken into custody. A subsequent search of the police vehicle in which Tyler and Bryant were transported revealed the presence of the ring and bracelet stolen earlier from David Shelton. Defendant, Ellis Cogdell, had no weapons nor any item taken from David Shelton.

II

[1] The record contains substantial evidence that defendant was identified at trial as a participant in the robbery, and, therefore, the trial court properly denied defendant's motion to dismiss made at the end of the evidence. On three separate occasions, David Shelton identified the defendant as one of the three robbers. The defendant was in the courtroom during the trial sitting with co-conspirator Benny Bryant. David Shelton testified:

> [On direct examination:]
>
> There were three of them. Two of them are sitting over there and the other was already; he has already pleaded guilty to it.
>
> MR. LEWIS: I object.
>
> COURT: Sustained as to the third one. Overruled as to the two of them sitting here in the courtroom.

Of the two of them sitting in the courtroom, in pointing them out to the jury, I say the second guy over there and the one with the moustache. The second guy is wearing a black sweater jacket and a brown sweater and green pants.

. . . . .

[On cross-examination:]

I did identify them to the police officer, but I didn't put up a positive ID, and now I see by looking at them today that I did identify them and that I was right.

. . . . .

[On redirect examination:]

I do recognize the people today. They were the ones that were in the car, two of the three.

We hold that David Shelton properly and positively identified the defendant in the courtroom. Accordingly, defendant's first assignment of error is rejected.

III

Based on eleven separate assignments of error, the defendant next contends that the trial court did, or failed to do, several things that prejudiced the trial proceedings.

[2] A. When David Shelton indicated that he would not testify, the trial court informed him that the alternative was to be jailed for contempt of court. Defendant assigns error to the trial court's action, but we find the trial court's action completely in keeping with the law. The general rule is that a witness can be held in contempt if the witness refuses to testify or to answer questions when examined. *See* 97 C.J.S. *Witnesses* Sec. 27(b)(1) (1957). *See also In re Williams*, 269 N.C. 68, 152 S.E. 2d 317, *cert. denied*, 388 U.S. 918, 18 L.Ed. 2d 1362, 87 S.Ct. 2137 (1967), in which a minister who refused to testify on religious grounds was held to have been in contempt of court.

[3] B. Defendant also assigns as error the trial court's questions of him, out of the presence of the jury, concerning his decision not to testify. Only after the following colloquy did the court ask questions of defendant, all of which were designed to insure that

defendant was aware of his rights and that the decision not to testify was based upon knowledge:

> MR. LEWIS: I have on several occasions explained it to him. I have not made the decision. I have given him the advice and asked him over the past several days to make that decision.
>
> COURT: Do you feel that he has now had enough time to think about it and has he now made his decision?
>
> MR. LEWIS: He has had plenty of time to think about it. He is still trying to make that decision.
>
> COURT: Mr. Cogdell, do you want a little more time to think about that?
>
> THE DEFENDANT: No, sir.
>
> MR. LEWIS: We do not desire to put on any evidence, Your Honor.

We find no error in what the trial court did. And since no effort was made to influence defendant one way or the other, no prejudice resulted.

[4] C. We summarily reject defendant's remaining assignments of error relative to the trial court's allegedly prejudicial actions: (1) instructing the jury that a reasonable doubt is not a "doubt suggested by the ingenuity of counsel"; (2) failing to summarize the evidence favorable to the defendant's contentions; (3) undertaking a prosecutorial role during the sentencing hearing by calling two witnesses; and (4) telling the jury during *voir dire* of limitations placed upon counsel. Contrary to defendant's suggestion, the record does not establish that the trial court overstepped the proper bounds of the judiciary in controlling the proceedings, or that the trial court, with or without design, cowed or obstructed defense counsel in his efforts to represent defendant.

As can be seen in IV, *infra*, our holding on this issue impacts substantially on defendant's next argument that his lawyer's representation constituted ineffective assistance of counsel.

IV

North Carolina follows the federal rule for judging effective assistance of counsel enunciated in *McMann v. Richardson*, 397

U.S. 759, 25 L.Ed. 2d 763, 90 S.Ct. 1441 (1970): "whether counsel's performance was 'within the range of competence demanded of attorneys in criminal cases'." *State v. Weaver*, 306 N.C. 629, 641, 295 S.E. 2d 375, 382 (1982) (quoting *McMann*, 397 U.S. at 771, 25 L.Ed. 2d at 773, 90 S.Ct. at 1449).

Having concluded that the trial court did not err in telling David Shelton that he could be held in contempt, that the trial court did not err in its pretrial instructions or in its instructions regarding reasonable doubt, and that the trial court did not assume a prosecutorial role so as to prejudice the defendant, we summarily reject defendant's contention that defense counsel's failure to object to the trial court's actions constitute ineffective assistance of counsel.

[5] We also summarily reject defendant's other contentions regarding ineffective assistance of counsel. Considering the doctor's report that the bullet which entered the chest just at the left of the heart, puncturing the left lung, "was a very serious injury causing . . . significant damage [which] could easily have proven fatal," we find no fault in defense counsel's stipulation that the bullet wound inflicted serious injury. Similarly, considering *State v. Lee*, 277 N.C. 205, 176 S.E. 2d 765 (1970), we cannot say that defense counsel was incompetent for his failure to object to the instruction that "he who hunts with the pack is responsible for the kill."

We have reviewed defendant's other criticisms of his lawyer's representation of him and find them to be without merit. We find defense counsel's advice within the range of competence demanded of attorneys in criminal cases.

V

Defendant next argues that the trial court erred in instructing the jury on principles of reasonable doubt and acting in concert. Specifically, defendant urges that the trial court committed prejudicial error by instructing that "he who hunts with the pack is responsible for the kill" and that reasonable doubt cannot be based upon the ingenuity of counsel not legitimately warranted by the testimony. As we have addressed defendant's assignments of error in this argument in IV, *supra*, we need say no more.

VI

[6] Finally, defendant contends that the trial court erred in finding three separate aggravating circumstances. We agree. In *State v. Lewis*, 68 N.C. App. 575, 315 S.E. 2d 766, *disc. rev. denied*, 312 N.C. 87, 321 S.E. 2d 904 (1984), this Court held the trial court erred in finding as an aggravating factor, in sentencing defendant for second-degree sexual offense and first-degree kidnapping, that the victim was very young when the victim was seventeen years old at the time of the crimes. The Court reasoned that the victim was not so extremely young as to make her age reasonably related to the purposes of sentencing. We find no reason to depart from the holding in *Lewis*. After all, David Shelton, the victim in this case, was seventeen.

[7] With regard to the two remaining aggravating circumstances found, the State itself, on pages 11 and 12 of its brief, finds fault with the trial court's findings:

> The State acknowledges that as to the crime of robbery with a firearm it was improper for the trial judge to find as an aggravating factor that the 'offense was committed for hire or pecuniary gain' (*see State v. Morris, supra*; G.S. 15A-1340.4 (a)(1)), even though such finding would have been proper as to the assault offense. The State also acknowledges that the record does not support the aggravating finding that the defendant has prior convictions. *See State v. Thompson*, 60 N.C. App. 679, 300 S.E. 2d 29 (1983).

Because the presumptive sentence is fourteen years for armed robbery and six years for assault with a deadly weapon with intent to kill inflicting serious bodily injuries, and because defendant received a 20-year sentence for the two consolidated offenses, the State contends that it was not necessary for the court to find aggravating factors under N.C. Gen. Stat. Sec. 15A-1340.4(b) (1983). The State is correct, but not because of the 1983 version of G.S. Sec. 15A-1340.4(b). In this case, defendant was sentenced on 26 October 1982, a full year before the effective date of the amended version of G.S. Sec. 15A-1340.4(b) which, in relevant part, states that a

> judge need not make any findings regarding aggravating and mitigating factors . . . if when two or more convictions are

consolidated for judgment he imposes a prison term (i) that does not exceed the total of the presumptive terms for each felony so consolidated, (ii) that does not exceed the maximum term for the most serious felony so consolidated, and (iii) that is not shorter than the presumptive term for the most serious felony so consolidated.

The portion of the amended statute quoted above was effective 1 October 1983. *See* 1983 N.C. Sess. Laws, ch. 453. Consequently, the amended statute is not controlling. However, case law interpreting the pre-1983 version of the statute, G.S. Sec. 15A-1340.4(b) (Supps. 1981-82), compels us to conclude that since defendant received a 20-year sentence for the two consolidated offenses, the trial court was not required to find any aggravating circumstances. *See, e.g., State v. Locklear*, 61 N.C. App. 594, 301 S.E. 2d 437, *disc. rev. denied*, 308 N.C. 679, 304 S.E. 2d 759 (1983). Consequently, although the trial court erred in finding aggravating circumstances, the error is harmless.

No error.

Judges WELLS and WHICHARD concur.

VAN SUMNER, INC. D/B/A V-S RENTAL AND SALES v. PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY

No. 8410SC590

(Filed 21 May 1985)

Insurance § 144— theft of insured property entrusted to another—summary judgment for defendant improper

Summary judgment was improperly granted for defendant insurance company under a clause excluding coverage for infidelity of a person to whom the insured property was entrusted where a caller identifying himself as a foreman of a construction company with which plaintiff had dealt in the past inquired concerning the rental of a backhoe, provided a building address for the contractor, and requested that the backhoe be delivered to a location adjacent to a construction site; plaintiff delivered the backhoe as directed to a person who signed the rental agreement for the contractor and drove the backhoe toward the construction project; and the contractor had no employee by that name and the backhoe had not been ordered or delivered to anyone authorized

to act for the contractor. There was no entrustment of the backhoe under the terms of the policy because plaintiff's intent was to deliver the backhoe to an employee of the contractor and not to deliver the backhoe to, or to repose confidence in, the person who signed the rental agreement.

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 12 March 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 5 February 1985.

Pursuant to the parties' stipulation, the facts of this case are undisputed. Plaintiff is engaged in the business of selling and leasing construction equipment. On 22 September 1981, T. G. Green, manager of plaintiff's Raleigh office, received a telephone call from a man who identified himself as "Jim Anderson," a foreman for Constructors, Inc., general contractor for the construction of the E. M. Johnson Water Treatment Plant in Wake County. The caller inquired concerning the rental of a backhoe and provided a billing address for Constructors, Inc. He directed Mr. Green to deliver the backhoe to the intersection of Possum Track and Ravenridge Road, a location adjacent to the construction site, and further instructed Mr. Green that if he was not at the location when the backhoe arrived, delivery should be made to the Constructors, Inc. project office. Plaintiff had done business with Constructors, Inc. on previous occasions and Mr. Green did not call Constructors, Inc. to confirm the rental of the backhoe or the billing address. Another of plaintiff's employees delivered the backhoe to the designated location where he was met by a man who identified himself as "Lewis Jones" and said that he was there to take delivery of the backhoe. He signed the rental agreement in the name of "Lewis Jones, for Constructors, Inc." Plaintiff's employee gave the keys to the backhoe to "Lewis Jones," who drove it off on a dirt road in the direction of the construction project.

Plaintiff mailed the invoice to the address provided to Mr. Green, but it was returned with the indication that the address was insufficient. Mr. Green then contacted Constructors, Inc. and was informed that Constructors, Inc. had never rented the backhoe nor received delivery of it at the construction site. It was then determined that Constructors, Inc. had no employee named Lewis Jones, and that the backhoe had not been ordered by, or delivered to, anyone authorized to act in behalf of Constructors,

Inc. The backhoe, stipulated as having a fair market value in excess of $12,000, has never been recovered.

Plaintiff was insured under an inland marine policy of insurance issued by the defendant which was in effect on 22 September 1981. The stolen backhoe was included in the schedule of insured property and was insured in the amount of $12,000. The policy contained the following language:

> THIS POLICY INSURES AGAINST:
>
> All risks of direct physical loss of or damage to the insured property from any external cause, except as hereinafter provided.
>
> THIS POLICY DOES NOT INSURE AGAINST:
>
> . . .
>
> (h) Infidelity of Insured's employees or person to whom the insured property is entrusted . . . .

Defendant denied liability for the theft of the backhoe because, it contended, the backhoe had been entrusted to the man who had identified himself as "Lewis Jones," and the theft, therefore, fell within the exclusion of the policy. From summary judgment in favor of defendant, plaintiff appealed.

Manning, Fulton & Skinner, by John I. Mabe, Jr., for plaintiff appellant.

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

MARTIN, Judge.

The sole question for our determination is whether the exclusion clause contained in the insurance policy precludes recovery, under the policy, for loss of the backhoe. We hold that the circumstances under which plaintiff transferred possession of its property did not amount to an entrustment of the property and that the exclusion, therefore, does not deny coverage.

In the construction of an insurance policy, nontechnical words which are not defined in the policy must be given the same meaning usually given to them in ordinary speech, unless the context

in which they are used in the policy requires that they be given a different meaning. *Grant v. Insurance Co.*, 295 N.C. 39, 243 S.E. 2d 894 (1978). Where there is no ambiguity in the language of the policy, the policy must be enforced according to its terms and liability for which the insurer did not contract may not be imposed. *Id.* However, exclusions from coverage provided by the policy are strictly construed, and when language which is reasonably susceptible of differing construction is used in the policy, it must be given the construction most favorable to the insured. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970); *Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 314 S.E. 2d 775 (1984).

In this case, the policy insured against physical loss of the insured property, but excluded loss caused by "*[i]nfidelity* of . . . [a] person to whom the insured property was *entrusted* [emphasis supplied]." "Entrust" is defined by Black's Law Dictionary 478 (5th ed. 1979) to mean:

> To give over to another something after a *relation of confidence* has been established. To deliver to another something *in trust* or to commit something to another with a *certain confidence* regarding his care, use and disposal of it. [Emphasis supplied.]

This definition comports with the ordinary usage of the term, as stated by Webster's Third New International Dictionary, which defines "entrust" as: "[T]o confer a trust upon; to commit or surrender to another, with a certain confidence regarding his care, use or disposal of." "Infidelity," according to Webster, means "a breach of trust." Thus, we construe the policy exclusion to exclude from coverage those losses resulting from a breach of a relationship of confidence pursuant to which property is voluntarily transferred.

There is no dispute as to the fact that plaintiff voluntarily transferred possession of its backhoe to "Lewis Jones." The dispute is whether the voluntary transfer arose out of a relationship of confidence existing between plaintiff and "Lewis Jones" so as to amount to an entrustment.

The California Supreme Court in *Freedman v. Queen Insurance Company of America*, 56 Cal. 2d 454, 15 Cal. Rptr. 69, 364

P. 2d 245 (1961), held that a policy provision excluding coverage for losses resulting from "theft . . . or other act . . . of a dishonest character . . . on the part of any person to whom the property . . . may be delivered or entrusted . . ." did not prevent recovery where the theft was committed through false impersonation. *Id.* at 456, 15 Cal. Rptr. at 70, 364 P. 2d at 246. In that case, plaintiff, a wholesale jeweler, received a call from a person who represented himself to be a retail jeweler known to the plaintiff. The caller requested that plaintiff provide him with several diamonds for selection by a customer and offered to send a messenger to pick up the diamonds. Shortly thereafter, a person arrived at plaintiff's place of business and identified himself as the retail jeweler's messenger and plaintiff gave him the diamonds. Plaintiff later learned that the retail jeweler had not called him nor sent the messenger and that the messenger was an imposter. The California court held that there could be no valid entrustment of the diamonds where possession of them was acquired by fraudulent means.

The Fifth Circuit Court of Appeals, however, in *David R. Balogh, Inc. v. Pennsylvania Millers Mutual Fire Insurance Company*, 307 F. 2d 894 (5th Cir. 1962), criticized the *Freedman* case on the grounds that, under its reasoning, the determination of coverage would depend on whether the person receiving the property conceived of the dishonest plan before or after he took possession. In *Balogh*, the Fifth Circuit held that an exclusionary clause virtually identical to that in *Freedman* prevented recovery where the plaintiff, also a jeweler, delivered an emerald to a prospective customer for the purpose of having the emerald examined by another jeweler. Instead, the prospective customer disappeared with the emerald. Under these circumstances, the Fifth Circuit determined that the emerald had been "entrusted" to the prospective customer who, unfortunately, turned out to be a thief.

In deciding the *Balogh* case, the Fifth Circuit relied on *Abrams v. Great American Ins. Co., New York*, 269 N.Y. 90, 199 N.E. 15 (1935). In that case, plaintiff delivered articles of jewelry to a known customer for the expressed purpose of her selling it to a third person. After receiving the jewelry, the customer absconded. The New York court held:

> When the word "entrusted" appears in the contract the parties must be deemed to have entertained the idea of a surrender or delivery or transfer of possession *with confidence* that the property would be used for the purpose intended by the owner and as stated by the recipient. *The controlling element is the design of the owner rather than the motive of the one who obtained possession.*

Id. at 92, 199 N.E. at 16 (emphasis supplied). The court held that plaintiff had delivered the jewelry to his customer with a confidence that it would be used for the purpose expressed and that he had therefore "entrusted" the jewelry to her.

We do not disagree with the holdings in *Balogh* or *Abrams*, because under the facts of each of those cases there was clearly a voluntary transfer of the property to the intended recipient pursuant to a relationship of trust between the parties as to the use of the property, and therefore, an entrustment of the property. However, the facts of those cases are clearly distinguishable from those before the California court in *Freedman*, or before us in the present case, because there was no misrepresentation of the identity of the recipient which induced the transfer.

Nor do we adopt the rule of *Freedman*, that there can be no entrustment in any situation where possession of property is obtained by fraud or trick. In our view, *Freedman* fails to consider the intent of the owner in transferring possession. As was demonstrated in *Abrams* and *Balogh*, a fraud may be practiced by the very person to whom the owner intends to entrust his property for an expressed purpose. The intent of the policy exclusion is to exclude coverage for such misplaced confidence. We believe that a determinative factor as to the existence of an entrustment is whether the person in whom the owner intended to repose confidence by delivery of the property for an expressed purpose is the same person to whom the property was actually transferred. If the answer is "Yes," then the owner entrusted the property, even though the recipient may have gained the owner's confidence by fraud. On the other hand, if by fraudulent misrepresentation of identity, an owner is induced to transfer possession of the property to one other than the person to whom the owner intended to repose confidence, the transfer cannot be deemed to be an "entrustment."

In the present case, it is clear that plaintiff's intent and design was to deliver its backhoe to an employee of Constructors, Inc., with a certain confidence that the backhoe would be used by Constructors, Inc., under the terms of the rental relationship. It was never the intention of plaintiff to deliver the backhoe to, or to repose confidence in, "Lewis Jones." The transfer of possession from plaintiff to "Lewis Jones" was induced by the fraudulent misrepresentation of identity by "Lewis Jones" that he was acting on behalf of Constructors, Inc. in receiving possession of the backhoe. Under such circumstances, the transfer of possession cannot amount to an entrustment.

We are aware of the decision of the North Carolina Supreme Court in *Motor Co. v. Insurance Co.*, 233 N.C. 251, 63 S.E. 2d 538 (1951), where an automobile dealer permitted a prospective customer to drive a used car from its dealership upon the customer's representation that he was taking it for approval by his wife and would return to purchase it if she agreed. The representation was false; neither the customer nor the automobile were ever found. The dealer sought recovery from its insurer, who defended under a policy provision excluding coverage for "loss suffered by the Insured in case he voluntarily parts with . . . possession . . . whether or not induced to do so by any fraudulent scheme, trick, device, or false pretense or otherwise." *Id.* at 252, 63 S.E. 2d at 539. The Supreme Court held that the exclusionary clause was not ambiguous and that the exclusion barred recovery because the plaintiff had voluntarily parted with possession of its automobile.

We do not find the result reached in that case to be applicable to our decision in the present case because of the considerable difference in the language of the policy exclusions. Had defendant in the present case excluded from coverage losses caused by a voluntary parting with possession, whether or not induced by fraud, we would have no difficulty in finding that plaintiff's loss was excluded from coverage. However, defendant chose the language in its policy and chose to exclude only those losses occasioned by infidelity of one to whom the property was entrusted, rather than all losses occasioned by trick or fraud. In our view, the exclusion as written by defendant is susceptible of differing constructions, and we have construed it in favor of coverage. *See Trust Co. v. Insurance Co., supra.*

Having decided that the exclusionary clause of the policy does not bar recovery, and it having been stipulated that the value of the backhoe exceeded the coverage provided by the policy, we hold that plaintiff is entitled to judgment for the full amount of the coverage provided. Accordingly, we remand to the Superior Court of Wake County for entry of judgment consistent with this opinion.

Reversed.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. CLINT EDWARDS FRANKS

No. 8426SC990

(Filed 21 May 1985)

Kidnapping § 1.3— confinement for purpose of facilitating rape—instruction on false imprisonment not required

The evidence in a second-degree kidnapping case tended to show that defendant confined, restrained or removed the victim with the intent to have sexual intercourse with her notwithstanding resistance on her part and thus did not require the trial court to submit the lesser-included offense of false imprisonment where defendant's evidence tended to show that he and the alleged victim looked around an abandoned house together and that nothing else happened, and where the State's evidence tended to show: defendant grabbed the victim and shoved her into the abandoned house; defendant tied the victim's hands behind her back with a coat hanger, bound her arms and shoulders, and tied her ankles with electrical wire; defendant pulled up the victim's T-shirt, felt her breasts and then pulled her shorts and underwear down to midthigh; defendant placed his finger in the entrance to the victim's vagina and asked if she were "ready"; defendant then placed the victim in a closet while he went to look for a blanket; defendant then took the victim out of the closet, stood her up for a minute, and said, "I ain't going to do it"; and defendant then pulled the victim's clothing back in place and untied or cut the coat hanger and wire from her wrists, ankles, arms and shoulders. The kidnapping offense was complete if defendant at any time during the confinement had the requisite intent, and it is immaterial that he changed his mind and did not complete the offense of rape.

APPEAL by defendant from *Beaty, Judge.* Judgment entered 23 January 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 3 April 1985.

Defendant appeals from a judgment of imprisonment entered upon his conviction of second degree kidnapping.

Attorney General Edmisten, by Assistant Attorney General John R. Corne, for the State.

Assistant Appellate Defender Robin E. Hudson for defendant appellant.

WHICHARD, Judge.

The issue is whether the court erred in refusing to instruct the jury on false imprisonment, a lesser included offense of kidnapping. We hold that the court did not err.

The necessity for instructing as to a lesser included offense arises only when there is evidence from which the jury could find that the crime of lesser degree was committed. *State v. Bradshaw*, 27 N.C. App. 485, 487, 219 S.E. 2d 561, 562, *disc. rev. denied*, 289 N.C. 299, 222 S.E. 2d 699 (1975). "The presence of such evidence is the determinative factor." *Id.*, quoting *State v. Melton*, 15 N.C. App. 198, 189 S.E. 2d 757 (1972). "The mere contention that the jury might accept the state's evidence in part and might reject it in part is not sufficient to require submission to the jury of a lesser offense." *Bradshaw*, 27 N.C. App. at 487-88, 219 S.E. 2d at 562, quoting *State v. Black*, 21 N.C. App. 640, 205 S.E. 2d 154, *affirmed*, 286 N.C. 191, 209 S.E. 2d 458 (1974).

G.S. 14-39, under which defendant was indicted, provides in pertinent part that:

> (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 . . . .

Here defendant was charged with unlawfully, wilfully, and feloniously kidnapping the prosecuting witness without her consent for the purpose of facilitating the commission of the felony rape. Rape is defined at G.S. 14-27.2(a)(2) and 14-27.3(a)(1) as engag-

ing in vaginal intercourse with another person by force and against the will of the other person. The statutory phrase "engaging in vaginal intercourse with another person" is expressed in our cases as gratifying one's passion on the person of a woman; "by force and against the will of the other person" is expressed as notwithstanding her resistance. *E.g. State v. Gammons*, 260 N.C. 753, 133 S.E. 2d 649 (1963); *State v. Burnette*, 242 N.C. 164, 87 S.E. 2d 191 (1955); *State v. Lang*, 58 N.C. App. 117, 293 S.E. 2d 255, *disc. rev. denied*, 306 N.C. 747, 295 S.E. 2d 761 (1982); *Bradshaw*, 27 N.C. App. 485, 219 S.E. 2d 561.

In the cases cited above, the presence or absence of intent to rape has been dealt with in two contexts: (1) as here, the context of confining, restraining or removing with intent to commit rape and (2) the context of assault with intent to commit rape. The difference between the greater offenses—kidnapping or assault with intent to commit rape—and the lesser included offenses—false imprisonment or assault on a female—lies in the presence of intent to commit rape.

If, in the context here, all the evidence tends to establish that the defendant confined, restrained, or removed the prosecuting witness with the intent to have sexual intercourse with her notwithstanding resistance on her part, *Bradshaw*, 27 N.C. App. at 488, 219 S.E. 2d at 563, failure to instruct on false imprisonment is not error; it is not error to fail to instruct on false imprisonment if there is no evidence tending to show that the victim was kidnapped for some purpose other than rape, or for no purpose. *See State v. Allen*, 297 N.C. 429, 435, 255 S.E. 2d 362, 365 (1979) (where all the evidence shows intent to rape, failure to instruct on lesser included offense of assault on a female not error); *State v. Roseman*, 279 N.C. 573, 580-81, 184 S.E. 2d 289, 294 (1971). We therefore must determine whether there was evidence from which the jury could have concluded that the defendant confined, restrained or removed the prosecuting witness with some intent other than to rape her. *Lang*, 58 N.C. App. at 119, 293 S.E. 2d at 257. "The offense of [kidnapping] with intent to rape does not require that defendant retain the intent throughout the [offense], but if he, at any time during the [kidnapping], has an intent to gratify his passion upon the woman, notwithstanding any resistance on her part, the defendant would be guilty of the of-

fense." *Bradshaw*, 27 N.C. App. at 488, 219 S.E. 2d at 563, citing *Gammons*, 260 N.C. 753, 133 S.E. 2d 649.

The State's evidence tended to show the following:

The defendant was twenty-three years old at the time of the crime. The prosecuting witness was a seventeen year old high school student. Sometime after 4 p.m. on 3 March 1983 the prosecuting witness was riding her bicycle near her home. She got off her bike to look in the open doorway of an old house that was, for the most part, boarded up. She turned at the approach of a man, later identified as the defendant, and said, "Hi." When she turned back toward the house, he grabbed her and shoved her in the doorway. He blocked the door and began kissing her. She backed away saying, "Don't, don't do that." Holding her arms and shoulders the defendant moved the prosecuting witness into the kitchen where she was cut on the lower thigh by broken glass. He tied her hands behind her back by twisting a coat hanger around her wrists. He also bound her arms and shoulders. He cut a piece of electrical wire with a knife, which he showed to the prosecuting witness, and tied her ankles with the wire.

Once the prosecuting witness was bound, the defendant pulled up her T-shirt and bra and felt her breasts. He undid her shorts and pulled her shorts and underwear down to midthigh. He placed his finger in the entrance to her vagina and said, "Are you ready?" At that point, the defendant carried the prosecuting witness upstairs. He stood her up and starting kissing her again. He then put her in a closet in a seated position, told her he was going to get a blanket, and shut the closet door. The prosecuting witness was still bound with her breasts and lower body exposed. She was unable to free her hands or stand.

The prosecuting witness stated that at that point, while shut in the closet, she began to cry. She did not, however, cry or scream in front of the defendant because, she testified, "I had heard somewhere about a would-be rapist trying to scare and humiliate the victim, if the victim doesn't appear to be scared or humiliated that would discourage the rapist; and also if I had screamed, it might have scared or upset him so he would try to quieten [sic] me down using force." The prosecuting witness further testified that she "was trying to appear not frightened or terribly scared."

The defendant returned after about ten minutes, during which time he hid under the house the bicycle the prosecuting witness had been riding. He opened the closet and said he didn't have a blanket but had brought his jacket. Then he took the prosecuting witness out of the closet, stood her up for a minute, and said, "I ain't going to do it." He stated, "What I did was wrong." He pulled her clothing back in place and untied or cut the coat hanger and wire from her wrists, ankles, arms and shoulders. He got her bike from under the house and she rode home. She reached home around 5 p.m.

The testimony of the prosecuting witness was corroborated by a police officer who stated that her wrists had red marks on them and her legs were scraped and cut. The officer also found freshly cut wire at the scene.

The defendant's evidence tended to show that the defendant encountered the prosecuting witness as he walked past the abandoned house, that she spoke to him, that they poked around the house together, made general conversation, and left separately at about 5 p.m.

On the basis of this evidence, and after a review of the relevant case law, we do not believe the jury could find that the crime of lesser degree was committed. To find this the jury would have to be able reasonably to conclude from the evidence that the defendant confined and restrained the prosecuting witness not with the intent to rape her, but for the purpose of touching and kissing her only.

Several cases are instructive. In *Bradshaw*, 27 N.C. App. 485, 219 S.E. 2d 561, the defendant entered the victim's bedroom in the night uninvited. When the victim awoke and asked the defendant what he wanted he answered, "You know." After a fierce struggle the defendant left. The Court found that all the evidence tended to establish that defendant committed the assault with the intent to gratify his passion notwithstanding resistance. "[H]is own statement," the Court stated, "clearly shows his intent at the time" he assaulted the victim. *Id.* at 488, 219 S.E. 2d at 563. The Court continued,

> Intent is an attitude or condition of the mind and is usually susceptible of proof only by circumstantial evidence. The cir-

> cumstances disclosed by defendant's own statement tend to refute the contention that his entry into the house and the assault were done other than with the intent to gratify his passion upon [the victim], notwithstanding any resistance on her part.

Id.

"[A] statement of intent [has been] deemed significant by our courts . . . ." *Lang*, 58 N.C. App. at 120, 293 S.E. 2d at 257. In *Lang*, which raised on appeal the same issue as here, the Court found that the jury could have concluded that the defendant confined, restrained and removed the victim merely for the purpose of fondling her. The jury could have so concluded, the Court stated, because it

> may have viewed as significant the prosecuting witness' testimony that during the more than an hour she was in the defendant's presence the defendant gave her instructions to get in the car, "keep [her] head down on [her] knees and don't raise it," take her clothes off and put her clothes on, but never stated that he wanted to have sexual intercourse with her.

Id.

Here, by contrast, the defendant made two statements to the prosecuting witness indicating his intent: with his finger on her vagina, he said "Are you ready?" Then, after carrying her upstairs and failing to find a blanket, he said, "I ain't going to do it." Thus, as in *Bradshaw* where the Court found intent and unlike in *Lang* where the Court did not, defendant's own statements refute the contention that he confined and restrained the prosecuting witness for some purpose other than rape. The fact that the defendant did not complete the offense of rape merely shows that he changed his mind. *See Gammons*, 260 N.C. at 755-56, 133 S.E. 2d at 651; *Bradshaw*, 27 N.C. App. at 488, 219 S.E. 2d at 563.

Nor do we believe the jury could reasonably conclude from the evidence that the defendant did not intend to gratify his passion if he encountered resistance. Cases where the Court has found that the defendant was dissuaded by the victim's resistance are distinguishable from this one on their facts.

In *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978), the Court found evidence of the lesser included offense of assault on a female where the defendant only forced the victim to have oral sex, demanded and received two dollars from her, then left. In *State v. Little*, 51 N.C. App. 64, 275 S.E. 2d 249 (1981), although defendant had a knife, he only threatened to hurt the victim and "did not state any specific sexual intentions . . . ." *Id.* at 70, 275 S.E. 2d at 253. "Significantly," the Court stated, "defendant immediately retreated . . . the moment he encountered meaningful resistance, i.e., as soon as [the victim] became verbally aggressive and loud. This evidence would permit the jury to find that . . . he did not intend to satisfy his lust, if he encountered . . . resistance, and thus reject the State's argument that he intended to carry out the act at all events . . . ." *Id.* Similarly in *Gammons*, 260 N.C. 753, 133 S.E. 2d 649, the Court found that the defendant desisted from further sexual advances when the victim told him she was going to scream if he did not leave her alone.

Here, however, the defendant precluded resistance by tying the prosecuting witness' arms behind her back and tying her ankles together with electrical wire. By thus incapacitating the prosecuting witness the defendant insured that he could and would not be deterred by any resistance on her part. All the evidence thus tends to establish that defendant committed the assault with the intent to gratify his passion notwithstanding resistance. *Bradshaw*, 27 N.C. App. at 488, 219 S.E. 2d at 563. It is immaterial that he changed his mind; the kidnapping offense was complete if he at any time during the confinement had the requisite intent. *Gammons*, 260 N.C. at 755-56, 133 S.E. 2d at 651; *Bradshaw*, 27 N.C. App. at 488, 219 S.E. 2d at 563.

While other rape and intent to rape cases may be more egregious on their facts, the uncontradicted evidence here shows that the defendant confined and restrained the prosecuting witness with the intent to have sexual intercourse with her against her will. We thus hold that the evidence did not require submission of false imprisonment to the jury.

No error.

Judges JOHNSON and EAGLES concur.

JOHN T. COUNCIL, INC. v. BALFOUR PRODUCTS GROUP, INC.

Nos. 8414SC798, 8414SC799, 8414SC944

(Filed 21 May 1985)

Rules of Civil Procedure § 58— time of entry of judgment

Despite the trial judge's subsequently professed intent to enter an order discharging a receiver in open court on 28 November 1983, he failed to do so in accordance with G.S. 1A-1, Rule 58, par. 1 or par. 2 where the court directed the receiver to prepare an appropriate order, the court granted a request by defendant's attorney to have an opportunity to review the proposed order, defendant's attorney received further verbal assurances from the receiver's counsel that the proposed order would not be submitted to the court until 8 December 1983 so that he would have ample time to review it, and the clerk's minutes stated only that the receiver's motion to be discharged was allowed. The Court's order was entered according to G.S. 1A-1, Rule 58, par. 3 on 8 December 1983 when entry of the order was given to the clerk, the order was filed, and notice of its filing was mailed to all parties.

APPEAL by defendant from *Johnson, Judge*. Orders entered 8 December 1983 and 10 April 1984 in Superior Court, DURHAM County. Appeal by defendant from *McLelland, Judge*. Order entered 9 April 1984 in Superior Court, DURHAM County. Heard in the Court of Appeals 3 April 1985.

Defendant was placed in permanent receivership in July 1979. Claude V. Jones was appointed receiver pursuant to G.S. 55-125 and G.S. 55-127. On 18 November 1983 the receiver petitioned to be discharged from his duties. Over defendant's written objection the court heard and allowed the petition on 28 November 1983. The court directed the receiver to prepare an appropriate order. Defendant's attorney requested opportunity to review the order before entry, which the court granted. The receiver sent the proposed order to defendant's attorney on 1 December 1983. The receiver submitted the proposed order, and a second order allowing attorney fees to be paid out of receivership proceeds, to the court on 8 December 1983. Both orders were signed and, according to the language contained therein, entered on 8 December 1983. Eight days later, on 16 December 1983, defendant filed notice of appeal from both orders.

On 22 December 1983 the receiver moved to dismiss the appeal from the order discharging him for failure to give timely notice on the ground that "[t]he order and decision of the [c]ourt

made in [o]pen [c]ourt was entered on November 28, 1983." In support of his motion, on 18 January 1984 the receiver filed an affidavit signed by Judge Johnson, who had entered the order, which stated, *inter alia*,

> [M]y decision [was] that the Petition be allowed in its entirety, and it was my understanding and intent that such decision rendered and announced in open court at said time [i.e., 28 November 1983] was the entry of the order embodying my decision. I did not give any contrary directions or instructions to the Deputy Superior Court Clerk, who was in attendance at such hearing.
>
> . . . .
>
> My attention has been called to the language "Entered at Durham on this 8 Day of December, 1983" at the bottom of the Order just above my signature. I did not notice this language at the time the draft was received and signed by me, and it made no impression on me.

After a hearing to determine when the order discharging the receiver was entered for purposes of timely notice of appeal (i.e., within ten days after entry of the order, G.S. 1-279(c)), on 21 March 1984 Judge Johnson ordered that "the minutes of the Clerk of Superior Court . . . be and hereby constitute the date and time of the entry of the order which is in dispute." Those minutes were dated 28 November 1983 and stated only that the motion was allowed. On 27 March 1984 defendant moved for relief from the order of 21 March 1984, requesting that it be amended to reflect 8 December 1983 as the entry date of the order discharging the receiver. Defendant so moved on the grounds that the clerk's minutes do not purport to record entry of an order, they were made without instruction from the court, and they contain no findings of fact. Judge Johnson denied that motion on 10 April 1984, which denial is the subject of defendant's appeal in No. 8414SC944.

"[B]ased solely upon Judge Johnson's determination of the entry date as being November 28, 1983," Judge McLelland on 9 April 1984 granted the receiver's motion to dismiss the appeal from the order discharging him. Judge McLelland's 9 April 1984 order is the subject of defendant's appeal in No. 8414SC799.

The award of attorney fees from receivership proceeds is the subject of defendant's appeal in No. 8414SC798.

Mount, White, King, Hutson and Carden, P.A., by Lillard H. Mount, for Claude V. Jones, Permanent Liquidating Receiver of Balfour Products Group, Inc., appellee.

Manning, Fulton and Skinner, by Howard E. Manning, Jr., and Charles E. Nichols, Jr., for defendant appellant.

WHICHARD, Judge.

The issue governing the disposition of all three appeals is whether the court entered the order discharging the receiver in accordance with G.S. 1A-1, Rule 58 on 28 November 1983. We hold that it did not. We resolve this issue mindful that Rule 58 was designed to make the moment of entry of judgment easily identifiable and to give fair notice thereof to all parties. G.S. 1A-1, Rule 58, Comment; *Rivers v. Rivers*, 29 N.C. App. 172, 223 S.E. 2d 568, *cert. denied*, 290 N.C. 309, 225 S.E. 2d 829 (1976); *Barringer & Gaither, Inc. v. Whittenton*, 22 N.C. App. 316, 206 S.E. 2d 301 (1974).

The text of the rule reads as follows:

> Subject to the provisions of Rule 54(b): Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.
>
> In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.
>
> In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be

> deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof. (1967, c. 954, s. 1.)

G.S. 1A-1, Rule 58. The rule undertakes to fix the time of entry in three situations: (1) where a verdict is returned or a decision is announced in open court granting recovery of a sum certain or costs or denying all relief; (2) where any other judgment is rendered in open court, upon direction of the judge; and (3) where any judgment is rendered other than in open court. Shuford, *North Carolina Civil Practice and Procedure* Sec. 58-3 (1981).

The first paragraph of Rule 58 clearly does not apply. The hearing on the petition to allow the receiver to be discharged did not result in (1) a jury verdict granting recovery of a sum certain or costs or denying all relief or (2) a decision by the judge in open court to like effect. Nor did the clerk "forthwith prepare, sign, and file the judgment without awaiting any direction by the judge." G.S. 1A-1, Rule 58, par. 1.

While not differentiating between the first and the second situations, *supra*, governed by Rule 58, the receiver argues that absent any contrary direction by the judge a notation in the clerk's minutes constitutes entry of judgment. This argument misconstrues both *Cochrane v. Sea Gate Inc.*, 42 N.C. App. 375, 256 S.E. 2d 504 (1979), on which the receiver relies, and the specific notation made by the clerk on 28 November 1983. The clerk's minutes read *in toto*:

John T. Council

vs

Balfour Products Group, Inc.

Motion for Approval of Final Accounting—allowed

Rec. paid balance to CSC,

(Hearing & discharge, Mr. Manning objections & exceptions)

Further, the deputy clerk who made this notation testified in her affidavit of 10 April 1984 as follows:

> In accordance with my usual practice, I noted on the courtroom calendar, which constitutes the official courtroom minutes, that the Motion of the Receiver was allowed. I did not make any notation that the order had been "entered" because I was not instructed to by Judge Johnson and I did not hear Judge Johnson announce in open court that any order was to be entered.

The testimony of the clerk, moreover, was corroborated in affidavits of two disinterested attorneys present in court during the 28 November 1983 hearing.

In *Cochrane*, 42 N.C. App. 375, 256 S.E. 2d 504, in contrast to the situation here,

> entry of judgment was made on 13 March 1978 when the trial judge, in open court and in the presence of counsel for both parties rendered summary judgment for defendant, and the clerk, in the absence of any contrary direction by the judge, made a notation of such decision in the court minutes.

Cochrane, 42 N.C. App. at 377, 256 S.E. 2d at 505.

The situation here is similar to that in *Fitch v. Fitch*, 26 N.C. App. 570, 216 S.E. 2d 734, *cert. denied*, 288 N.C. 240, 217 S.E. 2d 679 (1975), rather than to that in *Cochrane*. In *Fitch* on 29 January 1975 at the conclusion of the evidence the court instructed counsel for plaintiff to prepare an order containing findings of fact which he verbally suggested. On 31 January 1975 a written order signed by the judge was entered. On appeal defendant contended the court erred in that the written order differed from the instructions for the proposed order given in open court. The Court found no error and stated,

> In our opinion no judgment was 'rendered' . . . until 31 January 1975. (Citation omitted.) On 29 January 1975 the trial court *merely instructed the plaintiff's attorney to prepare an order* . . . . We conclude judgment was not in fact rendered until the entry of the order of 31 January 1975, which both parties agree was properly signed by the judge and entered. (Emphasis supplied.)

Id. at 575, 216 S.E. 2d at 736-37.

We find that on 28 November 1983 the court "merely instructed," *id.*, the receiver to prepare an appropriate order. Defendant's attorney requested and received opportunity to review the proposed order. He received further verbal assurances from receiver's counsel that the proposed order would not be submitted to the court until 8 December 1983 so that he would have ample time to review it. Thus, despite Judge Johnson's subsequently professed intent to enter the order discharging the receiver in open court on 28 November 1983, he failed to do so in accordance with G.S. 1A-1, Rule 58, par. 1 or par. 2. On the date of the hearing such intent was not announced to counsel, communicated to the clerk, or reflected in the clerk's minutes as a notation of entry of judgment.

We therefore hold that the order was entered and notice given according to G.S. 1A-1, Rule 58, par. 3 on 8 December 1983, when entry of the order was given to the clerk, the order filed, and notice of its filing mailed to all parties. We thus reverse Judge McLelland's order of 9 April 1984 allowing the motion to dismiss defendant's appeal of the order discharging the receiver. This is appeal No. 8414SC799. We vacate as inconsistent with our opinion herein Judge Johnson's order of 10 April 1984 denying defendant's request to amend the order of 22 March 1984 to reflect 8 December 1984 as the date of entry of the order allowing the receiver's discharge. This is appeal No. 8414SC944. Given our disposition in appeal No. 8414SC799, we dismiss as interlocutory and thus premature the appeal from the order of 8 December 1983 awarding attorney's fees from receivership proceeds; the appeal of that order should be brought forward as part of the appeal from the order discharging the receiver. This is appeal No. 8414SC798.

For purposes of the appeal to which we herein hold defendant entitled, defendant shall cause the record on appeal to be settled and certified as provided in Rule 11 of the Rules of Appellate Procedure, the appeal being considered as taken on the date of certification of this opinion.

In No. 8414SC799, reversed.

In No. 8414SC944, order vacated.

In No. 8414SC798, dismissed.

Judges JOHNSON and EAGLES concur.

FORSYTH COUNTY v. WILLIAM H. SHELTON; AND WIFE, CAROLYN SHELTON; CHRISTOPHER H. SHELTON; WILLIAM T. SHELTON; AND LISA C. SHELTON

No. 8421DC1026

(Filed 21 May 1985)

1. Municipal Corporations § 30.19— nonconforming use—voluntary abandonment

Defendants' motion for a directed verdict was properly denied on the issue of voluntary abandonment of a nonconforming use where the property had been operated by Ivor Shelton as a commercial swimming lake, picnic, and amusement area until he suffered a stroke in 1971; the property was leased to the YMCA through 1977; and was then used by family and friends but was not leased until 1982, when defendants acquired the property and reopened it for paying customers. Defendants' argument that the use of the property remained the same even though no one was using it would make the establishment of abandonment impossible. Moreover, the evidence was sufficient to raise a jury question as to whether the discontinuation of the commercial use was voluntary where Ivor Shelton's stroke caused a significant degree of physical disability but he retained the ability to conduct his affairs and continued to make decisions as to the use and maintenance of the property.

2. Municipal Corporations § 30.19— nonconforming use—abandonment—type of electrical service

In an action to determine whether a nonconforming use had been abandoned, there was no prejudicial error in the exclusion of evidence that a commercial electric account had been maintained for the property since 1961 where defendants put before the jury testimony that power service had been continuous since 1961. Whether the account was designated commercial or otherwise was of little relevance.

3. Municipal Corporations § 30.19— nonconforming use—abandonment—instructions

In an action to determine whether a nonconforming use had been abandoned, there was no error in the court's failure to give the requested instruction on involuntary cessation of the nonconforming use where the court correctly instructed the jury that plaintiff had to prove not only abandonment but also intent not to reestablish the use.

4. Municipal Corporations § 31— nonconforming use—vagueness of ordinance not raised before appeal

Defendants could not contend on appeal that a zoning ordinance was unconstitutionally vague in failing to define and distinguish prohibited "commercial amusements" and allowed "recreational facilities" where defendants admitted in their answer and proceeded throughout trial on the theory that the use was a nonconforming use. Defendants' proper remedy was to utilize existing administrative appeal channels to contest the zoning officer's determination that paid public use of the lake property was a nonconforming use.

5. Municipal Corporations § 30.19— abandonment of nonconforming use—stay pending appeal—no abuse of discretion

The propriety of a stay allowing operation of a nonconforming use pending appeal was moot where the Court of Appeals upheld a verdict that the nonconforming use had been abandoned; moreover, no grounds were apparent for forfeiture of the appeal bond. G.S. 1A-1, Rule 62(c).

APPEAL by defendants from *Gatto, Judge*. Judgment entered 14 May 1984 in FORSYTH County District Court. Heard in the Court of Appeals 7 May 1985.

Shelton's Lake is a small lake and picnic area with related facilities, located in the Forsyth County zoning jurisdiction. In 1950 or 1951, Ivor Shelton began operating the property in the summers as a commercial swimming lake, picnic and amusement area. Ivor Shelton suffered a stroke in 1971 and ceased operating the lake property. In 1973 he leased it to the local YMCA who used it through the summer of 1977. Between 1977 and 1982 the lake property was not leased or otherwise open to the public as a commercial amusement facility. It was used by family and friends. In 1982 defendants acquired the property, refurbished the buildings and the lake and reopened it for paying customers.

In 1967, plaintiff Forsyth County had enacted a zoning ordinance covering the area in question. The subdivision including the lake property was zoned for large-lot residential development, which permitted "recreational facilities" but not "commercial amusements." The ordinance provided that existing nonconforming uses could continue, but that once the use was voluntarily abandoned, with intent not to reestablish, it could not thereafter be reestablished.

In May 1982, the county zoning officer advised defendants that commercial operation of the lake property was a nonconforming use. Defendants went ahead with their plans to reopen and in

April 1983 the County filed suit to enjoin the use of the lake property as a commercial amusement. A jury trial followed, focusing on the issue of voluntary abandonment. The jury considered one issue, whether the nonconforming use of the lake property was abandoned prior to 1982. They answered "yes," and judgment was entered 14 May 1982 restraining defendants' operation of the lake property as a commercial amusement. Defendants appealed. They also moved for and obtained a stay pending appeal, to allow operation during the 1984 season.

Jonathan V. Maxwell and P. Eugene Price, Jr. for plaintiff.

D. Blake Yokley for defendants.

WELLS, Judge.

Defendants first assign error to the denial of their motion for directed verdict, based on the insufficiency of evidence of abandonment. Upon such motion, plaintiff's evidence is taken as true, with all reasonable inferences therefrom, resolving all conflicts and inconsistencies in plaintiff's favor, and disregarding defendants' evidence unless favorable to plaintiff or tending to clarify plaintiff's case. *Koonce v. May*, 59 N.C. App. 633, 298 S.E. 2d 69 (1982).

[1] Defendants make two arguments under this assignment. First, they argue that all the evidence showed that the "nature of the use of the property remained the same . . ., although no one was actually using it." This argument, if adopted, would make the establishment of abandonment in such cases impossible, contrary both to the ordinance and to the public policy of this state. *See Poster Advertising Co. v. Bd. of Adjustment*, 52 N.C. App. 266, 278 S.E. 2d 321 (1981) (nonconforming uses not favored). Zoning ordinances are construed against indefinite continuation of a nonconforming use. *Id.* Ordinances in general are construed to give effect to all of their parts if possible. *See Jackson v. Board of Adjustment*, 275 N.C. 155, 166 S.E. 2d 78 (1969). We therefore reject defendants' position, which would allow nonconforming uses to continue indefinitely and effectively nullify the abandonment provisions of the ordinance. Upon the evidence that use of the lake property was abandoned at least four years within the meaning of the ordinance, we hold that the nature and use of the lake property did not remain the same as its previous nonconforming use.

Defendants next contend, however, that the abandonment was not intentional. The ordinance defined abandonment as "the voluntary discontinuance of a use, when accompanied by an intent not to reestablish such use." Defendants contend that all the evidence showed that Ivor Shelton only ceased operating the lake property because of ill health, and always intended to reopen it to the public. We disagree. While defendants did produce evidence which tended to show that Ivor Shelton's stroke and attendant health problems prevented Ivor Shelton himself from operating the lake property and that Ivor Shelton always intended for the lake property to be reopened to the public, nevertheless, such evidence must be weighed and considered against plaintiff's evidence of non-use over a period of at least four years.

We first address the question of voluntariness of discontinuance. Defendants argue that Ivor Shelton's ill health conclusively established that the discontinuance of the operation of the lake property as a public facility was involuntary. Again we disagree. While the evidence showed that Ivor Shelton's stroke caused a significant degree of physical disability, the evidence also showed that Ivor Shelton retained the ability to conduct his affairs and that he did in fact continue to make decisions as to the use and maintenance of the property. Such evidence was sufficient to raise a jury question as to whether the discontinuance of the commercial use of the property was voluntary.

In support of their position that where discontinuance of use is occasioned by the illness of the owner, such discontinuance is involuntary, defendants rely on *Conway v. City of Greenville*, 254 S.C. 96, 173 S.E. 2d 648 (1970), a case involving discontinued use following the illness of the principal operator of a nonconforming business. While the South Carolina Court did find that *under the circumstances of that case*, the discontinuance of business use was involuntary, the court nevertheless made it clear that the question (in such cases) was "largely one of intention and must be determined from all of the surrounding facts and circumstances." *Id.* Such a standard has been adopted in a significant number of other states. *See* 82 Am. Jur. 2d, *Zoning and Planning* § 217. Similarly, we hold that the question of voluntariness of discontinuance of use in the case was one of fact, to be determined by the jury in the light of all the circumstances surrounding the discon-

tinued use of the Shelton Lake property as a commercial amusement enterprise.

Defendants also contend that all of the relevant evidence on the point showed that Ivor Shelton never showed any intent not to reopen the lake property to public commercial use. Again, we disagree, and hold that under all the circumstances of this case, including the significant length of non-use, a finder of fact could reasonably infer that Ivor Shelton manifested an intent to forego or abandon the use of the lake property as a commercial amusement enterprise.

[2] Defendants next assign error to the exclusion of evidence that a commercial electric account had been maintained for the lake property since 1961. The exclusion of evidence constitutes reversible error only if the appellant shows that a different result would have likely ensued had the error not occurred. *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 302 S.E. 2d 204 (1983). Defendants put before the jury testimony that power service had been continuous since 1961. Whether the account was designated commercial or otherwise appears to be of little relevance. Defendants have shown no prejudicial error.

[3] Defendants requested a jury instruction on involuntary cessation of the nonconforming use, which the court did not give.[1] Defendants claim prejudicial error. We consider the assignment in light of the evidence and the whole charge given. *See Stewart v. Gallimore*, 265 N.C. 696, 144 S.E. 2d 862 (1965) (per curiam). The court correctly instructed the jury that plaintiff had to prove not only abandonment but also the intent not to reestablish the use. In light of the evidence and the charge, we conclude the jury was correctly instructed, and that the instruction was substantially as defendants requested.

1. The requested instruction read in full:

> Ladies and Gentlemen of the Jury, the defendants contend that Ivor Shelton did not voluntarily discontinue the non-conforming use of the subject property. Defendants contend that because of the ill health of Ivor Shelton after he suffered a stroke, he was physically unable to open the subject property for its seasonal use, maintain it, and manage it. The law provides that if the cessation of the non-conforming use is involuntary, such cessation will not constitute an abandonment of the use.

[4] Finally, defendants assign error to the court's ruling, as a matter of law, that the ordinance was not unconstitutionally vague in failing to define and distinguish "commercial amusement" (prohibited) and "recreational facility" (allowed). Defendants admitted in their answer and proceeded throughout trial on the theory that the use was a nonconforming use. A nonconforming use is one not allowed by the ordinance, *i.e.*, a commercial amusement as opposed to a recreational facility. An admission in an answer judicially establishes the fact and removes the matter from further consideration. *Rollins v. Miller Roofing Co.*, 55 N.C. App. 158, 284 S.E. 2d 697 (1981). Defendants having admitted their nonconforming use, they were not then in a position to protest unfair treatment because they later (implicitly) contended the lake was a conforming use. *See Wilkes v. Bd. of Alcoholic Control*, 44 N.C. App. 495, 261 S.E. 2d 205 (1980) (only one adversely affected may challenge constitutionality). As the court below correctly pointed out, defendants' proper remedy was to utilize existing administrative appeal channels to contest the zoning officer's determination that paid public use of the lake property was a nonconforming use. *See Town of Kenansville v. Summerlin*, 70 N.C. App. 601, 320 S.E. 2d 428 (1984) (statutory remedy exclusive). Defendants do not contend that they were unaware of their right to appeal the decision of the zoning officer; their failure to do so precludes attack on that decision here. *New Hanover County v. Pleasant*, 59 N.C. App. 644, 297 S.E. 2d 760 (1982). They have never applied for a variance. The assignment is thus without merit.

[5] Plaintiff brings forward two cross-assignments of error. The first, that the court erroneously instructed on the burden of proof, is now moot. The second involves a stay pending this appeal obtained by defendants to allow the commercial operation of the lake property through the summer of 1984. As plaintiff concedes, the stay was in the discretion of the court. N.C. Gen. Stat. § 1A-1, Rule 62(c) of the Rules of Civil Procedure (1983). Plaintiff argues that a ruling on the propriety of the stay will nonetheless provide a legal basis to determine whether defendants' bond should be forfeited. It appears that the stay was granted expressly to allow operation of the lake property pending appeal; the bond clearly was set to ensure compliance with the conditions of operation set in the court's stay order. No ground for forfeiture is apparent, and our decision on the merits renders the propriety of

the stay itself moot. In view of the minimal actual harm to plaintiff, we are not inclined to rule that the stay constituted an abuse of discretion in any event. In the light of our decision, however, we now order that the stay order be vacated. The result is:

No error in the trial.

Stay order is vacated.

Judges JOHNSON and COZORT concur.

STATE OF NORTH CAROLINA v. DAVID EARL TRIPP

No. 843SC467

(Filed 21 May 1985)

1. **Narcotics § 3.3— opinion testimony based on tests by another—unreliability in this case**

An S.B.I. chemist's opinion testimony that a substance was heroin based upon a mass spectrometer analysis performed by a second S.B.I. chemist in April 1983 was inadmissible where the first chemist testified that the spectrometer was broken from February 1983 until June 1983, and there was no evidence that it was repaired and working properly at the time of the test, since the test relied upon by the witness was not inherently reliable. However, the chemist's testimony was not prejudicial error in light of evidence that tests performed on the substance by the witness himself indicated that it was heroin.

2. **Criminal Law § 42.6— chain of custody of narcotics**

The State properly proved the chain of custody of a substance from the time of its purchase from defendant until it was received by an S.B.I. chemist, and it was unnecessary for the State to prove the chain of custody of the substance after it was submitted to a second S.B.I. chemist for further tests where the results of the tests performed by the second chemist were inadmissible in evidence.

APPEAL by defendant from *Reid, Jr. (David E.), Judge.* Judgment entered 31 August 1983 in Superior Court, PITT County. Heard in the Court of Appeals 4 March 1985.

Defendant was found guilty of possession of heroin with the intent to sell and with the sale of heroin. The offenses were con-

solidated for judgment and defendant was sentenced to imprisonment for a term of six years. Defendant appeals.

Evidence presented by the State tended to show that on 1 April 1983 at about 3:50 p.m., Agent Handy Gunter, Jr., while working as an undercover agent, purchased two glassine bags of purported heroin from defendant at $25 per bag. Shortly after 4:00 p.m., 1 April 1983, Agent Gunter placed his initials on the two glassine bags, delivered them to Agent Malcolm McLeod for submission to the State Bureau of Investigation's Chemical Laboratory for analysis. Agent McLeod sealed the two glassine bags in a manilla envelope which he delivered to the S.B.I. laboratory by placing the manilla envelope with its contents into Agent John Casale's "lock-box." Agent Casale, a forensic chemist with the S.B.I. laboratory, had the only key for the lock box, and evidence placed therein could not be removed without the key. On 13 April 1983, Agent Casale removed the manilla envelope containing the two glassine bags from his lock box and performed two color tests and an infrared test on a sample of the white powder substance contained in one of the glassine bags. From these preliminary tests, Agent Casale formed an opinion of which he was 99% sure that the substance contained heroin. On 13 April 1983, Agent Casale, after performing these preliminary tests and arriving at an opinion that the substance contained heroin, placed a small sample of the white powder substance from the same glassine packet he analyzed into a glass vial, sealed and labeled the vial with the case number. The glass vial was submitted to Agent H. T. Raney for a mass spectrometer analysis. Agent Raney is also a forensic drug chemist with the S.B.I. laboratory and is the mass spectrometer operator for the lab.

On 10 June 1983, Agent Casale received a report from Agent Raney together with the vial he had submitted to him on 13 April 1983. The mass spectrometer graph conclusively indicated that the substance contained in the vial was heroin.

On 28 June 1983, Agent Casale placed the two glassine packets Agent McLeod had placed in his lock box on 13 April 1983 into a manilla envelope which he personally sealed, initialed, prepared for mailing and mailed them to Agent Malcolm McLeod. Agent McLeod received the manilla envelope with its contents on 1 July 1983. Once received on 1 July 1983, the package remained

unaltered and in Agent McLeod's exclusive possession and control.

The manilla envelope, State's Exhibit #1, and the two glassine packets, State's Exhibit #2, were properly identified. Agent Casale was received as an expert in the field of forensic chemistry specializing in the area of the identification and analysis of controlled substances. Over defendant's objection, Agent Casale was allowed to testify that the results of his analysis and an analysis performed by H. T. Raney of a sample from one of the glassine packets showed that it contained heroin. Defendant's motion to strike was denied.

Defendant testified in his own behalf and denied possession or selling the purported controlled substance.

Attorney General Edmisten, by Assistant Attorney General Henry T. Rosser, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender David W. Dorey, for defendant.

JOHNSON, Judge.

[1] Agent Casale testified, on direct examination, that in his opinion the substance obtained from the defendant was heroin. He based his opinion on the test results of an infrared test, two color tests and a mass spectrometer analysis. On cross-examination, defendant elicited from Agent Casale that he did not conduct the test performed on the spectrometer, but was testifying to results conducted by Agent Raney. Defendant objected and moved to strike this testimony as inadmissible hearsay, due to the fact Agent Casale had no personal knowledge of the test and was testifying from results of Agent Raney's tests. The State contends that Agent Casale's testimony was not hearsay and properly admissible under the principles articulated by the Supreme Court in *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979).

In *Wade*, the Court, after an exhaustive review of past cases, stated:

> Although none of these cases[1] articulates any sort of universally applicable rule, the pattern of their holdings supports the following propositions: (1) A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on *information supplied him by others*, including the patient, if such information is inherently reliable even though it is not independently admissible into evidence. The opinion, of course, may be based on information gained in both ways. (2) If his opinion is admissible the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion. (Emphasis added.)

Id. at 462, 251 S.E. 2d at 412. The State contends that these principles should apply to testimony of experts beyond the medical field as well. We agree with the State's contention that the above principles should apply to all persons properly qualified in court as an expert in a particular field. *Accord State v. Powell*, 306 N.C. 718, 295 S.E. 2d 413 (1982); *see also*, Brandis, North Carolina Evidence, sec. 136, p. 542 (2nd rev. ed.).

Applying the above quoted principles, we hold that Agent Casale's opinion based upon the mass spectrometer analysis should have been excluded. The record clearly shows that Agent Casale received the substance purchased from the defendant on 13 April 1983. After conducting his own preliminary tests, he submitted the substance to Agent Raney on 13 April 1983 to perform a mass spectrometer analysis. Agent Raney was not called to testify. Agent Casale testified that the mass spectrometer was broken from February of 1983 until June 1983. The best he could recall was, "it was broken down in February and then it would be up for a couple of days and then down. And then it was down indefinitely until June." Agent Casale further testified that he was not present when the tests were conducted, nor does he know how to operate the mass spectrometer. There was no evidence presented to show when and if the machine was repaired. Agent

1. *State v. Alexander*, 179 N.C. 759, 103 S.E. 383 (1920); *Penland v. Coal Co.*, 246 N.C. 26, 97 S.E. 2d 432 (1957); *Seawell v. Brame*, 258 N.C. 666, 129 S.E. 2d 283 (1963); *Cogdill v. Highway Commission*, 279 N.C. 313, 182 S.E. 2d 373 (1971); *State v. DeGregory*, 285 N.C. 122, 203 S.E. 2d 794 (1974); *State v. Bock*, 288 N.C. 145, 217 S.E. 2d 513 (1975).

Casale partially based his opinion that the substance was heroin from a graph produced from the mass spectrometer.

The first issue when an opinion is based in whole or in part on conversations with the patient or others is the admissibility of the opinion (the reliability requirement). *State v. Franks*, 300 N.C. 1, 265 S.E. 2d 177 (1980). In light of the mass spectrometer's condition and the absence of any testimony that it was repaired and properly working, the graph produced by it and relied upon by Agent Casale was not inherently reliable. Our holding today is limited to the facts of this case, for we cannot say that in every case where an analysis is done on a substance by one person and the results of that analysis forms the basis of an opinion of an expert that it should be excluded as not reliable.

Even though we have concluded it was error for the trial court to admit Agent Casale's opinion based upon the graph he received, we do not believe it was prejudicial error.

> Such prejudice will normally be deemed to be present, in cases relating to rights arising other than under the Federal Constitution, *only* "when there is reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial. . . ."

State v. Powell, 306 N.C. 718, 295 S.E. 2d 413 (1982) (quoting *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980)). There was ample competent evidence elicited from Agent Casale that the substance in question was heroin. He testified that he personally conducted three individual tests on the substance, two color tests and an infrared test. Based upon these three tests, he was of the opinion that the substance tested was heroin. Asked if his test was conclusive, Agent Casale testified he was 99% sure. Agent Casale's tests were performed on the substance prior to the tests conducted on the mass spectrometer by Agent Raney. In light of Agent Casale's opinion, from competent evidence, along with other evidence presented by the State to show defendant's guilt, we fail to find that had the error not occurred the result would have been different. Therefore, we hold the trial court's erroneous admission of the testimony was not prejudicial.

[2] Defendant next assigns as error the trial court's denial of his motion to dismiss due to the State's failure to establish a chain of

custody. The thrust of the defendant's argument relates to the interval of time between Agent Casale's submission of the substance to Agent Raney and its return. Defendant does not contest the chain of custody prior to Agent Casale's receipt of the substance. In light of our holding that the test results of Agent Raney were inadmissible, but the test results performed by Agent Casale were admissible, the chain of custody needed to be established was the time interval prior to Agent Casale's initial receipt of the substance. Defendant concedes that the State has proved that the substance purchased from the defendant was properly secured, transported to the S.B.I. laboratory and received by Agent Casale. We therefore dismiss defendant's contention.

In the trial of the defendant, we find

No prejudicial error.

Chief Judge HEDRICK and Judge COZORT concur.

WINBERT GUY, EMPLOYEE, PLAINTIFF v. BURLINGTON INDUSTRIES, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8410IC1003

(Filed 21 May 1985)

1. Master and Servant § 94.4— workers' compensation—refusal to allow additional evidence—no abuse of discretion

The Industrial Commission did not abuse its discretion by refusing to permit plaintiff to introduce additional evidence where plaintiff's motion was not accompanied by an affidavit as required by Industrial Commission Rule XXI.6 and the motion contained only vague implications as to the content of the additional evidence; the Deputy Commissioner accorded plaintiff substantial latitude in the presentation of his case and agreed to hold the record open for more than sixty days based on plaintiff's representations that he hoped to introduce additional medical testimony; plaintiff offered no reason for his failure to provide the testimony within the time allowed by the Deputy Commissioner; the testimony eventually sought to be introduced was that of plaintiff, who had been available to testify at all times and who had testified in the first hearing in 1979; plaintiff made no attempt to seek defendant's consent to the admission of the testimony even after the Deputy Commissioner revealed her willingness to consider the evidence given such consent; and plaintiff made no

showing that the evidence sought to be introduced was not known to him at the time of the last hearing. G.S. 97-85.

2. Master and Servant § 68— workers' compensation—no occupational disease—findings sufficient

The Industrial Commission's findings of fact were supported by competent evidence, supported the conclusions, and resolved all material facts raised by the evidence where the evidence showed and the Commission found that the mill in which plaintiff was employed processed cotton for only two months during the almost twenty-five year period of plaintiff's employment and the only chemical affecting the respiratory system about which plaintiff inquired was found in a floor finish which could cause breathing difficulties if there was excessive exposure to the chemical when wet. Plaintiff presented no evidence that he had ever been exposed to the floor finish, which the record shows was used very infrequently and generally not when the plant was in operation.

APPEAL by plaintiff employee from opinion and award of the North Carolina Industrial Commission filed 27 March 1984. Heard in the Court of Appeals 6 May 1985.

Plaintiff filed this claim under the Workers' Compensation Act, asserting that he is entitled to benefits under the Act because of disability resulting from an occupational disease. Following a hearing, the Industrial Commission made findings of fact and conclusions of law and entered an opinion and award denying plaintiff's claim. Plaintiff appealed.

Charles R. Hassell, Jr., for plaintiff, appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by C. Ernest Simons, Jr., and Steven M. Sartorio, for defendants, appellees.

HEDRICK, Chief Judge.

[1] Plaintiff's first assignment of error is set out in the record as follows: "The Industrial Commission erred in denying Appellant's request to present necessary evidence which would likely have affected the outcome of the case." The record reveals the following facts necessary to an understanding of this assignment of error.

The first hearing on plaintiff's claim was conducted on 26 June 1979. The opinion and award filed by the Chief Deputy Commissioner on 5 May 1980 was vacated by the Full Commission, and the case was reset for further testimony. A second hearing was held on 18 June 1981. At the conclusion of that hearing, Dep-

uty Commissioner Scott told plaintiff's counsel that additional testimony would be taken from another witness "[a]s soon as you are prepared to go forward with the hearing. . . ." Plaintiff produced additional evidence at the final hearing, held 13 August 1981. At the conclusion of that hearing, Deputy Commissioner Scott asked, "Does that close the evidence? . . . Has all the evidence been submitted or is there more?" Plaintiff responded by saying "we're trying to develop additional medical testimony," and by requesting "thirty days in which to complete that and advise you of our intentions." Deputy Commissioner Scott then agreed to hold the record open for thirty days. On 16 September 1981, having heard nothing from plaintiff, Ms. Scott called plaintiff's counsel and, learning that plaintiff desired an additional thirty days in which to gather additional evidence, granted plaintiff's request for another extension of time. On 2 November 1981, more than two weeks after the expiration of plaintiff's most recent extension, Deputy Commissioner Scott closed the record, having heard nothing further from plaintiff. On 5 November Ms. Scott called plaintiff's counsel in connection with a matter related to the case, at which time plaintiff's counsel asked to be allowed to take additional testimony from plaintiff. Plaintiff's counsel was informed that such additional evidence would be permitted only if defendants consented. Plaintiff's counsel indicated at that time that plaintiff would not seek defendants' consent and, in fact, never did so. On 10 November 1981 Deputy Commissioner Scott's opinion and award denying plaintiff's claim for benefits was filed, from which opinion and award plaintiff gave notice of appeal to the Full Commission. On 8 September 1982 plaintiff filed a motion asking that the opinion and award be set aside and that "the claim be reset in Raleigh for additional testimony from the plaintiff and other witnesses who may be available to establish the extent of his exposure to the floor finish" allegedly responsible for plaintiff's disability. On 27 March 1984 the Full Commission, without hearing additional evidence, adopted as its own the opinion and award filed by Deputy Commissioner Scott, and affirmed the result reached therein.

In his brief plaintiff contends that "[t]he denial of Appellant's request for an additional opportunity to describe the extent of his exposure to [the chemical that allegedly caused plaintiff's disabili-

ty] was in effect a denial of his claim," amounting to an abuse of discretion. We emphatically disagree.

"Ordinarily, the question of whether to reopen a case for the taking of additional evidence rests in the sound discretion of the Industrial Commission, and its decision will not be disturbed on appeal in the absence of an abuse of discretion." *Schofield v. Tea Co.*, 299 N.C. 582, 596, 264 S.E. 2d 56, 65 (1980). G.S. 97-85 provides that the Commission shall receive further evidence "if good ground be shown therefor." Our Courts have said that whether "good ground be shown therefor" is within the sound discretion of the Commission, and its ruling in that regard will not be reviewed on appeal absent a showing of manifest abuse of discretion. *See Lynch v. Kahn Construction Co.*, 41 N.C. App. 127, 254 S.E. 2d 236 (1979); *Thompson v. Burlington Industries*, 59 N.C. App. 539, 297 S.E. 2d 122 (1982), *cert. denied*, 307 N.C. 582, 299 S.E. 2d 650 (1983).

We hold that the Commission acted well within its discretion in refusing to permit plaintiff to introduce additional evidence. Rule XXI.6, Rules of Industrial Commission, provides that motions for a new hearing to take additional evidence must be written and supported by an affidavit. In the instant case, plaintiff's written motion is not supported by an affidavit, and the motion itself contains only vague implications as to the content of the additional evidence sought to be introduced. In addition, we note that Deputy Commissioner Scott accorded plaintiff substantial latitude in the presentation of his case. Plaintiff has offered no reason whatsoever for his failure to provide the testimony in question within the generous time allowed by the Deputy Commissioner. Furthermore, while Deputy Commissioner Scott agreed to hold the record open for more than sixty days based on plaintiff's representations that plaintiff hoped to introduce additional medical testimony, the testimony eventually sought to be introduced was that of plaintiff, who had been available to testify at all times and who in fact did testify in 1979. We also point out that plaintiff made no attempt to seek defendant's consent to the admission of this testimony, even after the Deputy Commissioner revealed her willingness to consider this evidence given such consent. Finally, we note that plaintiff has made no showing that the evidence sought to be introduced was not known to him at the time of the last hearing on 13 August 1981. In conclusion, we find

plaintiff's contention that the Commission abused its discretion in refusing to conduct yet another hearing on the matter absurd.

[2] Plaintiff's second and third assignments of error assert that the Commission erred by "failing to consider" certain evidence and by "failing . . . to make findings on the occupational aggravation of his pre-existing illness."

The well-established rule concerning the role of the appellate court in reviewing an appeal from the Industrial Commission is that the Court "is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E. 2d 676, 678 (1980). The Commission must make specific findings of fact regarding each material fact upon which a plaintiff's right to compensation depends. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981). The Commission is not required, however, to make findings as to facts presented by the evidence that are not material to plaintiff's claim. *Starr v. Paper Co.*, 8 N.C. App. 604, 175 S.E. 2d 342 (1970).

In the instant case, the transcript reveals that plaintiff, at the first hearing, attempted to show that his lung disease was at least partially attributable to his occupational exposure to cotton dust. The evidence affirmatively disclosed, however, and the Commission found as a fact, that the mill in which plaintiff was employed processed cotton for only two months during the almost twenty-five year period of plaintiff's employment. Plaintiff then shifted his theory of recovery to occupational disease brought about by his exposure to various chemicals used in the mill. The evidence revealed, however, and the Commission found as a fact, that the chemicals about which plaintiff inquired, with one exception, affect the central nervous system, not the respiratory system. The single chemical shown by the evidence to have potentially adverse effects on the respiratory system is found in a floor finish used by the plant in which plaintiff worked. The evidence showed and the Commission found as a fact that *excessive* exposure to this chemical, *when wet*, could cause chest pain, coughing, and breathing difficulties. Plaintiff presented no evidence showing that he had ever been exposed to this floor finish, which the record shows was used "very infrequently," and

was generally not used when the plant was in operation. We think it clear that the Commission's findings of fact are supported by competent evidence and that they in turn support the Commission's conclusions of law. We further hold that the findings of fact made by the Commission are sufficient to resolve all material facts raised by the evidence. The assignment of error is without merit.

Rather than abusing its discretion to the prejudice of the plaintiff as counsel contends, the record in this case demonstrates an overindulgent attitude upon the part of the Industrial Commission toward the dilatory and procrastinating tactics of plaintiff's counsel which inevitably works to the detriment of all parties with business before the Industrial Commission. The truth of the axiom that "justice delayed is justice denied," is clear in this case.

Affirmed.

Judges WEBB and WHICHARD concur.

BETTY LANIER CARLTON v. CLARENCE EDGAR CARLTON

No. 8421DC752

(Filed 21 May 1985)

Divorce and Alimony § 30— equitable distribution—separation agreement—subsequent reconciliation—effect of executory and executed provisions

Provisions of a 1963 separation agreement in which plaintiff relinquished all rights and interests in property "hereafter acquired" by defendant and in which the parties agreed to a full and final settlement of any property rights "that might arise in the future" were executory provisions which became void as to property acquired after they resumed the marital relationship, and a suit for equitable distribution of such property was proper. However, if the parties did divide and convey property prior to resuming the marital relationship, provisions of the separation agreement concerning such property were executed, and an equitable distribution suit to divide that property is barred unless the evidence shows an intent to cancel those provisions of the separation agreement.

Carlton v. Carlton

APPEAL by plaintiff from *Harrill, Judge*. Judgment entered 5 June 1984 in District Court, FORSYTH County. Heard in the Court of Appeals 12 March 1985.

This case concerns whether a separation agreement entered into by the parties bars an action by the plaintiff for equitable distribution.

The parties were married on 18 May 1961. They entered into a Deed of Separation in October 1963. Plaintiff maintains that notwithstanding the separation agreement, the parties resumed the marital relationship and lived together as husband and wife until 25 March 1982.

On 21 November 1983, plaintiff brought suit requesting an equitable distribution of marital assets accumulated through 25 March 1982. In his answer, as amended, defendant contends that the parties separated in 1963, not in 1982, and that the plaintiff's equitable distribution action is barred by the separation agreement entered into in 1963.

The defendant moved for summary judgment, which was granted. Plaintiff appeals the judgment.

Booe, Mitchell, Goodson and Shugart, by Jeanne S. Wine and David A. Logan, for plaintiff appellant.

White and Crumpler, by G. Edgar Parker, for defendant appellee.

ARNOLD, Judge.

The issue on appeal is whether the district judge properly granted summary judgment, barring plaintiff's action for equitable distribution as a matter of law. We hold that the district judge erred in granting the summary judgment.

Summary judgment is proper when there is no genuine issue as to any material fact. G.S. 1A-1, Rule 56(c). It is a drastic remedy, not to be granted "unless it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law," *Dendy v. Watkins*, 288 N.C. 447, 452, 219 S.E. 2d 214, 217 (1975), *quoting* Gordon, 5 Wake Forest Intra. L. Rev. 87, 91. The burden is on the moving party to establish the lack of any triable issue of fact. The papers of the

moving party are carefully scrutinized, while "those of the opposing party are on the whole indulgently regarded." *Id., citing* 6 Moore's Federal Practice (2d ed. 1975) § 56.15[8] at 2440. Summary judgment should be denied "[i]f different material conclusions can be drawn from the evidence." *Credit Union v. Smith*, 45 N.C. App. 432, 437, 263 S.E. 2d 319, 322 (1980).

The defendant contends that the evidence raised no material issue of fact, but only a question of law: whether the separation agreement entered into by the parties in 1963 bars plaintiff's present equitable distribution action. Defendant argues that all the provisions of the 1963 separation agreement were "executed" so that even if the parties resumed the marital relationship the agreement would remain in force.

Plaintiff contends, however, that certain provisions of the separation agreement were "executory," and that they became void when the parties reconciled. Plaintiff contends that the parties did not truly end the marital relationship until 1982, and that their marital property should be subject to equitable distribution.

The pertinent paragraphs of the 1963 separation agreement read as follows:

> THIRTEENTH: That for the consideration aforesaid, the party of the second part hereby relinquishes and quitclaims unto the said party of the first part, all her rights, dower, title and interest in and to the property of the said party of the first part, whether now owned or hereafter acquired by him, and covenants and agrees well and truly to perform and abide by this contract, except as the parties have agreed herein, regarding the real property now owned by said parties by the entirety.
>
> FIFTEENTH: It is mutually agreed that this instrument shall constitute a full, final and complete settlement of all existing property rights between the parties and shall operate as a full, complete and final settlement of any rights that might arise in the future.

It is well-settled in North Carolina that a separation agreement between husband and wife is terminated for every purpose insofar as it remains executory on their resumption of the marital relation. *In re Estate of Adamee*, 291 N.C. 386, 391, 230 S.E. 2d

541, 545 (1976); *Case v. Case*, No. 8418DC317, slip op. at 4 (N.C. App. February 19, 1985). The executory provisions of a separation agreement are those in which "a party binds himself to do or not to do a particular thing *in the future*." *Whitt v. Whitt*, 32 N.C. App. 125, 129-30, 230 S.E. 2d 793, 796 (1977). "Executed" provisions are those which have been carried out, and which require no future performance. 32 N.C. App. at 130, 230 S.E. 2d at 796.

In the present case the plaintiff agreed in the thirteenth paragraph of the 1963 separation agreement that she would relinquish all rights and interests in the defendant's property "whether now owned *or hereafter acquired by him*" (emphasis added). In the fifteenth paragraph she and defendant agreed that the separation agreement was a full and final settlement of all existing property rights between them, and "shall operate as a full, complete and final settlement of any rights *that might arise in the future*" (emphasis added).

Plaintiff's waiver was a promise that she would make no future claims to defendant's future property. This required future performance and therefore was executory. If the parties became reconciled and lived again as husband and wife between 1963 and 1982, then this promise was void as to property acquired after they resumed the marital relationship. A suit for equitable distribution of this property is therefore proper, if the suit otherwise meets the requirements of the equitable distribution statute. If the parties did divide and convey property prior to resuming the marital relationship, then the provisions of the separation agreement concerning that property were "executed," and an equitable distribution suit to divide that property is barred, unless the evidence shows an intent to cancel those provisions of the separation agreement.

The defendant argues that even if portions of the separation agreement were executory (and he maintains that none were), no evidence was presented that the parties continued in the marital relationship during the period 1963-1982. Yet, in plaintiff's complaint of 21 November 1983 and her affidavit of 21 November 1983 she alleges that she and defendant married on 18 May 1961 and did not separate until 25 March 1982, after more than twenty years of marriage. Defendant alleges in his amended answer and his affidavit of 21 May 1984 that the parties separated in 1963,

and submits the deed of separation of October 1963, which plaintiff signed.

We do not find that the separation agreement is conclusive on the issue of when the parties actually separated finally. Taking plaintiff's affidavit as true, we find there is a genuine issue of material fact on the question of when the parties separated, *i.e.*, of whether after they entered into the 1963 separation agreement they resumed the marital relationship. Given this fundamental conflict in the pleadings and the evidence, which renders it impossible to say with any certainty what was the status of the parties' marriage from 1963 through 1982, and the fact that certain key portions of the 1963 separation agreement were executory, we reverse the order of summary judgment and remand for rehearing on the issues of when the parties' period of separation actually occurred and whether, if they separated in 1963, they resumed the marital relationship.

We do not believe that in enacting G.S. 50-20(d) the General Assembly intended that a written separation agreement, once entered into, would be forever binding, forever a bar to an equitable distribution action. Rather, the parties to separation agreements must still be able to cancel their agreements, and the indicia of the intent to cancel as developed in our common law, we believe, must also still be intact. *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E. 2d 97 (1984), is distinguishable, because it deals with common law principles affecting the validity of separation agreements entered into while the parties are still living together.

Reversed and remanded.

Judges PHILLIPS and COZORT concur.

STATE OF NORTH CAROLINA v. GARY GENE WILLIAMS

No. 8410SC447

(Filed 21 May 1985)

Criminal Law § 92.4— joinder of multiple offenses—one defendant—improper

The trial court erred by joining for trial thirteen counts of second-degree burglary, eleven counts of felonious larceny, one count of attempted safecracking, and two counts of conspiracy arising out of burglaries committed on one weekend in October 1982 and one weekend in January 1983. Defendant was prejudiced by the joinder of separate and distinct crimes, the prolonged time lapse between them, the lack of a transactional connection constituting a single scheme or plan, the sheer number of offenses charged and joined, the fact that not all of the victims of the burglaries testified at defendant's trial, and the fact that certain indictments were not properly identified in the verdicts and judgments and that some judgments were apparently entered on nonexistent indictments. G.S. 15A-926(a) (1983).

APPEAL by defendant from *Battle, Judge.* Judgments entered 8 December 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 18 January 1985.

Attorney General Rufus Edmisten, by Special Deputy Attorney General Ann Reed, for the State.

John T. Hall, for defendant appellant.

BECTON, Judge.

From judgments imposing sentences totalling fifty-six years in prison following his conviction of thirteen counts of second-degree burglary, eleven counts of felonious larceny, two counts of conspiracy, and one count of attempted safecracking, the defendant, Gary Gene Williams, appeals. At trial, defendant stipulated that each of the alleged second-degree burglaries and each of the alleged felonious larcenies had taken place, but denied involvement in any of the alleged crimes.

Defendant was convicted principally on the basis of the testimony of co-defendant, William Nobe, and the testimony of a cellblock mate, Donald Hill. Nobe and Hill stated that defendant and other men would come to Raleigh from Missouri, look for homes with expensive furnishings, and burglarize them. Although co-defendant William Nobe had come to Raleigh to burglarize homes

on at least ten separate occasions, the defendant, according to Nobe, made only two trips to Raleigh—once on a weekend in October 1982, and once on a weekend in January 1983.[1]

Six questions are presented on appeal, some of which involve challenges to the trial court's evidentiary rulings and challenges to the entry of judgments on some of the many charges. The dispositive issue on appeal, however, is this: "Did Gary Gene Williams receive a trial free from prejudicial error when he was tried upon charges which were unrelated to each other in terms of time or place and which were improperly joined or consolidated for trial upon motion of the State?" We believe that he did not.

I

The defendant was charged with committing several offenses on a weekend in October 1982; the other offenses allegedly occurred on a weekend in January 1983. And, although defendant was charged with conspiracy in 83CRS39401B and in 83CRS-39441B, each conspiracy charge states a single date—30 January 1983 and 15 October 1982, respectively.

Prior to trial the State moved to join all offenses for trial pursuant to N.C. Gen. Stat. Sec. 15A-926(a) (1983) on the theory that the offenses charged were all part of a common scheme or plan. Alternatively, the State sought joinder of the offenses which occurred on the weekend in October for one trial, and joinder of the offenses which arose on the weekend in January for another trial. The trial court allowed the motion of the State to join for trial all offenses against defendant.

Consolidation of offenses for trial is controlled by G.S. Sec. 15A-926(a) (1983), which provides, in pertinent part, that offenses may be joined only when: "[T]he 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." And although a motion to consolidate charges for trial is addressed to the sound discretion of the trial court, the determination of whether a group of of-

1. The *modus operandi* of Nobe and other members of the Medina Gang is detailed in a reported case involving another co-defendant, *State v. Thompson*, 73 N.C. App. 60, 325 S.E. 2d 646 (1985).

fenses are transactionally related so that they may be joined for trial is a question of law fully reviewable on appeal. *State v. Corbett*, 309 N.C. 382, 307 S.E. 2d 139 (1983); *State v. Silva*, 304 N.C. 122, 282 S.E. 2d 449 (1981). *See* North Carolina Criminal Cases Manual 125 (Wake Forest University School of Law 1984). So, for offenses to be joined, there must be a transactional connection common to all, and the trial court must determine that a defendant would not be prejudiced by hearing more than one charge at the same trial. *Corbett; Silva.*

Significantly, G.S. Sec. 15A-926(a), "which became effective in 1975, differs from its predecessor, in part by disallowing joinder on the basis that the acts were of the same class of crime or offense when there is no transactional connection among the offenses." *State v. Corbett*, 309 N.C. at 387, 307 S.E. 2d at 143.

> One circumstance in which offenses are transactionally related so that they may be joined for trial occurs when they arise out of a single overall conspiracy. *State v. Silva*, 304 N.C. at 127. Another is when a series of crimes are so closely related in time that they appear to be parts of a continuous crime spree. *State v. Avery*, 302 N.C. 517, 276 S.E. 2d 699 (1981) (series of crimes during a two day period of escape from prison); *State v. Clark*, 301 N.C. 176, 270 S.E. 2d 425 (1980) (offenses one after the other on the same afternoon); *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978) (two sexual assaults within three hours); *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296, *death penalty vacated*, 429 U.S. 809 (1976) (four offenses within two and a half hours).
>
> In the absence of a conspiracy charge that serves as an umbrella, offenses that are committed on separate dates cannot be joined for trial, even when they are of like character, unless the circumstances of each offense are so distinctly similar that they serve almost as a fingerprint.

North Carolina Criminal Cases Manual 125-6. *See also State v. Corbett; 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). An example of a case in which the circumstances of each offense were so distinctively similar that they serve almost as fingerprints is *State v. Williams*, 308 N.C. 339, 302 S.E. 2d 441 (1983). In *Williams*, our

Supreme Court held that two transactions involving burglary and rape four weeks apart could be joined when:

> [o]n both occasions the crimes were committed against the same victim, in the same apartment at approximately the same time of night. The defendant gained entry to the apartment each time through an open window and committed a single act of intercourse with the victim. On both occasions the defendant effectuated his assault without the use of a weapon and he allowed the victim to take contraceptive measures on both occasions. In addition, the victim testified that the defendant told her he had watched her from outside the house on several nights between the two assaults.

308 N.C. at 344, 302 S.E. 2d at 445.

Nothing about *Williams* suggests a return to the old standard of permitting joinder of offenses which were simply of the same class of crimes. Likewise, *Williams* does not suggest, for example, that teenage residents of Durham County who, for every weekend during a six-month period, burglarize homes in Orange County using the same *modus operandi* for each burglary, could be tried on all offenses at one trial. Indeed, in *State v. Corbett*, 309 N.C. 382, 307 S.E. 2d 139 (1983), a case decided after *State v. Williams*, our Supreme Court held it was error to join three transactions involving kidnapping and rape or attempted rape even though in each of the cases the assailant forced his way into an automobile driven by a lone woman. Similarly, in *State v. Wilson*, this Court held it was error to join two counts of obtaining money by false pretenses, even though the fraudulent scheme employed in both cases was identical. Because the two transactions in *Wilson* were separated by almost three weeks, the Court noted that "[t]he offenses for which defendant was tried were separate and distinct, not part of 'a single scheme or plan.' We hold that the necessary transactional connection was not present in these cases and that joinder was improper as a matter of law." 57 N.C. App. at 449, 291 S.E. 2d at 833. We find *Wilson* controlling. The prejudice evidenced by the joinder in *Wilson* is equally apparent here—the separate and distinct crimes, the prolonged time lapse between them, and the lack of a transactional connection constituting a "single scheme or plan." Indeed, the State's single scheme or plan joinder argument is internally inconsistent

with its suggestion that defendant's convictions of two separate conspiracies—one in October and one in January—should stand.

Our joinder and severance statutes are based generally on the A.B.A. Standards Relating to Joinder and Severance (Approved Draft 1968). *See* G.S. Sec. 15A-926, Official Commentary. The A.B.A. Standards were designed, in part, to facilitate a move from a system in which decisions relating to joinder and severance were left to the largely unreviewable discretion of the trial judge, to a system of well-articulated standards so that similar cases would receive similar and rational treatment. *See* 2 Standards for Criminal Justice 13.4-.5 (2d ed. 1980). *See also North Carolina Criminal Cases Manual* 124.

We hold, as a matter of law, that G.S. Sec. 15A-926(a) does not permit joinder under the facts of this case, for the reasons stated in *State v. Wilson.* In addition, defendant was prejudiced by the joinder, considering (a) the sheer number of offenses charged and joined against this defendant; (b) the fact that not all of the victims of the burglaries testified at defendant's trial; and (c) the fact that the record reveals that certain indictments were not properly identified in the verdicts and judgments, and that some judgments were apparently entered on nonexistent indictments.[2]

Based on the above analysis, and considering the fact that there was in this case no conspiracy charge that served as an umbrella covering both the October offenses and the January offenses, we conclude that joinder of the offenses for trial in this case was error. Having so ruled, it is not necessary to address defendant's remaining assignments of error regarding the misidentification of indictments; subject matter jurisdiction; evidentiary rulings; and claims of ineffective assistance of counsel. These cases are remanded for

New trials.

Judges JOHNSON and MARTIN concur.

2. The State implicitly concedes that there was confusion evidenced by the misidentification of indictments by stating in its brief at p. 4, that "[t]he State agrees that defendant is entitled to have errors in the numbering of the judgment and commitment forms entered in this case."

MICHAEL RAYFORD BOWMAN AND WIFE, DIANE ST. CLAIR BOWMAN v. PHILLIP CARROLL BOWMAN AND VENUS PATTERSON BOWMAN

No. 8422SC608

(Filed 21 May 1985)

Negligence § 29.1— negligent construction of scaffold

Plaintiff's evidence was sufficient for the jury on the issue of negligence by defendant in the construction of a scaffold where it tended to show that plaintiff was injured when the scaffold collapsed while plaintiff was helping defendant nail shingles to the side of defendant's house under construction, that the collapse was caused by the breaking of a support timber which had been weakened by dry rot, and that defendant used some old boards in the construction of the scaffold without testing them to see if they were solid.

APPEAL by plaintiffs from *Albright, Judge.* Judgment entered 8 May 1984 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 4 March 1985.

Patrick, Harper & Dixon by Stephen M. Thomas; and Richard L. Gwaltney for plaintiff appellants.

Patton, Starnes, Thompson & Aycock by Thomas M. Starnes for defendant appellees.

COZORT, Judge.

Plaintiff Michael Bowman agreed to help defendant Phillip Bowman, his brother, nail shingles to the side of the defendants' house under construction. A wooden scaffold constructed by Phillip Bowman and his father approximately thirteen (13) to fourteen (14) feet above the ground collapsed, and Michael Bowman was seriously injured in the resulting fall. The collapse was caused by the breaking of a support timber which had been weakened by dry rot. Plaintiffs filed suit against defendant Phillip Bowman for negligently constructing or causing to be constructed a scaffold inadequate to support the weight of plaintiff Michael Bowman and against defendant Phillip Bowman's wife, defendant Venus Bowman, as a co-owner of the property where the accident occurred. Plaintiff Michael Bowman requested damages in the amount of $50,000 for his resulting injuries and his wife, plaintiff Diane St. Clair Bowman, asked for $15,000 for loss of consortium. The father of Michael and Phillip was not a party to this action. At

the close of plaintiffs' evidence, the trial court granted defendants' motion for directed verdict upon the grounds that plaintiffs had not presented sufficient evidence of negligence to justify submission of the case to the jury. On appeal by the plaintiffs, we reverse.

The sole question presented for our review is whether the plaintiffs' evidence of negligence was sufficient for submission of the case to the jury. The specific issue in this case is whether the defendant Phillip Bowman was negligent in failing to exercise due care, to use ordinary care, in the selection of the material out of which the scaffold was constructed. The plaintiffs' evidence shows that Phillip Bowman was building his house, doing most of the work himself with the aid of his father and others, using wood he had cut himself and wood salvaged from old buildings. The scaffold in question was also constructed with a combination of new and old materials, with all of the lumber being at least a year old. The particular board which broke was a piece of lumber Phillip had salvaged from an old warehouse he had torn down. In constructing the scaffold Phillip did not test the lumber to see if it was solid by rapping it with a hammer or striking it on the ground. He checked the wood only to see if it was straight. When the scaffold was finished, the defendant conducted no tests other than simply using the scaffold. The scaffold had been built approximately two to four weeks before it collapsed. Before Michael and Phillip climbed on the scaffold, they drove up the nails which had come loose and added nails in some places. The board which broke had been weakened by dry rot, a deterioration of old wood from the inside out, not detectable by looking at the outside of the board.

In deciding this issue, we note initially that "[i]t is the exceptional negligence action . . . where a directed verdict is entered. On a motion for directed verdict, the court must view the evidence in the light most favorable to the plaintiff. Where plaintiff receives the benefit of every reasonable inference, the issues of reasonable care and breach of that care are usually for the jury." *Cowan v. Laughridge Construction Co.*, 57 N.C. App. 321, 324, 291 S.E. 2d 287, 289 (1982). However, negligence will not be presumed from every accident. "In order to establish a *prima facie* case of negligence, plaintiff must offer evidence that defendant owed him a duty of care, that defendant breached that duty, and that de-

fendant's breach was the actual and proximate cause of plaintiff's injury." *Id.* at 323, 291 S.E. 2d at 289.

In *Odum v. Oil Company*, 213 N.C. 478, 196 S.E. 823 (1938), the North Carolina Supreme Court held that the defendant had a duty to use ordinary care in the selection of materials out of which a scaffold was constructed. In that case the Court upheld the submission of the case to the jury and the jury's verdict for the plaintiff when the plaintiff's evidence showed the defendant constructed the scaffold and that a weak, knotty piece of wood broke, causing the platform to fall, injuring the plaintiff. The Supreme Court upheld the submission of the case to the jury, with the trial court charging as follows: "I charge you that it was the duty of the defendant to use ordinary care in the selection of the material out of which the scaffold was constructed, that is, to use the degree of care which a man of ordinary prudence would use under the same or similar circumstances. And if he fails to do so, that is, if you find that the defendant built the scaffold and failed to exercise that degree of care which it should have exercised under the circumstances, and if such failure on its part was the proximate cause of the injuries received by the plaintiff, then it would be your duty, gentlemen, to answer the first issue 'Yes.'" *Id.* at 482-83, 196 S.E. at 826.

Plaintiffs' evidence below showed that defendant Phillip Bowman used some old boards in the construction of the scaffold, without testing them to see if they were solid. That was sufficient evidence to go to the jury on the question of defendant's failure to exercise due care, and we hold the trial court erred by granting the defendants' motion for a directed verdict.

Defendants urge this Court to affirm the trial court, citing *Spell v. Smith-Douglas Co., Inc.*, 250 N.C. 269, 108 S.E. 2d 434 (1959). In *Spell*, the North Carolina Supreme Court upheld the trial court's dismissal of the case where the plaintiff's evidence showed the plaintiff's heel went through a decayed board on a loading platform, which was forty (40) inches off the ground, at the defendant's business, causing the plaintiff to fall. The decay was on the inside and could not be seen by visual inspection from above or below the platform. The property, including the loading platform, was owned by Durham and Southern Railroad Company and was leased to defendant for the purposes of storage, sale, and

delivery of fertilizer. The Court held the evidence insufficient to show that a reasonable inspection would have disclosed the hidden defect which caused plaintiff's fall.

The case *sub judice* is distinguishable. In *Spell*, the opinion is silent as to evidence of who constructed the platform and when it was constructed. The property was owned by another corporation and leased by the defendant. Thus, defendant's visual inspection was reasonable. In the present case, defendant built the scaffold in question. He had an opportunity, and, if the jury finds from the evidence, a duty to do more than make a visual inspection. The plaintiffs' evidence was sufficient to go to the jury on the question of whether Phillip Bowman failed to exercise due care under these circumstances by not testing the scaffold materials before using them in a scaffold thirteen feet above the ground.

Reversed.

Chief Judge HEDRICK and Judge JOHNSON concur.

BONE INTERNATIONAL, INC. v. CHARLES O. JOHNSON

No. 847DC1004

(Filed 21 May 1985)

Automobiles and Other Vehicles § 6.2; Uniform Commercial Code § 11— sale of trucks—disclaimer of warranties—subsequent parol modification—summary judgment improper

Summary judgment should not have been granted for plaintiff in an action to collect repair bills on trucks sold to defendant by plaintiff where the forecast of evidence was that the written purchase money security agreements entered into by the parties in connection with the sale disclaimed any express or implied warranties on the trucks; the bills of sale had typed on them the words "NO WARRANTY"; within a few days of the purchase defendant learned that the particular fleet of which the trucks were a part had had major engine problems and had been recalled by the manufacturer; the trucks which defendant had purchased had not been returned for repairs; defendant returned to plaintiff's place of business and discussed cancellation of the sale but was assured that the trucks would be repaired free of charge if they developed major engine problems; the trucks were taken into plaintiff's garage for repairs when they developed engine problems; plaintiff sent defendant monthly bills for the repairs; and defendant claimed that plaintiff had agreed to adjust the

bills and that plaintiff's owner had told him that defendant was billed and that the bills were inflated so that plaintiff could present a large accounts receivable figure in a loan application. Defendant's testimony as to the subsequent oral modification of the original written agreement raised a genuine issue of fact because the agreement was not subject to the parol evidence rule and required no consideration. Although the parties did not plead or raise the statute of frauds or waiver of the disclaimers, the result would have been the same had they done so. G.S. 25-2-316(2), G.S. 25-2-209(1), G.S. 25-2-209(3) through (5).

APPEAL by defendant from *Brown, Judge.* Judgment entered 18 June 1984 in Superior Court, NASH County. Heard in the Court of Appeals 7 May 1985.

Plaintiff Bone International, Inc., commenced this action to recover $19,567.39 plus interest for labor and materials furnished for repairs to two 1977 White Road Commander trucks owned by defendant Charles Johnson.

In November of 1980, plaintiff sold the two used trucks to defendant for use in his trucking business. Defendant owned up to fourteen trucks and employed operators to drive them. When defendant bought the two Road Commander trucks from plaintiff, he entered into a purchase money security agreement for each, one document being dated 7 November 1980 and the other dated 10 November 1980. Both agreements had a bold face disclaimer on the front page, denying any express or implied warranties of merchantability or otherwise, extending beyond the description of the collateral. Plaintiff prepared a bill of sale for each truck. The bills of sale were dated 10 November 1980, and each had "NO WARRANTY" typed on its face.

Defendant testified by way of deposition that a couple of days after he had agreed to purchase the two trucks, he ran into Raymond Harris, a Cummings Engine representative. Mr. Harris told defendant that all the trucks in the fleet which included the two White Road Commanders had major engine problems and had been recalled by the manufacturer, but that those which defendant bought had not been returned and repaired.

Defendant claimed that he then went to plaintiff's place of business and talked to Dolen Atkinson, one of plaintiff's employees. Defendant told Atkinson that he desired to cancel the sale. Atkinson replied that, if the engines broke down, they would be repaired at no cost to defendant.

The trucks eventually had engine problems, and defendant's drivers took them to plaintiff's shop for repairs. Plaintiff billed defendant's account in the amount of $19,567.39 and sent defendant monthly statements reflecting the charges. Defendant claims that he contacted plaintiff about these bills and that plaintiff agreed to adjust them. Defendant has not paid the repair bills and plaintiff sued to recover.

Plaintiff moved for summary judgment, which was granted. Defendant appeals.

Fields, Cooper & Henderson, by Roy A. "Coop" Cooper, III, for plaintiff appellee.

Farris and Farris, by Thomas J. Farris and Robert A. Farris, Jr., for defendant appellant.

ARNOLD, Judge.

This is an appeal from an order of summary judgment granted plaintiff in its suit to recover payment for repair work done on two trucks owned by defendant. We must, therefore, determine whether or not the forecast of evidence given by the parties presented a genuine issue of material fact.

Plaintiff claims that defendant owes him $19,567.39 plus interest pursuant to an express agreement for repairs on two White Road Commander trucks. Plaintiff sold these trucks to defendant in November, 1980. They were used at time of sale. On the face of the written purchase money security agreements entered into by the parties in connection with the sale, plaintiff disclaimed any express or implied warranties on the trucks. The bills of sale also had typed on them the words "NO WARRANTY." Plaintiff argues that these written disclaimers and the alleged agreement for repairs should control the disposition of this case.

Defendant claims, however, that within a few days after his purchase of the trucks he discovered that the particular fleet of which they were a part had had major engine problems and had been the subject of a recall from the manufacturer. In addition, he discovered that the trucks he had purchased had not been returned for repairs.

Defendant testified by way of deposition that he immediately returned to plaintiff's place of business and discussed cancellation of the sale. Yet, he said, Dolen Atkinson, plaintiff's employee, assured him that the trucks would be repaired free of charge if they developed major engine problems. Defendant testified that he decided not to seek to cancel the sales contracts when he received this assurance from plaintiff's employee. In his answer to plaintiff's interrogatories, defendant also says that he asked Mr. Atkinson whether they should put their agreement as to repairs in writing, and Atkinson indicated that that was not necessary because plaintiff had never gone back on its word to defendant.

Defendant's trucks developed engine problems and were taken into plaintiff's garage by defendant's drivers. Plaintiff sent monthly bills to defendant for the repairs. Defendant did not pay them. Defendant claims that he contacted plaintiff about the bills, and reminded plaintiff's owner of the previous agreement as to free repairs, and that plaintiff agreed to adjust the amount of the bills. Defendant says he assumed plaintiff would omit charges for the engine repair, because of the prior understanding that the work would be done free. Defendant testified that plaintiff's owner told him that he was billed and that the bills were inflated so that plaintiff could present a large accounts receivable figure to a bank in its application for a loan. Defendant testified also that if he had known he was going to be charged for the repairs he would have had a local mechanic do the work for one-third the cost.

When defendant purchased the trucks from plaintiff, the purchase money security agreements signed by defendant clearly indicated that plaintiff made no express or implied warranties of merchantability or otherwise on the trucks. These disclaimers satisfied G.S. 25-2-316(2), which applies since they were part of an agreement involving the sale of goods. Defendant's post-sale agreement with plaintiff to do major engine repairs without charge constituted an oral modification of the original written agreement that there were no warranties. This *subsequent* agreement was not subject to the parol evidence rule. Further, under G.S. 25-2-209(1), this "agreement modifying a contract within this article [concerning sales under the Uniform Commercial Code] needs no consideration to be binding."

The defendant's testimony as to the oral modification thus raises a statutory defense to plaintiff's suit and so creates a genuine issue of material fact, precluding summary judgment.

We observe that the parties failed to plead or to raise, and so waived, the issues of the statute of frauds, *see* G.S. 25-2-209(3), waiver of the disclaimers, G.S. 25-2-209(4), and retraction and estoppel, G.S. 25-2-209(5). The pertinent sections of the Code read as follows:

> (3) The requirements of the statute of frauds section of this article (§ 25-2-201) must be satisfied if the contract as modified is within its provisions.
>
> (4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.
>
> (5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Had those issues been raised, on the facts as presented we would have reached the same result: that the summary judgment was improper. Even though there was no writing evidencing the oral modification, the defendant presented evidence that the plaintiff orally waived the written disclaimers and that defendant relied on this waiver to his detriment. This created an issue of fact for the jury on the question of waiver under G.S. 25-2-209 (4)-(5), which is not subject to the statute of frauds.

The order of summary judgment was improperly entered.

Reversed.

Judges MARTIN and PARKER concur.

In re Foreclosure of Bowers v. Bowers

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST OF ALPHONSO H. BOWERS, JR. AND WIFE, MARVA W. BOWERS AND ARCO, INC., GRANTORS v. ALPHONSO H. BOWERS, JR., MARVA W. BOWERS AND ARCO, INC., RESPONDENTS; AMERICAN FEDERAL SAVINGS AND LOAN ASSOCIATION, PETITIONER

No. 8418SC955

(Filed 21 May 1985)

Mortgages and Deeds of Trust § 17.1 — construction loan refinanced — second mortgage invalid — first mortgage not cancelled — foreclosure on first mortgage proper

The trial court did not err by entering an order allowing petitioner to foreclose under the terms of a deed of trust entered into in February 1982 where the deed of trust had been given in exchange for a loan of $140,000 to build a "spec." house; respondents had needed additional time and money to complete and sell the house; the parties entered into a second note and deed of trust, substituting them for the February 1982 note and deed of trust; petitioner drew a check for $140,000, closed the loan account and opened a new account for $196,800 but did not surrender or cancel the February 1982 note and deed of trust; and the second deed of trust was not valid because it did not contain the signatures of the respondents as officers of their wholly owned corporation, which held title to the lot. Failure of respondents to affix the proper signatures to the second deed of trust caused it to be invalid and amounted to a substantial failure of consideration which rendered the second agreement a nullity and revived the parties' duties under the original February 1982 agreement for which the second agreement had been substituted. G.S. 45-21.16.

APPEAL by respondents from *Cornelius, Judge.* Order entered in Superior Court, GUILFORD County, on 22 May 1984. Heard in the Court of Appeals 18 April 1985.

This case concerns a foreclosure on a deed of trust securing a note given for a construction loan.

On 24 February 1982, petitioner American Federal Savings and Loan Association loaned respondents Alphonso and Marva Bowers and Arco, Inc., a corporation which the Bowers wholly owned, $140,000 for the construction of a single-family "spec. house." Respondents executed a note and deed of trust in exchange for the loan, giving as security the lot on which the "spec. house" was to be built and any improvements erected on it. Title to the lot was taken in the name of Arco.

In August 1982, the house had not been finished, and no buyer had been found. The respondents asked petitioner for additional money and an extension of the construction period.

In September 1982, petitioner agreed to increase the loan amount from $140,000 to $196,800 and to extend the construction period. The agreement also provided that the interest rate on the loan would be reduced and that petitioner would receive additional interest payable out of the proceeds of sale of the "spec. house."

The parties agreed to document these changes in a new note and deed of trust, which were substituted for the original note and deed of trust. The lien on the property established by the first deed of trust was to continue to secure petitioner's loan to respondents.

At the closing of the second transaction, the closing attorney had Mr. and Mrs. Bowers sign the substitute note and deed of trust individually, but failed to have them sign as officers of Arco. Because Arco held record title to the property, the new deed of trust signed only by Mr. and Mrs. Bowers in their individual capacities was invalid.

Petitioner disbursed the new loan funds. It made a check payable to itself and Alphonso Bowers in the amount of $140,000. It closed its ledger card for the original loan, marking it "paid," and established a new card to reflect the terms agreed to in the September loan agreement. The original note and deed of trust were not marked satisfied and cancelled as of record.

Within a day or two after the closing, the closing attorney realized his mistake and through his secretary requested that Mr. and Mrs. Bowers return to his office to correct the error. They did not do so. Mr. and Mrs. Bowers claim they were not notified by the closing attorney of any error in the September 1982 agreement. Mr. Bowers testified by way of affidavit that he understood that the September loan was made in his and his wife's individual names to avoid any problems petitioner might encounter from various federal regulatory agencies if a joint venture agreement was disclosed. The closing attorney did not notify petitioner of the mistake until the summer of 1983.

In May 1983, petitioner commenced foreclosure proceedings on the second note and deed of trust. These foreclosure proceedings were not completed, apparently because the second deed

of trust was not valid due to the fact that the signers, Mr. and Mrs. Bowers, were not owners of the subject property.

Petitioner then instituted a second foreclosure proceeding, which is the subject of this appeal, on the original deed of trust. A hearing was held before the Assistant Clerk of Guilford County Superior Court, who entered an order authorizing the substitute trustee to proceed under the power of sale contained in the first deed of trust. Respondents appealed pursuant to G.S. 45-21.16(d) to the Superior Court. After de novo review, the Superior Court entered an order authorizing the substitute trustee to foreclose on the property under the power of sale contained in the first deed of trust. The respondents appeal from this order.

Hunter, Hodgman, Greene, Goodman & Donaldson, by Richard M. Greene, for respondent appellants.

Edward C. Winslow III for petitioner appellee.

ARNOLD, Judge.

The primary issue on appeal is whether the Superior Court properly entered an order allowing the petitioner, American Federal Savings and Loan, to foreclose under the terms of a deed of trust entered into in February 1982.

The petitioner entered into the February deed of trust with respondents in exchange for a loan to build a house. This deed of trust gave petitioner a lien on the house to be built with the loan proceeds and on the land on which it was located. Respondents, however, needed additional time and money to complete construction and to sell the house. The petitioner agreed to extend the construction period and to lend respondents more money.

The parties therefore entered into a second note and deed of trust, substituting them for the first note and deed of trust. Both the second note and deed of trust reflected the increased loan amount; the deed of trust continued the lien on the property established under the first deed of trust. At the time of the closing, petitioner drew a check for $140,000 and closed the loan account, and opened a new account in the amount of $196,800 in respondents' names. Petitioner did not surrender or cancel the first note and deed of trust.

The second deed of trust, however, was not valid because it did not contain the signatures of the respondents Mr. and Mrs. Bowers in their capacities as officers of Arco, Inc. Arco, Inc. was titleholder of the property which was the subject of the liens and two deeds of trust.

The respondents claim that whether or not the second deed of trust was valid, the petitioner paid off the debt evidenced by the first note and deed of trust when it drew the check for $140,000, applied it to the original loan account, and opened a new account. Respondents argue that petitioner lacks a valid debt and therefore a right to foreclose under the first deed of trust.

Petitioner argues that because the second deed of trust was invalid, there was no consideration for the second loan agreement and, therefore, for the payment of the obligation evidenced by the first note and deed of trust. Petitioner contends that failure of consideration for the second loan transaction restores the parties' duties under the first transaction for which the second was substituted.

We agree that the second deed of trust was given by respondents as security for the second loan, which was used to pay off the first loan. We agree also that the parties intended the second note and deed of trust to replace and be substituted for the original note and deed of trust. The trial judge's findings to this effect are supported by competent evidence in the record.

Failure of the respondents to affix the proper signatures to the second deed of trust caused it to be invalid and amounted to substantial failure of consideration for the second loan agreement. Failure of consideration renders the second loan agreement a nullity, *see Gore v. Ball, Inc.*, 279 N.C. 192, 199, 182 S.E. 2d 389, 393 (1971), and revives the parties' duties under the original loan agreement, for which the second agreement was substituted, *see* Restatement (Second) of Contracts § 279, Comment b (1979).

The original debt then is still valid and in force. Respondents are in default under it, for they have failed to refinance successfully or to make direct repayment. Petitioner still holds the original note, and the original deed of trust has not been cancelled of record at any time. Petitioner therefore has a right to foreclose under the original deed of trust. *See* G.S. 45-21.16.

Affirmed.

Judges PHILLIPS and COZORT concur.

MARY ANN DAWKINS, EMPLOYEE, PLAINTIFF v. ERWIN MILLS, AND/OR BURLINGTON INDUSTRIES, INC., EMPLOYER, SELF-INSURER, OR AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, ALLEGED CARRIER, DEFENDANTS

No. 8010IC606

(Filed 21 May 1985)

Master and Servant § 68— workers' compensation—knowledge of byssinosis—statute of limitations

The evidence supported a finding that plaintiff received notice from competent medical authority that she had the occupational disease byssinosis on 25 June 1977 at an occupational respiratory screening clinic sponsored by the Carolina Brown Lung Association where it showed that defendant was told by a doctor at the clinic that she would have a good case if she hadn't been out of the mill so long because "you've got it," that plaintiff had previously attended Brown Lung Association meetings and parties and knew the purpose of the screening clinic, that her husband had already received compensation for disability from byssinosis, and that plaintiff concluded from the doctor's statements that she had an occupational disease. Therefore, plaintiff's claim filed on 11 July 1980 was barred by the two-year statute of limitations of G.S. sec. 97-58.

APPEAL by plaintiff from opinion and award by the North Carolina Industrial Commission filed 22 December 1983. Heard in the Court of Appeals 6 February 1985.

Plaintiff, Mary Ann Dawkins, filed a workers' compensation claim with the Industrial Commission on 11 July 1980, alleging that her work environment had caused byssinosis. Deputy Commissioner Shepherd rendered an opinion and award denying Dawkins' claim, because it was not filed within the two-year statute of limitations as set forth in N.C. Gen. Statutes sec. 97-58 (1979). The Full Industrial Commission affirmed and adopted as its own the decision of the Deputy Commissioner. From the opinion and award of the Full Commission, Dawkins appeals.

Charles R. Hassell, Jr., for plaintiff appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by C. Ernest Simons, Jr. and Steven M. Sartorio, for defendant appellee Burlington Industries.

Teague, Campbell, Conely & Dennis, by George W. Dennis III, for defendant appellee American Mutual Insurance Company.

BECTON, Judge.

The sole issue on this appeal is whether plaintiff filed her workers' compensation claim within the time prescribed by G.S. sec. 97-58. G.S. sec. 97-58(c) states in part:

> The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement as the case may be.

The two-year statute of limitations under G.S. sec. 97-58(c) for filing claims with the Industrial Commission is a condition precedent with which a claimant must comply in order to confer jurisdiction on the Industrial Commission to hear the claim. *Poythress v. J. P. Stevens*, 54 N.C. App. 376, 283 S.E. 2d 573 (1981), *disc. rev. denied*, 305 N.C. 153, 289 S.E. 2d 380 (1982). G.S. sec. 97-58(c) does not commence running until: "[(1)] an employee has suffered injury from an occupational disease which renders the employee incapable of earning the wages the employee was receiving at the time of the incapacity by such injury, and [(2)] the employee is informed by competent medical authority of the nature and work related cause of the disease." *Dowdy v. Fieldcrest Mills*, 308 N.C. 701, 706, 304 S.E. 2d 215, 218 (1983); *Taylor v. Stevens & Co.*, 300 N.C. 94, 265 S.E. 2d 144 (1980).

Dawkins contends the Industrial Commission erred in finding and concluding that the evidence established that she was informed by competent medical authority of the nature and work related cause of her disease.

> Except as to questions of jurisdiction, findings of fact by the Industrial Commission are conclusive on appeal when supported by competent evidence even though there is evidence to support contrary findings. Findings of jurisdictional fact

> by the Industrial Commission, however, are not conclusive upon appeal even though supported by evidence in the record. A challenge to jurisdiction may be made at any time. When a defendant employer [or plaintiff employee] challenges the jurisdiction of the Industrial Commission, any reviewing court, including the Supreme Court, has the duty to make its own independent findings of jurisdictional facts from its consideration of the entire record. (Citations omitted.) *Dowdy*, 308 N.C. at 705, 304 S.E. 2d at 218.

The Industrial Commission found that Dawkins received notice from competent medical authority that she had an occupational disease on 25 June 1977 at an occupational respiratory problem screening clinic sponsored by the Carolina Brown Lung Association. The Industrial Commission also found that Dawkins' claim, filed on 11 July 1980, was barred by the two-year statute of limitations, G.S. sec. 97-58. These findings are jurisdictional findings of fact fully reviewable by this Court. *Id.*

The evidence as it exists in the record discloses, *inter alia*, that Dawkins started work in the spinning room at Erwin Cotton Mills in 1931. She worked at Erwin Mills for three years before leaving when her first child was born. Dawkins returned to Erwin Mills in 1941 and remained until 1948 when she had her second child. During the period from 1941 through 1948, she began having difficulty with her breathing. Dawkins has not worked at Erwin Mills since 1948.

In June 1977, Dawkins attended a screening clinic sponsored by the local chapter of the Brown Lung Association; she was examined by Dr. Steven Vogel, an expert in internal medicine. Dawkins testified as follows:

> Q. How was it that you happened to decide that you ought to file a claim for brown lung?
>
> A. Because I went up to the school house and I took the test at the school house, Erwin School and they told me then, said I tell you, you like to blowed it to the top, you like to blow it—busted it wide open and then when I got around there where the doctor was at, he says, "I'll tell you right now, if you hadn't been out of the mill so long, you'd have a good case." He said, "you've got it."

Q. Said you got byssinosis? That was the doctor over there at the screening clinic?

A. Yeah, but I don't know what his name was.

Q. Would it have been Dr. Vogel? There's a Vogel who signed on here?

A. I don't know.

Q. Anyway, a doctor told you you had it at that time?

A. He said I had a good chance of getting paid off, if I hadn't been out of the mill so long.

Q. Because you did have byssinosis?

A. Yeah.

The evidence also reveals that Dawkins had previously attended Brown Lung Association meetings and parties. Moreover, her husband, a former president of the Brown Lung Association, had already received compensation for disability as a result of byssinosis, before she attended the screening clinic. We believe that these attendant factors are relevant, for they shed light upon Dawkins' understanding of Dr. Vogel's statement, "You have it." *Cf. McKee v. Crescent Spinning Co.*, 54 N.C. App. 558, 284 S.E. 2d 175 (1981), *disc. rev. denied*, 305 N.C. 301, 291 S.E. 2d 150 (1982) (plaintiff told he had brown lung, but there was no evidence he knew or was advised that the disease was related to his work environment).

From the evidence produced at the hearing, we must conclude that Dawkins was notified by Dr. Vogel in 1977 that she had byssinosis. Dawkins knew the nature and purpose of the Brown Lung Association screening clinic; she concluded from Dr. Vogel's statements that she had an occupational disease. However, she did not file her claim until 1980, more than two years after she was notified that she had an occupational disease. Thus, plaintiff's claim is time barred by G.S. sec. 97-58.

The opinion and award of the Industrial Commission is

Affirmed.

Chief Judge HEDRICK and Judge COZORT concur.

STATE OF NORTH CAROLINA v. CLEVELAND RANSOM

No. 8412SC796

(Filed 21 May 1985)

1. **Criminal Law § 138.4— consolidation of judgments for sentencing—sentence in excess of maximum for most serious offense—improper**

The trial court erred by consolidating charges of breaking and entering and larceny for judgment, finding an aggravating factor, and imposing a sentence of twenty years when the maximum term for any of the charges was ten years. Under G.S. 15A-1340.4, the court may impose a sentence other than the presumptive term if aggravating or mitigating factors are found, pursuant to a plea bargain, or by consolidating two or more charges for judgment; but may impose a sentence other than the presumptive term without aggravating or mitigating factors only if three requirements are met, including the requirement that the sentence imposed is not for a term longer than the maximum term for any of the charges consolidated. There is no provision for finding aggravating or mitigating factors if two or more crimes are consolidated for judgment.

2. **Criminal Law § 144— amendment of judgment after adjournment—no jurisdiction**

The trial court did not have jurisdiction after it adjourned to grant the State's motion for appropriate relief and amend its judgment from a twenty year sentence for consolidated judgments for multiple larceny and breaking and entering counts to two consecutive ten-year sentences for consolidated indictments for larceny and for breaking and entering. None of the provisions of G.S. 15A-1416 apply to this case in that the imposition of an excessive sentence is not error from which the State may appeal and a prayer for judgment continued was not involved; furthermore, it was not correction of a clerical error for the court to change a judgment so that defendant's sentence could be enhanced by ten years. G.S. 15A-1445.

APPEAL by defendant from *Preston, Judge.* Judgment entered 16 April 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 7 March 1985.

The defendant was indicted on twenty charges of breaking or entering and twenty charges of larceny. He pled guilty to thirteen charges of breaking or entering and thirteen charges of larceny. The remaining charges were dismissed. The Court consolidated all the charges for the purpose of judgment. The Court found as an aggravating factor that the defendant had a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement. It found no mitigating factors and

sentenced the defendant to a term of twenty years on 21 March 1984. The defendant gave notice of appeal two days later.

On 29 March 1984 the State made a motion for appropriate relief on the ground it was obvious the court intended to consolidate the bills of indictment rather than the offenses for sentencing. On 16 April 1984 the Court found that there was a patent error in the judgment of 21 March 1984 and struck that judgment. The Court then consolidated the breaking or entering charges and sentenced the defendant to ten years imprisonment. It then consolidated the larceny charges and sentenced the defendant to ten years imprisonment on them to commence at the expiration of the sentence imposed on the breaking or entering charges. The defendant appealed.

Attorney General Edmisten, by Associate Attorney General Doris J. Holton, for the State.

Beaver, Holt and Richardson, by F. Thomas Holt, III, for defendant appellant.

WEBB, Judge.

[1] The maximum term for any of the charges to which the defendant pled guilty is ten years. Prior to the adoption of G.S. 15A-1340.4, when multiple charges were consolidated for judgment, the sentence could not exceed the maximum penalty for any of the charges. *See State v. Gosnell*, 38 N.C. App. 679, 248 S.E. 2d 756 (1978), *disc. rev. denied and appeal dismissed*, 296 N.C. 587, 267 S.E. 2d 567 (1979). G.S. 15A-1340.4 provides in part:

> If the judge imposes a prison term, whether or not the term is suspended, and whether or not he sentences the convicted felon as a committed youthful offender, he must impose the presumptive term provided in this section unless, after consideration of aggravating or mitigating factors, or both, he decides to impose a longer or shorter term, or unless he imposes a prison term pursuant to any plea arrangement as to sentence under Article 58 of this Chapter, or unless when two or more convictions are consolidated for judgment he imposes a prison term (i) that does not exceed the total of the presumptive terms for each felony so consolidated, (ii) that does not exceed the maximum term for the most serious

felony so consolidated, and (iii) that is not shorter than the presumptive term for the most serious felony so consolidated.

As we read this section the judge may impose a sentence other than the presumptive sentence if he finds aggravating or mitigating factors. He may also impose a sentence other than the presumptive sentence pursuant to a plea bargain. The third way he may impose a sentence other than a presumptive sentence is by consolidating two or more charges for judgment. He may without finding aggravating or mitigating factors impose a sentence other than the presumptive sentence so long as the sentence complies with the three requirements set forth in G.S. 15A-1340.4 including the requirement that the sentence imposed is not for a term longer than the maximum term for any of the charges consolidated.

The Court in this case consolidated the charges for judgment and then found an aggravating factor. The question is whether after the Court has found an aggravating factor may it enhance the sentence by more than is allowed under the third sentencing method of G.S. 15A-1340.4. We hold that it may not. G.S. 15A-1340.4 provides for three methods of sentencing. These methods are in the disjunctive. The statute makes no provision for finding aggravating or mitigating factors if two or more crimes are consolidated for judgment and we hold it was error for the Court to enhance the presumptive sentence by more than the maximum for any of the charges.

[2] The Court did not have jurisdiction to amend the judgment after it had adjourned. *State v. Jones*, 27 N.C. App. 636, 219 S.E. 2d 793 (1975), and a motion for appropriate relief was not available to it to make this amendment. G.S. 15A-1416 provides in part:

> (a) After the verdict but not more than 10 days after entry of judgment, the State by motion may seek appropriate relief for any error it may assert on appeal.
>
> (b) At any time after verdict the State may make a motion for appropriate relief for: (1) The imposition of sentence when prayer for judgment has been continued and grounds for the imposition of sentence are asserted.

(2) The initiation of any proceeding authorized under Article 82, Probation; Article 83, Imprisonment; and Article 84, Fines, with regard to the modification of sentences.

None of the provisions of G.S. 15A-1416 apply to this case. Subsection (a) provides that the State may make a motion for appropriate relief for any error the State may assert on appeal. The imposition of an excessive sentence is not error from which the State may appeal. *See* G.S. 15A-1445. The provisions of subsection (b) do not apply to this case.

The State argues that the Court did not intend to consolidate the breaking or entering cases with the larceny cases and it was the correction of a clerical error to enter a new judgment in which the cases were not consolidated. We do not believe it was the correction of a clerical error for the Court to change a judgment so that the defendant's sentence could be enhanced by ten years. *See State v. Gosnell, supra.*

We reverse and remand for a new sentencing hearing.

Reversed and remanded.

Judges PHILLIPS and MARTIN concur.

PARKS CHEVROLET, INC. v. VEOLA WATKINS

No. 8421DC1040

(Filed 21 May 1985)

Uniform Commercial Code § 46— sale of repossessed automobile—commercial reasonableness—summary judgment for creditor improper

Summary judgment was improperly granted for plaintiff automobile dealer where plaintiff sought a deficiency judgment after resale of defendant's repossessed automobile and defendant answered and counterclaimed that plaintiff's sale had not been commercially reasonable. Plaintiff had conducted a private resale so that no presumption of commercial reasonableness arose and the court made its determination that the resale was commercially reasonable based on the uncorroborated assertions of plaintiff; because reasonable minds may differ over the application of a standard such as commercial reasonableness, this determination is inherently a jury question which does not readily lend itself to summary judgment. G.S. 25-9-504(3), G.S. 25-9-601 *et seq.*

APPEAL by defendant from *Alexander, Judge.* Judgment entered 18 May 1984, District Court, FORSYTH County. Heard in the Court of Appeals 8 May 1985.

Plaintiff filed this civil action seeking payment of a deficiency balance due after the resale of defendant's repossessed automobile. Defendant answered and counterclaimed, asserting that plaintiff's sale of the repossessed automobile was not conducted in a commercially reasonable manner as required by N.C.G.S. 25-9-504(3), that the sale constituted an unfair trade practice under N.C.G.S. 75-1.1, and therefore that plaintiff's complaint should be dismissed and defendant allowed to collect appropriate damages. Plaintiff moved for summary judgment, supporting its motion with the pleadings and discovery on file and an affidavit from Mr. Parks, president of plaintiff corporation, stating that the resale was conducted in conformity with reasonable commercial practices. Defendant responded with an affidavit of her own in which she asserted that the resale of the repossessed automobile was not conducted in the proper manner. After a hearing on the motion the court allowed summary judgment for the plaintiff and dismissed defendant's counterclaims with prejudice. Defendant appealed.

Frye and Porter, by James M. Stanley, Jr., for plaintiff, appellee.

Legal Aid Society of Northwest North Carolina, Inc., by Susan Gottsegen, for defendant, appellant.

HEDRICK, Chief Judge.

The following facts are not in dispute: On 5 November 1979, plaintiff Parks Chevrolet, Inc., contracted to sell a used 1977 Monte Carlo to Cornell Donald Wright, defendant's son. The car was financed with a $3,500.00 installment note which defendant co-signed. Plaintiff retained an interest in the automobile as security for the loan. On 9 December 1981 defendant refinanced the automobile, executing a contract in the face amount of $3,969.54 payable in 27 monthly installments of $147.02. Defendant defaulted on the loan and on 8 March 1982 plaintiff repossessed the automobile while it was in plaintiff's possession for repairs. On 11 May 1982 plaintiff sold the automobile to a wholesaler for $1,330.00, leaving a deficiency balance of $1,519.53.

The dispositive issue on appeal is whether the court was in error when it granted summary judgment for the plaintiff and dismissed defendant's counterclaim when the issue of the commercial reasonableness of the resale of defendant's automobile remained unresolved between the parties. A secured party's right to dispose of collateral after default is governed by the Uniform Commercial Code, N.C.G.S. Chapter 25. Defendant argues that granting summary judgment to a creditor who seeks a deficiency from a private sale is appropriate only when the creditor proves that there is no dispute that the sale was commercially reasonable, and that here the creditor has failed to meet that burden. Plaintiff counters that Mr. Parks' affidavit shows that the sale was in conformity with the statutory requirements for the resale of repossessed collateral. Further, plaintiff argues that defendant has brought forth "not a shred of evidence" to show the sale was not reasonable.

When the party with the burden of proof moves for summary judgment he must show that there are no genuine issues of fact, that there are no gaps in his proof, that no inferences inconsistent with his recovery arise from the evidence, and that there is no standard that must be applied to the facts by the jury. The party with the burden of proof who moves for summary judgment supported only by his own affidavits will ordinarily not be able to meet these requirements and thus will not be entitled to summary judgment. *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E. 2d 392, 410 (1976).

In the present case defendant challenged the commercial reasonableness of the private resale of the repossessed automobile. G.S. 25-9-504(3) provides that a secured party may dispose of collateral after default, "but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable." In order to recover a deficiency judgment against a defendant, the burden of proof is on the plaintiff to show the sale of the collateral was commercially reasonable. *Arden Equipment Co. v. Rhodes*, 55 N.C. App. 470, 285 S.E. 2d 874 (1982). If the secured creditor disposes of the collateral at a public sale as directed in G.S. 25-9-601 *et seq.*, a conclusive presumption of commercial reasonableness is created. *Credit Co. v. Concrete Co.*, 31 N.C. App. 450, 229 S.E. 2d 814 (1976). Absent the establishment of the conclusive presumption through a public sale in compliance

with G.S. 25-9-601 *et seq.*, commercial reasonableness presents a factual issue to be determined by the jury in light of the relevant circumstances of each case. *Id.* at 458, 229 S.E. 2d at 820.

In the present case, plaintiff made a private resale of the repossessed collateral; therefore no presumption of commercial reasonableness arises. The court made its determination that the resale was commercially reasonable based on the uncorroborated assertions of plaintiff. The burden of proof was on the plaintiff to bring forth evidence in support of every element of its claim. Plaintiff presented little evidence as to the manner of the resale other than its statement that plaintiff sold the automobile to a wholesaler for $1,330.00. In granting summary judgment for plaintiff the court improperly concluded that the evidence presented was sufficient to establish the commercial reasonableness of the resale as a matter of law. Because reasonable minds may differ over the application of a standard such as commercial reasonableness, this determination is inherently a jury question which does not readily lend itself to summary judgment. For the reasons cited above, the court improperly granted summary judgment for the plaintiff. Summary judgment for the plaintiff is vacated and the case is remanded for trial.

Vacated and remanded.

Judges WEBB and WHICHARD concur.

JUDITH ANN LATHAM v. JAMES RAYMOND LATHAM

No. 8426DC968

(Filed 21 May 1985)

1. Divorce and Alimony § 23.3— child custody and support—jurisdiction after parties remarry

Plaintiff's motion for custody and support of the parties' child should not have been dismissed for lack of jurisdiction where the parties had divorced, remarried, and separated. The remarriage did not divest the court of its continuing jurisdiction over the minor child acquired in the action for divorce; a divorce action is pending for purposes of determining custody and support until the death of one of the parties or until the youngest child reaches majority.

2. Divorce and Alimony § 23— child custody—types of action

An action for custody or support of minor children may be maintained as follows: as a civil action; joined with an action or cross-action for annulment, divorce, or alimony; by motion in the cause in an action for annulment, divorce, or alimony; or upon the court's own motion in an action for annulment, divorce or alimony. G.S. 50-13.5(b)(1), (3), (4), (5), and (6).

APPEAL by plaintiff from *Lanning, Judge.* Order entered 17 August 1984 in District Court, MECKLENBURG County. Heard in the Court of Appeals 6 May 1985.

Plaintiff appeals from an order dismissing for lack of jurisdiction her motion for custody and support of the parties' minor child.

Connelly, Karro, Blane & Sellers, by Marshall H. Karro and Seth H. Langson, for plaintiff appellant.

No brief filed for defendant appellee.

WHICHARD, Judge.

[1] The parties were divorced on 1 October 1982 and remarried to each other on 6 January 1984. They have subsequently separated. The issue is whether the remarriage of the parties to each other terminated the jurisdiction of the court that granted the divorce to adjudicate the custody and support of the minor child born to the parties prior to divorce. Although this appears to be a question of first impression, we rely upon the long-settled rule that a divorce action is pending for purposes of determining custody and support until the death of one of the parties or until the youngest child born of the marriage reaches maturity, whichever event occurs first. *Weddington v. Weddington*, 243 N.C. 702, 704, 92 S.E. 2d 71, 73 (1956); *Morris v. Morris*, 42 N.C. App. 222, 223, 256 S.E. 2d 302, 303 (1979); *Johnson v. Johnson*, 14 N.C. App. 378, 382, 188 S.E. 2d 711, 714 (1972). In accordance with this rule we hold that the remarriage of the parties to each other does not divest the court of its continuing jurisdiction over the minor child acquired in the action for divorce.

In so holding we accord with several jurisdictions which, in related contexts, have determined that a dissolution decree does not become a nullity when the parties thereto remarry each other. *See, e.g., Travis v. Travis*, 181 S.E. 2d 61 (Ga. 1971) (accrued

installment payments of alimony not affected by remarriage of divorced spouses); *Greene v. Iowa Dist. Court for Polk County*, 312 N.W. 2d 915 (Iowa 1981) (judgment for child support not vacated by remarriage of the parties to each other); *Scheibel v. Scheibel*, 284 N.W. 2d 572 (Neb. 1979) (remarriage of parties will not operate as matter of law to prohibit holder of support order from collecting arrearages); *In re Marriage of Kaiser*, 568 S.E. 2d 571 (Mo. App. 1978) (remarriage after divorce does not restore marital community). *See, contra, e.g., Davis v. Davis*, 437 P. 2d 502 (Cal. 1968) (remarriage of parties to each other terminates prior child custody and support orders as well as jurisdiction of the court to enforce them).

[2] Our Supreme Court has stated that jurisdiction of the court to protect infants is " 'broad, comprehensive, and plenary.' " *Spence v. Durham*, 283 N.C. 671, 687 (1973), 198 S.E. 2d 537, 547, *cert. denied*, 415 U.S. 918, 94 S.Ct. 1417, 39 L.Ed. 2d 473 (1974). In divorce actions the court in which the action is brought acquires jurisdiction over the custody of the unemancipated children of the parties, and the jurisdiction continues even after divorce. *See Stanback v. Stanback*, 266 N.C. 72, 75, 145 S.E. 2d 332, 334 (1965); *Bass v. Bass*, 43 N.C. App. 212, 214, 258 S.E. 2d 391, 392 (1979) ("custody and support issues . . . remain *in fieri* until the children are emancipated"). In *Bunn v. Bunn*, 258 N.C. 445, 128 S.E. 2d 792 (1963), plaintiff argued that once an action for divorce and alimony was dismissed the court had no jurisdiction to determine child custody and support. The Court found that the trial court could proceed in its equity jurisdiction and stated, " 'The marital status of parents is not . . . a factor in determining the procedure to obtain custody of a child.' " *Id.* at 448, 128 S.E. 2d at 795, quoting *Cleeland v. Cleeland*, 249 N.C. 16, 18, 105 S.E. 2d 114, 116 (1958). Thus, without regard to the marital status of the parents, an action for custody or support of minor children may be maintained as follows: as a civil action; joined with an action or cross-action for annulment, divorce, or alimony; by motion in the cause, as here, in an action for annulment, divorce, or alimony; or upon the court's own motion in an action for annulment, divorce or alimony. G.S. 50-13.5(b)(1), (3), (4), (5), and (6).

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). In

actions for custody and support only majority of the child or death of a party fully and completely determines the cause. *Weddington*, 243 N.C. at 704, 92 S.E. 2d at 73. Nothing in the provisions of G.S. 50-13.5 alters this rule. *Johnson*, 14 N.C. App. at 382, 188 S.E. 2d at 714. The statutory scheme, G.S. 50-13.5, provides for an election of procedures in actions for custody or support. We see no reason why the remarriage of the parties should reduce the choices available. The legislature apparently intended to provide the maximum range of choice among procedures for determination of child custody and support. In light of that apparent intent and of our Supreme Court's indication that the jurisdiction of the court to protect infants is " 'broad, comprehensive, and plenary,' " we believe the choice of a motion in the cause in the prior divorce proceeding, in which the court already has personal jurisdiction over the party from whom relief is sought, should remain available even following the subsequent remarriage of the parties to each other.

Since it does not appear that either party has died or that the child has reached maturity, the court has jurisdiction to hear plaintiff's motion in the cause seeking custody and support of the parties' minor child. *Morris*, 42 N.C. App. at 223, 256 S.E. 2d at 303. The order dismissing the motion for lack of jurisdiction is therefore reversed, and the cause is remanded for further proceedings on plaintiff's motion.

Reversed and remanded.

Chief Judge HEDRICK and Judge WEBB concur.

WILLIAM B. SIMMONS v. ELNA CAROLE M. SIMMONS

No. 848DC665

(Filed 21 May 1985)

Divorce and Alimony § 24.1— child support—expenses while with father—refusal to give credit

The trial court did not abuse its discretion in refusing to give the noncustodial father credit against his child support arrearage for expenses incurred while the child spent time with him beyond the time periods provided in a consent order.

Simmons v. Simmons

APPEAL by plaintiff from *Exum, Judge.* Order entered 28 February 1984 in District Court, LENIOR County. Heard in the Court of Appeals 5 March 1985.

Plaintiff on 16 January 1984 filed a motion in the cause requesting modification of a consent order entered 9 December 1977 granting custody of the parties' minor child to defendant and directing plaintiff to pay $179.00 per month in child support. Although the original consent order provided plaintiff with visitation every other weekend, the minor elected, with his mother's consent, to spend more time with his father than provided for in the order. Since November 1977 the child has stayed 1,101 days with him and 1,160 days with defendant.

Plaintiff paid full support through September 1981. Beginning in October 1981, plaintiff paid support to defendant on a prorata basis of $6.00 per day ($179.00 per month divided by an average thirty day month) for each day the child spent with defendant. Plaintiff reduced these payments without defendant's consent or court approval. Plaintiff has continued to provide for all of the child's clothing, school, medical, dental and personal expenses.

In his motion, plaintiff sought full custody of the minor, or in the alternative, joint custody with defendant, with support to be broken down on a daily basis. Plaintiff also sought to be relieved from the $2,928.50 in arrearages which had accrued. Because plaintiff made payments to defendant while the child was actually residing with him and because he paid $5,625.18 in other miscellaneous expenses for the child, plaintiff contends he should receive a "credit" against his entire arrearage.

The court awarded joint custody of the child to plaintiff and defendant and directed plaintiff to pay $89.50 per month in support to defendant, one-half of the original amount, based on the assumption that the child will continue to reside one-half of the time with plaintiff. The court also concluded that it should not forgive the arrears of $2,928.50 and directed plaintiff to pay $50.00 per month on the arrearage. Plaintiff appealed.

Perry, Perry & Perry by Warren S. Perry for plaintiff-appellant.

Beech & Jones by Paul L. Jones for defendant-appellee.

PARKER, Judge.

In his sole assignment of error, plaintiff contends the lower court erred in concluding as a matter of law that it should not forgive the arrearage of $2,928.50. We disagree.

This Court has previously held that the noncustodial parent is not entitled as a matter of law to a credit against accrued arrearage in child support for expenses incurred while the child was with the noncustodial parent. *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E. 2d 178 (1977). Each case must be decided upon its own facts, and the guiding principle is whether an injustice would exist if a credit is not given. The decision to allow, or disallow, such credit is a matter within the discretion of the trial judge. *Jones v. Jones*, 52 N.C. App. 104, 278 S.E. 2d 260 (1981) and *Lynn v. Lynn*, 44 N.C. App. 148, 260 S.E. 2d 682 (1979).

While the ruling on this point is contained in the conclusions of law, the wording that, "the Court should not forgive" manifests that the trial judge did not misapprehend his discretionary authority to grant such relief.

In *Evans v. Craddock*, 61 N.C. App. 438, 300 S.E. 2d 908 (1983), this Court held the trial court did not abuse its discretion in denying the noncustodial father credit against his child support obligation for a four to five week period during which the minor child actually resided with the father. Similarly, in *Gibson v. Gibson*, 68 N.C. App. 566, 316 S.E. 2d 99 (1984), this Court rejected plaintiff's argument that substantial visitation with the noncustodial parent relieves the custodial parent of some of the fixed expenses of the child and held:

> The fact that a child spends a certain amount of time with one parent does not necessarily mean, as plaintiff would have us to assume, that his reasonable and necessary living expenses are incurred proportionally.

The pattern of unilateral reduction in support payments had continued in the instant case for over two years before plaintiff moved for modification of the 1977 consent order. As this Court stated in *Lynn v. Lynn, supra*, "[a] party bound by court order to make payments to another party may not, without risk of violation, unilaterally modify the form of compensation provided in the order."

Although plaintiff argues that the facts here justify credit for the time the child spent with him beyond the time periods originally contemplated by the parties, we find no abuse of discretion by the trial court in not giving him that credit.

The judgment appealed from is

Affirmed.

Judges ARNOLD and EAGLES concur.

STATE OF NORTH CAROLINA v. CARL WILLIAMS

No. 8416SC637

(Filed 21 May 1985)

Criminal Law § 138.11— armed robbery—greater sentence after second trial—no error

There was no error in sentencing defendant to a term of fourteen years after a retrial for armed robbery where the original sentence was twelve years. G.S. 14-87(d) prohibits the imposition of a sentence of less than fourteen years for armed robbery; G.S. 15A-1335 prohibits a more severe sentence after a new trial or resentencing because of reweighing aggravating factors or because of new aggravating factors, but did not apply here because the trial judge imposed the minimum and presumptive sentence and did not weigh aggravating factors.

APPEAL by defendant from *Barnette, Judge.* Judgment entered 20 March 1984 in Superior Court, ROBESON County. Heard in the Court of Appeals 5 March 1985.

Defendant was tried and found guilty of armed robbery. Judgment was entered 23 February 1982, and defendant was sentenced to twelve years of imprisonment. This court granted defendant's motion for appropriate relief and ordered a new trial on 9 January 1984. On retrial defendant was again found guilty of armed robbery and was sentenced to a term of fourteen years, with credit for time already served.

Attorney General Edmisten by Assistant Attorney General Marilyn R. Rich for the State.

Gary Lynn Locklear for defendant-appellant.

PARKER, Judge.

The only issue presented is whether the trial court erred by resentencing defendant for a term greater than his original sentence. As this question is one of statutory construction and no error is assigned to defendant's trial, we do not find it necessary to present the State's and defendant's evidence. Simply stated, the question is whether defendant's sentence is controlled by G.S. 14-87(d) or G.S. 15A-1335.

General Statute 14-87(d), effective 1 July 1981, provides: "Notwithstanding any other provision of law, . . . [a] person convicted of robbery with firearms or other dangerous weapons shall receive a sentence of at least 14 years in the State's prison . . . ." Under this statute trial judges are prohibited from imposing a term of less than fourteen years. *State v. Morris*, 59 N.C. App. 157, 296 S.E. 2d 309 (1982), *review denied*, 307 N.C. 471, 299 S.E. 2d 227 (1983). As this court observed in *State v. Leeper*, 59 N.C. App. 199, 296 S.E. 2d 7, *review denied*, 307 N.C. 272, 299 S.E. 2d 218 (1982): "The language of N.C. Gen. Stat. 14-87(d) is unambiguous and its effect is clear. Any person convicted of armed robbery must receive no less than a 14 year sentence, notwithstanding any other provision of law. Thus, there is no room for judicial construction on this point." *State v. Leeper*, 59 N.C. App. at 201, 296 S.E. 2d at 8-9.

Defendant's position is that G.S. 15A-1335 prohibits a trial judge from imposing a new sentence for the same offense greater than the prior sentence:

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

Defendant argues that *State v. Mitchell*, 67 N.C. App. 549, 313 S.E. 2d 201 (1984), supports his contention that G.S. 15A-1335 prohibits the trial judge from imposing a fourteen year sentence when his original sentence was twelve years. We do not agree for the reason that *Mitchell* is distinguishable on its facts and does not address the issue presented in the case *sub judice*.

Clearly, G.S. 15A-1335 applies to the situation where the trial judge is weighing aggravating and mitigating factors on resentencing a defendant or on sentencing a defendant after a new trial. The statute prohibits the trial judge from imposing a more severe sentence because of reweighing aggravating factors, or because of new aggravating factors. In the instant case, however, the trial judge did not weigh aggravating factors; therefore, G.S. 15A-1335 did not apply. In imposing a sentence of fourteen years the trial judge was imposing the minimum and the presumptive sentence, *State v. Morris, supra*, and he had no discretion to impose a sentence of less than fourteen years.

Affirmed.

Judges ARNOLD and EAGLES concur.

RAY SCROGGS v. JACK ALLEN RAMSEY

No. 8430DC939

(Filed 21 May 1985)

Courts § 14.3— district court—dismissal of action filed in another county

A district court judge sitting in Swain County had authority to hear defendant's motion to dismiss an action filed by plaintiff in Cherokee County where both counties are in the same judicial district, and the record shows that the trial judge is a district judge empowered to hear motions in causes regularly calendared for trial or for the disposition of motions at any session to which he is assigned to preside, that defendant's motion to dismiss was regularly calendared for disposition in the Swain County District Court, and that the District Judge was assigned to preside at the particular session of the Swain County District Court. G.S. 7A-146; G.S. 7A-192.

APPEAL by plaintiff from *Snow, Judge*. Order entered 6 June 1984 in District Court, SWAIN County. Heard in the Court of Appeals 6 May 1985.

This is a civil action wherein plaintiff seeks specific performance of a lease agreement or, in the alternative, damages for breach of contract. The record reveals the following: Plaintiff's complaint was filed on 16 January 1984 in Cherokee County. On 15 March 1984 defendant filed an answer and a motion to dismiss,

pursuant to N.C.R.C.P., Rule 12(b)(6), for failure to state a claim upon which relief can be granted. On 16 May defendant served plaintiff with notice that he would request a hearing on his motion to dismiss on 5 June 1984, "or as soon thereafter as counsel can be heard," in Swain County. On 4 June 1984 plaintiff filed a "Notice of Objection to Hearing," in which he contended that a hearing on defendant's motion "out of county" was without his consent and was not authorized by statute. On 6 June 1984 Judge Snow granted defendant's motion to dismiss. Plaintiff appealed.

Pachnowski & Collins, P.A., by Gerald R. Collins, Jr., for plaintiff, appellant.

Hunter, Large & Kirby, by Gary E. Kirby, for defendant, appellee.

HEDRICK, Chief Judge.

Plaintiff's sole contention on appeal is that Judge Snow was without authority to hear defendant's motion to dismiss "over written objection of the plaintiff/appellant . . . out of county and out of venue." Our resolution of this issue is controlled by G.S. 7A-192 which in pertinent part provides: "Any district judge may hear motions and enter interlocutory orders in causes regularly calendared for trial or for the disposition of motions, at any session to which the district judge has been assigned to preside." G.S. 7A-146 provides that the chief district judge has the following duties, among others:

> (1) Arranging schedules and assigning district judges for sessions of district courts;
>
> (2) Arranging or supervising the calendaring of non-criminal matters for trial or hearing.

We take judicial notice of the fact that both Cherokee and Swain Counties are in the Thirtieth Judicial District, that the Honorable Robert Leatherwood, III, is the Chief District Judge in that District, and that the Honorable John J. Snow, Jr., is a District Court Judge in that District. The record affirmatively discloses that *Scroggs v. Collins*, along with numerous other cases, was regularly calendared for hearing at the 5 June 1984 Session of Swain County Non-Jury and Domestic Relations District Court. The court calendar, which is a part of the record on appeal, fur-

ther discloses that Judge Snow was the presiding judge at this session. Also contained in the record is an excerpt from the District and Superior Court Schedule, which reveals that Judge Snow was assigned to Swain County to hear "Non-Jury and Domestic Relations (District Wide)" on 5, 6, 7, and 8 June. Because the record discloses that Judge Snow is a district judge empowered to hear motions in causes regularly calendared for trial or for the disposition of motions at any session to which he is assigned to preside, and that defendant's motion to dismiss was regularly calendared for disposition at the 5 June 1984 Session of Swain County Non-Jury and Domestic Relations District Court, and that Judge Snow was assigned to preside at this session, we hold that plaintiff's assignment of error is without merit.

Affirmed.

Judges WEBB and WHICHARD concur.

WILLIAM M. EVANS AND WIFE, HILDA G. EVANS v. VESTER MITCHELL

No. 8425SC1058

(Filed 21 May 1985)

Negligence § 2; Limitation of Actions § 4.2— negligence action against builder by second purchaser—denial of directed verdict improper

The trial court erred by denying defendant's motion for a directed verdict in an action to recover damages for the faulty construction of a house because plaintiffs were the second purchasers of the house. Moreover, although it was not raised on appeal, the house was constructed in 1972 and the version of G.S. 1-50(5) in effect from 1963 through 1981 barred plaintiffs' claims in 1978.

APPEAL by defendant from *McConnell, J.* Judgment entered 20 April 1984 in Superior Court, BURKE County. Heard in the Court of Appeals 9 May 1985.

The plaintiffs, William and Hilda Evans, brought suit against the defendant, Vester Mitchell, to recover damages for the faulty construction of their home. Their complaint stated three theories of recovery: implied warranty, fraud and deceptive practices in violation of G.S. Ch. 75, and negligence. The trial court allowed

defendant's motion for directed verdict as to the first two of these, and allowed the issue of negligence to be decided by the jury. The jury found the defendant guilty of negligence and awarded damages of $10,000.

The defendant appeals the denial of his motion for directed verdict on the negligence claim, the denial of his request to submit the issue of contributory negligence to the jury, and the failure of the trial court to explain adequately in his charge to the jury the element of proximate causation.

McMurray & McMurray, by John H. McMurray, for defendant appellant.

Sowers, Avery & Crosswhite, by William E. Crosswhite, for plaintiff appellees.

ARNOLD, Judge.

The defendant contends that the trial judge erred by denying his motion for directed verdict as to the plaintiffs' negligence claim. The defendant's contention has merit.

The defendant argues that plaintiffs were the second purchasers of the house at issue and therefore could not bring suit for negligence against the builder. In *Oates v. JAG, Inc.*, 66 N.C. App. 244, 311 S.E. 2d 369, *disc. rev. allowed*, 311 N.C. 761, 321 S.E. 2d 142 (1984), this Court held that a subsequent purchaser of a house, once removed from the original vendee, may not maintain an action against the original builder for negligent construction of the house. The court observed, and we agree, that "while some jurisdictions apparently have extended tort liability to real property under the theory of vulnerability espoused by Cardozo in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), North Carolina has not joined the crowd." *Oates v. JAG, Inc.*, 66 N.C. App. at 247, 311 S.E. 2d at 371. The trial judge therefore should have granted the directed verdict as to plaintiffs' negligence claim.

Sullivan v. Smith, 56 N.C. App. 525, 289 S.E. 2d 870, *disc. rev. denied*, 306 N.C. 392, 294 S.E. 2d 220 (1982), which plaintiffs cite, did not address the issue of the extension of tort liability in real property cases brought by subsequent purchasers. It therefore is not controlling on that issue.

We mention another serious defect in plaintiffs' claims, which the parties failed to raise on appeal. The plaintiffs' house was constructed in 1972. Under the version of the statute of repose, G.S. 1-50(5), effective from 1963 through 1981, all of plaintiffs' claims were barred in 1978. *See Colony Hill Condominium I Association v. The Colony Company*, 70 N.C. App. 390, 320 S.E. 2d 273 (1984).

The motion for directed verdict as to plaintiffs' negligence claim thus should have been granted.

We see no need to reach defendant's other contentions.

Reversed.

Judges MARTIN and PARKER concur.

PERSON COUNTY EX REL. JENNIFER YVETTE LESTER v. MICHAEL HOLLOWAY

No. 849SC994

(Filed 21 May 1985)

Bastards § 10; Parent and Child § 7— order of paternity—improper attack by motion for blood grouping test

Where the court entered a judgment of paternity pursuant to an affirmation of paternity signed by plaintiff mother and an acknowledgment of paternity signed by defendant, and defendant executed a sworn voluntary child support agreement, defendant could not thereafter attack the paternity judgment by a motion for a blood grouping test in the course of a proceeding related solely to support. G.S. 110-132(a) and (b).

APPEAL by plaintiff from *Allen, Judge*. Order entered 17 July 1984 in District Court, PERSON County. Heard in the Court of Appeals 6 May 1985.

Plaintiff appeals from an order, pursuant to G.S. 8-50.1 and G.S. 49-7, allowing a motion for a blood grouping test.

Jackson & Hicks, by Thomas L. Fitzgerald, for plaintiff appellant.

No brief filed for defendant appellee.

WHICHARD, Judge.

I.

The appeal is from an interlocutory order. In the exercise of our discretion we nevertheless consider it to expedite decision in the public interest.

II.

Pursuant to an affirmation of paternity signed by plaintiff mother and an acknowledgment of paternity signed by defendant, on 27 August 1980 the court entered an Order of Paternity having the force and effect of a judgment. G.S. 110-132(a). On the same day defendant executed a sworn voluntary support agreement consenting to pay $100 per month toward the support of his minor child. On 4 September 1980 the court entered an order, which had the force and effect of a court order of support, approving this agreement. G.S. 110-133.

For failure to make payments when due, on 31 January 1984 defendant was ordered to appear and show cause why he should not be held in contempt. In response defendant moved for a blood grouping test, which motion the court granted on 17 July 1984. Defendant thus attempts to attack a paternity judgment in the course of a subsequent proceeding related solely to support. This he may not do. G.S. 110-132(b).

In *Beaufort County v. Hopkins*, 62 N.C. App. 321, 323, 302 S.E. 2d 662, 663 (1983) this Court stated,

> [A] voluntary support agreement may, upon motion and a showing of changed circumstances, be modified or vacated at any time. [Citations omitted.] It cannot, however, be modified or vacated on the basis of relitigation, in a proceeding related solely to the order for support, of the paternity issue. That issue is *res judicata* and 'shall not be reconsidered by the court' in such a proceeding.

See also Durham County v. Riggsbee, 56 N.C. App. 744, 289 S.E. 2d 579 (1982).

The order is thus vacated and the cause remanded for further proceedings on the order to appear and show cause for failure to comply with the support order.

Vacated and remanded.

Chief Judge HEDRICK and Judge WEBB concur.

DIANNE HOLLEY, INDIVIDUALLY, GREG L. HINSHAW, GUARDIAN OF THE ESTATE OF ERVIN LEE HOLLEY AND DIANNE HOLLEY, GUARDIAN OF THE PERSON OF ERVIN LEE HOLLEY v. BURROUGHS WELLCOME CO., A NORTH CAROLINA CORPORATION AND AYERST LABORATORIES: A DIVISION OF AMERICAN HOME PRODUCTS CORPORATION

No. 8414SC671

(Filed 4 June 1985)

1. **Rules of Civil Procedure § 56; Sales § 24— drug manufacturers—warnings on package inserts—doctor interested witness—summary judgment improper**

Summary judgment was improperly granted for defendant drug manufacturers in an action based on allegedly inadequate package inserts and promotional literature for drugs used in anesthesiology where defendants supported their motions with the deposition testimony of the administering physician that he had not relied on defendants' package inserts or promotional literature. Although the doctor was not a party to the action, he was an interested witness in that the extent of his reliance on defendants' information was within his personal knowledge and, a malpractice suit against him having been settled, it was obviously within his interest to testify that his knowledge of malignant hyperthermia and the dangers posed by defendants' products came from years of professional training and experience and not from defendants' package inserts or professional journal advertisements. His testimony was inherently suspect, and defendants did not carry their burden of disproving any of plaintiffs' essential allegations. G.S. 1A-1, Rule 56(e).

2. **Negligence § 29.2— action against drug manufacturers—inadequate warnings—nurse anesthetist foreseeable user of products**

Summary judgment for defendant drug manufacturer was improper in an action based on allegedly inadequate package inserts and promotional information for drugs used in anesthesia where defendants relied on deposition testimony that the doctor who ordered the medication did not rely on defendants' inserts or information but the customary practice was that the monitoring and maintenance of anesthetized patients was the responsibility of a trained anesthetist under the supervision of an anesthesiologist. Plaintiffs clearly raised a question of fact regarding the adequacy of defendants' warnings or promotional information as to the nurse anesthetist.

3. **Negligence § 29.3— inadequate warnings by drug manufacturers—question of proximate cause—summary judgment improper**

Summary judgment for defendant drug manufacturers was improper where plaintiffs alleged that defendants' package inserts and promotional

literature did not provide adequate warnings and the doctor who administered the drugs testified that he relied on his own expertise rather than defendants' information. The doctor was an interested witness and his reliance on his own expertise was not conclusively established by his testimony; thus there was a question of fact as to the proximate cause of the injury.

4. **Rules of Civil Procedure § 8.1— detailed complaint—stricken for failure to include short and plain statement of facts—no prejudicial error**

There was no prejudicial error from the court's striking of plaintiffs' detailed complaint on the grounds that it did not contain a short and plain statement of the facts. G.S. 1A-1, Rule 8, prescribes the minimum information a pleading must contain; it does not require that a complaint contain only a "short and plain statement." However, because plaintiffs' redrafted complaint put all the essential elements before the court and the next procedural step is a trial, detailed pleadings would be of no help to plaintiffs and the trial court's ruling will not be disturbed.

Judge ARNOLD dissenting.

APPEAL by plaintiffs from *Johnson, Judge.* Judgment entered 17 November 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 12 February 1985.

This is a civil action in which plaintiffs seek damages from defendants for injuries to Ervin Lee Holley allegedly resulting from defendants' negligence with respect to the marketing and promotion of their products.

Plaintiffs' ward, Ervin Lee Holley, was admitted to Duke University Medical Center (Duke) for surgery on his knee. He had injured his knee while working. Holley was 21 years old and generally in good health. During the 6 April 1976 operation, problems developed that resulted in severe and irreversible brain damage to Holley.

On 31 December 1980, plaintiffs, Holley's guardians, filed a complaint against defendant pharmaceutical companies seeking punitive and compensatory damages in excess of $10,000. The original complaint takes up 23 pages of the record on appeal and contains a detailed and highly technical account of the sequence of events that resulted in Holley's injury. The complaint was based in part on the affidavit of Dr. Claude T. Moorman. Together, they may be summarized as follows:

Mr. Holley's injury was due to hypoxia, or oxygen deprivation, that resulted from malignant hyperthermia. Malignant

hyperthermia is a condition in which the body's temperature is elevated, causing an increase in the level of blood acidity and a corresponding decrease in the body's ability to supply oxygen to vital organs, including the heart and brain. Malignant hyperthermia is a condition associated with anesthesia; it can be caused by use of the general anesthetic known as halothane, manufactured by defendant Ayerst Laboratories and marketed by defendant American Home Products under the name of Fluothane. Succinylcholine chloride, a muscle relaxant manufactured and marketed by defendant Burroughs Wellcome under the trade name Anectine, also causes malignant hyperthermia and can aggravate an existing condition.

Anesthesia was induced in Ernest Lee Holley by administering sodium thiopental intravenously and was maintained by having him breathe a mixture of oxygen, nitrous oxide and Fluothane through a face mask. Dr. Donald Hooper was a staff anesthesiologist at Duke who prescribed Holley's anesthesia. Under his supervision, anesthesia was induced and maintained by Elizabeth Evans, a nurse anesthetist at Duke. During the next hour, nurse Evans noted a constant increase in blood pressure and heart rate and began to experience difficulty maintaining proper ventilation of Holley with the face mask. She summoned Dr. Hooper, who diagnosed bronchospasm and directed Nurse Evans to use a tracheal tube instead of the face mask. In order to relax Holley's constricted throat muscles and allow for easy insertion of the tube, Nurse Evans was directed by Dr. Hooper to give Holley Anectine intravenously. Rather than relaxing, however, Holley's muscles constricted further, making his jaw difficult to open. Again at Dr. Hooper's direction, a second dose of Anectine was administered. Mr. Holley then went into cardiac arrest and several minutes were required to resuscitate him.

According to the complaint and supporting affidavit of Dr. Moorman, Holley's increased heart rate, blood pressure and muscle rigidity are classic symptoms of developing malignant hyperthermia. Holley's body temperature was not taken. These symptoms apparently were not recognized for what they were by Nurse Evans or Dr. Hooper, who misdiagnosed the condition. When the first dose of Anectine aggravated Holley's condition, malignant hyperthermia was still not diagnosed. The second dose of Anectine further aggravated Holley's already hypoxic condi-

tion, causing his cardiac arrest. During the several minutes that were required to restore Holley's cardiac and respiratory functions, his brain was deprived of oxygen and was damaged severely and irreversibly.

One of the keys to recognizing and treating malignant hyperthermia, according to Dr. Moorman, is being aware of when the condition exists and recognizing the symptoms for what they are. Although Holley's anesthesia chart shows "a typical picture of increasing hypoxia," these indications apparently were not recognized as symptoms of malignant hyperthermia either by Nurse Evans or Dr. Hooper. As a consequence, Holley was not treated for malignant hyperthermia in time to prevent his injury.

According to plaintiffs and Dr. Moorman, primary sources of awareness of the consequences and side effects of using pharmaceuticals are the package inserts that accompany the products, entries in the Physician's Desk Reference, a standard reference text in the medical profession, and promotional information found in advertisements and provided by product salesmen. With respect to defendants' products, none of these sources in Dr. Moorman's opinion contained sufficient information or warnings to put an anesthesiologist or nurse anesthetist on notice of the possibility that the use of the products might induce or aggravate malignant hyperthermia in a patient. Dr. Moorman's affidavit lists five specific aspects in which the information then available on the products was lacking:

> 1. There is no warning that these agents are *triggering* agents for malignant hyperthermia.
>
> 2. There is no description of the early warning signs or progressing symptomatology of this condition which would alert an anesthetist or anesthesiologist to the rapid progression of the full-blown condition.
>
> 3. There are no suggestions as to a treatment regimen which would reverse the devastating effects of this reaction.
>
> 4. There is no warning that when suspected reactions to either one of these agents occurs, the continuing use of these agents in conjunction or as sole agents is absolutely contraindicated.

5. There is no warning as to other contraindicated drugs once this condition has developed such as the contraindication of the use of calcium which was utilized during resuscitation of this patient and could have aggravated the effects of the malignant hyperthermia. [Emphasis in original.]

Plaintiffs' complaint essentially sets forth the following theory of defendants' liability for the injury to E. L. Holley: (1) Defendants knew the dangers involved in the use of their products, specifically that their use could induce and aggravate malignant hyperthermia; (2) defendants actively marketed their products through advertisements, direct mailings of promotional literature, and direct solicitations by sales people; (3) defendants provided inadequate warnings regarding the known propensity of their products to cause malignant hyperthermia in some patients; (4) defendants had a duty to warn potential users of these dangers; and (5) the injury to E. L. Holley could have been prevented by adequate warnings.

Defendants moved to dismiss the complaint for failure to state a claim for relief and to strike the complaint on the grounds that it did not contain a short and plain statement of the facts. The motions to strike were allowed on 27 April 1981. Plaintiffs filed a new and much shorter complaint on 28 May 1981, alleging the same theory of liability. Defendants answered, denying the material allegations of the complaint.

Though the details are not clear from the record, plaintiffs also sued Duke and Dr. Hooper for malpractice in connection with the injury. That action was settled prior to trial.

In June of 1983, defendants moved for summary judgment and supported their motions with affidavits and the deposition of Dr. Hooper. The affidavits concerned the marketing practices of defendants and the warnings provided by defendants regarding the use of their products. In his deposition, Dr. Hooper denied relying on any of the information made available by defendants through advertisements, representations by sales people, the Physicians' Desk Reference or package inserts regarding the use and possible dangers of their products. Dr. Hooper also denied that Holley's injury had been caused by malignant hyperthermia. Plaintiffs responded with the affidavit of a pharmacologist that supported the claims made in the complaint. On 17 November

1983, the trial court entered summary judgment for defendants. Plaintiffs appealed.

McCain and Essen, by Grover C. McCain, Jr., for plaintiff-appellants.

Newsom, Graham, Hedrick, Bryson, Kennon and Faison, by E. C. Bryson, Jr., and Joel M. Craig, for defendant-appellee American Home Products Corporation.

Teague, Campbell, Conely and Dennis, by C. Woodrow Teague and Richard B. Conely for defendant-appellee Burroughs Wellcome.

EAGLES, Judge.

I

Plaintiffs contend that it was error to allow defendants' motions for summary judgment because genuine issues of fact exist that must be submitted to the jury. We agree.

Plaintiffs' specific contentions are (1) that there is an issue of fact as to the credibility of defendants' deposition witness, Dr. Hooper, that presents a jury question; (2) that Dr. Hooper was not the only person whose failure to recognize the symptoms of malignant hyperthermia was critical to the treatment of E. L. Holley; and (3) that there is a factual question as to the causal relationship between defendants' alleged failure to provide adequate warnings and the injury. If any of these specific contentions is valid, the court's entry of summary judgment for defendants was error.

a.

Our courts have often enunciated the principles governing summary judgment. They are well established in our law. "The party moving for summary judgment has the burden of establishing the lack of any triable issue of fact. His papers are carefully scrutinized and all inferences are resolved against him. . . . The court should never resolve an issue of fact." *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E. 2d 392, 399 (1976). *See also Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975); *Kessing v. Mortgage Co.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Ordinarily, summary judgment is not appropriate in negligence actions because the

right of recovery usually depends on the application of the reasonable person standard of care. Only the jury, under instructions from the court, may apply that standard. *Moore v. Fieldcrest Mills*, 296 N.C. 467, 251 S.E. 2d 419 (1979); *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972). *See generally*, 11 N.C. Index 3d, *Rules of Civil Procedure* Sections 56-56.7 (1978 and Supp. 1984).

North Carolina does not recognize strict liability in products liability actions. *Smith v. Fiber Corp.*, 300 N.C. 669, 268 S.E. 2d 504 (1980); *McCollum v. Grove Manufacturing Co.*, 58 N.C. App. 283, 293 S.E. 2d 632 (1982), *affirmed per curiam*, 307 N.C. 695, 300 S.E. 2d 374 (1983); *Wilson Brothers v. Mobil Oil*, 63 N.C. App. 334, 305 S.E. 2d 40, *disc. rev. denied*, 309 N.C. 634, 308 S.E. 2d 718 (1983). Therefore, whether defendants can be held liable in this case must be determined in accordance with ordinary negligence principles. *McCollum*, *Wilson*, both *supra*. In order to establish a *prima facie* case of negligence on a products liability action, a party must show, "(1) evidence of a standard of care owed by the reasonably prudent person in similar circumstances; (2) breach of that standard of care; (3) injury caused directly or proximately by the breach, and; (4) loss because of the injury." *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 656, 268 S.E. 2d 190, 194 (1980); *McCollum, supra*.

[1] Here, the standard of care or duty allegedly owed by defendants to E. L. Holley was to warn the personnel responsible for his anesthesia of the risk that the use of their products to induce anesthesia could cause malignant hyperthermia and to provide information to the responsible personnel concerning how to recognize and treat the condition. The breach of that duty alleged by plaintiffs is that the warnings and information provided by defendants were inadequate. This breach allegedly resulted in Holley's malignant hyperthermia going undetected until it was too late to prevent the injury. Though it is not stated in defendants' motions or in the trial court's order, it is clear from the documents supporting their motions that defendants were attempting to defeat plaintiffs' allegation that the breach caused the injury. This, at least, is the issue argued on appeal.

Defendants' strategy is clear: if they can establish that Dr. Hooper did not rely on the information provided by defendants with respect to their products, the question of whether the warn-

ings were adequate would be irrelevant and plaintiffs' allegations regarding proximate cause would be defeated. Though we have found no North Carolina cases on point, the principles of ordinary negligence and decisions from other jurisdictions seem to justify this strategy. *E.g., Oppenheimer v. Sterling Drug, Inc.*, 7 Ohio App. 2d 103, 219 N.E. 2d 54 (1964); *Ball v. Mallinckrodt Chemical Works*, 53 Tenn. App. 218, 381 S.W. 2d 563, 19 A.L.R. 3d 813 (1964).

Defendants supported their motions with several affidavits but relied primarily on the deposition of Dr. Hooper. Dr. Hooper testified that he was aware of the information available regarding the propensity of defendants' products to cause malignant hyperthermia but that he neither read nor relied on it. Rather, Dr. Hooper testified that his specialty involved a detailed awareness of the very information that plaintiffs claim defendants failed to provide: (1) that Fluothane and Anectine could cause malignant hyperthermia and (2) how to recognize and treat the condition. Dr. Hooper testified that he had set up at Duke a malignant hyperthermia awareness program that included a kit in each operating room and a protocol for dealing with the condition. Dr. Hooper further testified that he did not think that E. L. Holley had developed malignant hyperthermia. The effect of Dr. Hooper's testimony was that his knowledge of the causes, symptoms, effects and treatment of malignant hyperthermia was so sophisticated that he did not need to, and in fact did not, rely on the allegedly inadequate information provided by defendants relating to the use and possible adverse effects of their products.

If Dr. Hooper's lack of reliance could be proved, the key element of proximate cause in plaintiffs' *prima facie* case would be defeated. The threshold question is whether defendants' forecast of the evidence is sufficient to establish that Dr. Hooper did not rely on defendants' package inserts or promotional materials concerning the use of their products. Plaintiffs contend that Dr. Hooper's deposition testimony is the only evidence tending to show that he did not rely on defendants' information and that it is suspect because Dr. Hooper is an interested witness. We agree.

G.S. 1A-1, Rule 56(e), provides as follows:

> 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, supported by affidavits or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial.

Witness credibility is ordinarily a jury question. On a motion for summary judgment, however, the judge may determine that a deposition witness is credible as a matter of law where only latent doubts exist as to the witness's credibility and the opposing party fails to go beyond his pleadings in opposing the motion. *Conner v. Spanish Inns Charlotte, Inc.*, 294 N.C. 661, 242 S.E. 2d 785 (1978); *Kidd v. Early, supra.* In North Carolina, the mere fact that a witness has an interest in a case is not sufficient by itself to render his deposition testimony inherently suspect for purposes of summary judgment. *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E. 2d 576 (1976). In order for the testimony of an interested witness to be inherently suspect, it must concern facts peculiarly within the knowledge of the witness. *Carson v. Sutton*, 35 N.C. App. 720, 242 S.E. 2d 535 (1978).

In our opinion, Dr. Hooper's deposition testimony was subject to more than latent doubt as to its credibility. Dr. Hooper is not a party to this action. He was, however, the physician responsible for anesthetizing E. L. Holley and was a named defendant along with Duke in a malpractice action filed by plaintiffs based on the injury to E. L. Holley. That action was settled prior to trial. Plaintiffs contend that Dr. Hooper is interested because his reputation in the medical community could be adversely affected if he admitted that his own lack of knowledge may have contributed to Holley's injury. Obviously, it is in his interest, having settled the malpractice action, to testify that his knowledge of malignant hyperthermia and the dangers posed by defendants' products came from years of professional training and experience and not from defendants' package inserts or professional journal advertisements. This interest is clearly inferable from the record. It is likewise clear that Dr. Hooper's knowledge of malignant hyperthermia and the extent of his reliance on defendants' warnings and other information are matters that are entirely within his personal knowledge and impossible to verify independently from the record.

Construing the documents supporting and opposing defendants' motion for summary judgment in the light most favorable to the plaintiff, there is clearly sufficient evidence to permit the inference that Dr. Hooper was an interested witness and to raise more than a latent doubt as to his credibility. Accordingly, the test for determining whether testimony is inherently suspect is satisfied. The burden of disproving the testimony or impeaching its credibility was thus never shifted to plaintiffs and they were not required to go beyond their pleadings in order to defeat the motion. *See Mace v. Bryant Construction Co.*, 48 N.C. App. 297, 269 S.E. 2d 191 (1980).

Defendants do not seriously contend either that Dr. Hooper was not interested or that certain key facts in his testimony were not matters of his personal knowledge. Rather, they argue that it is plaintiffs who must prove that Dr. Hooper relied on defendants' promotional literature and package inserts and that it is precisely because these facts are purely subjective and known only to Dr. Hooper that plaintiffs have failed to prove their case. This failure, they argue, entitles them to summary judgment.

Defendants' argument is not persuasive. Stripped to its essentials, this is a negligence action. As indicated above, plaintiffs have made the necessary allegations. On their motion for summary judgment defendants failed to carry their burden of disproving any one of plaintiffs' essential allegations. Therefore, plaintiffs are not required to allege or prove anything else in order to avoid summary judgment. *Mace v. Bryant Construction Co., supra.* Even so, however, we note that plaintiffs did come forward with the affidavit of Dr. James T. O'Donnell, a pharmacologist, that directly rebutted Dr. Hooper's deposition. With regard to the question of whether Dr. Hooper relied on defendants' warnings and promotional literature, we note parenthetically that in jurisdictions following the rule of strict liability in actions like this one, Dr. Hooper's reliance would be irrelevant. *See* Annot., 53 A.L.R. 3d 239 (1973 and Supp. 1984).

It is clear that Dr. Hooper's testimony is inherently suspect and not adequate to defeat plaintiffs' *prima facie* case. Because the deposition was the only evidence tending to show a lack of reliance on defendants' package inserts and promotional literature, the court's entry of summary judgment was error.

b.

[2] Even if Dr. Hooper's deposition testimony were not inherently suspect, he is not the only person whose reliance on defendants' package inserts and promotional literature would affect defendants' liability to plaintiffs. Ms. Evans, a Certified Registered Nurse Anesthetist, was left in charge of Holley's anesthesia after she had helped Dr. Hooper induce it. She noticed his symptoms, but did not recognize them as symptoms of malignant hyperthermia which, according to plaintiffs' supporting affidavits, they clearly were.

Though we have found no case that is directly on point, standard principles of negligence law dictate that Nurse Evans was a foreseeable user of defendants' products to whom defendants' duty to warn applied. *Stegall v. Catawba Oil Co.*, 260 N.C. 459, 133 S.E. 2d 138 (1963); *Ziglar v. DuPont*, 53 N.C. App. 147, 280 S.E. 2d 510, *disc. rev. denied*, 304 N.C. 393, 285 S.E. 2d 838 (1981); *Davis v. Siloo*, 47 N.C. App. 237, 267 S.E. 2d 354, *disc. rev. denied*, 301 N.C. 234, 283 S.E. 2d 131 (1980); Restatement (Second) of Torts, Section 401 (1965). *See generally*, Annot., 76 A.L.R. 2d 9 (1961); 72 C.J.S. Supp. *Products Liability* Section 27 (1975). Defendants argue that Nurse Evans' knowledge of malignant hyperthermia is irrelevant because Mr. Holley's anesthesia was solely Dr. Hooper's responsibility. This argument is unpersuasive in the present context.

Defendants' argument would be appropriate in cases like those they cite where a nurse only administered a medicine or treatment that had been prescribed by a physician but was otherwise not responsible for the patient's care. *E.g., Reyes v. Wyeth Laboratories*, 498 F. 2d 1264, *cert. denied*, 419 U.S. 1096, 95 S.Ct. 687, 42 L.Ed. 2d 688 (5th Cir. 1974); *Byrd v. Marion General Hospital*, 202 N.C. 337, 162 S.E. 738 (1932). *See generally*, Annot., 94 A.L.R. 3d 748 Section 4(a) (1979). In most medical malpractice actions, the same argument would insulate Nurse Evans from personal liability under the doctrine of "captain of the ship" or *respondeat superior. E.g., McCullough v. Bethany Medical Center*, 235 Kans. 732, 683 P. 2d 1258 (1984). *See generally*, 70 C.J.S. *Physicians and Surgeons* Section 54 (1951 and Supp. 1984). Their argument is not appropriate in actions like the present one for products liability.

It appears to be standard practice, however, that the monitoring and maintenance of anesthetized patients is the responsibility of a trained anesthetist, like Nurse Evans, acting under the supervision of an anesthesiologist, like Dr. Hooper. *See* Annot., 31 A.L.R. 3d 1114 (1970 and Supp. 1984) and cases cited therein. Dr. Hooper's deposition indicates that this was the customary practice at Duke. Where this is the case, we believe that the rule announced in *Whitley v. Cubberly*, 24 N.C. App. 204, 210 S.E. 2d 289 (1974), that a pharmaceutical company was required to provide adequate warnings regarding its products to the "medical profession," ought to apply as well to other health care professionals using the products.

In a case that is nearly identical on its facts, even to the point of involving the Anectine and defendant Burroughs Wellcome, the Georgia Court of Appeals held that "drug insert warnings adequate for the use of a *professional trained in the administration of anesthesia*" [emphasis added] were sufficient to discharge the manufacturer's duty to provide adequate warnings. *Singleton v. Airco*, 169 Ga. App. 662, 664-65, 314 S.E. 2d 680, 682 (1984). It is clear from the court's language and the factual context of the case that the *Singleton* court meant for the duty to warn to apply not only to doctors but to trained anesthetists as well, despite *dicta* to the contrary. That approach is well-reasoned and appropriate to the facts before us. Liberally construed, plaintiffs' complaint and supporting affidavits establish the proposition that Nurse Evans might have reacted to Holley's symptoms sooner and more appropriately than she did, possibly avoiding injury, if she had been made aware of the propensity for defendants' products to cause and aggravate malignant hyperthermia and if she had known how to recognize and treat it. Since defendants present no rebuttal evidence on this issue, plaintiffs have clearly raised a question of fact regarding the adequacy of defendants' warnings and promotional information as to Nurse Evans.

c.

[3] We have noted that Dr. Hooper's deposition testimony does not defeat plaintiffs' allegation that the inadequate warnings caused E. L. Holley's injury. We hold that Dr. Hooper's reliance on his own expertise, because at this stage of the proceedings it is not conclusively established, does not constitute an intervening

cause of the injury so as to relieve defendants of liability. *See Hester v. Miller*, 41 N.C. App. 509, 255 S.E. 2d 318, *disc. rev. denied*, 298 N.C. 296, 259 S.E. 2d 913 (1979). Thus, there is a question of fact as to the proximate cause of Holley's injury.

II

[4] Plaintiffs also assign as error the court's striking of their complaint on the apparent grounds that the complaint did not contain a short and plain statement of the facts. We agree that it was error. Rule 8 of our Rules of Civil Procedure, G.S. 1A-1, provides, in pertinent part:

> (a) *Claims for relief.*—A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim or third party claim shall contain
>
> (1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, . . . or occurrences intended to be proved showing that the pleader is entitled to relief.

This rule prescribes the minimum information that a pleading *must* contain; it does not require that a complaint contain *only* a "short and plain statement." As our Supreme Court stated in *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970), " 'There is nothing in the rules to prevent detailed pleading if the pleader deems it desirable.' " *Id.* at 105, 176 S.E. 2d at 167, *quoting* Sizemore, General Scope and Philosophy of the New Rules, 5 Wake Forest Intra. L. Rev. 1, 15 (1969).

Rule 12(f) of our Rules of Civil Procedure permits a party to make motions to strike on the grounds that a pleading contains an "insufficient defense or any redundant, irrelevant, immaterial, impertinent or scandalous matter." Though lengthy, highly detailed and technical, plaintiffs' original complaint contains nothing that warranted striking it in its entirety. Neither defendants' motions nor the trial court's order indicate with particularity the offending portions of the complaint. The complaint was clearly sufficient to put defendants on notice of the claims against them, which is all that G.S. 1A-1, Rule 8(a)(1) requires.

Nevertheless, this error was not prejudicial. The redrafted complaint puts the essential issues before the court. In light of

our reversal of the summary judgment, the next procedural step is a trial which is likely to be protracted and complex. While detailed pleadings may have aided plaintiffs up to this point, they would be of no help now. Accordingly, the trial court's ruling will not be disturbed.

The trial court's order allowing defendants' motions for summary judgment is reversed and the cause remanded for trial.

Reversed and remanded.

Judge PARKER concurs.

Judge ARNOLD dissents.

Judge ARNOLD dissenting.

Plaintiffs claim that the package inserts and promotional literature provided by defendants for their drugs Fluothane and Anectine gave inadequate warnings of the dangers involved in their use, in particular, the risk that malignant hyperthermia might occur in certain individuals. Plaintiffs claim further that the defendants' failure to provide adequate warnings proximately caused injury to Ervin Lee Holley. Plaintiffs have presented affidavits supporting their assertions that the information in the package inserts and promotional literature was inadequate and that, if it had been adequate, it would have notified anesthesia personnel and Mr. Holley's injury would not have occurred.

In response, defendants presented the deposition of Dr. Donald Hooper, the anesthesiologist in charge when Ervin Holley suffered injury. Dr. Hooper testified that he did not rely on package inserts when he administered Fluothane and Anectine to Mr. Holley. Rather, he testified that he had developed an extensive independent knowledge of the symptoms and treatment of malignant hyperthermia as an adverse reaction to Anectine and Fluothane during his medical training as an anesthesiologist and through his reading of the medical literature. Indeed, he testified that he had worked to design malignant hyperthermia kits to be used in the operating rooms at Duke Medical Center. Dr. Hooper's testimony suggests that he was in full knowledge of the

information that an expanded warning on the package inserts and promotional literature might provide.

The evidence presented by plaintiffs does not contradict Dr. Hooper's testimony that he had independent knowledge of the relation between Fluothane and Anectine and malignant hyperthermia and of the treatment to be used when a patient shows signs of developing the syndrome. Given that Dr. Hooper's testimony is undisputed, there is lacking the required element of proximate cause between the defendants' alleged failure to warn and Ervin Holley's injury.

Plaintiffs allege, however, that Dr. Hooper was an interested witness and that his credibility should be determined by the jury. The majority agrees, finding that Dr. Hooper was not only an interested witness, but also one whose testimony was "inherently suspect." If Dr. Hooper was merely an interested witness, then under the rule of *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976), a summary judgment still could be grounded on his testimony if the opposing party failed to produce materials supporting their opposition or to utilize Rule 56(f) or failed to point to specific areas of impeachment or contradiction and summary judgment is otherwise appropriate, *Kidd*, 289 N.C. at 370, 222 S.E. 2d at 410.

I do not agree, however, that Dr. Hooper was an interested witness. My review of the record does not indicate that he had any connection with the defendants or plaintiffs, pecuniary or otherwise, which would have given him an interest in the outcome of this case of significance in a court of law. Plaintiff asserts that Dr. Hooper feared that his professional reputation might be injured if he revealed that he was not aware of the risk of malignant hyperthermia connected with use of Fluothane and Anectine. Plaintiff's assertion is mere speculation.

Moreover, Dr. Hooper's deposition contains no inherent contradictions, or other reason to doubt its truthfulness. Unlike an affidavit, the deposition did contain testimony under cross-examination. Dr. Hooper's deposition is therefore not "inherently suspect," and presents no issue of fact for the jury.

Dr. Hooper's testimony, then, would properly support summary judgment on grounds of lack of proximate causation.

The trial court's order should be affirmed.

In re Hughes

IN THE MATTER OF: VANESSA ANN HUGHES, MINOR CHILD; RESPONDENT: ATHENA ROSS HUGHES

No. 8429DC995

(Filed 4 June 1985)

1. **Parent and Child § 2.2— burns suffered by child—competency of doctor's testimony**

In an action to adjudicate a child as abused and neglected, a doctor's testimony further explaining his description of the size of a burn on the child's buttock and why it was of such irregular shape and of lesser degree than burns on the child's feet and his testimony describing the extreme pain caused by the burns and the normal reaction of a person exposed to such intense heat produced relevant facts and was properly admitted although such testimony did not come within the scope of the questions asked.

2. **Parent and Child § 2.2— burns suffered by child—child abuse and neglect—sufficiency of evidence and findings**

Although respondent mother offered evidence that burns suffered by her child were accidental, testimony by an expert in pediatrics and the treatment of abused children and other evidence supported the trial court's findings that the burns were intentionally inflicted and that respondent inflicted them or allowed them to be inflicted, and these findings supported the trial court's conclusions that the child was an abused and neglected juvenile who did not receive proper care from respondent and that the child should be placed in the custody of the county department of social services.

APPEAL by respondent from *Greenlee, Judge.* Judgment entered 4 May 1984 in District Court, MCDOWELL County. Heard in the Court of Appeals 19 April 1985.

This action is based on a juvenile petition seeking to place legal and physical custody of Vanessa Ann Hughes, minor child of respondent-appellant Athena Ross Hughes, in the McDowell County Department of Social Services and to adjudicate the minor child as an abused and neglected juvenile as defined in G.S. 7A-517(1)(a).

The essential facts are:

On the evening of 2 April 1984 the respondent, Athena Hughes, and her 23 month old daughter, Vanessa Ann Hughes, visited overnight with the respondent's friend Brenda Whitson. In addition to respondent and her daughter Vanessa, at the Whitson home that night were Mrs. Whitson, her son Chad age nine, her

daughter Kelly age 3½-4 years, and a male friend of Mrs. Whitson.

On the morning of 3 April 1984, Byron F. Alexander, a protective services worker with the McDowell County Department of Social Services, was called to the McDowell Hospital. There he found the respondent, Vanessa and Mrs. Whitson. Mr. Alexander learned that Vanessa was being treated for severe "stocking" type burns on both her feet. He questioned the respondent and Mrs. Whitson about how Vanessa had received the burns. The next day, Vanessa was transferred to Memorial Mission Hospital in Asheville and placed under the care of Dr. Fredrick Rector, Jr., a pediatrician. Based on the referral by the McDowell Hospital, a juvenile petition was filed by the McDowell County Department of Social Services on 3 April 1984 and served on the respondent.

At the 4 May 1984 hearing, Dr. Rector was qualified and testified as an expert in the field of pediatrics and treatment of abused children. He stated that Vanessa had received extremely deep second and third degree burns of a "stocking" type, covering her feet and extending approximately six inches up her legs. The burns were uniform in nature and of equal depth, except for the soles of her feet. Vanessa also sustained first and second degree burns in a small area on her buttock. There was no other evidence of any other burns on the child's body. Dr. Rector also testified that some skin grafts had already been performed, more grafts would be required in the future and the severe burns to the feet would leave permanent scars.

In Dr. Rector's opinion the burns were "non-accidental." He gave several reasons for this opinion, some of which the trial court included in its findings of fact: the burns were very neat burns, uniform in nature and of equal depth; there were no splash marks on her body which indicated that Vanessa had not splashed or thrashed about in the water; bath water hot enough to deliver the degree of burns received by Vanessa would be hot enough to leave first degree burns in areas where splash marks occurred, had there been any; the type of burns Vanessa received would be extremely painful and the normal reaction of a child exposed to such hot water would be to escape, churning up the water in the process; the burns were consistent with a child standing flat

footed in a tub filled with approximately six inches of hot water, without enough movement by the child to create splash marks.

Dr. Rector also testified that he had numerous experiences with children who received burns, both accidental and non-accidental. In his opinion, Vanessa's behavior and reaction to hospital personnel during the first ten days following her injuries were consistent with a child who had received intentional burns, in that the child "appeared to withdraw into a shell."

The respondent's evidence tended to show that on the night of 2 April 1984 she went to bed at approximately 12:00 a.m. after consuming two beers. She was not intoxicated. She slept in a king size bed with Vanessa in Brenda Whitson's bedroom. Mrs. Whitson came to bed later and the three individuals occupied the same bed for the night. The respondent testified that she did not awaken until the next morning when Mrs. Whitson woke her up and showed her the burns on Vanessa's feet. The respondent testified that she never heard water running or any screams from Vanessa. She also testified that Vanessa is capable of climbing into a bathtub by herself and has done so frequently in the past. The respondent testified that Vanessa cries softly and she has never heard Vanessa scream, even when she is hurt.

Mrs. Brenda Whitson testified that on the night of 2 April 1984 she slept in the same bed with the respondent and Vanessa. Frankie Smith, her male house guest, slept on the couch in the living room. When she woke up the morning of 3 April she helped her son Chad get ready for school. Vanessa, Kelly (Mrs. Whitson's daughter) and the respondent were still asleep. After Chad left for school, Mrs. Whitson laid down on the couch, half asleep. She next heard water running and Vanessa crying. Mrs. Whitson testified that Vanessa's cry was not a hurting cry or a scream and that it came from the bathroom. Minutes later, Mrs. Whitson went down the hall to the bathroom. She saw washcloths in the tub, a towel on the back of the toilet and approximately six inches of water in the bathtub. The water was hot. Kelly and Vanessa were in Kelly's bedroom. Vanessa was crying. Mrs. Whitson woke the respondent up and together they took Vanessa to the hospital.

Mrs. Whitson's bedroom is adjacent to the bathroom. A wall of standard thickness separates Mrs. Whitson's bedroom from the

bathroom. The distance from the bed in which the respondent slept and the bathtub is approximately seven to ten feet.

On 6 April 1984, a social worker and a deputy sheriff went to the Whitson home and ran hot water into the bathtub to a depth of 6 inches. It took approximately six and a half minutes to reach that level. Upon reaching six inches depth, the temperature of the water was 136 degrees, cooling after five minutes to approximately 134 degrees. The tub was measured at fourteen-and-a-half inches tall and four-and-a-half inches thick. The noise of the water running into the bathtub could be heard plainly from Mrs. Whitson's bedroom through the bathroom wall.

Stephen R. Little, for respondent-appellant.

Goldsmith and Goldsmith, by James W. Goldsmith, for petitioner-appellee.

EAGLES, Judge.

I

[1] The respondent first assigns as error the trial judge's denial of respondent's motions to strike certain testimony of Dr. Rector. Respondent contends that on two occasions Dr. Rector's testimony was not responsive to the questions asked. We disagree.

On re-cross examination by respondent's attorney Dr. Rector was asked to describe the size of the burn on the child's buttock. Dr. Rector described the size as "irregular" and "easily covered by a napkin." He then testified that the type of burn he was referring to "could conceivably be consistent with somebody being lowered into the water and lifting up their feet to avoid thermal injury and the buttock being burned and then the response to the buttock being burned the feet would immediately extend instead."

The respondent contends that the first part of Dr. Rector's response to the question was appropriately responsive but that the additional testimony went beyond the scope of the question asked into matters not solicited by the question and contained testimony of pure conjecture and speculation.

Dr. Rector was also asked to give his opinion, based upon his observation of similar injuries, as to how long a splash mark

would remain on someone's leg or arm. Dr. Rector responded that he felt that water hot enough to deliver the depth of burn received by Vanessa would also leave first degree burns on the skin superficially where splash marks occurred. Dr. Rector then stated:

> I think it's very important to understand that this is a big time burn. This is incredible pain, this is nothing that this child is going to rationally think about. She's not going to get in this tub by whatever mechanism is postulated and say, hey, this is hot, I think I'm going to get out. The moment her foot hits that hot water—bam—every reflex in her body is to scramble out of that bathtub . . . as fast as humanly possible and therein lies why I feel the way I do. This . . . is a primitive reflex. A reflex that even new born babies have. It takes no intelligence or rational thought to remove yourself from hot water or hot anything. You touch a hot pipe, you recoil back, fast. This isn't something, well, how am I going to get out, what is the best mechanism to get out. She's not going to think about that, she's just going to scramble for everything she's worth. And while she's being burned she's going to churn the water something fierce.

Again, the respondent contends that Dr. Rector's testimony went beyond answering the question and that his response describing the reflex action was made without foundation and constituted broad generalizations.

> Whether an answer is responsive to a question is not the ultimate test on a motion to strike. If an unresponsive answer produces irrelevant facts, they may and should be stricken. . . . However, if the answers bring forth relevant facts, they are nonetheless admissible [although] they are not specifically asked for or go beyond the scope of the question.

State v. Ferguson, 280 N.C. 95, 98, 185 S.E. 2d 119, 122 (1971). If an answer states relevant and admissible evidence, it need not be stricken merely because it was not responsive to the question. *State v. Morgan*, 299 N.C. 191, 206, 261 S.E. 2d 827, 836, *cert. denied*, 446 U.S. 986 (1980).

The description of the manner in which the burns on the child's buttock could have been received was a relevant subject of

inquiry at the hearing. The answer given by Dr. Rector was in further explanation of his description of the size of the burn and why it was of such irregular shape and of lesser degree. Dr. Rector's description of the extreme pain caused by the burns and the normal reaction of a person exposed to such intense heat were also relevant subjects of inquiry at the hearing. These responses, while not within the scope of the questions asked, produced relevant facts and were within the expertise of the witness.

Accordingly, we hold that the trial judge did not err in denying respondent's motions to strike.

II

[2] The respondent next assigns as error the court's denial of respondent's motions to dismiss the petition made at the close of the petitioner's evidence and at the close of all the evidence. We find no error.

In a non-jury trial when a motion to dismiss pursuant to G.S. 1A-1, Rule 41(b) is made, the judge becomes both judge and jury. He must consider and weigh all competent evidence before him. He passes on the credibility of the witnesses and determines the weight to be accorded their testimony. *Dealer Specialties, Inc. v. Housing Services*, 305 N.C. 633, 640, 291 S.E. 2d 137, 141 (1982). He evaluates the evidence "without limitations as to the inferences which the court must indulge in favor of the plaintiff's evidence on a similar motion for a directed verdict in a jury case." *Bryant v. Kelly*, 10 N.C. App. 208, 213, 178 S.E. 2d 113, 116 (1970), *rev'd on other grounds*, 279 N.C. 123, 181 S.E. 2d 438 (1971).

We have examined the record and find that the trial court was correct and that petitioner's evidence was sufficient to overcome respondent's motion to dismiss at the close of the petitioner's evidence.

In a bench trial, there is little point to a motion to dismiss at the close of all the evidence, since at that point in trial the judge will decide the facts in any event. When the judge decides the case, either on a motion for dismissal or at the close of all the evidence, he must make findings of fact and separate conclusions of law. These findings aid the appellate courts in understanding the trial court's basis for its decision. *Helms v. Rea*, 282 N.C. 610, 619, 194 S.E. 2d 1, 7 (1973). Where the trial court as trier of fact

has found the facts specifically, these findings are conclusive on appeal if supported by competent evidence, even though there is evidence which could support a contrary finding. *Bryant v. Kelly, supra.*

The respondent presented evidence through testimony of both the respondent and Brenda Whitson that they were the only two adults in the house when the injuries occurred. Both witnesses maintained that Vanessa's injuries occurred while the respondent was asleep and while the children were playing together in the bathroom.

The trial judge, acting as trier of fact, weighing the competent evidence and passing on the credibility of the witnesses, found that Dr. Rector's testimony was credible and accepted his testimony in full. The trial judge also found that the injuries were intentionally inflicted and that the respondent inflicted them or allowed them to be inflicted on her child. Despite the respondent's evidence that the injuries to Vanessa were accidental, the record contains plenary evidence to support the trial court's findings. Since the trial court's findings are clearly supported by the evidence, they are binding on appeal.

III

The respondent next assigns as error the denominating of certain points as findings of fact which the respondent contends are conclusions of law not supported by proper findings of fact or clear, cogent and convincing evidence. We find no error.

The respondent assigns as error the following findings of fact in the trial judge's order:

> Finding 8(b). There were no splash marks on the child's body, indicating that there had been no splashing or thrashing in the water by the child when the burns were received.
>
> Finding 8(c). Bath water hot enough to deliver the depth of burns observed upon Vanessa Ann Hughes would be hot enough to leave a first degree burn in areas where splash marks occurred, had there been any.
>
> Finding 8(d). Second and third degree burns of the type received by Vanessa Ann Hughes would be extremely painful, and the normal reaction of a child would be try to remove

itself from the hot water, churning up the water in the process, and also to scream loudly.

Finding 8(g). Dr. Rector has had numerous experiences in caring for children who have received burns through both accidental and non-accidental means, and the reactions of the child, Vanessa Ann Hughes, to hospital personnel for the first ten to eleven days following her injuries were consistent with the behavior of a child who has received intentional burns, in that said child appeared to withdraw into a "shell."

Finding 8(h). The history given to Dr. Rector of how the child received the burns in an accidental manner was not consistent with the injuries observed as stated above.

Finding 16. The testimony of Athena Hughes and Brenda Whitson to the effect that the burns sustained by Vanessa Hughes occurred accidentally was not credible. By their "stocking" nature, the injuries could not reasonably have been caused accidentally either by the child herself, or with the assistance of Kelly Whitson, a child of similar height and weight. Further, it is not credible or believable that Vanessa Ann Hughes, after receiving burns of such a serious nature, would not have cried or screamed so loudly that her mother, the respondent, would be awakened in her adjoining room by either the screams or the loudly running water. Moreover, had these injuries been inflicted upon Vanessa Ann Hughes by Brenda Whitson, respondent would have known such injuries were being inflicted due to the screams of the child and Mrs. Hughes' close proximity to the place where the injuries were received; yet respondent denied any awareness of the injuries at the time they were inflicted.

Finding 17. The injuries received by Vanessa Ann Hughes on April 3, 1984, were intentionally inflicted upon her, and said injuries caused a substantial risk of disfigurement, impairment of physical health, and loss of function of a bodily organ, her skin, necessitating skin grafts.

Finding 18. Athena Hughes inflicted or allowed to be inflicted the burns received by Vanessa Ann Hughes on April 3, 1984.

On appeal when a trial court's order is reviewed as not being supported by the evidence, we look at the evidence to see if there

is clear, cogent and convincing competent evidence to support the findings. *In Re Allen*, 58 N.C. App. 322, 325, 293 S.E. 2d 607, 609 (1982). If there is competent evidence, the findings of the trial court are binding on appeal. *In Re Smith*, 56 N.C. App. 142, 149, 287 S.E. 2d 440, 444, *cert. denied*, 306 N.C. 385, 294 S.E. 2d 212 (1982). They are conclusive on appeal even though the evidence might support a finding to the contrary. *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E. 2d 29, 33 (1968). The trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, he alone determines which inferences to draw and which to reject. *Knutton v. Cofield, supra.*

We have reviewed the record and we find that these findings are supported by ample clear, cogent and convincing evidence in the form of testimony from DSS social workers and the expert testimony of Dr. Rector. The evidence did raise conflicting inferences as to the cause of Vanessa's injuries. The trial judge weighed the conflicting inferences and determined that Vanessa's injuries were the result of non-accidental means and that the injuries were "intentionally inflicted upon her." By so finding, the judge rejected opposing inferences that the burns were received accidentally. Since the evidence supports the findings and the findings support the judgment, they are conclusive on appeal.

IV

The respondent's remaining two assignments of error were directed to the trial court's conclusions of law and the entry of the order. We find no error.

In the case at hand, the trial court based its order placing Vanessa Ann Hughes in the legal and physical custody of the McDowell County Department of Social Services on its conclusion, as a matter of law, that (1) on or about 3 April 1984 Vanessa Hughes was an abused juvenile as defined by G.S. 7A-517(1)(a); and (2) on or about 3 April 1984 Vanessa Hughes was a neglected juvenile who did not receive proper care from her parent, the respondent, Athena Hughes.

If the conclusion of law is supported by findings of fact based on clear, cogent and convincing evidence, the order appealed from should be affirmed. A "conclusion of law" is the court's statement

of the law which is determinative of the matter at issue between the parties. The conclusions of law necessary to be stated are the conclusions which under the facts found, are required by the law and from which the judgment is to result. *Montgomery v. Montgomery*, 32 N.C. App. 154, 157, 231 S.E. 2d 26, 29 (1977). Previously, we have discussed the findings of fact established by the record and have found that they are supported by clear, cogent and convincing evidence.

The respondent contends that removing Vanessa from the constant love and devotion of her mother is not in Vanessa's best interest. The respondent cites numerous occasions demonstrating that the respondent provided committed love and devotion for her daughter. Correctly, the respondent argues that the best interests of the child must be the "polar star" to guide the courts.

We note, however, "[t]he fact that a parent does provide love, affection and concern, although it may be relevant, should not be determinative, in that the court could still find the child to be neglected within the meaning of our neglect and termination statutes. . . . Therefore, the fact that the parent loves or is concerned about his child will not necessarily prevent the court from making a determination that the child is neglected." *In Re Montgomery*, 311 N.C. 101, 109, 316 S.E. 2d 246, 251-52 (1984).

For the reasons herein stated, the judgment of the trial court is

Affirmed.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. GARY HANSFORD MILLER AND ALAN RAY HATTAWAY

No. 8428SC862

(Filed 4 June 1985)

1. Criminal Law § 138— consolidated offenses—sentence exceeding total presumptive sentences—aggravating and mitigating factors not found separately

Resentencing was necessary where kidnapping offenses were consolidated with murder offenses for purposes of judgment, aggravating and mitigating

factors were not found for the kidnapping offenses, and the trial judge imposed prison terms exceeding the total of the presumptive terms for each consolidated felony. G.S. 15A-1340.4.

2. Criminal Law § 138— second-degree murder—heinous, atrocious, cruel—error

The trial judge erred in sentencing defendant for two counts of second-degree murder by finding that the offense was especially heinous, atrocious or cruel where the evidence tended to show that one victim was blindfolded and told that he was going to walk through a fence and down an embankment, was pushed through a fence and into a mine shaft, and was pulled up and pushed back into the mine shaft after his foot caught on a root; the only evidence presented as to the facts surrounding the other victim's death was that defendant Hattaway had said that "he had to fight the son-of-a-bitch he put in the mine a couple of weeks ago"; and the autopsy reports stated that both victims were alive at the time of impact and took one and a half or two breaths before dying. The State failed to show by the preponderance of the evidence excessive brutality, physical pain, or psychological suffering not normally present in a second-degree murder.

Judge WEBB dissenting.

Judge BECTON concurring.

APPEAL by defendants from *Sitton, Judge*. Judgments entered 10 February 1984 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 12 March 1985.

Defendants Miller and Hattaway were indicted for the first degree kidnapping of Thomas Forrester, first degree kidnapping of Betty Darlene Callahan, first degree murder of Forrester, first degree kidnapping of Lonnie Marshall Gamboa, and first degree murder of Gamboa. Defendants each pled guilty to three counts of first degree kidnapping and two counts of second degree murder.

At the sentencing hearing Asheville Police Officer Ross Robinson testified for the State. On 12 December 1981 defendants believed that Forrester had stolen defendant Hattaway's motorcycle. They went to Jay Fagel's residence, threatened Fagel with a gun, and asked him where they could find Forrester and the motorcycle. Fagel, his nine year old son, the defendants and Danny Roberts got into Roberts' van and went to the Intown Motel. In Forrester's room, defendants questioned Forrester about the motorcycle and money he owed defendant Hattaway on a drug deal. Defendant Miller hit Forrester on the side of the head with a gun. Defendants ransacked the room and strip-searched Forrester and Callahan. Defendants put the motorcycle into the van,

and everyone got into the van. Defendant Miller drove the van to the Park Drive-In where Forrester, Callahan and defendants got into a car and drove to Paul Bare's residence. Callahan and Forrester were blindfolded and put in a pickup truck with defendant Miller and another man. While Callahan and defendant Miller stayed in the truck, Forrester was pushed down a mine shaft. Callahan was subsequently taken to Chicago, Illinois, where she was forced to work as a prostitute for a motorcycle gang.

On 23 December 1981 Jo Jo Vines and defendants met Gamboa and discussed a debt Gamboa owed defendant Miller. Vines and defendant Hattaway taped Gamboa's arms together, put him in the trunk of a car, and, with defendant Miller following in another car, they drove to Bare's residence and handcuffed Gamboa to a tree. Several hours later, defendants, Vines and Bare blindfolded Gamboa and took him to Ore Knob Mine. They told Gamboa that he was going to have to walk down an embankment. While defendant Miller and Bare held guns on Vines, Vines pushed Gamboa down a mine shaft.

The bodies of Gamboa and Forrester were recovered a month later. The autopsies revealed that they were alive at the time of impact and lived long enough to take one and a half or two breaths.

A statement by defendant Miller, taken by Sheriff Waddell in Ashe County, was read into evidence. Defendant Miller stated that Forrester was kidnapped and murdered because of money he owed a man from Tennessee, who was connected with the Dixie Mafia and who was present during the kidnapping and murder.

Both defendants presented evidence through several character witnesses as to their good reputation in the communities in which they lived.

The trial judge made the following findings in aggravation:

Defendant Miller (second degree murder of Forrester):

> 10. The offense was especially heinous, atrocious or cruel. The Court finds that the Defendant, acting in concert with another, precipitated and intended the killing of Thomas Forrester and aided and comprehended Thomas Forrester's death by means of being thrown or pushed while alive into a

mineshaft some 250 ft. deep and the offense was especially heinous, atrocious or cruel.

Additional written findings of factors in aggravation: The Court finds that the Defendant premeditated and deliberated the death of Tommy Forrester.

Defendant Miller (second degree murder of Gamboa):

1. The defendant induced others to participate in the commission of the offense.

10. The offense was especially heinous, atrocious or cruel. The Court finds that the Defendant, acting in concert with another, precipitated and intended the killing of Lonnie Gamboa and aided and comprehended Lonnie Gamboa's death by means of being thrown or pushed while alive into a mineshaft some 250 feet deep and the offense was especially heinous, atrocious or cruel.

13. The defendant was armed with a deadly weapon at the time of the crime.

19. The defendant committed the offense while on pretrial release on another felony charge.

26. The defendant has a prior conviction for criminal offenses punishable by more than 60 days' confinement.

Additional written findings of factors in aggravation: The Court finds that the Defendant premeditated and deliberated the death of Lonnie Gamboa.

Defendant Hattaway (second degree murder of Forrester):

10. The offense was especially heinous, atrocious or cruel. The Court finds that the Defendant, acting in concert with another, precipitated and intended the killing of Thomas Forrester and aided and comprehended Thomas Forrester's death by means of being thrown or pushed while alive into a mineshaft some 250 ft. deep and the offense was especially heinous, atrocious or cruel.

Additional written findings of factors in aggravation: The Court finds that the Defendant premeditated and deliberated the death of Tommy Forrester.

Defendant Hattaway (second degree murder of Gamboa):

10. The offense was especially heinous, atrocious or cruel. The Court finds that the Defendant, acting in concert with another, precipitated and intended the killing of Lonnie Gamboa and aided and comprehended Lonnie Gamboa's death by means of being thrown or pushed while alive into a mineshaft some 250 feet deep and the offense was especially heinous, atrocious or cruel.

Additional written findings of factors in aggravation: The Court finds that the Defendant premeditated and deliberated the death of Lonnie Gamboa.

The trial judge made numerous findings in mitigation, for both defendants, concluded that the factors in aggravation outweighed the factors in mitigation, and imposed two consecutive sentences of forty-five years for each defendant. Defendants appealed.

Attorney General Edmisten by Assistant Attorney General Grayson G. Kelley for the State.

Public Defender J. Robert Hufstader for defendant-appellant Miller.

J. Stephen Gray for defendant-appellant Hattaway.

PARKER, Judge.

[1] At the outset, we observe that the trial judge failed to make findings in aggravation and mitigation for the kidnapping offenses, which were consolidated with the murder offenses for purposes of judgment. Since the trial judge imposed prison terms which exceeded the total of the presumptive terms of each consolidated felony, the statutory aggravating and mitigating factors must be considered for each offense. G.S. 15A-1340.4. In *State v. Ahearn*, 307 N.C. 584, 598, 300 S.E. 2d 689, 698 (1983), our Supreme Court held that:

> [I]n every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately, and separately supported by findings

tailored to the individual offense and applicable only to that offense.

On resentencing, which is necessary on account of the trial judge's failure to find aggravating and mitigating factors for the kidnapping offenses, and for the error discussed below, the trial judge must follow the guidelines set forth in *Ahearn* and G.S. 15A-1340.4.

[2] Both defendants argue that the trial court erred in finding, as a factor in aggravation, that the offense was especially heinous, atrocious or cruel. The trial judge found, for both defendants, that "the Defendant, acting in concert with another, precipitated and intended the killing of Lonnie Gamboa and aided and comprehended Lonnie Gamboa's death by means of being thrown or pushed while alive into a mineshaft some 250 feet deep and the offense was especially heinous, atrocious or cruel." The same finding was made as to both defendants for the killing of Forrester.

In *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E. 2d 783, 786 (1983), our Supreme Court held that in determining whether an offense was especially heinous, atrocious or cruel "the focus should be on whether the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense*." In *Blackwelder* there was evidence of numerous bruises and cuts on the victim's body, and the victim had been shot twice. The first serious wound inflicted was a shotgun wound to the victim's back, the second shotgun wound was a close range shot to the victim's head. Bloodstains throughout the victim's trailer indicated that the victim was wounded and bleeding for some time before the fatal second shot. The close range shotgun wound blew the victim's head open; the court described the crime scene as "a ghoulish, bloody nightmare." The court observed that it was not inappropriate to measure the brutality of the crime by the extent of the physical mutilation of the victim's body. The excessive brutality of the murder, and the fact that the victim suffered for some time after the first shot, led the court to hold that the trial judge properly found as an aggravating factor that the murder was especially heinous, atrocious and cruel. For other recent murder cases where this aggravating factor has been held properly found, *see State v. Payne*, 311 N.C. 291, 316 S.E. 2d 64 (1984) (victim, who

was sixty-eight years old, was severely beaten and suffered extreme pain due to his extensive injuries for two and one half months before his death); and *State v. Watson*, 311 N.C. 252, 316 S.E. 2d 293 (1984) (victim, defendant's wife, was shot ten times and, before she died, she managed to move from room to room in the house leaving a trail of blood behind her).

In the instant case we find that the State failed to show by the preponderance of the evidence excessive brutality, physical pain or psychological suffering not normally present in a second degree murder. The State's evidence tended to show that Gamboa was blindfolded and told he was going to walk through a fence and down an embankment. Vines pushed Gamboa through the fence and into the mine shaft. Gamboa's foot caught on a root, Vines pulled Gamboa back up, and then pushed him back into the mine shaft. According to Asheville Police Officer Ross Robinson, the autopsy report stated that both Gamboa and Forrester were alive at time of impact and took one and a half or two breaths before dying. The only evidence presented as to the facts surrounding Forrester's death was Robinson's testimony that defendant Hattaway told Vines, after Vines pushed Gamboa into the mine shaft, that "he had to fight the son-of-a-bitch he put in the mine a couple of weeks ago." Presumably defendant Hattaway was referring to Forrester's death. This evidence fails to reach the standard set forth in *Blackwelder*, and the trial judge's finding that the murders were especially heinous, atrocious or cruel was improper.

Vacated and remanded for resentencing.

Judge WEBB dissents.

Judge BECTON concurs in the result.

Judge WEBB dissenting.

I dissent. As to each defendant the Court found aggravating and mitigating factors as to each murder charge. Each murder charge was then consolidated for sentencing with either one or two of the kidnapping charges to which the defendant had pled guilty. The sentence imposed in each case was within the statutory maximum for second degree murder. I believe the findings in

aggravation and mitigation were sufficiently tailored to the murder pleas pursuant to *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983) and there was no error as to the form of the findings.

I also believe the evidence was sufficient to find in each murder case that the offense was especially heinous, atrocious, or cruel. In each case the defendants abducted the victim at gunpoint, at which time they blindfolded and bound him. They then drove him to the scene of the murders. In the case of Gamboa he was tied to a tree in midwinter while the victims discussed his fate. Each victim was forced to walk into a mine to the edge of a mineshaft. Each was then pushed into the mineshaft and fell to his death. During the period between his abductions and death each victim was left to anticipate the time, place and manner of his death. I have no trouble concluding from this that such psychological torture is not normally present in a second degree murder case. *See State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983).

I vote to affirm.

Judge BECTON concurring.

I have no hesitancy in remanding these cases because of the trial court's failure to list separately the aggravating and mitigating factors for each offense as required by *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). And although I am loathe to remand on the "especially heinous, atrocious or cruel" issue, I nevertheless do so based on my analysis of the relevant case law. *See State v. Ahearn; State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979); *State v. Thompson*, 66 N.C. App. 679, 312 S.E. 2d 212 (1984); and *State v. Medlin*, 62 N.C. App. 251, 302 S.E. 2d 483 (1983). These cases suggest that the Legislature, by using the word "especially," indicated that there must be evidence that the brutality involved exceeded that normally present in other murders or assaults.

Were we to hold otherwise, recognizing, of course, that every murder is arguably heinous, atrocious or cruel, trial courts could, by way of example, automatically apply the "especially heinous, atrocious or cruel" aggravating factor to every defendant who strangles or drowns a struggling victim. Similar results would befall defendants who threaten their victims, or discuss the vic-

tim's fate, before killing them. Whether such a result would be laudatory is not before us. The Legislature has certainly not so decreed.

The facts in *State v. Medlin* and *State v. Thompson* are particularly compelling. In *Medlin*, the defendant, after arguing with his girlfriend, the victim, who had been driven to her mother's home by another man,

> dragged the victim from the house, and into the yard, trying to convince her to leave with him. She resisted and defendant hit her in the eye, stated to her, 'If I can't have you, ain't nobody going to have you,' and shot her five times with a .22 caliber pistol. The victim then heard defendant tell her daughter, 'I have killed your mother.'
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> As a result of the shooting, [the victim] sustained bullet wounds to the head, the ear, the neck, the chest, and the hand. . . . She was hospitalized for ten weeks and thought she might need future operations. At the time of the hearing, [the victim's] face remained partially paralyzed, she could not hear out of one ear. . . .

62 N.C. App. at 251-2, 302 S.E. 2d at 484. This Court remanded the case because it was not "persuaded that the evidence in this case [reflected] the requirement of 'excessive brutality,' beyond that normally present in any assault with a deadly weapon with intent to kill inflicting serious injury. . . ." *Id.* at 254, 302 S.E. 2d at 485.

In *State v. Thompson*, this Court, specifically distinguishing *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983), remanded the case for resentencing even though the defendant twice told the victim prior to shooting him in the back that he, the defendant, intended to kill the victim.

Consistent with what I view to be the Legislative intent in drafting the "especially heinous, atrocious and cruel" language, I believe the trial court erred in finding, as a factor in aggravation, that the offenses were especially heinous, atrocious or cruel.

LINDA CADE WATTS, KIM WATTS, AND GEORGE WATTS v. CUMBERLAND COUNTY HOSPITAL SYSTEM, INC.; DR. JAMES ASKINS; DR. RALPH MORESS; NORTH CAROLINA BAPTIST HOSPITALS, INC.; DR. VICTOR KERANEN; DR. W. C. MILLER; DR. MENNO PENNICK; DR. EBAN ALEXANDER, JR.; DR. JAMES TOOLE; AND DAN HALL

No. 8412SC693

(Filed 4 June 1985)

Fraud § 12; Physicians, Surgeons and Allied Professions § 16.1 — health care providers — fraudulent concealment — summary judgment

In an action against seven doctors for fraudulent concealment of the true nature and extent of plaintiff's injuries with the intention of preventing her from discovering that fractures sustained in her neck and back in a 1974 automobile accident had been overlooked at the initial examination, plaintiff's forecast of evidence was insufficient to establish triable issues of fraud against five doctors where the evidence was uncontroverted that, at the time such doctors were involved with the care of plaintiff, no doctor had rendered an opinion or diagnosis that plaintiff had sustained fractures of her neck or spine in 1974, since such doctors could not have fraudulently concealed information from plaintiff that was unknown to them. However, plaintiff's forecast of evidence was sufficient to establish material issues of fact as to whether two other doctors knew of plaintiff's true condition after another doctor informed plaintiff that fractures showed up on x-rays taken at the time of her accident and whether they subsequently made false representations or concealments intended to conceal from plaintiff their knowledge of her true condition.

Judge WELLS dissenting in part and concurring in part.

APPEAL by plaintiff, Linda Watts, from *Johnson, Judge.* Order entered 14 October 1983 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 13 February 1985.

Hedahl & Radtke, by Joan E. Hedahl, for plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert M. Clay, Alene M. Mercer, David D. Ward, and H. Lee Evans, Jr., for defendant appellees Askins, Moress, North Carolina Baptist Hospitals, Inc., Keranen, Pennick and Alexander.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James D. Blount, Jr. and Jodee Sparkman King, for defendant appellees Miller and Toole.

BECTON, Judge.

I

This appeal is the companion case to No. 8412SC692, filed today. Both appeals arise from an action in which plaintiffs seek to recover damages from defendant health care providers for malpractice and fraudulent concealment which allegedly occurred in the course of defendants' treatment of plaintiff, Linda Watts, following a 7 June 1974 automobile accident in which she was injured. All defendants except Cumberland County Hospital System, Inc., moved for, and were granted, summary judgment. The plaintiffs appealed. However, as noted in the companion case, plaintiffs George Watts and Kim Watts have abandoned their appeals.

The appellee in the companion appeal is defendant Dan Hall, a marital and family therapist, who counseled Linda Watts subsequent to her accident. The appellees in the instant appeal are defendant physicians and defendant North Carolina Baptist Hospitals. In the companion case, one of plaintiff's several contentions was that the trial court erred in granting summary judgment for Hall on plaintiff's fraudulent concealment claim. This Court found error, and reversed.

The single question presented on the instant appeal is whether summary judgment was properly granted on the fraudulent concealment claim against the other appellees. For the reasons stated below, we affirm summary judgment as to North Carolina Baptist Hospitals, Miller, Askins, Moress, Keranen and Alexander; and as to Pennick and Toole, we reverse.

II

We address separately the appeal taken against defendant North Carolina Baptist Hospitals. Plaintiff's complaint sets forth a claim against Baptist Hospitals based on medical negligence only. Summary judgment was allowed on that ground, and also on the ground that the statute of limitations had expired. No assignment of error pertains to Baptist Hospitals; plaintiff's brief is devoted exclusively to the issue of fraudulent concealment. As appellate review is confined to questions raised by the assignments of error and discussed in a party's brief, North Carolina Rules of Appellate Procedure, Rules 10(a); 28(a), the issue of whether judg-

ment was correctly entered against Baptist Hospitals was not properly preserved for appellate review. We therefore affirm as to Baptist Hospitals.

III

We now address the propriety of summarily adjudicating this action as to each of the defendant doctors. First, we examine the Complaint for the purpose of summarizing the factual allegations against each physician upon which both the negligence and fraudulent concealment claims are founded.

Dr. Miller: Plaintiff alleges that she was x-rayed on the date of the accident by Dr. Miller, a radiologist at Cumberland County Hospital System, Inc.

Dr. Keranen: Plaintiff alleges that Dr. Keranen was the neurosurgeon on call on 4 July 1974, the date on which she went to the emergency room of Cape Fear Valley Hospital, that she was admitted the following day, that Dr. Keranen was, to her knowledge, her treating physician during this 13-day hospitalization, and that during her stay, Dr. Keranen transferred her case to Dr. Moress, a psychiatrist, without her knowledge.

Dr. Moress: Plaintiff alleges that she spoke to Dr. Moress twice for a total of five minutes around the time of her 18 July 1974 discharge from Cape Fear Valley Hospital; she alleges she was informed that Dr. Moress was the physician who discharged her.

Dr. Askins: Plaintiff alleges that when she was released from the Cumberland County Hospital System, Inc. outpatient services on 7 June 1974, she was told to contact Askins, an orthopedic surgeon, if she continued to have difficulty, that she attempted to contact him before her July 1974 hospitalization, but was informed that he was out of town, that she in fact saw Dr. Askins "several times" after 18 July 1974, and that she "was treated by him for a sprain and was given pain medication."

Dr. Alexander: Plaintiff alleges that she was treated by Dr. Alexander, a neurosurgeon, at North Carolina Baptist Hospitals, Inc., in April 1976, when she "sought further diagnosis and treatment," and that at this time a myelogram [an x-ray of the spinal cord] and EMG of her hand and arm were taken.

Dr. Pennick: Plaintiff alleges that she was referred to Dr. Pennick, a neurosurgeon, in June 1977, and that he admitted her to Cape Fear Valley Hospital; that during her two-week hospitalization, he performed carpal tunnel surgery on her hand, and also performed and/or ordered three discograms [an x-ray of an intervertebral disc], one myelogram, and x-rays of her back and neck; that she continued to see Dr. Pennick during the majority of 1979; that the only prescribed treatment was pain medication; that she took reports made by Dr. C. Gene Coin, indicating that she was suffering from a broken neck and spine, to Dr. Pennick in 1979; that she contacted Dr. Pennick in June 1981, was unsuccessful in her attempts to see him, and finally received a letter from him dated 29 July 1981, detailing her medical history. Plaintiff also alleges that in June 1981, Dan Hall spoke to Dr. Pennick, and that they exchanged letters, discussed her affairs, and that Dr. Pennick disclosed plaintiff's medical records to Dan Hall.

Dr. Toole: Plaintiff alleges that she was admitted to Baptist Hospital by Dr. Toole, a neurologist, on 27 May 1981; that x-rays and an EMG were taken, a myelogram was suggested by Dr. Toole and refused by plaintiff; that Dr. Toole suggested surgery but later reconsidered. Plaintiff alleges that on 5 June 1981, Dr. Toole informed her that, among other ailments, she had arachnoiditis [thickening and adhesions in the brain or spinal cord, resulting from other disease processes, or trauma], that the arachnoiditis was causing deterioration of her lower extremities, that this was the "first detailed diagnosis of her condition," but that Dr. Toole "did not disclose the full extent of her injuries in that he did not detail the lumbar break." She also alleges later in her complaint that Dr. Toole disclosed her medical records to Dan Hall.

Following from these specific factual allegations are conclusory allegations of negligence and fraudulent concealment. The allegations of negligence revolve around the failure of defendant doctors to observe, diagnose, and treat plaintiff's injuries; the allegations of fraudulent concealment are that the medical defendants knew or should have known of plaintiff's true condition, that they made false representations of material facts and opinions concerning the nature and extent of her injuries, with the intent of preventing plaintiff from discovering that the fracture had been overlooked at the initial examination, which misrepresenta-

tions were directly relied upon by plaintiff, with the result that she never received proper treatment and developed arachnoiditis and attendant complications.

The sole issue for our resolution is whether summary judgment was properly granted in favor of these doctors on the fraudulent concealment claim. Summary judgment is granted only when the movant meets its burden of showing that there is no genuine issue as to any material fact and it is entitled to judgment as a matter of law. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). When the pleadings or proof discloses that no cause of action exists, a summary judgment may be granted. *Nat Harrison Assoc., Inc. v. Ports Authority*, 280 N.C. 251, 185 S.E. 2d 793, *reh'g denied*, 281 N.C. 317 (1972). *Accord Rockingham Square Shopping Center, Inc. v. Town of Madison*, 45 N.C. App. 249, 262 S.E. 2d 705 (1980) (when plaintiff's complaint disclosed no cause of action, summary judgment for defendant proper).

As noted in the companion case, the essential elements of actual fraud are: "(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party," *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E. 2d 674, 677 (1981), and, where there is a duty to speak, the concealment of a material fact is equivalent to a fraudulent misrepresentation. *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 225 S.E. 2d 557 (1976). Furthermore, North Carolina Rules of Civil Procedure 9(b) requires that fraud be pleaded with particularity, and it is well-settled that in order to state a cause of action for fraud, facts must be alleged which, if true, would constitute fraud, it not being sufficient to allege the elements of fraud in general terms. *Eastern Steel Products Corp. v. Chestnutt*, 252 N.C. 269, 113 S.E. 2d 587 (1960).

The core of plaintiff's fraudulent concealment claim is that defendant doctors made false representations that were intended to prevent plaintiff from discovering that the fracture had been overlooked at the initial examination, and which ultimately concealed from plaintiff the true nature and extent of her injuries. With the exception of Drs. Pennick and Toole, the factual allegations against each of the defendant doctors, which we summarized in their entirety, reveal that plaintiff has utterly failed to allege

facts which, if proven, would establish fraud. This is so even though plaintiff's Complaint is 97 paragraphs long.

Nor do the materials produced during discovery, which, in addition to answers and affidavits from the defendants, consist principally of plaintiff's medical records, elevate this case to one of fraudulent concealment. The evidentiary materials merely tend to generally confirm and otherwise supplement plaintiff's allegations that she was treated by the doctors named in her Complaint, receiving the treatment she claims to have received. The single document in all of plaintiff's voluminous medical records indicating the possibility of an initial misdiagnosis is a 20 May 1979 report on a CAT scan of plaintiff's lumbar region, wherein Dr. C. Gene Coin states his "belief that certain wedge-shaped defects . . . represent residual changes from previous vertical fractures of . . . vertebral bodies." Plaintiff asserts in her answers to interrogatories that Dr. Coin subsequently reviewed x-rays taken at the time of her accident and informed her that the fractures showed up on these original x-rays.

Dr. Coin's report at best supports a conclusion that at the time of the accident plaintiff sustained fractures, and that these fractures were somehow overlooked. The presence of Dr. Coin's report would, in our opinion, have enabled plaintiff to survive defendants' motion for summary judgment on the merits of a medical malpractice claim. This question is not, however, before us. The trial court found that plaintiff's medical malpractice claim was barred by the applicable statute of limitations, and plaintiff does not challenge that ruling. Thus, this appeal does not deal with a cause of action sounding in negligence; it deals with a cause of action sounding in fraud. To prevail, the plaintiff must prove that false representations or concealments were made with knowledge of the truth or with reckless indifference thereto.

The allegations and proof as to Drs. Askins, Moress, Keranen, Miller and Alexander show only that at a point after they had completed treating the plaintiff, another doctor rendered an opinion different from theirs. There is no allegation or indication that these five doctors ever reviewed the original x-rays or consulted with one another. The evidence is uncontroverted that at the time Drs. Askins, Moress, Keranen, Miller and Alexander were involved with the care of plaintiff, no doctor had rendered

an opinion or diagnosis that plaintiff had sustained fractures of her neck and/or spine in 1974. We fail to see how these doctors could have fraudulently concealed information from the plaintiff that was unknown to them. The forecast of evidence leads inevitably to the conclusion that the plaintiff continues to rest her case as to these five doctors exclusively on wholly unsupported conclusory allegations of fraudulent concealment. We conclude that no triable issue of fact exists on plaintiff's claim of fraud, and as to Drs. Askins, Moress, Keranen, Miller and Alexander, the summary judgment must be affirmed.

The allegations and proof as to Drs. Pennick and Toole are distinguishable from those made and adduced against the other defendant doctors, and enable plaintiff to survive the summary judgment motions of the former. As to Dr. Pennick, plaintiff alleges that she was treated by him over a long period of time, that she made him aware of Dr. Coin's diagnosis, and that Pennick consulted with Dan Hall concerning her condition. As to Dr. Toole, plaintiff similarly alleges, and the medical records support, that Toole consulted with Dan Hall, and also that plaintiff had a full neurological workup under his care. Dr. Toole's discharge summary even indicates that he reviewed plaintiff's previous x-rays, although without specifying which ones. The allegations and proof support that Dr. Toole diagnosed plaintiff's arachnoiditis, but without sufficiently detailing its relation to plaintiff's alleged original fractures. In our opinion, plaintiff's far more substantial allegations and attendant proof raise material issues of fact as to whether Drs. Toole and Pennick knew of plaintiff's true condition, namely, that she had sustained fractures in her 1974 automobile accident, and subsequently made false representations or concealments intended to conceal from plaintiff their knowledge of her true condition. As to Drs. Toole and Pennick, then, summary judgment must be reversed.

IV

In conclusion, summary judgment for defendant North Carolina Baptist Hospitals and defendant doctors Miller, Askins, Moress, Keranen and Alexander is affirmed; summary judgment for defendant doctors Pennick and Toole is reversed. We summarize the effect of this decision, and that of the companion case, as follows:

Plaintiff, Linda Watts, has:

1. A cause of action based on negligence against defendant Cumberland County Hospital System, Inc. (This is because this defendant never moved for summary judgment.)

2. A cause of action based on fraudulent concealment against defendant doctors Pennick and Toole.

3. A cause of action on all claims against defendant Dan Hall.

4. No cause of action on any claim against defendant doctors Miller, Askins, Moress, Keranen, and Alexander, and defendant North Carolina Baptist Hospitals.

Plaintiffs George Watts and Kim Watts have:

1. A cause of action based on negligence against defendant Cumberland County Hospital System, Inc.

2. No cause of action on any claim against any other defendant.

Affirmed in part; reversed in part.

Judge WELLS concurs in part and dissents in part.

Judge WHICHARD concurs.

Judge WELLS dissenting in part and concurring in part.

The majority opinion recognizes plaintiff's claim for fraudulent concealment, based on plaintiff's allegations that defendant physicians made false representations of material facts which served to conceal from plaintiff the "true nature and extent" of her injuries; that such representations were made with the intention of preventing plaintiff from discovering that plaintiff's fracture had been "overlooked" at plaintiff's initial examination; and that such misrepresentations prevented plaintiff from obtaining necessary treatment.

In my opinion, plaintiff's allegations state a claim for malpractice, and I would not recognize a claim for fraud based on those allegations. I, therefore, dissent from that part of the ma-

jority opinion which recognizes and allows such a claim to go to trial.

I concur in the remainder of the majority opinion.

THE NORTH CAROLINA STATE BAR v. CHARLEENE WILSON, ATTORNEY

No. 8410NCSB1011

(Filed 4 June 1985)

1. **Attorneys at Law § 12— false affidavit as to whereabouts of defendant—violation of disciplinary rules**

An attorney's failure to disclose to the trial court in a divorce action in which service of process was by publication that she had received and responded to two letters from the defendant containing return addresses and her drafting and presenting to the court of an affidavit from her client falsely stating that the defendant's whereabouts were unknown and could not be discovered with due diligence constituted conduct involving fraud, dishonesty, deceit and misrepresentation in violation of DR1-102(A)(4), conduct prejudicial to the administration of justice and which adversely reflects upon her fitness to practice law in violation of DR1-102(A)(5) and (6), and the creation and knowing use of false evidence in violation of DR7-102(A)(4), (5) and (6). G.S. 8-28(a) and (b)(2).

2. **Attorneys at Law § 10— discipline authorized by statute—no appellate review**

Where the suspension of an attorney's license to practice law for one year for violation of the disciplinary rules was authorized by statute, it was not subject to review on appeal.

APPEAL by defendant from an Order of Discipline of the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar. Order entered 11 June 1984. Heard in the Court of Appeals 7 May 1985.

The facts giving rise to this case are basically undisputed. On or about 10 August 1983, Charleene Wilson, an attorney licensed to practice law in North Carolina in 1975, was retained by Brenda Joyce Hodge to secure a divorce for Mrs. Hodge from David C. Hodge. A complaint was filed and personal service was attempted. On 15 August 1983, the summons was returned unserved indicating that the Sheriff's Department was "unable to locate defendant in New Hanover County." On 13 August 1983, the defendant attempted to obtain service of process by publication.

A short time later, the defendant received a letter, dated 25 August 1983, from Mr. Hodge bearing as a return address a post office box in Troy, North Carolina. Defendant received another letter from Mr. Hodge dated 31 August 1983. This letter had as a return address a post office box in Goldsboro, North Carolina. In both of these letters Mr. Hodge objected to the granting of a divorce and stated that the parties had not been separated for a year as alleged in the suit. The defendant replied to both of the letters and informed Mr. Hodge of the requirements stated in the summons to answer the complaint and also informed him when the matter had been set for hearing. No attempt was made to serve Mr. Hodge by registered or certified mail pursuant to Rule 4(j)(1)(c) of the Rules of Civil Procedure at either of the return addresses listed on the letters. Following the receipt of those letters the defendant met with Mrs. Hodge and discussed the contents of these letters. She also wrote Mrs. Hodge a letter and asked that Mrs. Hodge tell her of Mr. Hodge's whereabouts if she was able to ascertain it.

On 30 September 1983, the divorce action came on for hearing in New Hanover County District Court. Prior to the hearing the defendant had Mrs. Hodge execute an affidavit which stated in part "the whereabouts of the Defendant are [sic] unknown to the Plaintiff and cannot with due diligence be ascertained, nor can the Defendant's post office address be ascertained with reasonable diligence." This affidavit was presented at the hearing. During the hearing Wilson failed to inform the court regarding the letters which she had received from Mr. Hodge, and she drafted and presented the court with a divorce judgment which stated that the whereabouts of Mr. Hodge was unknown.

On 22 February 1984, the North Carolina State Bar filed a complaint alleging that Wilson's conduct constituted grounds for discipline pursuant to G.S. 84-28(a), and (b)(2) in that she had violated the Disciplinary Rules of the Code of Professional Responsibility by: (a) failing to report the letters to the trial court, (b) failing to attempt personal service upon Mr. Hodge, (c) engaging in conduct which constituted fraud, deceit, dishonesty or misrepresentation by preparing and offering into evidence the affidavit of Mrs. Hodge, (d) permitting her client to testify in support of the affidavit, and (e) preparing the judgment wherein the

court found as a fact that the whereabouts of Mr. Hodge could not be ascertained.

The defendant answered admitting most of the facts set forth above but denied any wrongdoing.

Following a hearing the disciplinary committee issued an order in which it found as a fact those facts set forth above and the following additional facts which are pertinent to the determination of this appeal:

> 2. From the receipt of the letters by Wilson from David Hodge, dated August 25, 1983 and August 30, 1983 until the time of the hearing in the Divorce Case, (*Hodge v. Hodge*, 83CVD2505, New Hanover County) September 30, 1983, defendant made no inquiry as to duties imposed upon her by Rule 4 of The Rules of Civil Procedure or the Code of Professional Responsibility. Additionally, during the interim between the receipt of David Hodges letters of August 25 and August 30, 1983 and September 30, 1983, defendant sought no advice or counsel from other members of the Bar with respect to any obligation that may be imposed upon her as a result of receiving and answering letters from David Hodge.
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> 7. When the Divorce Case was called for trial on September 30, 1983, Wilson knew that 5501 Wrightsville Avenue, Wilmington, North Carolina was not the last address of David Hodge known to her client Brenda Hodge at the time said Affidavit was tendered.
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> 8. Although the Committee is aware of the fact that the transcript of the proceedings before Judge Rice on October 26, 1983 (Plaintiff's Exhibit "L" Page 20, Lines 19 and 20), in the light of other testimony, is capable of the interpratation [sic] that Wilson was aware on September 30, that David Hodge was in prison, assigned to work release in New Hanover County, and his wife Brenda Hodge had taken David Hodge to his job immediately prior to the hearing, the Committee reconciles the conflicting evidence on that issue in favor of Wilson to the extent necessary to find (and finds) such knowledge of David Hodge's actual whereabouts was

not communicated to Wilson, until after the trial of the Divorce Case on September 30, 1983.

. . . .

10. Although Wilson did not have actual knowledge of the whereabouts of the defendant David Hodge in the interim between receipt of David Hodge's letter of August 25, 1983 and September 30, 1983, Wilson was actually aware of defects in service of process upon David Hodge by publication and testified before the Committee that she had considered serving the defendant David Hodge by registered or certified mail, return receipt requested prior to the hearing date of September 30, 1983, but failed to do so.

Based upon these findings of fact the committee made the following conclusions of law:

1. The letters of David Hodge to Wilson dated August 25, 1983 and August 30, 1983 constituted an answer or answers to the Complaint filed by Wilson on behalf of her client Brenda Hodge within the intent of Rule 12 of The Rules of Civil Procedure and have been served upon Wilson in a manner permitted by The Rules of Civil Procedure.

2. Wilson was under the duty to disclose the service of Answers upon her by the defendant David Hodge in the Divorce Case, and to disclose the contents of said Answers to the Court.

3. Wilson was under a duty to her client Brenda Hodge to effect proper service of process upon the defendant David Hodge in the Divorce Case. By filing letters of August 25 and August 30, 1983, received from the defendant David C. Hodge in the Divorce Case with the Court, Wilson could have cured the defects in service of process by publication, which Wilson knew to exist at the time the Divorce Case was called for trial on September 30, 1983.

4. The failure of Wilson to disclose the contents of the letters of David Hodge to the Court and the service upon her of same constitutes a violation of DR1-102(A)(4), (5) and (6) and DR7-102(A)(3) in that she failed to disclose that which by law she was required to reveal and as a result thereof, deliberate-

ly misled a tribunal in a manner that is prejudicial to the administration of justice and reflects adversely upon her fitness to practice law.

5. In preparing and offering the Affidavit of her client, Brenda Hodge, in the Divorce Case, for the purpose of establishing effective service of process by publication and jurisdiction over the person of David Hodge, when Wilson knew that the requirements of Rule 4J of The Rules of Civil Procedure had not been met, and that the Affidavit contained false statements, Wilson violated DR1-102(A)(4), (5) and (6) and DR7-102(A)(4), (5) and (6), because she knowingly used perjured testimony, knowingly made a false statement of law and fact, participated in the creation of evidence when it was obvious that the evidence was false, offered false testimony knowing it to be false, and engaged in conduct prejudicial to the administration of justice adversely reflecting upon her fitness to practice law.

After considering aggravating and mitigating factors the committee ordered that defendant be suspended for the practice of law for a period of one year. From this Order, defendant appealed.

A. Root Edmonson for the North Carolina State Bar.

Wayne Eads for the defendant appellant.

ARNOLD, Judge.

[1] The first issue presented for review is whether the committee erred in finding that the letters from Mr. Hodge were answers within the meaning of the rules, that as such the defendant had a duty to disclose their service upon her by Mr. Hodge and that by failing to do so she violated DR1-102(A)(4), (5) and (6) and DR7-102(A)(3) by deliberately misleading the court in a manner which was prejudicial to the administration of justice. Assuming *arguendo* that the committee improperly concluded that the letters were "answers" to the divorce complaint, even so we find no error in the committee's conclusion that the failure to reveal the existence of the letters to the trial court was a violation of the Code of Professional Responsibility.

In her argument defendant contends that since EC 4-5 of the Code of Professional Responsibility indicates that a lawyer should not use information acquired during her representation of a client to the disadvantage of the client, she should not have disclosed the letters to the court. In support of this argument she also cites C.P.R. Opinion #200, issued by the Bar in October 1978, which held that an attorney should not inform the court that at sometime previous thereto the client had perpetrated a fraud in obtaining the divorce.

The fact situation set forth in the C.P.R. Opinion is distinguishable since the fraud already had occurred at the time the attorney became involved in the case. Furthermore, the defendant's actions did not consist of merely failing to disclose items which might have put her client at a disadvantage but she prepared a document which aided her client in perpetrating the fraud.

DR1-102(A)(4) of the Code of Professional Responsibility prohibits an attorney from "[e]ngaging in conduct involving dishonesty, fraud, deceit, or misrepresentation." Wilson clearly engaged in conduct which involved fraud, dishonesty, deceit and misrepresentation when she failed to inform the court of Mr. Hodge's letters which contained return addresses, while at the same time presenting to the court an affidavit, which she had drafted, in which her client swore "[t]hat the whereabouts of the defendant are [sic] unknown to the Plaintiff and cannot with due diligence be ascertained, nor can the Defendant's post office address be ascertained with reasonable diligence." When she engaged in this deceitful activity Mrs. Wilson was also involved in professional conduct prejudicial to the administration of justice and which adversely reflects upon her fitness to practice law in violation of DR1-102(A)(5) and (6). Therefore, we find no merit in defendant's exception to Conclusion Number 4.

We also note that under this assignment of error defendant has excepted to Conclusion of Law Number 5 and seems to contend that the committee's conclusion that the letters constitute "answers" affects the validity of this conclusion as well. As noted above it is clear that defendant's actions in preparing the false affidavit involved conduct involving fraud, deceit and misrepresentation. Furthermore, DR7-102(A)(4), (5) and (6) provides:

(A) In his representation of a client, a lawyer shall not:

. . . .

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

We also believe that the committee properly concluded that the defendant's actions clearly violated the disciplinary rules set forth above. The evidence and findings of fact clearly show that the defendant drafted, presented to her client and then offered into evidence an affidavit which she knew to be false.

For the above stated reasons, we hold that regardless of whether the committee properly concluded that Mr. Hodge's letters constituted answers to the complaint, it was justified in making conclusions of law numbers 4 and 5. Furthermore, we hold that conclusions of law numbers 4 and 5 standing alone are sufficient to support the committee's Order of Discipline.

Next defendant argues that finding of fact number 2 and finding of fact number 7 are not supported by the evidence. The test for determining whether the findings are supported by the evidence is the whole record test. Under this test there must be substantial evidence to support the committee's findings, conclusions and results. *N.C. State Bar v. DuMont*, 304 N.C. 627, 286 S.E. 2d 89 (1982). A review of the record indicates that there was substantial evidence to support the committee's finding of fact number 2 and number 7. The defendant's argument is without merit.

By her third assignment of error, defendant contends that under the whole record test the findings of fact and the allegations of misconduct are insufficient to support the order of discipline because they fail to show an intent on the part of the defendant to deceive, defraud or make misrepresentation to the court in the Hodges matter. We disagree, because as stated earlier the evidence clearly shows that defendant engaged in a course of conduct involving deceit, misrepresentation and fraud.

Thus, we hold that there was substantial evidence to support the committee's Order of Discipline.

[2] Finally, defendant argues that the Order of Discipline entered in this action was in excess of that authorized by law. She states that while the one-year suspension imposed was technically within the bounds allowed by the statute, it was improper because it was "vastly more punishment than has been meted out to other attorneys in similar situations."

G.S. 84-28(h) provides that our review of these cases is limited to "matters of law or legal inference," therefore, so long as the punishment imposed is within the limits allowed by the statute this Court does not have the authority to modify or change it. *N.C. State Bar v. DuMont*, 304 N.C. 627, 632, 286 S.E. 2d 89, 92 (1982). The defendant's discipline is, by her own admission, authorized by the statute, it is, therefore, not subject to review.

The judgment appealed from is hereby

Affirmed.

Judges MARTIN and PARKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 MAY 1985

CALDWELL MEM. HOSP. v. MILLER No. 8425DC1357	Caldwell (83CVD244)	Reversed & Remanded
COOPER v. COOPER No. 8421DC1043	Forsyth (77CVD3897)	Affirmed
DURCHMAN v. COVIL CORP. No. 8423SC1226	Wilkes (84CVS320)	Affirmed
GREENSBORO NAT'L BK v. MOREHEAD No. 8418SC1206	Guilford (81CVS4629)	Affirmed
IN RE MICHAEL POORE No. 8512DC3	Cumberland (84SP1005)	Affirmed
PAMLICO CHEMICAL v. WAYNE IMPLEMENT No. 842DC980	Beaufort (83CVD421)	Affirmed
PARK CROSSING OWNERS v. WESTON No. 8526DC4	Mecklenburg (84CVD6113)	Dismissed
STATE v. ANDERSON No. 847SC1220	Wilson (82CRS9821)	No Error
STATE v. BARNWELL No. 8415SC1219	Alamance (82CRS10) (82CRS4266) (82CRS1397)	Affirmed
STATE v. CANNADY No. 8428SC991	Buncombe (81CRS24293)	Affirmed
STATE v. CARR No. 858SC26	Greene (83CRS975) (83CRS976)	No Error
STATE v. FUTCH No. 8410SC1243	Wake (84CRS35077)	No Error
STATE v. HEARD No. 8411SC1291	Lee (84CRS1204)	No Error
STATE v. KERNS No. 8412SC1080	Cumberland (84CRS40)	No Error
STATE v. LITTLE No. 8428SC686	Buncombe (83CRS18189)	Reversed

STATE v. McDONALD No. 855SC91	New Hanover (81CRS8690) (81CRS8691)	Vacated & Remanded
STATE v. O'QUINN No. 8414SC1258	Durham (84CRS6590)	No Error
STATE v. TEACHEY No. 844SC449	Sampson (83CRS6988) (83CRS6989) (83CRS6990) (83CRS6991) (83CRS8372) (83CRS8373)	Remanded for Resentencing
STATE v. TILLMAN No. 8418SC631	Guilford (83CRS25139) (83CRS25140)	No Error
STATE v. VIRGIL No. 8411SC1292	Lee (84CRS1205)	No Error
STATE v. WEBBER No. 8428SC1216	Buncombe (83CRS24982)	No Error
STEWART v. STEWART No. 8418DC1104	Guilford (82CVD3886)	Affirmed
STOTT v. TRANSAMERICA PREM. INS. No. 8410DC868	Wake (82CVD2052)	Affirmed

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW

§ 5. Availability of Review by Statutory Appeal

The State has consented to the supervisory jurisdiction of the General Court of Justice over appeals from administrative agencies by the passage of the Administrative Procedure Act, and petitioners had to follow the G.S. 126-34 grievance procedure, over which the State Personnel Commission has jurisdiction. *Poret v. State Personnel Comm.*, 536.

ADOPTION

§ 2.2. Abandonment of Child

The trial court erred in an adoption proceeding by instructing the jury that it should consider the six month period preceding the filing of the complaint when determining whether respondent had abandoned the child because the summons was not endorsed until 102 days after it was issued. *In re Adoption of Searle*, 61.

ADVERSE POSSESSION

§ 7. Exclusive and Hostile Character of Possession by One Tenant in Common against Other Tenants in Common

There was not enough evidence to submit actual ouster of plaintiff cotenants to the jury because there was a presumption that defendant was holding for her cotenants. *Herbert v. Babson*, 519.

The presumption of constructive ouster did not arise where the property was listed for taxes in the name of the "heirs of Henry Herbert" which includes all the tenants in common and taxes and insurance premiums were paid by all the tenants in common. *Ibid.*

APPEAL AND ERROR

§ 1. Jurisdiction in General

The Court of Appeals had no jurisdiction to review plaintiff appellee's contentions with respect to visitation rights granted to defendant since the contentions were not cross-assignments of error and plaintiff failed to give notice of appeal. *Coleman v. Coleman*, 494.

§ 6.2. Finality as Bearing on Appealability

An appeal from a superior court order in an action challenging a reclassification of nursing positions at North Carolina Memorial Hospital was dismissed as interlocutory where the superior court found that it had jurisdiction and remanded the case for a further hearing before the State Personnel Commission. *Poret v. State Personnel Comm.*, 536.

§ 6.6. Appeals Based on Orders to Dismiss

Orders dismissing plaintiff wife's claim for punitive damages in a medical malpractice case and plaintiff husband's action for loss of consortium, leaving for trial only the wife's claim for compensatory damages, were not immediately appealable. *Thompson v. Newman*, 597.

§ 24. Necessity for Objections, Exceptions and Assignments of Error

The plaintiffs in a medical malpractice case were not prejudiced by the court's allowance of defendant's motion in limine preventing testimony by plaintiff patient about whether she would have consented to surgery had she been properly in-

APPEAL AND ERROR — Continued

formed of the usual and most frequent risks of the surgery. *Keene v. Wake County Hosp. Systems*, 523.

§ 31.2. Form and Sufficiency of Exception or Assignment of Error

Although respondent failed to note exceptions in the record and listed no exceptions under the assignments of error, App. Rule 10 was suspended to prevent manifest injustice. *In re Adoption of Searle*, 61.

ARBITRATION AND AWARD

§ 2. Agreements to Arbitrate as Bar to Action

Upon reconsideration of the case, the Court of Appeals was of the opinion that its previous decision should not be altered and that defendant had waived its right to compulsory arbitration. *Servomation Corp. v. Hickory Const. Co.*, 603.

ARSON AND OTHER BURNINGS

§ 3. Competency of Evidence

A deed of trust was relevant to show the interest of a bank in the burned property and thus to prove that defendant acted wantonly in procuring the burning of the property. *S. v. White*, 504.

§ 4.1. Sufficiency of Evidence

The evidence was sufficient to permit the jury to find that defendant conspired to burn and procure the burning of a house wantonly in that she did so in conscious disregard of and indifference to the rights of her sister, her sister's husband and a bank in the house. *S. v. White*, 504.

The State's evidence, including testimony that defendant was seen behind a house just minutes before flames were seen coming from the house, was sufficient to support defendant's conviction of feloniously burning an uninhabited dwelling house. *S. v. Smith*, 514.

§ 4.2. Insufficiency of Evidence

There was insufficient evidence to sustain defendant's arson conviction where the jury had to first infer that defendant was in the building and from that infer that he willfully and wantonly set the house on fire. *S. v. Williamson*, 114.

ASSAULT AND BATTERY

§ 14.3. Assault with Deadly Weapon with Intent to Kill; Sufficiency of Evidence

The State's evidence, including positive identification of defendant, was sufficient for the jury in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury. *S. v. Cogdell*, 647.

§ 14.6. Assault on Law Enforcement Officer; Sufficiency of Evidence

The State's evidence was sufficient for the jury in a prosecution for assault with a deadly weapon upon a law officer by driving a truck toward the officer and his patrol car while the officer was attempting to arrest defendant. *S. v. Jackson*, 92.

ATTORNEYS AT LAW

§ 7.5. Allowance of Fees as Part of Costs

The trial court was authorized to award reasonable attorney fees for child custody and support actions but not for a civil action to establish paternity. *Smith v. Price*, 413.

§ 12. Grounds for Disbarment

An attorney's failure to disclose to the trial court in a divorce action in which service of process was by publication that she had received and responded to two letters from defendant containing return addresses and her drafting and presenting to the court of an affidavit from her client falsely stating that the defendant's whereabouts were unknown and could not be discovered with due diligence violated various disciplinary rules. *N. C. State Bar v. Wilson*, 777.

AUTOMOBILES AND OTHER VEHICLES

§ 3.4. Driving without Valid License; Sufficiency of Evidence

Defendant's motion to dismiss a charge of driving with a revoked license for insufficient evidence was properly denied. *S. v. Carrington*, 40.

§ 5.2. Transfer of Title; Priority and Enforcement of Liens and Encumbrances

Where an automobile is sold in contemplation of regular use on the highway, the vehicle is subject to the certification of title statute and the provisions of Art. 9 of the U.C.C. do not apply. *Bank of Alamance v. Isley*, 489.

The trial court properly concluded that defendant has the superior right and title to the subject vehicle because a late perfected security interest is not retroactively valid against an innocent third party who acquired the automobile for value. *Ibid.*

§ 6.2. Liability of Seller for Defective Conditions

Summary judgment should not have been granted for plaintiff in an action to collect repair bills on trucks sold to defendant by plaintiff. *Bone International, Inc. v. Johnson*, 703.

§ 88.5. Sufficiency of Evidence of Contributory Negligence; Turning Maneuvers

The court erred by instructing on contributory negligence in an action arising from a collision between plaintiff's motorcycle and defendants' automobile. *Radford v. Norris*, 87.

§ 90.7. Giving Instructions not Supported by the Evidence; Sudden Emergency

The trial court erred in instructing the jury on the doctrine of sudden emergency where the evidence showed that defendant's negligence helped create the emergency situation. *Gupton v. McCombs*, 547.

§ 129.3. Driving under the Influence; Instructions as to Breathalyzer Tests

There was no basis in statutory or case law for arguing that a breathalyzer reading of .06 creates a presumption that a defendant is not impaired. *S. v. Sigmon*, 479.

§ 130.1. Driving under the Influence; Punishment for Subsequent Offenses

There was no abuse of discretion in denying a defendant convicted of driving while impaired a limited driving privilege. *S. v. Sigmon*, 479.

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 131.1. Failing to Stop after Accident; Competency and Sufficiency of Evidence

In a prosecution for failing to give required information after an accident involving property damage, there was no error in admitting an officer's testimony that a piece of plastic chrome fit a damaged portion of defendant's headlight rim "like a puzzle." *S. v. Carrington*, 40.

In a prosecution for leaving the scene of an accident, defendant's motion to dismiss for insufficient evidence was properly denied. *Ibid.*

BANKS AND BANKING

§ 1.1. Grant of Franchise or Charter

Citicorp did not have a vested right to operate an industrial bank because it had filed an application to establish an industrial bank before the enactment of the statute prohibiting the acquisition or control of an industrial bank by any company. *State ex rel. Banking Comm. v. Citicorp Savings Indus. Bank*, 474.

The statute proscribing the acquisition or control of an industrial bank by any company does not unconstitutionally discriminate against out-of-state bank holding companies. *Ibid.*

BASTARDS

§ 10. Civil Action to Establish Paternity of Illegitimate Child

A finding that blood tests showed a 95.98% probability that defendant was the father of a child but that undisputed evidence of infertility would drop the possibility to 0% was insufficient to support a conclusion that defendant was the father of the child where the court also found that medical evidence showed that defendant was infertile due to a successful vasectomy before the time of conception of the child. *Cole v. Cole*, 247.

The defendant in a civil paternity action raised only latent doubts as to the credibility of plaintiff mother's evidence, and the trial court properly entered judgment n.o.v. for plaintiff on the issue of paternity. *Smith v. Price*, 413.

The trial court in a paternity action properly dismissed defendant's counterclaim seeking damages in the amount of child support he would pay during the child's minority on the ground that he was fraudulently tricked into having sex with plaintiff since defendant in effect sought to avoid his legal obligation to support his child. *Ibid.*

Where the court entered a judgment of paternity pursuant to an affirmation of paternity signed by plaintiff mother and an acknowledgment of paternity signed by defendant, defendant could not thereafter attack the paternity judgment by a motion for a blood grouping test in the course of a proceeding related solely to support. *Person County ex rel. Lester v. Holloway*, 734.

BILLS AND NOTES

§ 19. Defenses and Competency of Parol Evidence

Defendants were not entitled to recover on notes where the jury found that all defendants had engaged in fraud. *Kim v. Professional Business Brokers*, 48.

BROKERS AND FACTORS

§ 4. Rights and Liabilities of Brokers to Principals

A broker representing a purchaser or seller owes a fiduciary duty to its client based upon the agency relationship itself. *Kim v. Professional Business Brokers*, 48.

§ 8. Licensing and Regulation

The license of a real estate broker who made a secret profit by buying and reselling property listed with him was properly suspended on grounds that the broker was guilty of acting for more than one party in a transaction without the knowledge of all parties for whom he acted, he was guilty of conduct constituting improper, fraudulent or dishonest dealing, and he was guilty of being unworthy or incompetent to act as a real estate broker or salesman in such manner as to safeguard the interest of the public. *Correll v. Boulware*, 631.

The statute permitting the revocation or suspension of a real estate license of a person found guilty of "being unworthy or incompetent to act as a real estate broker or salesman in such manner as to safeguard the interest of the public" is not unconstitutionally vague. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.2. Sufficiency of Evidence; Time of Offense

There was sufficient evidence that an unauthorized entry occurred during the nighttime where the victim testified that it was dark in his room and dark outside, and an accomplice testified that they arrived at the victim's house at 9:10 p.m. and waited outside until the victim turned the light off. *S. v. Leonard*, 443.

§ 5.4. Sufficiency of Evidence; Presumption from Possession of Recently Stolen Property

The State's evidence was sufficient to submit charges of breaking and entering a motor vehicle and nonfelonious larceny to the jury and to support the judgment even though defendant was never placed at the scene of the crime. *S. v. Durham*, 201.

§ 5.11. Sufficiency of Evidence of Breaking and Entering with Intent to Rape

The State's evidence was sufficient to permit an inference that defendant broke into the victim's dwelling with the intent to commit rape so as to support his conviction of first degree burglary. *S. v. Powell*, 584.

§ 7. Instructions on Lesser Included Offenses

The evidence in a first degree burglary case did not require the trial court to instruct on the lesser included offense of felonious breaking or entering. *S. v. Mayfield*, 601.

CONSTITUTIONAL LAW

§ 6.1. Taxation

Where Champion leased Hofmann Forest from the State, taxation of Champion's interest in Hofmann Forest by the counties in which the forest is located does not violate the prohibition against taxing State, county, and municipal property. *In re Champion International Corp.*, 639.

CONSTITUTIONAL LAW — Continued

§ 20. Equal Protection Generally

G.S. 105-282.7(a) does not violate the North Carolina Constitution by taxing the use of public cropland or forestland as if the lessee or user owned it while other leasehold interests are taxed at true value. *In re Champion International Corp.*, 639.

§ 30. Discovery in Criminal Cases

There was no error in admitting evidence which had not been disclosed to defense counsel despite a request for discovery. *S. v. Herring*, 269.

§ 48. Effective Assistance of Counsel

Defendant was not deprived of the effective assistance of counsel where his counsel objected only once at trial, failed to produce witnesses, and failed to move for a dismissal. *S. v. Durham*, 201.

Defendant was not denied effective assistance of counsel because his attorney did not argue mitigating factors at sentencing. *S. v. Scober*, 469.

Defense counsel's failure to object to the court's instructions on reasonable doubt and to the court's action in calling two witnesses during the sentencing hearing did not constitute ineffective assistance of counsel. *S. v. Cogdell*, 647.

Defendant was not denied the effective assistance of counsel because his attorney stipulated that a bullet wound inflicted serious injury or because his attorney failed to object to an instruction that "he who hunts with the pack is responsible for the kill." *Ibid.*

§ 49. Waiver of Right to Counsel

The court erred in permitting defendant to waive counsel and proceed pro se without advising defendant of the permissible range of punishments and determining whether defendant understood the consequences of his decision. *S. v. Michael*, 118.

§ 70. Right of Confrontation; Cross-Examination of Witnesses

In a prosecution for taking indecent liberties with a five-year-old child, the trial judge deprived defendant of his right to effective cross-examination by completely foreclosing cross-examination of the child or her mother about the child's nightmares and about her accusation that her father committed a similar offense. *S. v. Durham*, 159.

CONTEMPT OF COURT

§ 6. Hearings on Orders to Show Cause Generally

A show cause order should have been dismissed where the defendants had been dismissed from the 1982 abatement proceeding which resulted in the order they were charged with violating. *State ex rel. Brown v. Smith*, 599.

CONTRACTS

§ 21.2. Sufficiency of Performance; Breach of Building and Construction Contracts

The trial court erred in failing to make ultimate findings and a conclusion as to whether defendant city breached an implied warranty of suitability of the plans and specifications for a key wall in a water and sewer treatment facility constructed by plaintiff for defendants. *Gilbert Engineering Co. v. City of Asheville*, 350.

CRIMINAL LAW — Continued

§ 66.20. Voir Dire to Determine Admissibility of In-Court Identification; Findings of Court

The trial court did not err in admitting photographic and in-court identification testimony without making findings of fact. *S. v. Jackson*, 92.

§ 68. Other Evidence of Identity

The State's evidence, including evidence that bite marks on the victim's body were made by defendant's teeth, was sufficient to identify defendant as the perpetrator of a first degree burglary, second degree rape and attempted second degree sexual offense. *S. v. Carter*, 437.

§ 75.2. Confession; Effect of Statements by Officers

Defendant's confession was properly admitted where the police had told defendant they would obtain warrants to search his home and defendant feared they would discover illegal explosives concealed there. *S. v. Durham*, 121.

§ 75.7. Confession; Requirement that Defendant Be Warned of Constitutional Rights; When Warning Is Required

In a prosecution for obtaining candy by false pretense in which defendant's name was an important part of the evidence against her, there was no error in admitting the testimony of an officer who had recorded defendant's name prior to reading her her rights. *S. v. Anthony*, 590.

§ 75.15. Defendant's Mental Capacity to Confess

The evidence supported the trial court's determination that defendant's in-custody statement was voluntary where the only evidence tending to show that defendant may have been impaired was his bare assertion to an officer that he was "on coke." *S. v. Allen*, 449.

§ 76.10. Determination of Admissibility; Review of Trial Court's Determination

Where defendant objected to the admission of his statement to officers only on the basis of accuracy, he could not argue on appeal that the jury should have been instructed that the statement could only be used for impeachment or that the statement should not have been read to the jury. *S. v. Greene*, 21.

§ 80.1. Foundation and Authentication of Records

The authenticity of a copy of a deed of trust was sufficiently established for its admission into evidence where defendant identified an exhibit as the deed of trust she and her husband signed in which they pledged a house as security for a bank loan. *S. v. White*, 504.

§ 86.2. Impeachment of Defendant; Prior Convictions Generally

The trial court's error in not permitting defendant to testify on direct examination about his prior convictions was not enough to warrant reversal. *S. v. Stanley*, 178.

§ 86.3. Impeachment of Defendant; Prior Convictions; Effect of Defendant's Answer; Further Cross-Examination of Defendant

When a defense witness denied that he had been convicted of communicating a threat to his mother, the trial court did not err in permitting the prosecutor to "sift the witness" by asking further questions about specific acts of misconduct during the witness's alleged attack on his mother. *S. v. Williams and S. v. Perry*, 394.

CRIMINAL LAW — Continued

§ 93. Order of Proof

The trial court did not err by denying defendant permission to exhibit his palm to the jury immediately after the State introduced a latent fingerprint and a fingerprint identification card during its case in chief because exhibiting defendant's palm would constitute presenting evidence. *S. v. Scober*, 469.

§ 98. Presence of Witnesses

There was no abuse of discretion in the denial of defendant's motion for a mistrial based on the failure of one of his witnesses to appear where the witness would have been used in an improper attempt to impeach a testifying codefendant on a collateral matter. *S. v. Leonard*, 443.

§ 98.2. Sequestration of Witnesses

The court did not err by allowing three of the State's witnesses to confer together with the prosecutor after the court granted the parties' motion to sequester. *S. v. Williamson*, 114.

§ 99.2. Expression of Opinion by the Court; Remarks during Trial Generally

The trial court did not express an opinion in clarifying a witness's testimony by stating, "One man had marijuana on him that was in there. I think that's what he said." *S. v. Williams and S. v. Perry*, 394.

§ 99.7. Expression of Opinion by the Court; Admonitions to Witnesses

When the prosecuting witness indicated that he would not testify, the trial court did not err in informing him that the alternative was to be jailed for contempt. *S. v. Cogdell*, 647.

§ 99.9. Expression of Opinion by the Court; Examination of Witnesses by the Court

The trial court did not err in asking defendant questions out of the jury's presence concerning his decision not to testify. *S. v. Cogdell*, 647.

§ 101. Conduct or Misconduct Affecting Jurors

There was no prejudicial error where the court did not instruct the jury that no notes could be taken after a party objected. *S. v. Durham*, 121.

§ 102.4. Conduct of Prosecutor during Trial Generally

The prosecutor's comment to the trial court in support of his motion to strike a defense witness's testimony after the witness asserted his privilege against self-incrimination did not improperly convey to the jury that the witness was guilty of drug crimes for which he had not been tried. *S. v. Williams and S. v. Perry*, 394.

§ 102.5. Prosecutor's Conduct in Cross-Examining Defendant

There was no abuse of discretion in the court's control of the cross-examination of defendant. *S. v. Greene*, 21.

§ 102.8. Jury Argument; Comment on Failure to Testify

The trial court erred during closing arguments by not giving a curative instruction after sustaining defendant's objection to a comment by the prosecutor on defendant's wife's failure to testify. *S. v. Robinson*, 323.

§ 104. Consideration of Evidence on Motion to Nonsuit

Where defendant challenged the sufficiency of the evidence to support the entry of judgment, G.S. 15A-1227(d) indicates that the reviewing court must consider the defendant's evidence as well as the State's. *S. v. Durham*, 201.

CRIMINAL LAW — Continued

§ 111.1. Particular Miscellaneous Instructions

In a prosecution for driving with a revoked license and not leaving the required information at the scene of the accident, the court did not err by instructing the jury that a 1977 Chevrolet is a motor vehicle and that Lancaster Street in Durham is a public highway. *S. v. Carrington*, 40.

The court's instruction on identification testimony was sufficient where it emphasized that proof of defendant's identity as the perpetrator of the crime was an essential element of the case which the State had to prove beyond a reasonable doubt. *S. v. Mayfield*, 601.

§ 112.1. Instructions on Reasonable Doubt

The trial court did not err in instructing the jury that a reasonable doubt is not a "doubt suggested by the ingenuity of counsel." *S. v. Cogdell*, 647.

§ 113.1. Summary of Evidence in Instructions

The trial court did not err in failing to summarize evidence elicited by defendant on cross-examination which tended merely to impeach or show bias. *S. v. Carter*, 437.

§ 117.5. Charge on Credibility of Defendant

Defendant could not successfully argue on appeal that the trial court erred when it failed to list all his prior convictions when instructing the jury that defendant's testimony about his prior convictions could only be used to judge his truthfulness because the court had done precisely what defendant's counsel requested. *S. v. Carrington*, 40.

§ 118.2. Particular Charges on Contentions as Not Erroneous

The trial court in a felonious assault case sufficiently stated the contentions of defendant relating to self-defense. *S. v. McLean*, 224.

§ 119. Requests for Instructions

There was no error in the court's refusal to instruct the jury on the limited use of defendant's prior record. *S. v. Moser*, 216.

§ 122.1. Jury's Request for Additional Instructions

The trial judge did not err in failing to reiterate the State's burden of proof when he answered questions by the jury. *S. v. Smith*, 514.

§ 131.1. New Trial for Newly Discovered Evidence; Discretion of Trial Court

There was no error in the denial of defendant's motion for a new trial for newly discovered evidence. *S. v. Stanley*, 178.

§ 134. Form and Requisites of Judgment in General

There was no error in signing the impaired driving determination of sentencing factors form out of term and out of district. *S. v. Sigmon*, 479.

§ 134.4. Youthful Offenders

The trial judge erred by refusing to consider whether a defendant whose probation had been revoked should have been committed as a Committed Youthful Offender because he didn't think the youthful offender program applied to women. *S. v. Coffey*, 137.

CRIMINAL LAW — Continued

The evidence was sufficient to permit the trial court to find by a preponderance of the evidence that defendant's offense was committed against a witness against him while engaged in the performance of her official duties or because of the exercise of her official duties. *Ibid.*

A statement in a Supreme Court decision on defendant's prior appeal that a burglary victim was eighty-one years old was a sufficient basis for the trial court at a resentencing hearing to find that the victim of the crime was very old, and it was proper for the trial court to conclude that the victim's advanced age was an aggravating factor for the crime of burglary. *S. v. Williams*, 574.

The trial court erred in finding that the age of the seventeen-year-old victim was an aggravating factor in sentencing defendant for armed robbery and felonious assault. *S. v. Cogdell*, 647.

The trial court was not required to find any aggravating factors where defendant received a consolidated twenty-year sentence for armed robbery and felonious assault and the presumptive sentence was fourteen years for the armed robbery and six years for the assault. *Ibid.*

Resentencing was necessary where kidnapping offenses were consolidated with murder offenses, aggravating and mitigating factors were not found for the kidnapping offenses, and the trial judge imposed prison terms exceeding the total of the presumptive terms for each consolidated felony. *S. v. Miller*, 760.

The trial judge erred in sentencing defendant for two counts of second-degree murder by finding that the offense was especially heinous, atrocious or cruel where the State failed to show by the preponderance of the evidence excessive brutality, physical pain, or psychological suffering not normally present in second-degree murder. *Ibid.*

§ 138.4. Severity of Sentence; Limitations; Where There Are Several Charges

The trial court erred by consolidating charges of breaking and entering and larceny for judgment, finding an aggravating factor, and imposing a sentence of twenty years when the maximum term for any of the charges was ten years. *S. v. Ransom*, 716.

§ 138.11. Different Punishment on Second Trial

There was no error in sentencing defendant to a term of fourteen years after a retrial for armed robbery where the original sentence was twelve years. *S. v. Williams*, 728.

§ 143.5. Revocation of Probation; Admissibility and Sufficiency of Evidence

The evidence clearly supported the court's finding that defendant failed to report to the probation officer at reasonable times and in a reasonable manner and that was sufficient to support the court's order revoking probation. *S. v. Coffey*, 137.

The trial court did not err in a probation revocation proceeding by denying defendant's motion to suppress marijuana obtained in an airport search and seizure. *S. v. Lombardo*, 460.

§ 143.7. Violation of Conditions of Probation; Wilfulness and Lack of Lawful Excuse

The trial court was not under a duty to make specific findings with respect to defendant's alleged inability to comply with the terms of his probation where defendant's position was related through the statements of his counsel. *S. v. Crouch*, 565.

CRIMINAL LAW — Continued

§ 144. Modification of Judgment in Trial Court

The trial court did not have jurisdiction after it adjourned to grant the State's motion for appropriate relief. *S. v. Ransom*, 716.

§ 167. Harmless and Prejudicial Error in General

In a prosecution for murder, the trial court's errors did not alone rise to the level of prejudicial error, but collectively raised a reasonable possibility that a jury would have reached a different verdict had those errors not occurred. *S. v. Temples*, 106.

§ 169. Harmless Error in Admission of Evidence

There was no prejudicial error in a witness's reference to defendant's house as the "crime scene" and no prejudicial error in the prosecutor asking a witness if defendant made a statement after being advised of his rights. *S. v. Greene*, 21.

§ 177.1. Remand for Correction of Error in Judgment

The case was remanded to make the judgment consistent with the verdict where the verdict was guilty of assault with a deadly weapon but the judgment reflected a conviction of felonious assault with a deadly weapon with intent to kill inflicting serious injury. *S. v. Durham*, 121.

§ 181. Postconviction Hearing

Defendant's motion for appropriate relief to set aside a verdict of second-degree rape because of inconsistencies and contradictions in the evidence was properly denied. *S. v. Stanley*, 178.

DIVORCE AND ALIMONY

§ 18.16. Attorney's Fees in Alimony Action

The court's findings were insufficient to support its award of attorney fees to plaintiff in an action for alimony and child support. *Coleman v. Coleman*, 494.

§ 19.5. Alimony; Effect of Separation Agreements and Consent Decrees

The trial court's finding that a property settlement and consent judgment for alimony were intended as reciprocal and inseparable parts of a single agreement and so were not modifiable was supported by the evidence. *Rowe v. Rowe*, 54.

The evidence supported the court's determination that the support provisions of a separation agreement incorporated into a 1975 consent decree were reciprocal with the property settlement provisions and that the support provisions were not modifiable. *Cecil v. Cecil*, 455.

§ 20.3. Divorce as Affecting Right to Alimony; Attorney's Fees

The trial court erred in awarding attorney fees to defendant in a proceeding in which defendant sought modification of alimony subsequent to divorce where defendant was not entitled to the relief sought. *Cecil v. Cecil*, 455.

§ 21.5. Alimony; Punishment for Contempt

The evidence supported the court's finding that defendant owned a house by an unrecorded deed, and evidence that the house generated $200 per month in rental income established defendant's ability to pay $200 per month for child support and alimony pendente lite while he was in prison and supported the court's determination that defendant's failure to pay was willful and in contempt of court. *Coleman v. Coleman*, 494.

DIVORCE AND ALIMONY — Continued

§ 23. Jurisdiction in Child Custody and Support Actions

The trial court correctly found in an *ex parte* child custody order that North Carolina had been the children's home state for the six months before the commencement of the proceeding. *Hart v. Hart*, 1.

In a child custody dispute in which jurisdiction was in issue, the serviceman husband's testimony that he considered himself a North Carolina resident, though equivocal, was sufficient to satisfy the requirement that a parent reside in this state. *Ibid.*

The North Carolina trial court did not err in assuming jurisdiction in a child custody matter where the wife's action was filed in Florida the day after the husband filed his action in North Carolina. *Ibid.*

An action for custody or support of minor children may be maintained as a civil action; joined with an action or cross-action for annulment, divorce, or alimony; by motion in the cause in an action for annulment, divorce, or alimony; or upon the court's own motion in an action for annulment, divorce or alimony. *Latham v. Latham*, 722.

§ 23.3. Child Custody and Support; Jurisdiction after Divorce

Plaintiff's motion for custody and support of the parties' child should not have been dismissed for lack of jurisdiction where the parties had divorced, remarried, and separated. *Latham v. Latham*, 722.

§ 23.6. Child Custody and Support; Forum Non Conveniens

The trial court did not abuse its discretion in finding that North Carolina was a convenient forum for a child custody determination. *Hart v. Hart*, 1.

§ 23.9. Child Custody and Support; Evidence and Findings

In a child custody dispute in which the date on which the children were moved from North Carolina to Florida was in issue, the admission of letters from the wife's father in Florida for corroboration was harmless error. *Hart v. Hart*, 1.

The trial court correctly concluded that it had jurisdiction over a child custody action. *Ibid.*

§ 24. Child Support Generally

Where the Social Security Administration paid benefits to the disabled father on behalf of the children of the parties, the courts of North Carolina did not have authority to order the Social Security Administration and the father to pay those benefits directly to plaintiff mother who has custody of the children or to require the father to account for such benefits paid to him on behalf of the children. *Brevard v. Brevard*, 484.

§ 24.1. Determining Amount of Child Support

The trial court's child support order was insufficient where it contained no findings as to the father's present reasonable expenses and the estates of both parties, taking into account the distribution of marital property. *Little v. Little*, 12.

The trial court did not abuse its discretion in refusing to give the noncustodial father credit against his child support arrearage for expenses incurred while the child spent time with him beyond the periods provided in a consent order. *Simmons v. Simmons*, 725.

DIVORCE AND ALIMONY — Continued

§ 24.4. Enforcement of Child Support Orders; Contempt

The trial court was not required to make findings necessary for determining the amount of child support in a civil contempt proceeding to enforce a child support order. *Plott v. Plott*, 82.

An order holding plaintiff in contempt for failure to make child support payments was sufficient where it was implicit in the court's findings that plaintiff both possessed the means to comply and willfully refused to do so. *Ibid.*

The evidence was sufficient to support the court's order finding plaintiff mother in contempt for violation of a child support order. *Ibid.*

§ 24.5. Modification of Child Support Order

There was no error in a court's order that funds held in trust for a child's benefit be paid to defendant, the custodial parent, for the child's use and that plaintiff make support payments to the Clerk of Court for disbursement to defendant rather than to the trust account. *Prevatte v. Prevatte*, 582.

§ 24.9. Child Support; Findings

The trial court erred in its award of child support in that the order contained insufficient factual findings as to the income of the parties. *Atwell v. Atwell*, 231.

An order awarding child support did not contain sufficient findings as to the parties' estates where the court found only that the parties owned a house with $25,000 equity but did not find the fair market value and found only that there were substantial family obligations. *Ibid.*

A child support order contained insufficient findings as to the needs and expenses of the parties in that the court failed to make any findings as to the wife's individual needs apart from fixed household expenses and the husband's fixed expenses were not taken into account. *Ibid.*

A child custody order did not contain sufficient findings upon which the court could reach a conclusion as to reasonable needs of the child where the record was devoid of any finding relating to the actual past expenditures of the minor child. *Ibid.*

§ 27. Child Custody and Support; Attorney's Fees

The trial court's findings implicitly supported its award of attorney fees to defendant father in an action against the mother to enforce a child support order. *Plott v. Plott*, 82.

The trial court in a child support action abused its discretion by ordering that the husband pay attorneys' fees based on a finding that the wife had insufficient means to defray the expenses of the suit when the finding was in reality a conclusion of law. *Atwell v. Atwell*, 231.

An award of counsel fees in an action for child support was vacated where findings regarding the time the wife's counsel spent on the case and the value of his services were wholly unsupported by the evidence. *Ibid.*

The trial court was authorized to award reasonable attorney fees for child custody and support actions but not for a civil action to establish paternity. *Smith v. Price*, 413.

§ 30. Equitable Distribution

Accident insurance benefits paid to the husband to compensate him for his lost ability to work after a motorcycle accident left him partially paralyzed constituted marital property. *Little v. Little*, 12.

DIVORCE AND ALIMONY — Continued

The trial court's equitable distribution order was fatally defective where it failed to contain a complete listing of the marital property. *Ibid.*

The trial court's order did not contain sufficient findings to support its unequal division of the marital property. *Ibid.*

Stock in a closely-held corporation inherited by plaintiff during the marriage constitutes separate property, but any increase in the value of the stock due to active rather than passive appreciation constitutes marital property subject to equitable distribution. *McLeod v. McLeod*, 144.

When plaintiff's minority interest in a closely-held corporation inherited during the marriage became the controlling stock upon the corporation's redemption of all outstanding shares except those owned by plaintiff, the corresponding increase in value of plaintiff's shares resulted from active appreciation and constituted marital property subject to equitable distribution. *Ibid.*

Where a spouse furnishing consideration from separate property causes property to be conveyed to the other spouse in the form of a tenancy by the entireties, a presumption of a gift of separate property to the marital estate arises. *Ibid.*

A camper/trailer financed and improved with funds from the sale of plaintiff husband's separate property (corporate stock) and from bonuses plaintiff received from a closely-held corporation includes both separate and marital interests and should be apportioned according to the formula for source of funds-active/passive appreciation. *Ibid.*

The trial court erred by permanently enjoining plaintiff from foreclosing under a deed of trust where the wife was awarded the marital home in an equitable distribution and the husband had previously borrowed $48,000 from plaintiff secured by a deed of trust on the marital home which the wife had never signed. *Branch Banking and Trust Co. v. Wright*, 550.

Plaintiff's vested military retirement benefits constituted separate property not subject to equitable distribution where plaintiff's divorce complaint was filed prior to the effective date of the 1983 amendment to G.S. 50-20(b)(1). *Johnson v. Johnson*, 593.

The trial court erred in an action for divorce and equitable distribution by giving effect to the parties' oral stipulations relating to the distribution of the marital property without inquiring into the parties' understanding of the legal effect of their agreement or the terms of their agreement. *McIntosh v. McIntosh*, 554.

The trial court erred in a divorce action by hearing the issue of alimony before the issue of equitable distribution. *Ibid.*

Provisions of a 1963 separation agreement in which plaintiff relinquished all rights in property "hereafter acquired" by defendant and in which the parties agreed to a full and final settlement of any property rights "that might arise in the future" were executory provisions which became void as to property acquired after they resumed the marital relationship, and a suit for equitable distribution of such property was proper. *Carlton v. Carlton*, 690.

EJECTMENT

§ 1. Nature and Scope of Remedy

An equitable lien is not possessory and would not serve as a defense to an action for possession of property. *Ivey v. Williams*, 532.

EVIDENCE

§ 22. Evidence at Former Trial or Proceeding of Same Case

The court did not err by excluding the testimony given at the probable cause hearing by witnesses absent from trial. *S. v. Highsmith*, 96.

§ 28.2. Authentication of Particular Records and Documents

Minutes of a meeting of a legislative committee were sufficiently authenticated for admission into evidence. *Morgan v. Polk County Bd. of Education*, 169.

§ 32.5. Parol Evidence; Matters Relating to Conditions Precedent

Evidence that an agreement between defendants and plaintiff town was signed by defendants only on the condition that any payments made by defendants under the agreement would be reimbursed to them by plaintiff town did not come within an exception to the parol evidence rule allowing parol evidence to show conditional delivery of a contract. *Town of West Jefferson v. Edwards*, 377.

§ 32.6. Parol Evidence; Matters Relating to Validity of Instrument

Parol evidence was not admissible to show that a contract was not intended to be valid and binding. *Town of West Jefferson v. Edwards*, 377.

EXECUTORS AND ADMINISTRATORS

§ 5. Revocation of Letters

A petition to have a co-executor's letters testamentary revoked was properly verified and stated a claim upon which relief could be granted. *In re Estate of Longest*, 386.

§ 5.5. Other Grounds for Revocation of Letters Testamentary

In an order revoking respondent's letters testamentary, the Clerk's findings that respondent filed the estate's accounts late and improperly advanced himself $32,950 from the estate were supported by the evidence. *In re Estate of Longest*, 386.

§ 37.1. Costs, Commissions and Attorney's Fees

The question of attorney's fees and commissions to a co-executor was not determined at a hearing before an assistant clerk because the only purpose of the hearing was to decide the best course to follow to close the estate. *In re Estate of Longest*, 386.

FALSE PRETENSE

§ 2. Indictment

Indictments which alleged that defendant obtained property by false pretense in that she received and accepted delivery of candy by misrepresenting her identity sufficiently alleged that defendant's misrepresentations deceived the vendor of the candy and that the property was obtained as a result of misrepresentation. *S. v. Anthony*, 590.

§ 3.1. Sufficiency of Evidence

In a prosecution for obtaining candy by false pretense, the court did not err by denying defendant's motion to dismiss at the close of all the evidence where the jury could have found that defendant's fictitious name was a false representation on which the candy vendor relied in delivering the candy. *S. v. Anthony*, 590.

FALSE PRETENSE — Continued

§ 3.2. Instructions

There was sufficient evidence to support the court's instruction on acting in concert. *S. v. Anthony*, 590.

FRAUD

§ 3.1. Material Misrepresentation of Past Fact; Promissory Representation

Defendants' evidence was insufficient to show that plaintiff was guilty of fraud in promising to take back property sold to defendants if defendants could not make money on the property. *Northwestern Bank v. Rash*, 101.

§ 12. Sufficiency of Evidence

Defendants failed to make out a case of fraud entitling them to cancellation of a note given to plaintiff bank for the purchase of realty based on the bank's misrepresentation that it owned the property or based on the bank's misrepresentation of the amount of rent the property was producing. *Northwestern Bank v. Rash*, 101.

Defendants failed to show that plaintiff bank's representation as to the value of repairs made to property purchased by defendants was false so as to entitle defendants to cancellation of a note given for the property on the basis of fraud. *Ibid.*

In an action against seven doctors for fraudulent concealment of the true nature and extent of plaintiff's injuries to prevent her from discovering that fractures sustained in an automobile accident had been overlooked at the initial examination, plaintiff's forecast of evidence was insufficient to establish triable issues of fraud against five doctors but was sufficient to establish triable issues against two doctors. *Watts v. Cumberland County Hosp. System*, 769.

HIGHWAYS AND CARTWAYS

§ 5. Rights of Way Generally

The trial court properly granted summary judgment for defendants in an action in which plaintiff town sought in part injunctions restraining defendants from improving, enlarging, or closing two streets. *Town of Morehead City v. Department of Transportation*, 66.

§ 5.3. Actions to Condemn Rights of Way

The trial court erred by concluding that the Department of Transportation had a right of way over a portion of defendants' land based either on a presumption that the Department owned the right of way or on an express or implied dedication. *Dept. of Transportation v. Kivett*, 509.

HOMICIDE

§ 15. Relevancy and Competency of Evidence

In a prosecution for the murder by defendant of her husband, the court erred by admitting for impeachment a note allegedly written by defendant in contemplation of suicide. *S. v. Temples*, 106.

§ 19.1. Evidence Competent on Question of Self-Defense; Evidence of Character or Reputation

The trial court erred by admitting evidence of the decedent's general reputation in the community in a prosecution for the murder by defendant of her allegedly abusive husband. *S. v. Temples*, 106.

HOMICIDE — Continued

§ 21.7. Sufficiency of Evidence of Guilt of Second Degree Murder

The State's evidence was insufficient to support defendant's conviction of second-degree murder. *S. v. Davis*, 208.

§ 21.9. Sufficiency of Evidence of Guilt of Manslaughter

The State's evidence was sufficient to support defendant's conviction of involuntary manslaughter of a two-year-old child who had been left in defendant's custody some four days prior to her death. *S. v. Evans*, 31.

The court properly denied defendant's motion to set aside the verdict of involuntary manslaughter and for a new trial. *S. v. Greene*, 21.

§ 28.3. Instructions on Self-Defense; Aggression or Provocation by Defendant

The court erred by instructing the jury that one enters a fight voluntarily if she uses upon her opponent abusive language calculated to bring on a fight. *S. v. Temples*, 106.

The court erred by instructing the jury that a defendant acting in self-defense is guilty of voluntary manslaughter if she was the aggressor where the record contained no evidence that defendant was the aggressor. *Ibid.*

INFANTS

§ 20. Juvenile Delinquents; Judgments and Orders; Dispositional Alternatives

The trial court had common law authority to commit a juvenile to consecutive terms of detention. *In re Thompson*, 329.

The lack of findings as to alternatives to commitment in a juvenile order revoking a conditional release and ordering that respondent be recommitted does not constitute error. *In the Matter of Baxley*, 527.

§ 21. Juvenile Delinquents; Dispositional Alternatives

An appeal as to whether the juvenile judge failed to heed the mandate of the Willie M. consent order was dismissed in light of the federal court's continuing jurisdiction. *In the Matter of Baxley*, 527.

INSANE PERSONS

§ 1. Commitment to Hospitals

A petition for involuntary commitment was insufficient where it was not confirmed by oath or affirmation before a duly authorized certifying officer. *In re Ingram*, 579.

Statements in a petition for involuntary commitment were insufficient to establish reasonable grounds for issuance of a commitment order. *Ibid.*

INSURANCE

§ 8. Modification

Plaintiff did not introduce sufficient evidence that defendant's employee had actual or apparent authority to modify a life insurance contract when the employee responded to an inquiry from plaintiff's husband about an exclusion for military aircraft. *Pearce v. American Defender Life Ins. Co.*, 620.

INSURANCE — Continued

§ 14. Life Insurance; Provisions Excluding Liability if Death Results from Stipulated Causes

Judgment n.o.v. was properly granted in favor of defendant insurance company where plaintiff's husband had bought a life insurance policy with an accidental death rider which contained exclusions for aircraft crew members and for military aircraft, and plaintiff's husband died in an accident involving a military aircraft on which he was a crew member. *Pearce v. American Defender Life Ins. Co.*, 620.

§ 96.1. Automobile Liability Insurance; Time for Giving Notice of Accident or Claim

Where the court concluded that notice of a claim was not given as soon as practicable and that failure to notify the insurer "lacked good faith," there was no need to determine whether the insurer was prejudiced by the delay. *Ins. Co. v. Construction Co.*, 424.

Where the insured did not notify the insurer of an accident, the trial court improperly substituted an objective test of good faith by allowing unreasonable or unfair dealings to constitute bad faith by the insured. *Ibid.*

§ 128. Fire Insurance; Waiver of and Estoppel to Assert Forfeitures and Conditions

There was no reversible error where the trial court erroneously directed a verdict for defendant insurance company in an action to recover under a fire insurance policy on the grounds that the hazard of fire was increased by means within the control and knowledge of the insured. *Hawkins v. State Capital Ins. Co.*, 499.

A provision in a fire insurance policy providing for suspension of coverage if the building was unoccupied for more than sixty days could not be waived as a matter of law as to subsequent vacancies. *Ibid.*

§ 136. Actions on Fire Policies

In an action to recover under a homeowner's insurance policy for loss by fire, the court did not err in awarding plaintiffs the full amount of the policy for the loss of their dwelling. *Surratt v. Grain Dealers Mut. Ins. Co.*, 288.

§ 144. Actions on Property Damage Policies

Summary judgment was improperly granted for defendant insurance company under a clause excluding coverage for infidelity of a person to whom the insured property was entrusted. *Van Sumner, Inc. v. Penn. Nat. Mut. Casualty Ins. Co.*, 654.

INTOXICATING LIQUORS

§ 24. Civil Liability Generally

Defendant was entitled to summary judgment based on the contributory negligence of plaintiff in an action in which plaintiff alleged that defendant was negligent in continuing to serve him alcoholic beverages after he became intoxicated. *Brower v. Robert Chappell & Assoc., Inc.*, 317.

JUDGMENTS

§ 21.1. Attack on Consent Judgments; Want of Consent

Proceeding must be remanded for a determination as to whether respondents authorized their attorney to consent to an order for the sale of lands owned by tenants in common. *Lynch v. Lynch*, 540.

KIDNAPPING

§ 1.3. Instructions

The trial court erred in instructing the jury that defendant could be found guilty of kidnapping on the theory that he confined, restrained or removed the victim for the purpose of holding her as a hostage. *S. v. Moore*, 464.

The evidence in a second-degree kidnapping case tended to show that defendant restrained the victim with the intent to have sexual intercourse with her notwithstanding resistance on her part and thus did not require the trial court to submit the lesser-included offense of false imprisonment. *S. v. Franks*, 661.

LARCENY

§ 6.1. Competency of Evidence as to Value

Testimony that stolen rings had cost $2,100 when purchased twenty years before was admissible in a larceny case. *S. v. Coats*, 110.

§ 7.2. Sufficiency of Evidence; Value of Property Stolen

The State's evidence of the value of stolen goods was sufficient to support defendant's conviction of felonious larceny. *S. v. Coats*, 110.

§ 7.4. Sufficiency of Evidence; Possession of Stolen Property

The trial court properly allowed the jury to rely on the doctrine of recent possession and the evidence was sufficient to support defendant's convictions for felonious breaking or entering and felonious larceny. *S. v. Williamson*, 114.

The evidence was sufficient to justify a conviction for larceny of a dog where it showed that the dog was taken from its lot without the owner's consent, defendant had the dog almost immediately thereafter, falsely claimed that the owner had given it to him, and then sold it to another. *S. v. Rowell*, 595.

MASTER AND SERVANT

§ 10.2. Actions for Wrongful Discharge

Plaintiff's complaint stated an enforceable claim against defendant Duke Hospital, but not against two other parties who did not employ her, for wrongfully discharging plaintiff from her employment in retaliation for her refusal to testify falsely or incompletely in a medical malpractice case. *Sides v. Duke Hospital*, 331.

Plaintiff stated a claim for breach of contract where she alleged wrongful discharge from employment, even if the employment contract was at will, because Duke had no right to terminate her for the unlawful purposes alleged in the complaint. *Ibid.*

§ 10.3. Actions for Wrongful Discharge; Damages

Plaintiff's complaint stated a claim for punitive damages against Duke University Medical Center and two doctors based on wrongful discharge and malicious interference with contract where she alleged wanton and reckless disregard of her rights by Duke and actual malice by the doctors. *Sides v. Duke Hospital*, 331.

§ 13. Interference with Contract of Employment by Third Persons

Plaintiff stated a complaint against two doctors for wrongfully interfering with her contractual relationship with Duke University Medical Center. *Sides v. Duke Hospital*, 331.

MASTER AND SERVANT — Continued

§ 56. Workers' Compensation; Causal Relation between Employment and Injury

The Industrial Commission's finding that an electrician's death was caused by an electrical shock accidentally sustained in his employment was supported by the evidence. *Snow v. Dick & Kirkman*, 263.

§ 65.2. Workers' Compensation; Back Injuries

Where injury to plaintiff's back led to arachnoiditis and renders her incapable of holding any kind of job, she is entitled to compensation for permanent total disability under G.S. 97-29 rather than only for impaired back function under G.S. 97-31. *Jones v. Murdoch Center*, 128.

The Industrial Commission's finding that plaintiff had sustained a 25% permanent partial disability to his back and no other permanent impairment was supported by the evidence. *Ganey v. S. S. Kresge Co.*, 300.

§ 66. Workers' Compensation; Mental Disorders

The Industrial Commission's finding that plaintiff's psychological problems were not in themselves disabling was supported by testimony from plaintiff's psychiatrist. *Ganey v. S. S. Kresge Co.*, 300.

§ 68. Workers' Compensation; Occupational Diseases

The evidence supported a finding that plaintiff received notice from competent medical authority that she had the occupational disease byssinosis on 25 June 1977 at an occupational respiratory screening clinic. *Dawkins v. Erwin Mills*, 712.

The Industrial Commission's findings of fact were supported by competent evidence where the mill in which plaintiff was employed processed cotton for only two months during the almost twenty-five year period of plaintiff's employment and the only chemical affecting the respiratory system about which plaintiff inquired was found in a floor finish which was used very infrequently. *Guy v. Burlington Industries*, 685.

§ 69. Workers' Compensation; Amount of Recovery Generally

A workers' compensation plaintiff was not prejudiced by an erroneous order of the Industrial Commission suspending payments until plaintiff signed a form because plaintiff received payments to which he was not entitled because he refused tests requested by defendants' doctor. *Hooks v. Eastway Mills, Inc. and Affiliates*, 432.

§ 69.1. Workers' Compensation; Meaning of Disability

Plaintiff was not entitled to disability benefits for the period following her return to work after surgery until she reached maximum recovery. *Algary v. McCarley & Co.*, 125.

§ 72. Workers' Compensation; Partial Disability

The Industrial Commission erred in refusing to allow defendants credit on a permanent partial disability award for payments made to plaintiff after the date plaintiff's maximum recovery was reached. *Moretz v. Richards & Associates*, 72.

§ 77.1. Workers' Compensation; Modification of Award; Change of Conditions

The record did not support the Industrial Commission's finding that plaintiff had a substantial change of condition within two years of the last and final payment of compensation. *Cowart v. Skyline Restaurant*, 560.

MASTER AND SERVANT — Continued

§ 94.4. Workers' Compensation; Rehearing and Review by Industrial Commission; Additional Evidence

The Industrial Commission did not abuse its discretion by refusing to permit plaintiff to introduce additional evidence. *Guy v. Burlington Industries*, 685.

§ 99. Workers' Compensation; Attorneys' Fees

There was no error in the Industrial Commission's failure to award attorneys' fees in a workers' compensation case. *Ganey v. S. S. Kresge Co.*, 300.

§ 108.1. Right to Unemployment Compensation; Effect of Misconduct

Claimant's violation of a company rule requiring employees who are absent due to illness to call in by 7:30 a.m. did not constitute misconduct so as to disqualify him from receiving unemployment compensation under the circumstances of this case. *In re Helmandollar v. M.A.N. Truck & Bus Corp.*, 314.

§ 112. Federal Wage and Hour Law; Validity and Construction Generally

Night hours on call by plaintiff, a night supervisor in a residential care facility for physically handicapped young adults, constituted compensable work time under the Fair Labor Standards Act even though plaintiff was permitted to sleep during such time. *Lowe v. Bell House, Inc.*, 196.

MORTGAGES AND DEEDS OF TRUST

§ 1.1. Equitable Liens

An equitable lien is not possessory and would not serve as a defense to an action for possession of property. *Ivey v. Williams*, 532.

§ 17.1. Payment and Satisfaction; Burden of Proof; Particular Acts Constituting Payment and Satisfaction

The trial court did not err by entering an order allowing petitioner to foreclose under the terms of a deed of trust where a second deed of trust was not valid because it did not contain the signatures of respondents as officers of their wholly owned corporation. *In re Foreclosure of Bowers v. Bowers*, 708.

MUNICIPAL CORPORATIONS

§ 11. Discharge of Municipal Employees

There was sufficient evidence to support a jury finding that the Chief of Police was not justified in finding that plaintiff had committed an act unbecoming a police officer by soliciting the act of fellatio with another officer where plaintiff testified that he was merely testing the other officer to determine whether the other officer was a homosexual. *Warren v. City of Asheville*, 402.

A law officer may be discharged from employment because of his refusal to submit to a polygraph examination if the officer has been informed (1) that the questions will relate specifically and narrowly to the performance of official duties, (2) that the answers cannot be used against him in any subsequent criminal prosecution, and (3) that the penalty for refusal is dismissal. *Ibid.*

Plaintiff police officer was justified in refusing to take a polygraph examination where he learned through counsel that the polygraph operator planned to ask questions not related specifically to plaintiff's official duties and the charge being investigated. *Ibid.*

MUNICIPAL CORPORATIONS — Continued

§ 23.3. Extending and Furnishing Public Utilities and Services Outside Corporate Limits

Plaintiff town had authority to enter into a contract to extend water and sewer lines to defendants' property outside the town limits upon agreement by defendants to pay the town $6,400 for each acre developed by them to be served by the water and sewer system. *Town of West Jefferson v. Edwards*, 377.

§ 30.6. Zoning; Special Permits

The superior court properly ordered the Board of Aldermen of the Town of Carrboro to issue a conditional use permit for development of a nineteen-unit townhouse on a 3.3 acre site. *White Oak Properties v. Town of Carrboro*, 605.

§ 30.19. Zoning; Changes in Continuation of Nonconforming Use

Defendants' motion for a directed verdict was properly denied on the issue of voluntary abandonment of a nonconforming use. *Forsyth Co. v. Shelton*, 674.

In an action to determine whether a nonconforming use had been abandoned, there was no prejudicial error in the exclusion of evidence that a commercial electric account had been maintained for the property since 1961. *Ibid.*

In an action to determine whether a nonconforming use had been abandoned, there was no error in the court's failure to give the requested instruction on involuntary cessation of the nonconforming use. *Ibid.*

The propriety of a stay allowing operation of a nonconforming use pending appeal was moot where the Court of Appeals upheld a verdict that the nonconforming use had been abandoned. *Ibid.*

§ 31. Zoning; Judicial Review in General

Defendants could not contend on appeal that a zoning ordinance was unconstitutionally vague in failing to define and distinguish commercial amusements and recreational facilities where defendants admitted in their answer and proceeded throughout trial on the theory that the use was a nonconforming use. *Forsyth Co. v. Shelton*, 674.

NARCOTICS

§ 1.3. Elements of Statutory Offenses Relating to Narcotics

Manufacturing marijuana and possession of marijuana are separate statutory offenses, neither of which is a lesser included offense of the other. *S. v. Jenkins*, 295.

§ 3.3. Opinion Testimony

The trial court did not err in accepting an S.B.I. chemist as an expert in marijuana identification. *S. v. Jenkins*, 295.

An S.B.I. chemist's opinion testimony that a substance was heroin based upon a mass spectrometer analysis performed by a second S.B.I. chemist was inadmissible where there was no evidence that the spectrometer was working properly at the time of the test. *S. v. Tripp*, 680.

§ 4.3. Sufficiency of Evidence of Constructive Possession

The State's evidence placed defendant in such close juxtaposition to growing marijuana as to justify a jury finding that defendant was engaged in its manufacture. *S. v. Jenkins*, 295.

NEGLIGENCE

NUISANCE

PARENT AND CHILD

PARENT AND CHILD — Continued

§ 1.6. Terminating Parental Rights; Competency and Sufficiency of Evidence

The evidence and findings supported the court's order terminating respondent mother's parental rights in her three children on the ground of neglect. *In re Swisher*, 239.

§ 2.2. Child Abuse

The State's evidence was sufficient to support defendant's conviction of involuntary manslaughter of a two-year-old child who had been left in defendant's custody some four days prior to her death. *S. v. Evans*, 31.

Although respondent mother offered evidence that burns suffered by her child were accidental, testimony by an expert in pediatrics and other evidence supported the trial court's findings that the burns were intentionally inflicted and that respondent inflicted them or allowed them to be inflicted, and these findings supported the court's conclusions that the child was abused and neglected and should be placed in the custody of the county department of social services. *In re Hughes*, 751.

§ 7. Parental Duty to Support Child

Where the court entered a judgment of paternity pursuant to an affirmation of paternity signed by plaintiff mother and an acknowledgment of paternity signed by defendant, defendant could not thereafter attack the paternity judgment by a motion for a blood grouping test in the course of a proceeding related solely to support. *Person County ex rel. Lester v. Holloway*, 734.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 15. Malpractice; Competency and Relevancy of Evidence Generally

The plaintiffs in a medical malpractice case were not prejudiced by the court's allowance of defendant's motion in limine preventing testimony by plaintiff patient about whether she would have consented to surgery had she been properly informed of the usual and most frequent risks of the surgery. *Keene v. Wake County Hosp. Systems*, 523.

§ 16.1. Malpractice; Sufficiency of Evidence

In an action against seven doctors for fraudulent concealment of the true nature and extent of plaintiff's injuries to prevent her from discovering that fractures sustained in an automobile accident had been overlooked at the initial examination, plaintiff's forecast of evidence was insufficient to establish triable issues of fraud against five doctors but was sufficient to establish triable issues against two doctors. *Watts v. Cumberland County Hosp. System*, 769.

§ 20.2. Instructions in Malpractice Actions

Plaintiffs were not prejudiced by the trial court's erroneous instruction that a physician is not an insurer of the results. *Keene v. Wake County Hosp. Systems*, 523.

PROCESS

§ 6. Subpoena Duces Tecum

The trial judge did not abuse his discretion when he granted defendant's motion to quash plaintiff's subpoena duces tecum as to certain documents in the file of one of defendant's attorneys. *Rowe v. Rowe*, 54.

ROBBERY — Continued

Defendant's motions to dismiss and for appropriate relief on an armed robbery charge were properly denied where the evidence was that defendant, his brother, and an accomplice each held a firearm, threatened the victim, tied him up, and stole his money. *S. v. Leonard*, 443.

§ 5.2. Instructions Relating to Armed Robbery

The trial court did not err in instructing the jury that a cap pistol could be a dangerous weapon if it was apparently capable of inflicting a life threatening injury. *S. v. Allen*, 449.

RULES OF CIVIL PROCEDURE

§ 4. Process

Where the original summons and subsequent alias and pluries summonses in a wrongful death action were never delivered to a sheriff or other process officer for service except the last pluries summons, the action was discontinued 30 days after the issuance of the original summons, and the two-year statute of limitations had run at the time defendant was eventually served with process. *Smith v. Starnes*, 306.

§ 8.1. Complaint

There was no prejudicial error from the court's striking of plaintiffs' detailed complaint on the grounds that it did not contain a short and plain statement of the facts. *Holley v. Burroughs Wellcome Co.*, 736.

§ 13. Counterclaim

Plaintiffs' claim for abuse of process in filing notices of liens and lis pendens in a prior action brought by defendants against plaintiffs alleging misuse of and failure to account for partnership assets was not a compulsory counterclaim which had to be asserted in that action. *Hewes v. Wolfe and Hewes v. Johnston*, 610.

§ 15.2. Amendments of Pleadings to Conform to Proof

In an action for maliciously inducing the revocation of a will by undue influence, the court properly denied plaintiffs' Rule 15(b) motion to amend the complaint to conform with the evidence. *Griffin v. Baucom*, 282.

§ 32. Use of Depositions in Court Proceedings

There was no error in admitting depositions of Florida residents for corroborative purposes only, even though they qualified for admission as substantive evidence, where they were offered only for corroborative purposes. *Hart v. Hart*, 1.

The court erred in permitting plaintiff's counsel to read a portion of an officer's deposition to the jury where the officer had been subpoenaed and was available to testify, but such error was not prejudicial. *Warren v. City of Asheville*, 402.

§ 41. Dismissal of Actions Generally

By taking a voluntary dismissal two minutes after he filed his complaint and had summons issued, plaintiff effectively obtained the one year extension in which to commence a new action based on the same claim even though no service on defendant was attempted. *Estrada v. Burnham*, 557.

§ 50.3. Grounds for Directed Verdict

A statement of specific grounds for a directed verdict motion is not necessary where the issue is identified and the grounds for the motion are apparent to the court and the parties. *Smith v. Price*, 413.

RULES OF CIVIL PROCEDURE — Continued

§ 50.4. Judgment n.o.v.

The defendant in a civil paternity action raised only latent doubts as to the credibility of plaintiff mother's evidence, and the trial court properly entered judgment n.o.v. for plaintiff on the issue of paternity. *Smith v. Price*, 413.

§ 56. Summary Judgment

Summary judgment was improperly granted for defendant drug manufacturers in an action based on allegedly inadequate package inserts in promotional literature where defendants supported their motions with the deposition testimony of the administering physician, whose testimony was inherently suspect. *Holley v. Burroughs Wellcome Co.*, 736.

§ 58. Entry of Judgment

Despite the trial judge's subsequently professed intent to enter an order discharging a receiver in open court on 28 November 1983, he failed to do so in accordance with G.S. 1A-1, Rule 58, par. 1 or par. 2, and the order was actually entered on 8 December 1983 when entry of the order was given to the clerk, the order was filed, and notice of its filing was mailed to all parties. *Council v. Balfour Products Group*, 668.

§ 59. New Trials

There was no abuse of discretion in the denial of plaintiff's motion to set aside the verdict as to damages and for a new trial where the jury had found that plaintiff's decedent had died as a result of defendant's negligence and awarded damages of $5,000. *Pearce v. Fletcher*, 543.

§ 60. Relief from Judgment or Order

A child support order was a "final" order within the purview of Rule 60(b) even though it could be modified, but an order for alimony pendente lite was not a "final" order that could be a proper subject of a Rule 60(b) motion for relief from judgment. *Coleman v. Coleman*, 494.

§ 60.2. Grounds for Relief from Judgment or Order

A reasonable application of Rule 60(b)(6) requires that defendants be excused from trial where the court's finding that defendant's general counsel and partner received notice of the calendar was not supported by any evidence in the record. *In the Matter of Oxford Plastics v. Goodson, Jr.*, 256.

Defendants presented a meritorious defense to plaintiff's civil action where an agreement with plaintiff by an individual partner which included plaintiff's agreement to drop criminal charges against that partner was signed in the partner's individual name and not in the partnership name. *Ibid.*

§ 60.3. Relief from Judgment or Order; Relation to other Rules

Defendant's contention that the evidence did not support a finding by the trial court concerning defendant's ability to pay child support does not amount to a showing of any ground stated in Rule 60(b) for granting relief from a judgment. *Coleman v. Coleman*, 494.

SALES

§ 24. Actions for Personal Injuries Based on Negligence; Toxic Materials

Summary judgment was improperly granted for defendant drug manufacturers in an action based on allegedly inadequate package inserts and promotional literature for drugs used in anesthesiology. *Holley v. Burroughs Wellcome Co.*, 736.

SCHOOLS

§ 4.1. Boards of Education; Powers and Duties in General

The State Board of Education and the Polk County Board of Education had statutory authority to conduct an experimental extended school day and school term program in Polk County, and that experimental program did not violate the requirement of a "uniform system of free public schools" in Art. IX, § 2(1) of the N.C. Constitution or the portion of G.S. 115C-84(c) providing for a "uniform school term of 180 days." *Morgan v. Polk County Bd. of Education*, 169.

Petitioners had no standing to challenge an experimental extended school day and school term program on the ground that it denied them equal protection of the laws. *Ibid.*

§ 13.2. Dismissal of Teachers

Petitioner's dismissal from her teaching job was not "arbitrary, capricious and for personal reasons." *Crump v. Durham Co. Board of Education*, 77.

The statute which authorizes the dismissal of a career teacher for inadequate performance is not unconstitutionally vague. *Ibid.*

There was substantial evidence to support petitioner's dismissal for inadequate performance as a teacher under the whole record test. *Ibid.*

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1. Generally

Where the Social Security Administration paid benefits to the disabled father on behalf of the children of the parties, the courts of North Carolina did not have authority to order the Social Security Administration and the father to pay those benefits directly to plaintiff mother who has custody of the children or to require the father to account for such benefits paid to him on behalf of the children. *Brevard v. Brevard*, 484.

STATUTES

§ 5.1. Legislative Intent as Controlling Factor in Construction

Minutes of a meeting of a legislative committee were sufficiently authenticated for admission into evidence. *Morgan v. Polk County Bd. of Education*, 169.

§ 8. Retroactive Effect

G.S. 105-282.7 was not an unconstitutional retrospective tax. *In re Champion International Corp.* , 639.

TAXATION

§ 2.3. Equality and Uniformity; Validity of Particular Classifications

G.S. 105-282.7 was not unconstitutional in that it applies only to Champion because the statute by its terms operated uniformly upon all members of the described class. *In re Champion International Corp.*, 639.

§ 25. Ad Valorem Taxes Generally; Persons and Property Assessable

G.S. 105-288.7 is not unconstitutionally vague in its taxation of the user of State owned forestland. *In re Champion International Corp.*, 639.

§ 25.1. Ad Valorem Taxes; Listing

Reynolds was entitled to the 40% exemption under G.S. 105-277(a) where it was not disputed that Reynolds stored the tobacco for the purpose of manufactur-

UNIFORM COMMERCIAL CODE

WILLS

WITNESSES

WITNESSES — Continued

§ 5.2. Evidence of Reputation Competent for Corroboration

Testimony by two expert witnesses that another expert witness had the reputation of being the "premier hip surgeon" in North Carolina was properly admitted to rehabilitate the other witness. *Keene v. Wake County Hosp. Systems*, 523.

WORD AND PHRASE INDEX

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