NORTH CAROLINA COURT OF APPEALS REPORTS

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2 JULY 1985

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1987

CITE THIS VOLUME

75 N.C. App.

TABLE OF CONTENTS

THE COURT OF APPEALS

OF

NORTH CAROLINA

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R. A. HEDRICK

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HUGH A. WELLS
CHARLES L. BECTON
CLIFTON E. JOHNSON
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CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINION

CASES REPORTED WITHOUT PUBLISHED OPINION

GENERAL STATUTES CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

Art. I, § 17	State v. Kelly, 461
Art. I, § 19	Citicorp v. Currie, Comr. of Banks, 312
	Harris v. Scotland Neck Rescue Squad, Inc., 444
Art. I, § 32	Citicorp v. Currie, Comr. of Banks, 312
	Harris v. Scotland Neck Rescue Squad, Inc., 444
Art. I, § 34	Citicorp v. Currie, Comr. of Banks, 312
Art. XI, § 4	Craven County Hosp. Corp. v. Lenoir County, 453

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW

Case	*Reported*	*Disposition in Supreme Court*
Aetna Casualty Co. v. Penn Nat. Mutual Cas. Co.	75 N.C. App. 511	Allowed, 314 N.C. 662
Alford v. Tudor Hall and Assoc.	75 N.C. App. 279	Denied, 315 N.C. 182
Andrews v. Peters	75 N.C. App. 252	Denied, 315 N.C. 182
Appelbe v. Appelbe	75 N.C. App. 197	Denied, 314 N.C. 662
Ashley v. Delp	75 N.C. App. 363	Denied, 314 N.C. 537
Beasley v. National Savings Life Ins. Co.	75 N.C. App. 104	Allowed, 314 N.C. 537
Bjornsson v. Mize	75 N.C. App. 289	Denied, 314 N.C. 537
Camp v. Camp	75 N.C. App. 498	Denied, 314 N.C. 663
Carpenter v. Hertz Corp.	75 N.C. App. 511	Denied, 314 N.C. 663
Casteen v. De Nemours & Co.	75 N.C. App. 511	Denied, 314 N.C. 663
Chatterton v. Chatterton	75 N.C. App. 363	Denied, 314 N.C. 538
Citicorp v. Currie, Comr. of Banks	75 N.C. App. 312	Denied, 314 N.C. 538 Appeal Dismissed
City of Henderson v. Edwards	75 N.C. App. 199	Denied, 314 N.C. 328 Appeal Dismissed
Craven County Hosp. Corp. v. Lenoir County	75 N.C. App. 453	Denied, 314 N.C. 663
Cutting v. Foxfire Village	75 N.C. App. 161	Denied, 314 N.C. 664
Dailey v. Integon Ins. Corp.	75 N.C. App. 387	Denied, 314 N.C. 664
Donavant v. Hudspeth	75 N.C. App. 321	Allowed, 314 N.C. 538
Douglas v. Pennamco, Inc.	75 N.C. App. 644	Denied, 314 N.C. 664
Dunn v. Herring	75 N.C. App. 308	Denied, 314 N.C. 539
E. L. Morrison Lumber Co. v. Vance Widenhouse Construction, Inc.	75 N.C. App. 190	Denied, 314 N.C. 539
Fraser v. Di Santi	75 N.C. App. 654	Denied, 315 N.C. 183
Gaspersohn v. Harnett Co. Bd. of Education	75 N.C. App. 23	Denied, 314 N.C. 539
Hargett v. Gouch	75 N.C. App. 363	Denied, 314 N.C. 539
Harris v. Scotland Neck Rescue Squad, Inc.	75 N.C. App. 444	Denied, 314 N.C. 329

Case	*Reported*	*Disposition in Supreme Court*
In re Foreclosure of Fortescue	75 N.C. App. 127	Denied, 314 N.C. 330
Johnson v. Johnson	75 N.C. App. 659	Allowed, 315 N.C. 588
Kiddshill Plaza v. Foster-Sturdivant Co	75 N.C. App. 199	Denied, 314 N.C. 540
Kirk v. R. Stanford Webb Agency, Inc.	75 N.C. App. 148	Denied, 314 N.C. 541
Laughter v. Southern Pump & Tank Co., Inc.	75 N.C. App. 185	Denied, 314 N.C. 666
Lawrence v. Lawrence	75 N.C. App. 592	Denied, 314 N.C. 541
Little v. Penn Ventilator Co.	75 N.C. App. 92	Allowed, 314 N.C. 666
Lowder v. All Star Mills, Inc.	75 N.C. App. 233	Denied, 314 N.C. 541
McCarroll v. McCarroll	75 N.C. App. 363	Denied, 314 N.C. 667
Maffei v. Alert Cable TV of N.C., Inc.	75 N.C. App. 473	Allowed, 314 N.C. 667
Marks v. Marks	75 N.C. App. 522	Allowed, 315 N.C. 184
Myrvik v. Richardson	75 N.C. App. 511	Denied, 314 N.C. 542
Narron v. Hardee's Food Systems, Inc.	75 N.C. App. 579	Denied, 314 N.C. 542
Paris v. Kreitz	75 N.C. App. 365	Denied, 315 N.C. 185
Pate v. Town of St. Pauls	75 N.C. App. 511	Denied, 314 N.C. 542
Poore v. Poore	75 N.C. App. 414	Denied, 314 N.C. 542
Powell v. Williams Oil Co.	75 N.C. App. 512	Denied, 315 N.C. 185
Proctor v. Warren Wilson College	75 N.C. App. 199	Denied, 314 N.C. 668
Shaw v. Williamson	75 N.C. App. 604	Denied, 314 N.C. 669
Shaw v. Woodard	75 N.C. App. 363	Denied, 314 N.C. 331
Shelby Mut. Ins. Co. v. Dual State Constr. Co.	75 N.C. App. 330	Denied, 314 N.C. 669
Southern Glove Manufacturing Co. v. City of Newton	75 N.C. App. 574	Denied, 314 N.C. 669
State v. Lamson	75 N.C. App. 132	Denied, 314 N.C. 545
State v. Latta	75 N.C. App. 611	Denied, 314 N.C. 334
State v. McKay	75 N.C. App. 364	Denied, 314 N.C. 545
State v. McMillan	75 N.C. App. 364	Denied, 314 N.C. 545 Appeal Dismissed

Case	*Reported*	*Disposition in Supreme Court*
State v. Moore	75 N.C. App. 543	Denied, 315 N.C. 188
State v. O'Quinn	74 N.C. App. 786	Denied, 314 N.C. 546 Appeal Dismissed
State v. Owens	75 N.C. App. 513	Denied, 314 N.C. 546
State v. Stricklin	75 N.C. App. 200	Denied, 314 N.C. 120
State v. Talbert	75 N.C. App. 200	Denied, 314 N.C. 674
State ex rel. Comr. of Insurance v. N. C. Rate Bureau	75 N.C. App. 201	Denied, 314 N.C. 547
Troxler v. Roach	75 N.C. App. 512	Denied, 314 N.C. 548
Umstead v. Employment Security Commission	75 N.C. App. 538	Denied, 314 N.C. 675
Wachovia Bank v. Langley	75 N.C. App. 512	Denied, 314 N.C. 676
Waits v. Johnston	75 N.C. App. 512	Denied, 315 N.C. 597
Watts v. Cumberland County Hosp. System	75 N.C. App. 1	Denied as to additional issues, 314 N.C. 548 Allowed as to two defendants, denied as to one defendant, 314 N.C. 676
Watts v. Schult Homes Corp.	75 N.C. App. 110	Denied, 314 N.C. 548
Webster v. Webster	75 N.C. App. 621	Denied, 315 N.C. 190
Williams v. Burlington Industries, Inc.	75 N.C. App. 273	Allowed, 314 N.C. 549

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

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. 8412SC692

(Filed 4 June 1985)

1. **Appeal and Error § 24— assignments of error—necessity for discussion in brief**

Appellate review is limited to questions raised by assignments of error and discussed in a party's brief, App. Rule 28(a), and any other questions raised by the assignments of error are deemed abandoned.

2. **Rules of Civil Procedure § 56.2— motion for summary judgment—burden of proof**

A defendant who moves for summary judgment assumes the burden of positively and clearly showing that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. A defendant may meet this burden by (1) proving that an essential element of plaintiff's claim is nonexistent, or (2) showing through discovery that plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that plaintiff cannot surmount an affirmative defense which would bar the claim.

3. **Rules of Civil Procedure § 56.2— motion for summary judgment—burden of proof**

If the defendant moving for summary judgment fails to meet the initial burden of proof, the motion must fail even though the plaintiff does not submit any affidavits or other supporting materials in opposition to the motion. Once the defendant satisfies his or her burden of proof, however, the burden shifts to the plaintiff to present a forecast of evidence which shows that a genuine

issue of fact exists, or to provide an excuse for not so doing, and if the plaintiff does not respond as required, summary judgment, if appropriate, should be entered for defendant.

4. Appeal and Error § 2— contention not raised in trial court—no appellate review

The validity of plaintiffs' amended complaint was not before the appellate court where defendant did not object to the amended complaint or raise the issue of its validity before the trial court, defendant indicated his consent to the amended complaint by filing an answer to it, by responding to the allegations within it, and by submitting materials in support of his motion for summary judgment, and the parties and the court treated the amendment of the complaint as proper.

5. Physicians, Surgeons and Allied Professions § 11— marital and family therapists—furnishing or failure to furnish professional services—medical malpractice action

Certified marital and family therapists are health care providers as defined in G.S. 90-21.11, and any action for damages for personal injury or death arising out of their furnishing or failure to furnish professional services should be characterized as a medical malpractice action.

6. Physicians, Surgeons and Allied Professions § 11— unauthorized disclosure of patient's confidences—medical malpractice

A health care provider's unauthorized disclosure of a patient's confidences constitutes medical malpractice.

7. Physicians, Surgeons and Allied Professions § 11— marital and family therapists—disclosure of confidences—statement of claim for relief

Plaintiff's complaint was sufficient to state a claim for relief against a marital and family therapist for medical malpractice based upon unauthorized disclosure of confidential information about plaintiff patient.

8. Physicians, Surgeons and Allied Professions § 16.1— medical malpractice—disclosure of patient's confidences—insufficient affidavit for summary judgment

In an action against a marital and family therapist for medical malpractice based upon unauthorized disclosure of confidential information about plaintiff, defendant's affidavit in support of his motion for summary judgment showing only that he did in fact communicate with at least two of plaintiff's doctors and suggesting that those communications were justified was insufficient to satisfy the burden placed on a defendant moving for summary judgment.

9. Physicians, Surgeons and Allied Professions § 13— malpractice action against marital and family therapist—statute of limitations

A claim against a marital and family therapist for medical malpractice based upon unauthorized disclosure of confidential information was governed by the statute of limitations set forth in G.S. 1-15(c) rather than that set forth in G.S. 1-52. Where the last act giving rise to plaintiff's cause of action was defendant's unauthorized discussion with a doctor in July 1981, plaintiff's cause of action accrued at the time of that discussion, and it was not barred by the

statute of limitations where it was instituted within three years after July 1981.

10. Physicians, Surgeons and Allied Professions § 15.1— medical malpractice—establishing applicable standard of care

The applicable standard of care for a health care provider must be established by other practitioners in the particular field of practice or by other expert witnesses equally familiar with and competent to testify regarding that limited field of practice.

11. Physicians, Surgeons and Allied Professions § 15.2— standard of care for marital and family therapist—competency of witness

The trial court acted under a misapprehension of law in concluding that a witness was not qualified to testify about the relevant standard of care for a marital and family therapist in Fayetteville simply because he was not certified as a marital and family therapist. The court should have determined the witness's qualification as an expert on the standard of care applicable to defendant marital and family therapist by ascertaining whether, based on his education and experience, he had adequate knowledge of the standards of practice among pastoral, marital and family therapists in Fayetteville during the applicable period of time to be of help to the jury.

12. Physicians, Surgeons and Allied Professions § 15.2— standard of care for marital and family therapist—competency of witness

A witness was qualified to testify about the standard of care for a marital and family therapist in Fayetteville from 1974 until 1981 and defendant's deviation from that standard where the witness stated that he has been a Catholic priest since 1971; he has master degrees in philosophy and divinity; he studied psychology at the University of Detroit in 1967 and 1968; he received almost one year's academic and intern training in counseling and psychotherapy at a state hospital in Pennsylvania for which he received a diploma in those subjects; while working as a priest from 1971 to 1978 he functioned as a pastoral, family and marital counselor; he began law school in 1978 and is now a practicing attorney; and he had frequent dealings with other counselors, psychologists, and psychiatrists practicing in the Fayetteville area during the relevant time period and continues to have periodic contact with those persons. Therefore, the trial court should have considered the witness's affidavit in weighing the sufficiency of plaintiff's forecast of evidence in an action based on the alleged negligence of defendant marital and family therapist in furnishing professional services to plaintiff, and plaintiff's forecast of evidence was sufficient to establish a genuine issue of material fact as to defendant's negligence when the affidavit is considered.

13. Fraud § 1— elements of fraud

The essential elements of actionable 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.

14. Fraud § 9— pleading fraud

The G.S. 1A-1, Rule 9(b) requirement that in all averments of fraud the circumstances constituting fraud must be stated with particularity is met by alleging time, place, and content of the fraudulent misrepresentation, identity of the person making the misrepresentation, and what was obtained as a result of the fraudulent acts or representations.

15. Fraud § 9; Physicians, Surgeons and Allied Professions § 11— marital and family therapist—fraudulent concealment—sufficiency of complaint

The allegations in plaintiff's amended complaint were sufficient to satisfy the particularity requirement of G.S. 1A-1, Rule 9(b) and to state a claim for relief against defendant family and marital therapist for fraudulent concealment in failing to tell her that her pain was caused by physical injuries she received in an automobile accident rather than by her psychological state.

16. Fraud § 12; Physicians, Surgeons and Allied Professions § 17— marital and family therapist—fraudulent concealment—genuine issue of material fact

Defendant marital and family therapist, who moved for summary judgment in plaintiff's action for fraudulent concealment in failing to inform plaintiff that her pain was caused by physical injuries she received in an automobile accident rather than by her psychological state, failed to meet his burden of clearly showing that there is no genuine issue of material fact with respect to plaintiff's claim.

17. Appeal and Error § 42— report not offered in trial court—appendix to brief—no consideration by appellate court

A medical report included in an appendix to plaintiff's brief will not be considered by the appellate court in determining a summary judgment issue where there is no indication in the record that the report was offered at the summary judgment hearing or considered by the court in ruling on the motion for summary judgment.

18. Limitation of Actions § 8.2— fraudulent concealment—statute of limitations

Plaintiff's claim against defendant marital and family therapist for fraudulent concealment was not barred by the statute of limitations of G.S. 1-52(9) where plaintiff did not discover that defendant was concealing the alleged true nature of her condition until after 1 June 1979 and plaintiff instituted her action on 1 June 1982. Whether plaintiff in the exercise of reasonable care and due diligence should have discovered the fraud prior to 1 June 1979 is a question of fact for the jury.

Judge WELLS concurring in part and dissenting in part.

APPEAL by plaintiffs from *Bowen, Wiley F., Judge*. Judgment entered 28 November 1983 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 13 February 1985.

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. Plaintiffs alleged: that Linda Watts fractured her spine in an automobile accident in June 1974; that subsequently she received medical and other professional care from defendants; that the defendant physicians and hospitals negligently failed to discover that her spine was fractured; and that defendants fraudulently concealed the true nature and extent of her injuries.

The present appeal concerns plaintiffs' claims against Dan Hall, a marital and family therapist who counseled Linda Watts for several years after her automobile accident. Plaintiffs asserted claims against Hall based on negligence, breach of fiduciary duty, and fraudulent concealment. Plaintiff husband also seeks to recover for loss of consortium and emotional distress. Plaintiff daughter seeks to recover for loss of her mother's services and emotional distress.

Hall moved for summary judgment on the grounds that the complaint fails to state a claim against him upon which relief may be granted and that the claims are barred by the statute of limitations in G.S. 1-52. Based on its examination of the materials submitted in support of and in opposition to the motion, the court concluded that there is no genuine issue of material fact between plaintiffs and Hall and allowed the motion. From summary judgment for Hall as to all claims asserted against him, plaintiffs appeal.

Hedahl and Radtke, by Joan E. Hedahl, for plaintiff appellants.

Nance, Collier, Herndon and Wheless, by James R. Nance, Sr., for defendant appellee.

WHICHARD, Judge.

I.

[1] The only question argued in plaintiffs' brief is whether the court erred in granting summary judgment for Hall on the claims asserted by Linda Watts. Appellate review is limited to questions raised by assignments of error and discussed in a party's brief. N.C. R. App. P. 28(a). Any other questions raised by the assignments of error are deemed abandoned. *Id.* Since plaintiffs have

not brought forward and argued any questions regarding summary judgment for Hall on the claims asserted by plaintiffs husband and daughter, we deem those questions abandoned.

Plaintiff Linda Watts (hereafter "plaintiff") contends the court erred in granting summary judgment for Hall with respect to each of her claims. G.S. 1A-1, Rule 56(c) permits the granting of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment, the court must look at the record in the light most favorable to the party opposing the motion. *Patterson v. Reid*, 10 N.C. App. 22, 28, 178 S.E. 2d 1, 5 (1970).

[2, 3] A defendant who moves for summary judgment assumes the burden of positively and clearly showing that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. *See Bernick v. Jurden*, 306 N.C. 435, 440, 293 S.E. 2d 405, 409 (1982); *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E. 2d 189, 194 (1972); *Miller v. Snipes*, 12 N.C. App. 342, 344, 183 S.E. 2d 270, 272 (1971), *cert. denied*, 279 N.C. 619, 184 S.E. 2d 883 (1971). A defendant may meet this burden by (1) proving that an essential element of plaintiff's claim is nonexistent, or (2) showing through discovery that plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that plaintiff cannot surmount an affirmative defense which would bar the claim. *Bernick*, 306 N.C. at 440-41, 293 S.E. 2d at 409. If the defendant fails to meet this initial burden of proof, the motion must fail even though the plaintiff does not submit any affidavits or other supporting materials in opposition to the motion. *See Best v. Perry*, 41 N.C. App. 107, 110, 254 S.E. 2d 281, 284 (1979); *Edwards v. Bank*, 39 N.C. App. 261, 269, 250 S.E. 2d 651, 657 (1979). The plaintiff is not required to present evidence to support his or her claim unless the defendant meets the initial burden of proof. *Id.* Once the defendant satisfies his or her burden of proof, however, the burden shifts to the plaintiff to present a forecast of evidence which shows that a genuine issue of fact exists, or to provide an excuse for not so doing. *Bernick*, 306 N.C. at 441, 293 S.E. 2d at 409; *Best*, 41 N.C. App. at 110, 254 S.E. 2d at 284. If the plaintiff does not respond as required, summary judgment, if ap-

propriate, should be entered for defendant. *See Best*, 41 N.C. App. at 110, 254 S.E. 2d at 284.

II.

[4] We briefly address Hall's contention that because plaintiffs allegedly failed to comply with G.S. 1A-1, Rule 15(a), the original complaint rather than the amended complaint should be considered in determining whether he was entitled to summary judgment. Rule 15(a) provides, in relevant part:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

The original complaint was filed by plaintiffs without the assistance of counsel. Hall answered and plaintiffs thereafter retained counsel who filed an amended complaint. The record does not show whether plaintiffs obtained leave of court or the written consent of the defendants to amend their pleading. Hall contends that plaintiffs did neither and that therefore the amended complaint should be disregarded. We note as well that in a companion appeal (No. 8412SC693) from the entry of summary judgment for several of the remaining defendants, the defendants admit that plaintiffs obtained leave of court to file the amended complaint.

It does not appear that Hall objected to the amended complaint or raised the issue of its validity before the trial court. Instead, Hall indicated his consent to the amended complaint by filing an answer to it, by responding to the allegations within it, and by submitting materials in support of his motion for summary judgment. Clearly, the parties and the court treated the amendment of the complaint as proper. A contention not raised in the trial court may not be raised for the first time on appeal. *Hall v. Hall*, 35 N.C. App. 664, 665-66, 242 S.E. 2d 170, 172 (1978), *disc. rev. denied*, 295 N.C. 260, 245 S.E. 2d 777 (1978). Accordingly, the validity of the amended complaint is not before us and we proceed on the assumption that the amendment was proper.

III.

We next consider whether the court erred in granting summary judgment for Hall on plaintiff's breach of fiduciary duty

claim. Plaintiff alleged: that Hall is a practicing marital and family therapist duly certified as provided by G.S. 90-270.45 *et seq.*; that he maintains a counseling practice in Fayetteville; that he is a health care provider as defined in G.S. 90-21.11; that in late 1974 or 1975 she began treatment with Hall to help her deal with pain she was suffering from injuries sustained in an automobile accident; that she continued to accept counseling from Hall until July 1981; that she never gave any release or waiver, written or oral, authorizing Hall to discuss her case with anyone; that, to the contrary, she explicitly and consistently instructed him not to involve himself in her medical case; that Hall owed her a duty of confidentiality; that her communications with Hall were privileged; that Hall breached his fiduciary duty to her in that he disclosed confidential information about her to others without her knowledge or consent in spite of her explicit instructions to the contrary; and that consequently she suffered a loss of her privacy and a destruction of her confidential relationship. Plaintiff further alleged that Hall continued to discuss her case after she dismissed him as her counselor in July 1981; that specifically Hall discussed her case with Dr. Pennick after she dismissed Hall even though she had told him not to; and that in 1978 Dr. Pennick and Hall exchanged letters reflecting a referral arrangement between them and freely discussed plaintiff's affairs without her knowledge or consent.

In his answer Hall admitted that he was at the time of the institution of this action a duly certified marital and family therapist as described in Chapter 90, Article 18C of our General Statutes; that he maintains a counseling practice in Fayetteville; and that in late 1974 or 1975 and thereafter, plaintiff sought and accepted his counseling services. He further admitted that he had referred plaintiff to Dr. Pennick and to another doctor, Dr. Toole, in an effort to aid her in obtaining the best medical assistance available; and that as a part of his continuing interest in her he had discussed verbally and in writing the problems he found confronting her. He denied the remaining allegations. In an affidavit in support of his motion for summary judgment, Hall again admitted that he had communicated with Doctors Pennick and Toole, to whom he had referred plaintiff, as a part of his continuing interest in her welfare. Hall submitted nothing further in support of his motion with respect to this claim.

In an affidavit in opposition to the motion, plaintiff reasserted her allegations in greater detail and further stated that Hall had admitted to her that he had spoken with and/or written to four of the doctors she had seen regarding her medical case, including Doctors Pennick and Toole.

We first determine whether plaintiff has stated a claim upon which relief can be granted. Allegations should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no facts that would entitle her to relief. *O'Neill v. Bank*, 40 N.C. App. 227, 232, 252 S.E. 2d 231, 235 (1979). Plaintiff seeks to hold Hall liable as a health care provider for his alleged unauthorized disclosure of confidential information about her, which disclosure allegedly breached his duty of confidentiality. Our courts have not previously considered whether a cause of action may be maintained against a health care provider based upon unauthorized disclosure of confidential information about a patient; however, several jurisdictions have considered the validity of such a claim asserted against a physician or psychiatrist. *See* Annot., 20 A.L.R. 3d 1109 (1968). The majority have upheld the patient's right to recover from a physician for unauthorized disclosures. *See, e.g., Humphers v. First Interstate Bank*, 684 P. 2d 581, 587 (Or. App. 1984), *petition for review allowed*, 687 P. 2d 795 (Or. 1984); *MacDonald v. Clinger*, 84 A.D. 2d 482, 486, 446 N.Y.S. 2d 801, 804 (1982). Various theories have been suggested as a basis for the cause of action, including invasion of privacy, breach of implied contract, breach of fiduciary duty or duty of confidentiality, and medical malpractice. Courts considering the issue have not agreed upon the proper characterization of the cause of action and, in some cases, have held that liability may be imposed under more than one theory. *See, e.g., Humphers v. First Interstate Bank*, 684 P. 2d at 587-88; *Horne v. Patton*, 291 Ala. 701, 708-11, 287 So. 2d 824, 829-32 (1973).

[5] We believe the cause should be characterized as one for medical malpractice. Our legislature, by enactment of Article 1B, Chapter 90, titled "Medical Malpractice Actions," has indicated that a medical malpractice action is any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services by a health care provider as defined in G.S. 90-21.11. The term "health care provider" is defined in G.S. 90-21.11 as:

> any person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, psychology; or a hospital as defined by G.S. 131-126.1(3); or a nursing home as defined by G.S. 130-9(e)(2); or any other person who is legally responsible for the negligence of such person, hospital or nursing home; or any other person acting at the direction or under the supervision of any of the foregoing persons, hospital, or nursing home.

Article 18C of Chapter 90 provides for the certification of marital and family therapists, and such persons clearly engage in the practice of or otherwise perform duties associated with psychology. Thus, certified marital and family therapists are health care providers as defined in G.S. 90-21.11, and any action for damages for personal injury or death arising out of their furnishing or failure to furnish professional services should be characterized as a medical malpractice action. Since plaintiff alleged that Hall is a certified marital and family therapist and thus is a health care provider, and since her cause of action arises from Hall's furnishing of professional services, it appears that the action is one for medical malpractice as our statutes broadly define it.

Although negligence is the predominant theory of liability in a medical malpractice action, it is not the only theory on which a plaintiff may proceed. *See* Black's Law Dictionary 864 (rev. 5th ed. 1979). Malpractice consists of any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct. *Id.* This Court has recognized that a health care provider may be liable for medical malpractice based in part upon the provider's breach of a duty to maintain the patient's trust and confidence. *See Mazza v. Huffaker*, 61 N.C. App. 170, 176-77, 300 S.E. 2d 833, 837-38 (1983), *disc. rev. denied*, 309 N.C. 192, 305 S.E. 2d 734 (1983). In *Mazza*, a patient sought to recover compensatory and punitive damages from his psychiatrist on grounds of negligence, criminal conversation, and alienation of affections. The patient alleged that the psychia-

trist had been negligent in his care and treatment of him, and thus had committed medical malpractice, by having sexual relations with the patient's wife. Expert testimony showed that a psychiatrist has a duty to do no harm to his patient and to maintain the patient's trust and confidence, that sexual relations between a psychiatrist and the patient's spouse is a violation of that duty, and that such conduct by the defendant psychiatrist was not in accord with the standard of care applicable to him. *Id.* The jury returned a verdict for the patient on his medical malpractice and criminal conversation claims and awarded him damages. *Id.* at 172-73, 300 S.E. 2d at 836. This Court found the evidence sufficient to support a claim for professional malpractice and upheld the judgment entered on the verdict. *Id.* at 189, 300 S.E. 2d at 845.

[6] Although our Supreme Court denied the psychiatrist's petition for discretionary review, *Mazza v. Huffaker*, 309 N.C. 192, 305 S.E. 2d 734 (1983), it did review the judgment entered in a related action brought by the patient against the psychiatrist and his insurer. *See Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 319 S.E. 2d 217 (1984). In that action the patient sought a determination whether the insurer was liable under its physicians' liability insurance policy for the damages awarded. The Court, in holding that the insurer was liable for the damages under its policy, agreed that the psychiatrist's conduct constituted medical malpractice. *Id.* at 626, 319 S.E. 2d at 220. By thus recognizing that a psychiatrist's conduct in having sexual relations with his patient's spouse may constitute medical malpractice, our Courts acknowledged the broad nature of that term as defined in our statutes. Guided by these decisions, we conclude that a health care provider's unauthorized disclosure of a patient's confidences constitutes medical malpractice.

[7] As in any medical malpractice action, plaintiff must show that the defendant health care provider had a duty to conform to a certain standard of conduct and that a breach of that duty proximately caused an injury. *See* E. Hightower, North Carolina Law of Damages, Sec. 36.13, at 434 (1981); *see also Lowery v. Newton*, 52 N.C. App. 234, 237, 278 S.E. 2d 566, 570 (1981). Plaintiff alleged all the essential elements of malpractice in her claim for breach of fiduciary duty and it does not appear beyond doubt that she cannot prove any facts in support of her claim that would entitle her

to relief. *See O'Neill*, 40 N.C. App. at 232, 252 S.E. 2d at 235. Thus, plaintiff stated a claim upon which relief can be granted.

[8, 9] Hall's affidavit in support of his motion shows only that he did in fact communicate with at least two of plaintiff's doctors and suggests that those communications were justified. Such a showing is clearly insufficient to satisfy the burden placed on a defendant moving for summary judgment. Moreover, it does not appear that Hall was entitled to summary judgment on the ground that plaintiff's claim is barred by the statute of limitations. Since plaintiff's claim is one for malpractice arising out of the performance of professional services, the applicable statute is G.S. 1-15(c) rather than G.S. 1-52 as Hall alleges. G.S. 1-15(c) provides that a cause of action for malpractice arising out of the performance of professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action, and that in such cases a limitation of no less than three years shall apply. The last act giving rise to the present cause of action was Hall's alleged unauthorized discussion with Dr. Pennick which occurred no earlier than July 1981; therefore, the cause of action accrued at the time of that discussion. Since plaintiff's action was instituted within three years after July 1981, it is not barred by the statute of limitations as a matter of law.

We conclude that the court erred in granting summary judgment for Hall on plaintiff's breach of fiduciary duty claim.

IV.

Plaintiff alleged as a separate cause of action: that Hall owed her a duty of care when he undertook to be her counselor; that he breached that duty in that he negligently conducted his counseling and exceeded the proper parameters of his counseling role; and that she was damaged by Hall's negligence in that she has suffered self-doubt, emotional distress, and confusion. This cause is based on Hall's alleged negligence in furnishing his professional services and is thus more clearly one for medical malpractice. To support his motion for summary judgment on this claim, Hall submitted an affidavit in which he stated, in relevant part:

> that he is familiar with accepted standards for marital and family therapists at the time and place Mrs. Watts was seen

and treated by him and that in his opinion his conduct regarding Mrs. Watts and his counseling with her as well as his attempt to help her obtain the best medical assistance available was fully and entirely in accordance with such accepted standards of practice for marital and family therapists in North Carolina.

In the documents submitted by plaintiff in opposition to Hall's motion plaintiff set forth a detailed forecast of her evidence on this claim. Plaintiff submitted an affidavit in which she stated that she first sought Hall's counseling services because of marital stress caused by her husband's drinking, and that she spoke to Hall about the severe pain she had been suffering since the automobile accident in hopes that he could help her deal with the emotional aspect of the pain. She further stated, in pertinent part:

5. From the beginning, Dan Hall tried to make me accept that . . . my pain was predominantly emotional. . . .

. . . .

7. . . . [H]e . . . often discouraged me from going to see any other doctor. He would also constantly be asking who I was seeing, why I was going, what they said, and so forth. He seemed almost obsessed by it. A lot of times after I would have an appointment I would go to talk to Dan and find that he seemed to already know much of what I was going to say. Ultimately, I learned that he was in close communication with the various doctors I was attempt[ing] to get help from.

8. From the beginning, I would frequently decide not to talk with Dan anymore because I would often become so upset after our appointments. But when I wouldn't call for an appointment for more than a week or so, there he would be calling me to schedule one. If I told him I didn't feel I needed to talk to him anymore, he would start working on me and working on me over [the] phone, or coming by the house. He would not only talk to me, but he would be aggravating and harassing my entire family. He would get me feeling so guilty about not talking to him that I would finally agree. . . .

9. As early as 1976, friends and family would try to tell me that it seemed Dan Hall was manipulating my life and in-

terfering with my attempts to get medical attention for my back and neck. I wouldn't believe it. . . .

. . . .

16. After I confronted Dan Hall with his interfering with my medical care and told him that I did not want to see him ever again, he began to call the house even more than before. During one period, he called five, six, even seven times a day trying to talk to me, to get me to come see him again. He continued to call for months after our last meeting. In fact, he only stopped when I told him that I had seen an attorney and was going to file suit.

17. In addition to Dan Hall's interfering in my medical care, talking with the other doctors and conspiring to keep me ignorant of my true condition, violating my trust and breaching our confidential relationship, he also made many improper advances toward me. He has attempted to kiss me. He has attempted to feel my breast. He was always touching and trying to hug me. He has asked me if I fantacized [sic] about making love to him. He has asked me very detailed questions about my sexual thoughts and activity. One day he asked me if I wore bikini underwear. On another occasion, after I had had abdominal surgery, he asked me to drop my pants to show my scar.

. . . .

19. In addition . . ., it seemed that Dan would often try to stir up trouble between me and my family. . . . We had many arguments at home which were caused solely and completely by Dan Hall. . . . Each time we had such an occurrence, he would be right there wanting to help me through the difficulty—difficulties which he caused. I fully believe that he knew what he was doing and was doing it deliberately.

Plaintiff also submitted: affidavits of her husband and two children in which they confirmed and expanded upon plaintiff's allegations; the affidavit of the family's priest and counselor, Giacomo Ghisalberti; and exhibits which showed that prior to Hall's certification as a marital and family therapist, Hall held himself out as a pastoral counselor with a master's degree in

divinity. Ghisalberti stated in his affidavit that he is familiar with and knowledgeable of the standard of practice in Fayetteville for a pastoral, family, and marital counselor, and that in his opinion Hall's conduct in counseling plaintiff fell far short of that standard of practice in several respects. Ghisalberti then explained in considerable detail the ways in which Hall's counseling deviated from accepted practice.

In response to Ghisalberti's affidavit Hall filed a further affidavit in which he stated: that he is a duly qualified, registered, and licensed therapist in the field of family and marriage counseling; that he has never met or had any connection with Ghisalberti; and that he believes Ghisalberti is neither a registered nor a licensed therapist in family or marital counseling in this State and has never practiced in this State in this field of health care providers. It appears from the judgment that plaintiffs admitted that Ghisalberti was not registered or licensed in this State as a marital and family therapist as defined in Chapter 90 and that the court relied on plaintiffs' admission in concluding that Hall was entitled to summary judgment.

To support his motion for summary judgment on this claim, Hall attempted to show that plaintiff could not prove that he breached his duty to her by failing to conduct his counseling in accordance with accepted standards of practice. He did this by attempting to show that Ghisalberti was not qualified to testify about the applicable standard of care because he was not a certified family and marital therapist as defined in G.S. 90-270.47(3), as was Hall, when this action was commenced. It was Hall's position that since Ghisalberti's affidavit was the only evidence presented by plaintiff regarding the applicable standard of care and Hall's deviation therefrom, plaintiff's forecast of evidence was fatally deficient. The court apparently agreed that Ghisalberti's lack of certification as a marital and family therapist rendered him incompetent to testify about the applicable standard of care, and it thus did not consider Ghisalberti's affidavit in ruling on Hall's motion.

Since Hall, as a certified marital and family therapist, is a health care provider as defined in G.S. 90-21.11, and plaintiff's claim is one for damages for personal injury arising out of Hall's furnishing of his professional services, Hall can be liable for

damages only if it is shown by the greater weight of the evidence that the care he provided did not accord with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act(s) giving rise to the cause of action. *See* G.S. 90-21.12. Plaintiff has the burden of establishing the standard of care required of practitioners in Hall's field of practice, as well as Hall's breach thereof. *See Whitehurst v. Boehm*, 41 N.C. App. 670, 673, 255 S.E. 2d 761, 765 (1979).

[10] The applicable standard of care for a health care provider must be established by other practitioners in the particular field of practice or by other expert witnesses equally familiar with and competent to testify regarding that limited field of practice. *See Whitehurst*, 41 N.C. App. at 677, 255 S.E. 2d at 767. The test of a witness' qualification as an expert on the applicable standard of care in a malpractice case should be whether the witness has adequate knowledge of the customary standards of practice to be of help to the jury. *See*, Byrd, The North Carolina Medical Malpractice Statute, 62 N.C. L. Rev. 711, 730 (1984). A witness' testimony should not be excluded because there are other witnesses who are better qualified or more knowledgeable. *Id.* It is well settled that to qualify as an expert, a witness need not be a specialist, or have a license from an examining board, or have had experience with the exact subject matter involved, or be engaged in any particular profession. *See* 1 H. Brandis on North Carolina Evidence, Sec. 133, at 514-15 (1982). It is enough that, through study or experience, the witness is better qualified than the jury to form an opinion on the particular subject. *Id.* at 515.

[11] We find that the court acted under a misapprehension of law in concluding that Ghisalberti was not qualified to testify about the relevant standard of care simply because he was not certified as a marital and family therapist, and that it thus erred in concluding that plaintiff's forecast of evidence was insufficient. It is significant that there was no certification agency or procedure for marital and family therapists prior to 1 October 1979 when G.S. 90-270.45 *et seq.* became effective. Thus, neither Hall nor Ghisalberti could have been certified as a marital and family therapist prior to 1 October 1979. The court should have determined Ghisalberti's qualification as an expert on the standard of

care applicable to Hall by ascertaining whether, based on his education and experience, he had adequate knowledge of the standards of practice among pastoral, marital and family therapists in Fayetteville from 1974 until 1981 to be of help to the jury. *See* G.S. 90-21.12; Byrd, *supra.*

[12] In his affidavit Ghisalberti stated: that he had been a Catholic priest since 1971; that he had masters degrees in philosophy and divinity; that he had studied psychology at the University of Detroit in 1967 and 1968; that he had received almost one year's academic and intern training in counseling and psychotherapy at a state hospital in Pennsylvania for which he received a diploma in those subjects; that while working as a priest from 1971 to 1978 he had functioned as a pastoral, family and marital counselor; and that he began law school in 1978 and is now a practicing attorney. He further stated that he had frequent dealings with other counselors, psychologists, and psychiatrists practicing in the Fayetteville area during the relevant time period and that he continued to have periodic contact with those persons.

We find this evidence sufficient to establish Ghisalberti's qualification to testify about the relevant standards of practice and Hall's deviation from those standards. The court thus should have considered his affidavit in weighing the sufficiency of plaintiff's forecast of evidence. Assuming, without deciding, that the materials offered by Hall in support of his motion were sufficient to shift the burden to plaintiff to forecast evidence in support of her claim, we conclude that plaintiff met her burden. We find that the evidence forecast was sufficient to show a genuine issue of material fact with respect to plaintiff's claim and that Hall was not entitled to summary judgment thereon.

Nor was Hall entitled to summary judgment on the ground that this cause of action is barred by the statute of limitations. Since the claim is for medical malpractice, G.S. 1-15(c) applies. It is clear from the pleadings and documents in opposition to Hall's motion that the last act giving rise to the cause of action occurred within three years of the institution of this action; therefore, the cause is not barred. Accordingly, the court erred in entering summary judgment thereon for Hall.

Arguably, one of the ways in which Hall was negligent in his counseling of plaintiff was by revealing confidential information

about her to others without her authorization, and plaintiff's breach of fiduciary duty claim therefore is included within her negligence claim. Since plaintiff asserted these claims as separate causes of action, we have addressed them as such. Assuming, *arguendo*, that the two claims form the basis of a single cause of action, we find that defendant failed to show that he was entitled to summary judgment thereon.

V.

Lastly, we address plaintiff's contention that the court erred in granting summary judgment for Hall on her fraudulent concealment claim. Plaintiff alleged: that she sustained injuries in an automobile accident on 7 June 1974; that thereafter she was treated by the defendant doctors and counseled by Hall; that the defendants fraudulently concealed the true nature of her condition; that the medical defendants knew or should have known of her condition; that the medical defendants made false representations of material facts and opinions which served to conceal from plaintiff the true nature and extent of her injuries with the intention of preventing her from discovering that the fracture had been overlooked at the initial examination; that such misrepresentations directly prevented her from obtaining the necessary treatment in time to ward off arachnoiditis and further complications; that she justifiably relied on defendants' representations; and that she was damaged by her reliance in that she did not receive the needed medical treatment in a timely manner. She further alleged that Hall intentionally assisted the medical defendants in their fraudulent concealment through his unauthorized disclosures of plaintiff's confidences and through his counseling of her, beginning in 1975 and continuing until 1981 when she realized that Hall was intermeddling well beyond the scope of the counseling function.

Plaintiff also set forth more detailed allegations regarding when and where she was treated by the defendant doctors and their diagnosis or treatment of her. It is clear from the complaint as a whole, and particularly from plaintiff's allegations of negligence, that the defendants informed plaintiff that her distress was attributable to her psychological state rather than to any physical injuries. Plaintiff alleged, in relevant part, that:

After she was treated by several of the defendant doctors including Dr. Pennick, she was examined in May 1979 by another doctor, Dr. Coin, who performed a CT Scan. After reviewing the scan, Dr. Coin advised her that she was suffering from a broken back and spine. The next day Dr. Coin went to Cumberland County Hospital to examine the x-rays taken on the day of plaintiff's accident. Thereafter Dr. Coin advised plaintiff that he saw the two neck breaks on the original x-ray but that the original lumbar film was missing.[1]. Plaintiff took Dr. Coin's results to defendant Pennick who treated her from June 1977 through September 1979. She contacted Pennick again in June 1981. In 1978 Hall and Pennick, fraudulently and without plaintiff's knowledge or consent, freely discussed plaintiff's affairs. Hall continued to discuss plaintiff's record and case with others including Pennick after Hall was dismissed as her counselor in July 1981. Defendants Toole, who treated plaintiff in May and June of 1981, and Pennick breached their fiduciary duty to plaintiff by disclosing her medical records to Hall.

[13] The essential elements of actionable 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). It is well settled that where there is a duty to speak the concealment of a material fact is equivalent to fraudulent misrepresentation. *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 198, 225 S.E. 2d 557, 565 (1976).

> Silence, in order to be an actionable fraud, must relate to a material matter known to the party and which it is his legal duty to communicate to the other . . . party, whether the duty arises from a relation of trust, from confidence, inequality of condition and knowledge, or other attendant circumstances. . . . the silence must, under the conditions existing, amount to fraud, because it amounts to an affirmation that a state of things exists which does not, and the

1. Although plaintiff alleged that Dr. Coin advised her that she had a broken back and spine, it is clear from the record that the injuries allegedly discovered by Dr. Coin and which plaintiff claims to have sustained in the accident were fractures in her *neck* and back.

uninformed party is deprived to the same extent that he would have been by positive assertion.

Setzer v. Insurance Co., 257 N.C. 396, 399, 126 S.E. 2d 135, 137 (1962), quoting 23 Am. Jur., Fraud and Deceit, Sec. 77. It is clear that the false representation or concealment which is the basis of plaintiff's claim against Hall is his failure to tell her, in the course of his counseling, that her pain was caused by physical injuries she received in the 1974 accident rather than by her psychological state.

[14] G.S. 1A-1, Rule 9(b) provides that in all averments of fraud the circumstances constituting fraud must be stated with particularity. This requirement is met by alleging time, place, and content of the fraudulent misrepresentation, identity of the person making the misrepresentation, and what was obtained as a result of the fraudulent acts or representations. *Terry v. Terry*, 302 N.C. at 85, 273 S.E. 2d at 678; *see also*, G.S. 1A-1, Rule 9(f).

[15] We conclude that the allegations in the amended complaint are sufficient to satisfy the particularity requirement of G.S. 1A-1, Rule 9(b) and to state a claim for relief against Hall based on fraud. Plaintiff alleged all the essential elements of a claim based on fraud and alleged the circumstances surrounding the fraud in as much detail as reasonably should be required.

[16] Hall denied the allegations of fraudulent concealment in his answer and in an affidavit submitted in support of his motion. He also submitted the affidavits of defendants Askins, Moress, Keranen, Pennick, and Alexander, in all of which the following denial appears: "I have never, fraudulently or otherwise, concealed the true nature or extent of Mrs. Watts' injuries or condition, nor have I ever made any false representation of any kind to Mrs. Watts, nor has any other health care provider done so to my knowledge." These conclusory, self-serving denials are clearly insufficient to show that Hall is entitled to summary judgment. *See Lee v. Shor*, 10 N.C. App. 231, 235, 178 S.E. 2d 101, 104 (1970).

In addition, Hall offered in support of his motion "all matters of record as of the date of the filing of this motion." While it is not clear what documents were included within that description, it appears from the record that plaintiff's answers to interrogatories and documents filed by plaintiff in response to defend-

ants' requests for production of documents, which primarily consist of plaintiff's medical records from 1968 until 1983, were submitted for consideration in ruling on the motion. Copies of those documents are included in the record on appeal. Plaintiff's answers to interrogatories simply expand upon and support the allegations in plaintiff's complaint.

Plaintiff's medical records, however, clearly reveal the existence of a genuine issue as to whether plaintiff in fact sustained the injuries she claims. All doctors who examined plaintiff after the accident, defendant doctors as well as others, except for Dr. Coin, found that plaintiff had no fractures. It is not clear whether any of the doctors not named as defendants, other than Dr. Coin, examined plaintiff's original x-rays. Dr. Coin found fractures, however, and his reports are fairly detailed and not inherently incredible. The record does not show that any other materials were submitted by Hall in support of his motion nor does it contain any other materials.

Allegations of fraud do not readily lend themselves to resolution by summary judgment because a cause of action based on fraud necessarily requires determining the state of mind of the party accused, which ordinarily must be proved by circumstantial evidence. *See Johnson v. Insurance Co.*, 300 N.C. 247, 260, 266 S.E. 2d 610, 619 (1980); *Bank v. Belk*, 41 N.C. App. 328, 339, 255 S.E. 2d 430, 437 (1979), *disc. rev. denied*, 298 N.C. 293, 259 S.E. 2d 299 (1979).

> This renders summary judgment inappropriate in a fraud case where the court is called upon to draw a factual inference in favor of the moving party, . . . or where the court is called upon to resolve a genuine issue of credibility. . . . However, the issue of fraud may be summarily adjudicated when it is clearly established that there is no genuine issue of material fact. (Citations omitted.)

Johnson, 300 N.C. at 260, 266 S.E. 2d at 619. We conclude that Hall failed to meet his burden of clearly showing that there is no genuine issue of material fact with respect to this claim.

[17] We note that plaintiff indicates in her brief that a later medical report prepared by Dr. Coin was offered by Hall at the summary judgment hearing. Plaintiff has included a copy of that

report in an appendix to her brief. This is not approved. *See Calhoun v. Calhoun*, 7 N.C. App. 509, 512, 172 S.E. 2d 894, 896 (1970). This Court can judicially know only what appears of record. *In re Sale of Land of Warrick*, 1 N.C. App. 387, 390, 161 S.E. 2d 630, 632 (1968). Matters discussed in a brief, or exhibits in an appendix thereto, which are outside the record will not be considered. *See Calhoun* and *Warrick, supra.* There is no indication in the record that this report was offered at the summary judgment hearing or considered by the court in ruling on the motion. Accordingly, we have not considered this report in determining the issue presented.

[18] A cause of action based on fraud must be brought within three years after discovery by the aggrieved party of the facts constituting the fraud. G.S. 1-52(9). The record tends to show that plaintiff instituted this action on or about 1 June 1982 and that she did not discover that Hall had been in contact with her doctors and was concealing the alleged true nature of her condition until after 1 June 1979. Thus, her cause of action against Hall for fraudulent concealment is not barred by the statute of limitations. Whether plaintiff in the exercise of reasonable care and due diligence should have discovered the fraud prior to 1 June 1979 is a question of fact for the jury. *See Feibus & Co. v. Construction Co.*, 301 N.C. 294, 304-05, 271 S.E. 2d 385, 392 (1980), *reh. denied*, 301 N.C. 727, 274 S.E. 2d 228 (1981).

We conclude that the court erred in granting summary judgment for Hall on plaintiff's fraudulent concealment claim.

Accordingly, we reverse the summary judgment for Hall on the claims asserted by plaintiff Linda Watts. Because plaintiffs have not argued that the summary judgment entered on the claims asserted by plaintiffs George Watts and Kim Watts should be reversed, that summary judgment is affirmed. N.C. R. App. P. 28(a).

Affirmed in part; reversed in part.

Judge WELLS concurs in part and dissents in part.

Judge BECTON concurs.

Judge WELLS concurring in part and dissenting in part.

I concur with that part of the majority opinion which recognizes that plaintiff's breach of fiduciary duty claim constitutes a malpractice claim and that summary judgment for defendant Hall was improvidently granted on that claim.

I also concur that summary judgment was improvidently granted for defendant Hall on plaintiff's malpractice (negligent and improper counseling) claim.

I dissent from that part of the majority opinion which holds that plaintiff has stated, or can support, a separate claim for fraudulent concealment against defendant Hall. Relying on much of the same reasoning used by the majority with respect to plaintiff's "breach of fiduciary duty" claim, it is my opinion that plaintiff's fraudulent concealment claim is but another aspect or dimension of her malpractice claim.

SHELLY S. GASPERSOHN, BY AND THROUGH ARNOLD GASPERSOHN, GUARDIAN AD LITEM v. HARNETT COUNTY BOARD OF EDUCATION AND GLENN VARNEY

No. 8411SC1188

(Filed 4 June 1985)

1. Schools § 1; Assault and Battery § 3— corporal punishment—instructions correct

In an action for assault and battery in which plaintiff alleged that excessive and unreasonable corporal punishment had been administered upon her, the court did not err by not including plaintiff's requested instructions on determining whether reasonable force had been used, that the jury could consider the regulations of the Harnett County Board of Education, and that corporal punishment should never be employed as a first line of punishment for misbehavior. While it would not have been error to include some of the requested instructions, the instruction given was a correct statement of the law applied to the facts of the case. G.S. 115C-390.

2. Schools § 1— corporal punishment—contentions of the parties properly stated

The trial court did not express an opinion on the evidence while stating the contentions of the parties in an action arising from the use of corporal punishment in a high school by stating that no other alternative was offered when plaintiff was first given in-school suspension, by stating that "nobody held anybody" when recapitulating the evidence as to how corporal punish-

ment was administered, or by stating that plaintiff seemed anxious to take corporal punishment. The issue in the case was not what alternative punishment should have been offered, the evidence showed that no one held plaintiff and the statement did not imply that there was no compulsion to accept corporal punishment, and there was testimony that plaintiff twice requested corporal punishment.

3. Schools § 1— corporal punishment—no expression of opinion by the trial judge

In an action arising from the use of corporal punishment in a high school, the trial judge did not express an opinion against plaintiff when he declined plaintiff's request to charge the jury as to the vacillation of the defendants in imposing in-school suspension, by refusing to qualify one of plaintiff's witnesses as an expert in the presence of the jury despite having done so for one of defendants' witnesses, by saying "well, let's get away from band and talk about learning something, suppose it was mathematics?" after evidence of plaintiff's accomplishments in music and band, by allowing evidence for defendant that the paddling which plaintiff received was no different from other corporal punishments administered but sustaining an objection to plaintiff's question of another student about whether she had ever been hit that hard, by sustaining objections to questions propounded to plaintiff's expert witness, and by excluding testimony by the general practitioner who first examined plaintiff.

4. Constitutional Law § 24.1— corporal punishment—procedural due process

In an action arising from the use of corporal punishment in a high school, plaintiff's procedural due process rights were satisfied by the common law restrictions on unreasonable punishment and by the remedies for corporal punishment deemed excessive.

5. Schools § 1— corporal punishment—questions limited—no error

In an action arising from the use of corporal punishment in a high school, the court did not err by limiting questions concerning whether plaintiff asked for corporal punishment or for an alternative to in-school suspension, whether raking leaves was an alternative to in-school suspension, whether corporal punishment was administered as an alternative to in-school suspension at a junior high school, whether the assistant principal used one or both hands on the paddle on other occasions, whether another girl punished with plaintiff had ever been hit that hard, and the number of "licks" a third girl had received.

6. Damages § 17.7— corporal punishment—punitive damages dismissed—no error

There was no error in the dismissal of plaintiff's claim for punitive damages in an action arising from the use of corporal punishment in a high school where the jury found that there was no malice on the part of the assistant principal who had administered the punishment.

7. Schools § 1; State § 1— corporal punishment not proscribed in North Carolina by the United Nations Charter

Corporal punishment is not proscribed by international law made applicable to North Carolina by the United Nations Charter.

Judge WHICHARD concurring in the result.

Gaspersohn v. Harnett Co. Bd. of Education

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 5 January 1984 in Superior Court, HARNETT County. Heard in the Court of Appeals 17 May 1985.

This is an action by plaintiff for assault and battery. The plaintiff alleged that while she was a student at Dunn Senior High School in 1981 Glenn Varney, who was serving as assistant principal administered upon her excessive and unreasonable corporal punishment by striking her six times upon the buttocks and with a paddle. She alleged further that as a result of this punishment she suffered extensive bruising "to both buttock, and permanent psychological injuries."

The evidence showed that on 1 December 1981 the plaintiff, two other girls and a boy skipped school. On 2 December 1981 the plaintiff, as punishment for skipping school, was given six days in-school suspension. In-school suspension is a form of disciplinary action which allows students to stay in school without going to class. Students who are in in-school suspension are responsible for maintaining their schoolwork. At the time the plaintiff and the other two girls received this discipline they were adamant that they did not want to be in in-school suspension and requested that they "receive licks" as an alternative. Mr. Varney explained to them that the rule was that they would have to take three licks for each day of suspension which would be eighteen licks which was too many for them. He asked them to report for in-school suspension and told them that perhaps something could be done in a few days. The girls went to in-school suspension.

After the girls had been in in-school suspension for three days they sent for Mr. Varney and asked him again to let them "receive licks" in lieu of further in-school suspension. At this time Mr. Varney reduced the number of licks each girl was to receive from nine to six and administered them. Each girl was given three licks and each then requested that the punishment should continue. Each girl was then given three more licks. A member of the faculty witnessed the proceedings. The girls were then allowed to return to class.

The plaintiff had bruises on her buttocks for approximately three weeks and a psychologist who examined her diagnosed her as having post-traumatic stress syndrome, a psychological condition which leaves a permanent mental scar.

The Court submitted issues to the jury as to the reasonableness of the force used by Mr. Varney, the permanent injury to the plaintiff, the foreseeability of the injury and damages. The jury answered the first issue as to whether Mr. Varney had used more force than was reasonable in administering corporal punishment in favor of the defendant. The Court entered a judgment dismissing the action and the plaintiff appealed.

Reid, Lewis and Deese by Renny W. Deese for plaintiff appellant.

Morgan, Bryan, Jones and Johnson by Robert H. Jones for defendant appellee Harnett County Board of Education.

Teague, Campbell, Dennis and Gorham by C. Woodrow Teague and Dayle A. Flammia for defendant appellee Glenn Varney.

DeBank, McDaniel, Heidgerd, Holbrook and Anderson by C. D. Heidgerd for Minnesota Lawyers International Human Rights Committee amicus curiae.

WEBB, Judge.

This case brings to the Court questions arising from the administration of corporal punishment in the public schools of this state. Corporal punishment is allowed by G.S. 115C-390 which provides:

> Principals, teachers, substitute teachers, voluntary teachers, teacher aides and assistants and student teachers in the public schools of this State may use reasonable force in the exercise of lawful authority to restrain or correct pupils and maintain order. No local board of education or district committee shall promulgate or continue in effect a rule, regulation or bylaw which prohibits the use of such force as is specified in this section.

Prior to the adoption of G.S. 115C-390 there have been two cases in our Supreme Court dealing with corporal punishment. See *Drum v. Miller*, 135 N.C. 205, 47 S.E. 421 (1904), and *State v. Pendergrass*, 19 N.C. 365 (1837). In *Pendergrass* our Supreme Court reversed the conviction of a schoolteacher for assault and battery. The evidence showed that the teacher whipped a six or

seven year old girl so as to cause marks upon her body which disappeared within a few days. The Court said,

> "The jury should have been further instructed, that however severe the pain inflicted, and however in their judgment it might seem disproportionate to the alleged negligence or offence of so young and tender a child, yet if it did not produce nor threaten lasting mischief, it was their duty to acquit the defendant; unless the facts testified induced a conviction in their minds, that the defendant did not act honestly in the performance of duty, according to her sense of right, but under the pretext of duty, was gratifying malice."

In *Drum* our Supreme Court granted a new trial for an error in the charge. In that case the defendant schoolteacher threw a pencil at the plaintiff who was a student in his class. The pencil struck the plaintiff in the eye, inflicting serious injury. The Superior Court instructed the jury that unless they found that a prudent man might have anticipated that the injury complained of would likely result from the defendant's act they should find against the plaintiff on the issue of wrongful injury. Our Supreme Court held that it was not necessary for the jury to find the defendant should have foreseen the particular injury which occurred. The Court said it was necessary for the jury to find only that a permanent injury would be the natural and probable consequences of his act. The Court cited *Pendergrass* and said, "It is undoubtedly true that a teacher is liable if, in correcting or disciplining a pupil, he acts maliciously or inflicts a permanent injury, but he has the authority to correct his pupil when he is disobedient and inattentive to his duties, and any act done in the exercise of this authority and not prompted by malice is not actionable, though it may cause permanent injury, unless a person of ordinary prudence could reasonably foresee that permanent injury of some kind would naturally or probably result from the act."

We believe the pre-G.S. 115C-390 rule from *Pendergrass* and *Drum* is that a teacher has the right to administer corporal punishment to students so long as it is done without malice and to further an educational goal. If a teacher inflicts serious injury on a student the teacher is liable although acting without malice and to further an educational goal if he should have reasonably fore-

seen that a serious or permanent injury of some kind would naturally or probably result from the act. G.S. 115C-390 allows the administration of corporal punishment so long as reasonable force is used and proscribes local school boards from prohibiting it. See *Kurtz v. Board of Education*, 39 N.C. App. 412, 250 S.E. 2d 718 (1979), in which we held that a school board may regulate the manner in which corporal punishment is administered.

In *Baker v. Owen*, 395 F. Supp. 294 (1975), a three judge court held that G.S. 115C-390 does not violate any substantive constitutional rights. The Court in that case prescribed certain procedures that must be followed to protect the procedural due process rights of students who are to receive corporal punishment. In *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed. 2d 711 (1977), the United States Supreme Court held that the Eighth Amendment to the United States Constitution which forbids cruel and unusual punishment does not apply to corporal punishment administered in our schools. The Supreme Court held that traditional common law remedies for excessive corporal punishment satisfied the due process requirement of the Fourteenth Amendment. The common law remedy which the Court said applied in most states is that a child could recover for excessive punishment but there can be no recovery if the punishment is reasonable in light of its purpose. We believe the law in North Carolina as to corporal punishment in public schools follows the common law rule as enunciated by the Supreme Court in *Ingraham*.

[1] The appellant's first assignment of error is to the charge. The appellant requested that the Court charge the jury that in determining whether reasonable force had been used that "reasonableness embodies the concept that the use of force is limited to that necessary under the circumstances for the child's discipline and training, and that in evaluating reasonableness you may take into consideration plaintiff's age, sex, physical and mental condition, seriousness of the offense, the attitude and past behavior of plaintiff, the severity of the punishment, the probability of any physical or mental harm, the availability of less severe but equally effective means of discipline, the defendant's anger or malice, the instrument used, and the defendant's tolerance of pain." The appellant also requested that the Court instruct the jury that in relation to Mr. Varney's authority to use corporal

punishment they could consider the regulations of the Harnett County Board of Education. The appellant requested further that the jury be instructed that except for "acts of misconduct which are so antisocial or disruptive in nature as to shock the conscience, corporal punishment should never be employed as a first line of punishment for misbehavior."

The Court charged the jury that a teacher may use reasonable force in the exercise of lawful authority to restrain or correct pupils and maintain order. He explained to them that this included corporal punishment and said, "A teacher may therefore legally inflict temporary pain but may not seriously endanger life, limb, health or disfigure the child or cause any other permanent injury. He cannot lawfully beat the child, even moderately, to gratify his own evil passion. The chastisement must be honestly inflicted in punishment for some dereliction which the pupil understands. If the teacher keeps himself within these limits and his lawful jurisdiction, he must decide the question of the expediency or necessity of the punishment and its degree." The Court charged the jury further that if Mr. Varney failed to exercise ordinary care and inflicted permanent or long lasting injury which was the natural and probable result he would be liable to the plaintiff. We believe this is a correct statement of the law as applied to the facts of this case. It appears that Judge Bailey relied on *Pendergrass* and *Drum* in defining reasonableness as used in the statute. In this we find no error.

While it would not have been error to include some of the plaintiff's requested instructions in the charge we do not believe it was necessary. We believe for example, the law of this state is in compliance with the law in most of our states as outlined in *Ingraham* and Judge Bailey adequately instructed the jury as to the law. We have a statute governing the administration of corporal punishment. If we were to hold that a judge had to charge in accordance with some of the plaintiff's requests for instructions we believe we would be overruling the legislature which we do not have the power to do. We believe that an instruction that corporal punishment should never be employed as a first line of punishment except in cases in which the act of the student is so antisocial or disruptive in nature as to shock the conscience is contrary to the statute. The appellant's first assignment of error is overruled.

In her second assignment of error the appellant contends the Court erred in excluding certain testimony. The appellant concedes it was not error to exclude this testimony if the proper standard was applied by the Court in determining the appropriateness of the corporal punishment administered to the plaintiff. We hold the proper standard was applied. This assignment of error is overruled.

[2] In her third assignment of error the appellant contends the Court expressed an opinion on the evidence while stating the contentions of the parties. In charging the jury as to the in-school suspension which was first imposed on the plaintiff the Court stated "No other alternative was offered at that time." The defendant asked the Court to charge that boys were given the alternative of raking leaves, which alternative was not offered to the girls. The Court refused to give this instruction. The appellant contends that this gave the jury the impression that only the defendants' offered alternative of corporal punishment or outright suspension "were legitimate considerations." We do not believe the court should have given this requested charge. The question in this case is not what alternative punishment should have been offered in addition to corporal punishment. The defendant Varney was authorized by statute to administer corporal punishment. When the plaintiff chose this form of punishment as an alternative to in-school suspension the question is whether a reasonable amount of force was used and not whether some other form of punishment should have been used.

In recapitulating the evidence as to how corporal punishment was administered the Court said "nobody held anybody." The appellant contends that this implies there was no compulsion on her to accept corporal punishment. We do not believe that is the implication from this statement. The evidence shows that no one held the plaintiff. The jury should have been well aware, however, that she requested corporal punishment in order to be relieved of in-school suspension which was a form of compulsion. The Court in recapitulating the evidence stated that the plaintiff seemed anxious to take corporal punishment. The appellant argues that nowhere in the evidence is there anything which would support this characterization. There was testimony that the plaintiff requested corporal punishment on the day she received the in-school suspension. The evidence was that she sent for Mr. Varney

on the third day of the suspension and again requested it. We believe this supports the Court's characterization. This assignment of error is overruled.

[3] In her fourth assignment of error the appellant contends that several actions of the Court during the trial amounted to an expression of opinion against her. The Court declined a request of the plaintiff to charge as to the vacillation of the defendants in imposing in-school suspension as punishment. The plaintiff's contention in this regard is based on testimony of a former student that she was sent to a detention hall three years before the incident involved in this case. There was no in-school suspension program at Dunn Senior High School at that time. We do not believe this shows any vacillation by the defendants as to punishment.

The appellant also contends that the Court showed its bias against her by refusing in the presence of the jury to find that one of her witnesses was an expert in spite of the fact that the Court made such a finding in the jury's presence for one of the defendants' witnesses. She also argues it was an expression of an opinion for the Court to say "well, let's get away from band and talk about learning something, suppose it was mathematics?" after evidence that she had brought distinction to Dunn High School through her accomplishments in music and band. We do not believe the Court's method of qualifying the expert witnesses or its comments in regard to playing in the band rise to the level of reversible error.

The appellant further contends that the Court consistently rejected her evidence that she was falling behind in her schoolwork while in in-school suspension. She cites nothing in the record that supports this contention. She argues further that it was an expression of opinion for the Court to allow evidence for the defendant that the paddling which the plaintiff received was no different in force from other corporal punishment administered and to sustain an objection to a question asked one of the students paddled that day as to whether she had ever been hit that hard on any other occasion. We do not believe this is an expression of an opinion by the Court. Nor do we believe, as contended by the plaintiff that the manner of the Court's ruling on the testimony or his instructions not to be repetitive were expres-

sions of opinion. The defendant's fourth assignment of error is overruled.

The appellant next assigns error to what she contends is the improper sustaining of objections to questions propounded to her expert witnesses. Dr. Irwin A. Hyman, a practicing psychologist, testified for the plaintiff. He testified that in his opinion as a result of the corporal punishment the plaintiff had a post traumatic stress syndrome, that she had recurring nightmares about the event, she could not talk about it without crying and she had a fear of men who reminded her of Mr. Varney. During the testimony of Dr. Hyman the Court sustained objections to a question as to a letter mailed to him by the plaintiff's mother, to testimony as to the in-school punishment at Dunn High School and the severity of the corporal punishment administered in this case in comparison to other corporal punishments, as well as testimony by Dr. Hyman that the trauma of the plaintiff reminded him of the trauma suffered by women who have been raped. We believe the exclusion of these parts of the testimony of Dr. Hyman was inconsequential.

Dr. John Braswell Smith, a general practitioner, testified that he examined the plaintiff after she had been paddled, that he found bruises on her buttocks that in his opinion could have been painful for several days, and that he saw her two weeks later at which time the bruises had healed. During the testimony of Dr. Smith the Court sustained an objection to a question as to the size of the bruises on the ground such testimony would be repetitive. We find no error in this ruling. It also sustained an objection to a question as to whether the degree of bruising was related to the amount of force used. We believe the answer to this question is self-evident. There was no prejudice to the plaintiff not to have Dr. Smith answer it. The Court also sustained an objection to testimony of Dr. Smith as to his feeling about the bruises. We do not believe Dr. Smith's feelings about the bruises were relevant to this case. The Court also sustained an objection to a question as to how much force would have been required to inflict bruises of the size found on the plaintiff. Assuming this opinion would be within the expertise of Dr. Smith the jury had evidence that corporal punishment was administered to the plaintiff which was very painful to her and the pain could have lasted for several

days. We do not believe it was prejudicial to exclude this testimony. The defendant's fifth assignment of error is overruled.

[4] The plaintiff's sixth assignment of error is based on what she contends is a violation of her procedural due process rights. In *Ingraham v. Wright, supra*, it was held that procedural due process for those on whom corporal punishment is inflicted is satisfied by the common law restrictions on unreasonable punishment and by the remedies for corporal punishment deemed to be excessive. We believe the common law rule as modified by statute in this state satisfies the requirements of *Ingraham*. This assignment of error is overruled.

[5] In her seventh assignment of error the appellant contends that the Court erred in limiting questions propounded to certain witnesses. The plaintiff called Glenn Varney as an adverse witness. Among the questions propounded by the plaintiff was whether he remembered if the plaintiff asked for corporal punishment or whether she asked for an alternative to in-school suspension. The Court sustained an objection to this question as being repetitious. In this we find no error. An objection was also sustained to a question as to whether Mr. Varney did not let the plaintiff rake leaves as an alternative to in-school suspension. There was testimony by Mr. Varney and others that girls were not allowed to rake leaves as were boys as an alternative to in-school suspension because it was not considered proper for girls to rake leaves. We do not believe the plaintiff was prejudiced because Mr. Varney was not allowed to testify to it on this one occasion.

Dana Gage, the guidance counsellor at Coats Junior High School, was called as a witness for the plaintiff. She testified that she was a neighbor of the plaintiff and she saw her the night after the corporal punishment had been administered. She was not allowed to testify as to whether corporal punishment was administered at Coats Junior High School as an alternative to in-school suspension. The question in this case is the reasonableness of the corporal punishment administered to the plaintiff. Whether it was allowed as an alternative to in-school suspension in a junior high school is so tangential to the question in this case that it has little probative value. It was not error to exclude this testimony.

Nicole Heskey was called as a witness by the defendants. She testified that she was one of the three girls who received in-school suspension for skipping school and that she received corporal punishment the same day as the plaintiff. She testified on cross-examination that later in the same school year she again received corporal punishment and an objection was sustained as to whether Mr. Varney at that time used one hand or two on the paddle. It was not error to exclude this testimony. Later in the cross-examination she testified she could not remember whether she had told the plaintiff's attorney that she could not remember whether Mr. Varney held the paddle with one hand or two when she received her first corporal punishment. She was then asked if she remembered whether the plaintiff's attorney had asked her whether he used one hand or two and an objection was sustained to this question on the ground it was repetitious. In this we find no error. Miss Heskey then testified that she had worked in the principal's office and had seen corporal punishment administered to boys. An objection was sustained to a question as to whether Mr. Varney used one hand or two. We do not believe testimony as to whether Mr. Varney used two hands when administering corporal punishment to boys has enough relevance to this case that its exclusion constitutes prejudicial error. An objection was also sustained as to whether she had ever been hit that hard "before by anybody." Any testimony elicited by this question would be completely irrelevant to this case.

Roger Lee McCoy testified for the defendants that he was employed as police school liaison officer in the Harnett County School System at the time the corporal punishment was administered to the three girls and he was a witness to it. On cross-examination he was asked how many licks were given to Catherine Renee Bynum, one of the girls who received the corporal punishment. An objection was sustained to this question. Any testimony elicited by this question would have been cumulative. It was not error to exclude it. The appellant's seventh assignment of error is overruled.

[6] In her last assignment of error the appellant argues it was error to dismiss her claim for punitive damages. She contends punitive damages should be awarded when a wrong is done in a willful manner or under circumstances of rudeness, oppression, or in a manner which evidences a reckless and wanton disregard of

plaintiff's rights. See *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). The jury did not reach the damage issue and if there had been error in this regard it would not be prejudicial. The jury under proper instructions from the Court found there was not malice on the part of Mr. Varney. We do not believe there was sufficient evidence to submit an issue of punitive damages and the Court did not commit error by dismissing the claim for punitive damages.

[7] The amicus curiae has filed a brief in which it argues that the United States has ratified the United Nations Charter which makes it the supreme law of the land and a part of the law of North Carolina. It contends that international law proscribes corporal punishment and it is made a part of our law by the Charter. The amicus curiae argues we should hold that corporal punishment is not permitted in this state. The appellant in oral argument declined to adopt the argument of the amicus curiae. The United States Supreme Court in *Ingraham* did not mention the United Nations Charter or the application of international law. We do not believe we should hold that international law made applicable to North Carolina by the United Nations Charter proscribes corporal punishment.

No error.

Chief Judge HEDRICK concurs.

Judge WHICHARD concurs in the result.

Judge WHICHARD concurring in the result.

I agree with the majority that: *State v. Pendergrass*, 19 N.C. 365, 367-68 (1837), permits corporal punishment without criminal liability "however severe the pain inflicted, and however . . . disproportionate to the alleged . . . offense" if the punishment does not produce permanent injury or was not inflicted to gratify the educator's malice; and that *Drum v. Miller*, 135 N.C. 205, 205, 47 S.E. 421, 422 (1904), enlarges upon the law by permitting the educator to inflict permanent injury without civil liability (there "inflicting a very painful and serious wound, and causing partial, if not total, blindness" by throwing a pencil at a student) if done

without malice and in the exercise of lawful authority, unless the injury is reasonably foreseeable.

I do not agree, however, that the court properly relied on *Pendergrass* and *Drum* exclusively in defining reasonableness as used in G.S. 115C-390. I disagree on the basis of my reading of *Ingraham v. Wright*, 430 U.S. 651, 51 L.Ed. 2d 711, 97 S.Ct. 1401 (1977), and what appears to be the legislative intent behind the enactment of G.S. 115C-390.

The Court in *Ingraham* held that the Eighth Amendment did not apply to disciplinary corporal punishment of public school children, *id.* at 664, 51 L.Ed. 2d at 725-26, 97 S.Ct. at 1409, and that due process did not require prior notice and a hearing. *Id.* at 682, 51 L.Ed. 2d at 737, 97 S.Ct. at 1418. It so held, in part, because it determined that teachers and administrators are subject to the legal constraints of the common law whereby any punishment exceeding that reasonably necessary for the proper education and discipline of the child could result in civil and criminal liability under state law, *id.* at 677, 51 L.Ed. 2d at 734, 97 S.Ct. at 1415, and because it determined that these common law remedies were sufficient without advance procedural safeguards. *Id.* at 680, 51 L.Ed. 2d at 735-36, 97 S.Ct. at 1417.

In discussing the common-law test of reasonableness the Court noted that "early cases viewed the authority of the teacher as deriving from the parents." *Id.* at 662, 51 L.Ed. 2d at 724, 97 S.Ct. at 1407. *See, e.g., Pendergrass*, 19 N.C. at 365 ("[T]he power which the law grants to schoolmasters and teachers, with respect to the correction of their pupils . . . is analogous to that which belongs to parents, and the authority of the teacher is regarded as a delegation of parental authority."); *see also Drum*, 135 N.C. at 153, 47 S.E. at 425. "The concept of parental delegation," the Court noted, however, "has been replaced by the view—more consonant with compulsory education laws—that the State itself may impose such corporal punishment as is reasonably necessary. . . ." *Ingraham*, 430 U.S. at 662, 51 L.Ed. 2d at 724, 97 S.Ct. at 1407. Thus, corporal punishment is not contingent on parental approval. *See, e.g., Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd*, 423 U.S. 907, 46 L.Ed. 2d 137, 96 S.Ct. 210 (1975).

I believe G.S. 115C-390 was enacted in 1955 not to codify the 1837 and 1904 case law of *Pendergrass* and *Drum*, but to legislate

a new standard, that of "reasonable force" in the exercise of lawful authority to restrain or correct pupils and maintain order in the public schools. While the absence of permanent injury or disfigurement, foreseeable permanent injury, or malice may be evidence of the reasonableness of the force used, I do not believe instructions which refer to these elements alone are adequate under the statute. Rather, the court should allow evidence and instruct according to the guidelines the United States Supreme Court provides in *Ingraham*:

> All of the circumstances are to be taken into account in determining whether the punishment is reasonable in a particular case. Among the most important considerations are the seriousness of the offense, the attitude and past behavior of the child, the nature and severity of the punishment, the age and strength of the child, and the availability of less severe but equally effective means of discipline.

Ingraham, 430 U.S. at 662, 51 L.Ed. 2d at 724-25, 97 S.Ct. at 1408. *See also Baker*, 395 F. Supp. 294, 297 ("reasonable" and "lawful" in the North Carolina statute embody traditional tort concept of privilege to use only that force necessary under the circumstances).

I thus find the instructions based solely upon *Pendergrass* and *Drum*, and not incorporating the foregoing from *Ingraham*, inadequate. I do not find, however, that plaintiff has carried her burden of showing prejudice therefrom. Given the facts—plaintiff's age and level of maturity, her specific repeated requests to receive "licks" instead of in-school suspension, the assistant principal's hesitancy to administer corporal punishment and his reduction of the number of "licks" administered, and the brevity of the discomfort suffered by plaintiff—I do not believe the jury would have rendered a different verdict on different instructions. I therefore concur in the result.

STATE OF NORTH CAROLINA v. TERRY DUNCAN, HOWARD DUNCAN, AND DWIGHT LINDSEY

No. 8426SC936

(Filed 4 June 1985)

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

There was no abuse of discretion or denial of defendants' constitutional rights in denying their motion for a continuance to secure a witness in a prosecution for the sale and delivery of cocaine and trafficking in cocaine. The indictments had been pending since April of 1983, the motions were made on 7 February 1984, the witness's identity had been known to counsel during a previous trial involving other charges, the witness had been subpoenaed and had appeared when the cases had been set but not reached in December of 1983, and the witness could only have corroborated other testimony had she appeared. The circumstances which defendants contended the witness would have presented in support of entrapment were placed before the jury, defendants' counsel were notified a week in advance of the trial date, and one defendant's counsel issued a subpoena for the witness on 31 January. There was no indication that counsel had maintained any contact with the witness between her December appearance and the issuance of the subpoena, that the witness could have been located had the continuance been granted, and one defense counsel stated later in the trial that he was not sure what the witness would say when they found her.

2. **Criminal Law §§ 87.3, 73.1— cross-examination of the S.B.I. agent limited—investigative notes examined in camera—no error**

The court did not improperly limit the cross-examination of an undercover S.B.I. agent in a prosecution for the sale and delivery of cocaine and for trafficking in cocaine where defendants did not assert their constitutional claims in the trial court as a basis for examining the agent's investigative report and notes, the court conducted an *in camera* inspection of the notes and investigative report and supplied counsel with the requested information, and an excluded question concerning the relationship between one of the defendants and his girl friend called for hearsay and the same information was subsequently admitted.

3. **Narcotics § 4.2— sale and delivery of cocaine—no entrapment as a matter of law**

There was no error in denying a defendant's motion to dismiss charges of sale and delivery of cocaine and trafficking in cocaine based on entrapment where the State offered evidence that defendant readily agreed to obtain cocaine for an undercover S.B.I. agent when requested to do so by his girl friend, that the agent purchased cocaine from him or with his assistance on four occasions, and that the girl friend had no part in the subsequent transactions. Although defendant's contrasting testimony concerning the agent's repeated requests for him to obtain drugs for her, his hopes of a romantic relationship with her, his lack of financial gain from the transactions, and his lack of

knowledge about selling drugs may have been sufficient to raise the issue of inducement, it did not compel a conclusion of entrapment as a matter of law. The issue was submitted to and rejected by the jury.

4. Narcotics § 4— sale and delivery of cocaine—evidence sufficient

The motions of defendants Howard Duncan and Lindsey to dismiss charges of sale and delivery of cocaine and trafficking in cocaine for insufficient evidence were properly denied where Howard Duncan was present at a location where the sale of a substantial quantity of cocaine had been arranged by his brother, had expressed concern that an undercover S.B.I. agent might be an officer and that three ounces of cocaine was a lot to buy, was present in a motel room when the agent examined the white powder, and assisted his brother in counting the money paid by the agent. Lindsey had rented the motel room where cocaine was hidden, occupied the room until the agent and one of the other defendants arrived to complete the purchase, left the room only when the agent refused to go to the room and deal with the other defendant's "worker," and was the driver of a car where a white powder residue was found which was from the same source as the purchased cocaine.

APPEALS by defendants from *Davis, James C., Judge.* Judgments entered 9 February 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 April 1985.

Terry Duncan, his brother Howard Duncan and Dwight Lindsey were each charged, in separate bills of indictment, with the felonies of sale and delivery of cocaine and trafficking in cocaine by possession of more than 28 grams but less than 200 grams of cocaine. The offenses were alleged to have occurred on 18 March 1983. The jury returned verdicts of guilty as to each charge against each defendant. All defendants appealed from judgments imposing active prison sentences.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Daniel C. Higgins, for the State.

Ferguson, Watt, Wallace and Adkins, P.A., by James E. Ferguson, II, for defendant appellants.

MARTIN, Judge.

Defendants bring forward assignments of error relating to the denial of their motion for a continuance, evidentiary rulings made during their cross-examination of the undercover agent, and denial of their motions to dismiss. We have considered each of these assignments and conclude that no prejudicial error occurred at their trial.

The State's evidence tended to show that Officer W. H. Caldwell of the Charlotte Police Department Vice and Narcotics Division began an investigation of Terry Duncan relative to controlled substance violations in October 1982. In the course of the investigation, he requested the State Bureau of Investigation to assign a female undercover officer to assist him. Agent Deidra H. Bowman was assigned. Caldwell then made arrangements with Teresa Robinson, Terry Duncan's girl friend, to introduce Agent Bowman to Terry Duncan and to assist her in purchasing drugs from him. Robinson was not aware that either Caldwell or Bowman were law enforcement officers.

On 30 December 1982, Robinson introduced Agent Bowman to Terry Duncan. Between 30 December 1982 and 14 March 1983, Bowman made at least three drug purchases from him. On 14 March 1983, Bowman advised Terry Duncan that she "had a man" who had $5,000 to $6,000 and she inquired as to the quantity of cocaine she could purchase for that amount of money. Terry Duncan advised her that she could buy approximately three ounces. They agreed that the transaction would occur on 17 March 1983. On 17 March when Bowman contacted Terry Duncan, she was instructed to call him again on 18 March.

On 18 March, Bowman called Terry Duncan and then went to his bail-bond office at approximately 1:30 p.m. She observed Dwight Lindsey outside the office working on a green Chevrolet automobile. Terry Duncan told Bowman that he had not had time to "cut" the three ounces of cocaine out of a larger quantity which he had received. Terry Duncan went over to Dwight Lindsey and obtained a "beeper" paging device, gave it to Bowman, and told her that he would contact her later. Bowman left the office, and shortly thereafter, surveillance officers observed Dwight Lindsey drive away in the green Chevrolet. At approximately 5:25 p.m., Terry Duncan contacted Agent Bowman by the "beeper" and provided her with a telephone number. When she called the number, Terry Duncan told her that he was "ready to deal" and instructed her to come to the Best Western Motel on Independence Boulevard in Charlotte. When Bowman arrived at the motel parking lot, Terry Duncan got into her car and expressed concern that she might be a police officer. He told her to drive to an adjacent motel, the Coliseum Inn, and accompanied her. In the parking lot of the Coliseum Inn, Terry Duncan told Bowman to go to Room

379 and knock on the door, that his "worker" was inside the room and would handle the transaction. At about that time, Howard Duncan came to the automobile and also expressed his concern that Bowman might be a police officer and that they could get in a lot of trouble for selling three ounces of cocaine.

When Agent Bowman objected to entering the motel room alone, Terry Duncan got out of the car and went to Room 379. As he entered the room, Dwight Lindsey came out and stood in the parking lot. Bowman then entered the room. At Terry Duncan's instruction, Bowman reached above a mirror and removed a plastic bag. Inside the bag was another plastic bag containing white powder. She handed the bags to Terry Duncan, who removed the outer bag and returned the bag containing the white powder to Bowman so that she could weigh it. Howard Duncan then entered the room. Bowman weighed the powder and then went outside to her automobile to get the money. When she returned she handed the money to Terry Duncan, who counted it. After he had counted the money, Howard Duncan counted it. At that point, police officers entered the room and arrested both the Duncans. Dwight Lindsey was arrested in the parking lot of the motel.

The green Chevrolet which had earlier been driven by Lindsey was parked in the motel parking lot. A search warrant was obtained for the Chevrolet, and officers found a plastic bag containing white powder residue in the bag. An SBI chemist testified that the white powder which Agent Bowman obtained from Terry Duncan contained cocaine and weighed 83.70 grams. The white powder residue found in the Chevrolet was also analyzed as containing cocaine and as having come from the same source as the 83.70 grams of powder purchased by Bowman. Motel records indicated that Dwight Lindsey had rented Room 379 at the Coliseum Inn earlier on 18 March 1983.

Neither Dwight Lindsey nor Howard Duncan offered evidence. Terry Duncan testified that Teresa Robinson had introduced Agent Bowman to him as "Dee," a friend from Kannapolis, and had told him that Dee wanted to buy some cocaine for her boyfriend. Terry Duncan made a telephone call and then accompanied Robinson and Bowman to a house where he purchased cocaine for Bowman. Thereafter, Bowman called him repeatedly and came to his office asking that he obtain cocaine for her. He made

arrangements for her to purchase cocaine from other people on a couple of occasions, but made no money out of the transactions. He asked Bowman to go out with him several times; she declined but "kind of assured" him that she would "get together" with him. He testified that he had never sold cocaine to anyone, and that he arranged to get cocaine for Bowman only because Teresa Robinson and Agent Bowman asked him to do so.

Terry Duncan also testified that on 18 March 1983, Willie Caldwell owned the cocaine, had transported it to the motel, had put it in Room 379, and was supposed to deal with Bowman, but that she refused to deal with anyone but Terry Duncan. Therefore, he went into the room with her as an accommodation to her, and that Willie Caldwell was supposed to come to the room to pick up the money. He testified that neither Howard Duncan nor Dwight Lindsey knew anything about the drugs and that Bowman had suggested that the room be rented in Dwight Lindsey's name because Terry Duncan was married and because Bowman said that she had a jealous boyfriend and was afraid that she and Terry Duncan would be caught in the motel room together.

[1] Defendants contend that the trial court abused its discretion and violated their constitutional rights to confrontation, effective assistance of counsel and due process by denying their motion for a continuance. The cases were set for trial at the 6 February 1984 criminal session of Superior Court and were reached on Tuesday, 7 February. At that time, trial counsel for Terry Duncan made an oral motion for continuance on the grounds that a subpoena, which he had issued on 31 January 1984 to secure the presence of Teresa Robinson as a defense witness, had not been served. He contended, in support of the motion, that Teresa Robinson was an essential defense witness because she would testify that she had been recruited by Officer Caldwell to introduce Agent Bowman to Terry Duncan and the circumstances surrounding the introduction, and that she had never previously purchased any drugs from Terry Duncan. Through this testimony, he contended that he would establish that Terry Duncan had been entrapped. Trial counsel for Howard Duncan and Dwight Lindsey joined in the motion. Other than the statements of counsel, defendants presented no evidence, by affidavit or otherwise, in support of the motion.

Motions for continuance are ordinarily addressed to the sound discretion of the trial court; the court's ruling will not be disturbed on appeal absent a showing of an abuse of such discretion. *State v. Weimer*, 300 N.C. 642, 268 S.E. 2d 216 (1980). However, if a motion for continuance is based on a right guaranteed by the federal or state constitutions, the question is one of law, reviewable on appeal in the light of the circumstances of each case. *State v. Branch*, 306 N.C. 101, 291 S.E. 2d 653 (1982). In order to justify a new trial, a defendant must show (1) that the denial was erroneous, and (2) that he was prejudiced thereby. *State v. Searles*, 304 N.C. 149, 282 S.E. 2d 430 (1981).

Due process requires that defendant be allowed a reasonable time and opportunity to produce competent evidence in his defense and to confront his accusers with other evidence. *State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526 (1970). The right to assistance of counsel includes the right of counsel to confer with witnesses, to consult with the accused and to prepare his defense. *State v. Cradle*, 281 N.C. 198, 188 S.E. 2d 296, *cert. denied*, 409 U.S. 1047, 34 L.Ed. 2d 499, 93 S.Ct. 537 (1972).

Applying the foregoing standards to the circumstances of this case, we conclude that defendants have demonstrated no prejudice, and thus no violation of their constitutional rights, resulting from the court's denial of their motion for continuance. The indictments in these cases had been pending since April 1983 and Teresa Robinson's identity had become known to counsel during the course of a previous trial involving other charges against Terry Duncan. When the instant cases had been set, but not reached, at a previous session of court in December 1983, Robinson had been subpoenaed and had appeared. These facts disclose that counsel had ample opportunity to confer with defendants, to learn the identity of possible witnesses, including Robinson, and to confer with those witnesses.

Furthermore, assuming that Robinson, had she appeared, would have provided the testimony forecast by counsel, it appears that she could only have corroborated other testimony which was actually presented at the trial. Officer Caldwell testified, on cross-examination, that neither he nor any other Charlotte police officers had purchased controlled substances from Terry Duncan prior to the purchases by Agent Bowman, and that Terry Duncan

had never before been arrested for selling drugs or for any other offense. He requested Agent Bowman's assistance because he was of the opinion that Terry Duncan could be more easily approached by a female; he introduced Agent Bowman to Teresa Robinson as "Dee" and asked Robinson to help Dee buy drugs from Terry Duncan. Agent Bowman testified, on cross-examination, as to the circumstances surrounding her introduction to Robinson, and Robinson's introduction of her to Terry Duncan. Terry Duncan testified about his relationship with Robinson and the circumstances of his meeting Agent Bowman. Through the testimony of Terry Duncan, and the cross-examination of Officer Caldwell and Agent Bowman, all of the circumstances which counsel contended Robinson would present in support of the entrapment defense were placed before the jury. The court's refusal to continue the trial due to the absence of Robinson did not violate the defendants' constitutional rights.

The defendants have also failed to show that the court abused its discretion in denying the motion for continuance. Defendants' counsel were notified of the 6 February 1984 trial setting at least a week in advance of that date as is evidenced by the fact that Terry Duncan's counsel issued the subpoena for Robinson on 31 January. There is no indication that counsel had maintained any contact with her during the interim between her December appearance and the issuance of the subpoena, or that she could have been located had counsel been given additional notice of the trial or had the continuance been granted. Indeed, the record indicates that Robinson could not be located even after the trial judge personally called authorities and requested additional efforts at locating her, supplying information furnished by counsel as to her residence and place of employment. Finally, the record reflects that at a later point in the trial, Terry Duncan's counsel stated with respect to Robinson's testimony, "I really can't tell you what she's going to say when we get her . . . ." Under these facts, the court did not abuse its discretion by proceeding with the trial.

[2] Defendants contend that the court improperly limited their cross-examination of Agent Bowman and erred in refusing their requests to examine an investigative report and notes which Agent Bowman had used to refresh her recollection before testifying. They assert a violation of their Sixth Amendment rights to

confrontation and cross-examination. We find no merit in these contentions.

Initially, we note that defendants did not assert their constitutional claims in the trial court as a basis for examining the investigative report and notes, or with respect to the court's rulings in connection with the cross-examination of Agent Bowman by Terry Duncan's counsel. In order for an appellant to assert a constitutional right in an appellate court, the right must have been asserted and the issue raised before the trial court. *State v. Robertson*, 57 N.C. App. 294, 291 S.E. 2d 302, *disc. rev. denied*, 305 N.C. 763, 292 S.E. 2d 16 (1982).

On cross-examination of Agent Bowman, Terry Duncan's counsel established that Bowman and Teresa Robinson had discussed Robinson's relationship with Terry Duncan. Counsel then inquired, "What did she tell you about her relationship with Mr. Duncan?" The district attorney's objection was sustained, and the defendants take exception and assign error to the ruling. The court's ruling was correct; any response would have been inadmissible as hearsay as it could only have been offered to prove the nature of the relationship between Robinson and Terry Duncan. *See* Brandis, *North Carolina Evidence* § 138 (2d Rev. Ed. 1982). However, even assuming that the question was proper, defendants could not have been prejudiced by exclusion of the answer because Terry Duncan's counsel was subsequently permitted to inquire of Agent Bowman as to what Robinson had told her with respect to various aspects of the relationship.

At another point during the cross-examination of Agent Bowman by Terry Duncan's counsel, she was questioned concerning the number of police officers assigned to conduct surveillance of her 18 March contact with Terry Duncan. Agent Bowman referred to her notes and provided the answer. At that point, no request was made by counsel to examine the notes. Subsequently, during cross-examination by counsel for Howard Duncan and Dwight Lindsey, Agent Bowman admitted that she had used her notes and an investigative report to refresh her recollection before testifying. Counsel then requested to examine the notes and report and the request was denied by the court. However, after the request was renewed during the testimony of Officer Caldwell, the court conducted an *in camera* inspection of the

notes and report and supplied counsel with the information which he had requested. No further requests for access to the notes and report were made by either counsel. It is apparent from the record that this assignment of error has no merit.

[3] Terry Duncan contends that the evidence established, as a matter of law, that he was entrapped by Agent Bowman. He assigns as error the court's denial of his motion to dismiss the charges.

Entrapment is "the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting a criminal prosecution against him." *State v. Stanley*, 288 N.C. 19, 27, 215 S.E. 2d 589, 594 (1975).

> The defense of entrapment consists of two elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, (2) when the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities. [Citations omitted.]

State v. Walker, 295 N.C. 510, 513, 246 S.E. 2d 748, 749-50 (1978). Thus, activity on the part of law enforcement officers which brings about the commission of a crime by a defendant as a result of persuasion of the officers is entrapment; merely affording the opportunity for the commission of a crime is not entrapment. *Id.* Ordinarily, if the evidence raises the issue of entrapment, it is a question for resolution by the jury; the court can find entrapment as a matter of law only "where the undisputed testimony and required inferences compel a finding" that defendant was induced by the officers to commit an act which he was not predisposed to commit. *State v. Stanley, supra* at 32, 215 S.E. 2d at 597.

The evidence offered by the State against Terry Duncan tended to show that Terry Duncan, on 30 December 1983, readily agreed to obtain cocaine for Agent Bowman when requested to do so by Teresa Robinson. Thereafter, Bowman purchased cocaine from Terry Duncan, or with his assistance, on four occasions including 18 March. Teresa Robinson had no part in these subsequent transactions. Although each of these transactions was initiated by a request for cocaine by Agent Bowman, the jury

could reasonably infer that these solicitations provided no more than an opportunity for Terry Duncan to commit offenses to which he was predisposed. "Predisposition may be shown by a defendant's ready compliance, acquiescence in, or willingness to cooperate in the criminal plan where the police merely afford the defendant an opportunity to commit the crime." *State v. Hageman*, 307 N.C. 1, 31, 296 S.E. 2d 433, 450 (1982). Terry Duncan's contrasting testimony concerning Agent Bowman's repeated requests for him to obtain drugs for her, his hopes for a romantic relationship with her, his lack of financial gain from the transactions and his lack of knowledge about selling drugs may have been sufficient to raise the issues of inducement, and lack of predisposition, to commit the offenses, but fell short of compelling a conclusion of entrapment as a matter of law. The issue of entrapment was submitted to, and rejected by the jury. The court did not err in denying Terry Duncan's motion for dismissal of the charges.

[4] Defendants Howard Duncan and Dwight Lindsey assign as error the denial of their motions to dismiss for insufficiency of the evidence. We reject these assignments and hold that there was sufficient evidence to support each conviction.

A motion to dismiss in a criminal case requires that the evidence 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. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). Contradictions and discrepancies in the evidence are for resolution by the jury and do not warrant dismissal. *Id.* If there is substantial evidence, whether direct, circumstantial, or both, of a defendant's guilt, dismissal should be denied. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975).

The State produced evidence that on 18 March 1983 Howard Duncan was present at the location where a sale of a substantial quantity of cocaine had been arranged by his brother. Before the transaction occurred, Howard Duncan expressed concern that Agent Bowman might be an undercover officer and that "three ounces of cocaine was a lot to buy." These statements provide strong circumstantial evidence that Howard Duncan was aware of the nature of the transaction and its attendant risk. There was also evidence of his direct involvement in the sale. He was pres-

ent in the motel room when Agent Bowman examined the white powder. When she went outside to get the money from her car, he remarked to her that she was "smart" to have left the money in the trunk of the car. He assisted Terry Duncan in counting the money. The evidence was sufficiently substantial to permit a reasonable inference that Howard Duncan participated in the possession, sale and delivery of the cocaine and his motion to dismiss was properly denied.

As to Dwight Lindsey, the State produced evidence that he rented the motel room where the transaction occurred, and occupied the room where the cocaine was hidden until Terry Duncan and Agent Bowman arrived to complete the purchase. Terry Duncan instructed Agent Bowman to go to the room and to deal with his "worker"; it was only upon her refusal that Terry Duncan went to the room and Dwight Lindsey went outside. These circumstances indicate that had it not been for Agent Bowman's reluctance to deal with a stranger, Dwight Lindsey would have handled the actual exchange of the cocaine. In addition, the State produced evidence that Dwight Lindsey was the driver of the green Chevrolet in which was found white powder residue from the same source as the three ounces of cocaine. These circumstances are sufficiently substantial evidence of Dwight Lindsey's participation in the crimes to overrule his motion for dismissal.

Each of the defendants received a fair trial free from prejudicial error.

No error.

Chief Judge HEDRICK and Judge WELLS concur.

Woodlief v. Johnson

JOE P. WOODLIEF, SR. AND WIFE, SUSAN S. WOODLIEF, JOE P. WOODLIEF, JR. AND WIFE, MABLE WOODLIEF, GLENN BRAYTON ADAMS AND WIFE, DEBORAH YOUNG ADAMS, LILLIE BELLE JONES, EVERETTE C. MOORE AND WIFE, DOROTHY L. MOORE, EMERSON DISSTON BEECHER, JR. AND WIFE, SHIRLEY ANN BEECHER, JAMES A. STROUD AND WIFE, JO ANN STROUD, DONALD ANNAS AND WIFE, LINDA ANNAS, WILMA PEARCE UNDERWOOD AND HUSBAND, ROBERT RODNEY UNDERWOOD, C. B. SORRELL AND WIFE, RUBY SORRELL, JIMMY W. WATKINS, WILLIE E. AVERETT, WILLIAM V. DODSON, GAY PERRY, PAUL C. JONES AND WIFE, PEGGY P. JONES, JOSEPH C. BAILEY AND WIFE, CONNIE F. BAILEY, SHIRLEY L. WILLIAMS, FRANCES Q. ROBERTS, LEONARD KING, CLAYTON RAY MORTON, JIMMY JACKSON, DAVID GRIMES, CHARLES LEO ALFORD, HUBERT CRABTREE, AND VICTOR E. DILLARD v. TONY LEE JOHNSON, E. B. FLYNT, JACK FIRTH, JAMES BROWN, WADE A. HARRIS, LONNIE WHITLOW, OTTIS S. JACKSON, MILTON DAVIS, RONALD MERCER, OSCAR L. HUGGINS, JAMES AVERITTE, CHARLES L. ANGLIN, III, RICHARD GIRDWOOD, BELVIN STRICKLAND, OSCAR HARRIS, DR. JAY HOWARD, ROBBIE CAISON, HUBERT DAVIS, MILTON DAVIS, ESTATE OF JACK BROWN, HOWARD WILSON, DONALD W. HOYLE, JAMES D. MCPHAIL, BILLY G. STRICKLAND, CHARLES T. WEATHERSPOON, AND ANN CHEATHAM

No. 8413DC1002

(Filed 4 June 1985)

1. Declaratory Judgment § 2— action to determine rights and easement over private road and dock—jurisdiction

The district court had subject matter jurisdiction to determine the parties' rights over a private road in a declaratory judgment action involving an easement over a private road adjacent to White Lake and a pier and boat ramp at the end of the road extending into the lake. An action to obtain a judicial declaration of rights to an easement is authorized by the Declaratory Judgment Act and may be brought in district court; however, the North Carolina Department of Natural Resources and Community Development has exclusive authority to develop rules and regulations for piers and boat ramps for State-owned White Lake. Plaintiffs should have first requested a declaratory ruling as to the pier and boat ramp by the Department of Natural Resources and Community Development. G.S. 1-262, G.S. 7A-242.

2. Easements § 4.1— private road—description of easement and dominant and servient tracts

In an action to determine the rights of the parties in a private road adjoining White Lake, there was sufficient evidence from which the trial court could find and conclude that an easement deed adequately described the easement with reasonable certainty and described the dominant and servient tracts involved.

3. Easements § 4.3— easement over private road—beneficial to grantee—acceptance presumed

Acceptance of an easement by plaintiffs was presumed in an action for a declaratory judgment to determine the rights of the parties in a private road conveyed by the easement running from Highway 41 across State Road 1515 to White Lake where plaintiffs are landowners between Highway 41 and State Road 1515, defendants are landowners between State Road 1515 and White Lake, plaintiffs and defendants derived their titles from a common source, and the common grantor had recorded a deed purporting to grant an easement from Highway 41 across State Road 1515 to the edge of White Lake in 1956 after conveying title to plaintiffs and defendants or their predecessors in title in the 1940's. Acceptance of the easement by plaintiffs was presumed because it was beneficial to plaintiffs, the deed was not subject to a condition, and did not otherwise impose any obligation on the grantee. The fact that a grocery store building was in place on plaintiffs' land squarely on the easement does not breach the easement contract or manifest an intent not to accept the benefits of the easement because it was in place long before the easement was conveyed.

4. Declaratory Judgment § 2— action to determine rights in private road and pier —State-owned lake—no jurisdiction over pier

In a declaratory judgment action to determine the rights of the parties in an easement over a private road, pier, and boat ramp running from a state road to White Lake, the trial court erred by finding and concluding that the pier was an extension of the street easement. While the pier was in existence when the easement was granted, it extended over State-owned White Lake, the Department of Natural Resources and Community Development has exclusive authority to develop rules and regulations and issue permits for the construction and use of piers and boat ramps, and the trial court accordingly lacked subject matter jurisdiction. G.S. 113-8, G.S. 113-35, G.S. 146-13.

APPEAL by defendants from *Trest, Judge*. Judgment entered 9 February 1984 in District Court, BLADEN County. Heard in the Court of Appeals 17 April 1985.

This is an action for declaratory judgment in which the parties seek an adjudication of their respective rights and interests in an easement over a private road adjacent to White Lake in Bladen County known as Godwin Street and the pier and boat ramp existing at the end of Godwin Street extending into White Lake.

The essential facts are:

All plaintiffs and defendants are landowners or holders of leasehold estates in a tract of land that is rectangular in shape with approximately 160 feet fronting the edge of White Lake and

extending 3,136 feet across North Carolina Highway 41. State Road 1515 bisects the tract of land approximately 642 feet northeast of the waters' edge.

This tract of land, recorded in Deed Book 107, Page 17, Bladen County Registry, was conveyed on 1 July 1941 from P. R. Smith and wife to W. C. Godwin and wife. All plaintiffs and defendants herein derive their respective titles from the Godwins.

Subsequent to July 1941, the Godwins conveyed several lots on the southwest or lake side portion of this tract of land between State Road 1515 and the lake. These lots all lie adjacent to a dirt road approximately 30 feet in width known as Godwin Street. Godwin Street lies approximately in the center of this tract of land and runs from State Road 1515 to the waters' edge. On 27 August 1943, the Godwins conveyed all of the original tract of land lying on the northeast side of State Road 1515 to plaintiffs Joe P. Woodlief and wife.

Sometime in 1949, the Woodliefs constructed a building on their tract of land. This building is on the center of their tract, is adjacent to the right-of-way of State Road 1515 and faces down Godwin Street toward White Lake.

On 1 August 1945, the Godwins conveyed to the Woodliefs a 65 x 200 foot tract located on the southwest side of State Road 1515 and adjacent to Godwin Street. This tract was subdivided into four lots which were subsequently conveyed to several of defendants' predecessors in title.

On 25 October 1956, the Godwins, asserting that they had intended to reserve a thirty foot street through the center of the entire original tract recorded at Book 107, Page 17, Bladen County Registry, executed a deed purporting to convey a 30 foot easement for ingress, egress and regress, from Highway 41, across State Road 1515 and to the edge of White Lake. The deed recited that "all of said parties agreed that it would be for their mutual interest to establish a thirty foot street through the center of said tract for the common use of all the present and future owners of the subdivided lots conveyed out of that certain tract recorded at book 107, at page 17." Parties to this deed were the Godwins, as grantors, certain named grantees and "all other

owners of lots, subdivided from that certain tract of land . . . recorded in Book 107 at page 17" as the remaining grantees.

At the time of the conveyance of the easement through the entire original tract of land, the Woodliefs were the sole owners of that portion of the tract lying northeast of State Road 1515. The Godwins had title to Godwin Street from State Road 1515 to the waters' edge.

Sometime in 1946, a pier was constructed at the end of Godwin Street into White Lake by several of the owners of lots adjacent to Godwin Street. This original pier has been replaced on at least two occasions. White Lake is owned and controlled by the State of North Carolina and pursuant to G.S. 113-8, 113-34, 35 and 146-13, permits to build and maintain the pier were issued to named individuals as agents for Godwin Street. These piers have been used continually since 1947 by individuals residing along Godwin Street and those residing on the northeast side of State Road 1515.

After a hearing on the declaratory judgment action, the Honorable Roy D. Trest, District Court Judge, made findings of fact and conclusions of law and entered judgment that the Godwins had "conveyed to the plaintiffs, defendants, their predecessors and successors in title an express and perpetual easement of egress, ingress and regress over and upon that certain 30-foot strip of land known as Godwin Street." The trial court further ruled that "the pier which lies at the end of Godwin Street over the waters of White Lake is an extension or part of Godwin Street and that all of the plaintiffs and defendants are vested with the same right of egress, ingress and regress over and upon said pier as they have upon Godwin Street proper." The judgment did not adjudicate rights in the boat ramp. Defendants appeal.

Moore, Melvin and Wall, by James R. Melvin and Alan I. Maynard, for plaintiff-appellees.

Grady, Grady, and Greene, by Gary A. Grady, for defendant-appellants.

EAGLES, Judge.

I

Defendants first assign as error the trial court's denial of their motion to dismiss pursuant to G.S. 1A-1, Rule 41 made at the close of plaintiffs' evidence and the trial court's findings of fact and conclusions of law that the 1956 deed recorded at Book 133, Page 502, Bladen County Registry, creates an express grant of an easement to both plaintiffs and defendants over Godwin Street.

In a non-jury case, as here, after the plaintiff has rested his case, defendant may move pursuant to G.S. 1A-1, Rule 41(b) for a dismissal on the ground that upon the facts and the law plaintiff has shown no right to relief. *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973). The question presented is whether the plaintiff's evidence, taken as true, would support findings of fact upon which the trier of fact could properly base a judgment for the plaintiff. Our examination of the record in this case reveals sufficient evidence supporting the denial of the motion to dismiss and the trial court's findings of fact and conclusions of law that there was an express grant of an easement to both plaintiffs and defendants over Godwin Street. Where the trial judge sits as the trier of fact, his findings are conclusive upon appeal if supported by competent evidence, even though there may be evidence to the contrary. *Bryant v. Kelly*, 10 N.C. App. 208, 178 S.E. 2d 113 (1970), *rev'd on other grounds*, 279 N.C. 123, 181 S.E. 2d 438 (1971).

[1] The basis for defendants' first assignment of error is that the trial court lacked subject matter jurisdiction in this case and that the 1956 deed from the Godwins purporting to create a 30 foot easement from Highway 41 to the waters' edge did not constitute the grant of an express easement as a matter of law. We disagree.

It is well established that parties cannot by consent give a court subject matter jurisdiction which it does not have. *State v. Fisher*, 270 N.C. 315, 154 S.E. 2d 333 (1967). Though the parties have consented to subject matter jurisdiction in the district court here, defendants contend that since the North Carolina Department of Natural Resources and Community Development has ex-

clusive authority to develop rules and regulations for piers and boat ramps on State-owned White Lake, the plaintiffs should have first requested a declaratory ruling by the Department of Natural Resources and Community Development. While we agree with defendants' contentions as to the pier and boat ramp itself (an issue discussed *infra*), we do not agree that the district court lacked subject matter jurisdiction to determine the parties' rights in the easement in question over Godwin Street which is not State-owned. An action to obtain a judicial declaration of rights to an easement is authorized by our Declaratory Judgment Act and may be brought in the district court division, G.S. 1-262, G.S. 7A-242; *see, Hubbard v. Josey*, 267 N.C. 651, 148 S.E. 2d 638 (1966); *Carver v. Leatherwood*, 230 N.C. 96, 52 S.E. 2d 1 (1949). Accordingly, the district court had subject matter jurisdiction to determine the parties' rights in the easement in question from Highway 41 to the waters' edge of White Lake.

[2] The trial court found as fact and concluded as law that the 1956 deed from the Godwins to certain named grantees and all present and future owners created an express grant of an easement. The express grant in a deed is an accepted method for creating easements in North Carolina. Hetrick, *Webster's Real Estate Law in North Carolina*, Section 311 (1981). The written instrument creating an easement by grant must describe with reasonable certainty the easement created and must also describe the dominant and servient tracts involved. *Hensley v. Ramsey*, 283 N.C. 714, 199 S.E. 2d 1 (1973). The 1956 easement deed was stipulated into evidence and reveals that there is an express grant of

> a perpetual right of easement of egress, ingress and regress over and upon that thirty foot strip of land to be used as a street running through the center of that certain tract of land heretofore conveyed . . . and recorded in Book 107 at page 605, and the said street to run in an eastwardly direction from Highway 41 to the western edge of White Lake; the northern edge of said street runs with the southern line of the Cecil R. Butler lot as recorded in Book 125 at page 331; the Southern edge of said street runs with the northern line of the W. H. Brown lot as recorded in Book 107 at page 362, and others.

This is a more detailed description of the location of an easement than that approved by our Supreme Court in *Hensley v. Ramsey, supra,* where the easement was described as "a right-of-way across the Duncan lot . . . The location of the right-of-way is fixed as along the Langford (Lankford) line." 283 N.C. at 730, 199 S.E. 2d at 10.

It is also clear from the face of the 1956 deed that the Godwins retained title to the thirty foot strip of land through the center of the tract later known as Godwin Street. It is that thirty foot tract that is the servient tract, the dominant tracts being all of those lots subdivided out of the original tract of land recorded in Book 107, page 17, Bladen County Registry. Additionally, we note that the trial court made a finding of fact that at the time of the conveyance of the easement on 25 October 1956, the Godwins held title to Godwin Street. That finding of fact is not contested on appeal. Accordingly, there was sufficient evidence from which the trial court could find and conclude that the easement deed adequately described the easement with reasonable certainty and described the dominant and servient tracts involved.

[3] Defendants also argue that the deed from the Godwins creating the easement was never unconditionally accepted by plaintiff Woodliefs and is therefor invalid. We disagree. In North Carolina, acceptance is presumed if the conveyance is beneficial to the grantee even though he may have no knowledge of the transaction. *Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316 (1949). Here, all parties agreed that it was in their mutual interest to establish the easement for the common use of all present and future owners of the lots conveyed out of the original tract. This use is beneficial to the plaintiffs and acceptance must be presumed. *Ballard v. Ballard, supra.* We are aware that the presumption of delivery and acceptance does not apply if the deed is *subject to* a condition or otherwise imposes an obligation upon the grantee. *Beaver v. Ledbetter,* 269 N.C. 142, 152 S.E. 2d 165 (1967). However, the deed in question is not subject to condition and does not, on its face, impose any obligation upon any grantee. We also cannot say that plaintiffs have breached the easement contract by the fact that a grocery store building sits squarely upon the easement on plaintiffs' land, nor can we say that the building's presence manifests an intent not to accept the benefits of the easement. We note that the building was in place in 1944,

long before the easement deed of 1956. Under the facts of this case, it would be speculative to presume a non-acceptance of the easement by plaintiffs.

Based upon the record before us, we hold that there was sufficient evidence to withstand defendants' motion to dismiss pursuant to G.S. 1A-1, Rule 41 and sufficient evidence from which the trial court could find and conclude as a matter of law that the 1956 deed created "an express and perpetual easement of egress, ingress and regress over and upon that certain 30-foot strip of land known as Godwin Street."

II

[4] Defendants next assign as error the trial court's findings of fact and conclusion of law that the pier at the end of Godwin Street was an extension of the Godwin Street easement. We agree that there was error.

While it is true that the pier was in existence at the time of the grant of the easement in 1956, the pier extends over State-owned White Lake. The North Carolina Department of Natural Resources and Community Development has the exclusive authority to develop rules and regulations and to issue permits for the construction and use of piers and boat ramps on White Lake. G.S. 113-8, G.S. 113-35, G.S. 146-13. As to the rights of the parties in the pier and boat ramp, original jurisdiction for a declaratory ruling rests in the North Carolina Department of Natural Resources and Community Development pursuant to the Administrative Procedure Act, G.S. 150A-1, et seq. Plaintiffs did not pursue declaratory relief pursuant to G.S. 150A-17 and have failed to exhaust their administrative remedies prior to instituting this action. *Wake County Hospital v. Industrial Commission*, 8 N.C. App. 259, 174 S.E. 2d 292 (1970). Accordingly, the trial court lacked subject matter jurisdiction to adjudicate the parties' rights and interests in the pier and boat ramp.

For the reasons herein stated, we affirm so much of the judgment of the district court which declares that the named parties both plaintiff and defendant and their successors in title are owners of a perpetual easement of egress, ingress and regress over and upon that certain 30-foot strip of land known as Godwin Street which extends from State Road 1515 to White Lake and

that all parties are permanently restrained and enjoined from obstructing or interfering with the rights of any other party to Godwin Street. We reverse so much of the judgment of the district court which purports to adjudicate the parties' rights and interests in the pier located at the end of Godwin Street and extending over the waters of White Lake.

Defendants' remaining assignments of error are without merit.

Affirmed in part, reversed in part.

Judges WHICHARD and JOHNSON concur.

RALEIGH-DURHAM AIRPORT AUTHORITY v. DAVID WILLIAM KING AND WIFE, EMMA J. KING; CAROLINA POWER & LIGHT COMPANY; ROBERT D. HOLLEMAN, TRUSTEE; FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF DURHAM, N. C.; THE PROP AND RUDDER, INC.; AND COUNTY OF WAKE

No. 8410SC851

(Filed 4 June 1985)

1. **Eminent Domain § 6.2— airport expansion—testimony that land values in area chilled by proposed expansion**

In a condemnation action arising from an airport expansion, the trial court did not err by admitting expert testimony that growth in the area had been chilled by the proposed airport expansion. Plaintiff objected to the testimony of two of defendants' experts but not the first; moreover, it was perfectly relevant to allow defendants' expert witnesses to describe the growth and market movement in the general area surrounding the condemned property and the testimony was that the proposed condemnation had chilled growth in the area, not that it had directly chilled market values.

2. **Eminent Domain § 6.7— airport expansion—highest and best use without cloud of condemnation**

In an action to determine compensation for the condemnation of defendants' property for airport expansion, the court did not err by allowing defendants' expert to testify to the property's highest and best use if it had not been under a cloud of condemnation. G.S. 40A-65(a) prohibits the valuation of the property reflecting any decrease due to the "reasonable likelihood that the property would be acquired" in a condemnation proceeding. G.S. 48-65(c).

3. Eminent Domain § 6.4— airport expansion—rental income from airport tenants—evidence of fair market value

In a condemnation action arising from the expansion of an airport, the trial court did not commit prejudicial error by admitting evidence concerning the airport's rental income from airport service and commercial tenants as a proper means for the expert witness to determine the fair market value of the condemned property. Rentals of space inside the airport established the maximum rent that could be charged in the area, the availability of that space directly affected the amount of rent that could be charged outside the terminal, the evidence was not offered as comparable sales, and the witness's opinion of fair market value was not based primarily on this information.

4. Eminent Domain § 6.5— airport expansion—capitalization of hypothetical income from hypothetical improvements

In an action to determine compensation for the taking of defendants' land in an airport expansion, the trial court did not err by admitting expert opinion of the fair market value of defendants' property based on capitalization of hypothetical income from hypothetical improvements to the property. It was not error to allow the witness in explaining how he arrived at his figure for the fair market value of the property to "suppose" a reasonable rental value of the property "if properly developed"; the concept of "highest and best use" requires an expert to determine what the subject's fair market value would "realistically" be if the owner were "hypothetically" allowed to adopt his property to its most advantageous and valuable use.

APPEAL by plaintiff from *Brewer, Judge*. Judgment entered 2 May 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 2 April 1985.

Nye, Mitchell & Jarvis by Charles B. Nye and Jerry L. Jarvis for plaintiff appellant.

Thorp, Fuller & Slifkin by William L. Thorp and Anne R. Slifkin for defendant appellees.

COZORT, Judge.

In this condemnation action, the plaintiff deposited the sum of $116,550.00 as estimated just compensation for the appropriation of the defendants' property for airport expansion. The case was tried on the issue of just compensation and the jury returned a verdict in the amount of $260,000.00 for the defendants. The plaintiff appeals, seeking a new trial on this issue. Our review of the record and plaintiff's contentions reveal no commission of prejudicial error at trial. The facts follow.

The property at issue is a two-acre tract with 295.5 feet fronting the west side of State Road 1002 or Airport Road. Improvements included the defendants' home, a restaurant and country store combination with three gas pumps, and several small outbuildings. The defendants, David and Emma King, ran the grocery store/gas station and restaurant themselves until 1977. From that time until their land was taken by the Airport Authority, the Kings leased their commercial facility. During its last years of operation, the business grossed $325,000.00 to $350,000.00 per year.

At trial, the defendants presented three expert witnesses who testified to the property's fair market value. The experts' opinions differed with regard to the property's highest and best use, and their opinions as to the property's fair market value including improvements were: $281,000.00, $260,900.00, and $294,835.00.

The plaintiff's two witnesses placed the value of the property at $133,800.00 and $134,900.00.

On appeal, the plaintiff argues that the trial court committed prejudicial error by allowing certain evidence offered by the defendants to establish the fair market value of their property.

[1] The plaintiff's first assignment of error specifically objects to the trial court's admission into evidence expert testimony that market values in the project area had been chilled as a result of the proposed airport expansion. We hold the trial judge did not commit prejudicial error by allowing the testimony.

The defendants called three expert witnesses. Each witness was asked to describe the general growth and development of the area within the past ten to twenty years. The plaintiff at trial objected to expert witness Wallace Kaufman's testimony that "long-standing announcements" by the airport of its plans to expand had dampened the growth of the township containing the airport, differing from the high growth experienced by the surrounding townships in the Research Triangle Park. The plaintiff also objected to the question put to the third testifying expert, Jean Hunt, which asked how long the "cloud of condemnation" had affected the growth and development of this general area.

We overrule the plaintiff's assignment of error on two grounds. In the first place, it was perfectly relevant to allow the defendants' expert witnesses to describe the growth and market movement in the general area surrounding the condemned property. Their testimony was, in effect, that the proposed condemnation had chilled the growth in the area, not that the proposed condemnation had directly chilled market values.

However, we further note that the plaintiff's objections were untimely. We hold that the plaintiff has waived the benefit of its objections by failing to object during the first expert's testimony of the same import. The plaintiff's objections were first lodged during the testimony of Wallace Kaufman and later during the testimony of Jean Hunt. However, Thomas Anderson, the first defense expert to testify, described, without objection from the plaintiff, the general growth of the area surrounding the defendants' property during the last twenty years. In explaining why he believed there had been a decrease in the population of the area around the airport in comparison to the increase in the other areas surrounding it, Mr. Anderson opined:

> [T]he decrease in this area was caused by the expansion plans announced by the airport, had a chilling effect on the market and that investors were uncertain as to what would be happening in this corridor, and built just on the perimeter and stayed out of the way of the possible condemnation by the airport.

The plaintiff did not object to Anderson's reference to the "chilling effect" the airport's proposed condemnation had had on the area's growth and in turn on the area's property values. "The admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." *Moore v. Reynolds*, 63 N.C. App. 160, 162, 303 S.E. 2d 839, 840 (1983). The plaintiff's failure to object to the first admission of "chilling effect" evidence and its failure to show prejudice by the admission of the later objected-to testimony leads us to the conclusion that this assignment of error is without merit, and it is, therefore, overruled.

[2] Within this same assignment of error, the plaintiff further argues that the trial court erred in allowing Wallace Kaufman to testify to the value the defendants' property would have had at

the time of its taking if it had not been subjected to the threat of condemnation. In other words, according to the plaintiff, Kaufman was improperly permitted to testify to the highest and best use of the condemned property based on "an open market" as if the property had not been under the "cloud of condemnation." We again fail to see how the admission of this evidence was prejudicial error.

G.S. 40A-65(a) states that the value of the property taken shall not reflect any increase or decrease in value before the date of valuation that is caused by

> (i) the proposed improvement or project for which the property is taken; (ii) the reasonable likelihood that the property would be acquired for that improvement or project; or (iii) the condemnation proceeding in which the property is taken.

Under G.S. 40A-65(c), however, a decrease in the property's value before the date of valuation which is caused by physical deterioration of the property within the reasonable control of the property owner and by his unjustified neglect may be considered in determining the condemned property's value.

In the present case, the "cloud" over the area of the defendants' property formed in the first place because of the airport's announcements of its plans to expand. Airport Director John Brantley testified that for twenty to twenty-two years the airport has been involved in an expansion project. He stated that because the 1968 bond referendum received a lot of publicity "landowners in the area have certainly known that the airport was contemplating expansion." This fact according to expert witnesses dampened the growth in the area and in turn its property values. However, G.S. 40A-65(a) prohibits the value of the property to reflect any decrease due to the "reasonable likelihood that the property would be acquired" in a condemnation proceeding. Thus, Kaufman's valuation of the defendants' property, considering its highest and best use, quite correctly did not take into account the decrease in the property's value due to the airport's long-range condemnation plans. Kaufman clearly explained: "I'm appraising the fair market value of the property without the consideration of any effect of the expansion of the airport . . . discount[ing] any effect of the expansion of the airport on either decreasing or increasing the value of the property."

Since a property-owner cannot capitalize under the statute on any increase in the property's value due to the reasonable likelihood that it will be acquired, the condemnor likewise cannot take advantage of any resulting decrease in the property due to the threat of condemnation. Kaufman's testimony to the property's highest and best use as if it had not been under a cloud of condemnation was proper. We hold the trial court did not err in the admission of this evidence.

[3] The plaintiff next argues that the trial court improperly admitted evidence of rent charged and income derived by the Airport Authority from non-comparable property. During the trial the defendants sought to elicit detailed information relating to rental income derived by the Airport Authority from airport service and commercial tenants through the testimony of expert witness, Wallace Kaufman, who had reviewed the deposition of Airport Director John Brantley which contained the desired financial data. Upon the plaintiff's objection, the trial court considered the proffered testimony in the absence of the jury. After conducting a preliminary inquiry as to the purpose for which the evidence was being offered and after ascertaining that the evidence was not offered as a type of comparable but for the stated purpose of demonstrating the comparative cost and availability of property in the general vicinity, the trial court overruled the plaintiff's objection and stated:

> Well, I am not at this point receiving it into evidence as comparable. . . . I am receiving it into evidence solely for the purpose of showing the availability and/or cost of locations within the airport for the purpose of determining whether property outside the airport would be attractive for commercial purposes because of either the lack of space available in the airport for similar types of businesses or the relative cost within the airport of similar types of businesses.

The plaintiff argues that evidence of rental rates charged and income derived by the airport from non-comparable property both inside and outside the terminal buildings was inadmissible for any purpose. We disagree. Kaufman did not rely on these rents as "comparable sales." The plaintiff in its brief admits that there was "no contention or showing by the defendants that such properties were comparable."

Moreover, Kaufman did not base his opinion of the fair market value of the defendants' property primarily on this rental information. According to Kaufman, the airport was the "principal market maker" in the area, affecting property values and commercial viability of land in the vicinity of the airport. Airport rentals of space inside the terminal, because of the desirable location, established the maximum rent that could be charged in the area. Also, the availability of that space directly affected the amount of rent that could be charged outside the terminal. Thus, Kaufman's use of airport rentals allowed him to appraise the defendants' property within the context of the commercial and economic realities of the area. We hold that the trial court did not commit prejudicial error in admitting evidence concerning the airport's rental income on the basis that it was a proper means for the expert witness to determine a fair market value of the condemned property. We also agree with the defendants that the argument in plaintiff's brief does not deal with the capitalization of these rentals and therefore this portion of their assignment of error should be abandoned under Rule 28 of our Rules of Appellate Procedure.

[4] Finally, the plaintiff claims that the trial court committed reversible error in admitting expert opinion of the fair market value of the defendants' property based upon capitalization of *hypothetical* income from *hypothetical* improvements to the property. The plaintiff's objection was lodged during the following portion of Kaufman's testimony.

> Q. You mentioned using the income from property to determine the value of the property itself. What rental would be required to capitalize the King property to the value that the fair market value you've placed on it?
>
> A. Well, on the whole property?
>
> Q. Yeah.
>
> A. Well, it depends at what rate you're capitalizing, but if I'm using 10 percent rate, we're talking about twenty-eight thousand dollars a year total rental to the owner of the land.
>
> Q. That would be for—all of the businesses on the two acres of land?

A. That would be for the whole piece of land, yes.

Q. And do you have an opinion satisfactory to yourself as to whether or not that is a realistic rental according to the highest and best use of the Kings' property if properly developed?

MR. JARVIS: Objection.

COURT: Overruled.

A. Yes. I think that would be a realistic rental for that kind of commercial property.

Initially, we note that plaintiff's objection comes too late. In any event, however, Kaufman testified that a rental value of $28,000.00 per year was a realistic rental value for the defendants' property with regard to its highest and best use. The concept of "highest and best use" requires an expert to determine what the subject property's fair market value would "realistically" be if the owner were "hypothetically" allowed to adapt his property to its most advantageous and valuable use. 27 Am. Jur. 2d, *Eminent Domain*, Sec. 280 (1966). *See also State v. Johnson*, 282 N.C. 1, 191 S.E. 2d 641 (1972), *affirmed per curiam*, 286 N.C. 331, 210 S.E. 2d 260 (1974). Therefore, we hold it was not error for the trial court to allow Kaufman in explaining his opinion on how he arrived at his figure for the fair market value of the defendants' property to "suppose" what a realistic rental value of the property might be "if properly developed."

Furthermore, Kaufman stated that his opinion as to the fair market value of the condemned property was based upon actual improvements, market demand for commercial retail space in the area, and specific comparable sales. He further testified that in his opinion the fair market value of the property was $281,000.00. The plaintiff again did not object. Without expressing an opinion as to whether the capitalization of hypothetical income is a proper method of valuation, we hold that in the context of this case Kaufman's expert testimony was properly received.

For the foregoing reasons, we hold that the trial court committed no prejudicial error.

No error.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. EDWARD VERNON HITCHCOCK

No. 8412SC1068

(Filed 4 June 1985)

1. **Homicide § 15.2; Criminal Law § 34.6— child abuse—evidence of previous abuse**

In a prosecution for the second-degree murder of a four-year-old girl, the trial court did not err by admitting testimony that the victim had sustained a fractured jawbone while alone with defendant two months before her death. Where the evidence shows that the victim was a battered child who died as a result of injuries which could have been caused by acts of physical abuse administered by defendant, evidence of prior acts of physical abuse is relevant and admissible to show the defendant's intent and to show that defendant acted with malice.

2. **Homicide § 26— child abuse—second-degree murder—instructions using N.C.P.I.-Crim. 206.35 proper**

In a prosecution for the second-degree murder of a four-year-old child, the trial court did not redefine second-degree murder in its instructions by using N.C.P.I.-Crim. 206.35, which is specifically designed for use in cases where the State seeks to prove second-degree murder based on the theory that a child died as a result of physical abuse by the defendant. The court did not define second-degree murder differently from the way it would have been defined had the victim been an adult when it broke the two elements set forth in N.C.P.I.-Crim. 206.31A into smaller parts because it did not change the elements of the offense or in any way alter the definition.

3. **Homicide § 5— child abuse—malice and criminal negligence distinguished in instructions—no error**

There was no error in the trial court's definition and distinction of malice and criminal negligence in a prosecution for second-degree murder arising from the death of a four-year-old child.

4. **Criminal Law § 138— child abuse—aggravating factors—position of trust—young victim—no error**

In a prosecution for second-degree murder arising from the death of a child, the trial court did not err by finding as aggravating factors that the child was very young and that defendant took advantage of a position of trust or confidence to commit the offense where the State relied on evidence showing that the victim suffered from battered child syndrome to obtain the convic-

tion. The two aggravating factors are not elements of second-degree murder and they are each based on separate evidence. G.S. 15A-1340.4(a)(1).

APPEAL by defendant from *Preston, Judge.* Judgment entered 4 June 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 5 April 1985.

Defendant was convicted of the second degree murder of Deborah Teneile Edwards, the four-year-old daughter of his girlfriend with whom he lived, and was sentenced to a term of imprisonment. He appeals.

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

Assistant Public Defender Paul F. Herzog for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court committed prejudicial error by allowing the State to introduce evidence concerning an injury received by the victim in July 1983. Evidence was admitted, over defendant's objection, which showed the following:

Approximately two months before her death the victim, Deborah Teneile Edwards, sustained a fractured jawbone while she was at home alone with defendant. Defendant told the child's mother, Deborah Ann Edwards (hereinafter Edwards), that the child had slipped and fallen backwards in the bathtub. The sheriff's department and the department of social services conducted an investigation into the cause of the child's injury but no charges were filed as a result. Defendant later told investigators he believed the child had sustained the injury when she fell at the playground and not when she fell in the bathtub.

Defendant argues that: the evidence concerning the child's prior injury was irrelevant to the offense for which he was being tried; it was not admissible under any of the exceptions to the general rule prohibiting the introduction of evidence showing that the accused has committed another distinct, independent, or separate offense; and its admission was prejudicial in that it tended to raise unwarranted suspicions about him.

The other evidence presented at trial tends to show the following:

Sometime after May 1983 the victim, who had previously been living with her grandmother, came to live with her mother and defendant. Defendant resented the presence of the child and wanted her sent back to her grandmother. Edwards testified that after her daughter came to live with them, defendant became more irritable and was easily upset. Defendant was at home alone with the child from 9:00 a.m. until noon on 6 October 1983. When Edwards left for work at 9:00 a.m. the child was fine, but when she returned at noon the child became ill and vomited. Defendant told Edwards the child had not been sick when she had been with him that morning. Edwards noticed that the child had some bruises on her face. Edwards stayed with the child for the rest of the day because the child continued to feel ill. Defendant went to work.

The next day the child's condition first appeared to improve and then worsened. Defendant was alone with the child for brief periods while Edwards went to the store. That evening Edwards wanted to take the child to a doctor but defendant told her not to because the child had bruises. Defendant told her he thought the child's ribs were broken. The child's condition continued to worsen. Edwards wanted to call someone because the child was sick but defendant would not let her do so and unplugged the phone. He stood in front of the door and would not let her leave to go call anyone. He finally let her call her sister who told her to take the child to the hospital. Edwards testified that defendant told her that if she took the child to the hospital looking like she did that "they was going to try to accuse him of doing it," that they would charge her with the same thing that they would charge him with, and that she should tell the doctor the child fell down the stairs.

Edwards took the child to the hospital but the child was unconscious by the time they arrived and died shortly thereafter. On 8 October 1983 Edwards gave a written statement to the officers investigating the child's death in which she said the child had fallen down a short flight of stairs. Two days later she gave the investigating officers a second statement in which she indicated that she had lied when she said the child had fallen down

some stairs and that she had done so because she did not know what had happened to the child and was trying to protect defendant and herself. She said that in the past she had seen defendant discipline the child by spanking her, kicking her, shaking her, hitting her on the head, and poking her in the chest with his fingers. She said she had always tried to stop defendant but that defendant would either take it out on her or push her out of the way.

On 8 October 1983 defendant gave the investigating officers a written statement in which he stated, in relevant part: When he was alone with the child on the morning of 6 October 1983, the child irritated him by asking numerous questions. After a while he played a game with the child called "supergirl" in which he lay on the floor on his back with his feet in the air and on the child's abdomen and balanced the child so that she could pretend she was flying. The child lost her balance and fell. As she fell her head struck defendant's head, and defendant's knee hit her in the stomach. Shortly thereafter the child became sick and vomited. Defendant yelled at her and pushed her towards the bathroom causing her to run into a door frame. When defendant was alone with the child the next day, the child again indicated she was going to vomit. In trying to hurry the child to the bathroom defendant pushed her twice, causing her to run into a corner of a wall, and kicked her softly soccer-style in the ribs. At one point later that evening the child appeared to stop breathing so defendant slapped her in the face and hit her in the chest until she responded. Other testimony at trial showed that when defendant was arrested he said that "he didn't intend to kill [the child] with malice," "that he blew it," and "that child abuse cases were hard to prove."

The physician who treated the child when she was brought to the hospital on 7 October 1983 testified that when the child was brought in she was covered with bruises. He said that it was his very clear opinion that the child suffered from battered child syndrome and had been beaten quite severely over a period of time and had probably sustained a fatal abdominal injury.

Deborah Radisch, the medical examiner who performed an autopsy on the child, agreed that the child suffered from battered child syndrome. She defined battered child syndrome as the diagnosis used to describe a child on which multiple injuries,

possibly including several different kinds of injuries, are seen which are usually in various stages of healing and located in places where the child would not usually be injured in the course of normal play, and which are unexplained by or inconsistent with the history given by the child's caretaker. Radisch testified that there were large numbers of bruises on the child's body covering virtually every exposed surface and that she believed the child's death had been caused by a blow to her abdomen which injured her intestines and led to peritonitis. She stated that it would have taken a strong force to cause the child's injuries and that the injuries could not have resulted from everyday playing and roughhousing, nor were they consistent with a fall down a short flight of stairs. She further testified that she did not believe the child's injuries, particularly the injury to the child's abdomen, could have been caused by the soft soccer-style kicks defendant said he gave the child or by the child's fall while playing "supergirl" as described by defendant.

As a general rule, evidence which tends to show that a defendant committed another offense, independent of and distinct from the offense for which the defendant is being prosecuted, is inadmissible on the issue of guilt if its only relevancy is to show the character of the defendant or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also tends to show guilt of another crime. *State v. Barfield*, 298 N.C. 306, 325, 259 S.E. 2d 510, 527 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, 100 S.Ct. 3050, *reh. denied*, 448 U.S. 918, 65 L.Ed. 2d 1181, 101 S.Ct. 41 (1980); *State v. McClain*, 240 N.C. 171, 173-77, 81 S.E. 2d 364, 365-68 (1954). It is well settled that such evidence is admissible to show *quo animo*, intent, design, guilty knowledge or scienter, or to make out the *res gestae*. *State v. Lowery*, 286 N.C. 698, 705, 213 S.E. 2d 255, 260 (1975), *modified*, 428 U.S. 902, 49 L.Ed. 2d 1206, 96 S.Ct. 3203 (1976); *State v. Smith*, 61 N.C. App. 52, 57, 300 S.E. 2d 403, 407 (1983).

Where the evidence shows, as it does here, that the victim was a battered child who died as a result of injuries which could have been caused by acts of physical abuse administered by the defendant, evidence of prior acts of physical abuse is relevant and admissible to show the defendant's intent and to show that the defendant acted with malice. *See State v. Smith*, 61 N.C. App. at

57-58, 300 S.E. 2d at 407; *State v. Vega*, 40 N.C. App. 326, 331-32, 253 S.E. 2d 94, 97-98 (1979), *disc. rev. denied*, 297 N.C. 457, 256 S.E. 2d 809 (1979), *cert. denied*, 444 U.S. 968, 62 L.Ed. 2d 382, 100 S.Ct. 459 (1979). The evidence here concerning the victim's prior injury tended to show that defendant had physically abused the victim on a previous occasion. Thus, it was relevant for the above-mentioned purposes. Accordingly, we find no error in its admission.

[2] Defendant next contends the court committed prejudicial error in its instructions to the jury concerning the elements of second degree murder and involuntary manslaughter. First, he argues the court denied him equal protection of the law through its instructions on second degree murder in that it redefined the offense based on the fact that the victim was a child. Defendant tendered to the court proposed jury instructions which closely tracked N.C.P.I.-Crim. 206.31A. The court instead instructed the jury by following N.C.P.I.-Crim. 206.35 which is specifically designed for use in cases where the State seeks to prove second degree murder on the theory that the victim, a child, died as a result of physical abuse by the defendant. By instructing in accordance with N.C.P.I.-Crim. 206.35 defendant argues that the court: redefined second degree murder in that it instructed that the offense has five elements which the State must prove, rather than two elements as set forth in N.C.P.I.-Crim. 206.31A; relaxed and broadened the definitions of malice and intent; and instructed that evidence showing that the victim suffered from injuries typical of those found in children suffering from battered child syndrome could be considered in determining whether the injury which caused the victim's death was intentionally inflicted.

We do not agree that the court defined second degree murder differently from the way it would have been defined had the victim been an adult. Although the court enumerated the elements of the offense differently from the way they are enumerated in N.C.P.I.-Crim. 206.31A in that it broke the two elements set forth in that pattern instruction into smaller parts, in so doing the court did not change the elements of the offense or in any way alter its definition. The court's definition and explanation of the elements of intent and malice was in complete accord with our Supreme Court's opinion in *State v. Wilkerson*, 295 N.C. 559, 578-81, 247 S.E. 2d 905, 916-18 (1978). Similarly, the

court's instruction concerning the jury's consideration of the evidence showing that the victim was a battered child was a correct statement of the law. *See State v. Stinson*, 297 N.C. 168, 172, 254 S.E. 2d 23, 25-26 (1979); *see also State v. Mapp*, 45 N.C. App. 574, 580-81, 264 S.E. 2d 348, 353-54 (1980).

[3] Second, defendant contends his due process rights were violated by the instructions on second degree murder and involuntary manslaughter because the court defined malice and criminal negligence so similarly that no rational layperson could make a meaningful distinction between the terms or the offenses. In instructing the jury the court defined and distinguished between malice and criminal negligence as those terms were defined and distinguished by our Supreme Court in *State v. Wilkerson*, 295 N.C. at 578-80, 247 S.E. 2d at 916-17. Thus, the instructions were a correct statement of the law. We find no error and no violation of defendant's constitutional rights in the instructions on second degree murder and involuntary manslaughter.

[4] Defendant contends the court erred in sentencing by finding as aggravating factors that the victim was very young and that defendant took advantage of a position of trust or confidence to commit the offense. He argues that these aggravating factors were improperly found because the evidence necessary to prove them was necessary to prove an element of the offense and because the same evidence was used to prove both factors. *See* G.S. 15A-1340.4(a)(1). His argument is based on the fact that the State relied on evidence showing that the victim suffered from battered child syndrome to obtain the conviction. Since evidence showing that the victim was a child, and thus was very young, and showing that the defendant had a caretaker role, and thus was in a position of trust, was essential to show that the child suffered from battered child syndrome, he argues that the same evidence, i.e., evidence of battered child syndrome, was used to prove both factors. Similarly, since this same evidence was used to prove his intent and that he acted with malice, which are elements of the offense, he argues it should not have been used to prove these aggravating factors.

Defendant's arguments are without merit. The two aggravating factors are not elements of second degree murder, *see State v. Thompson*, 309 N.C. 421, 422 n. 1, 307 S.E. 2d 156, 158 n.

1 (1983), and they are based on separate evidence—evidence of the victim's age and evidence of the caretaker position held by defendant. Thus, the aggravating factors were not found in violation of the prohibition in G.S. 15A-1340.4(a)(1).

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

No error.

Judges JOHNSON and EAGLES concur.

IN THE MATTER OF MARY ELIZABETH BOTSFORD, DOB: AUGUST 14, 1967; MITCHELL AND JEWELL BOTSFORD, PARENT APPELLANTS; JOSEPHINE SMITH, GRANDMOTHER APPELLEE; JOANNE FOIL, GUARDIAN AD LITEM, APPELLEE

No. 8414DC810

(Filed 4 June 1985)

1. **Infants § 5— custody of juvenile—jurisdiction under Juvenile Code—informational affidavit not required**

Where the trial court obtained jurisdiction over the custody of a juvenile pursuant to G.S. 7A-523 of the Juvenile Code rather than pursuant to G.S. Ch. 50A, the informational affidavit referred to in G.S. 50A-9 was not a prerequisite to its jurisdiction. G.S. 7A-647(2)(b).

2. **Appeal and Error § 57.1— review of findings—necessity for evidence in record**

Where appellants did not file a verbatim transcript but set forth in the record in narrative form a summary of the evidence presented which was insufficient to permit the appellate court to determine whether competent evidence supports the trial court's findings, it is presumed that the findings are supported by competent evidence, and the findings are conclusive on appeal. App. Rules 9(a)(1)(v) and 9(c).

3. **Infants § 6.2— juvenile delinquent—dispositional custody order—modification based on needs of juvenile**

The trial court was authorized by G.S. 7A-664(a) to modify a consent custody order in a juvenile delinquency proceeding upon a showing that the needs of the juvenile had changed such that it was in her best interest that the order be modified and without a showing of a change in circumstances.

4. **Infants § 6.2— juvenile custody order—failure to show necessity for change**

A juvenile's parents failed to show that there was change in the needs of the juvenile requiring that her custody be returned from her grandmother to

her parents where the evidence tended to show that the grandmother had refused to consent to the juvenile's proposed marriage to the alleged father of her baby and that the parents wanted custody returned to them so that they could consent to the marriage and terminate their responsibility for the juvenile's support.

5. **Parent and Child § 7— child support payments under Juvenile Code—findings required**

Child support payments ordered pursuant to G.S. 7A-650(c), like those ordered pursuant to G.S. 50-13.4, should be based on the interplay of the trial court's conclusions as to the amount of support necessary to meet the needs of the child and the ability of the parents to provide that amount, and the court's conclusions should be based on findings of fact sufficiently specific to show that the court gave due regard to the relevant factors in G.S. 50-13.4(c) and any other relevant facts of the particular case.

6. **Parent and Child § 7— order requiring father to pay support for juvenile—insufficient findings and conclusions**

The trial court's order directing a juvenile's father to pay child support must be vacated and the cause remanded for new proceedings on the issue of child support where no evidence was presented and no findings or conclusions were made as to the amount of support necessary to meet the needs of the juvenile, the court made no conclusion as to what sum of money was a reasonable amount for the father to pay as support in accordance with G.S. 7A-650(c), and the court made no conclusion as to the ability or obligation of the mother to contribute to the juvenile's support.

APPEAL by parents Mitchell and Jewell Botsford from *Labarre, Judge.* Order entered 29 March 1984 in District Court, DURHAM County. Heard in the Court of Appeals 3 April 1985.

This juvenile action was instituted in May 1983 when Mary Elizabeth Botsford (hereinafter "the juvenile") was charged in two petitions with felonious forgery and uttering. The juvenile admitted to the charges, was adjudicated delinquent, and was placed on probation until July 1984. Subsequently the juvenile's grandmother filed a petition in the action seeking her custody. On 1 December 1983 a consent order was entered transferring custody of the juvenile from her parents to her grandmother. In March 1984 the juvenile's father filed a motion for review of the custody order in which he stated that it was in the best interest of the juvenile that her custody revert to him and his wife.

A hearing was held on the motion for review on 29 March 1984. On the morning of the hearing the guardian ad litem appointed to represent the juvenile filed a motion in the action re-

questing that custody of the juvenile be placed with the Durham County Department of Social Services and that the juvenile's parents be ordered to furnish financial support for her. At the conclusion of the hearing the court ordered that custody of the juvenile remain with the grandmother, that the juvenile's probation be extended until July 1985, and that the juvenile's father pay $50 per week as support. From the order entered, the parents of the juvenile appeal.

Margaret D. Rundell for parent appellants.

N. Joanne Foil, guardian ad litem appellee, for Mary Elizabeth Botsford, a minor.

No brief filed for appellee Josephine Smith.

WHICHARD, Judge.

[1] The parents contend the court lacked jurisdiction over the matter of the juvenile's custody and that therefore the consent order transferring custody to the grandmother was void. They argue that since the juvenile's grandmother never submitted to the court the informational affidavit required in custody actions by G.S. 50A-9, the court never obtained jurisdiction over the matter. This argument is without merit. The court acquired jurisdiction over the juvenile pursuant to G.S. 7A-523 when the juvenile was alleged to be delinquent. In exercising its jurisdiction, the court awarded custody of the juvenile to her grandmother pursuant to the authority granted it in G.S. 7A-647(2)(b). Once a court obtains jurisdiction over a juvenile, its jurisdiction continues until terminated by court order or until the juvenile reaches the age of eighteen. G.S. 7A-524. Here, the court's jurisdiction had not been terminated in either of these ways at the time the custody orders were entered; thus, the court clearly had jurisdiction over the matter. Moreover, since the court obtained jurisdiction over the matter pursuant to G.S. 7A-523 of the Juvenile Code rather than pursuant to Chapter 50A of the General Statutes, the affidavit referred to in G.S. 50A-9 was not a prerequisite to its jurisdiction.

[2] The parents next argue that certain of the findings of fact in the 29 March 1984 order are not supported by the evidence. N.C.R. App. P. 9(a)(1)(v) requires that the record on appeal contain so much of the evidence, either in narrative form or in the ver-

batim transcript of the proceedings, as is necessary for an understanding of all errors assigned. *See also* N.C.R. App. P. 9(c). Where such evidence is not included in the record, it is presumed that the findings are supported by competent evidence, and the findings are conclusive on appeal. *See Steadman v. Pinetops*, 251 N.C. 509, 514-15, 112 S.E. 2d 102, 106 (1960); *Browning v. Humphrey*, 241 N.C. 285, 287, 84 S.E. 2d 917, 918 (1954).

The parents here did not file a verbatim transcript of the proceedings in the court below but instead set forth in the record in narrative a summary of the evidence presented. The summary provided, however, is insufficient to permit us to determine whether competent evidence supports the findings. Thus, we presume that it does.

[3] The parents contend the court erred in applying a change of circumstances standard in determining whether they were entitled to a modification of the consent order. They argue that G.S. 7A-664 authorizes the modification of a dispositional order, such as the consent order here, upon a showing of either a change in circumstance *or* a change in the needs of the juvenile, and that they presented sufficient evidence of a change in the juvenile's needs to warrant such modification.

G.S. 7A-664(a) provides:

> Upon motion in the cause or petition, and after notice, the judge may conduct a review hearing to determine whether the [dispositional] order of the court is in the best interest of the juvenile, and the judge may modify or vacate the order in light of changes in circumstances or the needs of the juvenile.

We agree that the court was authorized to modify the consent order upon a showing that the needs of the juvenile had changed such that it was in her best interest that the order be modified; we do not agree, however, that the parents here made such a showing.

[4] The court's findings may be summarized as follows: In November 1983 the juvenile gave birth to a baby boy. Her parents informed her at that time that neither she nor her baby were welcome to live in their home. The juvenile's grandmother offered to allow the juvenile and her baby to live with her on a

permanent basis. The parents consented to the transfer of custody to the grandmother and custody of the juvenile was awarded to the grandmother by the consent order entered 1 December 1983. Thereafter the grandmother consistently provided care for the juvenile and her baby whereas the juvenile's parents provided no financial or other help.

The juvenile's father had previously pled guilty to assault on a female. He was initially charged with incest and admitted having sexual intercourse with the juvenile. He was placed on probation and ordered to participate in therapy; however, he failed to participate in therapy in a meaningful way. Russell William Ray, the alleged father of the juvenile's baby, at one point indicated that he would like to marry the juvenile, and the juvenile had stated that she would like to marry Ray at the earliest possible time. The juvenile's grandmother refused to consent to the juvenile's marriage until Ray could prove that he was a stable individual capable of supporting the juvenile and her baby, and that he had a steady job and an appropriate place to live. Ray refused to give the grandmother such proof.

The court further found: The grandmother's concerns over the juvenile's proposed marriage to Ray are reasonable in that Ray has provided no support whatsoever for the juvenile's baby, has visited the baby only very sporadically, and has shown no signs of stability, either by way of a steady job, an appropriate place to live, or an ability to provide a consistent source of emotional support for the juvenile. When the grandmother refused to consent to the proposed marriage, the juvenile left her grandmother's home and moved in with her parents. The juvenile's parents made it abundantly clear that they do not want the juvenile to live with them on a permanent basis. They desire that custody of the juvenile be returned to them so that they can consent to her marriage to Ray. The parents were candid with the court that their desire to approve the proposed marriage was solely for the purpose of terminating their responsibility for the juvenile's support. It is not in the juvenile's best interest that she even be allowed to visit in her parents' home without adult supervision in light of her father's previous conviction.

Based on these findings, the court concluded that no substantial change in circumstances affecting the welfare of the juvenile

warranting a modification of the consent order had been shown and that it was in the juvenile's best interest that her custody remain with her grandmother. We believe the findings of fact support these conclusions and do not show that there was any change in the needs of the juvenile requiring that her custody be returned to her parents. Thus, we affirm that part of the 29 March 1984 order leaving custody of the juvenile with her grandmother.

Next, the parents contend the court erred in ordering the juvenile's father to pay child support because the evidence, findings of fact, and conclusions of law were insufficient to support such an order. G.S. 7A-650(c) provides, in relevant part:

> Whenever legal custody of a juvenile is vested in someone other than his parent, after due notice to the parent and after a hearing, the judge may order that the parent pay a reasonable sum that will cover in whole or in part the support of the juvenile after the order is entered.

With respect to the issue of child support, the court here found as follows: that the juvenile's father is gainfully employed earning a net yearly income of over $20,000; that the juvenile's mother is also gainfully employed earning over $11,000 per year; that said parents are more than able to provide financial support for their daughter; that since 1 December 1983 the juvenile's grandmother has provided all financial support for the juvenile and her baby; that the grandmother has received the total sum of only $170 per month for the months of January, February, and March of 1984 as AFDC monies for the benefit of the juvenile and her baby; and that the grandmother is in need of financial support from the juvenile's parents for the benefit of the juvenile.

The court concluded that the juvenile's father is gainfully employed, able-bodied, and legally obligated to provide financial support for the benefit of his daughter, and ordered him to pay $50 per week as child support for the juvenile beginning on 6 April 1984.

Our research has disclosed no case from our appellate courts considering the findings of fact and conclusions of law necessary to support an order for child support under G.S. 7A-650(c) of the Juvenile Code. An order for child support entered pursuant to G.S. 50-13.4 must be based on 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 ability of the parties to provide that amount. *Plott v. Plott*, 313 N.C. 63, 68, 326 S.E. 2d 863, 867 (1985); *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980). These conclusions must themselves be based on findings of fact sufficiently specific to indicate to the appellate court that the trial court gave due regard to the estates, earnings, conditions, and accustomed standard of living of both the child and the parents, and the other facts of the particular case. *Id.* Where such findings are not made, this Court has no means of determining whether the order is adequately supported by competent evidence, and the order must be vacated. *Id.*

[5] We believe an order for child support entered pursuant to G.S. 7A-650(c) should also be supported by sufficiently specific findings of fact giving rise to conclusions of law as to need and ability to pay. Support payments ordered pursuant to G.S. 7A-650 (c), like those ordered pursuant to G.S. 50-13.4, should be based on the interplay of the trial court's conclusions as to the amount of support necessary to meet the needs of the child and the ability of the parents to provide that amount. The court's conclusions should in turn be based on findings of fact sufficiently specific to show that the court gave due regard to the relevant factors in G.S. 50-13.4(c) and any other relevant facts of the particular case. Where such findings are not made, the order should be vacated because appellate courts have no means of determining whether the order is supported by the evidence and based on the proper considerations.

[6] The court here made no findings of fact or conclusions of law as to the amount of support necessary to meet the needs of the juvenile, nor does it appear from the record that evidence was presented on this question. The court made no conclusion as to what sum of money was a reasonable amount for the father to pay as support in accordance with G.S. 7A-650(c). Although the court found that the juvenile's mother had income, and that the juvenile's parents were more than able to provide support for the juvenile, the court made no conclusion as to the ability or obligation of the mother to contribute to the juvenile's support, as it should have, *see Plott v. Plott*, 313 N.C. at 68, 326 S.E. 2d at 867, nor did it order the mother to contribute to or share in the juve-

nile's support. The parental obligation for child support is one shared by both parents. *Id.; see* G.S. 50-13.4(b) (1984).

Because these findings and conclusions were not made, that part of the 29 March 1984 order directing the juvenile's father to pay child support must be vacated and this cause remanded for a new hearing on the issue of the amount of support, if any, the parents should pay for the benefit of the juvenile.

Because we have determined that the 29 March 1984 order must be vacated insofar as it relates to child support, we need not address the parents' argument relating to the sufficiency of the notice given them that the issue of child support was to be addressed at the 29 March 1984 hearing.

The order is affirmed except for the portion directing the juvenile's father to pay child support. The portion directing the father to pay child support is vacated, and the cause is remanded for further proceedings on that issue in accord with this opinion.

Affirmed in part, vacated in part, and remanded.

Judges JOHNSON and EAGLES concur.

STATE OF NORTH CAROLINA v. ANGELA EVANS WALDEN AND BENITA YVETTE DARBY

No. 8415SC883

(Filed 4 June 1985)

1. Robbery § 4— conspiracy—evidence sufficient

There was sufficient evidence that defendant Darby knowingly entered into a criminal conspiracy with intent to carry out an agreement to commit robbery with a dangerous weapon where the State presented evidence of meetings attended by defendant Darby during which robbery of a grocery store was discussed and an agreement made that a real gun would be needed, of an aborted robbery attempt in which defendant Darby drove the vehicle, and of a discussion between defendant Darby and defendant Walden of who would drive to the robbery which was the subject of these charges.

2. Robbery § 4.6— accessory before the fact—evidence sufficient—guilty as principal

The trial court did not err by submitting the offense of common law robbery to the jury where the State's evidence showed that defendant Darby, through her continued involvement in planning the robbery after the agreement to rob the store was made, counseled and aided the principals in committing the robbery even though she was not present when it was committed. The State offered substantial evidence of each and every element of and the judge properly instructed the jury on accessory before the fact, and the North Carolina Legislature abolished the differences in the guilt and sentencing treatment between accessory before the fact and principals to the commission of a felony in 1981. G.S. 14-5.2.

3. Criminal Law § 75.2— confession—conflicting voir dire testimony—no findings—remanded

Defendant Walden's cause was remanded for a new hearing where the *voir dire* testimony indicated a knowing and intelligent waiver of defendant's *Miranda* rights, revealed that the statement may have been induced by a promise from a person in authority, and the trial court did not make findings resolving the conflict.

APPEAL by defendants Walden and Darby from *McLelland, Judge.* Judgments entered 31 October 1983 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 13 March 1985.

This is a criminal action in which defendants were charged in proper indictments with robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. Both defendants entered pleas of not guilty to each offense; the offenses were joined for trial.

The State's evidence tended to show the following: On 14 May 1983, about 9:00 p.m., Alonzo Smith and Lawrence Reed robbed a grocery store by use of a toy pistol. Smith, Reed, and defendant Walden were arrested immediately after the robbery in defendant Walden's automobile, of which she was the driver. The toy pistol, cash, checks, food stamps and food coupons were retrieved from the automobile.

Testimony implicating defendant Walden was offered through Alonzo Smith and Lawrence Reed. Alonzo Smith testified that defendant Walden came late to a meeting during which plans to rob the grocery store were discussed, that she drove the car to the scene of the crime, and that she discussed with him the layout of the store and the identification of the store manager during

the drive to the store on the night of the robbery. Lawrence Reed testified that defendant Walden was absent from the meeting, but that she drove the car and discussed the use of a gun with him during the drive to the grocery store.

Alonzo Smith and Lawrence Reed also implicated defendant Darby. Their testimony was similar and to the effect that defendant Darby approached Reed with a proposal to rob the grocery store; that she was present at meetings during which the robbery was discussed; that she drove Smith and Reed to the store a week before the robbery intending to rob the store that day, but they decided not to go through with their plans; and that she was supposed to drive the car on the date of the actual robbery.

Both defendants offered evidence on their own behalf denying any knowledge of or participation in the robbery of the grocery store. During Walden's cross-examination the State sought to use for impeachment purposes an in-custody statement made by her, which the State had not attempted to introduce as a part of its direct evidence. After a *voir dire* hearing, the court ruled that the State would be permitted to cross-examine Walden by the use of the statement, in which she admitted to investigating officers her knowledge of the robbery and her participation in driving the car to the scene of the crime.

Defendant Walden was convicted of common law robbery and found not guilty of conspiracy to commit robbery with a dangerous weapon. Defendant Darby was convicted of common law robbery and of conspiracy to commit robbery with a dangerous weapon. Judgments were imposed upon the jury verdicts, sentencing both defendants to the presumptive terms for their offenses. Defendants appealed.

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

Ridge, Richardson & Johnson, by Daniel S. Johnson, for defendant appellant Walden.

David L. Harris, for defendant appellant Darby.

MARTIN, Judge.

Defendant Walden's assignments of error relate to a statement she made while in custody. Because we are unable to deter-

mine if error occurred when the statement was admitted as being voluntary, we remand the case against Walden with instructions. Defendant Darby assigns as error the denial of her motions to dismiss. Evidence against defendant Darby of conspiracy to commit robbery with a dangerous weapon and as an aider and abettor of common law robbery was sufficient to submit the offenses to the jury, and we find no error as to defendant Darby.

I. DARBY'S APPEAL

Defendant Darby contends the trial court erred in denying her motions to dismiss the charges against her and for appropriate relief on the grounds that the State's evidence was insufficient to support the convictions of conspiracy to commit robbery with a dangerous weapon and common law robbery. Upon such motions, the evidence, whether direct or circumstantial, is considered in the light most favorable to the State, giving the State every reasonable inference to be drawn therefrom. *State v. Hood*, 294 N.C. 30, 239 S.E. 2d 802 (1978).

The State was required to present sufficient evidence from which the jury could find defendant guilty of conspiracy to commit robbery with a dangerous weapon, and common law robbery. When the State attempts to prove a criminal conspiracy, it must show an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way. *State v. Parker*, 234 N.C. 236, 66 S.E. 2d 907 (1951). A criminal conspiracy is complete when the agreement is made. *State v. Allen*, 57 N.C. App. 256, 291 S.E. 2d 341 (1982). "Those who aid, abet, counsel or encourage, as well as those who execute their designs are conspirators." *State v. Covington*, 290 N.C. 313, 342, 226 S.E. 2d 629, 648 (1976).

[1] The State presented evidence of meetings attended by Lawrence Reed, Alonzo Smith, defendant Walden and defendant Darby during which the robbery of the grocery store was discussed and the agreement made that a real gun would be needed. These meetings occurred before and after another aborted robbery attempt was made in which defendant Darby drove the vehicle. Prior to the robbery which is the subject of the instant charges, defendant Darby discussed with defendant Walden who would drive Reed and Smith to the robbery. This evidence is sufficient to enable the jury to find that defendant Darby was pres-

ent when the robbery plans were made; that defendant Darby aided the perpetrators in their criminal plans to rob the grocery store by using a gun; and, therefore, that defendant Darby knowingly entered into a criminal conspiracy with the intent to carry out the agreement to commit robbery with a dangerous weapon.

[2] Nor did the court err in submitting the offense of common law robbery to the jury. Common law robbery is the "felonious taking of money or goods of any value from the person of another or in his presence against his will, by violence or putting him in fear." *State v. McWilliams*, 277 N.C. 680, 687, 178 S.E. 2d 476, 480 (1971). The State's evidence showed that defendant Darby, through her continued involvement in planning the robbery after the agreement to rob the store was made, counseled and aided the principals in committing the robbery, but that she was not present when the principals committed the robbery. At common law, one who encouraged or aided another in committing a crime but who was not himself present at the commission of the crime was classified as an accessory before the fact. In *State v. Small*, 301 N.C. 407, 429, 272 S.E. 2d 128, 141 (1980), our Supreme Court held that "[u]nless and until the legislature acts to abolish the distinction between principal and accessory, a party to a crime who was not actually or constructively present at its commission may at most be prosecuted, convicted and punished as an accessory before the fact." In 1981 the North Carolina legislature did abolish the difference in guilt and sentencing treatment between accessories before the fact and principals to the commission of a felony. "Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony." G.S. 14-5.2. Cases decided before the enactment of G.S. 14-5.2 delineating the essential elements of accessory before the fact of felony are applicable to cases brought under G.S. 14-5.2. *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982). The State offered substantial evidence of each and every element of, and the judge properly instructed the jury on, accessory before the fact of felony, i.e., that "(a) . . . defendant counseled, procured or commanded the principal[s] to commit the offense; (b) that defendant was not present when the principal[s] committed the offense; and (c) that the principal[s] committed the offense." *State v. Sauls*, 291 N.C. 253, 257, 230 S.E. 2d 390,

392 (1976), *cert. denied*, 431 U.S. 916, 97 S.Ct. 2178, 53 L.Ed. 2d 226 (1977). This assignment of error is overruled.

II. WALDEN'S APPEAL

[3] Defendant Walden assigns as error the trial court's denial of her motion to suppress a statement she made to law enforcement officers after her arrest. Defendant argues that the investigating officers induced in her a hope or fear which resulted in her making inculpatory, involuntary statements and maintains the trial court's failure to make findings of fact in regard to the voluntariness of the statement rendered the trial court's denial of her motion to suppress error.

The State attempted to use the statement for impeachment purposes during cross-examination of defendant Walden. A *voir dire* hearing was conducted, at which defendant Walden was the only witness. Her testimony in pertinent part was as follows: She signed two waiver of rights forms stating that she did not wish to talk to the police. When the police discovered that she had worked for the grocery store which was robbed, "they insisted on having a statement" from her. She testified that a police officer told her, "I know you—I know you in on this [sic]. You may as well go on and tell me what's happening. The judge is going to look at it. The other guys is [sic] going to give a statement, and you go on and give us a statement and the judge will look at that, being that you've cooperated in all of this." According to her testimony, the police "promised that it would be better" for her if she made a statement, and also told her she had a high bond and gave her the impression "she was going to be in custody, so she had to talk." Defendant Walden immediately prior to giving her statement said she understood her *Miranda* rights, initialed a waiver of rights form, stating she wished to talk to the police. The trial court made no findings of fact from this evidence, but concluded "that the statements were voluntarily made and may be used in cross-examination."

Regardless of the scope and purpose of the statement's use, in cases such as this one in which the requirements of *Miranda* have been met and the defendant has not asserted the right to have counsel present during questioning,

> no single circumstance may be viewed in isolation as rendering a confession the product of improperly induced hope or

> fear and, therefore, involuntary. In those cases the court must proceed to determine whether the statement made by the defendant was *in fact* voluntarily and understandingly made, which is the ultimate test of the admissibility of a confession. In determining whether a defendant's statement was in fact voluntarily and understandingly made, the court must consider the *totality of the circumstances* of the case and may not rely upon any one circumstance standing alone and in isolation.

State v. Corley, 310 N.C. 40, 48, 311 S.E. 2d 540, 545 (1984) (original emphasis).

In addition to applying the totality of the circumstances analysis, the trial court on *voir dire* is to resolve evidentiary conflicts by findings of fact in such manner as to enable this Court to say whether the trial judge committed error in admitting the confession. *State v. Conyers*, 267 N.C. 618, 148 S.E. 2d 569 (1966). Our Supreme Court has stated that a court's failure to find facts resolving conflicting *voir dire* testimony is prejudicial error "requiring remand to the superior court for proper findings and a determination upon such findings of whether the inculpatory statement made to police officers by defendant during his custodial interrogation was voluntarily and understandingly made." *State v. Booker*, 306 N.C. 302, 312-13, 293 S.E. 2d 78, 84 (1982), *aff'd*, 309 N.C. 446, 306 S.E. 2d 771 (1983).

In the case under review, the *voir dire* testimony was conflicting. Defendant Walden's testimony, while indicating a knowing, intelligent waiver of her *Miranda* rights prior to giving her inculpatory statement, also revealed the statement may have been induced by a promise from a person in authority "which gave defendant a hope for lighter punishment . . . arous[ing] . . . an 'emotion of hope' so as to render the confession involuntary." *State v. Fuqua*, 269 N.C. 223, 228, 152 S.E. 2d 68, 72 (1967). Applying the *Booker* rule to this case, we hold this cause must be remanded to the Superior Court of Alamance County where a judge presiding over a criminal session will conduct a hearing, after due notice to defendant and with her counsel present, to determine whether the statement allegedly made by defendant Walden to officers on 16 May 1983 was voluntarily and understandingly made. If the presiding judge determines that the state-

ment was not understandingly and voluntarily made, he will make his findings of facts and conclusions and enter an order vacating the judgment appealed from, setting aside the verdict and granting defendant Walden a new trial. If the presiding judge makes a determination based upon competent evidence that defendant Walden's statement was made voluntarily and understandingly, he will make his findings of fact and conclusions of law and thereupon order commitment to issue in accordance with the judgment appealed from and entered 31 October 1983.

No error in Case No. 83CRS10059.

Remanded with instructions in Case No. 83CRS7332.

Chief Judge HEDRICK and Judge WELLS concur.

CLAUDE EUGENE MEADOWS AND BERNICE JENKINS MEADOWS v. CRAIG JOHN LAWRENCE

No. 8422SC684

(Filed 4 June 1985)

1. **Automobiles and Other Vehicles § 83.2— pedestrian—contributory negligence—summary judgment for driver proper**

Plaintiff's conduct constituted contributory negligence as a matter of law where he was standing in defendant's lane of Highway 64; defendant's car, with its headlights on, turned onto the road at a distance of at least 100 feet from plaintiff; the weather conditions were clear and dry; the road was straight and visibility unobstructed; just before impact defendant's car was traveling at about 43 miles per hour; and between the time defendant's car turned onto the highway and the time of the collision, plaintiff took one or two steps toward the center of the road. G.S. 20-174(a) (1983).

2. **Automobiles and Other Vehicles § 86— last clear chance—not pleaded—not considered**

Plaintiffs' contention that summary judgment for defendant was inappropriate because a genuine issue of fact existed as to last clear chance was not addressed where plaintiffs did not plead facts sufficient to invoke the doctrine and did not exercise the option of filing a reply. G.S. 1A-1, Rule 7(a).

Judge WELLS dissenting.

APPEAL by plaintiffs from *Helms, Judge.* Ordered entered 2 April 1984 in Superior Court, IREDELL County. Heard in the Court of Appeals 13 February 1985.

Harris & Pressly, by Edwin A. Pressly and Gary W. Thomas, for plaintiff appellants.

Sowers, Avery & Crosswhite, by William E. Crosswhite, for defendant appellee.

BECTON, Judge.

I

Plaintiffs, Claude Eugene Meadows and Bernice Jenkins Meadows, filed this negligence action against defendant, Craig John Lawrence, the driver, to recover damages for injuries sustained when Lawrence's car struck Mr. Meadows. Lawrence answered, alleging Mr. Meadows' contributory negligence as a proximate cause of the accident. Lawrence subsequently moved for, and was granted, summary judgment. Plaintiffs appeal, arguing that genuine issues of fact exist as to whether Meadows was contributorily negligent, and whether Lawrence had the last clear chance to avoid striking Meadows. We conclude that the evidence establishes Meadows' contributory negligence as a matter of law. Furthermore, as the plaintiffs failed to plead last clear chance, we do not consider that issue on the merits. We therefore affirm the trial court's entry of summary judgment.

II

Factual Background

On 28 August 1981, at about 10:30 p.m., Lawrence pulled out of a bowling alley parking lot onto U.S. Highway 64 West, heading towards Statesville. The weather conditions that night were clear and dry. As Lawrence pulled out, he saw the headlights of a car approaching from the opposite direction. He passed this car, and a second or two later, Lawrence first saw Meadows in the middle of his traffic lane at a distance Lawrence estimated at 50 to 70 feet.

Lawrence swerved to the left and applied his brakes. According to Lawrence, Meadows then staggered one or two steps at a forty-five degree angle towards the center of the highway. The collision took place at the left center of Lawrence's traffic lane; Meadows was struck by the middle portion of the bumper of Lawrence's vehicle. Lawrence testified that just before the acci-

dent, he was travelling at about 43 miles per hour, and that his headlights were on low beams at all times. Lawrence estimated that ten to fifteen seconds elapsed from the time he pulled out of the parking lot until the time of impact; he also estimated the distance between the point where he pulled out and the point of impact at 100 to 150 feet. The evidence showed that that portion of highway between the bowling alley and the site of the accident is straight with a slight uphill grade, and the visibility is unobstructed. According to Lawrence, there is a streetlight at the parking lot exit, and "a few" more streetlights between the parking lot and the point of impact.

Meadows submitted the affidavit of Elmer Cromie. Cromie stated that shortly before the accident he had travelled along that same stretch of Highway 64 in the same westerly direction as Lawrence. He stated that he had his headlights on low beam and that he first saw Meadows crossing his traffic lane from about 65 feet away, and that he had about 1½ seconds to maneuver around Meadows. He did so successfully, without taking his foot off the accelerator or applying his brakes.

III

[1] In his motion for summary judgment, Lawrence alleged that Meadows was contributorily negligent as a matter of law "in that he placed himself in the main travelled portion of a U.S. Highway and failed to see the oncoming vehicle and remove himself from the lane of traffic in which the defendant was proceeding." Meadows, however, cites *Troy v. Todd*, 68 N.C. App. 63, 313 S.E. 2d 896 (1984), as authority for his contention that the issue of contributory negligence should be resolved by a jury.

In a motion for summary judgment, the movant has the burden of proving that there is no genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law. *Ragland v. Moore*, 299 N.C. 360, 261 S.E. 2d 666 (1980). All reasonable inferences of fact are drawn against the movant. *Id.* Issues of contributory negligence, like issues of negligence, are rarely appropriate for summary judgment, *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E. 2d 287 (1978), as it usually remains for a jury to apply the standard of the prudent person to the facts. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972). However, where the uncontroverted evidence shows that a

plaintiff has failed to use due care and that such contributory negligence was at least one of the proximate causes of plaintiff's injuries, a defendant is entitled to summary judgment. *Brooks v. Francis*, 57 N.C. App. 556, 291 S.E. 2d 889 (1982).

Statutory and common law provide the standard of due care applicable to a person in Meadows' situation. N.C. Gen. Stat. Sec. 20-174(a) (1983) requires that a pedestrian "crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway." Although a violation of G.S. Sec. 20-174(a) (1983) is not contributory negligence *per se*, *Dendy v. Watkins*, 288 N.C. 447, 219 S.E. 2d 214 (1975), a failure to yield the right-of-way to a motor vehicle may constitute contributory negligence as a matter of law:

> [T]he court will nonsuit a plaintiff-pedestrian on the ground of contributory negligence when all the evidence so clearly establishes his failure to yield the right of way as one of the proximate causes of his injuries that no other reasonable conclusion is possible.

Ragland v. Moore, 299 N.C. at 364, 261 S.E. 2d at 668 (quoting *Blake v. Mallard*, 262 N.C. 62, 65, 136 S.E. 2d 214, 216 (1964), noting functional equivalence of nonsuit, directed verdict, and summary judgment).

The statutory duty is derived from the common law duty to use ordinary care to protect oneself from injury. In a situation factually similar to the one before us, the Supreme Court stated:

> It was plaintiff's duty to look for approaching traffic before she attempted to cross the highway. Having started, it was her duty to keep a lookout for it as she crossed.

Blake v. Mallard, 262 N.C. at 65, 136 S.E. 2d at 216-7. *Accord Garmon v. Thomas*, 241 N.C. 412, 85 S.E. 2d 589 (1955) (plaintiff was negligent in failing to keep a "timely lookout").

The courts of this State have, on numerous occasions, applied the foregoing standard of due care when the plaintiff was struck by a vehicle while crossing a road at night outside a crosswalk. If the road is straight, visibility unobstructed, the weather clear, and the headlights of the vehicle in use, a plaintiff's failure to see

and avoid defendant's vehicle will consistently be deemed contributory negligence as a matter of law. *See Price v. Miller*, 271 N.C. 690, 157 S.E. 2d 347 (1967); *Blake v. Mallard; Hughes v. Gragg*, 62 N.C. App. 116, 302 S.E. 2d 304 (1983); *Thornton v. Cartwright*, 30 N.C. App. 674, 228 S.E. 2d 50 (1976). The sole case relied upon by plaintiff, *Troy v. Todd*, involves a situation where plaintiff-pedestrian was walking on the edge of defendant's lane with his back towards traffic, and specifically distinguishes the cases on which we rely.

In applying the law to the instant facts, we review the evidence in the light most favorable to Meadows, the non-movant. In so doing, we find that Meadows was standing in Lawrence's lane of Highway 64; that Lawrence's car, with its headlights on, turned onto the road at a distance of at least 100 feet from Meadows; that the weather conditions were clear and dry; that the road was straight and the visibility unobstructed; that just before impact the car was travelling at about 43 miles per hour; and between the time Lawrence's car turned onto the highway and the time of the collision, Meadows took one or two steps towards the center of the road. Based on these facts, we conclude that Meadows failed to exercise due care commensurate with the situation in which he had placed himself; that such failure constituted contributory negligence as a matter of law; and that Meadows' contributory negligence was a proximate cause of the accident.

IV

[2] Plaintiffs also argue that summary judgment for Lawrence was inappropriate because a genuine issue of material fact exists as to whether driver Lawrence had the last clear chance to avoid striking the pedestrian Meadows. We find that the plaintiffs' pleadings were not sufficient to raise this defense, and we are thus precluded from addressing this argument. It is well-settled that some pleading alleging last clear chance is necessary if a plaintiff seeks to invoke this doctrine to avoid the affirmative defense of contributory negligence. *Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977). While the recommended pleading practice is to file a reply alleging last clear chance, *see* Rule 7(a), North Carolina Rules of Civil Procedure, if plaintiff's complaint contains factual allegations sufficient to give rise to the doctrine, these

allegations alone will enable plaintiff to invoke the doctrine. *Vernon v. Crist; Exum v. Boyles*, 272 N.C. 567, 158 S.E. 2d 845 (1968). In the case *sub judice*, the plaintiff did not exercise the option of filing a reply, nor, even under the liberal requirements of notice pleading, have the plaintiffs pleaded facts in their complaint sufficient to invoke the doctrine. Therefore, we do not reach the issue whether the defendant had the last clear chance to avoid the accident.

V

Concluding as we do that Meadows was contributorily negligent as a matter of law, and that the pleadings were insufficient to raise the issue of last clear chance, summary judgment must be, and is,

Affirmed.

Judge WELLS dissents.

Judge WHICHARD concurs.

Judge WELLS dissenting.

This is an unusual case. While I agree that the forecast of evidence shows that plaintiff Claude Meadows may have been contributorily negligent, I cannot agree that the forecast conclusively established that fact. The forecast shows that Meadows, a pedestrian, in an intoxicated condition, was attempting to cross a highway after dark, and that defendant did not see Meadows until moments (or a few seconds) before he struck Meadows near the center of defendant's lane of travel.

The issue of last clear chance is also of doubtful resolution. While it is clear that plaintiff has not alleged last clear chance, the forecast of evidence would tend to establish a last clear chance situation—*i.e.*, an intoxicated pedestrian in a position of peril (crossing a highway after dark) who was not seen by defendant in time to avoid hitting Meadows, and that if defendant had been keeping a proper lookout, he reasonably could have seen Meadows in time to avoid him. In his deposition in support of his summary judgment motion, defendant testified that Meadows was in the road in defendant's lane of travel, back side to defendant,

or at an angle to defendant, that defendant had entered the highway only seconds before reaching Meadows, and that he saw Meadows "momentarily" before striking him. An affidavit of defendant's wife, who was a passenger in defendant's car, tended to substantiate defendant's version of the accident. Plaintiffs, on the other hand, presented the affidavit of a motorist who passed Meadows only seconds before defendant struck Meadows. In that affidavit, the other motorist stated that he was traveling at about the same speed as defendant, saw Meadows in the highway, crossing the highway, and was able to avoid striking him. Had such evidence been presented at trial, I am persuaded that pursuant to the provisions of N.C. Gen. Stat. § 1A-1, Rule 15(b) of the Rules of Civil Procedure, plaintiffs would have been entitled to have the issue of last clear chance presented to the jury.

For the reason stated, I must respectfully dissent and vote to reverse entry of summary judgment for defendant.

KENNETH LITTLE, EMPLOYEE, PLAINTIFF v. PENN VENTILATOR COMPANY, EMPLOYER; AND HOME INSURANCE CO., CARRIER, DEFENDANTS

No. 8410IC982

(Filed 4 June 1985)

1. **Master and Servant §§ 73.1, 69— injury to eye—no loss of vision—compensable—greater risk of permanent disability—not compensable**

Plaintiff's injury was compensable under G.S. 97-31(24) where a piece of metal hit him in the eye while he was operating a rivet machine because he suffered a permanent injury to his eye but did not lose the eye or suffer any loss of vision, and the Commission did not err by finding that the proper and equitable compensation was $2,500. Compensation for injuries under subsection (24) is within the discretion of the Commission, provided the amount of the award does not exceed $10,000, and, while the evidence tended to support plaintiff's claim that his risk of some form of future vision impairment was significantly increased, the statutory scheme makes no provision for additional recovery because a claimant may be subject to a greater risk of permanent disability as a result of the accident.

2. **Master and Servant § 75— award of future medical expenses—erroneous**

The Industrial Commission erred by awarding future medical expenses to a plaintiff who had a piece of metal imbed itself in his eye while operating a rivet machine. G.S. 97-25 entitled plaintiff to reimbursement of such medical expenses as will lessen his period of disability, but plaintiff's disability ended

when he returned to work and began earning his old wage. While plaintiff is required to undergo continued medical treatment for his injury, the treatment is for the purposes of monitoring and observation rather than to hasten plaintiff's return to health or to give relief.

APPEAL by plaintiff and defendants from the opinion and award of the full Industrial Commission. Order entered 12 June 1984. Heard in the Court of Appeals 19 April 1985.

In this administrative proceeding, plaintiff seeks compensation from defendant Penn Ventilator for an injury to his left eye resulting from a job-related accident.

After an evidentiary hearing, the Deputy Commissioner for the Industrial Commission made the following pertinent findings of fact:

1. On March 28, 1980, plaintiff was operating a rivet machine when it malfunctioned and a piece of metal hit plaintiff in his left eye. Plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer.

2. Plaintiff was hospitalized and treated for a laceration of his cornea and as a result of that treatment the piece of metal was left in his eye and the laceration was closed around it. As a result, plaintiff has a visible scar tract through the vitreous gel body of his left eye which presents a clear danger for retinal detachment in the future. Plaintiff has a scar in the retina surrounding the encysted foreign body. This type of injury results in a significantly increased occurrence of retinal detachment when compared with the incidence in normal, uninjured eyes.

3. As a result of the injury herein, plaintiff has suffered permanent injury to an important part of his body, i.e., his left eye, for which no compensation is payable under any other subdivision of this section. Plaintiff has not suffered any loss of vision as a result of this injury at this time.

. . .

5. As a result of the injury herein plaintiff will require periodic check-ups to make sure there is no loss of vision or rusting of the metallic body left in his eye or evidence of

> retinal detachment; however, there is no provision in the Workers' Compensation Act for periodic medical examinations unless they are determined to be necessary to lessen the plaintiff's disability. That does not appear to be the case herein.

Based on these findings, the Deputy Commissioner awarded plaintiff $2,500 for the permanent injury to his eye, less his attorney's $350 fee. Plaintiff was also awarded reimbursement of medical expenses incurred as a result of the injury but the Deputy Commissioner held that defendant was not responsible for reimbursement of those expenses after plaintiff had reached maximum medical improvement.

Plaintiff appealed this decision to the full Industrial Commission which adopted the Deputy Commissioner's findings of fact and affirmed the $2,500 award. However, the full Commission modified the portion of the Deputy Commissioner's opinion and award relating to medical expenses as follows:

> However, it appears from a reading of the record that plaintiff will need monitoring of his medical condition in the future by his physicians so as to tend to lessen his period of disability. The portion of the decision relating to medical expenses shall be amended and revised to provide that the defendants shall continue to pay medical expenses incident to plaintiff's injury so long as his physician deems it necessary to lessen the period of disability.

One commissioner dissented on the grounds that $2,500 was inadequate compensation for plaintiff's injury because the injury created a risk that plaintiff could lose the injured eye in the future. Plaintiff and defendant appealed from the entry of this opinion and award.

Ralph G. Jorgensen for plaintiff-appellant.

Hedrick, Eatman, Gardner, Feerick and Kincheloe, by Edward L. Eatman, Jr., for defendant-appellee.

EAGLES, Judge.

The Commission held that plaintiff's injury was compensable under G.S. 97-31(24). Defendants contend that this was error. G.S. 97-31(24) provides as follows:

> In case of the loss or for permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed ten thousand dollars ($10,000).

Defendant argues that plaintiff's injury, if it is compensable at all, is compensable under G.S. 97-31(16), which authorizes compensation "[f]or loss of an eye," or G.S. 97-31(19), which authorizes compensation for total or partial loss of vision in an eye. This argument is without merit.

Subsections (16) and (19) of G.S. 97-31 by their very terms contemplate some loss, either of the eye itself or of the vision in an eye. While plaintiff here has unquestionably sustained a permanent injury to his eye, the evidence at the time of his hearing shows, and the Commission found, that he did not lose the injured eye or suffer any loss of vision. Since plaintiff's injury is not specifically encompassed by subsection (16) or (19) or any other subsection of G.S. 97-31, subsection (24) was the appropriate basis for the Commission's award.

In his single assignment of error, plaintiff contends that $2,500 is not adequate compensation for the permanent injury to his eye. He argues that the evidence shows that he is subject to an increased risk of blindness in one or both of his eyes and to the risk of losing the injured eye as a result of the injury. He also contends that the evidence shows that his vision is getting worse due to developing cataracts. In support of his contention, plaintiff directs our attention to his testimony at the hearing, the medical report on his injury and treatment, and several letters from physicians who examined him, all of which were in the record before the Deputy Commissioner. Plaintiff cites several medical authorities in support of his assertion that injuries like the one he sustained create an increased risk that the victim will eventually suffer permanent partial or total blindness or other visual problems.

Defendant appeals from that part of the opinion and award directing defendant to reimburse plaintiff for the medical expenses he will incur as a result of the continued monitoring, observation and treatment that the record shows his injury will

require. Defendant argues that medical expenses may be awarded under G.S. 97-25 only if they are reasonably necessary "to effect a cure or give relief and for such other additional time as in the judgment of the Commission will tend to lessen the period of disability." Defendant contends that the evidence and facts show that plaintiff was not disabled within the meaning of the Workers' Compensation Act. Since there is no disability, defendant argues that the continued treatment that plaintiff requires will not lessen his "period of disability" and that the award of medical expenses for that continued treatment was therefore improper.

We disagree with plaintiff's contention and affirm the Commission's award of compensation for plaintiff's permanent injury. However, because we think that the Commission improperly directed the reimbursement of plaintiff's expenses for continued medical treatment, we reverse that portion of the opinion and award.

[1] Plaintiff's argument appears to be that the Deputy Commissioner's finding of fact which was adopted by the full Commission, that the "proper and equitable" compensation for plaintiff's injury was $2,500, is not supported by the evidence. On appeal from an award of the Industrial Commission, this court's review is limited to the questions of whether the findings made by the Commission are supported by competent evidence in the record and whether those findings support the conclusions of law drawn by the Commission. *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978). If supported by competent evidence, the Commission's findings are conclusive as to all questions of fact. *Id.*; *Barham v. Food World*, 300 N.C. 329, 266 S.E. 2d 676, *reh. denied*, 300 N.C. 562, 270 S.E. 2d 105 (1980); G.S. 97-86.

As already noted, plaintiff's injury is compensable under G.S. 97-31(24). In order to recover under this section, plaintiff must prove that he has sustained injury to or loss of an important internal or external organ or part of his body for which no compensation is payable under any other section of G.S. 97-31. *Porterfield v. R.P.C. Corp.*, 47 N.C. App. 140, 266 S.E. 2d 760 (1980). Plaintiff is not required to establish a diminution in wage earning capacity, though it may be considered in setting the amount of the award. *Key v. McLean Trucking*, 61 N.C. App. 143, 300 S.E. 2d 280 (1983). Here, there was clearly a permanent injury to plain-

tiff's eye for which compensation is payable under 97-31(24). While the amount of compensation for most injuries compensable under G.S. 97-31 is determined according to a statutory formula, compensation for injuries under subsection (24) appears to be within the discretion of the Commission, provided that the amount of the award does not exceed the $10,000 ceiling.

With these principles in mind, our review of the record in this case discloses nothing that would indicate that the amount that was awarded plaintiff was either inequitable or improper. While the evidence tends to support plaintiff's claim that his risk of some form of future vision impairment is significantly increased and he testified that his vision had in fact already been impaired somewhat, the Commission's finding that there was no loss of vision is supported by the evidence and is therefore binding on us.

Plaintiff's right to receive any compensation for his work-related injury is entirely governed by statute. The statutory scheme allows plaintiff to be compensated for "permanent injury" but makes no provision for additional recovery because a claimant may be subject to a greater risk of permanent disability as a result of his accident. Based on the record evidence, which included evidence of plaintiff's increased risk, the Commission found $2,500 to be the appropriate compensation for plaintiff's permanent injury. The amount awarded was within the discretion of the Commission. We cannot say that the award is not supported by the evidence or that the evidence requires a greater award. Plaintiff's contention is without merit.

[2] Turning to defendant's argument, we agree that the Commission's conclusion that plaintiff was entitled to reimbursement of future medical expenses was incorrect. This is a legal conclusion which we may review. *Jackson v. Highway Commission*, 272 N.C. 697, 158 S.E. 2d 865 (1968). "Disability" is defined under the applicable law as "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). *See Watkins v. Central Motor Lines*, 279 N.C. 132, 181 S.E. 2d 588 (1971). G.S. 97-25 entitles plaintiff to reimbursement of such medical expenses as will tend to "lessen [his] period of disability." The record before us reveals no evidence of continuing disability as that term is

defined in the Workers' Compensation Act. In fact, the evidence in this case shows affirmatively that plaintiff had returned to work after five weeks and was earning more than before his injury.

Thus, plaintiff's "period of disability" ended when he returned to work and began earning his old wage. The medical reports and letters from plaintiff's physicians indicate that he has reached maximum recovery and that his condition has remained stable. While plaintiff is required to undergo continued medical treatment for his injury, the treatment is for purposes of monitoring and observation rather than to hasten plaintiff's return to health or give relief. The expenses involved in that treatment are not recoverable under G.S. 97-25. *See Millwood v. Cotton Mills*, 215 N.C. 519, 2 S.E. 2d 560 (1939); *Peeler v. State Highway Comm'n*, 48 N.C. App. 1, 269 S.E. 2d 153 (1980), *aff'd*, 302 N.C. 183, 273 S.E. 2d 705 (1981).

We agree that this result is harsh on plaintiff; he has undoubtedly suffered a serious injury which, while not presently disabling, could manifest itself later in the form of partial or total blindness. We recognize that the injury requires plaintiff at the very least to submit to continued medical treatment and that it may require more extensive treatment in the future. However, we note again that plaintiff's right to recovery of any medical expenses is entirely statutory and that any change in the law is a legislative responsibility. While we are empowered to declare and enforce plaintiff's rights under the law, we may not enlarge them, no matter how compelling the facts may be. *See Peeler v. State Highway Comm'n, supra.* The award of future medical expenses must accordingly be reversed.

That part of the Industrial Commission's opinion and award awarding plaintiff $2,500 for the permanent injury to his eye is affirmed. That part of the opinion and award directing the reimbursement of plaintiff's future medical expenses is reversed.

Affirmed in part; reversed in part.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. TERRY LYNN OAKLEY

No. 8422SC856

(Filed 4 June 1985)

Criminal Law § 181— State's petition for appropriate relief for new evidence— judgment set aside—improper

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury on the prosecuting witness where the defendant pled guilty to the lesser-included offense of assault with a deadly weapon inflicting serious injury, the trial court erred by hearing the State's motion to set aside the judgment for newly-discovered evidence after the victim objected and came forward with additional medical expenses the day after judgment. There is no provision authorizing the State to make a motion to set aside a judgment based on its own newly-discovered evidence, and, although a trial court may set aside a judgment on its own authority, the court here exceeded its authority because a trial court may grant appropriate relief only if the defendant would be entitled to such relief by motion. Striking the plea to the lesser-included offense and setting the case for trial on the original offense benefited the State exclusively. G.S. 15A-1415 (1983), G.S. 15A-1416 and 1445 (1983), G.S. 15A-1420(d) (1983), G.S. 15A-1417 (1983), G.S. 15A-1024 (1983).

APPEAL by defendant from *Helms, Judge.* Order entered 17 April 1984 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 12 March 1985.

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

Holton & Holton, by Stephen C. Holton, for defendant appellant.

BECTON, Judge.

This case involves the authority of the trial court to strike a guilty plea and set a case for trial after entry of the guilty plea.

On 26 September 1983, the defendant, Terry Lynn Oakley, was charged with assault with a deadly weapon with intent to kill inflicting serious injury on the prosecuting witness, Jackie O'Neal Gathings, in violation of N.C. Gen. Stat. Sec. 14-32(a) (1981). On 16 April 1984 the defendant pleaded guilty to the lesser included offense of assault with a deadly weapon inflicting serious injury in violation of N.C. Gen. Stat. Sec. 14-32(b) (1981). As evidenced by a

plea adjudication dated 16 April 1984, the trial court unconditionally accepted the plea and entered it in the record. Following a sentencing hearing, the trial court, in a 16 April 1984 judgment, imposed a six-year suspended sentence on the defendant; placed him on supervised probation for a five-year period; ordered him to pay $10,380.06 restitution to Gathings for her medical bills; and ordered him not to assault Gathings during the probationary period.

Gathings was not present either at the entry of the plea or at the sentencing hearing. At the sentencing hearing, the State had presented evidence that during an argument on 24 September 1983, the defendant, while intoxicated and jealous, had knocked Gathings to the ground and kicked her in the back. As a result, Gathings suffered a fractured vertebra and other back injuries. Assistant District Attorney York stated: "[A]t this time it is unknown as to the extent of the damage; she has undergone an operation and total medical bills you [the trial court] have before you is over $10,000. She is still receiving treatment now, to my understanding." From the defendant's evidence, it appears that the medical bills before the trial court were those Gathings had given to the District Attorney's office and totalled $10,380.06.

The following day, 17 April 1984, Gathings requested a hearing with the trial court to express her dissatisfaction with the proceedings. Assistant District Attorney Morris explained that Gathings had come to the District Attorney's office the previous day and asked how to get restitution for her medical bills. Mr. Morris told her to take the bills to the courtroom and tell the district attorneys there, Mr. Zimmerman and Mr. York. According to Mr. Morris, Gathings commented that her medical bills totalled more than $40,000. In unsworn testimony, Gathings herself then told the trial court that she had not followed Mr. Morris' directions. According to Gathings, a detective had told her not to go, saying that the defendant's case would not be coming up that day. Gathings brought no copies of the medical bills with her on 17 April. She then told the trial court that she was afraid for her life, because the defendant was threatening to kill her.

Immediately thereafter, the State made a motion pursuant to N.C. Gen. Stat. Sec. 15A-1420 (1983) to set aside the judgment. The trial court announced in open court that it would set aside

the judgment saying: "Matters have been brought before the court of which the court was not aware of at the time of the plea. Let the plea be withdrawn and be tried by the Jury, based on evidence the Court was not aware of at the time of the hearing." The order for arrest issued on 17 April 1984 listed the original charge of assault with a deadly weapon with intent to kill inflicting serious injury. On 20 April 1984 defendant appealed from the 17 April 1984 order setting aside the 16 April 1984 judgment and striking the guilty plea.

I

The defendant contends that the immediate hearing of the State's motion for appropriate relief violated statutory procedural requirements and constitutional due process. Furthermore, the defendant argues that the State's motion was improperly granted (1) based on unsworn testimony, (2) without evidence of new matters which the trial court was not aware of 16 April 1984, and (3) because it put the defendant in double jeopardy in violation of the United States and North Carolina Constitutions.

We agree that the trial court erred in hearing the State's motion. The State has no statutory right to make a motion to set aside a judgment on the basis of newly discovered evidence. *See* N.C. Gen. Stat. Secs. 15A-1416 and -1445 (1983). Because the trial court could have set aside the judgment on its own authority, allowing the State's motion was harmless error. However, in striking the guilty plea and setting the case for trial, the trial court exceeded its authority. We therefore reverse the 17 April 1984 order in part, and remand to the trial court for reinstatement of the guilty plea, for the reasons discussed below.

II

Under N.C. Gen. Stat. Sec. 15A-1415 (1983), a defendant may seek appropriate relief by motion at any time after the entry of judgment based on newly discovered evidence. The grounds for relief are narrowly drawn:

> Evidence is available which was unknown or unavailable to the defendant at the time of the trial, which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant.

G.S. Sec. 15A-1415(b)(6) (1984). *See* Eagles, *Disposition of Defendants Under Chapter 15A*, 14 W.F.L. Rev. 971, 1008-10 (1978). The granting of relief remains within the discretion of the trial court. *State v. Sprinkle*, 46 N.C. App. 802, 266 S.E. 2d 375, *disc. rev. denied*, 300 N.C. 561, 270 S.E. 2d 115 (1980). By contrast the State is authorized under G.S. Sec. 15A-1416 (1983) to "seek appropriate relief for any error which it may assert upon appeal" within ten days after entry of judgment. G.S. Sec. 15A-1445 (1983), governing the State's right to appeal from superior court, provides:

> (a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division:
>
> (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts;
>
> (2) Upon the granting of a motion for a new trial on the grounds of newly discovered or newly available evidence but only on questions of law.
>
> (b) The State may appeal an order by the superior court granting a motion to suppress as provided in G.S. 15A-979.

In addition, under G.S. Sec. 15A-1416, the State may make a motion for appropriate relief to impose a sentence after prayer for judgment has been continued, G.S. Sec. 15A-1416(b)(1), and to modify a sentence pursuant to Article 82 on probation, Article 83 on imprisonment or Article 84 on fines, G.S. Sec. 15A-1416(b)(2). Although the State is authorized to seek appropriate relief upon the granting of a defendant's motion for a new trial based on newly discovered or newly available evidence, G.S. Secs. 15A-1416 and -1445(a)(2), there is no statutory provision authorizing the State to make a motion to set aside a judgment based on its own newly discovered evidence. Thus, the trial court erred in hearing the State's motion to set aside the judgment.

As noted, the trial court did more than merely grant the State's motion to set aside the judgment; the trial court struck the guilty plea, and set the case for trial on its own authority. During the session a judgment is *in fieri*; the trial court has the discretion to vacate or modify the sentence imposed. *State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978); *State v. Brown*, 59 N.C. App. 411, 296 S.E. 2d 839 (1982), *cert. denied*, 310 N.C. 155, 311 S.E. 2d

294 (1984); *In re Tuttle*, 36 N.C. App. 222, 243 S.E. 2d 434 (1978); 24 C.J.S. *Criminal Law* Secs. 1587-90 (1961). *See Jenkins v. United States*, 555 F. 2d 1188 (4th Cir. 1977) ("[I]n a criminal case the sentence is the judgment."); *United States v. DiFrancesco*, 449 U.S. 117, 66 L.Ed. 2d 328, 101 S.Ct. 426 (1980) (lesser expectation of finality in sentencing phase—no violation of double jeopardy principles). Therefore, in vacating the sentence during the session in which it had been rendered, the trial court acted within its discretion.

Significantly, neither the statutory nor the case law empowers the trial court with the absolute discretion to strike a guilty plea once it has been unconditionally accepted and entered. "Undeniably, a defendant is considered to be convicted by the entry of his plea of guilty just as if a jury had found a verdict of guilty against him. . . ." *United States v. Hecht*, 638 F. 2d 651, 657 (3d Cir. 1981); *State v. Shrader*, 290 N.C. 253, 225 S.E. 2d 522 (1976); *State v. Shelly*, 280 N.C. 300, 185 S.E. 2d 702 (1972). Thus, a trial court's discretion to strike a guilty plea and set a case for trial derives, if at all, from its comparable authority to overturn a jury verdict and order a new trial.

We turn to the provisions of Article 89 of Chapter 15A of the North Carolina General Statutes, entitled *Motion for Appropriate Relief and Other Post-Trial Relief*. The introductory Official Commentary to Article 89 establishes that the motion for appropriate relief is intended to provide "a single, unified procedure for raising at the trial level errors which are asserted to have been made during the trial." N.C. Gen. Stat. Sec. 15A-1411 (1983) specifies:

> (c) The relief formerly available by motion in arrest of judgment, motion to set aside the verdict, motion for new trial, post conviction proceedings, *coram nobis* and all other post-trial motions is available by motion for appropriate relief. The availability of relief by motion for appropriate relief is not a bar to relief by writ of habeas corpus.

The relief offered when the trial court grants a motion for appropriate relief includes a new trial, dismissal of any or all charges or any other appropriate relief. N.C. Gen. Stat. Sec. 15A-1417 (1983).

Pursuant to G.S. Sec. 15A-1420(d) (1983), the trial court has the authority to grant appropriate relief on its own motion only if

the defendant would be entitled to such relief by motion for appropriate relief. It follows that the trial court does not have the authority to grant appropriate relief which benefits the State. In this case, striking the guilty plea to the lesser included offense and setting the case for trial on the original charge benefited the State exclusively.

We conclude that the trial court thereby exceeded its authority. We therefore reverse the 17 April 1984 order in part and remand the case to the trial court for reinstatement of the 16 April 1984 guilty plea to assault with a deadly weapon inflicting serious injury. Reinstatement of a guilty plea following the correction of an error of law does not violate the principles of double jeopardy. *United States v. Hecht.* As discussed earlier, the trial court acted within its discretion in setting aside the judgment. From the record it is apparent that the defendant and the State had entered into a plea arrangement. On remand, the defendant may withdraw his guilty plea at the resentencing hearing, if the judge decides to impose a sentence other than the original plea arrangement, N.C. Gen. Stat. Sec. 15A-1024 (1983), or he may seek to negotiate new terms and conditions under his original plea to the lesser included offense.

Reversed in part and remanded for reinstatement of guilty plea and resentencing.

Judges WEBB and PARKER concur.

WILLIE O. BEASLEY v. NATIONAL SAVINGS LIFE INSURANCE COMPANY

No. 8410SC726

(Filed 4 June 1985)

1. Damages § 12.1; Insurance § 43.1— failure to pay hospital insurance claim— bad faith and fraud—insufficient allegations for punitive damages

Plaintiff's claim for punitive damages based on bad faith and fraud by defendant insurer in failing to pay plaintiff's claim under a hospital insurance policy was properly dismissed since plaintiff's allegations were insufficient to allege a tortious act or to allege any accompanying element of aggravation.

2. Unfair Competition § 1— unfair trade practices—insufficient complaint

Plaintiff's complaint in an action to recover damages for defendant insurer's failure to pay plaintiff's claim under a hospital insurance policy was insufficient to state a claim for unfair and deceptive trade practices. G.S. 58-54.4(11).

3. Torts § 1; Trespass § 2— failure to pay insurance claim—intentional infliction of emotional distress—insufficient complaint

Plaintiff's complaint in an action to recover damages for defendant insurer's failure to pay plaintiff's claim under a hospital insurance policy was insufficient to state a claim for intentional infliction of emotional distress. Furthermore, the Court of Appeals will not recognize the tort of outrage under the facts of this case.

APPEAL by plaintiff from *Herring, Judge.* Order entered 7 March 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 7 March 1985.

This is a civil action wherein plaintiff seeks recovery of benefits under a hospital insurance contract issued by defendant.

On 23 November 1980, plaintiff applied to defendant for a hospital insurance contract covering himself for medical and hospital expenses. Defendant issued Policy Number 339794, effective 16 December 1980, and plaintiff paid the premiums. In January 1981, plaintiff suffered a heart attack, was hospitalized and incurred medical expenses in excess of $10,000.00. Plaintiff made a claim to defendant for benefits under the policy; defendant denied the claim.

On 7 October 1983, plaintiff filed this lawsuit, alleging six causes of action in support of his claim for damages: (i) breach of contract, (ii) breach of covenant of good faith and fair dealing, (iii) fraud, (iv) violation of the unfair and deceptive trade practices act, (v) intentional infliction of emotional distress and (vi) outrage. Plaintiff sought compensatory and punitive damages. Thereafter on 11 November 1983, before service of responsive pleadings, plaintiff filed an Amended Complaint which realleged the unfair trade practices violations with more particularity.

On 9 December 1983, defendant served its answer stating that the complaint failed to state a claim upon which relief can be granted. Defendant generally denied all the allegations contained in the complaint, and asserted that "the false, untrue, incomplete and material misrepresentations of the plaintiff" contained in his

insurance policy application "were such as to avoid any liability that defendant might have under its policy of insurance 337949 and were such that said policy of insurance never took effect. . . ."

After hearing on defendant's motion to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure, the court entered an Order dismissing all the enumerated causes of action, except for the breach of contract claim. Plaintiff appealed.

Brenton D. Adams and Delores King for plaintiff-appellant.

Young, Moore, Henderson & Alvis, P.A. by R. Michael Strickland, David M. Duke and Edward B. Clark for defendant-appellee.

PARKER, Judge.

As a preliminary matter, we note that the trial court's initial order, entered 5 March 1984, dismissed the claims for relief, other than the contract action, with leave for plaintiff to file an amended complaint. Two days later, plaintiff requested that the trial judge enter final judgment on these claims for relief and to make the finding under G.S. 1A-1, Rule 54(b) that there is "no just reason for delay," so that plaintiff could appeal the Order; this request was granted.

A motion under Rule 12(b)(6) addresses itself solely to the failure of the complaint to state a claim. "A complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). In reviewing the motion, "the complaint is construed in the light most favorable to plaintiff and its allegations are taken as true . . . . However, the court will not accept conclusory allegations on the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened . . . ." Wright & Miller, 5 Federal Practice & Procedure, § 1357 (1969). Since the trial judge in this case initially dismissed the five causes of action "without prejudice to plaintiff's right to seek leave to further amend the complaint," and plaintiff did not avail himself of the opportunity to allege more specific facts, we are

left to assume that the allegations in the complaint are the best they can be in this factual situation.

[1] In plaintiff's second cause of action, he alleged the following events and circumstances in support of his claim for bad faith:

> 13. That by virtue of the contract of insurance referred to above, the defendant owed to the plaintiff the duty to act in good faith and to deal fairly with the plaintiff.
>
> 14. That by reason of the defendant's failure to pay a valid claim under its insurance policy, the defendant violated its covenant of good faith and fair dealing to the plaintiff.
>
> 15. That the defendant unreasonably and in bad faith withheld from the plaintiff payment of his claim.

In plaintiff's third cause of action, he alleged defendant had committed fraud upon the plaintiff and asserted that: (i) defendant accepted plaintiff's application for insurance, (ii) defendant accepted the premium payments, (iii) plaintiff relied upon defendant's representations that defendant would pay claims, (iv) the representations were false and untrue in that defendant never had any intention of paying any claims, (v) defendant intended not to deal fairly with plaintiff, (vi) defendant willfully misrepresented a material fact, and (vii) plaintiff relied upon the willful misrepresentations of defendant to his detriment.

In *Stanback v. Stanback*, 297 N.C. 181, 196, 254 S.E. 2d 611, 621 (1979), our Supreme Court stated the general rule regarding a claim for punitive damages in a contract action:

> "[Generally], punitive damages are not recoverable for breach of contract with the exception of breach of contract to marry. *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976); *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976); *King v. Insurance Co.*, 273 N.C. 396, 159 S.E. 2d 891 (1968). But when the breach of contract also constitutes or is accompanied by an identifiable tortious act, the tort committed may be grounds for recovery of punitive damages. [Citation omitted.] Our recent holdings in this area of the law clearly reveal, moreover, that allegations of an identifiable tort accompanying the breach are insufficient alone to support a claim for punitive damages. In *Newton* the

> further qualification was stated thusly: 'Even where sufficient facts are alleged to make out an identifiable tort, however, the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed.' *Newton, supra,* at 112, 229 S.E. 2d at 301."

Plaintiff contends that the fraudulent acts enumerated above constitute such an "element of aggravation," and can withstand defendant's motion. We do not agree. G.S. 1A-1, Rule 9(b) of the Rules of Civil Procedure requires that circumstances constituting fraud must be stated with particularity. Assuming arguendo that plaintiff has successfully pleaded the essential or legal elements of a claim for fraud, plaintiff has failed to allege precisely any facts to support these bare allegations. In particular, plaintiff has pleaded no facts which would support his allegation "[t]hat the representations made by the defendant to the plaintiff were false and untrue in that the defendant never had any intention of paying any claims which the plaintiff would make . . . and the defendant knew that it would deny such claims when and if they were made." Without any essential factual basis to support this critical element, the tort claim for fraud cannot withstand defendant's Motion to Dismiss, and certainly does not constitute "an element of aggravation" as required by *Newton.*

Similarly, one allegation of bad faith dealing clearly fails to meet the standards enunciated by this Court in *Dailey v. Integon General Insurance Co.*, 57 N.C. App. 346, 291 S.E. 2d 331 (1982) and *Payne v. N.C. Farm Bureau Mutual Insurance Co.*, 67 N.C. App. 692, 313 S.E. 2d 912 (1984). In both cases, this Court held that the trial court erred in dismissing claims alleging bad faith on the part of the insurer. However, these cases are distinguishable from the case *sub judice* in that in *Dailey* and *Payne* plaintiff alleged sufficient facts to make out a cause of action for "a tortious act accompanied by 'some element of aggravation.' " *Dailey, supra.* For example in *Dailey,* an action for benefits under a fire insurance policy, plaintiff alleged that defendant's agents offered money to people to discredit plaintiff's claim and refused to negotiate to force a lower settlement. Not only has plaintiff herein failed to sufficiently allege a tortious act, he has failed to allege any accompanying "element of aggravation." Therefore, under the rule of *Dailey,* we hold that the trial court did not err

in dismissing plaintiff's claim for punitive damages based on bad faith and fraud under G.S. 1A-1, Rule 12(b)(6).

[2] Next, plaintiff, in his amended complaint, asserts that defendant violated the Unfair and Deceptive Trade Practices Act. It is clear that plaintiff merely has quoted G.S. 58-54.4(11) in alleging that defendant violated several subsections thereunder. The Act requires that before a violation can be made out, plaintiff must allege that defendant engaged in the prohibited acts "with such frequency as to indicate a general business practice." G.S. 58-54.4(11). Therefore, because plaintiff has failed to allege any facts supporting a violation of G.S. 58-54.4(11), and because plaintiff has failed to plead that the alleged violations occurred "with such frequency as to indicate a general business practice," the court did not err in dismissing this claim in plaintiff's original and amended complaint.

[3] Finally, plaintiff attempted to plead allegations as to intentional infliction of emotional distress and the tort of outrage. We note first that the tort of outrage has not been recognized in this jurisdiction, and we decline to do so under the facts before us. Assuming the pleading was an imperfect attempt to plead the necessary elements of the tort of intentional infliction of emotional distress, we conclude the allegations are fatally defective. Our Supreme Court, in *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E. 2d 325, 335 (1981), held that this tort "consists of: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another."

The facts alleged in the plaintiff's complaint clearly are not sufficient to establish the requisite intent to cause severe emotional distress to another. In *Stanback, supra*, the only case where our Supreme Court has implicitly recognized the tort of intentional infliction of emotional distress in conjunction with a breach of contract, the contract breached was an indemnity agreement to pay taxes as part of a marital separation agreement. In that highly personal situation, a supporting spouse with a mean or malicious propensity can have both the opportunity and the motivation to abuse the dependent spouse and to perpetuate the marital divisiveness and emotional distresses by deliberately failing to comply with the separation agreement. A contract of insurance, however, is a commercial transaction, and absent allegations of

specific facts which if proved would demonstrate calculated intentional conduct causing emotional distress directed toward a claimant, a complaint for insurance benefits alleging intentional infliction of emotional distress will not withstand a motion to dismiss under Rule 12(b)(6). For the foregoing reasons, the judgment appealed from is

Affirmed.

Judges ARNOLD and EAGLES concur.

EDWARD J. WATTS, AND WIFE JOYCE WATTS v. SCHULT HOMES CORPORATION AND D & R MOBILE HOMES, INC.

No. 8426SC998

(Filed 4 June 1985)

Negligence § 13.1— electrical fire in mobile home—contributory negligence by homeowner—judgment n.o.v. for manufacturer improper

The trial court should not have granted a judgment n.o.v. for defendant and denied plaintiffs a new trial on the basis of contributory negligence where plaintiffs were the joint owners of a mobile home manufactured by defendant; plaintiffs had requested and received service under warranty for a leaky roof; plaintiff husband saw the tv and lights flicker and noticed sparks, smoke and flames coming from the breaker box and drops of water on top of the box; plaintiff husband pulled the main fuses outside the home, called the fire department and notified defendant; defendant made no service call; plaintiff husband again notified defendant that the roof leaked in virtually every room and that drops of water were on top of the power box; plaintiff husband wiped the power box with a rag almost daily; the electricity functioned adequately; and the home was eventually destroyed by a fire determined to have been caused by moisture in the power box. It was undisputed that plaintiffs had no knowledge that moisture can trigger an electrical fire and plaintiffs did not have a specific legal duty under these facts to disconnect the electricity in their home permanently.

APPEAL by plaintiffs from *Snepp, Judge.* Order entered 14 August 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 April 1985.

Ronald Williams, P.A., for plaintiff appellants.

Hedrick, Eatman, Gardner & Kincheloe, by John F. Morris and Elizabeth B. Johnson, for defendant appellee.

WHICHARD, Judge.

Plaintiffs brought suit against defendants for negligence and breach of warranty in the manufacture and sale of a mobile home. The court directed a verdict as to defendant D & R Mobile Homes, Inc., the seller. As to the liability of defendant Schult Homes Corporation (defendant), the manufacturer, the jury found for plaintiffs in the amount of $25,000. On the ground that plaintiffs' claims were barred by the jury's further finding of contributory negligence, the court entered judgment notwithstanding the verdict for defendant. Plaintiffs moved for a new trial pursuant to G.S. 1A-1, Rule 59. From an order denying that motion plaintiffs appeal. We reverse.

A motion for a new trial is addressed to the sound discretion of the trial judge, whose ruling, in the absence of abuse of discretion, is not reviewable on appeal. *Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 589, 176 S.E. 2d 851, 853 (1970); *Horne v. Trivette*, 58 N.C. App. 77, 82, 293 S.E. 2d 290, 293, *cert. denied*, 306 N.C. 741, 295 S.E. 2d 759 (1982). "[H]owever, the appellate courts are limited to the abuse of discretion standard only where the motion involves 'no question of law or legal inference.'" *Seaman v. McQueen*, 51 N.C. App. 500, 505, 277 S.E. 2d 118, 121 (1981) (grant of new trial based upon erroneous legal inference that plaintiff's failure to look to left at intersection was contributory negligence as a matter of law), quoting *Selph v. Selph*, 267 N.C. 635, 637, 148 S.E. 2d 574, 575-76 (1966) (grant of new trial based upon erroneous legal inference that testimony from juror impeaching verdict was competent). In this case, for reasons that follow, we conclude that the court's denial of the motion for a new trial "involves a 'question of law or legal inference' and is therefore subject to reversal for legal error." *Seaman*, 51 N.C. App. at 506, 277 S.E. 2d at 121-22. *See also In re Will of Herring*, 19 N.C. App. 357, 359-60, 198 S.E. 2d 737, 739-40 (1973) ("[W]hen a judge . . . refuses to grant a new trial because of some question of law . . . the decision may be appealed and the appellate court will review it.").

The pertinent facts are as follows:

Plaintiffs are joint owners of a mobile home manufactured by defendant and covered by express limited warranty. On 17 November 1981 the mobile home was destroyed by a fire that origi-

nated above the electrical panel. Plaintiffs were not at home at the time of the fire.

Prior to the fire which destroyed plaintiffs' property, on 11 August 1980, 9 September 1980, 11 October 1980, and 9 December 1980, plaintiff husband requested and received service under the warranty from defendant for a leaky roof. The repairs provided lasted for about a month. On 6 November 1981 plaintiff husband observed the TV and lights flicker. He went to check the breaker box and noticed sparks, smoke, and flames coming from the corner of the box. He also noticed drops of water on the top of the box. In response plaintiff husband pulled the main fuses outside the mobile home and called the fire department. The mobile home was not equipped with a fire extinguisher. Plaintiff husband also notified defendant; a service work order dated 6 November 1981 indicates "Roof leaks, two full ceiling panels, lights flicker." Defendant made no service call in response to this information. On 9 November 1981 plaintiff husband again notified defendant that the roof leaked in virtually every room, that the ceiling panels in the bathroom had fallen in, and that drops of water were on top of the power box. Plaintiff husband wiped the power box with a rag almost daily. Except for the incident on 6 November 1981 the electricity continued to function adequately. On 17 November 1981, in plaintiffs' absence, the mobile home was destroyed by fire determined to have been caused by moisture in the power box.

There was no evidence that plaintiff husband knew that moisture can trigger an electrical fire. Rather, plaintiff husband made the general statement, "I have always heard that power and water do not mix." In answer to the question, "[T]hey cause fires. Right?" plaintiff husband stated, "I don't know. I'm not an expert." The manual that plaintiff received on purchase of the home contained no instructions governing the presence of water on the power box.

The court submitted three issues to the jury on breach of warranty and two on negligence. The issues submitted on breach of warranty were:

> (2) Did the defendant breach an implied warranty of merchantability to plaintiffs that the mobile home was safe to

live in and did that breach result in damages to the plaintiffs' property?

. . .

(3) Did the defendant breach an express warranty that the mobile home was free of defects in material and workmanship, and did that breach result in damage to the plaintiffs' property?

. . .

(5) Was the plaintiffs' property damage caused by their unreasonableness in proceeding to use the mobile home after discovering its unreasonably dangerous condition and becoming aware of the danger?

The jury answered each of these issues for the plaintiffs, i.e., "yes" to the first two and "no" to the third.

Interspersed with these issues the court submitted two negligence issues:

(1) Was the plaintiffs' property damaged as a result of the negligence of the defendant?

and

(4) Did the plaintiffs, as a result of their own negligence, contribute to the damage to their property?

The jury answered both questions "yes," thus finding plaintiffs' claim for negligence barred by their own contributory negligence.

The final issue concerned damages:

(6) What amount, if any, are the plaintiffs entitled to recover of the defendant for damage to their property?

The jury found for plaintiffs in the amount of $25,000.

On 2 May 1984 Judge Ferrell, who tried the case, entered judgment notwithstanding the verdict and ordered

that if the judgment notwithstanding the verdict granted herein is vacated or reversed on appeal the Court hereby determines in its discretion that the motion for a new trial should be denied in that the jury answered the Fourth Issue,

> as to contributory negligence in favor of the defendant . . . and such contributory negligence of the plaintiffs, the Court finds and concludes as a matter of law [is] a complete bar to any claim or claims of the plaintiffs and an adjudication on the merits of any and all of the plaintiffs' claim or claims.

On 14 August 1984 Judge Snepp entered a final order denying plaintiffs' motion for a new trial.

The final denial of the motion appears based upon the legal conclusion in the original judgment that plaintiffs by their own negligence contributed to the damage to their property. We hold that the issue of contributory negligence was erroneously submitted to the jury in that the evidence was susceptible to only one inference: that plaintiffs' conduct complied with the degree of care which reasonable and prudent persons would have exercised under like circumstances to avoid injury or damage. *Clark v. Roberts*, 263 N.C. 336, 343, 139 S.E. 2d 593, 597 (1965). *See gen.* 57 Am. Jur. 2d *Negligence* Sec. 317 at 718 (1971); *see also Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E. 2d 504 (1980).

Where the facts are undisputed, as here, and are susceptible of only one inference, the question of contributory negligence is one of law for the court and the court should withdraw the question from the jury. 57 Am. Jur. 2d, *supra*, Sec. 137 at 489; *see Rich v. Electric Co.*, 152 N.C. 689, 693, 68 S.E. 232, 233-34 (1910). It is undisputed that plaintiff husband had no knowledge that moisture can trigger an electrical fire. When on 6 November 1981 plaintiff husband noticed sparks, smoke, and flames coming from the corner of the breaker box he responded by pulling the main fuses outside the mobile home and calling the fire department. The fire department viewed the situation but did not suggest that plaintiffs were in danger or that they should permanently disconnect the electricity to their home. Plaintiff husband continued to inform defendant that the roof leaked throughout the mobile home. Except for the lights flickering on 6 November 1981, the electricity functioned normally. Plaintiffs lived in the mobile home for eleven more days without incident until the fire on 17 November 1981. Plaintiffs were not at home at the time of the fire.

For this evidence to raise an inference of contributory negligence it would have to show that plaintiffs failed to perform some

specific duty required by law in the exercise of ordinary care for their own safety or that of their property. *Smith*, 300 N.C. at 673, 268 S.E. 2d at 507; *Griffin v. Watkins*, 269 N.C. 650, 654, 153 S.E. 2d 356, 359 (1967); *Clark*, 263 N.C. at 343, 139 S.E. 2d at 597. For an omission of plaintiffs to have proximately caused the injury here, plaintiffs, in the face of a foreseeable injury, *Bender v. Duke Power Co.*, 66 N.C. App. 239, 242, 311 S.E. 2d 609, 611-12 (1984), would have to have had a specific legal duty to disconnect the electricity in their home permanently, thus giving rise to a cause of action for constructive eviction. We do not believe that under the facts presented plaintiffs had such a duty.

We therefore reverse the order denying the motion for a new trial, not because of abuse of discretion but because it appears based upon the same error of law that rendered the judgment notwithstanding the verdict erroneous, *Seaman*, 51 N.C. App. at 506, 277 S.E. 2d at 121, to wit, that the evidence raised an issue of fact for the jury as to plaintiffs' contributory negligence. Since the jury found for plaintiffs on the breach of warranty issues, and awarded damages supported by the evidence, the findings are sufficient to sustain the award.

The order denying a new trial is thus reversed, the judgment notwithstanding the verdict is vacated, and the case is remanded for entry of judgment for plaintiffs in the amount of $25,000 in accordance with the verdict.

Order reversed; judgment vacated; case remanded.

Judges JOHNSON and EAGLES concur.

ELIZABETH FOX MAUSER v. HAROLD GLENN MAUSER

No. 8425DC785

(Filed 4 June 1985)

1. Divorce and Alimony § 30— equitable distribution—conversion of assets after separation—whether marital or separate property

Whether a promissory note and new stock acquired by the husband after the separation of the parties in exchange for stock and funds from the sale of stock apparently acquired by the husband during the marriage in his name

alone constituted separate or marital property depended not on whether they were acquired after the date of separation but whether the source of assets used for their purchase constituted marital assets.

2. Divorce and Alimony § 30— equitable distribution—time of valuation of marital property

When a divorce is granted on the ground of separation for one year, marital property is to be valued as of the date of separation. G.S. 50-21(b).

3. Divorce and Alimony § 30— equitable distribution—conversion of stock after separation—relevancy of evidence

The trial court erred in refusing to consider evidence concerning the husband's conversion of stock after the separation of the parties since the stock should have been included as part of the marital estate subject to distribution if the converted stock was marital property, and since, even if the converted stock or any portion thereof was separate property, the value thereof was a factor to be considered by the trial court in determining what is an equitable division of the marital estate. G.S. 50-20(c)(1) and (2).

APPEAL by plaintiff from *Vernon, Judge.* Judgment entered 7 June 1984 in District Court, CATAWBA County. Heard in the Court of Appeals 14 March 1985.

Sherwood J. Carter for plaintiff appellant.

Rudisill & Brackett, P.A., by J. Steven Brackett, for defendant appellee.

BECTON, Judge.

I

This appeal concerns an equal equitable distribution of marital property. On 6 July 1983, plaintiff wife filed her Complaint seeking a divorce based on a year's separation, and an equitable distribution of the marital property. Defendant husband filed an Answer and Counterclaim, likewise seeking a divorce and an equitable distribution. The case was tried without a jury.

At trial, the court sustained numerous objections to a line of questioning by the wife's counsel to defendant husband concerning the disposition of some shares of stock he owned at the time the parties separated on 12 June 1982. The husband testified that at the time the parties separated, he owned 27,300 shares of stock, 25,000 of which were in Conover Plastics, Inc., a closely-held corporation in which the husband's father-in-law was the majority shareholder; the remaining 2,300 shares were held in

various other corporations. The husband testified that before either party became eligible to sue for divorce, he sold 24,000 shares of stock in Conover Plastics, Inc. to his mother, taking as consideration her promissory note, on which payment was deferred for a year. He testified that although he sold the Conover Plastics stock to his mother for $1.00 per share, he estimated that as of the date of the parties' separation, the value of the remaining 1,000 shares of Conover Plastics stock was $5.00 per share. He also testified that he sold the balance of the 27,300 shares of assorted stock, and used the proceeds of over $21,000 to furnish the bulk of the approximately $24,000 purchase price of 2,000 shares of Detroit-Edison stock.

In its order, the trial court granted the parties an absolute divorce, and made an equal division of the marital property. The trial court listed, *inter alia*, the 1,000 shares of Conover Plastics, Inc. stock as marital property, and ordered the husband to transfer an ownership interest in 500 shares to his wife. The judgment does not refer to the promissory note or the Detroit-Edison stock.

The wife appeals, presenting a single issue for our review, namely, whether the trial court's failure to consider evidence that her husband converted marital property during their separation but before the filing of the Complaint constituted reversible error. For the reasons stated below, we find error, and reverse.

II

[1] This case is governed by North Carolina's Equitable Distribution Act (the Act). N.C. Gen. Stat. Secs. 50-20 and -21 (1984). The threshold requirement of the Act is identifying "marital property," which is done by classifying property as either marital or separate, in accordance with the statutory definitions. *McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E. 2d 910 (1985); *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E. 2d 772 (1984).

In the instant case, the trial court refused to consider evidence relating to the sale of certain stock which was apparently acquired during the marriage and, at the time the parties separated, was titled in the husband's name alone. This refusal was presumably based upon the theory that since the original

stock was converted after the date on which the parties separated, neither the promissory note nor the newly-acquired stock could fit the statutory definition of marital property, which speaks of property acquired "during the course of the marriage and before the date of the separation of the parties, and presently owned. . . ." G.S. Sec. 50-20(b)(1) (1984). Put otherwise, the trial court seemed to reason that regardless of whether, before the sale, the stock constituted marital property, once the stock was converted, any property thereby obtained became the husband's sole and separate property, and any evidence relating to the conversion was irrelevant and hence inadmissible.

The trial court's evidentiary rulings were wrong and were apparently based on a faulty premise. Whether the promissory note and Detroit-Edison stock were separate property depended not on whether they were acquired after the date of separation, but whether the source of funds for their purchase was marital funds. In interpreting its Equitable Distribution Act, North Carolina has adopted the source of funds rule to determine whether and to what extent an asset is part of the marital estate, a rule recognizing the "dual nature of property that has been acquired with both marital and separate assets." *Wade v. Wade*, 72 N.C. App. 372, 381, 325 S.E. 2d 260, 269 (1985). *Accord McLeod v. McLeod.*

It has been further held that even when property is converted after the date of separation, as in the instant case, the source of funds rule continues to apply, and the dispositive question in determining if an asset is a marital asset remains whether the source of funds therefor were marital funds. *Phillips v. Phillips*, 73 N.C. App. 68, 326 S.E. 2d 57 (1985). The *Phillips* Court concluded there was no error in allowing the wife to testify that after the separation, her husband gave her funds to purchase a condominium:

> Simply because the transaction occurred after the parties' separation does not mean that the condominium is not marital property. If the funds [husband] gave [wife] were marital funds, then their exchange for other property after separation does not convert them into separate property.

Id. at 75, 326 S.E. 2d at 61.

In short, conversion of property between the date of separation and the date of divorce simply has no effect on its character as either marital or separate. A contrary result would only create an incentive for a spouse to convert marital assets titled in his or her name as soon as the parties separated, thereby undermining the very raison d'etre of the Act—to alleviate the inequities caused by the title theory approach to the distribution of marital property. *See White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). *Accord Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E. 2d 33 (1985) (Act's equitable purpose reflects trend toward recognition of marriage as equal partnership).

We observe that the availability of injunctive relief has no bearing on our result. The current version of G.S. Sec. 50-20(i) (1984), which allows a party to seek injunctive relief "to prevent the disappearance, waste or conversion of property alleged to be marital property" before the filing of an action for divorce, was not in effect at the time the parties separated. In the version in effect at that time, injunctive relief was not available until an action for divorce had been commenced, *see* G.S. Sec. 50-20(i) and (k) (Supp. 1981), plainly too late to protect the wife. Furthermore, even the increased availability of injunctive relief does not guarantee that a party will be successful in procuring an injunction. *See Duke Power Co. v. City of High Point*, 69 N.C. App. 335, 317 S.E. 2d 699 (1984) (to obtain injunction, injury must be actually threatened and practically certain, not anticipated and merely probable). Nor does it protect the spouse whose partner manages to convert marital assets before injunctive relief is applied for.

Applying the foregoing to the facts at hand, we find that the trial court never considered whether the original 27,300 shares of stock were financed from the marital estate or from the separate estate of either party. A resolution of this question was essential to ensure that a complete and accurate listing of the marital property was made. *See Little v. Little*, 74 N.C. App. 12, 327 S.E. 2d 283 (1985) (order that fails to make complete listing of marital property fatally defective).

We cannot, however, conclusively determine from the record before us whether the original stock constituted marital property, although it appears that it did. The husband testified that at least some of the original stock was purchased with his wage earnings,

and there is no indication that the separate assets of either party funded any of the original purchase price. Upon remand, the trial court is to determine from the complete record whether the original 27,300 shares of stock were marital property, and if so, value and distribute them pursuant to the Act. *See Loeb v. Loeb* (party claiming asset is separate property must prove same by clear, cogent and convincing evidence). Should the trial court determine that the stock was funded through both marital and separate property, we direct its attention to the recently decided cases of *McLeod v. McLeod* and *Phillips v. Phillips*, both of which discuss the classification of corporate stock as part marital and part separate property.

[2] Finally, as the evidence indicates that the husband transferred the 24,000 shares of Conover Plastic, Inc. stock to his mother for substantially less than their fair market value, we point out that when a divorce is granted on the grounds of one year's separation, marital property is to be valued as of the date of separation. G.S. Sec. 50-21(b) (1984).

III

[3] In conclusion, we hold that the trial court erred in refusing to consider evidence concerning the husband's conversion of property after the parties' separation. The ruling was error regardless of whether the property was originally obtained with marital or separate funds. It was error if the converted shares of stock were marital property, as the stock should have been included as part of the marital estate subject to distribution. The ruling was also error if the converted stock, or any portion thereof, was separate property, as the value of a spouse's separate estate is a factor properly considered by the trial court in determining what is an equitable division of the marital estate. *See* G.S. Sec. 50-20(c)(1) and (12). The judgment entered is therefore reversed, and the cause remanded for entry of a new order not inconsistent with this opinion.

Reversed and remanded.

Judges WEBB and PARKER concur.

RALEIGH-DURHAM AIRPORT AUTHORITY v. JAMES W. KING AND WIFE, MARY WARD KING; CAROLINA POWER & LIGHT COMPANY; THURMAN E. BURNETTE, SUBSTITUTE TRUSTEE; AND UNITED STATES OF AMERICA ACTING THROUGH THE FARMERS HOME ADMINISTRATION, UNITED STATES DEPARTMENT OF AGRICULTURE; AND COUNTY OF WAKE

No. 8410SC793

(Filed 4 June 1985)

1. **Eminent Domain § 5.9— airport expansion—rental revenues from land—evidence of fair market value**

In a condemnation case involving an airport expansion, admission of testimony as to the revenues and expenses of the parking business operated on the land in question was not error. Evidence of rental revenues from land may be admitted and considered in determining the fair market value of the land at the time of the taking.

2. **Eminent Domain § 6.7; Appeal and Error § 45.1— airport expansion—highest and best use—expansion of existing business**

In a condemnation action arising from an airport expansion, the trial court did not err by admitting expert testimony that the highest and best use of the property would be an expansion of an existing parking facility with a portion reserved for a service station. Plaintiff did not object to the general testimony, only to a more specific description of the service station, and made no argument in its brief about the overruling of its objections as to the specific description; moreover, there was no indication that defendants were showing enhanced loss because they were prohibited from carrying out a particular improvement and the evidence was admissible as evidence of the property's highest and best use.

3. **Eminent Domain § 6.4— value of condemned land—income approach**

There was no error in a condemnation case from the admission of testimony from the landowners' expert as to his use of the income approach as part of his overall appraisal and for purposes of comparison where his opinion of the property's value was based primarily on the comparable sales approach.

4. **Eminent Domain § 6.4; Appeal and Error § 45.1— airport expansion—prices charged by airport for parking—admissible**

In a condemnation case arising from an airport expansion, plaintiff airport abandoned on appeal its contention that the trial court erred by allowing testimony regarding prices charged by the Airport Authority for parking in the vicinity of the terminal by dwelling in its brief on defendant's parking business rather than the prices charged by the Airport Authority; even so, prices charged by the Airport Authority reflected demand for parking space in the area and helped to establish a fair market value for defendants' land. Rule 28, Rules of App. Procedure.

5. Eminent Domain § 6.2— condemnation—property not shown to be comparable —value admissible

The trial court in a condemnation action did not err by allowing testimony about sales and sales prices of properties not shown to be comparable to defendants' property where defendants' expert had testified that certain property was comparable and its sale price useful in establishing the fair market value of defendants' property, plaintiff sought to impeach the witness by reminding her that she had testified in another trial that the property was overpriced, the witness replied that she had received additional information, and defendants sought to question the witness on redirect about the additional information.

6. Eminent Domain § 6.2— condemnation—rentals charged for similar property

The trial court did not err in a condemnation case by admitting evidence of the per acre value of land offered for lease by the Airport Authority upon a capitalization rate where the opinion was based on figures in a letter from the Airport Authority to the Burger King Corporation. The application of the income approach to rentals charged for property used for similar purposes and located near defendants' land was relevant to the determination of fair market value; moreover, the letter had been initially introduced by plaintiff and no objection was made when it was reintroduced by defendants.

APPEAL by plaintiff from *Lee, Judge.* Judgment entered 26 March 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 2 April 1985.

This is a condemnation case, which arose when the plaintiff Raleigh-Durham Airport Authority sought to take land owned by defendants Mr. and Mrs. James King for expansion of the Raleigh-Durham Airport.

The property at issue is 3.6 acres situated on the eastern side of State Road 1002, or Airport Road. Improvements included the defendants' home, a frame office structure, and a fenced and graveled parking lot with room for about fifty-five cars. Mrs. King ran a parking business for airport passengers. Although the fenced and graveled lot could accommodate fifty-five cars, up to 200 cars had been parked in areas outside the lot during the holiday seasons. The total gross income for the parking business was $57,000 for ten months of operation in 1983. The parking rates charged were $2.50 per day.

Defendants presented expert witnesses who testified that the highest and best use of the land was as a parking lot, augmented with a service-type facility for the traveling public, such as a gas station.

One of defendants' expert witnesses valued the land and improvements at $429,000 while another valued the land and improvements at $391,500. One of plaintiff's expert witnesses valued the land and improvements at $155,500 while another valued them at $154,600.

After trial, a jury returned a verdict of just compensation in the amount of $355,800.

Plaintiff appeals.

Nye, Mitchell & Jarvis, by Jerry L. Jarvis, for plaintiff appellant.

Thorp, Fuller & Slifkin, by William L. Thorp and Anne R. Slifkin, for defendant appellees.

ARNOLD, Judge.

This is a condemnation case. The issue at trial was just compensation. The plaintiff now seeks a new trial on the grounds that the trial judge committed prejudicial error by admitting certain evidence submitted by defendants for the purpose of establishing the fair market value of defendants' land. We find no error in the trial judge's evidentiary rulings.

[1] Plaintiff first assigns as error the trial judge's admission of the testimony of defendant Mary King as to the revenues and expenses of the parking business operated on the 3.6 acres at issue in this case. Plaintiff argues that this was evidence of the profits of defendants' business and that although evidence of rents paid for use of the land is admissible, evidence of the profits of a business conducted on land is not admissible to prove the fair market value of the land. The trial judge allowed Mrs. King to testify as to the parking revenues after characterizing them as "rentals."

We agree that Mrs. King was essentially renting or leasing parking spaces to airline passengers. Evidence of the rental revenues from land may be admitted and considered in determining the fair market value of the land at the time of taking. *See Highway Commission v. Phillips*, 267 N.C. 369, 373, 148 S.E. 2d 282, 285 (1966); *Kirkman v. Highway Commission*, 257 N.C. 428, 432, 126 S.E. 2d 107, 110 (1962); 5 Nichols on Eminent Domain § 19.02

(rev. 3d ed.); 27 Am. Jur. 2d Eminent Domain § 433. The trial judge did not err in allowing the admission of Mrs. King's testimony.

[2] Plaintiff next contends that the trial court erred in admitting evidence of a projected expansion of the parking facilities on the defendants' property. Defendants presented an expert witness, Thomas Anderson, a real estate planning consultant, who testified that the highest and best use of the defendants' property would be an expansion of the parking facility to 360 spaces, with a portion reserved for a service station for the traveling public. Plaintiff did not object at trial to this general testimony, but did object to the expert's more specific description of the service station as a one-story structure, not unlike a 7-11, with one attendant. Having failed to object at trial, plaintiff cannot now complain about the expert's general testimony as to the expansion of the parking facilities. Further, in its brief plaintiff makes no argument about the trial court's overruling its objections as to the specific description of the service station and therefore waives them.

Even had plaintiff not made these procedural errors, the expert's general testimony as to the parking lot expansion and service station were admissible as evidence of the land's best and highest use, which may be considered in determining fair market value, *see State v. Johnson*, 282 N.C. 1, 14, 191 S.E. 2d 641, 651 (1972); 27 Am. Jur. 2d Eminent Domain § 435; *Kirkman v. Highway Commission*, 257 N.C. 428, 432, 126 S.E. 2d 107, 111 (1962). At no point did Mr. Anderson indicate that what he described as the highest and best use was intended or proposed by the Kings as an improvement to their property. We discern no purpose on the part of defendants "to show enhanced loss because the owner is prohibited from carrying out that particular improvement. . . ." *Johnson*, 282 N.C. at 25, 191 S.E. 2d at 657.

[3] Plaintiff objects also to the testimony of defendants' expert witness Walter Kaufman as to the fair market value of the property at issue. Plaintiff contends that Mr. Kaufman arrived at the fair market value by using a capitalization of income approach, which plaintiff says may not be used in condemnation cases.

The record reveals that Mr. Kaufman testified that the defendants' property was worth $429,000. In reaching this figure, he used two appraisal methods, the comparable sales approach and

the income approach. The value he calculated using the income approach was $500,000. He testified that "I took a look at the two different approaches and basically my decision was that the value indicated by the comparable sales was the most probable value and that was my opinion of value." Thus, Mr. Kaufman's opinion of value was based primarily on the comparable sales approach, which is proper in a condemnation case. *Highway Commission v. Conrad*, 263 N.C. 394, 400, 139 S.E. 2d 553, 558 (1965). His use of the income approach as part of his overall appraisal and for purposes of comparison did not make his final estimate of fair market value speculative and prejudicial. *See Highway Comm. v. Helderman*, 285 N.C. 645, 655-56, 207 S.E. 2d 720, 727-28 (1974).

[4] Plaintiff next assigns as error that the trial court allowed Wallace Kaufman to testify regarding prices charged by the Airport Authority for parking in the vicinity of the Airport terminal. In its brief, however, plaintiff dwells on a statement by Wallace Kaufman at the end of his testimony that Mrs. King was "doing quite well." Plaintiff argues that the statement that Mrs. King was doing well in her parking business was designed to show enhanced loss because she was prevented from carrying on with a profitable business. Yet, at trial, plaintiff objected to this statement, and the trial judge sustained the objection. We agree with defendants that the argument in plaintiff's brief does not deal with prices charged by the Airport Authority, and that therefore the assignment of error should be deemed abandoned pursuant to Rule 28 of our Rules of Appellate Procedure. Even had plaintiff managed to present an argument, we believe the trial judge properly admitted Mr. Kaufman's testimony as to prices charged for parking by the Airport Authority. These prices reflected demand for parking space in the area and thus helped to establish a fair market value for the defendants' land.

[5] Plaintiff next contends that the trial court committed error by admitting testimony of sales and sales prices of certain properties not used as comparables and not shown to be similar in nature, location and condition to the defendants' property. The defendants' expert witness, Mrs. Jean Hunt, had testified on direct that certain property, owned by a Mrs. Knight, was comparable to defendants' property and that its sale price was useful in establishing the fair market value of defendants' property. Plaintiff sought to impeach the witness by reminding her that she

had testified in another trial that the Knight property was overpriced. The witness replied that after acquiring additional information she did not believe the property was overpriced. On redirect examination, defendants' counsel sought to question the witness about the additional information, which involved two other sales of property in the vicinity of the defendants' property. Plaintiff objects to testimony as to these other sales, which, it claims, were not "comparable" to defendants' property.

Once plaintiff's counsel sought to impeach defendants' witness as to her change of mind on cross-examination, defense counsel could rehabilitate the witness on redirect examination by allowing her to explain her testimony. Plaintiff's counsel thus "opened the door" and cannot now complain about the witness's testimony as to additional sales which affected her view of the Knight transaction. *See Johnson v. Massengill*, 280 N.C. 376, 383, 186 S.E. 2d 168, 174 (1972).

[6] We reach now plaintiff's last contention: that the trial court erred in admitting opinion testimony of the per acre value of land offered for lease by the Airport Authority upon a capitalization rate. This opinion testimony was based on figures given in a letter from the Airport Authority to Burger King Corporation, describing the current leasing rates the Airport Authority was charging for land in and around the airport. The application of the income approach to rentals charged for property used for similar purposes and located near defendants' land was relevant to the determination of the fair market value of the land. *See generally* 23 A.L.R. 3d 724, 728-30; *see also Honolulu v. Bishop Trust Co.*, 48 Hawaii 444, 404 P. 2d 373, 23 A.L.R. 3d 692 (1965). The trial judge acted within his discretion in allowing evidence of the capitalization of these leasing or rental values.

Moreover, the letter itself had initially been introduced into evidence by the plaintiff, and discussed by plaintiff's witness. When defendants reintroduced the letter, no objection was made. Plaintiff cannot now object to the introduction of the letter, or to its use to calculate the rental value of land in the vicinity of the airport.

No error.

Judges PHILLIPS and COZORT concur.

In re Foreclosure of Fortescue

IN RE: WILLIAM NICHOLAS FORTESCUE, JR., UNMARRIED, GRANTOR AND RECORD OWNER; FORECLOSURE OF DEED OF TRUST RECORDED IN BOOK 298, AT PAGE 141, IN THE OFFICE OF THE REGISTER OF DEEDS OF HENDERSON COUNTY, NORTH CAROLINA

No. 8429DC1244

(Filed 4 June 1985)

1. **Mortgages and Deeds of Trust § 25— loan modification agreement— when payment became delinquent—acceleration and foreclosure**

Where a loan modification agreement gave petitioner the right to accelerate the entire indebtedness if one monthly payment became delinquent, the monthly payment became delinquent when it was not made on or before its due date rather than after the thirty-day grace period contained in the original note. Therefore, a payment not made when due on 10 November became delinquent on 11 November, giving petitioner the right to accelerate the debt and to institute foreclosure proceedings when respondent did not pay the entire amount of the debt.

2. **Mortgages and Deeds of Trust § 25— equitable defenses against foreclosure—how raised**

Equitable defenses may not be raised in a hearing pursuant to G.S. 45-21.16, but must instead be asserted in an action to enjoin the foreclosure sale under G.S. 45-21.34.

APPEAL by respondent from *Gash, Judge*. Order entered 26 July 1984 in District Court, HENDERSON County. Heard in the Court of Appeals 17 May 1985.

This is an action to foreclose a deed of trust securing the payment of a promissory note. The action was instituted by the lender, Tryon Federal Savings and Loan Association, pursuant to a power of sale as set out in G.S. 45-21.1 *et seq*. Notice of hearing was filed on 9 December 1983 and the hearing was held 15 February 1984 before the Clerk of Superior Court, Henderson County. The Clerk of Superior Court entered an order allowing foreclosure from which respondent appealed.

A hearing *de novo* was held in District Court after which the court entered an order allowing petitioner to proceed with the foreclosure of the deed of trust. Respondent appealed from the order.

McFarland and McFarland, by William A. McFarland, for petitioner, appellee.

Van Winkle, Buck, Wall, Starnes & Davis, Inc., by Albert L. Sneed, Jr., and Larry C. Harris, Jr., for respondent, appellant.

HEDRICK, Chief Judge.

G.S. 45-21.16 provides that a mortgagee who seeks to exercise a power of sale under a mortgage or deed of trust may do so only upon proper notice to all interested parties and only after a hearing before the clerk of superior court. The clerk is directed by statute to authorize the mortgagee to proceed under the power of sale if the clerk "finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to such. . . ." *Id.* Any party may appeal from the clerk's findings to the superior court, and the court is then to conduct a *de novo* hearing. *Id.* The superior court, like the clerk of court, is limited in its review to determination of the four factual issues set out above. *In re Watts*, 38 N.C. App. 90, 247 S.E. 2d 427 (1978).

In the instant case, Judge Gash found as facts that Tryon Federal is the owner and holder of a note representing a valid debt, that the debtor, William Fortescue, has defaulted in his payments on this note, that Tryon Federal has the right to foreclose in the event of default under the terms of the note, deed of trust, and loan modification agreement, and that Mr. Fortescue had proper notice of the hearing. On appeal, respondent assigns error to only one of these findings of fact; his contentions are set out in his brief as follows:

> Respondent-Appellant contends that it was error for the Trial Court to find that default occurred under the Note and Deed of Trust as modified. The reason that no default occurred is that payments were tendered before the date on which the right to accelerate arose.

[1] The dispositive issue on appeal is thus whether respondent tendered payment before petitioner's right to accelerate arose, or, stated another way, whether respondent was in default when petitioner instituted foreclosure proceedings. The following undisputed facts are pertinent to resolution of this issue:

On 24 April 1975 respondent executed a promissory note in favor of Tryon Federal, secured by a deed of trust executed the same day. The note provided that monthly installment payments were to be made "on or before the first day of each month," and contained the following acceleration clause:

> If default be made in the payment of any installment under this note as the same may become due . . . and if the default is not made good prior to the due date of the next such installment, the entire principal sum and interest shall at once become due and payable without notice at the option of the holder of this note.

On 13 April 1983, in consideration for dismissal of a foreclosure action against respondent, petitioner and respondent entered into a "loan modification agreement," which provided that monthly payments were due "on or before the 10th day of each month," and which contained the following acceleration clause:

> In the event one monthly payment as set forth herein shall become delinquent, then the entire indebtedness, together with accrued interest, shall immediately become due and payable and Tryon Federal Savings and Loan Association shall have the right to institute foreclosure.

The instrument further provided that "[e]xcept as herein modified, all other terms and conditions of the Promissory Note and Deed of Trust . . . shall remain in full force and effect."

Respondent tendered the installment payment due 10 September 1983 on 7 October 1983, and petitioner accepted this payment. The payment due 10 October 1983 was tendered and accepted on 7 November 1983. On 9 December 1983, petitioner, having received neither the November nor December payments from respondent, instituted foreclosure proceedings.

It is undisputed by the parties that petitioner has the right to accelerate the indebtedness, under the terms of the loan modification agreement, if one monthly payment becomes delinquent. The parties disagree, however, on the meaning of the word "delinquent." Respondent contends that the promissory note and loan modification agreement must be read together, and that a monthly payment is delinquent only if it is made after the thirty-day "grace period" contained in the promissory note. He thus argues

that the payment due 10 November would not have become delinquent, triggering petitioner's right to accelerate the debt, until 10 December. Consequently, he argues, all the evidence shows that he was not in default on 9 December 1983 when petitioner instituted foreclosure proceedings. Petitioner, on the other hand, argues that "the provision relating to default and acceleration in the Loan Modification Agreement effectively rescinded the similar provision contained in the Note." Consequently, petitioner argues, the payment due 10 November 1983 became delinquent on 11 November, and respondent was in clear default on 9 December 1983, when petitioner instituted foreclosure proceedings.

Resolution of the question presented is to be accomplished by construing the terms of the contract between the parties. All parties agree that the original contract was modified, and they further agree on the terms of the modification. As pointed out above, the only question before the trial judge was the meaning to be given the word "delinquent" in the loan modification agreement or, said another way, how the contract as modified was to be interpreted.

Where a second contract involves the same subject matter as the first, but where no rescission has occurred, the contracts must be construed together in identifying the intent of the parties and in ascertaining what provisions of the first contract remain enforceable, and in such construction the law pertaining to interpretation of a single contract applies. *Bank v. Supply Co.*, 226 N.C. 416, 38 S.E. 2d 503 (1946). "When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law. The court determines the effect of their agreement by declaring its legal meaning." *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E. 2d 622, 624 (1973). The court's primary purpose in construing a contract is to ascertain the intention of the parties. *Id.* at 409-10, 200 S.E. 2d at 624. "The court must construe the language of the contract according to its ordinary meaning, and in light of the stated purpose of the parties in executing the contract, to ascertain the intention of the parties with respect to particular provisions." *Cone v. Cone*, 50 N.C. App. 343, 349, 274 S.E. 2d 341, 345, *disc. rev. denied*, 302 N.C. 629, 280 S.E. 2d 440 (1981).

In the instant case, we note that the loan modification agreement states that respondent was "allegedly in default in payment" under the promissory note, and that the consideration for that agreement was dismissal of foreclosure proceedings instituted by petitioner. We further note that the later agreement provided that monthly payments were to be made on or before the tenth day of each month, rather than the first day, as had been provided in the promissory note. Finally, we note that the thirty-day grace period relied on by respondent is contained in the clause in the note governing petitioner's right to accelerate the debt, and that the loan modification agreement contains a new acceleration clause, which provides that petitioner may accelerate the debt in the event "one monthly payment as set forth herein shall become delinquent." We think it clear that Judge Gash gave the word "delinquent" its plain meaning, i.e., overdue or late, and that such a construction of the terms of the contract as modified is entirely consistent with the intent of the parties. Consequently, it is clear that respondent became delinquent in making his November payment on 11 November, triggering petitioner's right to accelerate the debt and to institute foreclosure proceedings when respondent did not pay petitioner the entire amount of the debt.

[2] Respondent next contends that the court erred in finding default because "even if respondent-appellant tendered payments after they were due, the lender waived its right to prompt payment by accepting late payments for the months of September and October." This Court has repeatedly held that equitable defenses may not be raised in a hearing pursuant to G.S. 45-21.16, but must instead be asserted in an action to enjoin the foreclosure sale under G.S. 45-21.34. *See, e.g., In re Watts*, 38 N.C. App. 90, 247 S.E. 2d 427 (1978); *In re Foreclosure of Deed of Trust*, 55 N.C. App. 68, 284 S.E. 2d 553 (1981), *disc. rev. denied*, 305 N.C. 300, 291 S.E. 2d 149 (1982).

The judgment of the trial court is

Affirmed.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. DAVID LAWRENCE LAMSON

No. 8419SC917

(Filed 4 June 1985)

1. **Burglary and Unlawful Breakings § 6.2— first-degree burglary—inference of felonious intent—evidence insufficient**

There was insufficient evidence to support defendant's conviction for first-degree burglary where defendant's indictment alleged that defendant broke and entered a dwelling house at nighttime with intent to commit larceny, there was nothing in the evidence to support a finding that defendant entered the house with intent to commit larceny, and there was evidence of other intent or explanatory facts and circumstances to preclude an inference of felonious intent from evidence that defendant was breaking into the house and fled when deputies arrived.

2. **Burglary and Unlawful Breakings § 6.2— first-degree burglary—mistake of fact—instruction required**

The trial judge erred in a prosecution for first-degree burglary by not instructing the jury on the defense of mistake of fact where the evidence showed that defendant had previously visited a friend at the house next door to the house where he was arrested, it was nighttime, and the two houses were similar in appearance.

APPEAL by defendant from *Mills, Judge.* Judgment entered 22 May 1984 in Superior Court, CABARRUS County. Heard in the Court of Appeals 14 March 1985.

Defendant was charged in a true bill of indictment with first degree burglary. He was found guilty and sentenced to eighteen years imprisonment.

At trial the State presented the following evidence. Joanne Christie testified that she lived at 101 Woodland Drive in Concord. The night of 7 April 1984 Christie's husband was at work, and she was at home with her mother and niece. Christie went to bed at 10:30 p.m. and was awakened by a scraping noise. She saw that her bedroom window, which opened onto the front porch, was open, and a man was standing outside her window. Christie was sure that she had closed the window when she went to bed. Christie asked defendant what he was doing, he jumped back, and she shut the window. Christie ran to the kitchen and called the Sheriff's Department and her husband. When she was in the kitchen she heard the back door shaking, as if someone was pulling the doorknob back and forth.

Deputy Sheriff Tommy Fisher testified that when he arrived at Christie's residence he saw defendant standing on the steps leading to the back door. Defendant started walking down the steps and then ran. Three hours later Fisher found defendant about a mile away and arrested him. According to Fisher, defendant had been drinking, but was not drunk. Behind Christie's garage Deputy Sheriff J. A. Cook found a brown canvas suitcase and a pile of clothing. There were eight letters addressed to defendant in the suitcase. No burglary tools were found in the suitcase or in defendant's possession.

Defendant presented the following evidence. John Nunn testified that he lived at 103 Woodland Drive, next door to the Christie residence. Jeff Henley, a friend of defendant's, was staying with Nunn, and defendant had visited him at Nunn's house several times.

Defendant did not testify.

The jury found defendant guilty of first degree burglary.

At the sentencing hearing defendant said he had no intent to break into Christie's home, he had mistaken her house for the Nunn's house and was trying to wake somebody up to see when Jeff Henley would be back to give him a ride to Charlotte.

The trial judge found one aggravating factor, that defendant had a prior conviction punishable by more than 60 days confinement, and no mitigating factors. Defendant received a sentence of eighteen years.

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

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

PARKER, Judge.

[1] The sole issue presented is whether there was sufficient evidence to support defendant's conviction for first degree burglary.

To support a conviction there must be substantial evidence of each essential element of the offense charged. *State v. Powell,*

299 N.C. 95, 261 S.E. 2d 114 (1980). Substantial evidence is the amount of relevant evidence that would convince a rational trier of fact. *State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553 (1982). To support a conviction of first degree burglary there must be substantial evidence that defendant broke and entered a dwelling house at nighttime, with intent to commit a felony therein. *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976). The intended felony alleged in defendant's indictment was larceny, thus the State must have presented evidence sufficient for the jury to find that, at the time defendant entered the residence, he intended to take and carry away the personal property of another without consent and with the intent to permanently deprive the owner of that property. *See* G.S. 14-72.

The State relies on *State v. McBryde*, 97 N.C. 393, 1 S.E. 925 (1887), for the proposition that intent to commit larceny can be inferred from the evidence presented at trial that defendant was breaking into the house and fled when the Deputy Sheriffs arrived.

In *McBryde*, the defendant entered a bedroom at 2:00 a.m. where two women were sleeping. One woman awoke and screamed, and the defendant fled. The defendant was found guilty of burglary with felonious intent to commit larceny. In affirming the trial court, our Supreme Court observed:

> The intelligent mind will take cognizance of the fact, that people do not usually enter the dwellings of others in the night time, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The fact of the entry alone, in the night time, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent.

State v. McBryde, 97 N.C. at 396-7, 1 S.E. at 927.

This inference has been relied on in numerous cases. *See, e.g., State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542 (1981); *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976); *State v. Hedrick*, 289 N.C. 232, 221 S.E. 2d 350 (1976).

This inference has, however, been held not to apply in two recent decisions by this court: *State v. Hankins*, 64 N.C. App. 324, 307 S.E. 2d 440 (1983), *affirmed per curiam* 310 N.C. 622, 313 S.E. 2d 579 (1984) and *State v. Moore*, 62 N.C. App. 431, 303 S.E. 2d 230 (1983). In *Hankins*, defendant pushed the front door open and entered the house. He said to one of the occupants, "This is no joke. I have got a knife. Get up against the wall." A man came out of his bedroom and began struggling with the defendant. Defendant fled. The court submitted first degree burglary to the jury with the underlying felonious intention of either rape or larceny. This court held that under *State v. Rushing*, 61 N.C. App. 62, 300 S.E. 2d 445, *affirmed per curiam* 308 N.C. 804, 303 S.E. 2d 822 (1983), there was not sufficient evidence that the defendant intended to commit rape at the time he entered the house, and the manner in which he entered the house did not give rise to the inference that he intended to commit larceny.

In *Moore*, an occupant of the house found defendant in an upstairs bedroom. Defendant was not carrying a weapon and was drunk. Defendant testified that a man threatened him with a knife and told him to go into the house. Defendant climbed the stairs believing the man holding the knife was behind him, opened the door and walked into the house. When he heard someone in the house, he hid behind a bedroom door. This court held that the evidence did not give rise to the *McBryde* inference of intent to steal because there was evidence to support an inference that defendant was coerced to enter the house.

In the instant case we find that there was evidence of other intent or explanatory facts and circumstances to preclude application of the *McBryde* inference of felonious intent. We find nothing in the evidence which supports a finding that defendant entered Christie's house with intent to commit larceny. Consequently, the first degree burglary charge against defendant must be dismissed. But for the error in the jury instructions discussed below, we would remand this case for resentencing on the lesser included offense of misdemeanor breaking or entering.

[2] We find, however, that the trial judge erred in failing to instruct the jury on the defense of mistake of fact, and we must award defendant a new trial on the charge of misdemeanor breaking or entering.

Ordinarily, a crime consists in the concurrence of prohibited conduct and culpable mental state. 1 Wharton's Criminal Law § 27 (14th ed. 1978). A crime is not committed if the mind of the person doing the act is innocent. *State v. Welch*, 232 N.C. 77, 59 S.E. 2d 199 (1950). If there is evidence from which an inference can be drawn that the defendant committed the act without a criminal intent, then the law with respect to intent should be explained and applied by the court to the evidence. *State v. Walker*, 35 N.C. App. 182, 241 S.E. 2d 89 (1978). In *Walker*, the defendant, who was charged with abducting a child, testified that when he took the child from the school bus he believed she was his granddaughter, and as soon as he discovered his mistake he returned her to the school. This court held that the evidence permitted the inference that the defendant was laboring under a mistake as to the identity of the little girl which could negate any criminal intent, and the trial judge erred in failing to instruct the jury on the defense of mistake of fact.

Similarly, in the instant case there was some evidence permitting the inference that defendant was acting under a mistake of fact. John Nunn testified that he lived at 103 Woodland Drive, next door to Christie, and that Jeff Henley, a friend of defendant's, was staying with him. Defendant had previously visited Henley several times at Nunn's house. Thus defendant had a reason to be at Nunn's house. Additionally, the evidence showed that Christie's house and Nunn's house were similar in appearance. Christie's house was brick, Nunn's house was imitation brick. Both houses had attached white garages, front porches with gables and roof peaks running north and south. Photographs of both houses were introduced into evidence for illustrative purposes. The obvious objective of the introduction of this evidence was to show mistake. This evidence, coupled with the fact that it was nighttime, is, in our view, sufficient to raise an inference of mistake of fact, and on retrial for misdemeanor breaking or entering the trial judge should instruct the jury on this defense.

New trial.

Judges WEBB and BECTON concur.

IN RE: DONALD RAY GARNER, A MINOR CHILD

IN RE: BOBBY DEWAYNE GARNER, A MINOR CHILD

No. 8419DC782

(Filed 4 June 1985)

Parent and Child § 1.6— terminating parental rights—neglect of child—failure to pay costs of care—insufficient findings

The trial court erred in terminating respondent's parental rights on grounds of neglect and failure to pay a reasonable portion of the costs of foster care for the children where (1) the conclusion of neglect was based solely on the existence of a prior adjudication of neglect, and (2) the court failed to make adequate findings as to respondent's ability to pay some portion of the costs of foster care, especially while respondent was incarcerated for writing worthless checks.

Judge BECTON concurring in result.

APPEAL by respondent Phyllis Brown Garner from *Neely, Judge.* Order entered 20 March 1984 in District Court, RANDOLPH County. Heard in the Court of Appeals 14 March 1985.

Respondent appeals from an order terminating her parental rights to Donald Ray Garner and Bobby DeWayne Garner. The Randolph County Department of Social Services (hereinafter petitioner) petitioned on 16 December 1983 for termination on the grounds that the respondent had neglected the children and, that for a continuous period of more than six months next preceding the filing of the petition, had failed to pay a reasonable portion of the cost of care for each child. The Randolph County District Court determined these children to be neglected on 13 July 1981, and they have been in foster care since that date. This proceeding involves only the respondent-mother, as the father has released the children to petitioner.

On 17 February 1983, petitioner and respondent executed an agreement and plan for the return of the children to respondent which required her to (i) establish a home by May 1983, (ii) establish dependable transportation for her children and herself, (iii) find and keep a job, or apply for public assistance, (iv) arrange for competent daycare if working, (v) make arrangements for the children to continue to receive help from the Mental Health Center, (vi) attend parenting classes, and (vii) refrain from writing bad checks. This agreement provided for court review of respond-

ent's compliance with the agreement in June 1983, and provided that if respondent had not met her part of the agreement at that time, termination proceedings could be instituted.

The court determined on 12 September 1984 that respondent had failed to comply with the agreement and to provide any financial support for the children. The court allowed petitioner to retain custody and recommended the institution of a termination proceeding. This action was instituted, and respondent appeals from an order terminating her parental rights.

Gavin & Pugh by W. Ed Gavin for petitioner-appellee.

Bell & Browne, P.A. by Robert E. Wilhoit as Guardian Ad Litem.

Pierre Oldham for respondent-appellant.

PARKER, Judge.

In her sole assignment of error, respondent asserts that the order terminating her parental rights is not supported by the findings of fact and conclusions of law.

General Statute 7A-289.32 provides that a court may terminate parental rights on seven different grounds, and a finding of any one of those grounds will authorize a court to terminate the parent's rights. G.S. 7A-289.31(a); *In re Moore*, 306 N.C. 394, 293 S.E. 2d 127 (1982). All such findings must, however, be based on "clear, cogent, and convincing evidence." G.S. 7A-289.30(e). The court in this case concluded that two grounds for termination existed. These were under subsections (2) and (4) which provide in part:

> (2) The parent has . . . neglected the child. The child shall be deemed to be . . . neglected if the court finds the child to be . . . a neglected child within the meaning of G.S. 7A-517(21).
>
> . . . .
>
> (4) The child has been placed in the custody of a county department of social services . . . and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

G.S. 7A-517(21) provides in part:

> Neglected Juvenile.—A juvenile who does not receive proper care, supervision, or discipline from his parent . . . or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare . . . .

In finding of fact No. 6, the court found "[t]hat each of the children has heretofore been adjudicated by Randolph District Court as being a neglected child." This finding was the sole finding of fact on the ground of neglect. The court then concluded as law that "Donald Ray Garner and Bobby DeWayne Garner are neglected children . . . ."

Our Supreme Court, in *In re Ballard*, 311 N.C. 708, 319 S.E. 2d 227 (1984), addressed this identical issue stating that "termination of parental rights for neglect may not be based solely on conditions which existed in the distant past but no longer exist." 311 N.C. at 714, 319 S.E. 2d at 231-32. The Court stated:

> We hold that evidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights.
>
> . . . .
>
> The respondent appellant next contends in support of this assignment of error that the trial court erroneously treated the prior adjudication of neglect standing alone as binding upon it and as determinative on the issue of neglect at the time of the termination proceeding. The respondent's contention in this regard has merit. 311 N.C. at 715, 319 S.E. 2d at 231-232.

As in *Ballard*, the trial court in the instant case treated the prior adjudication as determinative on the issue of neglect at the time of the termination proceeding. This was error. The court was certainly entitled to consider the prior adjudication in the fact-finding process, but *Ballard* requires new findings of fact based on "changed conditions . . . in light of the history of neglect by the parents and the probability of a repetition of neglect." 311 N.C. at 714, 319 S.E. 2d at 231.

Only one ground needs to be proven to uphold the termination order. G.S. 7A-289.31(a). Therefore, we must examine whether respondent failed to pay a reasonable portion of the cost of the care for the children.

The facts are undisputed that respondent had not contributed anything toward the support of her children since they were removed from her in 1981, and that she was incarcerated at the time of the termination hearing for writing numerous worthless checks. How long respondent had been incarcerated prior to the hearing is not clear from the record or termination order. The court, in finding of fact No. 13, found:

> That the mother for a continuous period of six months next preceding the filing of the Petitions to terminate parental rights has failed to pay a reasonable portion of the cost of care for the children; indeed, the mother has not paid any amount toward the support of the two children since they have been in the custody of the Randolph County Department of Social Services.

The relevant time period under the statute is "for a continuous period of six months next preceding the filing of the petition." G.S. 7A-289.32(4). Respondent contends that she could not pay any support during some portion of this relevant time period because of her incarceration.

In determining what is a "reasonable portion," the parent's ability to pay is the controlling factor. *In re Clark*, 303 N.C. 592, 281 S.E. 2d 47 (1981). In *Clark*, the Court stated:

> A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay. What is within a parent's "ability" to pay or what is within the "means" of a parent to pay is a difficult standard which requires great flexibility in its application.

In the case *sub judice*, respondent paid nothing for the children's care over the relevant time period. This Court has previously held that "nonpayment would constitute a failure to pay a 'reasonable portion' if and only if respondent were able to pay some amount greater than zero." *In re Bradley*, 57 N.C. App. 475, 479, 291 S.E. 2d 800, 802 (1982).

In *Bradley*, the respondent-father was incarcerated and did not make any payments to support his children. Mr. Bradley was participating in the work-release program, but lost the privilege when he returned from work in an intoxicated condition. On appeal respondent argued the unreasonableness of requiring a prisoner to provide financial support while incarcerated. Rejecting this argument, the Court in *Bradley* enunciated the following rule:

> Where, as here, the parent had an opportunity to provide for some portion of the cost of care of the child, and forfeits that opportunity by his or her own misconduct, such parent will not be heard to assert that he or she has no ability or means to contribute to the child's care and is therefore excused from contributing any amount. 57 N.C. App. at 479, 291 S.E. 2d at 802-03.

The rule in *Bradley* was not a blanket statement that incarcerated parents can never assert an inability to provide support. Such a rule would be in conflict with the holding in *Ballard* that "[a] finding that a parent has ability to pay support is essential to termination for nonsupport on this ground." 311 N.C. at 716-17, 319 S.E. 2d at 233. The ruling that respondent Bradley would not be heard to assert his inability to pay was based on his misconduct in returning intoxicated from his work release job which would have allowed him the opportunity to earn money to provide for his children, not on his mere incarceration. To conclude otherwise would produce extremely harsh results.

Under the holding in *Bradley*, the trial court should have made a specific finding that respondent was able to pay some amount greater than zero during the relevant time period. This Court has previously stated, in a termination case in which the respondent contended she was unable to pay any of the child care costs, that "the better practice would have been for the trial court to have made separate findings as to her failure to pay." *In re Allen*, 58 N.C. App. 322, 327-28, 293 S.E. 2d 607, 611 (1982).

Pursuant to the foregoing authorities, we hold that the court erred (i) in concluding that the children were neglected based solely on the existence of the prior adjudication of neglect, and (ii) in failing to make adequate findings as to respondent's ability to

pay some portion of the cost of foster care. Under G.S. 7A-289.31 (a) if either ground had been properly found, the lower court's ruling could be sustained, but because both grounds were erroneously decided, the case must be remanded for findings as to whether or not the children are neglected and as to whether the respondent was "able to pay some amount greater than zero" during the relevant time period.

Reversed and remanded.

Judges WEBB and BECTON concur.

Judge BECTON concurring in the result.

Notwithstanding the views I expressed in my dissent in *In re Bradley*, 57 N.C. App. at 479-481, I believe that a remand in this case is proper. I, therefore, concur in the result.

UNITRAC, S. A. v. SOUTHERN FUNDING CORPORATION

No. 8426SC943

(Filed 4 June 1985)

Process § 9.1— in personam jurisdiction—insufficient contacts

Defendant's motion for dismissal for lack of in personam jurisdiction should have been allowed where plaintiff was a Swiss company; defendant was a Florida corporation; the president of a third company called an independent agent for various yarn manufacturers in Charlotte to purchase yarn and claimed that defendant was to finance the purchase; the agent arranged that defendant's credit be approved by a New York "factor"; the agent then drew up a memorandum of sale which he mailed to defendant and a contract which he mailed to plaintiff for signature; the agent sent two copies of the signed contract to defendant but defendant did not acknowledge receipt of the memorandum of sale or of the contract; the yarn was shipped through Charleston, South Carolina to Florida on carriers based in North Carolina; and invoices were sent to defendant from New York. The contract was clearly not performed in North Carolina, the contract was not made between defendant and plaintiff's agent, and assuming that defendant ratified the agreement by failing to respond when it received the memorandum of sale and contract, there was no evidence that the conduct by which defendant ratified the agree-

ment occurred in North Carolina. Moreover, the use of North Carolina carriers was purely fortuitous and neither of the parties did business in North Carolina or was a resident of North Carolina. G.S. 55-145(a)(1).

APPEAL by defendant from *Kirby, Judge.* Judgment entered 14 May 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 April 1985.

On 3 October 1980, Stanton Friedman, president of Grove Mills, Inc., located in Opa-locka, Florida, telephoned John L. Stickley, Jr., of Charlotte, North Carolina. Stickley was an independent commissioned agent for various yarn manufacturers, including the plaintiff in this case, Unitrac, a Swiss company. Friedman told Stickley that he wanted to purchase some yarn, but that American Southern Dyeing and Finishing in Opa-locka was to finance the purchase. American Southern Dyeing and Finishing was not actually in existence at that time, but had been dissolved by merger on 30 November 1979 into Southern Funding Corporation, also a Florida corporation, and the defendant in this case.

Stickley arranged that the credit of American Southern be approved by a "factor," J. P. Maguire, in New York. He drew up a memorandum of sale, which he mailed to American Southern (then Southern Funding). He also mailed a contract to Unitrac, in Switzerland, for signature. He then sent two copies of the signed contract to American Southern. Stickley never communicated directly, by letter or telephone, with officers of Southern Funding. They did not return or acknowledge receipt of the memorandum of sale or contract; at trial they denied receiving them.

On 3 October 1980 Stickley telexed a warehousing agency in New York, instructing it to ship and bill for the yarn. The New York warehousing agents arranged the shipment and sent out invoices. On 8 October and 15 October 1980, two shipments of yarn, at 15,000 pounds each, were shipped from Charleston, South Carolina, to Grove Mills in Florida. The carriers were North Carolina companies. Invoices were apparently sent to Southern Funding from New York. Officials of Southern Funding claimed that they did not receive but one of the invoices, and that was in March 1981. On receipt of this invoice, they claimed to have telephoned

Friedman, who they claim acknowledged that a mistake had occurred and requested that the invoice be sent to him.

The bill for the yarn was never paid. Unitrac brought suit in Mecklenburg County Superior Court against Southern Funding, two of its predecessors, who were subsequently dismissed, and Grove Mills, who did not participate because it filed for bankruptcy. Southern Funding moved for dismissal for lack of in personam jurisdiction over it. This was denied, and after a trial by jury, Southern Funding was found liable for the price of the yarn, $52,275.

Defendant appeals.

Mullins & Van Hoy, by Michael P. Mullins, for defendant appellant.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by Fred T. Lowrance and Sally Nan Barber, for plaintiff appellee.

ARNOLD, Judge.

The question which determines this appeal is whether or not Mecklenburg County Superior Court had in personam jurisdiction over defendant Southern Funding Corporation, a resident of Florida. It did not.

Plaintiff Unitrac, Inc., claims that defendant had two contacts with North Carolina, which provided the basis for in personam jurisdiction. These were (1) the agreement between Unitrac and Southern Funding for the sale of yarn, as evidenced by a memorandum of sale and contract prepared by John L. Stickley in Charlotte, North Carolina, and (2) the fact that the yarn was shipped to Florida from Charleston, South Carolina, by carriers based in North Carolina. Plaintiff claims that these contacts satisfy the "long-arm" statute G.S. 55-145(a)(1) and the constitutional requirement of due process of law.

Under G.S. 55-145(a)(1), the contract can be the basis of in personam jurisdiction if it is made or to be performed in North Carolina. Whether the exercise of jurisdiction under G.S. 55-145(a)(1) comports with due process in turn hinges on whether Southern

Funding, the non-resident defendant, had certain "minimum contacts" with North Carolina such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice," *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945). These contacts cannot be the result of "unilateral activity" of those who claim some relationship with the defendant Southern Funding; rather, "it is essential . . . that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed. 2d 1283, 1298 (1958).

Where jurisdiction is grounded on a contract, due process is satisfied only if that agreement has a "substantial connection," with North Carolina, *Byham v. House Corp.*, 265 N.C. 50, 57, 143 S.E. 2d 225, 232 (1965); *Goldman v. Parkland*, 277 N.C. 223, 229, 176 S.E. 2d 784, 788 (1970). Our courts have found that such a connection exists if the contract is made or is to be performed in North Carolina (thus confirming the constitutionality of the long-arm statute). *Harrelson Rubber Co. v. Dixie Tire & Fuels*, 62 N.C. App. 450, 453-54, 302 S.E. 2d 919, 921 (1983); *General Time Corp. v. Eye Encounter, Inc.*, 50 N.C. App. 467, 274 S.E. 2d 391, 394 (1981). Generally, a contract is "made" where the final act necessary to make it a binding agreement occurs. *General Time Corp.*, 50 N.C. App. at 472, 274 S.E. 2d at 394.

In the present case, the contract clearly was not performed in North Carolina. The yarn was spun in Switzerland, and shipped to South Carolina. Delivery was then made from South Carolina to Florida. Payment was allegedly to be made by defendant in Florida to a "factor" in New York.

The parties are in dispute over the question of where the contract was made. The plaintiff relies on *Goldman, supra*, and argues that the final act necessary to make the agreement binding occurred when Mr. Stickley, in Charlotte, received Mr. Friedman's order of yarn and then deposited a memorandum of sale and contract in the mail.

The defendant argues, however, that the documents prepared by Mr. Stickley provided expressly that the yarn sale agreement

did not constitute a binding contract until accepted and confirmed in writing by the plaintiff Unitrac, in Switzerland. The memorandum of sale, which Mr. Stickley said he sent to defendant, had such a term.

Plaintiff responds, however, that this transaction is a sale of goods, governed by the U.C.C., and that the documents only confirmed an underlying oral agreement. This agreement was made, plaintiff says, when Mr. Stickley acted, and the signature of Unitrac was a mere formality.

Even if we accept plaintiff's analysis, the problem, however, is that the underlying agreement was not originally made between *defendant* and plaintiff's agent, Mr. Stickley. It was made between Mr. Stickley and Mr. Friedman, who, as the jury found, was not an agent of defendant, authorized to place an order on defendant's behalf. A contract binding defendant was not made until defendant did some act indicating its intent to be bound, *i.e.*, recognized the existence of the contract. *See* G.S. 25-2-204.

The plaintiff argues, and the jury found, that the defendant "ratified" the yarn sale agreement by failing to respond when it received the memorandum and contract for the sale of the yarn. For the purposes of this discussion, we assume that the ratification did occur. Further, we find that the ratification was the last act needed to make a binding contract between defendant and plaintiff.

There is no evidence in the record that the conduct by which defendant ratified the contract, however, involved any contact with North Carolina. Defendant's officers did not call Mr. Stickley or go to North Carolina to consult with him. Rather, the evidence suggests that if defendant received the documents and approved them, it did so in Florida.

Given that the final act necessary to make the contract binding occurred outside North Carolina, and that the contract was performed entirely outside North Carolina, we do not find that the contract's connection with North Carolina was so "substantial" as to support the exercise of in personam jurisdiction by a North Carolina court consistent with G.S. 55-145(a)(1) or the due process clause.

Even if defendant's officers recognized from the documents that Mr. Stickley was involved in the yarn agreement and that he was located in North Carolina, we do not find that this recognition and defendant's failure to object to the yarn sale is sufficient to show that defendant "purposely availed" itself of the privilege of doing business in North Carolina.

Consideration of other factors in this case confirms our view that the defendant should not have been subjected to the in personam jurisdiction of the North Carolina courts. The record suggests that the fact that North Carolina carriers shipped the yarn was purely fortuitous. Neither of the parties did business in North Carolina or was a resident of North Carolina. Since the plaintiff was not a resident of North Carolina, the State had no special interest in asserting jurisdiction to protect one of its citizens. Finally, Mr. Friedman, who initiated the yarn sale, and whose testimony would have been extremely valuable, was a resident of Florida, and could have been subpoenaed there.

There are lacking in this case the minimum contacts which are a constitutional prerequisite to the exercise of this state's power over the defendant pursuant to G.S. 55-145(a)(1).

The defendant's motion for dismissal should have been granted.

Reversed.

Judges PHILLIPS and COZORT concur.

J. LOYD KIRK AND WIFE, LEONE KIRK, AND J. LOYD KIRK CORPORATION v. R. STANFORD WEBB AGENCY, INC.

No. 8428SC921

(Filed 4 June 1985)

1. **Trial § 32.1— failure to procure adequate coverage—requested instructions not given—no prejudicial error**

There was no prejudicial error in not instructing the jury as requested by plaintiffs in an action against an insurance agent for failing to procure sufficient insurance where the jury answered that issue in plaintiff's favor.

2. **Insurance § 2.2— fire insurance—failure to procure adequate coverage—contributory negligence by insured**

There was no error in submitting contributory negligence to the jury in an action against an insurance agent for not procuring adequate fire insurance where the evidence was that plaintiffs did not read the policy, did not know the true value of their property, and did not inform defendant of its true value. The provision of the policy in question was plain and unambiguous, and the plaintiff who conducted the insurance transactions had a four-year engineering degree from North Carolina State, an M.B.A. from the University of Southern California, and had run a business from 1973 to the filing of this action. Moreover, plaintiffs did not object at trial to the submission of contributory negligence to the jury.

3. **Rules of Civil Procedure § 59— denial of motion for new trial—no abuse of discretion**

There was no error in the denial of plaintiffs' motion for a new trial where there was no showing of a manifest abuse of discretion by the trial judge.

APPEAL by plaintiffs from *Sitton, Judge.* Judgment entered 9 April 1984 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 17 April 1985.

This is a civil action in which plaintiffs, J. Loyd Kirk, Leone Kirk and J. Loyd Kirk Corporation, seek damages from defendant, R. Stanford Webb Agency, Inc., for breach of a contract to procure fire insurance for a restaurant building owned by plaintiffs and for negligence in failing to procure sufficient fire insurance to cover loss by total destruction of the restaurant building caused by fire.

The essential facts are:

Plaintiff, J. Loyd Kirk, is the president of J. Loyd Kirk Corporation which owns and operates the Forest Manor Motel and Restaurant in Asheville.

In 1975, Kirk and Richard Burdette, an agent of defendant, entered into negotiations that resulted in the issuance of a "blanket" fire insurance policy for the restaurant and motel buildings. Plaintiff's evidence tends to show that Burdette advised Kirk that the blanket building coverage would be payable in case of fire in any one of the buildings insured under the policy, and that Burdette explained a "co-insurance provision" to mean that the value being insured would be multiplied by a factor of 90% and the result would equal the amount of insurance coverage which would apply to any one building in any one fire up to the policy limit for blanket protection which was then $141,926.00. Whether Burdette promised that the issuing insurance company would make an appraisal of the insured property is in dispute.

Between the time of the original issue of the policy in 1975 and 3 December 1980, the policy limits were increased several times to reflect inflation and in 1979 the policy in question was switched from the Insurance Company of North America to United States Fidelity & Guaranty (U.S.F.&G.). Coverage under the U.S.F.&G. policy was eventually increased to $242,000.00 at the time of the loss. Burdette allegedly represented to Kirk that the new policy would cover the building and contents for any one fire in any one building up to the amount of blanket protection in the policy just as the previous policy had.

On 3 December 1980, a fire destroyed the restaurant building. U.S.F.&G. appointed an adjuster who met with Kirk and Burdette and explained the co-insurance provision of the policy in effect at the time of the fire. In applying the co-insurance provision of the policy as explained by the U.S.F.&G. adjuster, the coverage on the restaurant building only was $177,408.00. This amount was substantially less than the amount recoverable as allegedly explained to Kirk by Burdette. The policy in question contains the following definition of co-insurance:

> Co-insurance clause: This Company shall not be liable for a greater proportion of any loss or damage to the property covered under this policy than the limit of liability under this policy for such property bears to the amount produced by multiplying the co-insurance percentage applicable (specified in this policy) [here 90%] by the total of (a) the replacement cost (without deduction for depreciation) of that part of said

property which is specifically described as covered on a replacement cost basis and (b) the actual cash value of that part of said property which is covered on an actual cash value basis at the time of the loss.

Kirk testified that the actual portion of this policy dealing with co-insurance was never discussed by Burdette prior to the fire. Kirk also admitted that he had not read the policy in effect at the time of the fire.

The jury found that defendant was negligent in failing to procure insurance coverage for plaintiffs in an amount sufficient to provide up to the sum of $242,000 for the 3 December 1980 fire loss and for loss of rental to the restaurant in the amount of $7,500. However, the jury also found that plaintiffs by their own negligence contributed to their loss. The trial court entered judgment that plaintiffs take nothing by this action, that the action is dismissed with prejudice and that plaintiffs pay costs. Plaintiffs' motion for a new trial was denied.

Bennett, Kelly and Cagle, by Harold K. Bennett, for plaintiff-appellants.

Van Winkle, Buck, Wall, Starnes and Davis, by Marla Tugwell and O. E. Starnes, for defendant-appellee.

EAGLES, Judge.

I

Plaintiffs first assign as error the trial court's refusal to instruct the jury as specially requested. We find no error.

[1] Without setting out the requested instruction herein, we note that the jury answered the issue to which the requested instruction pertained, i.e., negligence of defendant in failing to procure sufficient insurance to cover plaintiffs' loss, in plaintiffs' favor. Accordingly, even if there was error on the part of the trial court in failing to instruct the jury as requested by plaintiffs, the error is harmless. *Key v. Merritt-Holland Welding Supplies, Inc.*, 273 N.C. 609, 160 S.E. 2d 687 (1968).

[2] The main thrust of plaintiffs' argument here seems to be that the issue of contributory negligence should not have been submitted to the jury. We disagree.

While there was sufficient evidence from which the jury could (and did) find that defendant insurance company was negligent, there exists in North Carolina a duty for the insured to read the terms of the insurance policy. *Elam v. Smithdeal Realty and Insurance Co.*, 182 N.C. 599, 109 S.E. 2d 632 (1921). The evidence that plaintiffs did not read the policy is undisputed in this case. There was also sufficient evidence from which the jury could find that plaintiffs did not know the true value of their property and failed to inform defendant of its true value.

We recognize that insurance policies are often complex and may be difficult for the average insured to comprehend. Our examination of the policy here shows the co-insurance provision of the policy to be plain and unambiguous. Further, we note that J. Loyd Kirk, the plaintiff who conducted the insurance transactions with defendant, had obtained a four year engineering degree from North Carolina State University and an M.B.A. degree from the University of Southern California. He worked in the construction industry for three and a half years and ran a business from 1973 until the filing of this action. Based on these facts, we believe the jury could find that plaintiffs were contributorily negligent. We also note that plaintiffs did not object at trial to the submission of the contributory negligence issue to the jury. For this additional reason, they cannot complain on appeal. Rule 10(b)(2), Rules of Appellate Procedure; *Board of Education v. Juno Construction Corp.*, 50 N.C. App. 238, 273 S.E. 2d 504 (1981), *rev. denied*, 310 N.C. 152, 311 S.E. 2d 290 (1984); *Hendrix v. All American Life & Casualty Co.*, 44 N.C. App. 464, 261 S.E. 2d 270 (1980).

II

[3] Plaintiffs next assign as error the denial of their motion for a new trial. We find no error.

Our review of a trial court's discretionary ruling either granting or denying a motion to set aside the verdict and order a new trial is strictly limited to the 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 (1982). We have carefully examined the record and conclude that plaintiffs make no showing here of a manifest abuse of discretion on the part of the trial court. Accordingly, this assignment of error is overruled.

In the trial of this case we find

No error.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. THRIFT LEASE, INC.; HERBERT N. FRANCIS AND WIFE, HERSEL FRANCIS; R. WORTH MANGUM, TRUSTEE; SURYAKANT PATEL AND WIFE, JASHU PATEL; KANTILAL PATEL AND WIFE, JYOTI PATEL; FIRST UNION NATIONAL BANK; GENE D. CLARK, TRUSTEE; RAYMOND P. HOWELL; MARY W. MAUNEY; CHARLES E. CLEMENT, TRUSTEE

No. 8424SC926

(Filed 4 June 1985)

1. **Eminent Domain § 5.1— damages for taking of part of tract**

When part of a tract of land is appropriated by the State for public purposes, the measure of damages is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of the remaining property immediately after the taking, and that difference is offset by any general or special benefits accruing to the owner.

2. **Eminent Domain § 6.8— benefits to remaining property from road construction**

The trial court in an eminent domain proceeding did not err in allowing testimony by plaintiff's experts as to the increased value of defendant's remaining land after construction of a state secondary paved road partially on land taken by condemnation from defendant and partially on a right of way which already contained a dirt and gravel road.

APPEAL by defendant Thrift Lease, Inc. (hereafter defendant) from *Saunders, Chase B., Judge*. Judgment entered 19 April 1984 in Superior Court, WATAUGA County. Heard in the Court of Appeals 17 April 1985.

Defendant appeals from a judgment denying it compensation for the partial taking of its property by eminent domain.

Defendant originally owned a tract of land consisting of 11.17 acres, fronting approximately 191.46 feet on U.S. Highway 321 in the city of Boone. In 1977 it conveyed 1.66 acres located at the northern boundary of the tract to Region D Council of Governments (Region D) and included in the conveyance a thirty foot

right of way from U.S. Highway 321 to the property involved. Region D constructed a dirt and gravel road on the right of way. It subsequently conveyed the 1.66 acre tract and the right of way to a third party who conveyed it to plaintiff.

Plaintiff thereafter condemned an additional fifteen feet on each side of the original right of way on defendant's property, the condemned property comprising .85 acre. Using the additional width, plaintiff replaced the dirt and gravel road with a paved, lighted road as part of the State's secondary road system. This road is nearly a mile in length and serves property of Appalachian State University. Defendant's remaining 8.65 acres lie adjacent to both sides of the road.

In a proceeding to assess compensation for the taking of defendant's property the jury determined that defendant was entitled to no compensation.

Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for plaintiff appellee.

McElwee, McElwee, Cannon & Warden, by William H. McElwee, III, for defendant appellant.

WHICHARD, Judge.

Defendant requests a new trial on the issue of compensation on the grounds that the court erred in allowing plaintiff's experts to testify as to the value of defendant's property after the taking of the .85 acre and in summarizing this testimony in its instructions to the jury. We find no error.

[1] When part of a tract of land is appropriated by the State for public purposes, the measure of damages is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of the remaining property immediately after the taking. *Dept. of Transportation v. Bragg*, 308 N.C. 367, 369-70, 302 S.E. 2d 227, 229 (1983). *See also Kirkman v. Highway Commission*, 257 N.C. 428, 432-33, 126 S.E. 2d 107, 111 (1962); *Templeton v. Highway Commission*, 254 N.C. 337, 339, 118 S.E. 2d 918, 920 (1961). That difference is offset by any general or special benefits accruing to the owner. *Dept. of*

Transportation, 308 N.C. at 369-70, 302 S.E. 2d at 229; *Kirkman*, 257 N.C. at 433, 26 S.E. 2d at 111.

Here plaintiff's experts testified that the fair market value of the entire tract before the taking was between $500,000 and $520,000; the fair market value of the remaining property after the taking was between $600,600 and $650,000. Thus, although the taking diminished plaintiff's tract by .85 acre, it increased the value of the remaining acreage beyond the worth of the whole tract before the taking. This was due, experts testified, to the enhanced value of property served by a State secondary road.

[2] Defendant contends that the court erred in allowing plaintiff's experts to testify to the value of its property after the taking because the experts based their valuation on benefits derived from the completed highway project. Defendant contends that its property was already benefitted by the dirt and gravel road on the thirty foot right of way conveyed by a third party to plaintiff before the taking. Plaintiff's experts, defendant contends, should have based their valuation only on the benefits conferred on defendant by the taking of the additional thirty foot right of way.

Defendant's contentions are incorrect. As plaintiff notes, defendant's argument is based upon the false premise that in determining whether its property was benefitted only those improvements that are physically located within the area taken can be considered. The law is otherwise. Those benefits (or damages) to condemned land *which arise from the particular improvement* for the purpose of which the owner's land was taken or damaged may be considered in determining just compensation. *Kirkman*, 257 N.C. at 433, 126 S.E. 2d at 111.

Thus in *Dept. of Transportation*, 308 N.C. 367, 302 S.E. 2d 227, the owner was entitled to recover compensation for damage caused by diversion of water onto his remaining property as a result of the condemnor's use of the appropriated portion, *id.* at 370, 302 S.E. 2d at 229, i.e., the owner was entitled to recover compensation for damage arising from the taking. The damage was not confined to the area taken. The Court stated that determining the fair market value of the property after the taking contemplates the impact of the project *in its completed state* upon the remainder. *Id.* Other cases cited by plaintiff are in accord.

See, e.g., *Board of Transportation v. Rand*, 299 N.C. 476, 263 S.E. 2d 565 (1980) (testimony that value of defendants' land was increased by the taking because roadway fronting the property was paved and stating dollar value of land before and after the taking sufficient to require instructions); *Goode v. Asheville*, 193 N.C. 134, 136 S.E. 340 (1927) (jury shall view the land and assess damages and special benefit, advantage, or enhanced value which shall accrue by reason of the improvement).

Here plaintiff constructed a State secondary road containing concrete curbs, gutters, and storm drains. It is lighted with lights mounted on salt treated poles and arch lamps on tapered aluminum poles. Four curb cuts give defendant access to its adjacent property. The evidence is uncontradicted that defendant intends to develop its tract to its highest and best use as commercial property. *See Williams v. Highway Commission*, 252 N.C. 514, 517, 114 S.E. 2d 340, 342 (1960) (highest and best use of property one factor to be considered in determining market value). It is further uncontradicted that commercial property adjacent to a secondary road maintained by the State is more valuable than commercial property adjacent to a dirt and gravel road. Defendant's own witness testified that buyers almost universally try to purchase property on a State maintained road if they are able.

We thus find no error in the allowance of testimony of plaintiff's experts as to the increased value of defendant's remaining land after construction of a State secondary road partially on land taken by condemnation from defendant and, correspondingly, no error in the court's summary of this testimony in its instructions.

No error.

Judges JOHNSON and EAGLES concur.

STATE OF NORTH CAROLINA v. PAUL GRAHAM FERRELL

No. 8421SC928

(Filed 4 June 1985)

1. **Automobiles and Other Vehicles § 120— 0.10% breathalyzer standard constitutional**

The 0.10% blood alcohol standard for driving while impaired in G.S. 20-138.1 is not unconstitutionally vague because drivers do not know when they have reached the 0.10% level and the statute is not unconstitutional on the theory that blood alcohol measurement made sometime after drinking is so dissimilar from a defendant's condition while driving that it bears no reasonable relationship to penalizing impaired drivers.

2. **Automobiles and Other Vehicles § 126.2— breathalyzer results—proper foundation—evidence of drinks after driving went to weight not admissibility**

The State introduced sufficient evidence to lay a foundation for the admissibility of breathalyzer results where the evidence was overwhelming that defendant was the driver of the car and the State offered substantial evidence that defendant consumed alcohol before or during the time he drove. Defendant's admission that he consumed three beers prior to the accident and that he drank several big swallows from a Jack Daniels bottle to calm down after the accident goes to the weight to be given the chemical analysis, not to its admissibility.

3. **Constitutional Law § 75; Criminal Law § 102.5— DWI—appeal de novo to superior court—State's inquiry about defendant's failure to testify in district court—improper**

The trial court erred in a DWI trial in superior court by allowing the State to inquire into defendant's failure to testify in district court. The State's impeachment of defendant adversely implicated defendant's right not to testify in district court as well as his right to counsel and violated both the law and the spirit of G.S. 8-54 and 7A-290.

APPEAL by defendant from *Seay, Judge*. Judgment entered 11 April 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 14 March 1985.

Attorney General Thornburg, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

David E. Crescenzo for defendant appellant.

BECTON, Judge.

In this driving while under the influence of an impairing substance case, defendant, Paul Graham Ferrell, contends (1) that

the relevant statute, N.C. Gen. Stat. Sec. 20-138.1(a)(2) (1983), which proscribes driving after consuming sufficient alcohol to have a blood alcohol concentration of 0.10% or more at "any relevant time after the driving," is unconstitutional in that the statute is vague and uncertain, and in that it otherwise violates his substantive due process rights; (2) that the "results of the chemical analysis of the breath should not have been allowed into evidence because there was no foundation for the testimony"; and (3) that the trial court erred by "permitting the State to question the defendant regarding his failure to testify in the district court trial." We find merit in defendant's third argument and accordingly award him a new trial.

I

[1] The recent Supreme Court decision in *State v. Rose*, 312 N.C. 441, 323 S.E. 2d 339 (1984), effectively disposes of all of defendant's constitutional challenges to G.S. Sec. 20-138.1. The Supreme Court in *Rose* held that the 0.10% blood alcohol concentration standard in the statute is not unconstitutionally vague simply because a drinking driver does not know precisely when he has reached the 0.10% level and further, that the statute is not unconstitutional on the theory that blood alcohol measurement made sometime after drinking may reflect a driver's physical condition so dissimilar from his condition while driving that it bears no reasonable relationship to the State's legitimate goal of penalizing impaired drivers.

II

[2] We summarily reject defendant's second argument that an insufficient foundation was laid for the admission of the breathalyzer test results. The evidence, both circumstantial and direct, including defendant's statement to the arresting officer, is overwhelming that the defendant was the driver of the car. Additionally, the State offered substantial evidence that the defendant consumed alcohol before or during the time he drove. Defendant's admission that he had consumed three beers prior to the accident and his further statement that he drank several big swallows from a Jack Daniels bottle given to him by an individual who picked him up after the accident and asked him if he wanted a drink to calm him down, were properly admitted in evidence. Defendant's argument goes to the weight to be given to the chemical

analysis and not its admissibility. Consequently, the State introduced sufficient evidence to lay a foundation for the admissibility of the chemical analysis.

III

[3] We agree with defendant's final assertion that "the trial court committed prejudicial error by permitting the State to question the defendant regarding his failure to testify in the district court trial." As the following colloquy shows, the State, by inquiring into defendant's failure to testify in district court, did more than attempt to impeach defendant with his prior silence considering his allegedly belated attempt in superior court to establish his defense that the alcohol concentration in his blood was caused by drinking *after* the accident as opposed to drinking *before* the accident:

Q. Do you remember being in District Court on this charge?

A. Yes, sir, I do.

Q. Did you ever or anybody ever mention that you had been drinking after the accident on that occasion?

Mr. Crescenzo: I object, Your Honor.

The Court: Overruled.

A. I did not take the stand on that occasion. We did not put up a defense.

Q. Did anybody mention at all that you had been drinking after the accident?

A. No, sir.

Q. Now, you have had time to speak with your attorney since the accident, haven't you?

A. Yes, sir.

Q. And you have had time to speak with everybody involved since the District Court case, haven't you?

A. Yes, sir.

Q. And you know that if someone drinks after the accident, that would be a defense to this charge, don't you?

A. No, sir.

Q. This is the first time we have ever heard of you drinking since this accident, isn't it?

Mr. Crescenzo: I object, Your Honor.

The Court: Sustained.

Q. You never told the officers on November 16th, 1983, that you had been drinking after this accident, did you, Mr. Ferrell?

A. No, sir, I didn't.

Q. As a matter of fact, you refused to answer any questions, didn't you?

A. Yes, sir, I did.

The confluence of N.C. Gen. Stat. Sec. 8-54 (1981), N.C. Gen. Stat. Sec. 7A-290 (1981), and defendant's constitutional right not to testify and to have counsel represent him compels us to find error by the trial court in permitting the State to question defendant regarding his failure to testify in district court.

G.S. Sec. 8-54, in pertinent part, provides that:

> In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him.

The language of the statute is unmistakable, and our Supreme Court has made it clear that the statute prohibits the district attorney from making direct, or even indirect, references to a defendant's failure to testify. *State v. McCall*, 286 N.C. 472, 212 S.E. 2d 132 (1975), and *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975).

G.S. Sec. 7A-290 provides, in pertinent part, that: "[a]ny defendant convicted in district court before the judge may appeal to the superior court for trial *de novo*." (Emphasis added.) And, "[t]he trial *de novo* is not really an appeal on the record. It is a new trial as a matter of absolute right from the beginning to the end. It totally disregards the plea, trial, verdict, and judgment of

the District Court." *State v. Brooks*, 287 N.C. 392, 405, 215 S.E. 2d 111, 120 (1975).

The prejudice inherent in allowing the district attorney to question defendants at superior court trials regarding their choice not to testify at the initial district court trial or hearing is obvious. Counsel often advise defendants not to testify or not to present evidence at district court hearings for a number of reasons, one of which, specifically approved by our Supreme Court as well as by the United States Supreme Court, is "to learn about the prosecution's case and . . . not reveal his own." *Id.* at 405, 215 S.E. 2d at 121 (quoting *Colten v. Kentucky*, 407 U.S. 104, 118, 32 L.Ed. 2d 584, 594, 92 S.Ct. 1953, 1961 (1972)). Additionally, a defendant in district court may, on the advice of counsel, opt to roll the die, not testify, and then determine, depending on the district court's sentence, whether to appeal. The trial lawyer who knows his case, knows what kind of impression the defendant will make before the judge, and knows the habits, or even the idiosyncracies, of the particular judge hearing the case, may strategically advise his client not to take the stand. On the other hand, a jury of laymen (and it would be equally prejudicial if just one juror did) could, as suggested by defendant in his brief, "conclude that the failure to testify meant that the defendant either had something to hide, or, as was the obvious intent in the instant case, that the defendant had developed his story only after hearing the State's case and conferring with counsel." This danger is precisely what the law addresses. The State's impeachment in this case adversely implicated defendant's right not to testify in district court as well as his right to counsel. Further, it violated both the law and spirit of G.S. Secs. 8-54 and 7A-290.

For the above reasons, defendant is entitled to a

New trial.

Judges WEBB and PARKER concur.

Cutting v. Foxfire Village

ROY F. AND BLANCHE E. CUTTING; RAYMOND AND OLIVE E. SANTINI; DAVID AND ELINOR L. SULLIVAN; ANN A. HENRICI; PRESCOTT W. AND D. JEAN DOWNER; R. WELLINGTON AND LOUISE H. DANIELS; DON F. AND DORIS B. McNEAL; WILLIAM AND HELEN SABOLSKY; RICHARD P. DUPONT; THOMAS DIXON DICKENS; GENE J. AND ROSEMARY C. FLURI; NORMAN L. AND THOMAS G. PULLAN; PAUL E. AND ANNA ROSCA; JAMES P. YUDES; CHARLES D. AND MARGARET S. ALSTAD; GERALD E. AND DOROTHY STEVENS; RAYMOND G. AND DOROTHY F. MATHER; RICHARD HELLER; AND FRANCIS R. WEIS v. FOXFIRE VILLAGE

No. 8420DC794

(Filed 4 June 1985)

Municipal Corporations § 26— assessments for water system—value added—uniform assessments improper

A municipal council could not determine the value added basis for assessing property for a municipal water system by calculating the average value of the water system to all unimproved lots not containing wells, establishing a nominal percentage thereof as the increase in value to improved lots, and imposing a $2,400 assessment on all unimproved lots and a $120 assessment on all improved lots. Rather, G.S. 160A-218(3) requires individual assessments of lots based upon a set rate per dollar of value added to the lots served by the new system.

APPEAL by plaintiffs from *Honeycutt, Judge*. Judgment entered 27 March 1984 in District Court, MOORE County. Heard in the Court of Appeals 1 April 1985.

In this civil action plaintiffs appeal from an order dismissing their petition in which they contend, as owners of vacant, unimproved lots located in Foxfire Village, that the Foxfire Village Council improperly assessed their property for a proposed municipal water system. The issuance of a municipal revenue bond to finance the construction of the water system was approved in a referendum election held in November 1980. The water system became operational 1 August 1983. On 29 November 1983, the Foxfire Village Council adopted two resolutions to assess property owners for the construction of the water system. The resolutions imposed a $2,400.00 assessment on all unimproved lots and a $120.00 assessment on all improved lots. An improved lot was defined as one "which had water available from any sources other than the Developer-owned water system on the 1st day of August 1983," and an unimproved lot was defined as one "which did not

have an operating well upon the lot on the 1st day of August 1983."

Plaintiffs, owners of unimproved lots as defined by the resolutions, petitioned the Moore County District Court for a declaratory judgment, contending the amount of assessment was not determined according to requirements of the North Carolina General Statutes. The trial court made findings of fact, upon which it concluded as a matter of law the following:

> 1. The Plaintiffs have failed to prove, by the greater weight of the evidence, that Foxfire Village did not act reasonably and consistently with the evidence, facts, and the law, when it assessed $2,400.00 on all unimproved lots as of August 1, 1983.
>
> 2. The Plaintiffs have failed to prove, by the greater weight of the evidence, that Foxfire Village did not act reasonably and consistently with the evidence, facts, and the law, when it assessed $120.00 upon all lots that were improved as of August 1, 1983.

From an order dismissing plaintiffs' petition, plaintiffs appealed.

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

Johnson, Poole and Webster, by Samuel H. Poole, for defendant appellee.

MARTIN, Judge.

The sole question presented by this appeal is whether the trial court erred in upholding the amounts of water assessments imposed by the Foxfire Village Council, and therefore, this appeal involves the interpretation of G.S. 160A-218(3), which provides a value added basis upon which assessments may be made. Because the requirements of G.S. 160A-218(3) have not been met, we reverse the trial court's order dismissing plaintiffs' petition.

Plaintiffs contend the Foxfire Village Council failed to comply with statutory provisions in determining the water assessments on lots within Foxfire Village. "Any city is authorized to make special assessments against benefited property within its corporate limits for: . . . [c]onstructing, reconstructing, extending,

and otherwise building or improving water systems." G.S. 160A-216(3). The manner in which Foxfire Village chose to make the assessments is set forth in G.S. 160A-218(3), which states as one alternative that the assessments may be made on the basis of:

> [t]he value added to the land served by the project, or subject to being served by it, being the difference between the appraised value of the land without improvements as shown on the tax records of the county, and the appraised value of the land with improvements according to the appraisal standards and rules adopted by the county at its last revaluation, at an equal rate per dollar of value added.

Thus, under the statute, property is assessed at an equal rate per dollar of value added. The amount of value added by the improvement is determined by computing "the difference between the appraised value of the land without improvements as shown on the tax records of the county, and the appraised value of the land with improvements according to appraisal standards and rules adopted by the county. . . ."

The evidence before the trial court as to the Foxfire Village Council's method of assessment consisted of the following: the mayor testified that the Village Council decided that if a lot had an operating well on it on 1 August 1983, it was to be considered an improved lot; otherwise it was considered unimproved. One of the considerations used in determining the amount of assessment to an unimproved lot was the average cost of installing a well and pump, which the council determined to be $2,400.00. Dewitt Purvis, tax supervisor of Moore County, testified that there had been no reappraisal of lots in Foxfire since 1979, except where a new home had been built. According to county standards, value of a lot would be enhanced by $1,400.00 by the addition of a well, or by $2,300.00 by the addition of a well and septic tank. He also testified that the Council decided 5% of the amount of the assessment on the unimproved lots, $2,400.00, would be the fair assessment of the improved lots, i.e., $120.00; and that these assessment figures were fair. A council member testified that the council considered that there would only be a nominal increase in the value of lots that already had a well, and considered $120.00 to be a nominal assessment. There were no appraisals made of improved lots, nor consideration of the value of a particular lot, before ar-

riving at the amount of the assessment. "In our opinion, water available to a $10,000 lot was worth the same as water available to a $20,000 lot. We also decided that $2,400 was a fair amount of assessment to a lot for installation of the water system, whether or not the lot was worth $10,000 or $20,000." The supervisor of real estate appraisal for the North Carolina Department of Revenue testified that in his opinion the assessments on the improved and unimproved lots were "fair and reasonable," and, although the value added assessment method contemplates appraisals before and after the improvement, a general appraisal is sufficient, and appraisal of individual lots to determine increased value is unnecessary. This evidence does not support the trial court's "Findings of Ultimate Facts" that the assessments were the "value added" to the lots "according to the appraisal standards and rules adopted by Moore County at its last revaluation."

Where, as here, the language of a statute is clear and unambiguous, there can be no judicial construction and the courts must give the statute its plain and definite meaning as adopted by the legislature. *In re Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978). "In such cases courts are without power to interpolate or superimpose provisions or limitations not contained in the statute." *State v. Koberlein*, 309 N.C. 601, 605, 308 S.E. 2d 442, 445 (1983). The statute clearly prescribes a before and after improvement appraisal of the property with the assessment based on a set rate per dollar of value added to the land served by the water system construction, an amount which may necessarily vary due to the nature of the individual lots themselves. This the Village of Foxfire has failed to do. Rather, the Foxfire Village Council simply calculated the average value of the improvement to all unimproved lots, established a nominal percentage thereof as the increase in value to improved lots, and thereby arrived at the amount of value added to the property. No "appraised value of the land with improvements according to appraisal standards adopted by the county" was established. The method used by the Village of Foxfire to determine the amount of value added to the individual lots was not a method sanctioned by G.S. 160A-218(3). Therefore, we reverse the order of the trial court dismissing plaintiffs' petition for reassessment and remand the cause to the District Court of Moore County for entry of an order requiring the Foxfire Village Council to determine the amounts of assess-

ments for water improvements in accordance with the provisions of G.S. 160A-218.

Reversed and remanded.

Chief Judge HEDRICK and Judge WELLS concur.

BRUCE PATRUM v. M. C. ANDERSON

No. 8418DC1016

(Filed 4 June 1985)

Process § 9.1— North Carolina plaintiff—Georgia defendant—agency contract for sale of racing equipment—no in personam jurisdiction

In an action to collect a commission for selling NASCAR racing equipment where plaintiff was a North Carolina resident and defendant a Georgia resident, defendant's motion to dismiss for lack of *in personam* jurisdiction should have been granted because there was no evidence to support findings that defendant could expect that plaintiff would exert effort and incur expenses in North Carolina in furtherance of his obligations under the agreement, that plaintiff did in fact exert effort and incur expenses in North Carolina, and that defendant conducted regular and systematic business in North Carolina. The fact that plaintiff is a resident of North Carolina does not necessarily mean that he performed or should have been expected to perform the agreement in North Carolina, and the fact that defendant on six occasions ordered souvenir caps or toy cars from plaintiff's company in North Carolina, occasionally came to North Carolina to watch auto races, and owned a racing team which entered cars in North Carolina races does not constitute regular and systematic business in North Carolina. G.S. 1-277(b), G.S. 1-75.4(1)(d), (5).

APPEAL by defendant from *Lowe, Judge*. Judgment entered 10 July 1984 in District Court, GUILFORD County. Heard in the Court of Appeals 7 May 1985.

This is an appeal from the trial judge's denial of defendant's motion to dismiss for lack of in personam jurisdiction.

The plaintiff is a resident of Guilford County, North Carolina, and the defendant is a resident of Chatham County, Georgia. The defendant owns M. C. Anderson Construction Company as a closely-held corporation. This company is authorized to do business in Georgia and South Carolina.

From 1976 until 1982, defendant was involved in NASCAR auto racing. In 1976, defendant organized a closely-held corporation called M. C. Anderson Racing, Inc. This company was organized under the laws of Georgia. Defendant was its principal shareholder. The company owned three race cars and entered various NASCAR races across the country. The defendant testified in his deposition that his company may have run cars in Charlotte and Rockington, but not in Rockingham or Wilkesboro. He testified that he personally attended races in Charlotte, Rockingham and North Wilkesboro.

On several occasions, defendant purchased souvenir hats and toy cars from plaintiff for the employees of his construction company.

In 1982 defendant decided he would get out of the racing business. Plaintiff, who was in North Carolina, telephoned him in Georgia to inquire whether he planned to sell his racing equipment. Plaintiff and defendant entered into an agreement, whereby plaintiff would receive a 10% commission if he could sell defendant's racing equipment. Defendant testified that plaintiff called him frequently, but never came up with a buyer.

A Mr. Raymond Beatle contacted defendant about buying the racing equipment. Defendant testified that Mr. Beatle had never met plaintiff and had not been sent to him by plaintiff. Defendant testified that he believed Mr. Beatle was from Texas. Defendant said he called plaintiff and confirmed that plaintiff had not been in touch with Mr. Beatle. Plaintiff claimed, however, that he deserved some or all of the 10% commission. Defendant denied that plaintiff had any right to a commission, since plaintiff had not found the buyer.

Plaintiff commenced an action to recover the commission in Guilford County, North Carolina. Defendant moved to dismiss for lack of in personam jurisdiction. The trial judge denied the motion to dismiss and defendant appeals.

Hunter, Hodgman, Greene & Donaldson, by Robert N. Hunter, Jr., for plaintiff appellee.

Booth, Harrington, Johns & Campbell, by David B. Puryear, Jr., for defendant appellant.

ARNOLD, Judge.

This case is properly before us pursuant to G.S. 1-277(b). It presents a single issue: whether the trial court correctly denied defendant's motion to dismiss for lack of in personam jurisdiction. We hold that the trial court erred and therefore we reverse.

The defendant first contends that the trial judge made several findings of fact which are not supported by any competent evidence in the record.

We agree that Findings of Fact 15 and 16 have no support in the record. In Finding of Fact 15, the trial court found that defendant could foresee and expect that plaintiff as his agent would exert effort and incur expenses in North Carolina in furtherance of his obligations under the agreement. In Finding of Fact 16 the trial judge found that the plaintiff, as defendant's agent, did exert efforts and incur expenses in North Carolina.

The record, however, contains no evidence as to where plaintiff searched for buyers, or that he gave defendant any indication that he would look in North Carolina. Defendant's testimony does not indicate that he had any expectation that plaintiff would look in North Carolina or knowledge that he did look there. The fact that plaintiff is a resident in North Carolina does not mean necessarily that he performed, or should have been expected to perform, the parties' agreement in North Carolina. Further, "the mere act of entering into a contract with a North Carolina resident does not constitute the necessary minimum contacts for the exercise of jurisdiction over a non-resident. . . ." *Time Corp. v. Encounter, Inc.*, 50 N.C. App. 467, 471, 274 S.E. 2d 391, 393 (1981). The eventual buyer, we note, was apparently from Texas.

We also agree that Findings of Fact 20 and 21 have no support in the record. Finding of Fact 20 states that:

> M. C. Anderson conducted regular and systematic business under the protection of the laws of North Carolina with the Plaintiff.

Finding of Fact 21 states that:

> M. C. Anderson conducts regular and systematic business under the protection of the laws of North Carolina in that M. C. Anderson Construction Company, a sole proprietor-

ship, in the normal course of its daily operations takes bids and conducts business with suppliers of construction equipment and construction supplies located in the State of North Carolina.

The record shows that on six occasions defendant ordered souvenir caps or cars from plaintiff's company in North Carolina, that defendant occasionally came to North Carolina to watch auto races, and that he owned a racing team which entered cars in North Carolina races. These "purchases and related trips" do not constitute regular and systematic business in North Carolina. *See Helicopteros Nacionales de Colombia v. Hall*, --- U.S. ---, --- S.Ct. ---, 80 L.Ed. 2d 404 (1984). Further, we see nothing in the record which indicates that the M. C. Anderson Construction Company "in the normal course of its daily operations takes bid and conducts business with suppliers of construction equipment and construction supplies located in the State of North Carolina."

Since the record lacks competent evidence that plaintiff was to perform or performed the agreement in North Carolina, or that defendant engaged in substantial activity in North Carolina, we do not find any statutory basis for personal jurisdiction over defendant. *See* G.S. 1-75.4(1)(d), (5).

Moreover, since there is no evidence to support the finding that defendant conducted regular and systematic business in North Carolina, the courts of North Carolina have no general jurisdiction over defendant consistent with due process. *Helicopteros*, --- U.S. at ---, --- S.Ct. at ---, 80 L.Ed. 2d at 413.

The agreement itself also fails to give North Carolina specific jurisdiction over defendant consistent with due process. There is no evidence linking plaintiff's business activity on behalf of defendant to North Carolina, nor is there any evidence showing defendant was in North Carolina for any purpose connected with the agreement. Nothing in the record indicates that, by entering into an agency agreement with plaintiff, defendant purposely availed himself of the benefits and protections of our laws. *Phoenix America Corp. v. Brissey*, 46 N.C. App. 527, 532, 265 S.E. 2d 476, 480 (1980).

As the trial court found, the "crucial witnesses and material evidence are evenly distributed between the States of North Carolina and Georgia."

We hold that the assertion of in personam jurisdiction over the defendant is not authorized by our statutes and violates due process.

Reversed.

Judges MARTIN and PARKER concur.

KENNETH SPEARS v. LUCIOUS WALKER AND GRACE WALKER

No. 8326SC1036

(Filed 4 June 1985)

Contracts § 6.1 — construction of residence — unlicensed general contractor — summary judgment for defendant proper

Summary judgment for defendants was proper in an action by a builder alleging breach of a construction contract by defendant homeowners. The trial court correctly classified plaintiff as an unlicensed general contractor who could not enforce a contract or recover for his services because plaintiff retained control over the purchase of materials through his own bank account and accounts with suppliers, the total estimated cost in excess of $63,000 was an estimate given by plaintiff, plaintiff retained supervisory control over much of the work of the subcontractors, and the amount well exceeded the threshold amount of $30,000. G.S. 87-1.

APPEAL by plaintiff from *Gaines, Judge*. Judgment entered 26 April 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 May 1985.

This is a civil action filed by a builder alleging breach of a construction contract by property owners. The plaintiff, a self-employed home builder, seeks to recover from the defendants, Lucious and Grace Walker, the sum of $11,391.70. This sum is alleged to be due under an oral contract entered into in August 1979 for construction of the defendants' personal residence. Under the contract plaintiff would perform certain construction, assist in the procurement of subcontractors, supervise the work of such subcontractors, and purchase materials and supplies through his accounts with material suppliers. The plaintiff estimated the total cost of construction would be $63,971.56.

The defendants answered and filed a counterclaim alleging breach of contract by plaintiff Spears. In a subsequent motion for summary judgment, the defendants asserted that the plaintiff, albeit unlicensed as a general contractor, met the statutory definition of general contractor set forth in G.S. § 87-1, and as an unlicensed general contractor, was barred from recovery as a matter of law.

In support of the motion for summary judgment, defendants offered evidence tending to show the following. The plaintiff was not licensed as a general contractor. He gave a written estimate for construction of the dwelling for $63,971.56 excluding the cost of interior trim. On the basis of this estimate the defendants procured a loan from a mortgage lender. The defendants agreed to place funds in the plaintiff's bank account to enable the plaintiff to purchase materials through his accounts with materials suppliers. The plaintiff procured and supervised a woodworker, carpenter, two brickmasons, two sheetrockers, a roofer, a cabinetmaker, and a septic tank installer. Plaintiff's supervision included work that defendant Lucious Walker performed which was credited to defendants' account at $3.10 per hour.

In opposition to the motion for summary judgment plaintiff introduced the following evidence. On his application for a building permit, defendant Lucious Walker listed himself as contractor. Plaintiff's estimate of $63,971.56 was based on a take-off from plans as presented by defendants. Defendants orally agreed to pay plaintiff $16,785.57 for his services and supervision; $10,443.10 for woodworking, saw box, supervision of excavation and masonry; and $6,342.47 (10% of the mortgage loan) for additional supervision. On the basis of these facts, the trial court entered an order for summary judgment for the defendants.

From that order, the plaintiff appeals.

Harkey, Coira, Fletcher and Lambeth, by Charles F. Coira, Jr., for plaintiff appellant.

Ray and Brooks, by Joyce M. Brooks, for defendant appellees.

ARNOLD, Judge.

The issue before this Court is whether, from the evidence presented, the trial court correctly granted summary judgment classifying the plaintiff as a general contractor and thus barring his action for breach of contract to construct a portion of the defendants' house. We hold that it did.

"Rule 56, Rules of Civil Procedure, authorizes the rendition of summary judgment upon a showing by the movant that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Vassey v. Burch*, 301 N.C. 68, 72, 269 S.E. 2d 137, 140 (1980).

At the time the parties entered into the contract, G.S. § 87-1 provided in pertinent part:

> [A] "general contractor" is defined as one who for a fixed price, commission, fee or wage, undertakes to . . . construct any building . . . where the cost for the undertaking is $30,000 or more. . . .

"The courts of this State have held that an unlicensed person who, in disregard of § 87-1, contracts with another to construct a building for the cost of $30,000.00 or more, may not affirmatively enforce the contract or recover for his services and materials supplied under theory of *quantum meruit* or unjust enrichment" (citations omitted). *Roberts v. Heffner*, 51 N.C. App. 646, 651, 277 S.E. 2d 446, 450 (1981). In interpreting § 87-1 and ascertaining the extent to which an undertaking and its cost should be attributed to a particular contractor, the courts in North Carolina have focused on the control exercised by the contractor over the project. As this Court stated in *Helms v. Dawkins*, 32 N.C. App. 453, 456, 232 S.E. 2d 710, 712 (1977), *overruled on other grounds, Sample v. Morgan*, 311 N.C. 717, 319 S.E. 2d 607 (1984):

> While several factors must be taken into consideration in determining whether a party is a general contractor within the meaning of the contractors' licensing statutes, the principal characteristic distinguishing a general contractor from a subcontractor or other party contracting with the owner, . . . is the degree of control to be exercised by the contractor over the construction of the entire project. Ordinarily the degree of control a contractor has over the construction of a

particular project is to be determined from the terms of the contract.

In the instant case, the parties failed to memorialize their agreement. From the evidence presented at trial as to the parties' conduct, it is clear that the plaintiff, although not licensed as a general contractor, met the threshold criteria of G.S. § 87-1 and that he exercised a substantial degree of control by his supervision of construction, his purchase of materials and his selection of material suppliers.

The purpose of chapter 87 of N.C.G.S. is to deter unlicensed persons from engaging in the construction business. *Bryan Builders Supply v. Midgette*, 274 N.C. 264, 270, 162 S.E. 2d 507, 510, 511 (1968). A person is a general contractor if the cost of the undertaking exceeds the statutory limit. The plaintiff asserts that the cost of the undertaking was limited to the amount of $16,785.57, the amount agreed upon for plaintiff's supervision and services. Plaintiff submits that the case of *Fulton v. Rice*, 12 N.C. App. 669, 184 S.E. 2d 421 (1971), is determinative as to the meaning of cost of the undertaking. In that case this Court defined undertaking as a promise or engagement. "The cost of the undertaking is therefore the cost of the promise or engagement." *Fulton*, 12 N.C. App. at 672, 184 S.E. 2d at 423. The Court reasoned that where the costs of the building and the contract are not the same, and the contractor has no control over the purchase of materials or other expenses which the owner might incur, allowing the owner's total cost of the building to be determinative would leave the contractor at the mercy of the owner. *Id. Fulton* is distinguishable from the instant case in that the plaintiff did retain control over the purchase of materials through his own bank account and accounts with the suppliers. The total estimated cost in excess of $63,000 was an estimate given by the plaintiff. The facts indicate that the plaintiff retained supervisory control over much of the work of the subcontractors and over purchases passing through his accounts. The purchases of materials alone totalled over $29,000. This figure together with the amount of $16,785.57 for the plaintiff's services and supervision well exceeds the threshold amount of $30,000 established by G.S. § 87-1.

Given the uncontroverted evidence of the plaintiff's continuing control over amounts exceeding $30,000, the trial judge's grant of summary judgment was proper and is affirmed.

Affirmed.

Judges MARTIN and PARKER concur.

STATE OF NORTH CAROLINA v. MARSHA W. LILLY

No. 8410SC822

(Filed 4 June 1985)

1. **Public Officers § 11— private use of public vehicle—statement of charges sufficient**

A misdemeanor statement of charges alleging unlawful use of a publicly owned vehicle was sufficient where it alleged that defendant was a State employee, that she directed her subordinate to pick up a birthday cake and deliver it to her home, and that she did so with knowledge that her private purpose would be accomplished through the use of a State owned motor vehicle. The charge was not defective in that it alleged that defendant directed her subordinate to use the vehicle for her private purpose rather than using the vehicle herself because one who commands another is guilty as an abettor, and all people who participate in the commission of a misdemeanor are principals. G.S. 14-247, G.S. 15A-924(a)(5).

2. **Public Officers § 11— private use of public vehicle—allowing use—instructions erroneous**

The trial court erred in its jury instructions in a prosecution for using a public vehicle for private purposes by instructing the jury that the State must prove that defendant's use or allowance of use of the motor vehicle was for any private purpose. G.S. 14-247 proscribes the use of a State vehicle for a private purpose and one who directs commission of that offense is guilty under the common law; however, neither the common law nor the statute extend to punishing a person for allowing its violation.

APPEAL by defendant from *Ellis, Judge*. Judgment entered 16 March 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 1 April 1985.

Defendant was charged, in a misdemeanor statement of charges, with unlawful private use of a publicly owned vehicle in violation of G.S. 14-247. She was convicted in Wake County District Court and appealed her conviction to Superior Court. Upon trial *de novo* in Superior Court, the jury returned a verdict of "[g]uilty of the private use or allowance of the private use of a motor vehicle belonging to the State of North Carolina on March

25, 1983." Defendant appealed from that verdict and the judgment entered thereon.

Attorney General Rufus L. Edmisten, by Associate Attorney Victor H. E. Morgan, Jr., for the State.

Manning, Fulton & Skinner, by Howard E. Manning, Jr. and Charles E. Nichols, Jr., for defendant appellant.

MARTIN, Judge.

Defendant on appeal alleges error in the denial of her motion to dismiss, the jury instructions, verdict and judgment. Because the instructions to the jury contain error prejudicial to the defendant, she must be accorded a new trial.

[1] Initially, defendant contends that the trial court erred in denying her motion to dismiss the misdemeanor statement of charges for its failure to charge a criminal offense. We disagree. G.S. 14-247, entitled "Private Use of a Publicly Owned Vehicle," provides in pertinent part:

> It shall be unlawful for any officer, agent or employee of the State of North Carolina, or of any county or of any institution or agency of the State, to use for any private purpose whatsoever any motor vehicle of any type or description whatsoever belonging to the State, or to any county, or to any institution or agency of the State.

A violation of the statute is a misdemeanor. The essential elements of the offense created by the statute are (1) the use of a publicly owned vehicle (2) by a public official or employee (3) for a private purpose. *Hawkins v. Reynolds*, 236 N.C. 422, 72 S.E. 2d 874 (1952).

The misdemeanor statement of charges alleged that defendant

> did unlawfully and willfully allow the use of a motor vehicle belonging to the State of North Carolina to be used for the defendant's private purpose while she was an officer, agent and employee of the State of North Carolina in her capicity [sic] as Food Service Director of the State of North Carolina; to wit: directing a subordinate employee Willie G. Reid to perform a personal errand for the benefit of the defendant

when she knew and had reason to know that a State vehicle would be used. The private purpose alleged being directing Willie G. Reid to go to Alamance County unit to pick up a birthday cake for her son and bring the cake to her home at 2101 Rangecrest Road, Raleigh, North Carolina. In violation of N.C.G.S. 14-247.

G.S. 15A-924(a)(5) requires that "[a] criminal pleading must contain: . . . [a] plain and concise factual statement . . . which . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." While the misdemeanor statement of charges does not represent a paradigm for legal draftsmanship, it meets the minimum requirements established by the foregoing statute. When all of the surplusage is excluded from consideration, the pleading asserts that defendant is a State employee, that she directed her subordinate to pick up a birthday cake and deliver it to her home, and that she did so with knowledge that her private purpose would be accomplished through the use of a State owned motor vehicle.

Defendant argues, however, that because the statement of charges alleges that she directed her subordinate to use the vehicle for her private purpose, rather than that she herself used the vehicle, the charge was defective. Her contention is incorrect. One who commands or procures another to commit an offense is an abettor. *State v. Hargett*, 255 N.C. 412, 121 S.E. 2d 589 (1961); *State v. Johnson*, 220 N.C. 773, 18 S.E. 2d 358 (1942). All persons who participate in the commission of a misdemeanor, as aiders, abettors or otherwise, are principals under the common law and may be charged and convicted as such, *State v. Avery*, 236 N.C. 276, 72 S.E. 2d 670 (1952); *State v. Graham*, 224 N.C. 351, 30 S.E. 2d 154 (1944), whether present or absent at the time of the commission of the offense. *State v. Bennett*, 237 N.C. 749, 76 S.E. 2d 42 (1953).

[2] Having concluded that the misdemeanor statement of charges is sufficient to support a conviction for violation of G.S. 14-247, we direct our attention to defendant's assignments of error relating to the jury instructions, verdict and judgment. Her assignments are well taken and must be sustained.

The trial court instructed the jury that, for conviction, the State was required to prove, among other things:

> [s]econdly . . . that the defendant, Marsha Lilly, while an . . . employee of the State of North Carolina . . . *used or allowed to be used* a motor vehicle belonging to the State. Used or allowed to be used means knowingly or having reason to know that it was being used for a private purpose; third, the State must prove that the defendant's *use or allowance of use* of the motor vehicle was for any private purpose whatsoever. [Emphasis supplied.]

In the final mandate, the court instructed:

> I further instruct you that if you find from the evidence that the State has proved beyond a reasonable doubt that on or about March 25th, 1983 the defendant, Marsha Lilly, was an employee of the State of North Carolina; that the defendant *used or allowed to be used* a motor vehicle belonging to the State of North Carolina, or any institution or agency of the State; and that the defendant *used or allowed to be used* a motor vehicle for any private purpose whatsoever; then it would be your duty to return a verdict of guilty on this charge. [Emphasis supplied.]

G.S. 14-247 proscribes the use of a State owned vehicle for a private purpose, and we have determined that, under the common law, one who *directs* the commission of that offense is guilty as well. Neither the common law nor the prohibition of the statute, however, extend to punish a person for *allowing* its violation.

> It is well established that in order for a defendant to be punished for criminal conduct, his actions must fall plainly within the prohibition of the statute which defines the crime. . . . Statutes which define criminal conduct may not be extended by mere intendment.

State v. Cole, 294 N.C. 304, 310, 240 S.E. 2d 355, 359 (1978). In addition, the instruction suggests that defendant would be guilty if she knew that a State vehicle was being used, or about to be used, for a private purpose and did nothing to prevent the illegal use. Merely having knowledge of the commission of a criminal offense, and doing nothing to prevent its commission, does not render one guilty. *State v. Hargett, supra.* We hold that it was er-

ror to instruct the jury that defendant would be guilty if she allowed the use of a State owned vehicle for a private purpose. That such error was prejudicial to defendant is apparent from the fact that the jury returned a verdict of "[g]uilty of the private use or allowance of the private use of a motor vehicle belonging to the State of North Carolina on March 25, 1983." Such a verdict is clearly erroneous because it includes a finding of guilt for an offense which is nonexistent, i.e., "allowance of the private use" of a State owned motor vehicle. The verdict, therefore, will not support the judgment entered in this case, and such judgment must be vacated and the case remanded for a new trial.

Because of our holding, we deem it unnecessary to address the remaining assignments of error.

New trial.

Chief Judge HEDRICK and Judge WELLS concur.

COLONIAL ACCEPTANCE CORPORATION v. NORTHEASTERN PRINTCRAFTERS, INC., L. F. AMBURN, JR., CHARLES O. TYSOR AND E. N. MANNING

No. 846SC1017

(Filed 4 June 1985)

Principal and Surety § 1.1— corporate surety—usury not a defense

The trial court properly granted summary judgment for plaintiff where defendant had raised the defense of usury in an action to recover an indebtedness from a corporation and its "guarantors," who in substance stood as sureties for the corporate debt. G.S. 24-9 prohibits a corporation or anyone in its behalf from claiming the defense of usury and a surety answers in behalf of the corporation and is precluded from raising the defense.

APPEAL by individual defendants from *Reid, Judge*. Judgment entered 23 May 1984 in BERTIE County Superior Court. Heard in the Court of Appeals 7 May 1985.

Plaintiff agreed in 1980 to advance business loans of up to $100,000 to defendant Northeastern, secured by a "Security Agreement" signed by defendant Amburn in his capacity as presi-

dent of Northeastern. Under the agreement, interest on the balance due was set at 9.5 percent plus the "formula rate," which was computed as 120 percent of the maximum commercial rate charged by New York banks. The effective interest rate under the agreement accordingly ran substantially over 20 percent throughout the loan period.

Amburn and co-defendants Tysor and Manning (all referred to hereinafter as "defendants") also executed a "Guaranty" simultaneously with and on the same form as the security agreement. Defendants, as individuals, guaranteed performance by Northeastern of all its contractual obligations. They agreed that their liability was "primary, direct and unconditional," enforceable without resort to prior action against Northeastern and without notice of default.

Northeastern defaulted in December 1982, owing at that time about $26,000. In March 1983 plaintiff filed the present action, seeking recovery of the indebtedness from Northeastern and defendants, "jointly and severally," as well as interest and attorney fees. Defendants attempted to raise the defense of usury, arguing that the interest on the corporate debt charged to them as individuals could not exceed the statutory maximum. On plaintiff's motion, the trial court granted summary judgment against defendants, specifically ruling that their defense of usury was "contrary to law." Defendants appealed.

Pritchett, Cooke & Burch, by Stephen R. Burch, for plaintiff.

W. T. Culpepper, III, for defendants.

WELLS, Judge.

The sole question presented by this appeal is whether these individuals may assert the defense of usury, or whether they are precluded therefrom by the provisions of N.C. Gen. Stat. § 24-9 (Cum. Supp. 1983).[1] This is a question of first impression in this state.

1. G.S. § 24-9 reads in full:

Notwithstanding any other provision of this Chapter or any other provision of law, any foreign or domestic corporation substantially engaged in commercial, manufacturing or industrial pursuits for pecuniary gain may agree

The statute prohibits a corporation, "its successors or anyone else in its behalf" from claiming the defense of usury. We therefore look first to determine defendants' relation to the corporate debtor. The agreement is labeled "Guaranty," but its substance, not the label, controls. *Trust Co. v. Creasy*, 301 N.C. 44, 269 S.E. 2d 117 (1980). It is clear from the language of the agreement that defendants, being directly and immediately liable, stood as sureties for the corporate debt. *Id.; Casualty Co. v. Waller*, 233 N.C. 536, 64 S.E. 2d 826 (1951). While a surety's liability is primary, defendants' liability is not, as they now contend, indistinguishable from that of the corporation. N.C. Gen. Stat. § 26-1 (Cum. Supp. 1983); *see E'Town Shopping Center, Inc. v. Lexington Finance Co.*, 436 S.W. 2d 267 (Ky. App. 1969) (fact that liability of guarantor is same as co-maker does not mean that two are identical).

A surety is one who promises to answer for the debt of another. *Casualty Co. v. Waller, supra.* Although the surety's obligation depends on the existence of a valid obligation of the principal, the surety may be sued immediately upon default. *Id.* As such, the surety performs a valuable and necessary commercial service. We conclude accordingly that the surety answers "in behalf" of the corporation within the meaning of G.S. § 24-9 and would, under the plain language of the statute, be precluded from raising the defense of usury.

The North Carolina surety law we have found tends to support this view. The obligation of a surety is ordinarily measured by the obligation of the principal. *Edgewood Knoll Apartments v. Braswell*, 239 N.C. 560, 80 S.E. 2d 653 (contractual limitations, not those in surety agreement, control), *reh'g denied and appeal dismissed*, 240 N.C. 760, 83 S.E. 2d 797 (1954). And a surety has usually been held to his or her contract, *see Holland v. Clark*, 67 N.C. 104 (1872) (surety and principal's agent, but not principal, liable); *Governor v. Matlock*, 9 N.C. (2 Hawks) 366 (1823) (fact that bond for larger penalty than required by law immaterial), except where the entire agreement is unenforceable. *Basnight v. Manu-*

to pay, and any lender may charge and collect from such corporation, interest at any rate which such corporation may agree to pay in writing, and as to any such transaction the claim or defense of usury by such corporation and its successors or anyone else in its behalf is prohibited.

facturing Co., 174 N.C. 206, 93 S.E. 734 (1917) (gaming contract). The legislature has recognized certain defenses of sureties as surviving provisions waiving defenses, but not usury. *See* N.C. Gen. Stat. § 26-9 (1965).

The usury statutes themselves formerly specifically limited the interest obligation of individual sureties on certain corporate indebtedness. N.C. Gen. Stat. § 24-8 (1965), *amended* 1969 N.C. Sess. Laws c. 1303, s. 5, *codified* N.C. Gen. Stat. § 24-8 (Cum. Supp. 1983). The statute under consideration here, G.S. § 24-9, has never contained such a limitation. Its repeal in G.S. § 24-8 suggests a legislative decision to preclude individual sureties from raising the defense of usury in *any* action on corporate debts.

By holding that individual sureties may not assert usury where the principal corporate debtor may not, we adhere to the clear majority rule. *See* Annot., 63 A.L.R. 2d 924 § 12 (1959 and Later Case Service 1984). No equitable factors which have motivated other states to allow the defense appear in this record. *See Tuttle v. Haddock*, 213 Va. 63, 189 S.E. 2d 363 (1972) (state law prohibited securing of loans with residential real estate); *Palmetto Federal Sav. and Loan Ass'n v. Mullen*, 275 S.C. 317, 270 S.E. 2d 437 (1980) (loan actually personal in nature, made through corporate intermediary to allow higher interest). *Meadow Brook National Bank v. Recile*, 302 F. Supp. 62 (E.D. La. 1969), relied on heavily by defendants, allowed the defense admittedly despite persuasive authority *contra* and with no case support, and constituted a federal prediction of state law. *Id.* As such, it is doubtful precedent, and has since been overruled by legislative enactment. *See Matter of LeBlanc*, 622 F. 2d 872, *reh'g denied*, 627 F. 2d 239 (5th Cir. 1980). Under substantially similar statutory language ("successors or anyone in their behalf") the Supreme Court of Georgia recently reached a result identical to that we reach today. *Fidelcor Mortgage Co. v. Tyroff*, 250 Ga. 900, 302 S.E. 2d 96 (1983).

We are aware of the many conflicting policy considerations involved in this case. *See generally* Comment, Usury Law in North Carolina, 47 N.C.L. Rev. 761 (1969). Those conflicting policy considerations are for the legislature to resolve, and it is our conclusion that under our present statutes, these conflicting considerations have been resolved against defendants.

Defendants ask that we nevertheless grant the corporation relief from an unconscionable contract. They did not plead unconscionability in the trial court, nor have they shown how the contract interest was oppressively higher than rates charged similar corporate borrowers. The question is not properly before us and we decline to reach it.

The order of the trial court is

Affirmed.

Judges JOHNSON and COZORT concur.

JOHN H. JOHNSON v. THE CITY OF WINSTON-SALEM

No. 8421SC1038

(Filed 4 June 1985)

Municipal Corporations § 17.1— injury from sidewalk collapse—res ipsa loquitur—summary judgment for defendant improper

Summary judgment was improper for defendant City where plaintiff was walking along a sidewalk which was under the City's exclusive control, plaintiff was injured when the sidewalk collapsed, and none of the evidence tended to give an explanation for the giving way of the concrete sidewalk. Plaintiff's evidence was sufficient to invoke the doctrine of *res ipsa loquitur*, and that doctrine raises genuine issues of material fact as to negligence and proximate cause.

Judge WHICHARD dissenting.

APPEAL by plaintiff from *Albright, Judge*. Order entered 22 August 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 8 May 1985.

This is a civil action wherein plaintiff seeks to recover damages for personal injuries allegedly resulting when a public sidewalk under defendant's control collapsed under plaintiff's weight.

Defendant filed an answer denying the material allegations in plaintiff's complaint and alleging contributory negligence on the part of the plaintiff.

Defendant filed a motion for summary judgment which it supported with the pleadings, defendant's answers to plaintiff's interrogatories and plaintiff's testimony upon deposition. Plaintiff responded in opposition to the motion relying upon the pleadings, defendant's answers to plaintiff's interrogatories, plaintiff's testimony upon deposition and affidavits.

From summary judgment for defendant plaintiff appealed.

The Law Firm of Billy D. Friende, Jr., by Donald R. Buie, for plaintiff, appellant.

Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr., and Gusti W. Frankel, for defendant, appellee.

HEDRICK, Chief Judge.

Although the question is not raised or discussed by either party, we hold the evidentiary matter offered in evidence by plaintiff in opposition to defendant's motion for summary judgment is sufficient to invoke the doctrine of *res ipsa loquitur*, and such doctrine raises genuine issues of material fact as to negligence and proximate cause requiring us to reverse summary judgment for the defendant.

In order to invoke the doctrine of *res ipsa loquitur* plaintiff must show, "(1) that there was an injury, (2) that the occurrence causing the injury is one which ordinarily doesn't happen without negligence on someone's part, (3) that the instrumentality which caused the injury was under the exclusive control and management of the defendant." *Jackson v. Gin Co.*, 255 N.C. 194, 197, 120 S.E. 2d 540, 542 (1961). Where the plaintiff's evidence justifies the application of the doctrine of *res ipsa loquitur*, the nature of the occurrence itself and the inferences drawn from the evidence are sufficient to enable plaintiff, without direct proof of negligence, to make out a *prima facie* case and carry the case to the jury. *Young v. Anchor Co.*, 239 N.C. 288, 79 S.E. 2d 785 (1954). If more than one inference can be drawn from the facts, when defendant's negligence is the most likely cause of the injury, the doctrine of *res ipsa loquitur* should apply. *McPherson v. Hospital*, 43 N.C. App. 164, 258 S.E. 2d 410 (1979).

In the present case the forecast of evidence for plaintiff is that the sidewalk along which plaintiff was walking was under

the exclusive control of the City of Winston-Salem, *Husketh v. Convenient Systems*, 295 N.C. 459, 245 S.E. 2d 507 (1978), and plaintiff was injured when the sidewalk collapsed. None of the evidence contained in support of and in opposition to the motion for summary judgment tends to give an explanation for the giving way of the concrete sidewalk. We are of the opinion that the evidence is sufficient to raise genuine issues of material fact as to defendant's negligence and as to whether such negligence was the proximate cause of plaintiff's injury.

Reversed and remanded.

Judge WEBB concurs.

Judge WHICHARD dissents.

Judge WHICHARD dissenting.

Given the extent of the duty the law imposes on a municipality to pedestrians on its streets or sidewalks, I do not agree that the matter offered in evidence by plaintiff in opposition to defendant's motion for summary judgment is sufficient to raise a genuine issue of material fact as to defendant's negligence.

Res ipsa loquitur is not an independent basis for imposing liability. It imposes no duties on the defendant. *Res ipsa* is merely a method by which the plaintiff proves defendant's violation of the duty the law imposes. Byrd, *Proof of Negligence in North Carolina: Part I. Res Ipsa Loquitur*, 48 N.C.L. Rev. 452, 458-59 (1970). The effectiveness of the doctrine to show a breach of defendant's duty depends both upon the extent and nature of the duty owed and upon the circumstances shown by the evidence. Byrd at 459, citing *Lippard v. Johnson*, 215 N.C. 384, 1 S.E. 2d 889 (1939), and *Boone v. Matheny*, 224 N.C. 250, 29 S.E. 2d 687 (1944).

The law imposes on a municipality the duty of correcting defects on its streets and sidewalks within a reasonable time after it knows or should know that the defect exists and is a hazard to persons using the street or walk in a proper manner. *Gower v. Raleigh*, 270 N.C. 149, 151, 153 S.E. 2d 857, 859 (1967); *Waters v. Roanoke Rapids*, 270 N.C. 43, 153 S.E. 2d 783 (1967); *Smith v. Hickory*, 252 N.C. 316, 113 S.E. 2d 557 (1960); *Fitz-*

gerald v. Concord, 140 N.C. 110, 52 S.E. 309 (1905); *McClellan v. City of Concord*, 16 N.C. App. 136, 138, 191 S.E. 2d 430, 432 (1972). A municipality

> is not liable to every pedestrian who falls and sustains an injury by reason of . . . a defect in its sidewalk . . . . [It] is not liable . . . unless it was negligent in failing to correct the defect within a reasonable time after it knew, or should have known, that it existed and was a hazard to persons using the . . . walk in a proper manner. *Gower*, 270 N.C. at 151, 153 S.E. 2d at 859.

The forecast of evidence here is clear that if a defect in the sidewalk existed it was neither observable nor foreseeably injurious to plaintiff, nor could it have been discovered by reasonable inspection. Thus, the notice requirement imposed by the cases cited herein has not been met. To apply the doctrine of *res ipsa loquitur* in such a situation would enlarge the duty of care now imposed by law on municipalities. *See e.g. Wallerman v. Grand Union Stores*, 221 A. 2d 513 (N.J. 1966) (customer who slipped on string bean recovered under *res ipsa* without evidence of how long bean had been on floor or who put it there; deliberate policy decision to enlarge proprietor's duty); *Dement v. Olin-Mathieson Chem. Corp.*, 282 F. 2d 76 (5th Cir. 1960) (*res ipsa* applied to multiple defendants for policy reasons).

Our Supreme Court has stated expressly that "[t]he doctrine of *res ipsa loquitur* does not apply in actions against municipalities by reason of injuries to persons using its public streets." *Gettys v. Marion*, 218 N.C. 266, 269, 10 S.E. 2d 799, 801 (1940). Because the notice requirement applies to defects in sidewalks as well as streets, the above rule would appear equally applicable in sidewalk cases. *Smith*, 252 N.C. at 318, 113 S.E. 2d at 559.

In my view the effect of the majority's application of *res ipsa loquitur* is to abrogate existing limits on a municipality's liability for injuries caused by defects in its streets or sidewalks. Such abrogation is the prerogative of the Supreme Court or the legislature, not of this Court.

Finding no forecast of evidence that defendant municipality knew or should have known of the defect in its sidewalk which allegedly caused plaintiff's injuries, I believe summary judgment

for defendant was proper under the well-established case law of this jurisdiction. I therefore vote to affirm.

ROBERT JEFFREY LAUGHTER v. SOUTHERN PUMP & TANK CO., INC.

No. 8429SC1039

(Filed 4 June 1985)

Negligence § 30— fire truck accident—summary judgment for defendant improper

Summary judgment for defendant was improper in an action in which plaintiff, a volunteer fireman, was injured when he responded to a call in a truck on which defendant had mounted a 2,000 gallon water tank because reasonable persons could reach different conclusions on the evidence forecast. Defendant's evidence was that the fire truck had maintained a speed of about 58 miles per hour and remained in its lane without swaying before the accident; that the right front wheel of the truck had dropped off the right shoulder of the road as plaintiff attempted to negotiate a tricky left turn on the mountainous rural paved road; that plaintiff swung the truck to the left and that the truck turned over, rolling side to side then flipping end over end for about 150 feet; and that the water tank remained attached to the chassis while the truck was rolling but the chassis became detached from the truck by the time it stopped rolling. Plaintiff offered the affidavit of an expert in accident reconstruction that certain welds were of poor quality and separated while the truck was making a left turn, causing an unstable water tank condition which led to loss of control of the vehicle.

APPEAL by plaintiff from *Lamm, Judge.* Judgment entered 21 May 1984 in Superior Court, HENDERSON County. Heard in the Court of Appeals 8 May 1985.

In an action for negligence and breach of warranty summary judgment was entered for defendant, from which plaintiff appeals.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Allan R. Tarleton, for plaintiff appellant.

Caudle & Spears, P.A., by Lloyd C. Caudle, for defendant appellee.

WHICHARD, Judge.

This action arises out of an accident involving a fire truck which occurred on Terry's Gap Road in Henderson County. On 3 November 1978 plaintiff, a volunteer fireman, responded to a fire

alarm in the department's truck, a 1972 or 1973 model Chevrolet on the chassis of which was welded a 2,000 gallon water tank. Defendant sold and mounted the tank. The truck rolled down a hill and plaintiff was thrown from the cab, sustaining injuries. Plaintiff contends in his complaint that due to defendant's faulty welding "the water tank suddenly broke loose from the truck chassis on the left side, causing the vehicle to go out of control, leave the roadway and overturn."

The issue is whether summary judgment for defendant was properly granted. Because we have determined that it was not, we reverse.

Before entry of summary judgment the court must determine by the record that no genuine issue of material fact exists and that a party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56; *Williams v. Power and Light Co.*, 296 N.C. 400, 402, 250 S.E. 2d 255, 257 (1979); *A-S-P Associates v. City of Raleigh*, 38 N.C. App. 271, 274, 247 S.E. 2d 800, 803 (1978), *rev'd on other grounds*, 298 N.C. 207, 258 S.E. 2d 444 (1979). Summary judgment is a drastic measure and should be used with caution, *Williams*, 296 N.C. at 402, 250 S.E. 2d at 257, especially in a negligence action in which the jury ordinarily applies the reasonable person standard to the facts. *Id. See also Page v. Sloan*, 281 N.C. 697, 706, 190 S.E. 2d 189, 194 (1972). After reviewing the record we have determined that there is a genuine issue of material fact about which reasonable minds could differ that must be resolved by the jury.

The material offered by defendant in support of its motion contains the affidavit of the only eyewitness to the accident, a licensed practical nurse who spotted the fire truck and followed it for about three miles until it wrecked. Her affidavit forecasts the following evidence: Prior to the accident the fire truck maintained a speed of about 58 m.p.h. and remained in its lane without swaying. As plaintiff attempted to negotiate a tricky left turn on a mountainous rural paved road the right front wheel of the truck dropped off the right shoulder of the road. Plaintiff swung the truck to the left and the truck turned over, first rolling side over side and then flipping end over end. The truck travelled about 150 feet in this manner. The water tank remained attached to the chassis while the truck was rolling. All of the parts of the truck

remained intact while the truck rolled. By the time the rolling stopped the chassis had become detached from the truck. Plaintiff was thrown about two and one-half car lengths from the truck.

The material offered by plaintiff contained the affidavit of his expert in accident reconstruction who, on 16 November 1978, 12 December 1978, and 13 December 1978 visited the scene of the accident and the garage which housed the wrecked fire truck. He noted that the water tank was partially attached to the frame of the truck. From his examination of the accident scene and the vehicle involved plaintiff's expert concluded:

> a. That the welds attaching the tank bracket to the truck frame on the left side of the truck (as viewed from the rear) separated while the truck was making a left-hand turn, resulting in an unstable water tank condition which, in turn caused a loss of control of the vehicle;
>
> b. That the loss of control due to the unstable water tank caused the fire truck to partially leave the paved surface of the roadway on the right side and then to cross the highway and roll over to the point of rest;
>
> c. That the likely cause of the separation of the mounting brackets from the vehicle frame was the poor quality of the welds holding the brackets to the frame;
>
> d. That on certain of the welds, the welding did not penetrate the frame or bracket sufficiently to create a bond adequate to resist the stress created by the [dynamic] forces of the cargo within the tank during the turn being made at the time of the accident.

In our opinion reasonable persons could reach different conclusions on the evidence forecast. *Page*, 281 N.C. at 708, 190 S.E. 2d at 195. Reasonable persons could conclude, for example, that plaintiff simply ran off the road while maneuvering a difficult left turn at a high rate of speed without exercising due care. They could also conclude, however, that "certain of the welds . . . did not penetrate the frame . . . sufficiently" to withstand the stress created by a 2,000 gallon water tank mounted on a truck driven by one exercising due care and that this, rather than plaintiff's lack of due care, caused the accident. If the evidence is conflicting on issues of negligence or contributory negligence, issues of fact

are raised which may not be answered by the court as a matter of law. *Williams*, 296 N.C. at 405, 250 S.E. 2d at 259. Summary judgment for defendant therefore is reversed and the case remanded for trial.

Reversed and remanded.

Chief Judge HEDRICK and Judge WEBB concur.

ANN F. McKENZIE v. OWEN RAY McKENZIE

No. 8415DC999

(Filed 4 June 1985)

Divorce and Alimony § 30— equitable distribution—improper before absolute divorce

Pursuant to G.S. 50-21(a), the trial court was without authority to enter an order of equitable distribution with the consent of the parties prior to a decree of absolute divorce.

Judge PHILLIPS concurring.

APPEALS by plaintiff and defendant from *Washburn, Judge.* Judgment entered 13 June 1984 in District Court, ALAMANCE County. Heard in the Court of Appeals 17 April 1985.

Plaintiff instituted this action seeking a divorce from bed and board and an equitable distribution of the marital property. With the consent of the parties, the court entered an order on 12 May 1983 granting the parties a divorce from bed and board and ordering the parties to prepare for and appear at a hearing for the purpose of equitably distributing the marital property. The parties consented to an equitable distribution of the marital property regardless of whether or not an absolute divorce had been granted at the time of the distribution. On 13 June 1984, with the consent of the parties, the court entered an order equitably distributing the parties' property. The parties appeal from that order.

Daniel H. Monroe and Latham and Wood, by James F. Latham and William Eagles, for plaintiff.

Vernon, Vernon, Wooten, Brown & Andrews, P.A., by Wiley P. Wooten and T. Randall Sandifer, for defendant.

JOHNSON, Judge.

At the time the order of equitable distribution was entered, the parties had not received an absolute divorce, nor had they received an absolute divorce at the time of oral argument, as counsel conceded in oral argument. G.S. 50-21(a) specifically provides:

> Upon application of a party to an action for divorce, an equitable distribution of property *shall follow* a decree of absolute divorce. . . . The equitable distribution *may not precede* a decree of absolute divorce. (Emphasis added.)

Although the court had jurisdiction over the parties and their property, it was without authority to enter the order of equitable distribution preceding an absolute divorce in light of the explicit language of G.S. 50-21(a). The order of the trial court is a nullity and must be vacated.

Vacated.

Judges WHICHARD and PHILLIPS concur.

Judge PHILLIPS concurring.

Though the judicial settlement of marital suits on almost any terms agreeable to the parties is strongly encouraged by public policy, the judicial settlement undertaken in this instance has been expressly forbidden by our law making body and we cannot enforce it. Equitable distribution before divorce has been banned, I suppose, because the General Assembly is interested in achieving finality as well as equity in marital adjudications and a distribution made before the decree is more subject to upset than one made after the decree. In all events the legislative ban is too plain for us to disregard it, though doing so might expedite the settlement of this particular case.

E. L. MORRISON LUMBER CO., INC., PLAINTIFF v. VANCE WIDENHOUSE CONSTRUCTION, INC., AND AETNA CASUALTY AND SURETY CO., DEFENDANT, AND C K FEDERAL SAVINGS & LOAN ASSOCIATION, DEFENDANT AND THIRD PARTY PLAINTIFF v. STEWART TITLE GUARANTY COMPANY AND STEWART TITLE OF SALISBURY, INC., THIRD PARTY DEFENDANT

No. 8419SC1125

(Filed 4 June 1985)

Appeal and Error § 9— appeal on third-party issue—voluntary dismissal of original complaint—appeal dismissed

An appeal by C K Federal Savings and Loan from summary judgment for the third-party defendant was dismissed where the original plaintiff took a voluntary dismissal of its complaint against C K Federal Savings and Loan.

APPEAL by third-party plaintiff from *Hairston, Judge*. Judgment entered 7 August 1984 in Superior Court, CABARRUS County. Heard in the Court of Appeals 14 May 1985.

This is a civil action wherein E. L. Morrison Lumber Co. sued Vance Widenhouse Construction, Inc., Aetna Casualty and Surety Co. and C K Federal Savings & Loan Association to recover for labor and materials allegedly furnished for improvements upon property prior to the issuance of a deed of trust on the property. In response to this suit C K Federal Savings and Loan filed a third-party complaint against Stewart Title Guaranty Company and Stewart Title of Salisbury, Inc., seeking to "be indemnified by said third-party defendants with respect to any amount which the plaintiff Morrison may recover of the defendant C K Federal in this action, together with all costs and expenses incurred by C K Federal in its defense. . . ." The third-party defendants answered and conducted discovery. Following discovery, the third-party defendants moved for summary judgment. Summary judgment was granted on 7 August 1984. From this Order C K Federal Savings and Loan appealed. On 12 September 1984, E. L. Morrison Lumber Co. took a voluntary dismissal of its action against Vance Widenhouse Construction, Inc., C K Federal Savings & Loan Association and Aetna Casualty and Surety Co.

Hartsell, Hartsell & Mills, by Fletcher L. Hartsell, Jr., for third-party plaintiff appellant.

Hancock & Hundley, by R. Darrell Hancock and George R. Hundley, for third-party defendant appellee.

ARNOLD, Judge.

"When, pending an appeal . . ., a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court." *Parent-Teacher Assoc. v. Bd. of Education*, 275 N.C. 675, 679, 170 S.E. 2d 473, 476 (1969). In the case *sub judice*, when the plaintiff took a voluntary dismissal of its complaint against C K Federal Savings and Loan, the Savings and Loan attempt to obtain indemnification from the third-party became moot, thus, necessitating the dismissal of this appeal.

Appeal dismissed.

Judges MARTIN and PARKER concur.

ROY BAKER v. SARA JAMISON DUHAN AND SHIRLEY P. JAMISON

No. 8418SC1252

(Filed 4 June 1985)

1. Landlord and Tenant § 8.3— failure to keep common areas in safe condition— sufficient evidence of negligence

Plaintiff tenant's evidence was sufficient to make out a *prima facie* case of negligence by defendant landlords where it tended to show that a hole caused by the removal of a bush was an unsafe condition on defendants' premises; defendants had constructive notice of the unsafe condition but failed to repair it; and defendants' failure to repair the unsafe condition was a proximate cause of plaintiff's injury.

2. Landlord and Tenant § 8.4— tenant's knowledge of dangerous condition—no contributory negligence as matter of law

Plaintiff tenant was not contributorily negligent as a matter of law in forgetting about a hole in a common area of the leased premises caused by the

removal of a bush where it was dark when plaintiff stepped into the hole and was injured, grass had grown around the hole, and a period of time had elapsed since defendant had learned of the hole.

APPEAL by plaintiff from *Washington, Judge.* Judgment entered 16 October 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 17 May 1985.

This is a civil action wherein plaintiff seeks to recover damages for injuries allegedly received by plaintiff when he stepped in a hole allegedly under defendants' control. At the close of plaintiff's evidence, a directed verdict was entered in favor of defendants. From that judgment plaintiff appealed.

Smith, Patterson, Follin, Curtis, James and Harkavy, by Norman B. Smith and Davison M. Douglas, for plaintiff, appellant.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr., for defendants, appellees.

HEDRICK, Chief Judge.

Plaintiff's evidence reveals the following: Plaintiff rents from defendants a mobile home and the corner lot on which it is situated. The lot fronts on a public street and is adjacent to a private drive. There is a walkway from the mobile home to the private street. In the early morning hours of 12 November 1981 plaintiff returned home from his game room business and parked his car on the private street near his trailer. He got out of his car, began walking toward his home, and immediately stepped in a hole approximately 10 inches wide and 10 inches deep, breaking a bone beneath his knee. The hole was caused by the removal of a bush some time prior to plaintiff's accident. Plaintiff further testified that he had known of the hole, but "over time I had forgotten about it." Plaintiff also testified that he had told defendants' agent, who collected the rent, that "[y]ou ought to come down and fill that hole up."

N.C.G.S. Sec. 42-42(a)(3) of North Carolina's Residential Rental Agreements Act in pertinent part provides that a landlord shall "[k]eep all common areas of the premises in safe condition." This Court, in *Lenz v. Ridgewood Associates*, 55 N.C. App. 115, 121, 284 S.E. 2d 702, 706 (1981), *disc. rev. denied*, 305 N.C. 300, 290

S.E. 2d 702 (1982), has stated that such a duty "implies the duty to make reasonable inspection and correct an unsafe condition which a reasonable inspection might reveal. . . ."

[1] In the present case, plaintiff is entitled to have his evidence taken in the light most favorable to him. When that is done, a jury may be permitted but is not required to find that plaintiff was defendants' tenant; that the hole was an unsafe condition on defendants' premises; that defendants had constructive notice of the unsafe condition; that defendants failed to exercise ordinary care to repair the unsafe condition; and that defendants' failure to repair the unsafe condition was a proximate cause of plaintiff's injury. This evidence is sufficient to constitute a *prima facie* case.

[2] Defendants contend that, as a matter of law, plaintiff's prior knowledge of the dangerous condition operates to hold him contributorily negligent. We disagree. The general rule is that a person will not be held contributorily negligent as a matter of law for forgetting a known danger when, under the circumstances of the particular situation, a person of ordinary prudence would have forgotten or would have been inattentive to the danger because of the surrounding circumstances. *Dennis v. Albemarle*, 242 N.C. 263, 87 S.E. 2d 561 (1955). On the facts of this case, we cannot say whether the surrounding circumstances—darkness, a growth of grass around the hole, the lapse of time between plaintiff's awareness of the hole and his injury—are sufficient to excuse plaintiff's contributory negligence. We believe, however, that the better view is to allow the jury to decide whether a person of ordinary prudence would have forgotten or would have been inattentive to the unsafe condition because of the surrounding circumstances.

The case of *Walls v. Winston-Salem*, 264 N.C. 232, 141 S.E. 2d 277 (1965), cited by defendants, is inapplicable here, as the hole into which that plaintiff fell was always obvious and did not ever become latent, as did the hole in this case.

Because plaintiff has made a *prima facie* showing of negligence and defendants' defense of contributory negligence is a question of fact for the jury, the directed verdict for defendants was improper.

Reversed and remanded.

Judges WEBB and WHICHARD concur.

CAROLINA SQUIRE, INC. v. CHAMPION MAP CORPORATION

No. 845SC1166

(Filed 4 June 1985)

Rules of Civil Procedure § 13— *complaint dismissed—compulsory counterclaim*

There was no error in dismissing plaintiff's claim as a compulsory counterclaim to a pending declaratory judgment action where both actions arose from the same franchise agreement, both were brought about by the same set of occurrences, the claim asserted in this action was clearly extant during the pleading phase of the declaratory judgment action, none of the exceptions to the compulsory counterclaim provisions of G.S. 1A-1, Rule 13(a) were applicable, and plaintiff made no showing that it would be jeopardized if all issues were adjudicated in a single action.

APPEAL by plaintiff from *Fountain, Judge*. Order entered 10 September 1984 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 15 May 1985.

This is a civil action wherein plaintiff Carolina Squire seeks damages from defendant Champion Map Corporation for alleged breach of contract, interference with plaintiff's performance under the contract, and unfair and deceptive trade practices and methods.

Defendant Champion filed a motion to dismiss under Rule 13(a), N.C. Rules Civ. Proc., contending that the claims asserted in the present action were required to be asserted as compulsory counterclaims in a declaratory judgment action which was pending in Superior Court, Mecklenburg County. After a hearing on the motion the trial judge entered an order dismissing plaintiff's action without prejudice to file the claims asserted in this action as counterclaims in the pending action.

Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams, for plaintiff, appellant.

Kennedy, Covington, Lobdell & Hickman, by John M. Murchison, Jr., and Eugene C. Pridgen, for defendant, appellee.

HEDRICK, Chief Judge.

The question raised by this appeal is whether the trial court properly held that plaintiff's claims in the present action should have been raised as compulsory counterclaims in the previously filed declaratory judgment action and thus that plaintiff's claim should be dismissed. Plaintiff claims that, although both suits are based on the same contract and a common factual background, the nature of the actions is so disparate that the claims are not logically related, and thus the claims made in the instant action cannot be compulsory counterclaims of the pending declaratory judgment action. Defendant counters that the two suits are logically related in that the suits involve the same parties, the same franchise agreement, and the same questions as to whether either of the parties breached the franchise agreement.

G.S. 1A-1, Rule 13(a) states in relevant part:

> *Compulsory Counterclaims.*—A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . .

The purpose of Rule 13(a), which makes certain counterclaims compulsory, is to foster judicial economy by requiring that one court resolve all related claims in a single action. *Gardner v. Gardner*, 294 N.C. 172, 240 S.E. 2d 399 (1978).

In *Atkins v. Nash*, 61 N.C. App. 488, 300 S.E. 2d 880 (1983), this Court found that a subsequently filed claim for specific performance was a compulsory counterclaim in a prior action for damages for breach of a real estate exchange contract. In that case the court explained that both suits clearly arose out of the same transaction, both claims were extant during the pleading phase of the initial suit, and none of the exceptions to the compulsory counterclaim provision of Rule 13(a) were applicable. The instant case presents a situation similar to that analyzed in *Atkins*.

Although the suit filed first was for declaratory judgment and the present claim is for damages, both actions arise out of the

same franchise agreement and both were brought about by the same set of occurrences. The claim asserted in the present suit was clearly extant during the pleading phase of the pending action for declaratory judgment. None of the exceptions to the compulsory counterclaim provisions of Rule 13(a) are applicable. Furthermore, plaintiff has made no showing that its rights will be jeopardized if all issues are adjudicated in a single action. We therefore hold that the trial court did not err in dismissing plaintiff's claim.

Affirmed.

Judges WEBB and WHICHARD concur.

KEITH W. LANDRETH v. SALEM PROPERTIES, A NORTH CAROLINA GENERAL PARTNERSHIP; AND SALEM SQUARE OWNERS ASSOCIATION, A NORTH CAROLINA NON-PROFIT CORPORATION

No. 8421DC1247

(Filed 4 June 1985)

Appeal and Error § 6.2— appeal from amendment of judgment—appeal premature

An appeal from an amendment of a judgment changing the dismissal of plaintiff's claim to a judgment without prejudice was dismissed as premature.

APPEAL by defendant from *James A. Harrill, Jr., Judge.* Order entered 21 September 1984 in District Court, FORSYTH County. Heard in the Court of Appeals 17 May 1985.

The defendant appeals from the amendment of a judgment dismissing the plaintiff's claim. The plaintiff filed this action on 9 July 1982 claiming damages for the diversion of water onto his property. The defendant filed an answer. The case was apparently placed on a cleanup calendar and on 15 June 1983 was dismissed with prejudice on 15 June 1983 for failure to prosecute. The plaintiff made a motion to set aside the dismissal which was denied on 12 July 1984. On 21 September 1984 the Court on its own motion amended the judgment of dismissal so that the judgment was entered without prejudice. The defendant appealed and

the plaintiff cross assigned error to the judgment of dismissal entered 15 June 1983.

David Crescenzo for plaintiff appellee.

Joseph T. Carruthers for defendants appellants.

WEBB, Judge.

Although neither party has raised a question as to the appealability of the Court's order we should dismiss the appeal on our own motion if it is not appealable. *Metcalfe v. Palmer*, 46 N.C. App. 622, 265 S.E. 2d 484 (1980). We believe we are bound by *Metcalfe* to dismiss the appeal in this case. In *Metcalfe* this Court dismissed as premature an appeal from an order setting aside a judgment dismissing a case for the plaintiff's failure to prosecute. The only difference between that case and this one is that in this case the Court amended a judgment rather than setting it aside. We believe this is a distinction without a difference.

Appeal dismissed.

Chief Judge HEDRICK and Judge WHICHARD concur.

NICOLA CAROLINE APPELBE v. RONALD WRIGHT APPELBE

No. 8521DC52

(Filed 4 June 1985)

Divorce and Alimony § 24.10— child support for college education—complaint properly dismissed

Plaintiff's complaint seeking support from her father for her college education was properly dismissed for failing to state a claim upon which relief could be granted where she had graduated from high school, was eighteen and one-half years old, and suffered no handicap on the present record. North Carolina courts do not have the authority to order child support for children who have reached their majority except in cases of mental or physical handicap or to complete secondary schooling. G.S. 50-13.8, G.S. 50-13.4(c).

APPEAL by plaintiff from *Albright, Judge*. Judgment entered 24 October 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 3 June 1985.

Plaintiff daughter brought the present action against defendant father to obtain support for her college education. In her complaint, plaintiff alleges the following facts: Plaintiff graduated from high school and was eighteen and one-half years of age when she instituted this action; Guilford College approved her application for admission; plaintiff's mother is unable to fund plaintiff's college education. Plaintiff's complaint does not allege any contractual support obligation owed by plaintiff's father. From judgment dismissing plaintiff's complaint for failure to state a claim on which relief could be granted, plaintiff appealed.

Randolph and Tamer, by Clyde C. Randolph, Jr., and Rebekah L. Randolph, for plaintiff, appellant.

David B. Hough for defendant, appellee.

HEDRICK, Chief Judge.

North Carolina courts do not have authority to order child support for children who have reached their majority, *Gates v. Gates*, 69 N.C. App. 421, 317 S.E. 2d 402 (1984), *affirmed*, 312 N.C. 620, 323 S.E. 2d 920 (1985) (*per curiam*), except in cases of mental or physical handicap. N.C. Gen. Stat. Sec. 50-13.8. We have uniformly rejected claims by or on behalf of adult children for support for college education. *See Nolan v. Nolan*, 20 N.C. App. 550, 202 S.E. 2d 344, *cert. denied*, 285 N.C. 234, 204 S.E. 2d 24 (1974); *Crouch v. Crouch*, 14 N.C. App. 49, 187 S.E. 2d 348, *cert. denied*, 281 N.C. 314, 188 S.E. 2d 897 (1972). We note that the General Assembly has recently established an obligation for support for children 18 and older, but only to complete secondary schooling. 1983 N.C. Sess. Laws c. 54, *codified at* N.C. Gen. Stat. Sec. 50-13.4(c). The legislature having recently expressed our State's public policy on the matter, we must accept it. The cases cited by plaintiff in which other states have allowed support for education past majority involve situations in which such court-ordered support is authorized by statute. Plaintiff has not shown, nor do we know of, any North Carolina statute allowing such an award. Plaintiff has graduated from high school, aged eighteen and one-half years, and suffers no handicap on the present record. She therefore has failed to state a claim for relief.

Affirmed.

Judges WELLS and COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 JUNE 1985

CITY OF HENDERSON v. EDWARDS No. 849SC1171	Vance (82CVS1)	Affirmed
DANIEL v. KEECH No. 842SC983	Beaufort (83CVS339)	No Error
DOWLING v. BATTAGLIA No. 8430SC1287	Jackson (84CVS67)	Dismissed
HALES v. MARLOWE No. 857SC30	Wilson (82CVS1235)	No Error
JACKSON v. COUNTY OF CUMBERLAND No. 8510IC1	Industrial Commission (I-4491)	Dismissed
KIDDSHILL PLAZA v. FOSTER-STURDIVANT CO. No. 8510SC56	Wake (84CVS3288)	Dismissed
MARTIN v. MARTIN No. 8427DC1205	Gaston (83CVD2588)	Vacated
MORTON v. TROTT No. 844SC877	Onslow (81CVS1799) (84SP15)	No Error
NEWBY v. NEWBY No. 8415DC1063	Chatham (81CVD160)	Affirmed
PROCTOR v. WARREN WILSON COLLEGE No. 8428SC1256	Buncombe (83CVS2671)	Reversed & Remanded
SKINNER v. NC DEPT OF CORRECTION No. 8410IC1062	Industrial Commission (TA-8745)	Affirmed
SOWELL v. PHILLIPS DIAMONDS No. 8410IC1238	Industrial Commission (I-3013)	Affirmed
STATE v. ALBRITTON No. 842SC1329	Beaufort (84CRS998) (84CRS999) (84CRS1000) (84CRS1002) (84CRS1003) (84CRS1006)	Affirmed

STATE v. CURTIS No. 8425SC559	Caldwell (83CRS3769)	No Error
STATE v. GIVENS No. 8515SC53	Orange (84CRS2670) (84CRS2671)	No Error
STATE v. HALL & STYERS No. 8523SC73	Yadkin (84CRS839) (84CRS843)	Vacated & Remanded
STATE v. RANKINS No. 8518SC15	Guilford (84CRS26947)	No Error
STATE v. RUSS No. 8413SC1286	Bladen (83CRS3572) (83CRS3573) (83CRS3574)	No Error
STATE v. STRICKLIN No. 8416SC1072	Scotland (83CRS2641)	No Error
STATE v. TALBERT No. 8420SC947	Stanly (84CRS398) (84CRS399)	No Error
STATE v. THORNE No. 8412SC1013	Cumberland (82CRS50007)	No Error
STATE v. THORNS No. 8521SC88	Forsyth (83CRS53071)	Affirmed
STATE v. WISE No. 843SC777	Craven (83CRS12534) (83CRS12535)	No Error
TALLY v. HOOPER No. 8421SC1020	Forsyth (82CVS6842)	No Error

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE, APPELLEE v. NORTH CAROLINA RATE BUREAU, APPELLANT, IN THE MATTER OF A FILING DATED OCTOBER 3, 1983 BY THE NORTH CAROLINA RATE BUREAU FOR REVISED FARMOWNERS DWELLING INSURANCE RATES

No. 8410INS744

(Filed 18 June 1985)

1. **Insurance § 145.1— farmowner insurance rates—increase conditioned on filing for decrease in non-Rate Bureau coverages**

The Commissioner of Insurance erred in conditioning approval of an 11.7 percent rate increase for farmowner insurance coverages subject to the Rate Bureau's jurisdiction on a filing for a rate decrease for farmowner insurance coverages not subject to the Rate Bureau's jurisdiction.

2. **Insurance § 145.1— farmowner insurance rates—modified farm projection factor**

Applying the whole record test, the Commissioner of Insurance did not err in disapproving the Rate Bureau's calculation of the premium trend component of the modified farm projection factor in its filing for an increase in farmowner insurance rates. However, the Commissioner erred in adopting the recommendation of a witness that the premium and loss trends be considered equal so that the modified farm projection factor would be given a value of one.

3. **Insurance § 145.1— farmowner insurance rates—excess multiplier—data from all companies not required**

The Rate Bureau was not required to base the excess multiplier for catastrophic losses in a rate filing for farmowner insurance on data from all insurance companies comprising its membership. G.S. 58-124.19(2); G.S. 58-124.20(c).

4. **Insurance § 145.1— farmowner insurance rates—excess multiplier—Commissioner's failure to give notice of deficiency**

Where the Commissioner of Insurance failed to give notice that the Rate Bureau's use of farm, fire and extended coverage data in determining the excess multiplier in a farmowner insurance rate filing was deficient, he was prohibited from disapproving the Rate Bureau's excess multiplier solely on that basis. G.S. 58-124.21(a).

5. **Insurance § 145.1— farmowner insurance rates—excess multiplier demarcation**

The Commissioner of Insurance did not err in disapproving the Rate Bureau's excess multiplier demarcation of 80 percent for farmowner insurance rates and in adopting a 100 percent demarcation. However, the Commissioner's adoption of an excess multiplier of 5 percent was not based on material or substantial evidence and was improper.

6. Insurance § 145.1— farmowner insurance rates—changes based on masonry veneer—effect of three-year policies

The Commissioner of Insurance erred in failing to consider the Rate Bureau's filing for farmowner insurance rate changes based on masonry veneer classifications, but the Commissioner did not err in failing to consider the effect on rates of writing three-year farmowner policies. G.S. 58-124.19(4); G.S. 58-124.20(a).

7. Insurance § 145.1— farmowner insurance rates—underwriting loss

Nothing in G.S. 58-124.19(2) requires that the Commissioner of Insurance provide for an underwriting profit in farmowner insurance rates so long as the rate level established on the statutory rate criteria is not inadequate, excessive, or unfairly discriminatory. Therefore, if income from investments on loss reserves, loss expense reserves, and unearned premium reserves is sufficient to produce an overall profit that is not inadequate, excessive, or unfairly discriminatory, the rate level thus determined does not violate the statutory criteria even though it would produce an underwriting loss.

8. Insurance § 145.1— farmowner insurance rates—underwriting profit

The Commissioner of Insurance was not required to approve an underwriting profit greater than that requested by the Rate Bureau.

9. Insurance § 145.1— farmowner insurance rates—return on net worth—inadequate findings

Findings by the Commissioner of Insurance were inadequate to support his conclusion that farmowner rates should be set at a level to produce a 13.5 percent return on net worth, and the cause must be remanded to the Commissioner for meaningful findings of fact.

10. Insurance § 145.1— farmowner insurance rates—sufficiency of notice of hearing

The Commissioner of Insurance's notice of hearing in a farmowner rate case was not deficient in failing to provide the exact rating formula that he planned to employ and gave adequate notice of the deficiencies subsequently raised at the hearing. G.S. 58-124.21.

11. Insurance § 145.1— farmowner insurance rates—qualification of expert witness

A witness's education and experience as a property and casualty actuary qualified him as an expert witness in a farmowner insurance case although he had never before testified in a farmowner rate hearing.

APPEAL by defendant North Carolina Rate Bureau from the North Carolina Commissioner of Insurance. Order entered 26 January 1984 by the Commissioner of Insurance. Heard in the Court of Appeals 8 March 1985.

The North Carolina Rate Bureau (hereinafter Rate Bureau) filed for use with the Commissioner of Insurance (hereinafter Commissioner) a general rate increase for farmowner insurance

coverages subject to the Rate Bureau's regulation. The 3 October 1983 filing proposed an average statewide rate increase of 25 percent, the rate increase consisting of a premium increase of 20.5 percent and a 4.5 percent increase attributable to a mandatory $100.00 deductible for certain coverages.

In a notice of public hearing, the Commissioner notified the Rate Bureau that its rate filing failed to comply with the applicable rate making statutes. The Commissioner's notice specified twelve deficiencies. At a two week hearing, four witnesses appeared for the Rate Bureau and three witnesses appeared for the Department of Insurance.

The Commissioner entered an order following the hearing in which he disapproved the requested 25 percent increase, but found that an increase of 11.7 percent, excluding changes in rates for brick veneer structures, was justified. The Commissioner also found that rates were excessive for farmowner insurance coverages that were not within the jurisdiction of the Rate Bureau. Non-Rate Bureau coverages were not a part of the filing before the Commissioner, but these coverages are contained in the farmowner policy program which also contains coverages subject to the Rate Bureau. The Commissioner withheld approval of the 11.7 percent rate increase found adequate because of the excessive rates for the non-Rate Bureau coverages. The Commissioner conditioned approval of the 11.7 percent increase on a separate rate filing by the Insurance Service Office (hereinafter ISO) for a rate decrease in the non-Rate Bureau regulated coverages in the farmowner policy program. The order provided that:

> The Bureau is granted leave to refile proposals for rate changes which comply with the indication of 11.7% exclusive of brick veneer changes, proposes a simultaneous effective date with the proposed rate level changes not under the jurisdiction of the Bureau, and the proposed rate level changes of ISO incorporates an underwriting profit margin of −3.0%, since it will produce rates of return on net worth consistent with that needed to attract risk capital.

The Rate Bureau has appealed.

Attorney General Thornburg, by Special Deputy Attorney General Isham B. Hudson, Jr., for the Commissioner of Insurance.

Young, Moore, Henderson & Alvis, P.A., by R. Michael Strickland, Charles H. Young, Jr., and William M. Trott, for the North Carolina Rate Bureau.

WELLS, Judge.

The Rate Bureau, in its 108 page brief, brings forward forty-four assignments of error incorporated into eleven arguments based on 274 exceptions noted in the record. Because of the extensive number of errors alleged, and because of the complexity of the issues presented, only those arguments necessary to a determination of the material issues presented by this appeal will be addressed. We deem it unnecessary to discuss the Rate Bureau's arguments numbered eight, nine, and eleven because these arguments present issues addressed in other assignments of error, or they involve findings of fact by the Commissioner that are unnecessary to the order. We ultimately find that the Commissioner's order must be vacated and remanded.

I. RATE BUREAU JURISDICTION

[1] The Rate Bureau argues that the Commissioner erred by conditioning approval of an 11.7 percent rate increase for farmowner insurance coverages subject to the Rate Bureau's jurisdiction on a filing for a rate decrease for farmowner insurance coverages not subject to the Rate Bureau's jurisdiction. We agree and vacate that part of the Commissioner's order.

The North Carolina General Assembly created the North Carolina Rate Bureau and empowered it with the authority to promulgate rates for all insurance companies writing specified lines of insurance in this state. N.C. Gen. Stat. §§ 58-124.17 to -124.30 (1982 and Cum. Supp. 1983). Article 12B of Chapter 58 prescribes the lines of insurance subject to the Rate Bureau's jurisdiction. Among the various insurance coverages subject to the Rate Bureau's authority, the General Assembly provided that:

> The Bureau shall have the duty and responsibility of promulgating and proposing rates for insurance against loss to residential real property with not more than four housing units located in this State and any contents thereof or

> valuable interest therein and other insurance coverages written in connection with the sale of such property insurance. . . . *The Bureau shall have no jurisdiction over . . . farm buildings other than farm dwellings and their appurtenant structures [and] farm personal property . . .*

G.S. § 58-124.17(3) (emphasis added). Insurance companies writing property and casualty lines of insurance which are not subject to the Rate Bureau's jurisdiction are subject to a separate rate making scheme under Article 13C of Chapter 58. N.C. Gen. Stat. §§ 58-131.34 to -131.60 (1982). The farmowner insurance coverages specifically excluded from the Rate Bureau's jurisdiction in Article 12B are explicitly included within Article 13C:

> [T]his Article [13C] shall apply to insurance against loss to farm buildings (other than farm dwellings and their appurtenant structures) [and] farm personal property . . .

G.S. § 58-131.36(11).

The authority of the Commissioner to review, approve, modify, or disapprove insurance rates promulgated by the Rate Bureau is limited to that authority granted by the General Assembly. *E.g., Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547, *reh'g denied*, 301 N.C. 107, 273 S.E. 2d 300 (1980); *Comr. of Insurance v. Rate Bureau*, 43 N.C. App. 715, 259 S.E. 2d 922 (1979), *disc. rev. denied*, 299 N.C. 735, 267 S.E. 2d 670 (1980). Since the Commissioner's duties and responsibilities are fixed by the General Assembly, "he may act only to the extent and in the manner legislatively prescribed." *Comr. of Insurance v. Rate Bureau*, 43 N.C. App. 715.

We conclude from the explicit language of G.S. §§ 58-124.17 (3) and -131.36(11) that the Commissioner did not have statutory authority to withhold approval of the 11.7 percent rate increase on the condition that ISO file for a rate decrease for Article 13C coverages. As applied to the farmowner insurance program, both statutes contemplate that coverages applicable to farm residences and appurtenant structures are subject to Article 12B and that the insurance rates for coverages applicable to the commercial operations and property of the farmowner are subject to Article 13C. The distinction drawn for the farmowner insurance program is consistent with the General Assembly's intent to subject

"essential" lines of insurance to Rate Bureau jurisdiction, while permitting Article 13C filing for most commercial lines of insurance, deemed "non-essential." *See Comr. of Insurance v. Rate Bureau*, 300 N.C. 381.

The Commissioner relies on N.C. Gen. Stat. § 58-44.3 (1982) for the requisite authority to withhold approval of Article 12B rates. G.S. § 58-44.3 is a part of the anti-rebate statutes. N.C. Gen. Stat. §§ 58-44.3, -44.5, -54.4(8) (1982). These statutes prohibit an insurer or insurance agent from "discrimination" in setting rates for any person. They are obviously designed to prohibit an insurance agent or company from charging reduced or excessive insurance rates contrary to the established rating rules applicable to the risk, *cf., Insurance Agency v. Leasing Corp.*, 26 N.C. App. 138, 215 S.E. 2d 162 (1975) (agent's agreement to waive short rate cancellation), and are not applicable to rate making. Both Article 12B and Article 13C contain anti-discrimination provisions. G.S. § 58-124.19(1), which governs the Rate Bureau's filings, specifically provides that rates promulgated by the Rate Bureau cannot be "unfairly discriminatory," and this provision applies only to insurance coverages subject to the Rate Bureau's jurisdiction. The Article 13C definition of "discrimination" is substantially different.

The provisions of the Commissioner's order withholding implementation of the 11.7 percent increase must be vacated. N.C. Gen. Stat. § 58-9.6(b) (1982). Because that part of the Commissioner's order that must be vacated is clearly separable from the balance of the order in which the Commissioner found an 11.7 percent increase justified, we consider the Rate Bureau's remaining assignments of error addressed to the merits of the rate increase.

II. Modified Farm Projection Factor

[2] The Rate Bureau contends that the Commissioner erred by disapproving the premium trend and modified farm projection factor contained in its filing. Specifically, the Commissioner, in findings of fact numbered 28 through 45 and conclusion of law number 1, found that the modified farm projection factor employed by the Rate Bureau was not actuarily sound and resulted in excessive rates.

The "modified farm projection factor" represents a mathematical calculation by which the effect of inflation on future losses and the effect of increases in premiums due to insureds increasing policy limits are accounted for during the period covered by the rate filing. By "trending," the rate maker projects known losses and anticipated premiums into the future to reflect factors that will either increase or decrease losses to be paid or premiums to be collected. The farm projection factor consists of two separate components. First, future losses must anticipate inflation in repair or replacement costs, thereby requiring greater premiums. Second, policy owners increase the amount of their insurance coverage to meet rising replacement or repair costs, thereby generating additional premiums from which insurance companies can pay losses. Rates must be adjusted downward when premiums rise from increased coverage limits. The Rate Bureau's formula was expressed as a percentage by dividing the trended losses, the numerator, by trended premium increases, the denominator.

The Rate Bureau's filing was based on loss costs rising by 7.04 percent, projected for the next 20.5 months, and premiums increasing 6.55 percent, projected for the next 14.5 months. The modified farm projection factor netted a result that losses would increase 4 percent more than premiums from increased coverage limits. The Commissioner disapproved the premium trend factor used as the denominator in the modified farm projection factor, finding that the Rate Bureau had provided either inadequate or unreliable supporting data, and he adopted a modified farm projection factor of one (unity).

The appellate standards of review we must apply to the Commissioner's order are found in the Administrative Procedures Act, particularly N.C. Gen. Stat. § 150A-51 (1983) and the provisions of G.S. § 58-9.6. Our supreme court, in applying these standards, has stated:

> [I]t is for the administrative agency to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. . . . It is not our function to substitute our judgment for that of the Commissioner when the evidence is conflicting. However, as also in-

> dicated above, when evidence is conflicting, the standard for judicial review of administrative decisions in North Carolina is that of the 'whole record' test. . . . 'The "whole record" test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence. . . .'

Comr. of Insurance v. Rate Bureau, 300 N.C. 381 (citations omitted). The whole record test requires the reviewing court to consider the record evidence supporting the Commissioner's order, to also consider the record evidence contradicting the Commissioner's findings, and to determine if the Commissioner's decision had a rational basis in the material and substantial evidence offered.

While the Commissioner's order must be based on material and substantial evidence in the record, the ultimate burden of proof to justify a rate adjustment and its amount is on the Rate Bureau. *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381; *Commissioner of Insurance v. Rate Bureau*, 40 N.C. App. 85, 252 S.E. 2d 811, *cert. denied*, 297 N.C. 452, 256 S.E. 2d 810 (1979). The Commissioner, however, may not simply declare that the Rate Bureau has failed to meet its burden of proof. The Commissioner must show:

> [S]pecifically . . . how the Bureau has not carried its burden of proof, and, if the Commissioner fails to do so by substantial evidence, the presumption of *prima facie* correctness given to an order of the Commissioner . . . is rebutted.

Commissioner of Insurance v. Rate Bureau, 40 N.C. App. 85 (emphasis in original).

Applying these principles, we review the essential evidence surrounding the modified farm projection factor adopted by the Commissioner. The Rate Bureau's evidence supporting its projection factor consisted of testimony of Charles Orlowicz, an ISO actuary employed by the Rate Bureau and qualified as an expert witness.

To determine the loss trend component of the farm projection factor, Orlowicz used the North Carolina Boeckh residential index, which measures construction cost changes for housing in North Carolina, and the modified Consumer Price Index, which measures cost changes for items other than construction costs.

His ultimate conclusion was that losses had increased at a 7.04 percent annual rate. To determine the premium trend component of the farm projection factor, he used actual North Carolina farmowner policy data to calculate percentage increases in premiums for the years 1980 and 1981, the only years for which actual farmowner data was available. Premiums increased 7.8 percent from 1979 to 1980, and increased 5.8 percent from 1980 to 1981. For years prior to 1980 for which farmowner policy data was not available, he used homeowner premium trend data which he modified. The homeowner premium trend was modified by taking the farmowner premium trend for the years in which actual farmowner premium data was available and comparing that data with premium trends in homeowner insurance for the same periods. The difference in the percentage of growth between homeowner and farmowner premium trend was 65.5 percent, and he applied that differential to homeowner data from previous years.

Orlowicz stated that premium trends in homeowner and farmowner insurance were sufficiently analogous to permit the use of homeowner data to derive an actuarily sound farmowner trend. In Orlowicz's opinion, homeowner premium trends would be greater than farmowner premium trends for several reasons. First, the years for which actual data was compared confirmed that the percentage of farmowner premium trend was less than homeowner premium trend. Second, a homeowner inflation guard endorsement was marketed which automatically increases coverage limits in relation to inflation. Approximately 75 percent of the homeowner policies written in North Carolina have the inflation guard endorsement. The inflation guard endorsement is not written in conjunction with farmowner policies in North Carolina. Third, he testified that the cost of new construction in the nonfarm residential market would account for the higher premium trend factor for homeowner policies because there would be less new farm home construction. In his opinion, the Rate Bureau premium trend was conservative when compared to other methodologies employed to determine farmowner premium trend, and the method he employed would result in lower overall premium rates than if other methodologies had been employed.

Philipp Stern, a consulting actuary employed by the Department of Insurance and qualified as an expert witness, testified that the premium trend and modified farm projection factor em-

ployed by the Rate Bureau were actuarily unsound. He stated that the Rate Bureau had failed to provide underlying data from which the 1980 and 1981 farmowner premium trend could be properly verified. He classified the Rate Bureau's contention that the farmowner premium trend was approximately two-thirds of the homeowner premium trend as "absurd." First, there had been no evidence and there was no reason to assume that replacement or repair costs would be different for farmowner and homeowner losses. Second, he concluded that the homeowner inflation guard endorsement was an immaterial consideration. He based this conclusion on the fact that both the homeowner and farmowner policies "required" insureds to maintain coverage at 80 percent of the dwelling replacement cost in order to receive full replacement cost protection. Despite the fact that homeowners could purchase a policy endorsement to increase coverage limits due to inflation, Stern stated that farmowners, and their insurance agents, would have equal motivation to increase coverage limits to maintain replacement cost coverage. Third, Stern stated that the Rate Bureau had not provided sufficient documentation of the farmowner premium trend for 1980 and 1981, based on actual North Carolina experience. He explained that the Rate Bureau had employed data based on the number of policy transactions. Stern had requested, and he alleged that the Rate Bureau had not provided, data on average farmowner premiums by risk exposure.

Based on Stern's calculations from seven levels of risk exposure, he testified that the farmowner premium trend for 1979 to 1980 was between 8.2 percent and 8.7 percent, not the 7.8 percent calculated by the Rate Bureau. For 1980 to 1981, Stern calculated a farmowner premium trend factor of 2.3 percent to 2.5 percent, not the 5.8 percent calculated by the Rate Bureau. He noted that the Rate Bureau, using its policy transaction methodology, had reported a first quarter 1980 premium increase of 30.6 percent. When compared to all other quarters reported, Stern stated that the percentage increase was inordinate and not reliable. Stern determined that if the first quarter premium trend was incorrect that the ultimate result would be that the farmowner premium trend would be 43.6 percent of homeowner as compared to Orlowicz's determination of 65.5 percent.

Based on his review, it was Stern's opinion that the Rate Bureau had failed to support its filing and recommended that the

filing be disapproved on that basis. In the alternative, Stern proposed that the loss trend and premium trend be equated as being equal, resulting in a modified farm projection factor of one (unity).

From this evidence and from other conflicting evidence in the record that is too lengthy to be outlined here, the Commissioner found that the Rate Bureau had not met its burden of proof on the premium trend. The Commissioner then disapproved the Rate Bureau's premium trend and adopted Stern's proposal that the modified farm projection factor be given a value of one: in other words, premium trend and loss trend being held equal. The effect was to reduce the Rate Bureau's general rate request.

The Rate Bureau vigorously attacks Stern's actuarial methodology and conclusions contending that his findings were based on guesswork. Applying the whole record test, we hold that the Commissioner did not err in rejecting the Rate Bureau's premium trend calculation. Stern's expert evidence in this case was substantial. It afforded the Commissioner the necessary evidentiary foundation from which he could find that the percentage increase urged by the Rate Bureau was not properly justified. Stern demonstrated that the first quarter 1980 farmowner premium trend was inconsistent with all other quarters reported, and, contrary to Orlowicz's testimony, would substantially impact the Rate Bureau's premium trend. Most importantly, Stern testified that Orlowicz's methodology in determining that the farmowner premium trend as a percentage of the homeowner premium trend was inappropriate because it was based on fallacious assumptions. In this respect, the testimony of both Stern and Orlowicz was highly contradictory, both witnesses relying on subjective judgments, especially in determining the effect of the homeowner inflation guard policy endorsement, to derive a farmowner trend from homeowner data. The weight and credibility of the conflicting evidence was for the Commissioner to decide. We cannot say, as we must in order to sustain the Rate Bureau's assignments of error, that the Commissioner's findings did not have a logical basis in the evidence presented.

While we find that there was substantial and material evidence from which the Commissioner could reject the Rate Bureau's premium trend, we hold that the Commissioner erred in adopting Stern's recommendation that the premium and loss

trends be equated as equal. The Commissioner found as a fact that the Rate Bureau's loss trend of 7.04 percent was justified. By adopting Stern's recommendation that the premium and loss trends be equal, the Commissioner impliedly determined that the premium trend was 10.08 percent. Furthermore, Stern admitted that his recommendation was based on an assumption that the premium trend should equal the loss trend. There is no substantial or material evidence to support Stern's assumption and his recommendation. We, therefore, reject the Commissioner's modified farm projection factor of one.

On remand of this matter to the Commissioner, he may consider Stern's testimony that the Rate Bureau's premium trend was not supported. If the Commissioner should elect to reject the Rate Bureau's premium trend in its entirety, the Commissioner must give due consideration to a rate adjustment for the Rate Bureau's loss trend which he found to be justified. We note, however, that ample evidence in the record would permit the Commissioner to calculate a premium trend by modifying the Rate Bureau's proposed premium trend based on Stern's testimony that the premium trend should more closely parallel that of the homeowner premium trend. The record evidence of the relationship of farmowner and homeowner premium trend was highly contradictory, especially testimony on the effect of the homeowner inflation guard endorsement on the relationship, and the weight and credibility of the conflicting evidence is for the Commissioner's determination.

III. Excess Multiplier

The Rate Bureau next contends that the Commissioner erred by disapproving its excess multiplier used in the filing. The Rate Bureau advances numerous arguments by which it contends that the Commissioner failed to base his order on substantial or material evidence in ordering an excess multiplier of 5 percent.

The "excess multiplier" is a computation which provides a premium against catastrophic losses. In the context of farmowner insurance, catastrophic losses would normally result from hurricanes, tornadoes, and severe windstorms. The excess multiplier defines the limits of losses that can normally be anticipated over a period of time, segregates those losses that would be attributable to catastrophic occurrences, and then spreads the

losses over a number of years. The intended effect is to prevent rates from fluctuating excessively due to catastrophic losses in any one year.

The Rate Bureau requested a 10.6 percent excess multiplier. Orlowicz conducted a study of hurricanes which affected North Carolina from 1871 to 1983. The study revealed that 31 hurricanes entered North Carolina during twenty-three separate years, an average of one hurricane each 4.9 years. Next, Orlowicz determined that incurred losses which exceeded 80 percent of earned premiums in any given year would be classified excess losses. Because no excess losses had occurred since the farmowner policy was first written in 1962, he added incurred losses and earned premiums for the standard fire and extended coverage policy which was written for farm dwellings and buildings both prior to and following 1962. After adding farm fire and extended coverage statistics, he determined that since 1950, excess losses had occurred in three years; 1954, 1955 and 1960. By dividing normal losses in each of the years reviewed into excess losses in the three years determined to have such losses, he concluded that a 10.6 percent excess multiplier was justified.

Stern testified that the 10.6 percent excess multiplier employed by the Rate Bureau was not based on proper rating experience. He testified that the fire and extended coverage data used by the Rate Bureau was not proper rate making data because the excess multiplier should be based on the same loss experience as used to determine the rate levels. The Rate Bureau had not used fire and extended coverage data in the balance of the rate filing. Stern also stated that use of the 80 percent cut off to determine excess losses was not reasonable. The Rate Bureau had used the 80 percent demarcation because it generated the same number of excess loss years as did a 100 percent cut off applied to fire and extended coverage insurance. In Stern's opinion, fixing an 80 percent demarcation for excess losses for farmowner insurance because it produced the same number of excess years as fire and extended coverage policies was not actuarily sound. Stern proposed a 100 percent demarcation because it was the same standard applied to fire and extended coverage policies. In addition, Stern testified that the Rate Bureau's filing only used data from insurance companies reporting to ISO, and did not include data available from the American Association of Insurance

Services (hereinafter AAIS) and the National Association of Independent Insurers (hereinafter NAII). Based on ISO, AAIS, and NAII data combined, and using a 100 percent demarcation, the excess multiplier would be 7 percent.

Stern ultimately proposed an excess multiplier of 5 percent. Because there were no excess losses, either at the 80 percent or 100 percent demarcation, based solely on farmowner policy data, Stern calculated his excess multiplier from certain assumptions. First, for the rating years of 1982 and 1983, he assumed that those years would have a normal loss ratio of approximately 65 percent. Second, he assumed that 1985 would have a catastrophic loss ratio of 150 percent. Using a 100 percent demarcation would result in an excess multiplier of 3.9 percent. To arrive at the 5 percent recommended, Stern took a mean of the 7 percent excess multiplier based on combined rating data with a 100 percent demarcation and the 3.9 percent excess multiplier he derived. The mean of 4.1 percent was rounded to 5 percent.

J. Robert Hunter, a member of the Casualty Actuarial Society and the American Academy of Actuaries, and qualified as an expert in property and casualty insurance with a specialty in profitability of property and casualty insurance companies, testified on behalf of the Insurance Department. Hunter testified that the Rate Bureau's use of fire and extended coverage data in determining the excess multiplier was improper. Instead, he proposed that the 80 percent demarcation be retained, but applied the demarcation to loss ratios exceeding 80 percent for the years 1980 and 1981, not deemed excess years by the Rate Bureau. By including these years in his proposal, Hunter determined an excess multiplier slightly less than the excess multiplier proposed by Stern.

[3] The Rate Bureau first contends that the Commissioner erred by disapproving their excess multiplier because only ISO data was used. In his order, the Commissioner found that the companies reporting to ISO only accounted for some 30 percent of the farmowner business in North Carolina. The Commissioner also found that the balance of farmowner business written in North Carolina was reported to the NAII and AAIS. The Rate Bureau argues that N.C. Gen. Stat. § 58-124.20(c) (1982) does not require that data from all companies be used in its rate filings, the NAII

data for some years was not compiled on a basis which permits consolidation with ISO data, and the AAIS had collected data only from 1973. The Rate Bureau also contends that there was no evidence suggesting that use of all ISO, NAII, and AAIS data would have produced a result different than that they proposed if each non-ISO organization had compiled data for the thirty-one year period reviewed and that use of all data available resulted in an excess multiplier similar to the one proposed in the filing.

N.C. Gen. Stat. § 58-124.19(2) (1982) provides that in developing insurance rates "consideration shall be given . . . to the hazards of conflagration and catastrophe." Beyond this language, the General Assembly has not given any guidance to the rating standards by which such an allowance is to be made. While we note that the Commissioner's findings of fact in regard to the appropriate excess multiplier are vague and afford minimum guidance in determining the precise basis on which he reached his determination, it is apparent from his order that the Commissioner adopted Stern's proposal. We must again apply the "whole record" test to determine the sufficiency of this aspect of the Commissioner's order.

Initially, we agree with the Rate Bureau's contention that they are not required by statute to base a rate filing on data from all insurance companies comprising their membership. G.S. § 58-124.20(c) requires the Rate Bureau to "maintain reasonable records . . . of the experience of its members and of the data, statistics or information collected or used by it in connection with the rates, rating plans, rating systems, . . . surveys or inspections made or used by it." While the Rate Bureau's data, based on ISO's statistical base, represented approximately 30 percent of the farmowner experience in North Carolina, there is nothing in the record which suggests that this data base, standing alone, would be insufficient to reach a determination of the excess multiplier. That question, however, is not the issue which must be resolved.

The Commissioner's order indicates that he disapproved the Rate Bureau's excess multiplier because it was based on ISO data alone while reliable data from the NAII and AAIS was available, and this rating experience dictated an excess multiplier less than that based only on ISO data. At the request of the Department of

Insurance, the Rate Bureau combined ISO, NAII, and AAIS data available and applied an 80 percent demarcation to determine excess losses. This calculation indicated an excess multiplier of 9.7 percent. If Stern's 100 percent demarcation was applied to the combined data, the excess multiplier would be 7 percent. Orlowicz testified that the combination of ISO data, compiled on a premium earned and loss incurred basis, with NAII data, compiled on a premium written and loss paid basis, would understate the excess multiplier. Stern's expert testimony tends to show that the use of combined data provided a more adequate basis on which to base an excess multiplier. The conflict in expert opinions goes to the weight and credibility of the evidence. The Commissioner resolved the use of combined data against the Rate Bureau, and, based on the whole record, we find no error in the Commissioner relying on the rate making data beyond that compiled by ISO.

The Rate Bureau next advances several arguments in which they contend that the Commissioner erred in disapproving the Rate Bureau's excess multiplier because fire and extended coverage premium and loss data was used in calculating their excess multiplier. The Commissioner found as a fact that the Rate Bureau had used, "in addition to the farmowners business of the ISO companies, the experience of other business pertaining to farm dwellings written under different kinds of policies which are not under rate review in this filing."

[4] First, the Rate Bureau argues that the Commissioner failed to give adequate notice of his objections to the use of fire and extended coverage data in the notice of public hearing required by G.S. § 58-124.21(a). The statute provides:

> At any time within 30 days from and after the date of any filing, the Commissioner may give written notice to the Bureau specifying in what respect and to what extent he contends such filing fails to comply with the requirements of this Article . . .

Id. Our supreme court, in *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, discussed the requirements of the statute. The issue before that court was whether the Commissioner knew in advance of the hearing whether the Rate Bureau had used unaudited rate making data. The supreme court found that the record on appeal in that case established that the Commissioner knew the data was

unaudited, and held that the statute and fundamental fairness required that he give notice of the deficiency. The court continued:

> We wish to emphasize the narrow holding in this portion of our opinion. The Commissioner correctly notes that it was clearly not the intent of the Legislature to prevent the Commissioner from disapproving a filing if matters coming to his attention during the course of a hearing would compel such disapproval. Obviously, matters relating to credibility or other factors might arise during the course of a hearing for which the Commissioner could not have provided notice prior to the hearing. What we hold here, and all that we hold here, is that when the Commissioner knows prior to the giving of public notice 'in what respect and to what extent he contends such filing fails to comply with the requirements of [the] Article,' then he must give the specifics in his notice of public hearing. Here, the Commissioner clearly failed to do this with respect to the reliability of the data.

Id.

The Rate Bureau's farmowner filing stated that the "Excess Loss Procedure is based on North Carolina all class Monoline Farm [fire and extended coverage policies] and Farmowners underwriting experience for all available years, 1950 through 1981 with the earliest available Farmowners experience being reported in 1962." At the hearing, Stern testified that the filing had given notice that the Rate Bureau had relied on fire and extended coverage data even though he had not realized the implications of its usage at that time. The record on appeal also discloses that the Commissioner knew at the issuance of the notice of public hearing that the Rate Bureau had used fire and extended coverage data. In a letter to the Rate Bureau dated on the same day as the notice of public hearing, the Commissioner requested additional information concerning the filing stating, "[a]lso, it [the excess multiplier] is based on the 'all class monoline farm and farmowners underwriting experience.' "

Clearly, the Commissioner knew that the Rate Bureau had used fire and extended coverage data prior to the notice of hearing. We hold that the statute and fundamental fairness required the Commissioner to give notice of the nature and extent of any alleged deficiency in the use of fire and extended coverage data.

Our holding, however, does not mean that the Commissioner was required to adopt the Rate Bureau's excess multiplier. We hold, and all that we hold is, that having failed to give notice that the use of farm fire and extended coverage data was deficient, the Commissioner was prohibited from disapproving the Rate Bureau's excess multiplier solely on that basis. *Comr. of Insurance v. Rate Bureau*, 300 N.C. 474, 269 S.E. 2d 595 (1980).

[5] The Rate Bureau also contends that the Commissioner erred by rejecting the 80 percent demarcation to separate normal losses from excess losses. The Commissioner, in his order, determined that a 100 percent demarcation was reasonable. The Rate Bureau's argument raises three issues. First, they contend that the 80 percent cut off was fully justified in the record and this demarcation is used in every other state. Second, they argue that the Commissioner failed to find facts that justified the use of the 100 percent demarcation. Third, they attack the 5 percent multiplier adopted by the Commissioner in his order because it was not based on any data and was premised on erroneous assumptions.

We hold that the Commissioner did not err in disapproving the Rate Bureau's excess multiplier demarcation of 80 percent. First, the Rate Bureau relies on the fact that the 80 percent demarcation is used in every other state. On such evidence, the Commissioner could have adopted the Rate Bureau's excess multiplier, but such evidence does not prohibit the Commissioner from adopting a demarcation different from that used in other jurisdictions. *See Comr. of Insurance v. Automobile Rate Office*, 293 N.C. 365, 239 S.E. 2d 48 (1977) (approving automobile rate system based on motor vehicle point system rather than insurance point system typically used).

Second, the Rate Bureau contends that use of an 80 percent demarcation for farmowner policies was fully justified in the record because it produced a similar number of excess years when compared to fire and extended coverage policies. Orlowicz testified that the farmowner policy provided coverages in addition to the fire and extended coverage policy which further justified the use of an 80 percent demarcation. It was conceded, however, that the amount of losses due to catastrophic events in the three years determined excess years by the Rate Bureau could be related to rate inadequacy rather than catastrophic

losses even though hurricanes entered North Carolina in each of the three years described as excess years.

Stern testified that since a 100 percent demarcation was used in fire and extended coverage policies, the same demarcation should be applied in farmowner insurance. In recommending a 5 percent multiplier, Stern based his proposal on combined ISO, NAII, and AAIS data applying a 100 percent demarcation. We conclude that from the conflicting evidence, the Commissioner could properly adopt a 100 percent demarcation.

We hold, however, that the Commissioner erred in adopting Stern's recommendation of an excess multiplier of 5 percent. Stern developed his recommendation by assuming that 1983 and 1984 would be normal loss years. Then, he developed a hypothetical excess loss of 150 percent which produced an excess multiplier of 3.9 percent. He conceded that if the 1985 excess loss ratio was 200 percent his excess multiplier would double. No evidence in the record before us supports Stern's assumptions since they are based on speculation rather than any underlying rate making data. While "[t]he language of G.S. 58-248 does not restrict the Commissioner's consideration to the statistical data furnished by the Rate Office [now the Rate Bureau] and he may consider evidence from other sources if it is otherwise competent," *Comr. of Insurance v. Automobile Rate Office*, 292 N.C. 1, 231 S.E. 2d 867 (1977), the Commissioner's order of a 5 percent excess multiplier is based on evidence that is not material or substantial. We reject the Commissioner's 5 percent excess multiplier.

On remand, the Commissioner must give due consideration to the fire and extended coverage data used by the Rate Bureau because he failed to place the Rate Bureau on notice that the use of this data was objectionable; however, he may also consider NAII and AAIS data. The Commissioner must also determine the proper demarcation used to identify excess losses. There is ample evidence in the record from which the Commissioner could conclude that the Rate Bureau's excess loss demarcation is justified and ample evidence from which the Commissioner could modify the Rate Bureau's request by the use of combined rating data and use of a 100 percent demarcation.

IV. Masonry Veneer and Three Year Policies

[6] By its next argument, the Rate Bureau contends that the Commissioner erred in failing to make a rate adjustment for the reclassification of masonry veneer structures and the incidence of three year policies. We find that the Commissioner erred in failing to consider the Rate Bureau's filing for rate changes based on masonry veneer classifications, but that the Commissioner did not err in failing to consider the effect on rates of writing three year farmowner policies.

G.S. § 58-124.20(a) requires the Rate Bureau to:

> [F]ile with the Commissioner copies of the rates, classification plans, rating plans and rating systems used by its members. Each filing shall become effective immediately on the date specified therein but not earlier than 90 days from the date such filing is received by the Commissioner.

In formulating and promulgating rates the General Assembly provided:

> Risks may be grouped by classifications and lines of insurance for establishment of rates and base premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in hazards or expense provisions or both. . . .

G.S. § 58-124.19(4). When the Commissioner receives a filing he has 30 days in which he "may give written notice to the Bureau specifying in what respect and to what extent he contends such filing fails to comply with the requirements of this Article and fixing a date for hearing not less than 30 days from the date of mailing of such notice." G.S. § 58-124.21(a).

In its filing, the Rate Bureau clearly stated that masonry veneer farmowner dwellings previously rated as frame structures would be rated as masonry structures. The filing contained no further documentation or explanation for the change. In his notice of hearing, the Commissioner did not specify any deficiency in the requested classification change. Furthermore, the Commissioner's letter of 1 November 1983 to the Rate Bureau never mentioned the brick veneer change. At the hearing, the Rate Bureau offered

substantial evidence as to the requested classification change and its effect on premiums.

The Commissioner's order mentioned the brick veneer change requested in only three instances. Even though the Commissioner never specifically states his findings of fact on the requested classification change, it is apparent that he disapproved the brick veneer classification. The Commissioner now argues that the proposed change was not properly before him at the hearing. We disagree.

The Rate Bureau's filing specifically requested the brick veneer classification change even though supporting data was not provided. The controlling statutes do not require the Rate Bureau to provide justification of classification changes in the rate filing itself. G.S. § 58-124.20(a) merely requires that the Rate Bureau file "classification plans, rating plans and rating systems used by its members." The Rate Bureau filed accordingly. Certainly, the Commissioner had ample authority to give notice to the Rate Bureau that it had not adequately documented the need for the classification. Under G.S. § 58-124.20, the Commissioner could have required the Rate Bureau to submit documentation supporting the requested change. And, since the Rate Bureau has the ultimate burden of proof at the hearing, the Rate Bureau's failure to provide adequate documentation and subsequent failure to produce any substantial evidence justifying the reclassification at the hearing would have subjected that portion of the filing to disapproval. Having failed to give the Rate Bureau notice of the alleged deficiency, however, the Commissioner was precluded from raising the classification change as an issue at the hearing and was required to permit a rate adjustment on this basis because of the material and substantial evidence offered by the Rate Bureau. *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381.

The statutory procedures applicable to the brick veneer change are equally applicable to the question of the three year policy term. At the time of the filing, farmowner rating rules required that most policies be written for a three year term, but the premium collected annually. The Rate Bureau had filed with the Commissioner, in a separate filing, a request to write farmowner policies on a one year basis as is normal practice with homeowner insurance. The Rate Bureau based its farmowner fil-

ing on one year policies rather than three year policies in anticipation of the Commissioner's approval of its separate filing. At the time of the rate hearing, the Rate Bureau's request to write one year policies had been disapproved. Therefore, the Rate Bureau introduced evidence to revise premium trend and loss trend factors upwards to reflect three year policies.

The Commissioner's order did not allow for additional premiums for the writing of three year policies. He argues that the rate increase needed to reflect the writing of three year policies was not before him at the hearing. We agree.

The legislative rating scheme clearly contemplates that the Rate Bureau must give the Commissioner sufficient notice of its rating plan in order that he may review the plan within 30 days and specifically determine the nature and extent of any deficiencies. Unlike the brick veneer change requested, the Rate Bureau's filing does not note that disapproval of the separate filing to write three year policies would require increases in premium trends in the filing before the Commissioner. If the Commissioner had simply declined to hold a hearing on the farmowner filing, thereby permitting the Rate Bureau's filing to become automatically effective, the rates proposed would have been based on the one year policy assumptions filed by the Rate Bureau. Because the Commissioner is required to give notice of all deficiencies within 30 days, and conduct a hearing within 30 days following his notice of hearing, it is only reasonable that the Rate Bureau's filing give adequate notice of its basis in order that the Commissioner may properly review the filing and be afforded an opportunity to develop proper evidence.

Our holding should not be interpreted to mean that the Commissioner could not have considered the effect of his disapproval of the Rate Bureau's request to write one year rather than three year policies. Our holding only provides that he was not required to do so. The proper procedure was for the Rate Bureau to base its proposed farmowner filing on the existing law requiring farmowner policies to be written on a three year basis and to have proposed an amendment to the filing if the Commissioner had approved the separate filing. *See Comr. of Insurance v. Rating Bureau*, 291 N.C. 55, 229 S.E. 2d 268 (1976). Or, the Rate Bureau could have simply withdrawn its farmowner filing and made a

subsequent filing reflecting the Commissioner's disapproval of a one year farmowner policy. *Id.*

On remand of this case to the Commissioner, he must consider the Rate Bureau's brick veneer classification change and order an adequate rate adjustment based on the record evidence. The Commissioner may, but is not required to, consider the effect of three year farmowner policies.

V. PROFIT AND CONTINGENCIES

The Rate Bureau, based on ten assignments of error, argues that the Commissioner erred in setting a rate level intended to produce a 13.5 percent return on net worth. Based on twelve assignments of error, the Rate Bureau argues that the Commissioner erred by approving a minus 3 percent underwriting profit.

G.S. § 58-124.19 establishes the standards by which insurance rates must be set. It provides:

> (1) Rates shall not be excessive, inadequate or unfairly discriminatory.
>
> (2) Due consideration shall be given to actual loss and expense experience within this State for the most recent three-year period for which such information is available; to prospective loss and expense experience within this State; to the hazards of conflagration and catastrophe; to a reasonable margin for underwriting profit and to contingencies; to dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers; to investment income earned or realized by insurers from their unearned premium, loss, and loss expense reserve funds generated from business within this State; to past and prospective expenses specially applicable to this State; and to all other relevant factors within this State: Provided, however, that countrywide expense and loss experience and other countrywide data may be considered only where credible North Carolina experience or data is not available.
>
> (3) In the case of fire insurance rates, as are subject to the rate-making authority of the Bureau, consideration may be given to the experience of such fire insurance business dur-

> ing the most recent five-year period for which such experience is available.
>
> . . .
>
> (5) In the case of workers' compensation insurance and employers' liability insurance written in connection therewith, due consideration shall be given to the past and prospective effects of changes in compensation benefits and in legal and medical fees that are provided for in General Statutes Chapter 97.

Id. By adopting subsection (1), the General Assembly intended that the term "inadequate" should serve to protect the interest of the insurance companies, filing as if one company through the Rate Bureau, by ensuring that rates are sufficient to earn a reasonable profit, and the term "excessive" protects the interests of consumers by prohibiting insurance companies from earning unreasonable profits. *Comr. of Insurance v. Rate Bureau*, 54 N.C. App. 601, 284 S.E. 2d 339 (1981), *appeal dismissed*, 305 N.C. 298, 290 S.E. 2d 708 (1982). In subsection (2), the General Assembly mandated that the Commissioner consider the specific rating criteria listed in reaching an ultimate rate level that complies with the subsection (1) standards. *Hunt v. Reinsurance Facility*, 302 N.C. 274, 275 S.E. 2d 399 (1981).

The Commissioner, in findings of fact numbered 46 through 60, disapproved the Rate Bureau's request for an underwriting profit of 6 percent. The Commissioner ordered an underwriting profit of minus 3.3 percent. While the 11.7 percent rate increase approved by the Commissioner would have produced a negative underwriting profit, it would produce a 13.5 percent rate of return on net worth which the Commissioner found appropriate.

The Rate Bureau contends that G.S. § 58-124.19(2) required the Commissioner to approve rates which provided a positive underwriting profit and margin for contingencies as a matter of law. We disagree.

[7] G.S. § 58-124.19(2) only requires that the Commissioner give "due consideration" to the enumerated rating criteria, including allowance for an underwriting profit. Nothing in the language of the statute requires that the Commissioner provide for an underwriting profit so long as the rate level established on the statu-

tory rate criteria is not inadequate, excessive, or unfairly discriminatory. We agree with the Commissioner's interpretation of the statute, that if income from investments on loss reserves, loss expense reserves, and unearned premium reserves is sufficient to produce an overall profit that is not inadequate, excessive, or unfairly discriminatory the rate level thus determined does not violate the statutory criteria.

Our conclusion that the Commissioner could properly order a rate level that would produce an underwriting loss while providing for an overall adequate profit is supported by previous decisions of our appellate courts. In *Comr. of Insurance v. Rating Bureau*, 292 N.C. 471, 234 S.E. 2d 720 (1977), our supreme court considered the requirements of the rating scheme provided by G.S. § 58-132.1, subsequently repealed and replaced by G.S. § 58-124.19. The former statute is similar to that currently used; the current statute being more specific as to the various rating standards. Justice Lake precisely and cogently assessed the Commissioner's duty in applying the statutory rate standards:

> [I]t was obviously not the intent of the Legislature to make any one, or all, of these matters [statutory rating standards] conclusive. . . . The weight to be given the respective factors is for the Commissioner to determine in the exercise of his sound discretion and expertise. . . .
>
> The ultimate question for the Commissioner's determination is whether the proposed rates will, after provision for reasonably anticipated losses and operating expenses, leave for the insurers . . . a fair and reasonable profit. . . .

Comr. of Insurance v. Rating Bureau, 292 N.C. 471. We conclude, therefore, that the Commissioner is required to consider each statutory rating factor specified by the General Assembly, and, when having done so, the Commissioner may balance the various factors to reach an adequate rate level.

The interplay between investment income and underwriting profit was also considered in *Comr. of Insurance v. Automobile Rate Office*, 292 N.C. 1. In that case the Commissioner reduced the requested allowance for an underwriting profit from 5 percent to 2.7 percent of earned premiums, based on an allowance for investment income. The supreme court specifically held that the

Commissioner, acting on material and substantial evidence, could reduce the underwriting profit by allowing for investment income. Even though the court decided that case under slightly different rating standards than currently effective, the statutory schemes are analogous. We find no reasoning in that case which would prevent the Commissioner from ordering a negative underwriting profit if investment income alone would produce a reasonable profit.

Furthermore, the Rate Bureau's farmowner filing was based on an underwriting loss of minus 3.3 percent. The Rate Bureau's filing indicated that a rate increase of 35.7 percent was needed to produce an adequate rate. The request, however, was lowered to 25 percent. Paul Mize, General Manager of the Rate Bureau, testified that the "rate change was capped at 25% at the direction of the Property Committee and the Governing Committee of the Rate Bureau in order to ameliorate swings in the rate level." The undisputed evidence in the record confirms that by "capping" the rate request at 25 percent the Rate Bureau's margin for underwriting profit was minus 3.3 percent.

[8] The Commissioner was not required to approve an underwriting profit greater than that requested by the Rate Bureau. The logical conclusion of the Rate Bureau's argument is that the Commissioner was required to approve an underwriting profit even though the Rate Bureau requested an underwriting loss. We considered a similar situation in *Comr. of Insurance v. Rate Bureau*, 54 N.C. App. 601, where the Commissioner disapproved a Rate Bureau filing which requested an underwriting loss because it produced inadequate rates. We held that the Commissioner erred in disapproving the rate request on that basis:

> [W]e are satisfied that the limiting effect of the term 'inadequate' as it is used in the statute is that the Commissioner may not disapprove of such portions or parts of a filing as will result in rates which are inadequate to produce a fair and reasonable profit to the companies represented in the filing. . . .
>
> An additional reason for rejecting the reasoning of the plaintiff in this case is the bizarre result reached by the order. Upon concluding that the filing must be rejected because the requested rates are 'inadequate,' plaintiff would

> leave in effect rates which are even more inadequate. We cannot believe that the legislature even contemplated such a result.

Id. (Citations omitted.) For all the reasons set forth above, we find that the Commissioner did not err in not approving an underwriting profit greater than that proposed by the Rate Bureau.

[9] The Rate Bureau also argues that the Commissioner erred in setting a 13.5 percent return on net worth. Their position is that the testimony of their expert witness, Dr. Irving Plotkin, that a 19 percent rate of return was justified was the only material and substantial evidence in the record as to the needed return on net worth.

The Department of Insurance tendered two expert witnesses, Dr. John Wilson and J. Robert Hunter, who testified on the rate of return needed. The Commissioner's order primarily relies on Dr. Wilson's testimony. Dr. Wilson offered an opinion that a 13.5 percent rate of return was justified relying on a complex stock analysis model comparing common stock prices to book value. On the whole record, we find that Dr. Wilson and Hunter's testimony was material and substantial.

The Rate Bureau advances numerous arguments designed to discredit the theoretical basis, methodology, and conclusions of Dr. Wilson's analytical model. For example, the Rate Bureau notes that Dr. Wilson determined that a return on investment income of 8 percent was justified. Dr. Wilson's actual calculations resulted in an investment income allowance of 7.7 percent which he rounded to 8 percent, and Dr. Wilson's calculation also failed to deduct investment expenses in deriving investment income. Reducing investment income by investment expenses would result in a net investment income allowance of 7.3 percent rather than 8 percent. Hunter's testimony, which the Commissioner relied upon to support Dr. Wilson's findings, clearly indicates that his methodology to determine investment income relied, in part, on investment earnings from surplus which is specifically prohibited. *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381.

The Commissioner's findings of fact do not reflect his consideration of the contradictory evidence and the basis on which he determined the adequacy of a 13.5 percent rate of return. It ap-

pears that he adopted Dr. Wilson's recommendation, but his findings of fact do not indicate whether he considered the undisputed testimony that Dr. Wilson had rounded certain results and failed to include investment expenses in his analysis. Furthermore, the Commissioner may not consider investment income from capital and surplus accounts, and his order does not reflect the Rate Bureau's evidence that Hunter included income from these sources in his analysis. After a thorough review of all the evidence and the Commissioner's findings of fact, we are unable to delineate the manner in which the Commissioner reached his determination of a 13.5 percent rate of return. His findings of fact on this issue are inadequate to afford an effective appellate review. We must, therefore, remand this issue to the Commissioner for meaningful findings of fact.

On remand of this matter, the Commissioner must make findings of fact which establish the basis of the rate of return on net worth adopted. The testimony of Hunter and Dr. Wilson is substantial and material evidence for the Commissioner's consideration. The Commissioner must consider, however, the uncontradicted evidence that Dr. Wilson rounded his mathematical results and omitted investment expenses from his calculations. The Commissioner must consider the evidence tending to show that Hunter based part of his calculations on investment income from capital and surplus because investment income from these sources may not be considered in insurance rate making. In reaching his ultimate determination, the Commissioner must make findings of fact which clearly indicate the facts on which he bases his order, the resolution of conflicting evidence, and the consideration given to the material and substantial evidence that has been offered.

VI. NOTICE OF HEARING

The Rate Bureau next contends that the Commissioner erred in admitting evidence and making findings of fact and conclusions of law with respect to matters of which the Rate Bureau was not given proper notice in the notice of public hearing. This argument centers on the Rate Bureau's use of fire and extended coverage data, their failure to segregate wind losses in determining an excess multiplier, their failure to provide for a simultaneous effective date for rate decreases in non-Rate Bureau jurisdiction

coverages, and the Commissioner's failure to specify his contentions regarding the proper method of determining an appropriate rate level.

We have previously discussed the Rate Bureau's arguments in relation to the excess multiplier and the simultaneous filing date for non-Rate Bureau coverages included in the farmowner policy package. No further discussion is needed here. As to the Rate Bureau's contention that the Commissioner failed to provide the exact rating formula that he planned to employ, we find no error.

[10] The Rate Bureau concedes that the Commissioner's notice of hearing was sufficient to place them on notice that he found their profit determination deficient, but they argue that he failed to provide in his notice the manner in which profitability would be determined. G.S. § 58-124.21 only requires the Commissioner notify the Rate Bureau of the deficiencies of which the Commissioner knows after having reviewed the Rate Bureau's filing within the 30 day period of review. *See Comr. of Insurance v. Rate Bureau*, 300 N.C. 381. There is no evidence in the record before us to indicate that the Commissioner knew the precise rating methodology that he would propose at the hearing before the notice of hearing was required. The Commissioner's notice of hearing specifically provided that investment income had not been considered and that the Rate Bureau had failed to justify the 6 percent profit and contingency margin requested. We conclude that the Commissioner's notice of hearing gave adequate notice of the alleged deficiencies subsequently raised at the hearing.

VII. Expert Witness

[11] The Rate Bureau next contends that the Commissioner erred in accepting Hunter as an expert Property and Casualty Actuary for farmowner insurance. The Rate Bureau argues that Hunter has never testified in a farmowner rate hearing and that premium trend and excess multiplier calculations require actuarial experience beyond a general actuarial background and experience.

N.C. Gen. Stat. § 8-58.13 (1981) provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

The decision to qualify a witness as an expert is ordinarily within the exclusive province of the trial judge or hearing officer. *E.g., Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972).

The record discloses that Hunter is a fellow of the Casualty Actuarial Society, and a member of the American Academy of Actuaries. Among numerous other qualifications, Hunter has served as chief actuary of the Federal Insurance Administration, published several scholarly works on investment income and insurance rate making, and testified in numerous rate hearings, including a homeowner policy hearing in North Carolina. He had reviewed one farmowner rate filing, but had never testified in a farmowner rate hearing.

The undisputed evidence in the record demonstrates that actuaries are not designated by lines of insurance: actuarial certification is normally as a property and casualty actuary. Hunter's educational qualifications and experience as a property and casualty actuary qualified him as an expert witness. Furthermore, while the Rate Bureau contends that a farmowner rate filing requires specialized expertise, no evidence of this requirement was offered at the hearing and nothing in the Rate Bureau's argument to this court supports their position. We conclude that the Commissioner did not err in qualifying Hunter as an expert witness.

DISPOSITION

In reviewing an order of the Commissioner, N.C. Gen. Stat. § 58-9.6(b) empowers an appellate court to:

> [A]ffirm or reverse the decision of the Commissioner, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced . . .

That part of the Commissioner's order which requires the Rate Bureau to refile for a rate increase with non-Rate Bureau cover-

ages must be vacated because the Commissioner acted in excess of statutory authority.

The Commissioner, however, did approve part of the Rate Bureau's requested rate increase subject to the improper requirement that rates for non-Rate Bureau must be filed simultaneously. There was material and substantial evidence that the entire rate increase requested by the Rate Bureau was not justified even though the Commissioner based his ultimate determination as to the rate justified on evidence that was not material or substantial. The record discloses substantial and material evidence from which the Commissioner could have based his decision, therefore, we vacate the Commissioner's order and remand for further proceedings. We summarize the deficiencies in the order to guide the Commissioner's consideration on remand.

As to the premium trend portion of the farm projection factor, there was sufficient evidence to support the Commissioner's finding that the trend determined by the Rate Bureau was not fully justified. Stern's testimony would permit the Commissioner to find that the farmowner premium trend should more closely parallel the homeowner premium trend. If the Commissioner rejects the Rate Bureau's premium trend component of the modified farm projection factor, the Rate Bureau's undisputed evidence of loss trend, found actuarily sound by the Commissioner, requires that he give due consideration to that factor.

In determining an excess multiplier, the Commissioner may properly consider combining ISO, NAII, and AAIS data. He may also consider the use of a 100 percent demarcation to determine excess losses. The Commissioner, having failed to give adequate notice to the Rate Bureau of any deficiency in the use of fire and extended coverage policy data, must consider that evidence. We reiterate, however, the Commissioner is not required to reach the same conclusions from this evidence as reached by the Rate Bureau.

The Commissioner must consider the Rate Bureau's request for the masonry veneer classification change, and we note that the record evidence supporting this classification change is uncontradicted. The Commissioner may, but is not required to, consider the Rate Bureau's evidence of the effect of writing three year policies rather than one year farmowner policies.

The Commissioner must consider each rating factor arising on the evidence which is enumerated in G.S. § 58-124.19. He may balance these factors so long as he reaches a rate that is neither inadequate, excessive, nor unfairly discriminatory. If the overall rate level is adequate, he may approve a negative underwriting profit.

Dr. Wilson's testimony as to investment income from premium, loss, and loss expense reserves is substantial and material evidence which the Commissioner could properly consider. The Commissioner must, however, consider the undisputed evidence in the record that Dr. Wilson rounded certain data results and failed to consider investment expenses in his calculations. The Commissioner may not consider evidence of investment income from capital or surplus.

On remand, the Commissioner should be specific in his findings of fact. The order before us merely recites witness testimony in substantial parts, it is vague as to the manner in which the Commissioner reached mathematical results, and it does not reflect the weight that each rating factor was given in reaching his ultimate determination.

Finally, the Commissioner may issue a new order in this case without further hearings as we conclude that the record is sufficient to permit a proper order. We note, however, that the Commissioner who issued the order before us is not the present Commissioner. In fairness to the present Commissioner, who did not hear the evidence in this case, we grant the authority to conduct further hearings in this matter, if he deems it appropriate.

In the face of the Commissioner's disapproval of their rate increase, the Rate Bureau elected to continue to use the rate requested during the pendency of this appeal and placing the amount of the rates disapproved in escrow in accordance with G.S. § 58-124.22(b). The Rate Bureau is hereby ordered to continue such procedure until a final determination of this matter is reached.

After carefully reviewing the entire record before us, and based on the holdings we have reached in each of the arguments presented, the order of the Commissioner dated 26 January 1984 is hereby

Reversed in part, vacated in part, and remanded.

Judges WHICHARD and BECTON concur.

MALCOLM M. LOWDER, MARK T. LOWDER AND DEAN A. LOWDER, PLAINTIFFS v. ALL STAR MILLS, INC., LOWDER FARMS, INC., CAROLINA FEED MILLS INC., ALL STAR FOODS, INC., ALL STAR HATCHERIES, INC., ALL STAR INDUSTRIES, INC., TANGLEWOOD FARMS, INC., CONSOLIDATED INDUSTRIES, INC., AIRGLIDE, INC., AND W. HORACE LOWDER, DEFENDANTS; AND CYNTHIA E. LOWDER PECK, MICHAEL W. LOWDER, DOUGLAS E. LOWDER, LOIS L. HUDSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR STEVE H. HUDSON, BRUCE E. HUDSON, BILLY J. HUDSON, ELLEN H. BALLARD, JENNELL H. RATTERREE, DAVID P. LOWDER, JUDITH R. LOWDER HARRELL, EMILY P. LOWDER CORNELIUS AND MYRON P. LOWDER, INTERVENING DEFENDANTS

No. 8420SC993

(Filed 18 June 1985)

1. **Limitation of Actions § 7— shareholders' derivative action for constructive trust—instructions on statute of limitations proper**

The trial court properly instructed the jury that a ten-year statute of limitations applied to an action to impose a constructive trust on corporate assets arising from a breach of a fiduciary duty and the court's instruction properly applied the principle that the statute of limitations began to run from the time the trustee disavowed the trust and knowledge of the disavowal was brought home to the *cestui que trust*. Other alleged errors in the instructions were not raised at trial. Rule 10(b)(2), Rules of App. Procedure.

2. **Corporations § 12— misappropriation of corporate opportunities by corporate officer—evidence sufficient**

There was sufficient evidence to support a verdict that defendant Horace Lowder as an officer or director of All Star Mills had usurped or misappropriated corporate opportunities by the formation or operation of other corporations controlled by him. Mills had the financial ability to take advantage of the opportunities, Mills was engaging in the businesses which were diverted, and corporate facilities of Mills were used in the formation and operation of the various companies. There was sufficient evidence that Horace was an officer at the time the opportunities arose in that he had signed the income tax returns of Farms as president as early as 1953 and the return of Mills as assistant treasurer as early as 1961, he had had major input into the formation and operation of these companies, and he had taken over management of the companies in the late 1950's when his father had surgery. Additionally, by 1975 Mills engaged in no business except to lease its facilities to businesses

owned or controlled by Horace Lowder, and whether or not various decisions were just and reasonable to Mills was for the jury to decide.

3. **Corporations § 12— misappropriation of corporate opportunities to corporations controlled by officer—constructive trust against assets of officer's corporations—proper**

In a shareholders' derivative action alleging misappropriation of corporate opportunities by an officer, there was no error in entering a judgment which placed a constructive trust in favor of All Star Mills upon the assets of corporations controlled by defendant Horace Lowder rather than upon their stock. The judgment provided that the balance of the assets belonged to All Star Mills after the payment of liabilities and the return of shareholders' investment properly proven; moreover, the jury found that the operation of the companies and not just their formation constituted the misappropriation of corporate opportunities.

4. **Corporations § 13— misappropriation of corporate opportunities by officer to corporations controlled by officer—dissolution of corporations proper**

There was no error in a judgment ordering dissolution of corporations controlled by defendant Horace Lowder where the court found and concluded that plaintiffs as shareholders of All Star Mills had reasonable expectations that the companies would be managed by the controlling officer in accordance with his fiduciary obligations and according to law, that the plaintiffs' equity in the corporation would not be diluted by the diversion of corporate assets to other companies, and that plaintiffs would have a reasonable opportunity to realize on their equity in the companies; that plaintiff Malcolm Lowder had a reasonable expectation based on working with the corporations since 1955 that he would have continued employment and a position and compensation reasonably proportionate to his ownership in the companies and his training and experience; and that plaintiffs' reasonable expectations were frustrated through no fault of theirs because Horace Lowder misappropriated corporate opportunities of All Star Mills. The court further found that Horace Lowder had exercised complete control over the corporations since his father's death in 1970, had refused to allow plaintiff Malcolm Lowder a position of more authority or participation after their father's death, handled tax claims against the companies without consulting counsel, managed the companies without consulting other shareholders, directed operations toward companies in which he had larger interests, issued treasury stock to himself without consulting other stockholders, that other shareholders had exhibited animosity toward plaintiff in the litigation, and that it would be difficult if not impossible for the affairs of the companies to be conducted in such a way that plaintiff might realize his reasonable expectations. G.S. 55-125(a)(4), G.S. 55-125.1.

APPEAL by defendants and intervening defendants from *McKinnon, Judge*. Judgments entered 25 January 1984 and 30 April 1984 in Superior Court, STANLY County. Heard in the Court of Appeals 19 April 1985.

This is a shareholder derivative action brought by plaintiffs on behalf of All Star Mills, Inc. (Mills) and Lowder Farms, Inc. (Farms). They alleged, *inter alia*, that defendant Horace Lowder, as an officer and director of Mills and Farms, breached fiduciary duties by misappropriating corporate opportunities of Mills and Farms through the formation and operation of corporations owned or controlled by defendant Horace Lowder: All Star Hatcheries, Inc. (Hatcheries), All Star Foods, Inc. (Foods), and All Star Industries, Inc. (Industries). At the conclusion of a three week long trial, the jury found that defendant Horace Lowder misappropriated corporate opportunities of Mills by the formation of Hatcheries, Foods and Industries. It also found that these claims were not barred by the statute of limitations. The superior court entered judgment in accordance with the jury's verdict, and impressed a constructive trust upon the assets of Hatcheries, Foods and Industries. The court subsequently entered an order making permanent a temporary receivership instituted 2 February 1979 and requiring the liquidation and dissolution of Mills, Farms, and Consolidated Industries.

Moore, Van Allen, Allen & Thigpen, by Jeffrey J. Davis and Randel E. Phillips, for plaintiffs.

Boyce, Mitchell, Burns & Smith, P.A., by Lacy M. Presnell, III, for defendants.

Hopkins, Hopkins & Tucker, by William C. Tucker, for intervening defendants.

JOHNSON, Judge.

I

All Star Mills, Inc. was formed in 1934 as Southern Flour Mills, Inc. by ancestors of the current individual parties. It engaged primarily in the business of flour and animal feed production and also operated a small egg packing facility. In 1955, the name of the corporation was changed to its current name, All Star Mills, Inc. The stock of All Star Mills, Inc. is owned by the parties as follows:

28.7% (505 shares)	Plaintiffs Malcolm Lowder and his two sons, Mark and Dean

29.8% (523 shares)	Defendant W. Horace Lowder, his wife and children
27.1% (477 shares)	Intervening defendant Lois Hudson, her husband and children
11.9% (210 shares)	Intervening defendant David P. Lowder

On 9 November 1950, Lowder Farms was incorporated to engage in the production of eggs, which it sold to Mills for resale. Its stock is owned by the parties as follows:

31.8% (500 shares)	All Star Mills, Inc.
12.1% (190 shares)	Plaintiff Malcolm Lowder
12.1% (190 shares)	Defendant Horace Lowder
12.1% (190 shares)	Intervening defendant Lois Hudson
18.4% (290 shares)	Intervening defendant David Lowder and his family

All Star Hatcheries, originally called All Star Mills, Hatchery Division, Inc., was incorporated 1 June 1959 at the impetus of defendant Horace Lowder to engage in the business of hatching eggs. Hatcheries' stock is owned 50% by defendant Horace Lowder and 50% by defendant Horace Lowder's wife.

In 1961, a decision was made to have Mills transfer its egg production business to All Star Foods, Inc. (Foods), which had been incorporated in 1959 to engage in the canning of chickens. At that time Horace Lowder owned all of Foods' stock. When egg production was transferred to Foods, additional stock was issued to Hatcheries and Mills, causing Hatcheries to own 49%, Mills to own 49% and Horace Lowder to own 2%, of Foods' stock. Because Horace Lowder and his wife owned Hatcheries, Horace Lowder effectively owned 51% of Foods' stock.

Shortly after the formation of Hatcheries, Horace Lowder became interested in purchasing approximately 15,000 acres of land in Hyde County, which he desired to purchase for Hatcheries. His father, who was instrumental in the formation of Mills, however, insisted that the land be purchased by Foods. All Star Industries, Inc. (Industries), which had been formed in 1961 to assist the other companies with financing, was called upon to refinance an existing debt secured by a deed of trust on the Hyde County land. Horace Lowder owns 100% of the stock of Industries.

Also, early in the 1960's, Horace Lowder became interested in purchasing a farm in Montgomery County to build poultry houses for breeders to produce eggs for hatching. Horace wanted to purchase the farm for Hatcheries, but his father, W. A. Lowder, wanted the farm to be purchased by his three children. For this purpose, W. A. Lowder formed Consolidated Industries (Consolidated) and sold thirds of stock in this corporation to each of his three children: plaintiff Malcolm Lowder, defendant Horace Lowder and intervening defendant Lois Hudson. Consolidated leased the farm to Hatcheries, which built poultry houses and placed cattle on the farm.

As noted above, Mills was founded by the fathers, brothers or grandfathers of the individual parties. From the mid-1930's to his death in 1970, W. A. Lowder primarily managed Mills. Horace Lowder began to work for Mills in 1951. By the late 1950's, Horace began to exert more influence over the management of the corporations. As early as 1953, Horace Lowder signed Lowder Farms income tax returns. Upon the death of his father in 1970, Horace Lowder assumed complete control over the management of the companies.

In the early 1960's, the Internal Revenue Service (IRS) began investigating the tax affairs of Mills and Farms. As a result of these investigations, Horace Lowder was ultimately convicted of income tax violations in 1973. Horace Lowder represented the companies without counsel at these hearings. After his appeals were exhausted, Horace Lowder was imprisoned in 1975 for one year. Just before his incarceration, Horace Lowder decided to discontinue the feed production business of Mills and transfer it to Foods, which leased Mills' facilities. He also decided to limit the feed production to certain customers, including Farms and Hatcheries. He informed Mr. David Lowder, Mrs. Lois Hudson, and Mr. Malcolm Lowder of these decisions, and they acquiesced in them.

Prior to his death, W. A. Lowder had told Malcolm that, upon his death, he wanted Malcolm to move his office from the egg production facilities back to the main office at the mill and to assist Horace in the management of the companies. Malcolm attempted to move to the mill office after his father's death, but Horace turned him away, saying Malcolm was not needed there and that

he should return to the egg plant at Foods. Malcolm returned to the egg plant.

Prior to the time Horace Lowder went to prison in 1975, Malcolm Lowder had made no inquiry as to the ownership of the several companies or their financial status or made no demand or request for dividends or financial statements. No dividends had been distributed in any of these companies since the late 1950's. No shareholders' meetings had been held at these companies since the late 1950's or early 1960's.

In 1975, while reviewing documents related with Horace's criminal appeal, Malcolm learned for the first time of the nature and extent of his brother's ownership of the various companies. He learned that Horace and his wife not only owned all of the stock of Hatcheries, but that Horace owned all of the stock of Industries. He also learned that Foods was not a wholly owned subsidiary of Mills, as he had thought, but was owned 49% by Mills, and 51% by Horace, directly or through Hatcheries.

In 1978, after Horace had been released from prison, the IRS renewed its efforts to collect taxes from the companies. Horace again appeared before the Tax Court and attempted to represent the companies without legal representation. Malcolm attended these hearings and learned new information. Malcolm thereafter in that same year made demand on Horace, pursuant to G.S. 55-38, to inspect the books and records of Mills, Farms, and Consolidated. In response to this demand, Horace gave Malcolm income statements and balance sheets for the previous ten years, but failed to furnish plaintiff complete access to the books and records of the companies.

Three days after Malcolm made demand to inspect the books and records, defendant Horace Lowder issued to himself 1,435 shares of Mills' treasury stock and 460 shares of Farms' treasury stock. By virtue of these transactions, Horace Lowder attempted to increase his share of All Star Mills from 29.8% to 61.3% and of Lowder Farms from 12.1% to 32%.

As a result of these actions, plaintiff filed this lawsuit in January 1979. Immediately upon the filing of this action, Horace fired Malcolm from his employment.

II

[1] The first issue we address is the statute of limitations issue. The availability of the statute of limitations defense in shareholder derivative actions is dependent upon the nature of the claim being asserted. R. Robinson, North Carolina Corporation Law and Practice, sec. 14-11 (3d ed. 1983). The present action was tried as one to impose a constructive trust on corporate assets arising out of a breach of fiduciary duty. Despite defendants' arguments to the contrary, it has repeatedly been held that a ten year statute of limitations applies to such actions. *See Cline v. Cline*, 297 N.C. 336, 255 S.E. 2d 399 (1979); *Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965); *Jarrett v. Green*, 230 N.C. 104, 52 S.E. 2d 223 (1949); *Speck v. N. C. Dairy Foundation, Inc.*, 64 N.C. App. 419, 307 S.E. 2d 785 (1983), *reversed on other grounds*, 311 N.C. 679, 319 S.E. 2d 139 (1984). The trial court therefore properly instructed the jury that a ten year statute of limitations applied to this action. In such actions, the statute of limitations begins to run "from the time the trustee disavows the trust and knowledge of his disavowal is brought home to the *cestui que trust*." *Cline v. Cline, supra* at 348, 255 S.E. 2d at 407. Judge McKinnon's instruction to the jury properly applied this principle. It is undisputed that Horace Lowder knew the true facts regarding the ownership of the various companies no later than 1975. There is some question as to whether plaintiffs knew, or should have known, the true facts before then. In any event, the question was for the jury, and defendants' motions for a directed verdict, for judgment notwithstanding the verdict, and for a new trial were properly denied.

Defendants contend that the court erred in its instructions by failing to instruct the jury that the statute of limitations began to run when the fraud should have been discovered by any officer or director with adverse interests to Horace Lowder and by instructing the jury that the statute of limitations was tolled when Horace took complete control of the corporations. Defendants, however, did not object to these instructions at trial. They are therefore barred from raising them on appeal. Rule 10(b)(2), Rules of Appellate Procedure; *Wall v. Stout*, 310 N.C. 184, 311 S.E. 2d 571 (1984); *Durham v. Quincy Mut. Fire Ins. Co.*, 311 N.C. 361, 317 S.E. 2d 372 (1984).

For the same reasons, we reject defendants' contention that the trial court committed prejudicial error by instructing the jury that plaintiffs were "estopped" from bringing this action more than ten years after they knew, or should have known, the true facts. Not only did the defendants not object, they specifically requested the instruction given. They cannot now claim error. *Overton v. Overton*, 260 N.C. 139, 132 S.E. 2d 349 (1963); *Kim v. Professional Business Brokers*, 74 N.C. App. 48, 328 S.E. 2d 296 (1985).

III

[2] The next issue is whether the evidence was sufficient to support a verdict that Horace Lowder, as an officer or director of Mills, usurped or misappropriated a corporate opportunity of Mills through the formation and operation of Foods, Hatcheries and Industries. The law in North Carolina regarding the usurpation of corporate opportunities is set forth in *Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E. 2d 551 (1983): A transaction engaged in by a corporate fiduciary on his behalf is not void or voidable if the corporate fiduciary can prove that the transaction was "just and reasonable" to the corporation because it was not an opportunity which the corporation would have wanted. In determining whether a corporate fiduciary has usurped a corporate opportunity, the facts of the particular case must be analyzed to determine whether the opportunity is functionally related to the corporation's business and whether the corporation has an interest or expectancy in the opportunity. In making this determination, several factors may be considered:

> 1) the ability, financial or otherwise, of the corporation to take advantage of the opportunity; 2) whether the corporation engaged in prior negotiations for the opportunity; 3) whether the corporate director or officer was made aware of the opportunity by virtue of his or her fiduciary position; 4) whether the existence of the opportunity was disclosed to the corporation; 5) whether the corporation rejected the opportunity; and 6) whether the corporate facilities were used to acquire the opportunity.

Id., at 310, 307 S.E. 2d at 569.

Defendants concede Mills had the financial ability to take advantage of the opportunities. Mills, of course, was engaging in the businesses which were diverted to companies which Horace Lowder owned or controlled, and corporate facilities of Mills were used in the formation and operation of the various companies. For example, Mills built the building used by Hatcheries and Foods. Hatcheries and Foods also used Mills' employees and Mills paid their salaries. Mills' funds were also used in the formation and operation of Industries, which was formed to finance the purchase of land in Hyde County by Foods. Foods borrowed the money from Industries, which had borrowed the money from Horace Lowder, who had in turn borrowed from Mills, Foods, Hatcheries and Farms. The net result of these transactions was that Horace Lowder, personally and through his 100% ownership of Industries, earned one half of one per cent interest on the deal.

North Carolina recognizes that one may be a *de facto* officer or director of a corporation. *See* R. Robinson, *supra*, secs. 11-8 and 13-2. The evidence tended to show that Horace Lowder signed the income tax returns of Farms as president as early as 1953 and signed the income tax returns of Mills as assistant treasurer as early as 1961; that Horace Lowder had major input into the formation and operation of these companies; and that Horace took over management of the companies in the late 1950's when his father had surgery removing one of his kidneys. The evidence thus supports a finding that Horace was an officer at the time these opportunities arose.

At one time, Mills engaged in the businesses of flour milling, cornmeal milling, feed production, raising broilers, and egg marketing. By 1975, it engaged in no business, except to lease its facilities to businesses owned or controlled by Horace Lowder.

Horace Lowder, at trial, offered explanations for various decisions to show that the transactions were "just and reasonable" to Mills. For example, he explained that Mills got out of the egg marketing business because egg marketing placed Mills in an awkward position with its feed customers. Yet, Foods went from no sales and no business to $2.5 million in sales and a gross profit of more than $380,000 in its first year of operation. Whether or not these explanations were reasonable were for the jury to determine.

We hold the foregoing evidence was sufficient for the jury to infer that Horace Lowder, as an officer or director of Mills, misappropriated corporate opportunities of Mills by the formation or operation of Foods, Hatcheries and Industries.

IV

[3] Defendants next contend that the judgment entered upon the jury verdict was erroneous because a constructive trust in favor of Mills was placed upon all the assets of Foods, Hatcheries and Industries rather than upon their stock. This contention has no merit. The judgment provided that the balance of the assets of the companies, after the payment of liabilities and the return of shareholders' investment properly proven, belonged to Mills. The practical effect of the court's judgment is the same. Moreover, the jury found that the operation of the companies, and not just their formation, constituted the misappropriation of the corporate opportunities.

V

[4] We next consider the court's judgment ordering a dissolution and liquidation of the corporations. A superior court has the power to liquidate the assets and business of a corporation in an action by a shareholder when it is established that "(l)iquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder." G.S. 55-125(a)(4). In *Meiselman v. Meiselman, supra,* the Court set out the analysis a superior court should employ in determining whether to order dissolution or other relief under G.S. 55-125(a)(4): The superior court must first identify the "rights and interests" a complaining shareholder has in the corporation. The Supreme Court defined these rights and interests as including the "reasonable expectations" a complaining shareholder has in the corporation. These reasonable expectations are to be determined by examining the entire history of the participants' relationship. That history includes the reasonable expectations created at the inception of the relationship, and those which evolved during the course of the parties' relationship. The interests and views of the other participants must be considered in determining these reasonable expectations. In order for a plaintiff's expectations to be reasonable, they must be known or assumed by the other shareholders and concurred in by them. In sum, plaintiff must show that: (1) he had one or more substantial

reasonable expectations known or assumed by the other participants; (2) the expectation has been frustrated; (3) the frustration was not plaintiff's fault and was in large part beyond plaintiff's control; and (4) under all the circumstances of the case, plaintiff is entitled to some form of equitable relief.

Once the plaintiff has made this showing the superior court must then determine whether some form of relief is reasonably necessary for the protection of the plaintiff's rights and interests. The court may order liquidation pursuant to G.S. 55-125(a)(4) or it may order the relief allowed by G.S. 55-125.1. The determination of relief is within the superior court's equitable discretion.

Among the rights and interest that the Court in *Meiselman* said that a shareholder has in a close corporation are secure employment, fringe benefits which flow from his association with the corporation, and meaningful participation in the management of the family business, in addition to the traditional shareholder rights, such as the right to notice of stockholders' meetings, the right to vote cumulatively, the right of access to the corporate offices and to corporate financial information, and the right to compel the payment of dividends. In the present case, the superior court found and concluded that plaintiffs, as shareholders of All Star Mills, had reasonable expectations that the companies would be managed by the controlling officer in accordance with his fiduciary obligations and according to law; that the plaintiffs' equity in the corporation would not be diluted by the usurpation of corporate opportunities or the diversion of corporate assets to other companies; and that plaintiffs would have a reasonable opportunity to realize on the value of their equity in the companies. The court further found and concluded that plaintiff Malcolm Lowder, as a shareholder of Mills, Farms and Consolidated, had a reasonable expectation that he would have "continued employment and a position and compensation reasonably proportionate to his ownership in the companies, and his training and experience"; and that plaintiffs' reasonable expectations were frustrated, through no fault of theirs, because as the jury determined, Horace Lowder misappropriated corporate opportunities of All Star Mills. As further support of its decision to liquidate the corporations, the superior court cited Horace Lowder's excercise of complete control and domination of the corporations since his father's death in 1970, his refusal to allow Malcolm Lowder a posi-

tion of more authority or participation after their father's death, his handling of tax claims against the companies without counsel, his management of the companies without consulting other shareholders, his direction of operations toward companies in which he had larger interests, and his issuance of treasury stock to himself without consulting other shareholders. Noting that the other shareholders had exhibited animosity towards Malcolm Lowder during this litigation, had aligned themselves with Horace Lowder in this litigation, and had adopted a corporate resolution requiring the Board of Directors to return to Horace Lowder any assets lost by him as a result of the litigation, the Court found and concluded that the majority of the stockholders would align themselves in opposition to plaintiffs in any future operation of the corporations and that it would be difficult, if not impossible, for the affairs of the companies to be conducted in such a way that plaintiff might realize his reasonable expectations. The court concluded that the only way plaintiffs' reasonable expectations could be protected was through the liquidation and dissolution of Farms and Consolidated.

Defendants except to the superior court's finding of fact that Malcolm Lowder had a reasonable expectation of continuous employment as being unsupported by the evidence. The record, however, shows Malcolm Lowder began working for Mills in 1955 and worked continuously for either Mills, Farms, Hatcheries or Foods until he was abruptly fired by Horace in 1978. It was reasonable for the court to conclude that Malcolm Lowder, as a shareholder, had a reasonable expectation that his employment would continue. His working for all those years was sufficient notice to the other shareholders that he had a reasonable expectation of continued employment. Indeed, they sought to punish Malcolm and frustrate his expectations of employment by passing a corporate resolution not to rehire Malcolm in any capacity.

Defendants also except to other findings of fact as being unsupported by the evidence. Even if it is assumed, *arguendo*, that these findings were unsupported by the evidence, the remaining findings support the court's judgment. We hold the court's findings of fact and conclusions of law support its order of liquidation and dissolution. We can find no abuse of discretion by the court in ordering liquidation and dissolution of Mills, Farms and Consolidated.

VI

Plaintiffs have also brought forward cross-assignments of error, but because of our disposition of this case, we need not consider them.

In summary, we find no error in the trial and affirm the judgment of liquidation and dissolution.

No error.

Judges ARNOLD and EAGLES concur.

STATE OF NORTH CAROLINA v. FRANK ELWIN CORLEY

No. 8428SC916

(Filed 18 June 1985)

1. **Criminal Law § 138— resentencing hearing—mitigating factor—prison conduct after original sentencing**

The trial court erred in failing to consider defendant's prison conduct between the original sentencing hearing and the resentencing hearing for purposes of mitigation where defendant's trial counsel requested the court to consider defendant's good prison record as a mitigating factor, and defendant offered a letter from the prison director stating that defendant had obtained his high school equivalency diploma as an honors student while in prison, that he had been given a job in the prison canteen involving significant responsibility, and that he had committed no infractions.

2. **Criminal Law § 138— aggravating factor—use of or armed with gun**

Although there was evidence to support a finding that defendant was "armed with" a gun during a kidnapping, the evidence did not support a finding that defendant "used" the gun during the kidnapping. G.S. 15A-1340.4(a)(1).

3. **Criminal Law § 138— consolidated sentence—separate findings of aggravating and mitigating factors**

Where the trial court consolidated kidnapping and larceny charges for sentencing, the court should have made separate findings in aggravation and mitigation as to each offense.

4. **Criminal Law § 138— aggravating factor outweighing eleven mitigating factors**

The trial court did not abuse its discretion in finding that a single aggravating factor outweighed the eleven factors found in mitigation.

Judge PARKER dissenting in part and concurring in part.

State v. Corley

APPEAL by defendant from *Robert D. Lewis, Judge.* Judgment entered 17 February 1984 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 14 March 1985.

Attorney General Thornburg, by Assistant Attorney General Nonnie F. Midgette, for the State.

Appellate Defender Adam Stein, by First Assistant Appellate Defender Malcolm Ray Hunter, Jr., for defendant appellant.

BECTON, Judge.

I

This case presents an appeal from a sentence imposed at a resentencing hearing governed by the Fair Sentencing Act. The evidence presented at trial is recited in the earlier appeal of this matter, *State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984), and we have incorporated into the body of this opinion only such facts as we find necessary to an understanding of the questions presented for our review.

The defendant was convicted of first degree murder, first degree kidnapping, and felony larceny. The jury recommended a life sentence for the murder, and the trial court consolidated the remaining two convictions and imposed a 30-year sentence to begin at the expiration of the life term. On appeal, our Supreme Court affirmed the convictions of murder and larceny, reduced the kidnapping conviction from first degree to second degree, and remanded the kidnapping and larceny charges for a new sentencing hearing. *State v. Corley.*

At the resentencing hearing, the parties relied upon evidence that had been presented at trial and at the original hearing. In addition, the defendant presented evidence concerning his good behavior in prison since the imposition of the original sentence. The kidnapping and larceny charges were again consolidated for sentencing. The trial court found eleven mitigating factors and one aggravating factor, and concluded that the factor in aggravation outweighed those in mitigation and imposed the maximum 30-year sentence for second degree kidnapping on the consolidated charges.

The defendant appeals, arguing that the trial court committed reversible error in (1) failing to consider defendant's good record in prison between the first and second sentencing hearings as a nonstatutory mitigating factor; (2) finding as an aggravating factor as to the kidnapping charge that defendant used a deadly weapon; (3) failing to make separate findings in aggravation and mitigation for each of the consolidated offenses; and (4) imposing a 30-year sentence for second degree kidnapping and larceny. We agree that it was prejudicial error for the trial court to refuse to consider evidence of defendant's prison conduct between sentencing hearings, and it is on that basis we remand this case for resentencing. As defendant's other assignments of error pertain to matters that may recur on remand, we also address them briefly.

II

[1] Defendant first argues that it was reversible error for the trial court to fail to consider his prison conduct between the original sentencing hearing and the resentencing hearing for purposes of mitigation. We agree.

The trial court should find a nonstatutory mitigating factor when defense counsel has made a specific request therefor, and when the evidence is substantial, uncontradicted, and manifestly credible. *See State v. Gardner*, 312 N.C. 70, 320 S.E. 2d 688 (1984). To permit the trial court to ignore such evidence would eviscerate the Fair Sentencing Act. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). Here, the record shows that defendant's trial counsel requested that the court consider in mitigation of defendant's sentence the fact that defendant maintained a good prison record between the time of his commitment and the date of the resentencing hearing. The evidence offered in support of this factor was a letter from the prison director stating that while imprisoned, defendant had obtained his high school equivalency diploma as an honors student, that he had been given a job in the prison canteen involving significant responsibility, and that he had committed no infractions. The State did not contest the veracity of this evidence; instead, the prosecutor argued that it was an improper basis for a mitigating factor as the defendant was merely doing, under compulsion, what was expected of him.

In our opinion, defendant has met his burden of persuasion concerning his conduct in prison, *viz.*, that the evidence so clearly

establishes the facts in issue that no reasonable inferences to the contrary may be drawn, and that the credibility of the evidence is manifest as a matter of law. *State v. Jones*. And when, as here, the defendant has met this burden of persuasion, the only question remaining is whether the facts shown are of mitigating value. In this connection, the following comments concerning resentencing under the Fair Sentencing Act, are enlightening:

> For all intents and purposes the resentencing hearing is *de novo* as to the appropriate sentence. *See State v. Watson*, 65 N.C. App. 411, 413, 309 S.E. 2d 3, 4 (1983); *State v. Lewis*, 38 N.C. App. 108, 247 S.E. 2d 282 (1978). On resentencing the judge makes a new and fresh determination of the presence in the evidence of aggravating and mitigating factors. The judge has discretion to accord to a given factor either more or less weight than a judge, or the same judge, may have given at the first hearing, [although] in the process of weighing and balancing the factors on rehearing the judge cannot impose a sentence greater than the original sentence.

State v. Mitchell, 67 N.C. App. 549, 551, 313 S.E. 2d 201, 202 (1984).

The cases relied upon in *State v. Mitchell*, *State v. Watson* and *State v. Lewis*, held that upon rehearing, an earlier sentence could be modified "if based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing." *State v. Lewis*, 38 N.C. App. at 110, 247 S.E. 2d at 284. This "identifiable conduct" includes evidence of a defendant's behavior while incarcerated. *State v. Watson. See also State v. Stone*, 71 N.C. App. 417, 322 S.E. 2d 413 (1984) (resentencing judge made finding in mitigation based upon evidence of defendant's post-conviction behavior, which included prison records, although he declined to accord the finding any weight).

Thus, the substantial and uncontradicted evidence presented by the defendant was of mitigating value, yet none of the eleven factors in mitigation found by the trial court is directed to defendant's conduct in prison. The trial court found that the factor in aggravation outweighed those in mitigation, and imposed a sentence in excess of the presumptive. We cannot say that the trial judge would not have been influenced by an additional mitigating factor.

Therefore, as the defendant may have suffered prejudice from the court's failure to make a finding in mitigation relating to his post-conviction behavior, he is entitled to a new sentencing hearing.

III

We briefly comment on defendant's other assignments of error.

[2] First, defendant argues that the trial court's single finding in aggravation, that "[t]he defendant used a deadly weapon at the time of the crimes," was improper as to the kidnapping because the defendant did not *use* a deadly weapon during the kidnapping. N.C. Gen. Stat. Sec. 15A-1340.4(a)(1) (1983) includes in its list of aggravating factors: (i) "The defendant was armed with or used a deadly weapon at the time of the crime." We point out that although there was evidence to support a finding that the defendant was *armed with* a gun during the kidnapping, the evidence does not suggest the disjunctive part of the statute, that defendant *used* the gun during the kidnapping.

[3] Next, defendant argues that the trial court committed reversible error in failing to make separate findings in aggravation and mitigation for each of the consolidated offenses. We are aware that a failure to make such separate findings will be deemed harmless error when the factors as found apply equally to each of the consolidated offenses, *State v. Higson*, 310 N.C. 418, 312 S.E. 2d 437 (1984), as is arguably the case here. However, we emphasize the continuing vitality of the rule of law governing the sentencing of consolidated offenses found in *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), namely, that in order to support a sentence for consolidated offenses varying from the presumptive, "each offense . . . must be treated separately, and separately supported by findings tailored to the individual offense and applicable only to that offense." *Id.* at 598, 300 S.E. 2d at 698. On remand, the trial court should accord each offense separate treatment, as *Ahearn* dictates. We also discourage the practice used by the trial court at the first resentencing—striking out the singular word "crime" on the form typically used for Fair Sentencing Act felonies, and typing in "crimes."

[4] Finally, the defendant contends that it was a reversible abuse of discretion for the trial court to impose a 30-year

sentence for the consolidated offenses by concluding that the single aggravating factor outweighed the eleven found in mitigation. Suffice it to say that the weight to be given any particular factor rests in the trial court's sound discretion, and the balance struck by the court will not be disturbed if there is support in the record for the determination. *State v. Ahearn. Accord State v. Baucom*, 66 N.C. App. 298, 311 S.E. 2d 73 (1984) (only one factor in aggravation needed to support sentence greater than presumptive).

Remanded for resentencing.

Judge WEBB concurs.

Judge PARKER dissents.

Judge PARKER dissenting in part and concurring in part.

I disagree with the holding of the majority that the trial judge erred in failing to find a nonstatutory mitigating factor. The majority opinion relies on *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983) and *State v. Gardner*, 312 N.C. 70, 320 S.E. 2d 688 (1984), to support the holding that defendant is entitled to a new sentencing hearing based on the trial judge's failure to find defendant's good postconviction prison conduct as a nonstatutory mitigating factor. These cases do not, in my judgment, support such conclusion.

In *State v. Jones* the defendant assigned error to the trial judge's failure to find as a mitigating factor, set forth in G.S. 15A-1340.4(a)(2)(c), that "[t]he defendant was a passive participant or played a minor role in the commission of the offense." Our Supreme Court held that when evidence in support of a statutory aggravating or mitigating factor was uncontradicted, substantial and credible, the sentencing judge errs if he fails to find this statutory factor, and "to permit the sentencing judge simply to ignore it would eviscerate the Fair Sentencing Act." *State v. Jones*, 309 N.C. at 219, 306 S.E. 2d at 454. Similarily, in *State v. Gardner* our Supreme Court held that the trial court erred in failing to find, *ex mero motu*, that "the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer," G.S. 15A-1340.4(a)(2)(1), when the substantial, uncon-

tradicted and manifestly credible evidence supported such finding. The court concluded:

> We wish to make it abundantly clear that the duty of the trial judge to find a mitigating factor that has not been submitted by defendant arises only when the evidence offered at the sentencing hearing supports the existence of a mitigating factor *specifically listed in N.C. Gen. Stat. § 15A-1340.4(a)(2)* and when the defendant meets the burden of proof established in *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). The trial judge is not required to consider whether the evidence supports the existence of non-statutory mitigating factors in the absence of specific request by defense counsel.

State v. Gardner, 312 N.C. at 73, 320 S.E. 2d at 690. The last sentence does not, as the majority opinion suggests, impose a duty on the trial judge to find a nonstatutory mitigating factor. Rather, it simply provides that if defense counsel fails to request such finding, the trial judge is not required to consider whether the evidence supports the nonstatutory mitigating factor.

As our Supreme Court explained in *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983), if the judge imposes a term different from the presumptive term, he must consider the statutory aggravating and mitigating factors, and he may consider nonstatutory factors that he finds proved by the preponderance of the evidence and reasonably related to the purposes of sentencing. I find no North Carolina case which imposes a duty on a sentencing judge to find a nonstatutory mitigating factor, and I read G.S. 15A-1340.4(a) as allowing, rather than requiring, nonstatutory factors to be considered. Moreover, in my opinion, the following cases relied upon by the majority, *State v. Watson*, 65 N.C. App. 411, 309 S.E. 2d 2 (1983) and *State v. Lewis*, 38 N.C. App. 108, 247 S.E. 2d 282 (1978), which are not Fair Sentencing Act cases, have little relevance to the instant case. Both of these cases involved the trial court's failure to make a "no benefit" finding as required under G.S. 148-49.14, and were remanded by this court for a *de novo* sentencing hearing. Neither case addressed the issue of postconviction behavior as a mitigating factor in sentencing a defendant under the Fair Sentencing Act.

In *State v. Stone*, 71 N.C. App. 417, 322 S.E. 2d 413 (1984), also cited by the majority, the defendant assigned error to the

trial court's failure to consider and give weight to his postconviction behavior as a nonstatutory mitigating factor. The trial judge found these factors in mitigation, but declined to give them any weight because "these are matters to be considered by the Board of Parole as they occurred after sentence was imposed [on 19 July 1982, and] [h]e is not entitled to consideration twice." This court found that the trial judge was within his discretion in failing to give weight to the nonstatutory mitigating factors and agreed that it was a matter to be considered by the Department of Correction in awarding "gain time" and "good time."

I do not find that the trial court erred in failing to find defendant's postconviction conduct as a nonstatutory mitigating factor. In my view, finding or refusing to find a nonstatutory mitigating factor is entirely within the trial judge's discretion and not reviewable on appeal.

The majority also observes that the trial judge erred in finding, as a factor in aggravation, that "[t]he defendant used a deadly weapon at the time of the crimes." I agree with the majority that there was no evidence that defendant used his gun during the kidnapping. The finding in aggravation is, however, appropriate for the larceny offense. In his statement made to Detective Ted Lambert, defendant said, "We traveled a distance of about 8 miles. There was a house there and I told Ted that was my mother's house. We pulled up in the driveway and I opened my door and said, 'Ted you don't know me very well. I don't want to use this gun. I just want you to get out.' He didn't get out."

Nevertheless, the case must be remanded for resentencing since the offenses were consolidated for judgment.

MARGARET H. ANDREWS v. AUGUST RICHARD PETERS, III

No. 843SC747

(Filed 18 June 1985)

1. Master and Servant § 89.1; Assault and Battery § 3.1— civil action for battery by co-employee—motion for directed verdict properly denied

There was no error in denying defendant's motions for a directed verdict in an action by an employee injured as the result of a prank by defendant co-

employee where defendant did not deny that he intended to tap plaintiff behind the knee. Liability for the intentional tort of battery hinges on intent to cause a harmful or offensive contact and tapping plaintiff's knee was easily an offensive contact.

2. **Rules of Civil Procedure § 52— motion for new trial on damages granted—conflicting medical evidence—findings not sufficient**

An action by an employee against a co-employee for an intentional tort was remanded for additional findings of fact where the trial court had granted plaintiff's Rule 59 motion on the issue of damages, defendant had filed a Rule 52 motion asking for detailed findings and conclusions, the court's order was no more than a statement of its discretionary authority without a detailed factual basis for its decision, and there was conflicting medical evidence as to damages.

3. **Damages § 10— tort action against co-employee—sick leave pay—collateral source—properly excluded**

In an action by one co-employee against another for injuries resulting from a deliberate prank, evidence of plaintiff's sick leave pay was properly excluded under the collateral source rule, but the testimony of her company's personnel director and evidence of her back problems were properly admitted.

Judge WELLS concurring in part and dissenting in part.

APPEAL by defendant from *Allsbrook, Judge*. Orders entered 21 December and 29 December 1983 in Superior Court, PITT County. Heard in the Court of Appeals 8 March 1985.

Barker, Kafer & Mills, by James C. Mills, for plaintiff appellee.

McMullan & Knott, by Lee E. Knott, Jr., for defendant appellant.

BECTON, Judge.

This case is before our Court for the second time. On the initial appeal our Court, in *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E. 2d 748 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E. 2d 364 (1982), reversed the trial court's granting of the defendant's Rule 12(b)(1) motion and remanded the case for trial. Our Court held that the North Carolina Workers' Compensation Act is not the exclusive remedy for an employee "intentionally injured" by a co-employee. An employee is thus free to assert an intentional tort action against a co-employee. *Id.* The co-employee immunity read into the Act by the North Carolina case law does not extend to in-

tentional acts. *Id.* We refer to the earlier opinion for a complete analysis.

The facts, briefly stated, are as follows. The plaintiff, Margaret H. Andrews, was injured on 27 September 1979 when her co-employee at Burroughs Wellcome Corporation, the defendant, August Richard Peters, III, walked up behind her at work and tapped the back of her right knee with the front of his right knee, causing her knee to buckle. Andrews lost her balance, fell to the floor, and dislocated her right kneecap. Andrews instituted this action against Peters for intentional assault and battery. She sought compensation for medical expenses, loss of income, pain and suffering, permanent disability, and punitive damages.

The trial judge submitted the case to the jury on the theory of battery. The jury entered a verdict in favor of Andrews on liability and awarded her $7,500 in damages. Andrews filed a Rule 59(a)(6) and (7) motion for a new trial on the issue of damages, alleging that the inadequate verdict was the product of passion or prejudice and that the evidence was insufficient to support the verdict. Peters responded with a Rule 52(a)(2) motion, asking the trial court to "set forth fully and in detail the findings of fact and conclusions of law upon which its ruling on the plaintiff's motion (Rule 59) is based. . . ." The trial court granted Andrews' Rule 59 motion in its 21 December 1983 order. Peters then filed a combined Rule 52(b) and Rule 60(b)(6) motion, asking the trial court to state in its 21 December 1983 order the amount of damages it deemed sufficient to prevent a new trial and further, to vacate its 21 December 1983 order and instead, increase Andrews' award to a maximum of $25,000. In its 29 December 1983 order the trial court denied Peters' combined motion. From the trial court's 21 and 29 December orders, Peters appeals.

I

[1] Peters contends that the trial court erred in denying his motions for a directed verdict at the close of Andrews' evidence and at the close of all the evidence. According to Peters, this Court's holding in the earlier opinion permits an employee to seek recovery from a co-employee only in "those instances where the injury was intentionally inflicted as opposed to those instances where the injury resulted from an intentional act, the result of which was neither intended nor reasonably foreseeable." Peters alleges

that there is no evidence that he intended to injure Andrews. As summarized in Peters' brief:

> [Peters] testified that he did not intend to be rude or offensive in tapping [Andrews] behind her knees. He stated that the same thing had only moments before been done to him by a co-worker and that it struck him as fun. He stated that he tried to catch [Andrews] to prevent her from striking the floor, that he was shocked by what had happened, and that he immediately apologized to [Andrews] and attempted to help her.

Peters cites language in the earlier *Andrews v. Peters* opinion ("an employee intentionally injured by a fellow employee"); in *Daniels v. Swofford*, 55 N.C. App. 555, 286 S.E. 2d 582 (1982) ("actual intent on the part of the corporate employer to injure [plaintiff]"); in *Wesley v. Lea*, 252 N.C. 540, 114 S.E. 2d 350 (1960) ("no evidence of any intention on the part of defendant to injure plaintiff"); and in *Warner v. Leder*, 234 N.C. 727, 69 S.E. 2d 6 (1952) ("the defendant did not intentionally injure the plaintiff") to support his contentions. However, the Supreme Court has recently clarified the *Andrews v. Peters* holding:

> In a recent opinion by Judge (now Justice) Vaughn, our Court of Appeals expressly held that the Workers' Compensation Act does not preclude a suit against a co-employee for intentional torts. *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E. 2d 748 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E. 2d 364 (1982). This holding rested upon the common-sense conclusion that the legislature did not intend to insulate a co-employee from liability for intentional torts inflicted upon a fellow worker. *Id.*, 55 N.C. App. at 127, 284 S.E. 2d at 750. The Court of Appeals also noted that in many of the jurisdictions granting co-employee immunity, an exception for intentional acts causing injury had been either expressly set out in the statute or judicially grafted upon them. *Id.*

Pleasant v. Johnson, 312 N.C. 710, 713, 325 S.E. 2d 244, 247 (1985).

Furthermore, Peters' construction of the broad language in the *Andrews v. Peters* holding and in the earlier case law ignores the nature of the intent required for an intentional tort action.

> The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids. The defendant may be liable although intending nothing more than a good-natured practical joke, or honestly believing that the act would not injure the plaintiff, or even though seeking the plaintiff's own good.

W. Prosser & W. Keeton, *The Law of Torts* Sec. 8, at 36-7 (5th ed. 1984). *See also Restatement (Second) of Torts* Sec. 13 comment c (1965). For example, liability for the intentional tort of battery hinges on the defendant's intent to cause a harmful or offensive contact. *Restatement, supra*, Sec. 13 (1965). Significantly,

> [t]he defendant's liability extends, as in most other cases of intentional torts, to consequences which the defendant did not intend, and could not reasonably have foreseen, upon the obvious basis that it is better for unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim.

Prosser & Keeton, *supra*, Sec. 9, at 40.

Peters does not deny that he intended to tap Andrews behind the knee. Although tapping Andrews' knee was arguably not in and of itself a harmful contact, it easily qualifies as an offensive contact. "A bodily contact is offensive if it offends a reasonable sense of personal dignity." *Restatement, supra*, Sec. 19 and comments. There is no evidence of consent to the touching. *See Restatement, supra*, Sec. 13 comment c.

The trial judge phrased the issue of liability succinctly: "Did the defendant commit a battery upon the plaintiff on September 27, 1979?" We note that the jury instructions are neither included in the record nor are they the subject of an assignment of error. We are therefore left to presume that the trial court instructed the jury correctly on the theory of battery. From the jury's verdict, we conclude that the jury found that Peters intended to cause a harmful or offensive contact, *i.e.*, the tapping of Andrews' knee, and that he should therefore be liable for the unforeseen results of his intentional act.

Since there was evidence of the requisite intent to submit the case to the jury on the theory of battery, we hold that the trial court did not err in denying Peters' motions for a directed verdict.

II

[2] The jury heard conflicting testimony from two orthopedic surgeons, Dr. Randolph Williams and Dr. Harold Vandersea, who had treated Andrews respectively for knee problems and knee and back problems. Dr. Williams stated that he treated Andrews from September 1979 until September 1980 for her dislocated kneecap. During that time he performed one knee operation on Andrews. On 8 September 1980 Dr. Williams "felt that she had reached maximum improvement." He never examined Andrews or treated her for back trouble. His fee was $899.85. The hospital bill for the one operation was $1,121.50.

On 16 March 1981, six months after the end of Dr. Williams' treatment, Andrews consulted Dr. Vandersea, complaining that she still had pain in her knee, that she had fallen several times because her knee gave out, and that she was having back trouble. Dr. Vandersea performed two knee operations on Andrews, finally removing the kneecap. In addition, Dr. Vandersea repaired a ruptured disc in Andrews' back. In his opinion the back condition resulted from the falls, and the knee condition resulted from the September 1979 injury. Dr. Vandersea's bill totalled $2,778. The hospital bill for Dr. Vandersea's operations was $3,062.72.

The Burroughs Wellcome personnel director calculated the total amount in lost wages over the period from 1979 through 1983 at $15,280.65.

Peters argues that the trial court abused its discretion in granting Andrews' Rule 59(a)(6) and (7) motion for a new trial, when the jury "obviously . . . chose to believe the testimony of Dr. Williams and to disbelieve the testimony of Dr. Vandersea" in awarding Andrews $7,500 in damages.

We note that the 21 December 1983 order is a discretionary Rule 59 order; the trial court concluded "that the court should *in its considered discretion* grant a new trial to the plaintiff as to the second issue [damages] . . . ." (Emphasis added.) *See Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982) (identifica-

tion of discretionary Rule 59 order). As our Supreme Court emphasized in *Worthington*, "an 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." 305 N.C. at 487, 290 S.E. 2d at 605. The *Worthington* Court reviewed the entire record before determining that the trial court had not abused its discretion in granting a Rule 59 motion to set aside an excessive verdict and to order a new trial.

However, in *Worthington*, neither party had made a Rule 52 (a)(2) motion specifically asking for findings of fact and conclusions of law on the decision of the Rule 59 motion. N.C. Gen. Stat. Sec. 1A-1, Rule 52(a)(2) (1983) reads, in pertinent part: "Findings of fact and conclusions of law *are necessary* on decisions of any motion or order *ex mero motu* only *when requested by a party* and as provided by Rule 41(b)." (Emphasis added.) Thus, the trial court's compliance with the party's Rule 52(a)(2) motion is mandatory. *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* Sec. 2574 (1971) (discussion of Federal Rule 52(a)). Once requested, the findings of fact and conclusions of law on a decision of a motion, as in a judgment after a non-jury trial, must be sufficiently detailed to allow meaningful review. *See Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980) (Rule 52(a)(1)). The trial court's findings of fact are only conclusive on appeal when they are supported by competent evidence. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E. 2d 149 (1971).

Here, the trial court made findings of fact in its 21 December 1983 order, but they are not sufficient for a clear understanding of the basis of its decision. After reciting the issues submitted to the jury and the contents of Andrews' Rule 59 motion, the trial court found:

> 3. That the court has thoroughly considered all of the evidence that was given during the course of this trial. That the court has reviewed its notes that were made during the course of the trial. That the court has a distinct recollection of the trial.
>
> 4. That the court in its considered discretion is of the opinion that the motion filed by the plaintiff in this cause

> should be allowed and that the plaintiff should be given a new trial as to the second issue presented to the jury.

and concluded:

> Based upon the foregoing findings of fact, the court does hereby conclude that the court should in its considered discretion grant a new trial to the plaintiff as to the second issue presented to the jury during the trial of 10 October 1983 Civil Session of the Pitt County Superior Court.

Thus, the trial court's order is no more than a statement of its discretionary authority without detailing the factual basis for its decision. The legislative enactment of Rule 52(a)(2) clearly envisions greater specificity upon the request of a party.

Given Peters' Rule 52(a)(2) motion, the insufficiency of the findings of fact in the 21 December 1983 order, and the conflicting evidence in the record, we believe that additional findings of fact are essential to provide this Court with a basis for a meaningful review. *See* 9 Wright & Miller, *supra*, Sec. 2577 (similar enforcement of Federal Rule 52(a)). We therefore vacate the 21 and 29 December 1983 orders and remand the case to the trial court for additional findings of fact on its decision on Andrews' Rule 59 motion. Considering Peters' assignment of error, we need to know why the trial court granted Andrews' Rule 59 motion.

III

[3] We dispose of Peters' remaining contentions summarily. The trial court properly excluded evidence of Andrews' sick leave pay. *Fisher v. Thompson*, 50 N.C. App. 724, 275 S.E. 2d 507 (1981) (violation of collateral source rule). The testimony of the Burroughs Wellcome personnel director and evidence of Andrews' back problems were properly admitted.

IV

Vacated and remanded for further proceedings consistent with this decision.

Judge WELLS concurs in part and dissents in part.

Judge WHICHARD concurs.

Judge WELLS concurring in part and dissenting in part.

I concur in that part of the majority opinion which affirms the trial court's denial of defendant's motion to dismiss. I dissent from that part of the majority opinion which holds that the trial court was required, upon defendant's request, to make findings of fact and enter conclusions of law in ruling on plaintiff's Rule 59 motion. In my opinion, Rule 52 does not require findings of fact and conclusions of law when the trial court makes a discretionary ruling on a motion to set the verdict aside and for a new trial in a jury trial.

STATE EMPLOYEES' CREDIT UNION, INC., PLAINTIFF v. WILLIAM M. GENTRY, DEFENDANT, AND DEAN WITTER REYNOLDS, GARNISHEE, AND INTERSTATE SECURITIES CORPORATION, APPEARING IN SUPPORT OF ITS MOTION TO INTERVENE

No. 8410SC1035

(Filed 18 June 1985)

1. **Parties § 6— intervention by attaching creditor—notice of levy insufficient—no right to intervene**

Intervenor Interstate Securities did not have an unconditional right to intervene under G.S. 1-440.33(g) where the "notice of levy" served upon the garnishee by Interstate was insufficient process to accord Interstate the status of an attaching creditor. G.S. 1-440.1 *et seq.*, G.S. 1-440.43(2) (1983).

2. **Rules of Civil Procedure § 24; Parties § 6— intervention—motion filed after entry of default—pleading filed eleven days after judgment**

Interstate's motion to intervene was untimely where the motion was filed after entry of default against defendant and the pleading required by Rule 24(c) was not filed until eleven days after judgment by default had been entered in the principal action.

3. **Parties § 6— motion to join attaching creditors—improper intervention by one of two creditors—motion moot**

The trial court did not err by finding that garnishee Dean Witter's motion to join all attaching creditors was moot where Interstate had not properly intervened. There was no issue of superiority of liens between plaintiff and Interstate and relief granted under the garnishee's G.S. 1-440.33(g) motion to make parties to the action all attaching creditors would have been meaningless because there was only one attaching creditor. Moreover, delivery of personal property held by a garnishee to a sheriff, armed with the appropriate judicial process, exonerates the garnishee as to the personal property delivered. G.S. 1-440.28(c) (1983).

State Employees' Credit Union, Inc. v. Gentry

APPEAL by intervenor from *Herring, Judge.* Order and amended order entered 31 May 1984 and 30 August 1984 in WAKE County Superior Court. Heard in the Court of Appeals 8 May 1985.

The State Employees' Credit Union, Inc. (hereinafter Credit Union) instituted this action seeking damages in the amount of $45,902.15 against defendant, William M. Gentry, Jr. On 27 January 1984, the Credit Union obtained a summons and an order extending the time to file a complaint. The Credit Union also sought and obtained an order of attachment, a summons to garnishee, and a notice of levy. Copies of the summons to garnishee, the order of attachment, and the notice of levy were served on Dean Witter Reynolds, Inc. (hereinafter Dean Witter) garnishee in this action on 2 February 1984. Dean Witter filed an answer on 8 March 1984, admitting that it was in possession of funds belonging to Gentry in the amount of $19,156.53.

On 3 February 1984, Interstate Securities Corporation (hereinafter Interstate) obtained a confession of judgment in a separate action against Gentry for $38,565.20. On 26 March 1984, Interstate served a notice of levy on the funds held by Dean Witter. After receiving Interstate's notice of levy, Dean Witter filed a motion under N.C. Gen. Stat. § 1-440.33(g) (1983) for an order to make all attaching creditors parties to this action. Dean Witter also filed a motion to deposit the funds belonging to Gentry into the court.

Gentry failed to file a defensive pleading within the time allowed, and on 25 April 1984 the Credit Union obtained an entry of default.

On 1 May 1984, Interstate filed a motion to intervene in this action under N.C. Gen. Stat. § 1A-1, Rule 24(a)(2) of the Rules of Civil Procedure (1983).

On 7 May 1984, the trial court entered a default judgment against Gentry. On that same day, the trial court also entered a judgment against Dean Witter ordering the garnishee to deliver to the sheriff of Wake County all funds in its possession belonging to Gentry.

On 18 May 1984, Interstate filed a complaint in intervention.

On 31 May 1984, Interstate's motion to intervene and Dean Witter's motions to join all attaching creditors and to deposit funds into the court were heard. After a hearing on all the motions, the trial court denied Interstate's motion to intervene and decreed that Dean Witter's motions were moot. From the order and amended order denying its motion to intervene and declaring Dean Witter's motions moot, Interstate appealed.

Bailey, Dixon, Wooten, McDonald, Fountain & Walker, by John N. Fountain and J. Scott Merrell, for State Employees' Credit Union.

Manning, Fulton & Skinner, by Charles E. Nichols, Jr., for Dean Witter Reynolds.

Moore, Van Allen, Allen & Thigpen, by William D. Dannelly and C. Steven Mason, for Interstate Securities Corporation.

WELLS, Judge.

We note at the outset that the intervenor has failed to identify the various exceptions upon which its assignments of error are based as required by Rule 28(b)(5) of the Rules of Appellate Procedure. Pursuant to Rule 2 of the Rules of Appellate Procedure, we deem it appropriate to dispose of this appeal on the merits.

[1] Interstate first contends that the trial court committed reversible error in denying its motion to intervene. Specifically, Interstate contends that it had a mandatory right to intervene in the proceedings. We disagree.

Interstate argues first that G.S. § 1-440.33(g) confers on it an unconditional right to intervene. The material portion of G.S. § 1-440.33(g) declares that:

> If more than one order of attachment is served on a garnishee, the court from which the first order of attachment was issued shall, upon motion of the garnishee or of any of the attaching creditors, make parties to the action all of the attaching creditors, . . .

Clearly, this provision applies where more than one order of attachment has been served on the garnishee and when the person making a motion under this section is either the garnishee or an

attaching creditor. Generally, an attaching creditor is one who has caused an attachment to be issued and levied on the property of the debtor. Black's Law Dictionary at 332 (5th ed. 1979). N.C. Gen. Stat. § 1-440.12 (1983) governs the issuance of an order of attachment. When read in *pari materia* with N.C. Gen. Stat. §§ 1-440.10 and 1-440.11 (1983), this section directs the court to issue an order of attachment when the requisite affidavit and bond have been filed. Further, in order to levy on property of the debtor in the possession of a garnishee, the sheriff must deliver to the garnishee a copy of the order of attachment, the summons to garnishee, and the notice of levy. N.C. Gen. Stat. § 1-440.25 (1983).

In this case, Interstate did not comply with the statutory procedures. The "notice of levy" served upon the garnishee by Interstate was insufficient process to accord Interstate the status of attaching creditor. *See* N.C. Gen. Stat. § 1-440.12 (1983); G.S. § 1-440.25. It was incumbent on Interstate, if it desired to establish a lien by attachment or an interest in the attached property, to put its claim in issue by filing a proper claim in accordance with N.C. Gen. Stat. § 1-440.1 *et seq.* or § 1-440.43(2) (1983). That Interstate failed to employ either of these well-defined mechanisms is unquestioned. Consequently, Interstate's contention that it can intervene as an attaching creditor under G.S. § 1-440.33(g) fails.

[2] Interstate argues next that it had a right to intervene in these proceedings under Rule 24(a)(2) of the Rules of Civil Procedure.

Rule 24(a)(2) provides in relevant part:

> (a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action:
>
> . . .
>
> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Assuming, *arguendo*, that Interstate has met the prerequisites of Rule 24(a)(2) as to interest in the property, the dis-

positive consideration is timeliness. Timeliness is the threshold question to be considered in any motion for intervention. *Comment* to Rule 24(a) of the Rules of Civil Procedure; *Corley v. Jackson Police Dept.*, 755 F. 2d 1207 (5th Cir. 1985). Whether a motion to intervene is timely is an issue addressed to the sound discretion of the trial court and its resolution will depend on the circumstances of the case. *Comment* to Rule 24(a) of the Rules of Civil Procedure; *Spring Constr. Co., Inc. v. Harris*, 614 F. 2d 374 (4th Cir. 1979). In determining whether a motion to intervene is timely, a trial court will give consideration to: the status of the case; the unfairness or prejudice to the existing parties; the reason for the delay in moving for intervention; the resulting prejudice to the applicant if the motion is denied; and any unusual circumstances. *NAACP v. New York*, 413 U.S. 345 (1973); *South v. Rowe*, 102 F.R.D. 152 (N.D. Ill. 1984), *aff'd in part, rev'd in part*, 759 F. 2d 610 (7th Cir. 1985).

As a general rule, motions to intervene made prior to trial are seldom denied. Conversely, motions to intervene made after judgment has been rendered are disfavored and are granted only after a finding of extraordinary and unusual circumstances or upon a strong showing of entitlement and justification. *U.S. v. Association Milk Producers, Inc.*, 534 F. 2d 113 (8th Cir.), *cert. denied, National Farmers' Organization, Inc. v. U.S.*, 429 U.S. 940 (1976); *Black v. Central Motor Lines, Inc.*, 500 F. 2d 407 (4th Cir. 1974). The situation is less clearly defined when motions to intervene are made after a trial or a hearing on the issues, and before a final judgment is rendered.

Although there is a paucity of North Carolina cases defining the parameters of timeliness under Rule 24, we believe that our decision in *Berta v. Highway Comm.*, 36 N.C. App. 749, 245 S.E. 2d 409 (1978) sheds some light on the issue of timeliness in this case. In *Berta*, an applicant filed a motion to intervene in an inverse condemnation proceeding after the court had conducted a hearing to determine all issues other than damages. Trial on the single issue of damages had already been scheduled. The court held that under these circumstances applicant's motion to intervene was not timely. *Berta v. Highway Comm., supra.*

In this case, Interstate filed a motion to intervene after entry of default against defendant. N.C. Gen. Stat. § 1A-1, Rule 55 of

the Rules of Civil Procedure (1983) which governs the entry of default and judgment by default, contemplates a two-step procedure in order to take a judgment by default. The entry of default, which is the first step, is interlocutory in nature and is not a final judicial action. *Battle v. Clanton*, 27 N.C. App. 616, 220 S.E. 2d 97 (1975), *disc. rev. denied*, 289 N.C. 613, 223 S.E. 2d 391 (1976). Nevertheless, when default was entered, the substantive allegations raised by the Credit Union complaint were no longer at issue, and for the purpose of the entry of default and default judgment, were deemed admitted. *See Bell v. Martin*, 299 N.C. 715, 264 S.E. 2d 101, *reh'g denied*, 300 N.C. 380 (1980). The entry of default therefore conclusively established Gentry's liability to the Credit Union. The extent of that liability has never been at issue. We also note that the motion to intervene was defective in that it was not accompanied by a pleading in accordance with Rule 24(c). *Kahan v. Longiotti*, 45 N.C. App. 367, 263 S.E. 2d 345 (1980), *overruled on other grounds, Love v. Moore*, 305 N.C. 575, 291 S.E. 2d 141 (1982). The record reveals that the requisite pleading was not filed until eleven days after judgment by default had been entered in the principal action. We therefore conclude that Interstate's motion to intervene after entry of default was untimely.

In summary, we hold that under the facts and circumstances presented by this case, Interstate did not have a statutory right to intervene under G.S. § 1-440.33(g) and that its motion to intervene under Rule 24(a) was untimely. Accordingly, this assignment of error is overruled.

[3] Interstate contends next that the trial court erred in finding that Dean Witter's motion to join all attaching creditors was moot. We disagree. More specifically, Interstate contends that the motion to join all attaching creditors was not moot because the issue of whether its lien was superior to the lien of the Credit Union remains unresolved. We reject this contention. For reasons already stated, Interstate did not have a lien on the personal property held by Dean Witter. Thus, there was no issue of superiority of liens as between Credit Union and Interstate. Dean Witter's motion to join all attaching creditors was inapposite and therefore was moot from the outset.

Interstate also argues that the motion to join all attaching creditors was not moot because, the relief sought, to exonerate Dean Witter as to all claims of competing creditors, was not granted. In our view, Interstate misconstrues the relief sought by Dean Witter's motion. The relief sought by a motion under G.S. § 1-440.33(g) is to make parties to the action all attaching creditors. As we have already stated, there was only one attaching creditor in this action. Consequently, any relief that might have been granted under this statute would have been meaningless. Further, contrary to Interstate's contentions, delivery of personal property held by a garnishee to a sheriff, armed with the appropriate judicial process, exonerates the garnishee as to the personal property delivered. N.C. Gen. Stat. § 1-440.28(c) (1983). This argument is, likewise, rejected. Accordingly, we hold that the trial court did not err in finding that Dean Witter's motion to join all attaching creditors was moot.

For the reasons stated, the order and the amended order appealed from are

Affirmed.

Judges BECTON and EAGLES concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD CAMPBELL

No. 8425SC988

(Filed 18 June 1985)

Parent and Child § 2.2— felonious child abuse—insufficient evidence

The State's evidence was insufficient to support defendant's conviction of felonious child abuse in that it failed to show an intention by defendant to cause the child serious injury where it tended to show that the two-year-old child received second and third degree burns on both hands from hot water in a bathtub while in the care of defendant, that there were clear lines of demarcation of the burns around both wrists, and that the child's hands would have to be in contact with the hot water from ten to fifteen seconds to incur such burns.

Judge WEBB dissenting.

State v. Campbell

APPEAL by defendant from *Lane, Judge*. Judgment entered 3 May 1984 in Superior Court, BURKE County. Heard in the Court of Appeals 2 April 1985.

Defendant was convicted of felonious child abuse in violation of G.S. 14-318.4. The child allegedly abused was Amanda Renee Harris, the two year old daughter of the woman with whom defendant resided. The child was normally left during the day under the defendant's sole supervision. The child's mother testified that defendant told her that he had run hot water into the bathtub to wash out a mop and that Amanda was playing in the adjoining bedroom. While the hot water was still running, he went into the kitchen area to get the mop; Amanda went into the bathtub area and reached over the tub and placed her hands into the water. Defendant heard Amanda scream, dropped the mop on the kitchen floor, went to the bathroom and saw Amanda come back up from the bathtub and fall on her rear.

Defendant applied ice to the child's burned hands, took her next door to the neighbor's and then purchased some ointment. Defendant then took the child to the emergency room at Grace Hospital where she was treated and released. Thereafter, defendant went to Amanda's mother's place of employment and explained to her what had happened. She left her job early and went home to be with her child. The next day, defendant transported the child to see a doctor for additional treatment.

Dr. Keith Forgy, who treated the child, testified that the child had suffered second and third degree emersion burns up to her wrists, leaving a clear line of demarcation around each wrist. In response to the prosecutor's question as to his opinion as to how long the child's hands would have had to have been in contact with a hot liquid to cause burns of this severity, the doctor stated:

> My opinion is certainly qualified, because you have to take into account the temperature of the liquid you're talking about. But assuming that it's not boiling hot, it would probably take a matter of at least ten to 15 seconds. If we're assuming that it's an emersion burn.

The doctor further testified that he found no other burns anywhere else on her body.

The defendant offered no evidence. From judgment imposing the presumptive sentence of two years, defendant appealed.

Attorney General Edmisten by Associate Attorney General Victor H. E. Morgan, Jr., for the State.

Joe K. Byrd, Jr., for defendant-appellant.

PARKER, Judge.

Defendant assigns as error the trial judge's denial of his motions to dismiss at the close of the State's evidence and at the conclusion of all evidence. G.S. 14-318.4 provides in pertinent part:

> (a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child who intentionally inflicts any serious physical injury which results in:
>
> (1) Permanent disfigurement, or
>
> (2) Bone fracture, or
>
> (3) Substantial impairment of physical health, or
>
> (4) Substantial impairment of the function of any organ, limb, or appendage of such child,
>
> is guilty of child abuse and shall be punished as a Class I felon.

There is no dispute that the minor child, Amanda Harris, age two years, suffered substantial and permanently disfiguring injuries by way of burns on her hands, while under the supervision of the defendant. Defendant argues, however, that there is no evidence that he intentionally inflicted any serious physical injury on Amanda.

On defendant's motion to dismiss, "[t]he question for the court is whether there is substantial evidence to support a jury finding that the offense charged in the bill of indictment was committed, and that the defendant was the perpetrator. . . ." *State v. Byrd*, 309 N.C. 132, 305 S.E. 2d 724 (1983). Alternately, if the evidence so considered raises no more than a suspicion or a conjecture that the offense charged in the indictment has been committed or that the defendant committed it, then the evidence is

not sufficient to carry the case to the jury. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971).

A review of prior decisions germane to this case leads us to the conclusion that defendant's motions should have been allowed.

We note at the outset that this case does not come within the purview of the "battered child syndrome" theory discussed by our Supreme Court in *State v. Byrd, supra* and *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). As defined in *Byrd*:

> The "battered child syndrome" is simply a medicolegal term which describes the diagnosis of a medical expert based on scientific studies that when a child suffers certain types of continuing injuries that the injuries were not caused by accidental means. Upon such a finding, it is logical to presume that someone "caring" for the child was responsible for the injuries.

A finding that the alleged victim suffered from the "battered child syndrome" raises an inference that the supervising defendant intentionally inflicted the injuries suffered by the child. We have carefully examined the evidence in this case and find no medical testimony indicating that Amanda Renee Harris suffered from a "battered child syndrome." Therefore, the State does not have the benefit of the permissible inferences arising from such testimony. 309 N.C. at 138, 305 S.E. 2d at 729.

In *Byrd, supra*, defendant parents were each convicted of involuntary manslaughter in the death of their twenty-five day old son. The evidence tended to show that the victim Jo Van had a series of breaks in his ribs, which had occurred one to two weeks prior to his death, three areas of discoloration on his scalp and a severe bruise at the back of his head, the result of blunt trauma, which caused his death. There was further evidence that the defendants had an older daughter who had been removed from their custody and who had been hospitalized at the age of one month for injuries similar to those suffered by her deceased younger brother. At the conclusion of the State's evidence, each defendant moved for a dismissal. The trial judge denied the motions. Defendants offered no evidence.

Our Supreme Court noted that a violation of the child abuse statute which proximately resulted in death would support a con-

viction for manslaughter. In addition, the Court held that although the sister suffered from a battered child syndrome and her earlier injuries were reasonably similar to those suffered by Jo Van, the inference as to the nonaccidental nature of her injuries could not furnish the basis for an inference that Jo Van's injuries were nonaccidentally inflicted. Such reasoning would constitute an impermissible inference based upon an inference. 309 N.C. at 139, 305 S.E. 2d at 730. The Court concluded as follows:

> We are forced to conclude that the evidence implicating defendants as those responsible for Jo Van's injuries, and the evidence as to whether the injuries were accidentally or intentionally inflicted, is so speculative and conjectural that defendants' motions for dismissal should have been granted.

In *State v. Reber*, 71 N.C. App. 256, 321 S.E. 2d 484 (1984), defendant was convicted of felonious child abuse. The evidence showed that the alleged victim was left under the defendant father's supervision while the mother went next door to use the telephone. When the mother returned, the child was breathing erratically and later responded only to painful stimuli. In vacating his conviction, this Court held:

> To validly convict the defendant under the indictment lodged against him, the State had to prove that he intentionally inflicted a serious injury on the three and a half month old child, which resulted in the substantial impairment of the child's physical health. G.S. 14-318.4. The only element of the offense that the evidence presented tends to establish is that the child's health has been seriously impaired by an injury of some kind; it does not tend to show that the injury received by the child was inflicted by the defendant or that he inflicted such injury intentionally.

The alleged injury involved hemorrhaging of the blood vessels deep in the skull. This Court vacated the conviction, in spite of medical testimony that the child suffered from "battered child syndrome," because the verdict that defendant intentionally injured the child was based on speculation and conjecture, not evidence. 71 N.C. App. at 261, 321 S.E. 2d at 486.

The recent case of *State v. Harper*, 72 N.C. App. 471, 325 S.E. 2d 30 (1985), is clearly distinguishable from *Reber, supra*, and

Byrd, supra. In *Harper*, defendant was tried for felonious child abuse and three separate charges of misdemeanor contributing to the neglect of a minor. Defendant resided in a three bedroom mobile home with his three children and five relatives. Defendant's niece, who resided in the mobile home, testified that she saw the defendant strike his five year old son with a board at least ten times, until the board was broken. The next day the child was swollen in the face and eyes and had a knot on his head. There was also medical testimony that this child suffered from a kidney disease and required medication which had to be properly administered or else the child would die. The treating physician testified that when he saw the child, the child had been in relapse for at least one week because of defendant's failure to properly administer the necessary medication; that his injuries were caused by blunt trauma; and that the child was suffering a battered child syndrome. Defendant asserted on appeal that his motion to dismiss should have been granted because there was no credible evidence that he intentionally inflicted any serious physical injury on his son.

In upholding his conviction, this Court held:

> We believe the testimony of the defendant's niece and his sister that they saw him beating the child with a board, and the testimony of Dr. Irons that in his opinion the child had a battered child syndrome with the bruises to his head and eye being caused by a blunt trauma is sufficient for the jury to find the defendant intentionally inflicted serious injury to the child.

In *Harper, supra*, unlike the present case, there was competent evidence that defendant inflicted injuries upon his son from which the jury could then reasonably infer that he intended to inflict serious injury. No such direct evidence is available in the case *sub judice*. "Child abuse . . . is not the sort of act that is done openly. It is a surreptitious act. Hence, circumstantial evidence must be relied upon to prove fact." *State v. Mapp*, 45 N.C. App. 574, 264 S.E. 2d 348 (1980). However, our Supreme Court, in *State v. Rowland*, 263 N.C. 353, 358, 139 S.E. 2d 661, 665 (1965), stated:

> When the motion for nonsuit 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.

Like our Supreme Court in *Byrd, supra*, we are forced to conclude in this case that the evidence as to whether the injuries were accidentally or intentionally inflicted is so speculative and conjectural that defendant's motion for dismissal should have been granted. Although the State's case was clearly based on the assumption that defendant held the child's hands in the hot water to punish her, the State has failed to present any evidence, circumstantial or otherwise, of defendant's intention to cause the child serious injury, a necessary element of the crime charged.

We, therefore, vacate the judgment of conviction and direct that a judgment of acquittal be entered.

Vacated and remanded.

Judge BECTON concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. The evidence in this case showed that while a two-year-old child was in the care of the defendant the child received second and third degree burns on both hands. There was a clear line of demarcation of the burns around both wrists. There was testimony that the child's hands would have to be under the water from 10 to 15 seconds to incur the burns. I believe a jury would reasonably infer that the child would not hold its hands steadily under the water for 10 to 15 seconds in order to incur second and third degree burns with a clear line of demarcation on the wrists. Someone had to hold the child's hands under the water. The defendant was the only adult with the child when the child was burned. The jury could conclude from this that the defendant held the child's hands under the hot water inflicting second and third degree burns.

I vote to find no error.

HENRY L. WILLIAMS, PETITIONER-APPELLANT v. BURLINGTON INDUSTRIES, INC., AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS-APPELLEES

No. 844SC1145

(Filed 18 June 1985)

1. **Appeal and Error § 24— question raised for first time on appeal—not considered**

An assignment of error relating to the proper standard of judicial review of Employment Security Commission decisions was raised for the first time on appeal and was not considered. Rules of App. Procedure, Rule 10(b).

2. **Master and Servant § 111— error in remanding for second hearing—facts did not support conclusion, but determined cause**

The Employment Security Commission erred by remanding to the appeals referee for a second hearing where the facts found by the appeals referee determined the controversy even though the facts found did not support the conclusions. To hold otherwise would allow the Commission to remand cases repeatedly for a second bite at the apple. G.S. 96-15(e).

3. **Master and Servant § 108.1— leaving work early—false time records—good faith**

There was not a willful and deliberate disregard of company policy or an unwillingness to work which would disqualify claimant from unemployment benefits by reason of G.S. 96-14(2) where the facts found by the appeals referee showed that claimant left work early without permission and entered hours into his time record that he did not work, but had what amounted to a good faith cause for leaving early, not notifying his supervisor, and entering hours into his record that he did not work.

APPEAL by petitioner from *Lewis, Judge*. Judgment entered 17 August 1984 in Superior Court, SAMPSON County. Heard in the Court of Appeals 15 May 1985.

This is a civil action in which petitioner, Henry L. Williams, seeks unemployment benefits based on his discharge from respondent, Burlington Industries, Inc.

The essential facts are:

Petitioner was discharged from his job at Burlington Industries (Burlington) 13 June 1983 after approximately thirteen years' employment purportedly for work related misconduct. At the time of his discharge petitioner was employed as a frequency checker, i.e. someone who observes other employees at their

tasks in order to determine whether there are "problems or mistakes" occurring in the various processes of Burlington's mill.

Burlington's evidence tends to show that petitioner was discharged for leaving work early without permission and for filling out his time records differently from the amount of time he had actually worked.

On 7, 8 and 9 June 1983, petitioner, who was scheduled to work until 7:00 a.m., left work early (5:29 a.m. on 7 June, 4:52 a.m. on 8 June and 5:35 a.m. on 9 June). Petitioner made entries on his time record indicating that he had worked his full twelve hour shift on each of the days in question. A supervisor discovered the discrepancy between the time sheets and the time petitioner actually left work.

Petitioner's evidence tends to show that he left work early on 7, 8 and 9 June only after he had completed the tasks assigned to him on those days, because he had worked all night and because he was tired. Petitioner testified that he recorded his time worked at the beginning of each shift because he had a tendency to forget to record his time at the end of the shift before leaving work and that he did not deliberately or intentionally falsify his time records. Further, petitioner had been allowed to leave early on a previous occasion and was paid for the full shift. Petitioner knew he was to call his supervisor to obtain permission to leave work early, but did not do so on 7, 8 or 9 June because of the early morning hour. Petitioner had been criticized by other supervisors for very early morning telephone calls.

Petitioner was dismissed on 12 June 1983 for the stated reasons, leaving work early without permission and for falsifying time records. The dismissal was also based partly on the accumulation of four reprimands in a twelve month period. Petitioner received a reprimand for improper posting of his frequency checks on 7 August 1982. Petitioner then received three reprimands at one time on 11 June 1983 for leaving work early on 7, 8 and 9 June and for falsifying time records. Burlington has a policy that an employee may be dismissed for accumulating four reprimands in a twelve month period but testified that this was only one of the reasons that petitioner was dismissed.

Petitioner initially applied for unemployment benefits effective 12 June 1983. An adjudicator for respondent, Employment

Security Commission (Commission), denied benefits based on misconduct on 28 June 1983. Petitioner appealed and an appeals hearing conducted before an appeals referee resulted in a denial of benefits based on misconduct on 27 July 1983. An appeal by petitioner to the Commission followed and a review was conducted 30 September 1983. On 26 October 1983, the Commission remanded petitioner's claim to the appeals referee for a second subsequent hearing and decision. The subsequent appeals hearing was conducted on 14 November 1983 before the same appeals referee. On 22 November 1983, the appeals referee again denied petitioner's claim for benefits based on misconduct. An appeal by petitioner to the Commission resulted in an affirmance of the decision of the appeals referee, although the Commission's opinion stated that the evidence could have supported a decision for petitioner. The Superior Court of Sampson County affirmed the Commission's decision on 9 July 1984. Petitioner appeals.

East Central Community Legal Services, by Phillip Wright, for petitioner-appellant.

Thelma M. Hill, Staff Attorney, for respondent-appellee, Employment Security Commission of North Carolina.

EAGLES, Judge.

I

[1] At the outset we note that petitioner attempts to raise an assignment of error on appeal relating to the proper standard of judicial review of decisions by the Commission. Our examination of the record reveals that this purported assignment of error is raised for the first time in the appeal to this court. Having failed to raise this question at either the administrative level or in the superior court, petitioner cannot for the first time raise this question here. Accordingly, this assignment of error is not properly before us. Rule 10(b), Rules of Appellate Procedure.

II

[2] Petitioner next assigns as error the remand by the Commission to the appeals referee for a second, subsequent hearing and decision. Petitioner argues that since Burlington failed to prove misconduct at the first hearing, this matter should have ended at that time with a decision in favor of petitioner. We agree.

Our review of the first decision of the appeals referee disqualifying petitioner for benefits on 27 July 1983, shows that the Deputy Commissioner, acting for the Commission, remanded the case for a new hearing and decision on the grounds that:

> It is unclear under which rule the claimant was discharged and exactly what the rule provided. Further, it appears that the three warnings and discharge all occurred on June 11, 1983. For a warning to serve any purpose as to future conduct, it would seem that it would have to be prospective. The Appeals Referee shall make a specific finding whether the claimant forgot to correct his time entries or falsified them.

This action by the Commission was taken pursuant to G.S. 96-15(e) which states in pertinent part:

> The Commission or Deputy Commissioner may on its own motion affirm, modify, or set aside any decision of an appeals referee on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it, or may provide for group hearings in such cases as the Commission or Deputy Commissioner may deem proper.

Petitioner alleges and we agree that the Commission abused its discretion under G.S. 96-15(e) by remanding this case to the appeals referee for a second hearing, in effect giving the employer a second opportunity to prove its case. While we find no reported North Carolina case authority construing a remand pursuant to G.S. 96-15(e), the appropriate standards for such a remand are readily ascertainable from cases dealing with judicial review of decisions of the Commission.

> If the findings of fact of the Commission, even though supported by competent evidence in the record, are insufficient to enable the Court to determine the rights of the parties upon the matters in controversy, the proceeding should be remanded to the end that the Commission make proper findings.

In re Boulden, 47 N.C. App. 468, 471, 267 S.E. 2d 397, 399 (1980); *Employment Security Commission v. Young Men's Shop*, 32 N.C. App. 23, 29, 231 S.E. 2d 157, 160, *cert. denied*, 292 N.C. 264, 233

S.E. 2d 396 (1977). If there is no finding as to a material fact which is necessary for proper determination of a case, the case must be remanded to the Commission to make a proper finding. *Employment Security Commission v. Young Men's Shop, supra.* The reciprocal of this principle would seem to be that if all sufficient and necessary findings of material fact essential to resolving the issue have been made, there is no need to remand the case and any remand would be an abuse of discretion. To hold otherwise would allow the Commission, in the exercise of its discretion, pursuant to G.S. 96-15(e), to remand cases repeatedly for a "second bite at the apple" where the facts found by the appeals referee actually determine the controversy even though the facts found do not support the appeals referee's conclusions of law purportedly based on those findings of fact.

The record reveals that the appeals referee found as fact:

2. Claimant was discharged from this job for leaving work early and without permission and falsifying time records.

3. On June 7, 1983, June 8, 1983 and June 9, 1983, claimant was scheduled to work from 7:00 p.m. to 7:00 a.m. On each of those days claimant left prior to 7:00 a.m. and did so without permission. *Claimant left early on those dates because he had completed his work and was tired. Claimant didn't request permission because he would have to call his supervisor at his home and claimant did not want to disturb the supervisor.* (Emphasis added.)

4. On claimant's time record, claimant entered that he had worked twelve hours on each day, June 7, June 8, and June 9, 1983. Claimant had not worked 12 hours. *Claimant entered his time before the start of each work day and just didn't think about correcting the entries on the subsequent days.* (Emphasis added.)

Based on these findings of fact, the appeals referee concluded that claimant's leaving early without permission and falsifying time records "did evince a willful disregard of the employer's best interest." Accordingly, the appeals referee denied benefits by reason of misconduct connected with employment.

We believe that the facts found by the appeals referee at the conclusion of the first hearing resolve the case, but not in favor of

respondents. For this reason, it was error for the Commission, under the facts of this case, to remand for a second, subsequent hearing before the appeals referee.

[3] This Court has defined the term "misconduct" as it applies to the termination of employment and denial of unemployment insurance benefits as:

> [C]onduct evincing such wilful 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). While Burlington could certainly terminate petitioner's employment for leaving work early without permission and for falsifying time records, we hold that the facts of this case do not indicate 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). *See, Kahl v. Smith Plumbing Co.*, 68 N.C. App. 287, 314 S.E. 2d 574 (1984).

The facts found by the appeals referee in the first instance show that while petitioner did, in fact, leave work early without permission and that he did enter hours into his time record that he did not actually work, he had what amounted to good faith cause for leaving work early, not notifying his supervisor and entering hours into his time record that he did not actually work. See, *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 289 S.E. 2d 357 (1982).

Accordingly, the findings of fact do not support the conclusions of law by the appeals referee in his order of 27 July 1983 denying benefits to petitioner. Those same facts, however, resolve the issues and it was error for the Commission to remand this case for a second subsequent hearing before the appeals referee. The judgment of the Superior Court of Sampson County in 84-CVS251 affirming "the decision of the Employment Security Commission . . . in its entirety" is vacated and the case remanded for entry of an award of benefits.

Our determination of this issue makes it unnecessary for us to consider petitioner's remaining assignments of error.

Vacated and remanded.

Judges BECTON and PHILLIPS concur.

J. A. ALFORD AND WIFE, MARY V. ALFORD v. TUDOR HALL AND ASSOCIATES, INC.

No. 8430SC1117

(Filed 18 June 1985)

Insurance § 2.2— agent's failure to procure insurance—insufficient evidence of negligence

Plaintiffs' evidence was insufficient to support a jury verdict finding defendant agent negligent in failing to procure insurance on plaintiffs' house where it tended to show that the male plaintiff told defendant's employee that he needed insurance on his house but left open the extent of coverage and the amount of premium, that the male plaintiff only requested defendant to calculate premiums for several coverages and said he would bring a check by later, and that defendant's employees at no time informed plaintiffs that their new house was covered or that a policy of insurance would be sought from an insurer, and where the evidence failed to show that the parties had a course of dealing whereby defendant would obtain insurance for plaintiffs without their approval as to the amount of coverage.

APPEAL by defendant from *Burroughs, Judge*. Judgment entered 5 April 1984 in Superior Court, MACON County. Heard in the Court of Appeals 14 May 1985.

In January, 1983 plaintiffs commenced an action against defendant, alleging that defendant was negligent in failing to procure insurance on plaintiffs' house. Plaintiffs requested damages of $55,000 plus interest for loss by fire to the house.

The plaintiffs' evidence showed that on the Monday before Thanksgiving, in 1981, plaintiff Julius Alford went to defendant's office in Highlands, North Carolina, to inquire about insurance. The plaintiff spoke with John Hall, defendant's employee, telling him that he (plaintiff) needed insurance on a house he was building. Mr. Hall responded, "Well, how much do you need?" Plaintiff

responded that he had never built a house before and did not know. Mr. Hall inquired about the footage of the house, the building materials used, whether it was to have a fireplace, and about the roof. Mr. Hall then said the plaintiff would need insurance in the neighborhood of $75,000. Plaintiff said that the property would also have a barn on it, and Mr. Hall replied that, "Well, maybe we better figure it for a little bit more." Plaintiff then requested that Mr. Hall figure premiums for $75,000, $85,000 and $95,000. Mr. Hall recommended a homeowner's policy, as opposed to builder's risk, which plaintiff requested. Plaintiff testified that he told Mr. Hall to figure the premiums and then give him a call that afternoon and that he would bring in a check the next day. He told Mr. Hall he would be out of town that afternoon, but to call anyway. Mr. Hall, he says, said, "okay."

Plaintiff also testified that it was his practice to decide how much of his property he wanted covered and then when the premiums were quoted he would decide whether he was willing to pay the premium. He said that he knew he wanted $75,000 worth of coverage on his new house, but had not decided whether he wanted more.

Defendant admits none of its employees called plaintiff on Monday afternoon. Plaintiff testified that he returned to defendant's office that afternoon after it had closed, but that no one was there. Plaintiff testified that the next day he got an emergency call from Cashiers, North Carolina, and spent the entire day there repairing a freezer. On Wednesday morning, he worked in Highlands and at 12:00 p.m. went to defendant's office. He found the office closed because of the Thanksgiving Holiday. A note on the door said it would be closed until Monday. Plaintiff went by the office again on Friday on the chance someone would be there, but found no one.

Plaintiffs' evidence showed further that a fire occurred in his house on the Saturday night after Thanksgiving. On the following Monday, plaintiff went to defendant's office to inquire about coverage. Defendant, after consulting with its underwriters, told plaintiff he had no coverage for the fire.

Plaintiffs also presented evidence that their present house was insured through defendant, but that they had merely assumed the policy when they purchased it from plaintiff Julius

Alford's aunt. Mr. Alford testified that he bought liability insurance for his company from Tony Chambers when Chambers was with defendant, but that a week or so later Chambers left defendant and started his own office. Mr. Alford testified that he bought the insurance from Tudor Hall, but that at the time of the fire and now, he carries it through the Chambers firm. Further, Mr. Alford testified that all his automobile insurance is with Allstate Insurance.

Plaintiffs presented John Hall, who testified that (1) plaintiff Julius Alford did not fill out an application for the insurance, (2) plaintiff did not agree to any specified premium or limit to coverage, and (3) defendant did not at any time tell plaintiff he was insured.

Defendant moved for a directed verdict at the close of plaintiffs' evidence, which was allowed as to plaintiffs' contract claim and was denied as to the negligence claim. The jury returned a verdict of negligence, and defendant moved for judgment notwithstanding the verdict. The trial judge granted this motion and plaintiffs appeal.

Holt, Haire and Bridgers, by R. Phillip Haire, for plaintiff appellants.

Morris, Golding and Phillips, by Thomas R. Bell, Jr. and James N. Golding, for defendant appellee.

ARNOLD, Judge.

The sole question presented is whether the trial court erred in granting the defendant's motion for judgment notwithstanding the verdict.

Judgment notwithstanding the verdict was properly granted if all the evidence supporting plaintiffs' claim, taken as true and considered in the light most favorable to plaintiffs, was not sufficient as a matter of law to support a verdict for the plaintiffs. *Hargett v. Air Service and Lewis v. Air Service*, 23 N.C. App. 636, 638, 209 S.E. 2d 518, 519 (1974), *cert. denied* 286 N.C. 414, 211 S.E. 2d 217 (1975); *Musgrave v. Savings & Loan Assoc.*, 8 N.C. App. 385, 392, 174 S.E. 2d 820, 824 (1970).

The plaintiffs claim that defendant negligently failed to procure fire insurance on plaintiffs' house. The law is well-settled

that an insurance agent or broker is not obligated to assume the duty of procuring a policy of insurance for a customer, *Musgrave v. Savings & Loan Assoc.*, 8 N.C. App. 385, 393, 174 S.E. 2d 820, 825 (1970), but that an agent or broker "who, with a view to compensation for his services, undertakes to procure insurance on the property to another, and who fails to do so, will be held liable for any damage resulting therefrom." *Boney, Insurance Comr. v. Insurance Co.*, 213 N.C. 563, 566, 197 S.E. 122, 125 (1938) *quoting* 18 A.L.R. at 1214. *See also Elam v. Realty Co.*, 182 N.C. 599, 602, 109 S.E. 632, 633 (1921).

In determining whether an agent has undertaken to procure a policy of insurance, a court must look to the conduct of the parties and the communications between them, and more specifically to the extent to which they indicate that the agent has acknowledged an obligation to secure a policy. Where "an insurance agent or broker promises, or gives some affirmative assurance, that he will procure or renew a policy of insurance under circumstances which lull the insured into the belief that such insurance has been effected, the law will impose upon the broker or agent the obligation to perform the duty which he has thus assumed." 3 Couch on Insurance 2d (Rev. ed.) § 25:46 (1984). Further, if the parties have had prior dealings where the agent customarily has taken care of the customer's needs without consultation, then a legal duty to procure additional insurance may arise without express and detailed orders from the customer and acceptance by the agent. *Id.*; *see McCall v. Marshall*, 398 S.W. 2d 106 (Tex. 1965).

Evidence that an agent took an application from the customer is sufficient to support a duty to procure insurance. *See Musgrave v. Savings & Loan Assoc.*, 8 N.C. App. 385, 392-93, 174 S.E. 2d 820, 824-25 (1970). A "bare acknowledgment" of a contract to protect the insured against casualty of a specified kind until a formal policy can be issued is enough, even if the parties' communications have not settled all the terms of the contemplated contract of insurance. *Sloan v. Wells*, 296 N.C. 570, 573, 251 S.E. 2d 449, 451 (1979); *see also Harrell v. Davenport*, 60 N.C. App. 474, 477-78, 299 S.E. 2d 308, 311 (1983) (parties' failure to agree on premium or policy period is not fatal to plaintiff's claim).

In the present case, the evidence considered in the light most favorable to the plaintiffs indicates that the defendant's em-

ployees at no time informed or assured plaintiffs that their new house was covered or that a policy of insurance would be sought from an insurer. The evidence shows that although plaintiff Julius Alford told defendant's employee John Hall that he needed insurance on his house, he also left open the question of the extent of coverage and the amount of the premium. Alford requested defendant to calculate premiums for several coverages and said that he would bring a check by later.

Alford testified that in previous dealings with insurance agents other than defendant it was his practice to decide how much coverage he wanted, then examine the premium quoted, and decide whether he was willing to pay the premium. Alford admitted that he had gone to defendant's office before November, 1981 and discussed with John Hall insurance on his barn. The record does not show, however, that Alford went ahead and insured the barn through defendant.

Further, Alford testified that his present house was insured by defendant, but he admitted that he merely assumed the policy, which had been originally purchased by his aunt, when he bought the house from her. Alford also stated that his company's liability policy was acquired through Tony Chambers when Chambers was with defendant's firm, but that Chambers left defendant a week or so later and formed his own firm and that defendant carried the policy through him afterwards and at the time of the fire.

The record indicates that defendant did not have sufficient information or authority to seek a formal policy of insurance for plaintiff, and we do not believe plaintiffs could have reasonably expected defendant to go forward on the basis of the conversation between Mr. Alford and John Hall on the Monday before Thanksgiving. Moreover, the evidence fails to show that the parties had a course of dealing whereby the defendant would obtain insurance for plaintiffs without their approval as to the amount of coverage.

From the record it appears that the defendant did not promise or undertake either impliedly or expressly to procure insurance for the Alfords. An agreement by the agent to calculate premiums at various levels of coverage, without more, is in the nature of preliminary discussion, and does not reflect an undertaking to secure insurance. Given this lack of an undertaking, the

law does not impose on defendant a duty to attempt to contact plaintiff or to warn him of the lack of coverage on his house.

Our review of the record convinces us that the evidence is not sufficient to support an inference that defendant acknowledged an obligation to procure insurance, which is essential to plaintiffs' claim of negligence. The trial judge's grant of judgment notwithstanding the verdict was properly entered.

Affirmed.

Judges MARTIN and PARKER concur.

STATE OF NORTH CAROLINA v. JOHN DEAN HAMLET

No. 8425SC571

(Filed 18 June 1985)

Larceny § 5.2— recent possession—sufficient evidence that possession was recent

The evidence was sufficient to support defendant's convictions of felonious breaking or entering and felonious larceny under the doctrine of recent possession where defendant conceded that the property was stolen; the facts were sufficient to support defendant's exclusive possession of the stolen goods; and defendant sold a stolen television on May 17 after a deputy had seen it in the trunk of a car occupied by defendant and another man on 16 May; defendant had told the deputy that the television was his; a piece of fiberglass found at the site of the break-in matched a piece of broken fiberglass on the car occupied by defendant; and the owner of the cabin at the break-in site testified that the break-in had occurred within four weeks of May 18.

Judge BECTON dissenting.

APPEAL by defendant from *Howell, Ronald W., Judge*. Judgment entered 24 January 1984 in CALDWELL County Superior Court. Heard in the Court of Appeals 8 February 1985.

Defendant was convicted by a jury on a three-count indictment charging felonious breaking or entering, felonious larceny, and felonious possession of stolen property. The trial court arrested the guilty verdict on the felonious possession charge, and imposed consecutive sentences of fifteen years on the other two charges.

The evidence at trial showed that on 16 May 1983, defendant had been working on his car all day at home when, at about 4:30 p.m., Jerry Johnson drove up to defendant's trailer in a blue car owned by Johnson's wife. There was a television set in the open car trunk. Defendant drove Johnson across town. They returned to defendant's trailer at about 7:00 p.m., at which time they were stopped by a sheriff's detective, who arrested Johnson on an unrelated matter.

The detective testified that he observed a television in the trunk and some personal property, including linens, in the passenger area, and when he asked to whom this property belonged, defendant responded that it was his. (Defendant later testified that Johnson had asked him to claim ownership.) The detective further testified that he noticed a fiberglass piece around the car headlight was broken, and that as he was leaving with Johnson in custody, he noticed defendant carrying the items into the trailer.

The following day, 17 May 1983, Jerry Hamby purchased a television and stereo from defendant, with defendant signing the $250 bill of sale. Johnson was present at the time the sale was made. On 18 May 1983, Carl L. Dill discovered that his vacation cabin had been broken into, and that a color television and controls, a wagon wheel, a wooden shade and some linens were missing. Dill testified that the items had been in the cabin when he last visited approximately four weeks earlier; beyond that, he could not estimate when the break-in occurred.

The sheriff's deputy who investigated the break-in found a broken cabin window, noticed that the front yard gate was bent down, and found a piece of blue-green fiberglass in or near the gate. The deputy turned over the piece of fiberglass to the detective who had stopped defendant and Johnson; the detective compared the piece to the fiberglass around the headlight of Mrs. Johnson's car and stated that he "got a physical match with the 2 items." The detective also subsequently recovered a console television set from Hamby, which Dill identified as the one that had disappeared during the break-in.

Defendant denied ever having been on the Dill property, or stealing the television, testifying that the first time he ever saw the television was at 4:30 p.m. on 16 May, when he saw it in the trunk of Mrs. Johnson's car.

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

Appellate Defender Adam Stein, by Assistant Appellate Defender Malcolm Ray Hunter, Jr., for defendant.

WELLS, Judge.

Defendant makes a single argument on this appeal: that the breaking or entering and larceny convictions must be reversed because the state relied entirely on the doctrine of recent possession to support these convictions, and there was no direct evidence of recent possession.

The doctrine of recent possession:

> [I]s simply a rule of law that, upon an indictment for larceny, possession of recently stolen property raises a presumption of the possessor's guilt of the larceny of such property. . . . Furthermore, when there is sufficient evidence that a building has been broken into and entered and thereby the property in question has been stolen, the possession of such stolen property recently after the larceny raises presumptions that the possessor is guilty of the larceny and also of the breaking and entering. . . .

State v. Maines, 301 N.C. 669, 273 S.E. 2d 289 (1981). The presumption is strong or weak depending upon the circumstances of the case and the length of time intervening between the larceny and the discovery of the goods; the presumption is an evidential fact to be considered by the jury along with other evidence in the case. *Id.* The presumption arises only when the state proves beyond a reasonable doubt that (1) the property was stolen, (2) that it was found in the defendant's exclusive control and custody, or that defendant had the power and intent to control the goods, and (3) the possession was recently after the larceny. *Id.*

Applying this three-part test to the facts, we find that, first, defendant concedes that the property was stolen. Second, although defendant contends otherwise, we find the facts sufficient to support the element of defendant's exclusive possession of the stolen goods. Defendant admitted to the sheriff's detective that he was the owner of the goods, and although he testified at trial

that Johnson told him to claim ownership, the undisputed evidence shows that defendant carried the television and other items into his trailer, and that defendant personally sold the television to Jerry Hamby the following day. *See State v. Maines, supra* (what constitutes exclusive possession generally turns on circumstances of possession).

The question remains, however, whether the state's evidence demonstrated that the property had been *recently* stolen. The term "recent" is a relative one, dependent on pertinent circumstances of the individual case, *State v. Holbrook*, 223 N.C. 622, 27 S.E. 2d 725 (1943), which circumstances include the length of time between the theft and the possession, the type of property involved and its legitimate availability in the community, *i.e.*, whether it is a type normally and frequently traded in lawful channels. *State v. Blackmon*, 6 N.C. App. 66, 169 S.E. 2d 472 (1969), *compare State v. Parker*, 54 N.C. App. 522, 284 S.E. 2d 132 (1981). The evidence showing defendant's sale of a valuable television almost immediately after it was discovered in his possession, the evidence from which the inference could be drawn that the theft of the television was recent, and the evidence connecting Mrs. Johnson's car to the premises at which the theft occurred was sufficient to show that the stolen property was recently stolen.

We find no error in the trial below

No error.

Judge WHICHARD concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Believing that the State's evidence was insufficient to raise the presumption that the television sold by defendant to Jerry Hamby had been recently stolen by defendant, I dissent.

State v. Holbrook, 223 N.C. 622, 27 S.E. 2d 725 (1943) and *State v. Blackmon*, 6 N.C. App. 66, 169 S.E. 2d 472 (1969), which the majority cites, are distinguishable. Actually, Holbrook was granted a new trial as a result of errors in the trial court's jury

instructions. The *Holbrook* Court noted, however, that "it is manifest that [Holbrook] had the tires *six or seven* days after the larceny and sold two of them to Rom Billings. . ." and then issued a caution which I deem significant: "The doctrine that there is, or may be, a presumption of guilt from the recent possession of stolen goods is one that should be kept in proper bounds or, in the language of *Lord Hale*, 2 Pleas of the Crown, 289, 'It must be very warily pressed.' " *State v. Holbrook*, 223 N.C. at 624-5, 27 S.E. 2d at 727 (emphasis added).

In *Blackmon*, although 27 days elapsed between theft and discovery, there was fingerprint evidence linking defendant with the time and place of theft, and also evidence that the stolen wrench was "a handmade special-purpose tool not normally available in the community." On these facts, it was deemed proper to instruct the jury on the doctrine of recent possession.

Blackmon was specifically distinguished in *State v. Parker*, 54 N.C. App. 522, 284 S.E. 2d 132 (1981). In *Parker*, the defendant lived next door to the prosecuting witness, whose stereo tapes were recovered from defendant's room nineteen days after the theft, and whose rifle was recovered from defendant's closet thirty days after the theft. Although the defendant lived next door, the *Parker* Court indicated that no circumstantial evidence established defendant's presence at the exact time and place of the theft. As the *Parker* Court pointed out, Blackmon's conviction was upheld "based upon the uniqueness of the stolen wrench [a handmade tool] as well as the fingerprint evidence against defendant . . . [which] tended to establish defendant's presence *at the exact time and place the wrench was stolen.*" 54 N.C. App. at 527, 284 S.E. 2d at 135 (emphasis added).

In addition, in *Parker*, the stereo tapes and rifle were admitted by the State to be items normally traded in lawful channels. The *Parker* Court held that the facts and circumstances did not give rise to the doctrine of recent possession, and as the State had relied exclusively on that theory, the lower court committed reversible error in denying defendant's motion to dismiss.

In my opinion, the situation before us resembles that in *Parker* in that the State relied solely on the doctrine of recent possession. Here, up to a month elapsed between the theft and the discovery of the television and other goods in defendant's

possession. The fact that the television was sold by defendant the day after discovery goes only to the exclusivity of defendant's possession, not to the recentness of the larceny. The matching up of the fiberglass on Mrs. Johnson's car to that on Dill's gate merely connects the vehicle, not the defendant, to the breaking or entering or larceny. In short, the evidence simply does not "manifest a substantial probability that the stolen goods could only have come into the defendant's possession by his own act, [excluding] the intervening agency of others. . . ." *State v. Blackmon*, 6 N.C. App. at 76, 169 S.E. 2d at 479. *See State v. Jackson*, 274 N.C. 594, 597, 164 S.E. 2d 369, 370 (1968) ("The possession, in point of time, should be so close to the theft as to render unlikely the possibility that the possessor could have acquired the property honestly").

In conclusion, believing the evidence does not properly support the application of the doctrine of recent possession to this case, I vote to reverse the convictions for felonious breaking and entering and felonious larceny.

THORIR D. BJORNSSON AND WIFE, ERNA B. BJORNSSON v. CARLTON H. MIZE, PEARL B. MIZE, AND MONTESSORI CHILDREN'S HOUSE OF CHAPEL HILL, INC.

No. 8414SC1300

(Filed 18 June 1985)

1. **Nuisance § 7— alteration of flow of surface water—summary judgment improper**

The trial court erred by granting summary judgment for the Mizes in a private nuisance action in which plaintiffs sought to hold adjacent landowners liable for flooding damages because of their alteration of the flow of surface water where plaintiffs offered affidavits that the flooding was caused in part by the Mize development and in part by the downstream drainage system, and the Mizes offered affidavits that the flooding was caused entirely by an inadequate drainage system downstream from the plaintiffs' property.

2. **Nuisance § 7— alteration of flow of surface water—summary judgment proper**

The trial court did not err in granting the Rule 12(b)(6) motion of defendant Montessori Children's House, treated as a motion for summary judgment because matters outside the record were considered, where Children's House presented an affidavit that it had never been the owner of the property in

question and had not come into possession of the property until after the last flooding complained of in the complaint, and plaintiffs did not come forward with evidence showing an issue of triable fact between the parties.

3. **Rules of Civil Procedure § 19— alteration of flow of surface water—necessary party**

In an action in which plaintiffs sought to hold adjacent landowners liable for flooding caused by alteration of the flow of surface water, the trial court erred by failing to join as a necessary party Montessori Partnership, the record owner of the property leased to the Montessori Children's House. Plaintiffs' claim that separate development of the lands owned by the Mize defendants and the Montessori Partnership together caused the flooding could not be fully adjudicated without the addition of the Montessori Partnership. G.S. 1A-1, Rule 19(a).

APPEAL by plaintiffs from *Farmer, Judge*. Orders entered 11 September 1984 and 15 September 1984 in Superior Court, DURHAM County. Heard in the Court of Appeals 6 June 1984.

On 8 June 1984, the plaintiffs brought this action seeking to restrain further development of the defendants' properties. In their complaint, plaintiffs alleged that they were the owners of certain property on Colony Woods Drive which was adjacent to or near the properties of the defendants. The complaint further alleged that during 1983 the defendants began the development of the adjacent properties and that because of this development plaintiffs' property had been flooded on numerous occasions. Based upon this complaint the trial court issued an *ex parte* temporary restraining order against the defendants.

A hearing was conducted on the plaintiffs' attempt to obtain a preliminary injunction. In support of their motion for a temporary injunction the plaintiffs presented their affidavit which stated that they bought their property in 1978 and had not had any problems with flooding until June of 1983. They further stated that in the Spring of 1983 the defendants began to develop their respective properties and that since that time plaintiffs' property had been flooded on nine occasions between June 1983 and 29 May 1984. The plaintiffs also presented an affidavit from an engineer in which he stated that the development of the defendants' property had severely diminished the water retaining potential of properties and that flooding had occurred because the drainage system under Colony Woods Drive was inadequate to accommodate the increased volume of water.

In opposition to the motion for a preliminary injunction the Mize defendants offered an affidavit from Carlton Mize in which he stated that in the development of his property he had made every effort to minimize any increase in water flow because of the development. He stated that he did this by following the natural contour of the land and constructing, at the suggestion of his project engineer, a 5-foot high rock dam in the wet weather ditch into which most of his property drained. The Mizes also offered an affidavit from the plaintiffs' neighbors who stated that during the ten years in which they had owned their house, which was next door to the plaintiffs, they had experienced flooding on three or four occasions prior to 1984, and that during the most severe flooding it was discovered that the drainage pipe which ran between their property and the plaintiffs' property to carry the water to Colony Woods Drive had become obstructed by roots. The affidavit further stated that as soon as the obstruction was removed the excess water drained rapidly away. Also offered in opposition to the motion for a preliminary injunction was an affidavit of an engineer employed by the Mize defendants. In his affidavit the engineer stated that although the Mize development had slightly accelerated the rate of surface water runoff this should be offset by the rock dam which was constructed in the wet weather ditch on the Mize property. The engineer further stated that in his opinion any flooding on the plaintiffs' property was due to an inadequate drainage facility on plaintiffs' property and under Colony Woods Drive.

In opposition to the preliminary injunction the defendant Montessori Children's House of Chapel Hill, Inc. filed a motion to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure based upon a showing that it was neither the owner nor developer of any of the property in question but merely occupied part of the property through a leasehold interest. In support of its motion the Children's House filed an affidavit by its administrator which stated that the defendant did not take possession of the property until June 1984 and that it was merely a tenant rather than an owner or developer of the property.

Following the hearing the temporary restraining order was dissolved and the court refused to issue a preliminary injunction.

The Mize defendants then answered denying that they had caused any flooding, and alleging that they had made reasonable

use of their land and that any flooding was due to improper drainage on the plaintiffs' own property and downstream therefrom. They also filed a motion to add the Montessori Partnership as a defendant in this action alleging that they rather than the Montessori Children's House were the owners of the other tract of land in question. The plaintiffs also filed a motion to add the Montessori Partnership as a defendant.

On 17 August 1984, the Mize defendants moved for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure. On 11 September 1984 the motion was granted. On 18 September 1984, an order was filed in which the motion to dismiss of Montessori Children's House of Chapel Hill, Inc. was granted and the plaintiffs' motion to add the Montessori Partnership as a defendant was denied. From these orders, plaintiffs appealed.

Levine, Stewart & Tolton, by Michael D. Levine, for plaintiff appellants.

Stubbs, Cole, Breedlove, Prentis & Poe, by James A. Cole, Jr., and Terry D. Fisher, for defendant appellees Carlton H. Mize and Pearl B. Mize.

Randall, Yaeger, Woodson, Jervis & Stout, by Robert B. Jervis, for defendant appellee Montessori Children's House of Chapel Hill, Inc.

ARNOLD, Judge.

[1] The first issue presented for review is whether the trial court erred in granting the defendants, Carlton H. Mize and Pearl B. Mize, summary judgment. Summary judgment is only appropriate where a movant has shown that there is no genuine issue as to a material fact and that they are entitled to a judgment as a matter of law. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980).

The plaintiffs' cause of action is a private nuisance action in which they seek to hold the adjacent landowners liable for flooding damages because of their alteration in the flow of surface water. In order to prevail against the Mize defendants, the plaintiffs must show a causal link between the development on the Mize property and the flooding of plaintiffs' land. Once they establish the causal link their right to recover is governed by the

reasonable use doctrine set forth in *Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E. 2d 787 (1977).

There is a conflict in the forecasts of evidence offered by the parties. The plaintiffs offered affidavits from which a jury could find that the flooding was caused in part by the Mize development and in part by the downstream drainage system. In opposition to this showing the Mizes offered affidavits which tended to show that the flooding was caused entirely by an inadequate drainage system downstream from the plaintiffs' property. The question of causation is a question of fact; therefore, the trial court erred in granting summary judgment in favor of the Mize defendants.

[2] The next issue is whether the trial court erred in allowing the motion to dismiss by the defendant Montessori Children's House of Chapel Hill, Inc. pursuant to Rule 12(b)(6). It is apparent from the record that in ruling upon the motion to dismiss the court relied upon matters outside the record; therefore, we will treat the court's actions as if it ruled upon a motion for summary judgment made pursuant to Rule 56 of the Rules of Civil Procedure. *See* Rule 12(b) of the Rules of Civil Procedure.

In support of their motion to dismiss the Children's House presented an affidavit from its administrator that it was not and had never been owners of the property in question, and that it furthermore had not come into possession of the property until after the last flooding complained of in the complaint. Following the filing of this affidavit the plaintiffs failed to come forward with evidence, by affidavit or otherwise, which would have tended to show an issue of triable fact existed between the parties. By failing to do so the plaintiffs' claim against the Children's House was subject to summary judgment. Rule 56 of the Rules of Civil Procedure. The summary judgment in favor of the Montessori Children's House of Chapel Hill, Inc. is affirmed.

[3] Finally, plaintiffs contend the court erred by denying their motion to join as a necessary party Montessori Partnership, the record owner of the property leased to the Children's House.

> G.S. 1A-1, Rule 19(a) requires that a person must be joined as a party to an action if that person is "united in interest" with another party to the action. A person is "united

in interest" with another party when that person's presence is necessary in order for the court to determine the claim before it without prejudicing the rights of a party before it or the rights of others not before the court.

Ludwig v. Hart, 40 N.C. App. 188, 190, 252 S.E. 2d 270, 272 (1979). In the case at bar the plaintiffs are alleging that the separate development of the lands owned by the Mize defendants and the land owned by the Montessori Partnership together caused the flooding on their property. This claim cannot be fully adjudicated without the addition of Montessori Partnership; thus, it is a necessary party. The court's order denying plaintiffs' motion to join it was in error and must be reversed.

Affirmed in part, reversed in part and remanded.

Judges MARTIN and PARKER concur.

STATE OF NORTH CAROLINA v. ELLIOTT JACKSON

No. 8426SC841

(Filed 18 June 1985)

Larceny § 7.7— larceny of automobile—sufficiency of evidence

The State's evidence was sufficient to support inferences that the victim's car was taken by defendant without her consent and that defendant intended permanently to deprive the victim of the car so as to support defendant's conviction of felonious larceny where it tended to show that the victim did not give defendant permission to take her car or to repair it; she refused to give defendant the keys to the car and was surprised to find it gone; defendant told the victim he had taken the car to have it repaired; and the car was never returned to the victim or even located by the police. Furthermore, the evidence did not require the trial court to instruct the jury on the lesser-included offense of unauthorized use under G.S. 14-72.2.

APPEAL by defendant from *Kirby, Judge*. Judgment entered 5 April 1984, in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 March 1985.

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

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

COZORT, Judge.

The defendant was convicted of felonious larceny of a 1971 Ford Mustang and sentenced to five years' imprisonment. On appeal, the defendant contends that the trial court erred in denying his motion to dismiss the charge due to insufficient evidence. We hold that the motion was properly denied.

The evidence for the State tended to show that in September of 1983 Geneva Hill met the defendant while he and another man were painting a house in her neighborhood. Ms. Hill, who was in the process of painting her kitchen, approached the men and began asking them questions about painting. On their invitation, Ms. Hill decided to work with them awhile in order to learn more about painting. Several hours later when Ms. Hill's sister and children arrived, the men gave them a ride back to her house in their van.

When they stopped at the Hill home, the defendant noticed Ms. Hill's 1971 Ford Mustang in the driveway. He looked under the hood and, when he learned it was in need of repair, explained that he could fix it. The two men then looked at the painting job Ms. Hill had begun, then left.

After several weeks, the defendant began calling Ms. Hill and at some point mentioned that he could fix the Mustang for forty dollars. Ms. Hill indicated that such an amount was not in her budget. The defendant then insisted that he wanted to have it fixed for her because he cared about her. The defendant continued to call Ms. Hill and came over to her house one Saturday evening.

Shortly thereafter, the defendant called Ms. Hill one weekday morning and asked her to leave the keys to the Mustang in her mailbox. When she refused, the defendant stated that he would take the car anyway. Nevertheless, she did not leave the keys.

Ms. Hill did not have any further conversations with the defendant until after 13 October 1983. When she came home that

evening, the car was gone. The defendant called later that night to say that he had taken the car to have it fixed. When the defendant did not return the car on the following Saturday as he had promised, Ms. Hill, on the advice of her brother, called the police. The police suggested that Ms. Hill first look for the car at the place where the defendant had stated it was being fixed. Her brother went to that place, but could not locate the car.

Ms. Hill's car has never been returned to her. She testified that she did not give the defendant at any time her permission to take the Mustang.

The defendant's evidence consisted of his testimony alone. He testified that on the day he and his painting partner gave Ms. Hill a ride to her house, she asked him about repairing her car. She gave him her address and telephone number and told him to get in touch with her about fixing her car. When the defendant called the following Saturday, Ms. Hill asked him to find a frame for her car. On a subsequent telephone conversation, the defendant testified that Ms. Hill invited him over to her house. By this time the defendant had located a frame for her car for $175.00. When he went over to her house, she stated that she did not have any money and suggested to the defendant that he buy the frame and let her pay him for it later. The defendant declined. According to the defendant, when he left Ms. Hill's house that evening, the Mustang was parked in her yard.

The defendant stated that he never saw Ms. Hill again and denied taking or ever cranking the Mustang.

On rebuttal, the State offered the testimony of Ms. Hill's nine-year-old son who testified that on the day before the car was found missing, the defendant and another man came to their house, discovered that Ms. Hill was not at home, then proceeded to look under the car's hood and to start it with cables. Roosevelt Hill also testified that the defendant put water in the car and unsuccessfully tried to unlock the door with a hanger. Although the truck the defendant arrived in had a chain connected to the front of it, he left without attempting to tow the car away.

The defendant contends that the trial court erred in denying his motion to dismiss the charge on the basis of insufficient evidence. The scope of our review on a motion to dismiss is to deter-

mine whether there is substantial evidence of each element of the offense charged. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984). Substantial evidence has been defined as 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). The evidence is to be considered in the light most favorable to the State and the State is entitled to every reasonable inference that might be drawn therefrom. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977).

The defendant was charged with felonious larceny under G.S. 14-72. To convict a defendant of larceny, the State must show that the defendant: "(1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of the property permanently." *State v. Reeves*, 62 N.C. App. 219, 223, 302 S.E. 2d 658, 660 (1983). To be convicted of felonious larceny, the value of the property taken must exceed $400. G.S. 14-72(a).

The defendant argues that the State did not present substantial evidence that the Mustang was taken without Ms. Hill's consent or that the defendant took it with the intent to permanently deprive Ms. Hill of its use. We disagree. We hold Ms. Hill's repeated testimony that she did not give the defendant permission to take her car or to fix it, coupled with the fact that she refused to give him the car keys and her surprise to find it gone on 13 October 1983, was substantial evidence on the element that the property was taken without her consent.

We similarly hold that there was substantial evidence presented by the State that the defendant took Ms. Hill's car with the intent to permanently deprive her of its use. Ms. Hill testified that when she refused to leave her keys for the defendant that he stated that "he was going to . . . take it anyway." Ms. Hill's son testified that on the day before the car was taken, the defendant, after discovering his mother was not at home, started the car through the use of cables and tried to get inside the car with a coat hanger. The defendant states in his brief that the "mere fact that the car was never returned does not eliminate the possibility that defendant intended to return the car when he took it." However, the fact that the car has not yet been returned or even located by the police is sufficient to raise an inference in favor of

the State that the defendant did in fact intend to keep the car permanently when he took it.

The defendant further argues in his brief that because there was insufficient evidence of an intent to permanently deprive, the trial court should have dismissed the felonious larceny charge and submitted the case to the jury only on the charge of "unauthorized use of a motor-propelled conveyance" under G.S. 14-72.2, which is a lesser included offense of larceny. *State v. Ross*, 46 N.C. App. 338, 264 S.E. 2d 742 (1980). *See also State v. Coward*, 54 N.C. App. 488, 283 S.E. 2d 536 (1981). The trial court is not required to instruct the jury on a lesser included offense to the original crime unless the offense arises on the evidence. *State v. Hall*, 305 N.C. 77, 286 S.E. 2d 552 (1982). Contrary to the defendant's argument, the State's evidence was positive as to each element of the crime of felonious larceny. There was no conflicting evidence with regard to whether the defendant intended to steal Ms. Hill's car. The jury could believe as the State contended that the defendant did intend to permanently deprive Ms. Hill of the use of her car at the time he took it or they could believe as the defendant contended that he did not take her car under any circumstances. Therefore, the trial judge was not required to instruct the jury on unauthorized use of a motor vehicle and properly refrained from doing so. *See State v. McRae*, 58 N.C. App. 225, 292 S.E. 2d 778 (1982).

We hold the trial judge properly denied the defendant's motion to dismiss.

No error.

Judges ARNOLD and PHILLIPS concur.

In re Caldwell

IN THE MATTER OF: BIANCA LAPRENA CALDWELL, MINOR CHILD; MECKLENBURG COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER; AND TERESA VALAY CALDWELL, AND ROMERO CLARK, RESPONDENTS

No. 8426DC1138

(Filed 18 June 1985)

1. Appeal and Error § 19— pauper's appeal—motion not timely—fees paid—heard on the merits

The trial court correctly denied respondent leave to proceed on appeal *in forma pauperis* where respondent did not file her motion within ten days of the expiration of the session at which judgment was rendered; however, all fees and printing charges were paid, the Court of Appeals therefore had jurisdiction, and the case was heard on the merits. G.S. 1-288 (1983).

2. Appeal and Error § 28.2— sufficiency of evidence to support findings—not raised by broadside exception

The sufficiency of the evidence to support the findings was not before the Court of Appeals in a termination of parental rights action where respondent failed to except to any findings of fact. An exception to the court's conclusion that the findings were supported by clear, cogent and convincing evidence did not present the entire body of findings for review.

3. Parent and Child § 1— termination of parental rights—conclusion supported by findings

The court's findings supported the conclusion that respondent's parental rights should be terminated under G.S. 7A-289.32(2) where the court found that the child was in the bottom five percent of children in her age group in weight, that respondent failed to supervise her properly, that the child was allowed to remain in dirty diapers and drink out of discarded bottles, that the child lived in an environment injurious to her health and welfare, that respondent suffered from mental problems resulting in inability to care for herself and adversely affecting her ability to care for a child, that social workers who took care of respondent's affairs for her found her ability to deal with reality diminished, and that nothing suggested any real improvement in respondent's condition.

4. Parent and Child § 1— termination of parental rights—not based on mental illness

The trial court did not attempt to terminate respondent's parental rights for mental illness without the required finding of a reasonable probability that the inability to provide proper care would continue throughout the child's minority where facts evidencing physical neglect were found and were sufficient to support a determination that the child was neglected. The review of respondent's condition was necessary to determine that the neglect would probably recur.

5. Appeal and Error § 42; Parent and Child § 1.5— termination of parental rights—failure of tape-recording equipment—no prejudice shown

In an action for the termination of parental rights, there was no prejudicial error where the tape device used to record the trial did not work. Simply conjecturing that there may have been objections to critical testimony without showing why any such testimony ought to have been excluded will not support reversal, particularly when trial counsel assists in reconstructing the record. G.S. 7A-198 (1981).

6. Parent and Child § 1.5— termination of parental rights—refusal to exercise discretion not to terminate—findings not required

The trial court did not err by failing to find facts for the refusal to exercise its discretion not to terminate parental rights. The order terminating rights must itself provide the legal basis for termination and include requisite findings; no further findings are required.

APPEAL by respondent Teresa Valay Caldwell from *Matus, Patrick, Judge*. Order entered 7 June 1984 in MECKLENBURG County District Court. Heard in the Court of Appeals 14 May 1985.

This is a parental rights action concerning Bianca LaPrena Caldwell, born in March 1982. Respondent Romero Clark, the child's father, consented to termination of his parental rights. Respondent Caldwell (hereinafter respondent) contested termination. The evidence at hearing showed that while in respondent's care the child weighed only seventeen pounds at thirteen months, in the fifth percentile for her age group. The child was always dirty and lived in unsanitary conditions. Respondent suffered from severe emotional and mental problems, including psychosis and schizophrenia, and had difficulty dealing with reality. She stipulated the child was neglected in May 1983. The child was placed in foster care. The Department of Social Services (hereinafter DSS) filed a petition to terminate parental rights in November 1983; upon hearing and further psychological evaluation, respondent's parental rights were terminated. She appealed.

Ruff, Bond, Cobb, Wade & McNair, by Robert S. Adden, Jr. and William H. McNair, joining on the brief Ronald L. Chapman, guardian ad litem, for petitioner Department of Social Services.

Harper, Connette & Stovall, by Lois H. Grace Stovall, for respondent Caldwell.

WELLS, Judge.

[1] Respondent attempted to appeal *in forma pauperis* pursuant to N.C. Gen. Stat. § 1-288 (1983). Notice of appeal was given 7 June 1984, and trial counsel moved to withdraw the same day. Present counsel was appointed 18 June 1984, and filed appeal entries 5 July 1984, followed by a motion for leave to appeal *in forma pauperis* and for an extension of time to file same on 11 July 1984. The motion was allowed the same day. Petitioner DSS filed a motion to dismiss the appeal on 31 July 1984, alleging lack of notice and lateness. Relying on *In re Shields*, 68 N.C. App. 561, 315 S.E. 2d 797 (1984), the trial court ruled that respondent had failed to comply with G.S. § 1-288 and struck its order allowing appeal *in forma pauperis*. Respondent assigns error.

G.S. § 1-288 requires that motions to appeal *in forma pauperis* be made at the latest within ten days after the expiration of the session at which judgment is rendered. This requirement is mandatory. *In re Shields, supra.* Even assuming that the ten day limit began to run as of the time counsel was appointed for appeal, no motion was filed within ten days. The late filing of appeal entries has no bearing on the question; appeal entries are simply a convenient means of providing a record entry of the fact that an appeal *has been taken*, and do not constitute the taking of the appeal itself. *See* Commentary, Rule 3 of the Rules of Appellate Procedure. The court correctly denied respondent leave to proceed *in forma pauperis*. The docket of this court indicates that all fees and printing charges have nevertheless been paid; therefore this court has jurisdiction over the cause and we proceed to the merits.

[2] The trial court found that respondent's parental rights should be terminated under N.C. Gen. Stat. § 7A-289.32(2) (Cum. Supp. 1983). If this judgment is supported by the evidence and findings of fact, it must be affirmed. Respondent has failed to except to any of the findings of fact, they are therefore conclusive on appeal. *In re Apa*, 59 N.C. App. 322, 296 S.E. 2d 811 (1982). We reject respondent's argument that because she has excepted to the court's conclusion of law that the findings are supported by clear, cogent and convincing evidence, the sufficiency of the evidence to support the entire body of the findings is thus presented for review. Such broadside exceptions have always been

considered ineffective by our appellate courts. Once substantial evidence has been introduced, whether that evidence reaches the level necessary to support a finding, whether beyond a reasonable doubt or clear, cogent and convincing, rests essentially with the finder of fact. *See Addington v. Texas*, 441 U.S. 418 (1979). The finder's decision will not ordinarily be reviewable. *See Jackson v. Virginia*, 443 U.S. 307, *reh'g denied*, 444 U.S. 890 (1979). The sufficiency of the evidence to support the findings is accordingly not before us. *In re Apa, supra.*

[3] In cases such as this, to determine neglect the trial court may consider the original adjudication of neglect, and must also consider evidence of changed conditions to the time of hearing in light of the evidence of prior neglect and the probability of repetition of neglect. *In re Ballard*, 311 N.C. 708, 319 S.E. 2d 227 (1984). It is not essential that there be evidence of culpable neglect following the initial adjudication. *See In re Johnson*, 70 N.C. App. 383, 320 S.E. 2d 301 (1984). Here the court found that the child was in the bottom five percent of children in her age group in weight, that respondent failed to supervise her properly, that the child was allowed to remain in dirty diapers and drink out of discarded bottles, and that the child, while with respondent, lived in an environment injurious to her health and welfare. *See* N.C. Gen. Stat. § 7A-517(21) (1981). In addition, the court found that respondent suffered mental problems resulting in inability to care for herself and adversely affecting her ability to care for a child. The court found that the various social service workers that had seen respondent up to the time of hearing found her ability to deal with reality diminished and that the social workers still took care of her affairs for her; significantly, nothing in the order suggests any real improvement in respondent's condition. We conclude that these findings support the court's conclusion that respondent's parental rights should be terminated under G.S. § 7A-289.32(2); *In re Ballard, supra.* The evidence clearly showed that the problems which caused the injurious environment had continued and probably would recur.

[4] Respondent argues that in its focus on her mental condition, the trial court attempted to in fact terminate her parental rights for mental illness, *see* N.C. Gen. Stat. § 7A-289.32(7) (1981), but erroneously ignored that section's requirement that the court find a reasonable probability that the incapability to provide proper

care will continue throughout the child's minority. We disagree. The ground for termination was neglect. Facts evidencing physical neglect were properly found, sufficient to support a determination that the child was neglected. The review of respondent's own condition was necessary to determine that this neglect probably would recur. *In re Ballard, supra; see In re Castillo,* -- N.C. App. ---, 327 S.E. 2d 38 (1985) (court must consider all evidence of neglect and probability of repetition). Absent such evidence showing likelihood of repetition, it is doubtful that individual instances of neglect will support termination, except in exceptional cases. *See e.g., In re Moore,* 306 N.C. 394, 293 S.E. 2d 127 (1982) (violent, likely sexual, abuse), *appeal dismissed sub nom., Moore v. Guilford County Dept. of Social Services,* 459 U.S. 1139 (1983).

Recent decisions support our result on this issue. In *In re Montgomery,* 311 N.C. 101, 316 S.E. 2d 246 (1984) the supreme court affirmed termination on grounds of neglect where there was little evidence of deleterious physical conditions, although the parents did have a history of poverty and failure to get the children to school. The parents' mental retardation apparently swayed the court to conclude that erratic attention to education and basic material needs would continue, sufficient to support termination for neglect. Similarly, in *In re McDonald,* 72 N.C. App. 234, 324 S.E. 2d 847 (1985), we affirmed termination where the only instance of active neglect involved smoking near gasoline. However, general inadequate care, and, more importantly, chronic alcoholism, supported termination of parental rights. The findings of neglect were proper and supported the court's order in accord with the law.

[5] Respondent assigns error because the tape device used to record the trial did not work (the record was subsequently reconstructed with the help of trial counsel). Tape recording of trials in district court is permitted by law. N.C. Gen. Stat. § 7A-198 (1981). Absent contemporaneous objection to the use of tape devices, to show prejudicial error an appellant must at least indicate the import of some specific testimony or other proceeding that has been lost. *In re Peirce,* 53 N.C. App. 373, 281 S.E. 2d 198 (1981). Simply conjecturing, as respondent has done, that there may have been objections to critical testimony, without showing why any such testimony ought to have been excluded, will not support reversal,

particularly when as here trial counsel assists in reconstructing the record.

[6] Finally, respondent contends that the trial court erred in refusing to exercise its discretion not to terminate and in failing to find facts for this refusal. Irrespective of the existence of grounds for termination, the court retains discretionary authority to dismiss the petition in the best interests of the child. N.C. Gen. Stat. § 7A-289.31(b) (1981); *In re Montgomery, supra.* The statute only requires findings of fact when the court chooses to exercise this discretion. We are aware of no requirement that the court find facts in declining to do so. The order terminating rights must itself provide the legal basis, including requisite findings, for termination. The legislature has determined as a policy matter, in the interest of the child, that an order so supported will suffice to terminate parental rights. No further findings are required.

The order appealed from is therefore

Affirmed.

Judges JOHNSON and COZORT concur.

ENVIRONMENTAL LANDSCAPE DESIGN SPECIALIST, A PARTNERSHIP COMPRISING OF JACK RUPPLIN AND KEITH WHITFIELD v. JOHN SHIELDS AND CHATTIE SHIELDS

No. 8422DC920

(Filed 18 June 1985)

1. **Quasi Contracts and Restitution § 2.1— quantum meruit recovery for landscape design services**

Plaintiff's evidence was sufficient to permit it to recover in *quantum meruit* for landscape design work performed for defendants after the trial court granted a directed verdict for defendants on plaintiff's express contract claim.

2. **Quasi Contracts and Restitution § 2.2— recovery in quantum meruit—sufficient evidence of damages**

Plaintiff's bill based on $30 per hour and evidence that the landscaper who eventually landscaped defendants' property also charged $30 per hour was sufficient to go to the jury on the issue of damages in a *quantum meruit* action to recover for landscape design services.

3. Damages § 2; Quasi Contracts and Restitution § 2.2— recovery in quantum meruit—award of interest—separate statement of interest and principal

Although it was proper for the jury to award interest in a *quantum meruit* action, the jury was required by G.S. 24-5 to distinguish the principal from the amount allowed as interest, and the cause must be remanded for a new trial on the issue of damages where the jury failed to do so.

APPEAL by defendants from *Johnson, Robert W., Judge.* Judgment entered 25 April 1984 in District Court, DAVIE County. Heard in the Court of Appeals 17 April 1985.

This is an action in which plaintiff sought to recover for landscape design services it provided to defendants. At the conclusion of trial, the jury found that plaintiff performed landscape design work for defendants under such circumstances that the defendants should be required to pay for it and that plaintiff was entitled to recover $4,216.80 from the defendants. Defendants appeal.

David P. Shouvlin, for plaintiff appellee.

Henry P. Van Hoy, II, for defendant appellants.

JOHNSON, Judge.

The first question we address is whether the court erred in denying defendants' motions for a directed verdict and for judgment notwithstanding the verdict. The purpose of a motion for directed verdict is to test the sufficiency of the evidence to go to the jury. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971). In ruling upon a motion for directed verdict made at the close of all the evidence, the court must consider all of the evidence in the light most favorable to the plaintiff, including evidence elicited from the defendant favorable to the plaintiff. *Tate v. Bryant*, 16 N.C. App. 132, 191 S.E. 2d 433 (1972). The same principles and standards apply to motions for judgment notwithstanding the verdict. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974).

[1] Plaintiff alleged two claims in its complaint: (1) breach of an express contract; and (2) unjust enrichment. At the conclusion of all the evidence, the court granted a directed verdict for defendants on the express contract claim. Although the better practice would have been for plaintiff to plead both express and implied contract, plaintiff could still recover in *quantum meruit* in the absence of proof of an express contract, if a contract could be im-

plied from the evidence. *Paxton v. O. P. F., Inc.*, 64 N.C. App. 130, 306 S.E. 2d 527 (1983). To recover in *quantum meruit*, plaintiff must show: (1) services were rendered to defendants; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously. *Johnson v. Sanders*, 260 N.C. 291, 132 S.E. 2d 582 (1963). In short, if plaintiff alleged and proved acceptance of services and the value of those services, it was entitled to go to the jury on *quantum meruit*. *Carolina Helicopter Corp. v. Cutter Realty Co.*, 263 N.C. 139, 139 S.E. 2d 362 (1964).

Taken in the light most favorable to the plaintiff the evidence tends to show that Mr. Bill Adams, a general contractor, referred Mr. Keith Whitfield, a partner in plaintiff landscape design and landscaping business, to the defendants regarding the possibility of performing landscaping services for defendants. Mr. Whitfield met with defendant Mr. Shields and Mr. Shields requested Whitfield to present designs and ideas to him for landscaping his yard. Whitfield thereupon prepared drawings for various designs and presented these drawings to Mr. Shields, who indicated he liked a design with waterfalls and fountains and directed Whitfield to prepare a finalized design. The next day, Bill Adams contacted plaintiff and told him the deal was off because the Shields thought the plans were too pretentious and offered to pay plaintiff up to $1,500 on behalf of the Shields as settlement. Whitfield then contacted Mr. Shields, who told him to continue with his drawings but to make them less pretentious. Whitfield met with Mr. Shields for a third time, at which time Mr. Shields examined Whitfield's drawings and instructed Whitfield to finalize them. When the Shields would not return his calls, Whitfield discovered another landscape contractor was working on their yard.

Mr. Shields conceded on cross-examination that he requested various drawings and that he understood there would be a charge for design work even if there were no implementation of the designs. There also was evidence that defendants were aware plaintiff was charging by the hour. Whitfield testified that he told defendants he was charging $30.00 per hour. The evidence thus showed that defendants requested and accepted plaintiff's services with knowledge that they were not being performed gratuitously.

[2] Defendants argue there was insufficient evidence of damages because plaintiff's bill, standing alone, was insufficient to show the reasonable value or market value of plaintiff's services. *See Harrell v. Construction Co.*, 41 N.C. App. 593, 255 S.E. 2d 280 (1979), *aff'd*, 300 N.C. 353, 266 S.E. 2d 626 (1980). While a bill for services rendered, standing alone, is insufficient to support an award of damages, it is some evidence of the value of one's services. *Hood v. Faulkner*, 47 N.C. App. 611, 267 S.E. 2d 704 (1980). Moreover, the reasonable value of services rendered is determined largely by the nature of the work and the customary rate of pay for such work in the community and at the time the work was performed. *Id.*; 66 Am. Jur. 2d *Restitution and Implied Contracts* sec. 28 (1973). Besides plaintiff's bill, there was evidence in the present case that the landscaper who eventually landscaped defendants' property also charged $30.00 per hour. We hold this evidence was sufficient to go to the jury on the issue of damages.

[3] Defendants also contend the court erred in refusing to strike the jury's verdict as to damages because the jury apparently included interest in its award; otherwise, there was insufficient evidence to support its award.

G.S. 24-5 provides that "(a)ll sums of money due by contract of any kind . . . shall bear interest, and when a jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest. . . ." The trend in North Carolina has been to allow interest in almost all types of cases involving breach of contract, including recoveries on *quantum meruit*. *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590 (1962); *Thomas v. Realty Co.*, 195 N.C. 591, 143 S.E. 144 (1928); *Perry v. Norton*, 182 N.C. 585, 109 S.E. 641 (1921). It was therefore not improper for the jury to award interest. When it awarded interest, however, it was required by G.S. 24-5 to distinguish the principal from the amount allowed as interest. In cases of *quantum meruit*, in which there is no express contract, and in which the jury must determine the reasonable value of services, it is especially important for the jury to make this designation. Because we do not know from the jury verdict what the jury determined the reasonable value of plaintiff's services to be, the cause must be remanded for a new trial solely on the issue of damages.

Defendants lastly contend that the court erred in excluding evidence that plaintiff had been paid $500 for a similar prior landscaping design job for another customer. Even if the exclusion of this evidence was error, it was harmless as identical evidence was admitted through another witness. *Reeves v. Hill*, 272 N.C. 352, 158 S.E. 2d 529 (1968); *Medford v. Davis*, 62 N.C. App. 308, 302 S.E. 2d 838, *disc. rev. denied*, 309 N.C. 461, 307 S.E. 2d 365 (1983).

New trial on issue of damages.

Judges WHICHARD and EAGLES concur.

JOYCE ELAINE DUNN v. DAVID SCOTT HERRING AND GEORGE DILLAN SMITH

No. 844SC1018

(Filed 18 June 1985)

1. **Automobiles and Other Vehicles § 76.1— striking unlighted trailer across roadway—no contributory negligence**

There was no error in the denial of defendants' motions for a directed verdict and for judgment n.o.v. based on plaintiff's alleged contributory negligence where plaintiff was driving in a westerly direction after dark in clear weather; she came out of a curve and saw the headlights of an apparently large vehicle in the eastbound lane; the oncoming vehicle seemed to be moving slowly if at all; plaintiff slowed from fifty-five miles per hour to thirty-five miles per hour to see what course the vehicle would follow; plaintiff then struck defendants' trailer, which was backing into a driveway with the tractor in the eastbound lane and the trailer across the westbound lane without flares or warning devices.

2. **Automobiles and Other Vehicles § 90.9— control of automobile—instruction not required by evidence**

There was no evidence requiring the judge to instruct the jury on the proper control of an automobile where the evidence revealed that plaintiff, knowing the area was frequented by farm vehicles, slowed her vehicle after coming out of a curve and observing the headlights of a tractor-trailer in the opposite lane, plaintiff thereafter collided with the trailer portion of the tractor-trailer which was across her lane of traffic and was unlit and without warning devices or flares even though it was after dark. There was no evidence that plaintiff was not in control of her vehicle.

3. Judgments § 55— prejudgment interest—liability insurance admitted in answer

In an action arising from an automobile collision, there was no error in the court's assessment of interest from the date the complaint was filed where defendants admitted in their answer that the claim was covered by liability insurance. G.S. 24-5.

APPEAL by defendants from *Bruce, Judge.* Judgment entered 6 June 1984 in Superior Court, DUPLIN County. Heard in the Court of Appeals 7 May 1985.

This is a civil action for damages in which plaintiff seeks to recover damages for personal injuries sustained when plaintiff's automobile collided with defendants' tractor-trailer. Plaintiff's complaint alleged defendants' negligence as the cause of the accident; defendants in turn answered and pleaded contributory negligence as an affirmative defense. The jury returned a verdict for plaintiff and defendants appealed.

Allen, Hooten & Hodges, P.A., by John R. Hooten and John C. Archie, for defendants.

Thompson and Ludlum, by E. C. Thompson, III, for plaintiff.

JOHNSON, Judge.

[1] Defendants contend that the trial court erred in denying their motions for directed verdict and for judgment notwithstanding the verdict on the grounds that plaintiff's evidence established her contributory negligence as a matter of law.

Plaintiff's evidence revealed the following: Plaintiff was traveling from Greenville to her parents' home located near Warsaw on Rural Paved Road 1300. After leaving Greenville at approximately 5:30 p.m. on Highway 11, plaintiff turned onto Rural Road 1300 headed in a westerly direction. Plaintiff was driving a 1979 Chevrolet Monza, a compact two-door car. At the time plaintiff was proceeding on Rural Paved Road 1300, it was dark but the weather conditions were clear. In an area known as Benson's Garage, plaintiff had just come out of a curve when she first observed the headlights of an oncoming vehicle in the eastbound lane. Plaintiff reduced her speed from fifty-five miles per hour to about thirty-five miles per hour. The vehicle looked like a large vehicle because the lights were up high. Plaintiff believed the

vehicle was moving very slowly, if moving at all. She stated that, "being raised in the country, I was used to farm trucks being on the roads, so I slowed down to see what course it would follow." The distance from the curve where plaintiff first observed the headlights to defendants' vehicle was about two tenths of a mile. Plaintiff did not observe any type of warning devices, flagmen or anything else to put her on notice that defendants' vehicle was across her lane of travel. Plaintiff stated that she did not see defendants' tractor-trailer at any time before the collision. Plaintiff did not apply her brakes since the headlights were in the eastbound lane and she was unaware of the trailer portion of defendants' vehicle being across her lane of travel. After the collision, plaintiff was taken to New Hanover Memorial Hospital suffering from body injuries. Plaintiff's vehicle was badly damaged.

The evidence also revealed defendant Herring, the driver of the tractor-trailer involved in the collision, was backing the tractor-trailer into a driveway off Rural Paved Road 1300. The tractor portion of the vehicle was located in the eastbound lane of traffic and the trailer portion was extended across the westbound lane of traffic. There were no flares or warning devices placed at or near the tractor-trailer. The headlights of the tractor portion of the vehicle were lit, but the trailer portion was unlit.

First, we take judicial notice of the fact this case was previously before this Court. *Dunn v. Herring*, 67 N.C. App. 306, 313 S.E. 2d 22 (1984). The issue before us now is the identical issue presented in the earlier appeal; whether plaintiff's evidence established her contributory negligence as a matter of law, thus barring her recovery. After a thorough review of the facts and application of the relevant legal principles, this Court, in the prior action, found that plaintiff's evidence did not establish her contributory negligence as a matter of law and reversed the directed verdict granted in defendants' favor and the case was remanded for a new trial. We have reviewed the entire record before us and find that plaintiff has presented substantially the same evidence.

The only difference between the case *sub judice* and the previous case before this Court, *Dunn, supra*, is that defendants in our case also moved for a judgment notwithstanding the verdict. However, the test to be applied in considering a motion for judgment notwithstanding the verdict is the same as that applied in

considering a motion for a directed verdict. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). Therefore, we find that the trial court properly denied defendants' motions for directed verdict and judgment notwithstanding the verdict. *Dunn, supra.*

[2] Defendants next contend that the trial court erred in failing to charge the jury on the question of proper control. G.S. 1A-1, Rule 51(a) requires the trial judge to declare and explain the law arising on the evidence presented in the case. We have reviewed the record and we can find no evidence that would require the trial judge to instruct on proper control. The evidence revealed that plaintiff slowed her vehicle down after coming out of the curve and observing the headlights of the tractor-trailer. The headlights were in the eastbound lane, but the plaintiff knowing that the highway was frequented by farm machinery slowed down to ascertain its movements. Thereafter, she collided with the trailer portion of the tractor-trailer which was located in the westbound lane, her lane of traffic. It was dark when these events transpired, however, the trailer was unlit and there were no warning devices or flares. There was no evidence plaintiff, after she slowed down, was not in control of her vehicle. On this evidence, we believe the trial judge properly refused to submit the instruction on proper control.

Defendants assign error to the trial court's denial of their motion for a new trial on the grounds that the trial court committed error in denying defendants' motion for directed verdict and failing to instruct the jury on proper control. In light of our previous discussions of defendants first two assignments of error, we find defendants' contention is without merit.

[3] Lastly, defendants assign error to the court's entry of judgment and assessment of interest from the date the complaint was filed. Defendants cite G.S. 24-5 as support for their proposition.

G.S. 24-5 provides in pertinent part:

> The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract shall bear interest from the time the action is instituted until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly. The preceding sentence shall apply only to claims covered by

liability insurance. The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract which are not covered by liability insurance shall bear interest from the time of the verdict until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly.

Defendants contend that the record is absolutely devoid of any evidence, findings of fact or conclusion which shows that this claim was covered by liability insurance. We have reviewed the record and find that the defendants in their answer admitted the existence of liability insurance. Admissions in the pleadings admitting a material fact becomes a judicial admission in a case and eliminates the necessity of submitting an issue in regard thereto to the jury. *Crowder v. Jenkins*, 11 N.C. App. 57, 180 S.E. 2d 482 (1971). These admissions have the same effect as jury findings and nothing else appearing, they are conclusive and binding upon the parties and the trial judge. *Id.* Defendants' contention is without merit.

No error.

Judges WELLS and COZORT concur.

CITICORP, THE MORRIS PLAN INDUSTRIAL BANK, ALLEN D. MOORE, ROBERT E. OAKES, W. H. MAY, JR., AND RICHARD B. BARNWELL v. HONORABLE JAMES S. CURRIE (OR EACH OF HIS SUCCESSORS) IN HIS CAPACITY AS COMMISSIONER OF BANKS FOR THE STATE OF NORTH CAROLINA

No. 8410BC1099

(Filed 18 June 1985)

1. Banks and Banking § 1.1— statute prohibiting control of nonbank banking institutions—constitutionality

The statute prohibiting the acquisition or control of certain nonbank banking institutions by a bank holding company or any other company, G.S. 53-229, does not violate the Commerce Clause in Art. I, § 8 of the U. S. Constitution or Art. I, §§ 19, 32 and 34 of the N. C. Constitution.

2. Banks and Banking § 1.1— contract to acquire industrial bank—nullification by statute—no violation of contract clause of U. S. Constitution

Although G.S. 53-229 nullified a contract for Citicorp to acquire an industrial bank, the statute did not violate the contract clause of Art. I, § 10 of the U. S. Constitution.

3. Banks and Banking § 1.1— no vested right to operate industrial bank

Citicorp did not have a vested right to operate an industrial bank because it had entered into a contract to acquire an industrial bank and had filed an application for approval of such acquisition before the enactment of the statute prohibiting the acquisition or control of an industrial bank by any company, G.S. 53-229.

4. Banks and Banking § 1.1— statute prohibiting control of industrial bank—no bill of pains and penalties

The statute prohibiting the acquisition or control of an industrial bank by any company, G.S. 53-229, does not constitute a bill of pains and penalties proscribed by Art. I, § 10 of the U. S. Constitution when applied to the stockholders of an industrial bank who had agreed to sell the bank to Citicorp since the statute does not inflict punishment on the stockholders without a trial.

APPEALS by applicant Citicorp and by The Morris Plan Industrial Bank, Allen D. Moore, Robert E. Oakes, W. H. May, Jr., and Richard B. Barnwell from a decision of the Commissioner of Banks entered 31 August 1984. Heard in the Court of Appeals 13 May 1985.

Citicorp contracted with The Morris Plan Industrial Bank (Morris Plan) on 5 July 1984 for the acquisition of Morris Plan by Citicorp. On 6 July 1984 Citicorp filed an application with the Commissioner of Banks (Commissioner) for approval of its acquisition of Morris Plan as required by G.S. 53-42.1. The Commissioner denied Citicorp's application on the grounds that G.S. 53-229, which was effective as of 7 July 1984, barred Citicorp from acquiring an industrial bank such as Morris Plan. Citicorp, Morris Plan, and the four stockholders of Morris Plan named above appealed to this Court pursuant to G.S. 7A-29(a), 53-225(c), and 53-231.

Attorney General Thornburg, by Special Deputy Attorney General Reginald L. Watkins, and Chief Counsel of the State Banking Commission Robert L. Anderson, for appellee Commissioner of Banks.

Robinson, Bradshaw & Hinson, by Robin L. Hinson, A. Ward McKeithen, Dan T. Coenen, and Mark W. Merritt, for applicant appellant Citicorp.

Latham and Wood, by James F. Latham and William A. Eagles, for appellants The Morris Plan Industrial Bank, Allen D. Moore, Robert E. Oakes, W. H. May, Jr., and Richard B. Barnwell.

Jordan, Brown, Price & Wall, by John R. Jordan, Jr., Robert R. Price, and Henry W. Jones, for amicus curiae North Carolina Bankers Association, Inc.

WEBB, Judge.

[1] The appellants first contend the Commissioner's decision should be reversed because the statute he relied upon, G.S. 53-229, violates Article I, section 8 of the Constitution of the United States and Article I, sections 19, 32, and 34 of the Constitution of North Carolina. These issues have been resolved in the recent decision of *State ex rel. Banking Commission v. Citicorp Savings Industrial Bank of North Carolina (Proposed)*, 74 N.C. App. 474, 328 S.E. 2d 895 (1985). That decision held that G.S. 53-229 required the dismissal of Citicorp's application to form an industrial bank in North Carolina. In so holding, this Court determined that G.S. 53-229 did not violate the Commerce Clause in Article I, section 8 of the Constitution of the United States or the provisions of Article I, sections 19, 32, and 34 of the Constitution of North Carolina. We adhere to that holding in the present case.

[2] The appellants next contend that G.S. 53-229 nullifies their contract to sell The Morris Plan Industrial Bank and thus violates Article I, section 10 of the United States Constitution which provides in part:

> No state shall . . . pass any . . . law impairing the obligations of contracts.

The United States Supreme Court has interpreted the contract clause on several occasions. *See Energy Reserves v. Kansas Power and Light*, 459 U.S. 400, 74 L.Ed. 2d 569, 103 S.Ct. 697 (1983); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 57 L.Ed. 2d 727, 98 S.Ct. 2716 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 52 L.Ed. 2d 92, 97 S.Ct. 1505 (1977); *Veix v. Sixth Ward Bldg. and Loan Assn.*, 310 U.S. 32, 84 L.Ed. 1061, 60 S.Ct. 792 (1940); and *Home Bldg. and Loan Assn. v. Blaisdell*, 290

U.S. 398, 78 L.Ed. 413, 54 S.Ct. 231 (1934). These cases hold that this constitutional provision limits the power of the states to amend or abolish the obligations of a contract. The contract clause of the Constitution does not, however, strip the states of their police power to protect the general welfare of the people. The United States Supreme Court has said, "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 190, 76 L.Ed. 2d 497, 510, 103 S.Ct. 2296, 2305 (1983) (*quoting Hudson Co. v. McCarter*, 209 U.S. 349, 357, 52 L.Ed. 828, 832, 28 S.Ct. 529, 531 (1908)).

We believe we are bound by *Exxon Corp. v. Eagerton, supra* to hold that G.S. 53-229 as applied to the stockholders of Morris Plan does not violate the Contract Clause. In that case the United States Supreme Court held it was not a violation of the Contract Clause for a state legislature to adopt a law in a field in which the legislature is authorized to legislate although the law incidentally impairs the obligation of a pre-existing contract. The statute in *Exxon Corp.* was not aimed specifically at the contract. We believe that is the situation in this case. The General Assembly may regulate banks including industrial banks. G.S. 53-229 is a law of general application. The stockholders of Morris Plan may not insulate themselves from its effect by entering into a contract and it is not unconstitutional for the General Assembly to legislate in this area although such legislation may affect contracts.

[3] The appellants further contend the Commissioner erred in applying G.S. 53-229 to the present case because their contract and Citicorp's application predated enactment of G.S. 53-229. *State ex rel. Banking Commission, supra*, held G.S. 53-229 barred an application to form an industrial bank where the application was filed prior to enactment of G.S. 53-229. The only difference between that case and the present case is that here private parties contractually agreed to Citicorp's acquisition of Morris Plan Industrial Bank before Citicorp applied for the Commissioner's approval of the acquisition. This difference does not lead us to a different result. *State ex rel. Banking Commission, supra*, concluded that the right to operate an industrial bank is governed by statute, that no one has the right for the General Assembly not to

change a law, and that Citicorp did not have a vested right to operate a bank when G.S. 53-229 was adopted. The same considerations control the present case. Citicorp and Morris Plan did not acquire a vested right for the sale of Morris Plan to Citicorp by virtue of their contract. The contract expressly and necessarily recognized that it was subject to and conditioned on regulatory approval and the requirements of law. The Commissioner properly applied the law as it existed at the time of his decision, and Citicorp and Morris Plan cannot insulate themselves from the requirements of law through contractual arrangements.

Citicorp and Morris Plan cite *Lester Bros., Inc. v. Pope Realty & Ins. Co.*, 250 N.C. 565, 109 S.E. 2d 263 (1959); *Patterson v. Hosiery Mills*, 214 N.C. 806, 200 S.E. 2d 906 (1939); and numerous other cases for the rule that a newly enacted statute may not destroy substantive rights in general and vested contract rights in particular. These cases are distinguishable. Under G.S. 53-42.1 Citicorp and Morris Plan could not acquire a substantive or vested right to change the control of the industrial bank until they had received the Commissioner's approval. G.S. 53-229 became effective before they received the necessary approval, so G.S. 53-229 did not destroy any substantive or vested right.

[4] The stockholders of The Morris Plan Industrial Bank contend that G.S. 53-229 is unconstitutional as to them because it is a bill of pains and penalties which is proscribed by Article I, section 10 of the United States Constitution. Relying on *United States v. Brown*, 381 U.S. 437, 14 L.Ed. 2d 484, 85 S.Ct. 1707 (1965), *United States v. Lovett*, 328 U.S. 303, 90 L.Ed. 1252, 66 S.Ct. 1073 (1946) and *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 18 L.Ed. 356 (1867), the stockholders argue that the statute selects them for punishment by not allowing them to sell their stock in Morris Plan. A bill of pains and penalties is a legislative act that inflicts punishment on a person without a trial. Such an act is proscribed by the United States Constitution which prohibits bills of attainder.

We do not believe G.S. 53-229 is a bill of pains and penalties. It does not inflict punishment on the stockholders of Morris Plan without a trial. It prevents them from selling their stock to Citicorp. This is a burden on them but they may sell to other persons or continue to hold this stock in a profitable corporation. The

legislation was passed not to punish the stockholders but to further what the General Assembly determined was a legitimate state interest. It is not a bill of pains and penalties although it may not let the stockholders do what they want to do.

Affirmed.

Chief Judge HEDRICK and Judge WHICHARD concur.

C. W. MATTHEWS CONTRACTING COMPANY, INC. v. STATE OF NORTH CAROLINA AND NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS

No. 8412SC813

(Filed 18 June 1985)

Highways and Cartways § 9— action on highway contract—voluntary dismissal in superior court—time limit for refiling

The superior court erred by dismissing plaintiff's claim for liquidated damages and additional compensation under a contract with the North Carolina Department of Transportation where plaintiff proceeded through proper administrative channels until its claim was denied by the State Highway Administrator, filed suit in superior court within six months of the denial of its claim, took a voluntary dismissal, and refiled its claim within one year but more than six months from the denial by the State Highway Administrator. The conditions precedent in G.S. 136-29 bestowed jurisdiction upon the superior court and do not preempt the Rules of Civil Procedure; the conditions of G.S. 136-29 were satisfied, the trial court had jurisdiction of plaintiff's claim, and the action was to proceed as any other civil action. G.S. 1A-1, Rule 41(a)(1), G.S. 136-29.

APPEAL by plaintiff from *Preston, Judge*. Order entered 18 April 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 3 April 1985.

Plaintiff instituted a civil action seeking reimbursement of liquidated damages and additional compensation allegedly due pursuant to a contract with the North Carolina Department of Transportation (DOT). Prior to filing this civil action, plaintiff proceeded through the proper administrative channels which concluded with its claim being denied by the State Highway Administrator on 22 January 1981. Plaintiff then filed suit in

Superior Court on 21 July 1981, within six months of the denial of its claim. On 12 August 1981, before DOT filed its responsive pleading, plaintiff filed a notice of voluntary dismissal.

Plaintiff refiled his claim in Superior Court on 11 August 1982. DOT moved to dismiss for lack of subject matter jurisdiction and for failure of the complaint to state a claim upon which relief could be granted. The trial court granted the dismissal for failure of the complaint to state a proper claim which would provide the court with subject matter jurisdiction and plaintiff appealed.

Anderson, Broadfoot, Anderson, Johnson & Anderson, by John H. Anderson, II, for plaintiff.

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

JOHNSON, Judge.

The question presented for review is whether the trial court erred in granting defendant's motion to dismiss. The resolution of this issue involves the interpretation of the procedural effect of G.S. 136-29.

G.S. 136-29 provides, *inter alia,*

> (a) Upon the completion of any contract for the construction of any State highway awarded by the Department of Transportation to any contractor, if the contractor fails to receive such settlement as he claims to be entitled to under his contract, he may, within 60 days from the time of receiving his final estimate, submit to the State Highway Administrator a written and verified claim for such amount as he deems himself entitled to under the said contract setting forth the facts upon which said claim is based.
>
> (b) As to such portion of the claim as is denied by the State Highway Administrator, the contractor may, within six (6) months from receipt of said decision, institute a civil action by the filing of a verified complaint and issuance of summons in the Superior Court of Wake County or in the Superior Court of any county wherein the work under said contract was performed. The procedure shall be the same as in all civil actions except as herein and as hereinafter set out.

G.S. 136-29 permits the plaintiff to maintain an action against the State of North Carolina for settlement of money allegedly due pursuant to the highway contract on project number 8.2326309. Plaintiff, as set forth in the statute, must pursue its claim through administrative channels receiving a decision from the State Highway Administrator before it can institute a civil action in Superior Court. If plaintiff is not satisfied with the decision of the State Highway Administrator, the statute permits plaintiff to institute a civil action in Superior Court. Plaintiff must bring the civil action within six months after receiving the decision of the State Highway Administrator. Clearly, the requirement of proceeding first through administrative channels for a resolution of the claim and the requirement that if plaintiff receives an adverse ruling that the suit must be instituted within six months are conditions precedent. G.S. 136-29. These conditions must be satisfied to vest the trial court with jurisdiction to hear the action.

Plaintiff first pursued his claim through the proper administrative channels. It received an adverse ruling on its claim from the State Highway Administrator on 22 January 1981. On 21 July 1981, within six months of receipt of the adverse ruling, plaintiff instituted this civil action by filing a complaint and serving summons. Plaintiff satisfied all the conditions precedent set forth in G.S. 136-29 and as of 21 July 1981, the trial court had jurisdiction to hear plaintiff's claim.

Both parties agree that at this stage of the proceedings the action is properly filed and the trial court has jurisdiction. However, on 12 August 1981, before DOT filed any motions or its answer, plaintiff took a voluntary dismissal pursuant to Rule 41 of the Rules of Civil Procedure. G.S. 1A-1, Rule 41(a)(1) provides that:

> Subject to the provisions . . . 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 . . . Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice . . . 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. . . .

Plaintiff refiled its claim on 11 August 1982, within the one year prescribed by Rule 41(a)(1). DOT contended that plaintiff, by taking a voluntary dismissal and refiling the action on 11 August 1982, has not satisfied the filing requirement of G.S. 136-29. The trial court concluded that G.S. 136-29 preempted Rule 41 and that plaintiff's action filed on 11 August 1982 failed to meet the conditions precedent of G.S. 136-29. We disagree.

We believe that once the conditions of G.S. 136-29 are satisfied, the trial court is vested with jurisdiction and the action proceeds as any other civil action. Our Courts have previously considered the procedural effect of similar conditions precedent contained in our statutes. G.S. 97-58 sets forth conditions precedent to the filing of a worker's compensation 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). In *Poythress*, the Court held that the two year time limitation for filing claims with the Industrial Commission is a condition precedent with which a claimant must comply in order to confer jurisdiction upon the Industrial Commission to hear the claim. *Id.* at 382, 283 S.E. 2d at 577. The Court has also held that the conditions precedent contained in G.S. 97-24 are conditions which must be met to confer jurisdiction upon the Industrial Commission. Therefore, following previous case law, we hold that the conditions precedent contained in G.S. 136-29 are conditions that bestow jurisdiction upon the Superior Court and do not preempt the Rules of Civil Procedure. "The state, once it has consented to suit, occupies the same position as any other litigant." *Barrus Construction Co. v. N. C. Dept. of Transportation*, 71 N.C. App. 700, --- S.E. 2d --- (1984). This Court in *Barrus* held that G.S. 1A-1, Rule 4 applies to civil actions filed pursuant to G.S. 136-29. "No special attention to this rule [Rule 4] appears for suit against the state, nor does this civil action appear to be any different from other civil actions." *Id.* The same holds true in the case *sub judice*.

The conditions of G.S. 136-29 satisfied, the trial court had jurisdiction of plaintiff's claim and the action was to proceed as any other civil action. In a civil action, plaintiff, before resting his case, may as a matter of right take a voluntary dismissal and refile its action within one year. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 279 (1971). Plaintiff, in the present case, exercised that option and was properly before the trial court.

The judgment of the trial court granting defendant's motion to dismiss was error and must be reversed.

Reversed.

Judges WHICHARD and EAGLES concur.

LEWIS W. DONAVANT v. ALLEN S. HUDSPETH, M.D.

No. 8421SC850

(Filed 18 June 1985)

Evidence § 29.3— admissibility of hospital records

In a medical malpractice action, various hospital records and correspondence between physicians indicating that a catheterization was performed on plaintiff shortly after a coronary bypass operation was performed on plaintiff by defendant surgeon because of a concern that vein grafts may have been sutured in unreversed should have been admitted under the business records exception to the hearsay rule. Also, the hospital records were admissible to show the basis of opinions formed by plaintiff's expert witnesses.

APPEAL by plaintiff from *Long, James M., Judge.* Judgment entered 28 July 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 5 April 1985.

In March 1979, plaintiff consulted Dr. Joseph Gaddy, a cardiologist, concerning chest pains. Dr. Gaddy examined plaintiff and recommended coronary bypass surgery. Because Dr. Gaddy's hospital had no facilities for heart bypass operations, Dr. Gaddy referred plaintiff to Dr. Fred Kahl, another cardiologist, at North Carolina Baptist Hospital. Dr. Kahl performed diagnostic tests and agreed with Dr. Gaddy that bypass surgery was necessary. Dr. Kahl recommended defendant Hudspeth of Baptist Hospital to perform the surgery.

Immediately following the bypass surgery on 29 March 1979, defendant summoned Dr. Kahl to perform an emergency catheterization procedure to check the blood flow through the veins to the heart. Defendant and Dr. Kahl were satisfied from the results of this procedure that there was an adequate blood flow to the heart.

By 1982, four of the five grafts inserted by defendant had totally occluded. Another coronary bypass operation had to be performed by another surgeon to replace these grafts.

Plaintiff instituted this action alleging, *inter alia*, that defendant was negligent in performing the coronary bypass operation by improperly positioning vein grafts "backwards," which led to the closing of the veins. At the conclusion of trial, the jury found that defendant was not negligent. From judgment entered upon the jury's verdict, plaintiff appeals.

Young, Haskins, Mann, Gregory & Young, by Robert W. Mann and George O. Burpeau, III, for plaintiff appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by J. Robert Elster, Michael L. Robinson and J. Stephen Shi, for defendant appellee.

JOHNSON, Judge.

The dispositive issues on appeal are whether the trial court erred (1) in excluding evidence of a telephone conversation Dr. Gaddy had with Dr. Kahl two or three days after the surgery, in which Dr. Kahl indicated the emergency catheterization was performed because of a concern that the veins had not been properly reversed and (2) in excluding evidence of hospital records which indicated the emergency catheterization had been performed because of a concern that the veins had been placed in backwards. For the following reasons, we hold the court erred in excluding this evidence and award plaintiff a new trial.

We first address the exclusion of the entries in the hospital records. The excluded evidence consisted of the following: (1) A report of the catheterization results prepared by Dr. Lynn Orr, Jr. and signed by Dr. Kahl, which indicated that the emergency catheterization had been performed because "Dr. Hudspeth apparently was concerned about the possibility that the saphenous vein grafts had been sutured in unreversed"; (2) a letter from Dr. Kahl to Dr. Gaddy dated 2 April 1979, in which Dr. Kahl stated defendant requested Dr. Kahl to perform a repeat arteriogram immediately after surgery "(b)ecause of concern that the saphenous vein grafts were not reversed when they were inserted"; (3) a letter from Dr. Kahl to Dr. Gaddy dated 11 June 1979 in which Dr. Kahl

stated plaintiff underwent selective graft angiography several hours following surgery "(b)ecause of the question about whether the vein grafts had been reversed at the time of surgery"; (4) an admission history and physical prepared by a resident and signed by Dr. Kahl, which stated that a second catheterization for coronary angiography had been performed several hours after surgery "as there was some question as to whether the veins had been placed with the grafts in reverse position (i.e. with valves obstructing the flow)"; (5) a report of the results of another catheterization procedure performed 6 June 1979, which was prepared by Dr. Orr and signed by Dr. Kahl, and which indicated that the emergency arteriograms were performed immediately after surgery because defendant "apparently was concerned about the possibility that the vein grafts had been sutured in unreversed"; and (6) a discharge summary signed by Dr. Kahl which indicated that after plaintiff's surgery "there was some question of whether the veins had been reversed." The trial court excluded these entries because they were hearsay.

One of the well defined exceptions to the hearsay rule is the business records exception. 1 H. Brandis on North Carolina Evidence sec. 155 (1982). A hospital record, of course, is a business record, and is admissible into evidence upon the laying of a proper foundation. G.S. 8-44.1; *Sims v. Insurance Co.*, 257 N.C. 32, 125 S.E. 2d 326 (1962). The Court in *Sims* remarked with regards to the trustworthiness of hospital records:

> It is a matter of common knowledge, we think, that modern hospitals are staffed by medical, surgical and technological experts who serve as members of a team in the diagnosis and treatment of human ills and injuries. The hospital record of each patient is the daily history made in the course of examination, diagnosis and treatment. The welfare, even the life of the patient, depends upon the accuracy of the record. And the records, as evidence, are more credible perhaps, as to accuracy, than the independent recollection of the physicians, surgeons and technicians who make them. Motive for falsification is lacking.

257 N.C. at 35, 125 S.E. 2d at 329. A proper foundation for admission of the records consists of testimony from a hospital librarian or custodian of the records or other qualified witness as to the

identity and authenticity of the record and the mode of its preparation, including testimony that the entries were made at or near the time of the act or event recorded, that the entries were made by persons having personal knowledge of the event or act, and that the entries were made *ante litem motam. Id.* The court, however, should exclude from jury consideration entries which amount to hearsay on hearsay. *Id.*

Defendant argues the evidence was properly excluded for two reasons: (1) the preparer of the records did not have personal knowledge of the matters contained in the records; and (2) the entries constituted double hearsay. While the reports may have been prepared by an intern or resident, the reports were signed by Dr. Kahl. In the absence of fraud, one who signs a writing is presumed to do so with full knowledge and assent as to its contents. *Williams v. Williams*, 220 N.C. 806, 18 S.E. 2d 364 (1942); *State v. King*, 67 N.C. App. 524, 313 S.E. 2d 281 (1984). The letters, of course, were written by Dr. Kahl. As indicated earlier, hospital records are trustworthy and inherently reliable. Further, statements made by one physician to another for purposes of diagnosis and treatment are inherently reliable. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979). Given the reliability of these records, we hold the court erred in excluding them. *See State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971).

In addition, the hospital records were admissible to show the basis of the opinions formed by the plaintiff's expert witnesses. In *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979), the Court held that a physician, as an expert witness, may give his opinion, based upon, among other things, information supplied him by others, if such information is inherently reliable even though it is not independently admissible into evidence, and the expert may testify as to the information he relied upon in forming his opinion for the purpose of showing the basis of his opinion. Likewise, while the telephone conversation between Dr. Gaddy and Dr. Kahl in which Dr. Kahl gave the reason for performing the emergency catheterization may not have been admissible as substantive evidence, it was admissible to show the basis for Dr. Gaddy's opinion.

Plaintiff also contends that the court erred in excluding testimony that defendant's expert witness was critical of Dr.

Kahl's record keeping. We fail to perceive how the exclusion of this testimony was prejudicial to plaintiff.

The exclusion of the hospital records, standing alone, is sufficient to justify an award of a new trial. Had the evidence not been excluded, the jury may very well have reached a different result. In addition, we note the court's instructions to the jury followed the pattern jury instructions struck down by the Supreme Court in *Wall v. Stout*, 310 N.C. 184, 311 S.E. 2d 571 (1984). At the time of trial, the decision in *Wall v. Stout* had not been rendered.

New trial.

Judges WHICHARD and EAGLES concur.

JOE NEWTON, INC., A NORTH CAROLINA CORPORATION v. R. READ TULL, CHARLES W. TULL, PHYLLIS B. TULL; SUNBELT PROPERTIES, A FLORIDA LIMITED PARTNERSHIP; IDLEWILD LIMITED PARTNERSHIP, A NORTH CAROLINA LIMITED PARTNERSHIP; ALLIED PROPERTIES CORPORATION, A NORTH CAROLINA CORPORATION

No. 8426SC1005

(Filed 18 June 1985)

1. Rules of Civil Procedure § 56— summary judgment considered before motion to strike answer—failure of general contractor to be licensed—summary judgment proper

The trial court did not err by not ruling on plaintiff's motion to strike the answer before considering defendants' motion for summary judgment based on plaintiff's failure to be licensed as a general contractor. Plaintiff waived its right to entry of default by waiting until the answer had been filed before seeking to obtain entry of default; furthermore, even if plaintiff's motion to strike the answer had been allowed before the court considered the motion for summary judgment, defendants would nevertheless have been entitled to proceed with their summary judgment motion because the failure of a general contractor to be licensed is an affirmative defense which may be raised by affidavit. Summary judgment may be granted for a party upon an affirmative defense shown by affidavit before the party files an answer. G.S. 1A-1, Rule 55(a).

2. Contracts § 6.1— construction contract with corporation not licensed as general contractor—sole owner licensed—contract not enforceable by corporation

Summary judgment was properly entered for defendants in an action on a construction contract where plaintiff's president and sole shareholder was individually licensed as a general contractor but plaintiff corporation was not. Defendants did not contract with the individual, defendants would have no right to enforce the contract against the individual, and plaintiff may not enforce the contract or recover in *quantum meruit* against defendants on the basis of the individual's license. G.S. 87-1 *et seq.*

3. Rules of Civil Procedure § 56.4— affidavit contradicting complaint by party opposing summary judgment—not sufficient

There was no issue of fact as to whether plaintiff was a general contractor and summary judgment was properly granted for defendants where the affidavit of plaintiff's president and sole stockholder asserted that plaintiff had no authority to control the work or to choose subcontractors and that the portion of its bill for general contracting work as opposed to heating, air conditioning, and electrical work was less than $30,000, and plaintiff had alleged in its complaint that it was employed as a general contractor, that it performed "general contracting services," and that it had furnished materials and labor for which defendants had agreed to pay $90,154. Plaintiff may not create genuine issues of material fact in order to defeat summary judgment by filing affidavits which contradict the judicial admissions of its pleadings. G.S. 87-1.

APPEAL by plaintiff from *Snepp, Judge.* Order entered 13 December 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 May 1985.

Plaintiff corporation brought this action to recover $55,054.00, plus interest, allegedly due by reason of a contract for construction of certain renovations at Idlewild Office Park. Plaintiff alleged that in November 1982, it initially entered into a contract with Showcase Services, Inc., who was then the general contractor for the project, and defendant Allied, as agent for the other defendants, to perform duct work and electrical work. According to the complaint, Showcase Services, Inc., was terminated as general contractor and plaintiff corporation was then employed by defendants as "general contractor" in December 1982, to be paid on a "time and materials" basis. Plaintiff alleged that it "performed electrical services, wiring services, and general contracting services" on the project; that under the contract it is entitled to compensation in the amount of $90,154.00, and that defendants have paid plaintiff only $35,100.00. In the alternative, plaintiff sought compensation in *quantum meruit.*

Defendants sought, and were granted, an extension of time to file answer until 6 September 1983. On 19 September 1983, defendants filed an Answer and Counterclaim. Plaintiff had not moved for entry of default before the Answer and Counterclaim was filed, but on 12 October 1983, plaintiff moved that the answer be stricken because it was "untimely" filed. On 31 October 1983 defendants filed a motion for summary judgment which was supported by an affidavit from the custodian of the records of the North Carolina Licensing Board for General Contractors. The affidavit disclosed that plaintiff corporation had never been granted a license to practice general contracting in North Carolina.

In opposition to the motion for summary judgment, plaintiff submitted an affidavit by Mr. Joe Newton, in which he stated that he was the president, sole director and sole shareholder of plaintiff corporation, and that he, individually, was licensed as a general contractor. He further stated, *inter alia*, that he, through the corporation, was employed to do the work, and that the corporation did not actually perform in the capacity of a general contractor. Other affidavits, corroborative of Mr. Newton's, were also submitted.

On 13 December 1983 the trial court, without ruling on plaintiff's motion to strike the answer, entered summary judgment for defendants. Plaintiff appealed.

Erdman and Boggs, by David C. Boggs and Kevin L. Barnett, for plaintiff appellant.

Richard A. Cohan for defendant appellees.

MARTIN, Judge.

Plaintiff assigns as error (1) the trial court's failure to rule upon plaintiff's motion to strike defendants' answer, and (2) the granting of summary judgment in favor of defendants. We conclude that neither assignment has merit and we affirm the judgment of the trial court.

[1] Initially, plaintiff contends that the trial court erred in not ruling upon its motion to strike the answer before considering defendants' motion for summary judgment. Plaintiff argues that had the trial court allowed the motion to strike the answer, plaintiff would have been entitled to entry of default and defendants

would not have been entitled to proceed with their motion for summary judgment. We find no merit in this argument.

By waiting until answer had been filed before seeking to obtain entry of default, plaintiff waived its rights to entry of default pursuant to G.S. 1A-1, Rule 55(a). Default may not be entered after an answer has been filed, even if the answer is tardily filed. *Peebles v. Moore*, 302 N.C. 351, 275 S.E. 2d 883 (1981). Furthermore, even if plaintiff's motion to strike the answer had been ruled upon and allowed before the trial court considered the motion for summary judgment, defendants would, nonetheless, have been entitled to proceed with their summary judgment motion. The failure of a general contractor to be licensed is an affirmative defense which must be pleaded. *Barrett, Robert & Woods v. Armi*, 59 N.C. App. 134, 296 S.E. 2d 10, *disc. rev. denied*, 307 N.C. 269, 299 S.E. 2d 214 (1982). Such an affirmative defense may be raised for the first time by affidavit for the purpose of ruling on a motion for summary judgment. *Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976); *Furniture Industries v. Griggs*, 47 N.C. App. 104, 266 S.E. 2d 702 (1980). Summary judgment may be granted for a party upon an affirmative defense shown by affidavit before the party files answer. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981). For these reasons, we find no error in the trial court's consideration of defendants' motion for summary judgment before ruling on the plaintiff's motion to strike the tardily filed answer.

[2] Plaintiff also contends that the trial court erred in entering summary judgment for defendants. Plaintiff argues first that since its president and sole shareholder, Joe Newton, was individually licensed as a general contractor pursuant to G.S. 87-1 *et seq.*, his license should inure to the benefit of plaintiff corporation. In *Brady v. Fulghum*, 309 N.C. 580, 308 S.E. 2d 327 (1983), the North Carolina Supreme Court expressly rejected the "substantial compliance" doctrine and ruled "that a contract illegally entered into by an unlicensed general construction contractor is unenforceable by the contractor." *Id.* at 586, 308 S.E. 2d at 331. In the instant case, defendants did not contract with Joe Newton individually; their contract was with plaintiff corporation. Defendants would have no right to enforce that contract against Joe Newton individually. Plaintiff corporation, as an unlicensed contractor, may not enforce the contract against defendants on the

basis of Joe Newton's individual license. *See Allan S. Meade & Assoc. v. McGarry*, 68 N.C. App. 467, 315 S.E. 2d 69 (1984).

Plaintiff also argues that if it is not entitled to payment pursuant to the contract, it should be permitted to recover on the theory of *quantum meruit*. The same rule which prevents an unlicensed contractor from recovering for breach of the construction contract also denies recovery on the theory of *quantum meruit*. *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968).

[3] Finally, plaintiff contends that summary judgment was inappropriate because the affidavit of Joe Newton created genuine issues of fact as to whether plaintiff, in fact, acted as a general contractor and whether the cost of the undertaking brought it within the provisions of G.S. 87-1. In the affidavit, Joe Newton asserted that plaintiff had no authority to control the work or to choose subcontractors, and that the portion of plaintiff's bill for "general contracting" work, as opposed to heating, air conditioning and electrical work, was less than the statutory amount, $30,000.00, prescribed in G.S. 87-1. We also find this contention to be without merit. Plaintiff alleged in its complaint that it was employed as a "general contractor," that it performed "general contracting services," and that in accordance with its contract it furnished materials and labor for which defendants agreed to pay the sum of $90,154.00.

> A party is bound by his pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader. He cannot subsequently take a position contradictory to his pleadings.

Davis v. Rigsby, 261 N.C. 684, 686, 136 S.E. 2d 33, 34 (1964). Plaintiff may not create genuine issues of fact in order to defeat summary judgment by filing affidavits which contradict the judicial admissions of its pleadings. *See Rollins v. Miller Roofing Co.*, 55 N.C. App. 158, 284 S.E. 2d 697 (1981). Summary judgment was appropriately entered for defendants.

Affirmed.

Judges ARNOLD and PARKER concur.

THE SHELBY MUTUAL INSURANCE COMPANY OF SHELBY, OHIO v. DUAL STATE CONSTRUCTION COMPANY

No. 8420SC1086

(Filed 18 June 1985)

1. **Insurance § 136— fire insurance—evidence of other fires**

In a declaratory judgment action by plaintiff insurance company to determine its liabilities under a fire insurance policy issued to defendant, the trial court did not err in permitting plaintiff to cross-examine defendant's president and sole stockholder about prior fires which had damaged other property belonging to him. Although the consideration of such evidence was limited by the trial court to the issue of the stockholder's credibility, testimony elicited about prior fires allegedly resulting from incendiary origins and in the collection of insurance proceeds was relevant on the question of intentional burning.

2. **Insurance § 121— fire insurance—fire caused by insured—sufficiency of evidence**

The evidence was sufficient to support a jury finding that defendant's sole stockholder caused the burning of defendant's property where it tended to show: prior fires had damaged other property belonging to the stockholder; only the stockholder and his secretary had keys to the building that burned, and there was no evidence of forced entry to the building; a witness testified that he burned the building at the request of the stockholder's cousin so that the stockholder could collect the insurance proceeds; defendant's business showed a net loss of $4,215 for the prior year, and the company's liabilities at the time of the fire were listed as $785,201; the stockholder owed defendant $77,977 and bank records indicated that 158 checks were returned for insufficient funds during the eighteen months prior to the fire; at the time of the fire, the stockholder had started a new business and was attempting to liquidate defendant corporation; and the stockholder was separated from his wife at the time of the fire and had a child support obligation of $1,600 per month.

APPEAL by defendant from *Wood (William Z.), Judge.* Judgment entered 10 May 1984 in Superior Court, RICHMOND County. Heard in the Court of Appeals 10 May 1985.

This is a declaratory judgment action in which plaintiff, Shelby Mutual Insurance Company of Shelby, Ohio, seeks to establish its rights, duties and liabilities under a fire insurance policy issued by it to defendant, Dual State Construction Company, as a result of a fire occurring at defendant's premises in October, 1981.

At trial one issue was submitted to the jury:

Did William Forest Taylor, the President and sole stockholder of the defendant, Dual State Construction Company,

cause the burning of its property on or about October 4, 1981?

The jury answered this issue "yes." The trial court then entered judgment finding and concluding that plaintiff is not indebted or obligated to defendant for any loss resulting from the fire which occurred on or about October 4, 1981. Defendant appeals.

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

Johnson and Lambeth, by Robert White Johnson, for defendant-appellant.

EAGLES, Judge.

[1] Defendant's sole assignment of error is whether the trial court erred in denying defendant's *motion in limine* and in allowing plaintiff to cross examine the president and sole stockholder of defendant with respect to previous fires at other locations owned or operated by him. We find no error.

Citing *State v. Alley*, 54 N.C. App. 647, 284 S.E. 2d 215 (1981), a criminal arson case, defendant argues that it was reversible error to allow plaintiff to cross examine defendant's president and sole stockholder, Mr. William F. Taylor, about prior fires which had damaged other property belonging to him. We disagree. Defendant's reliance on *State v. Alley, supra*, is misplaced. *Alley* involves the more strict standards applicable in a criminal arson case and does not govern civil cases. *See, Yassoo Enterprises, Inc. v. North Carolina Joint Underwriting Association*, 73 N.C. App. 52, 325 S.E. 2d 677 (1985).

The record reveals that a *voir dire* was conducted concerning the proposed questioning of Mr. Taylor about prior fires. Howard C. Burgin, Special Agent of the Federal Bureau of Investigation, testified that shortly after the fire which is the subject of this action, Mr. Taylor told him that he had experienced three previous fires. Mr. Taylor also told Agent Burgin that he had not experienced any other fires on property owned by him. Agent Burgin testified on *voir dire* about the circumstances surrounding two of the previous fires. According to agent Burgin's testimony, Mr. Taylor owned a residence which burned three times in one weekend (the last fire causing a total loss of the residence) and that

the fires occurred as a result of arson. Another fire occurred at an "In and Out" convenience store in which Mr. Taylor allegedly had an interest. Agent Burgin testified that he was informed that a relative of Mr. Taylor was found at the scene of the fire along with gasoline in plastic jugs and that the fire was determined to be of incendiary origin.

At the close of the *voir dire*, the trial court ruled that Mr. Taylor could be cross examined concerning the previous fires but that other evidence of the previous fires would be excluded. The trial court then instructed the jury that they could consider the testimony of Mr. Taylor concerning previous fires elicited on cross examination only for the purpose of determining whether Mr. Taylor was telling the truth.

Mr. Taylor subsequently testified he was paid roughly half the value of the residence by the insurance company and that the insurance company only paid for the contents of the store building. Mr. Taylor further testified that instead of three fires, he had experienced five fires and that he had "forgotten" about two other fires when he was interviewed by Agent Burgin. Mr. Taylor on cross examination denied that his residence had burned three times in one weekend and denied that any of his relatives or gasoline cans were found at the "In and Out" store.

To establish an intentional burning by an insured as a defense to recovery on a fire insurance policy, the insurer must prove that the property was intentionally burned and that the insured participated directly or indirectly in its burning. Among the circumstances which a jury may consider in determining whether the insurer has met its burden of proof include evidence of any previous fires where the insured collected insurance benefits, incendiary origin of the previous fires and prior attempts by the insured to procure someone to burn property. *Freeman v. St. Paul Fire and Marine Insurance Co.*, 72 N.C. App. 292, 324 S.E. 2d 307 (1985). Accordingly, the testimony elicited from Mr. Taylor about his previous fires which allegedly resulted from incendiary origins and which resulted in the collection of insurance proceeds was relevant and could have been considered by the jury as some evidence tending to show intentional burning. Here, however, the trial court limited the jury's use of that evidence to the issue of Mr. Taylor's credibility. For these reasons, defendant shows no prejudice by the admission of testimony concerning prior fires.

[2] In addition to the testimony elicited from Mr. Taylor concerning prior fires, there was evidence which tends to show that Mr. Taylor was the president and sole stockholder of defendant corporation at all relevant times. There were only two keys to the building that burned—Mr. Taylor's and his secretary's. On the day of the fire, the secretary was the last person known to leave the building. She locked it when she left. The investigation revealed that there had been no evidence of forced entry to the building.

James Everett Bass testified that he burned the building at the request of Mr. Taylor's cousin so that Mr. Taylor could collect the insurance proceeds. Bass testified that he was to be paid $500.00 for burning the building.

Mr. Taylor testified that defendant's business had declined in the year preceding the fire and that the company showed a net loss of $4,215 for the fiscal year ending 31 March 1981. The company's liabilities at the time of the fire were listed at $785,201.

Defendant's 1981 income tax return indicated that Mr. Taylor owed the company $77,977 and bank records indicated that 158 checks were returned for insufficient funds between April of 1980 and October 1981.

At the time of the fire, Mr. Taylor had started a new business and was attempting to liquidate defendant corporation. He had attempted to sell the building in question for $75,000 but had not received an offer in that amount. Additionally, Mr. Taylor was separated from his wife at the time of the fire and had a child support obligation of $1,600 per month.

The foregoing circumstantial evidence when taken together was sufficient to permit a jury to reasonably infer that Mr. Taylor caused the fire. *Freeman v. St. Paul Fire and Marine Insurance Co., supra.*

Accordingly, we find

No error.

Judges BECTON and PHILLIPS concur.

JAMES H. FAISON, JR. v. THE NEW HANOVER COUNTY BOARD OF EDUCATION

No. 845SC1055

(Filed 18 June 1985)

1. **Schools § 13.2— dismissal of supervisor—timing of career teacher status**

The court properly granted summary judgment for plaintiff on the issue of whether he was entitled to the safeguards of the Teacher Tenure Act before being demoted from his supervisory position where plaintiff had served as Director of Vocational Education from April of 1977 through the 1982-1983 school year. The 1982 amendment to G.S. 115C-325(d)(2) showed that the legislature intended to protect persons who had served as principals and supervisors for at least three consecutive years regardless of whether this time was served prior to attaining career teacher status.

2. **Schools § 13.2— dismissal of career supervisor—damages**

Plaintiff, a former Director of Vocational Education, was entitled to a salary adjustment to compensate him for any loss of salary and benefits where he was improperly demoted by transfer to a lower-paying nonadministrative position without being afforded the procedural safeguards of G.S. 115C-325 (d)(2).

APPEAL by defendant from *Tillery, Judge*. Order entered 16 August 1984 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 9 May 1985.

The plaintiff was employed to serve as the Director of Vocational Education for the New Hanover County Schools on 1 April 1977. He continued to serve in that capacity during the 1977-1978, 1978-1979, 1979-1980, 1980-1981, 1981-1982, and the 1982-1983 school years. On 1 March 1983, the defendant decided not to continue plaintiff in this position for the 1983-1984 school year, but instead offered him a position as a teacher of Trade and Industrial Education at D. C. Virgo Junior High School. Plaintiff sought to have the board's actions reviewed pursuant to the procedure set forth in the Teacher Tenure Act. The defendant denied this request stating that plaintiff had not attained career status as a supervisor and was, therefore, not entitled to the procedural safeguards set forth in the act.

In November 1983, plaintiff filed this action in which he sought a judgment declaring that his job transfer was illegal and unconstitutional, a judgment directing that he be reinstated as Director of Vocational Education with back pay and benefits, and

attorney's fees pursuant to 42 U.S.C. § 1988. The defendant answered denying the dispositive allegations of the complaint and contending that while the defendant had attained career status as a teacher he had not attained such status as a supervisor.

On 16 August 1984, the court entered an order granting plaintiff partial summary judgment and holding that plaintiff had attained career status as a supervisor in the New Hanover County School System as of the date he was informed of the defendant's intention to remove him from his supervisor's position and reassign him to a teaching position. From this Order, the defendant appealed.

On 10 October 1984, the court ordered that the plaintiff be reinstated as Director of Vocational Education and that he be awarded back salary and benefits from the date of his demotion. The enforcement of this Order was stayed pending the resolution of the defendant's earlier appeal. No notice of appeal from this Order appears in the record on appeal.

On 25 October 1984, the plaintiff took a voluntary dismissal of his claim for attorney's fees filed pursuant to 42 U.S.C. 1988.

Ferguson, Watt, Wallas & Adkins, by Frank E. Emory, Jr., for plaintiff appellee.

House, Hill, Jones, Nash & Lynch, by William L. Hill, II and David A. Nash, for defendant appellant.

ARNOLD, Judge.

[1] The first question presented for review is whether the court properly concluded that the plaintiff had acquired career status as a supervisor in the New Hanover County School System as of the date of his demotion. To answer this question we must construe N.C. Gen. Stat. 115C-325(d)(2) as it existed at the time this controversy arose. N.C. Gen. Stat. 115C-325(d)(2) (1981 Cum. Supp.) provided that:

> A career teacher who has performed the duties of a principal or supervisor in a particular position in the school system for three consecutive years shall not be transferred from that position to a lower-paying administrative position or to a lower-paying nonadministrative position without his consent

except for the reasons given in G.S. 115C-325(e) and in accordance with the procedure for the dismissal of a career teacher set out in this section.

The appellant argues that to be protected under this statute a person must obtain the status of a career teacher and perform the duties of a principal or supervisor for three consecutive years following his designation as a career teacher. In response, the appellee contends that to be protected one need only be designated as a career teacher and have served as a principal or supervisor for three consecutive years. He argues, however, that this three-year period need not be served after one becomes a career teacher but may be served at any time after employment by the school system.

"The cardinal principle of statutory construction is that the intent of the legislature is controlling. In ascertaining the legislative intent courts should consider the language of the statute, and what it seeks to accomplish. (Citations omitted.)" *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 210, 306 S.E. 2d 435, 443-444 (1983). The language of the statute is ambiguous, therefore, we must look further to determine the intent of the legislature. Some evidence of the legislative intent is found in Chapter 770 of the 1983 Session Laws. In that bill the General Assembly enacted a bill entitled "An Act to Clarify the Provisions of the Fair Employment and Dismissal Act" which amended G.S. 115C-325(d)(2) to read as follows:

> Whether or not he has previously attained career status as a teacher, a person who has performed the duties of a principal in the school system for three consecutive years or has performed the duties of a supervisor in the school system for three consecutive years shall not be transferred from that position to a lower paying administrative position or to a lower paying nonadministrative position without his consent except for the reasons given in G.S. 115C-325(e)(1) and in accordance with the provisions for the dismissal of a career teacher set out in this section. Transfer of a principal or a supervisor is not a transfer to a lower paying position if the principal's or supervisor's salary is maintained at the previous salary amount.

> When a teacher has performed the duties of supervisor or principal for three consecutive years, the board, near the end of the third year, shall vote upon his employment for the next school year. The board shall give him written notice of that decision by June 1 of his third year of employment as a supervisor or principal. If a majority of the board votes to reemploy the teacher as a principal or supervisor, and it has notified him of that decision, it may not rescind that action but must proceed under the provisions of this section. If a majority of the board votes not to reemploy the teacher as a principal or supervisor, he shall retain career status as a teacher if that status was attained prior to assuming the duties of supervisor or principal. A supervisor or principal who has not held that position for three years and whose contract will not be renewed for the next school year shall be notified by June 1 and shall retain career status as a teacher if that status was attained prior to assuming the duties of supervisor or principal.

We believe that this amendment shows that the legislature intended by this section of the statute to protect persons who have served as principals and supervisors for at least three consecutive years regardless of whether this time was served prior to obtaining career teacher status. Believing this to be the intent of the legislature, we hold that the trial court properly concluded that the plaintiff was entitled to summary judgment on the issue of whether he was entitled to the procedural safeguards of the Teacher Tenure Act before being demoted from his supervisory position. The court order allowing partial summary judgment is affirmed.

[2] Defendant also contends that even if the court properly granted summary judgment it was error to order that the plaintiff be reinstated to his prior position and awarded the salary and benefits of that position. However, in its argument defendant admits that the court had the authority "to order an appropriate salary adjustment."

In his brief the plaintiff, while still arguing that he is entitled to reinstatement, states that he is willing "to accept the law award of back salary and benefits from the date of his demotion until a proper hearing can be held, and waive his right to rein-

statement as Vocational Education Director." Thus, there no longer exists a justiciable issue with regards to whether the plaintiff is entitled to reinstatement.

Under the terms of G.S. 115C-325(d)(2) the plaintiff might not be transferred to "a lower-paying nonadministrative position," without being afforded the procedural safeguards of the statute, since he was demoted without being afforded these safeguards he is entitled to a salary adjustment to compensate him for any loss of salary and benefits which he suffered because of this improper demotion.

Affirmed.

Judges MARTIN and PARKER concur.

STATE OF NORTH CAROLINA v. DEBORAH AUSTIN

No. 845SC970

(Filed 18 June 1985)

1. **Larceny § 8— charge of misdemeanor larceny—improper conviction of concealment of merchandise**

Where defendant was charged in a magistrate's order with misdemeanor larceny, the trial court erred in instructing the jury on concealment of merchandise and in entering judgment of conviction for such crime.

2. **Constitutional Law § 66— waiver of right to presence at trial**

Defendant's unexplained absence from her trial during a portion of the second day of the trial constituted a waiver of the right to be present at trial.

3. **Constitutional Law § 48— ineffective assistance of counsel—failure of proof**

Defendant failed to show that she was denied the effective assistance of counsel in that she failed to show that there is a reasonable probability that the result would have been different but for counsel's inadequate representation.

4. **Larceny § 6.1— value of stolen goods—testimony by store employee**

A store employee's detailed account of the "approximate" number of items she observed being stolen and the retail value of each item was competent to establish the value of the goods stolen in a prosecution for felonious larceny.

5. **Larceny § 9— verdict in felonious larceny case—fixing of value not required**

Where the jury was given a choice of verdicts of guilty of felonious larceny, guilty of non-felonious larceny, or not guilty, the verdict of guilty of

felonious larceny indicated the jury's belief that the value of the property exceeded $400, and the jury was not required to fix the value of the stolen property in their verdict form.

6. Criminal Law § 177.3— consolidated judgment—error as to one charge—remand for resentencing and new trial

Where the trial court imposed a consolidated sentence of six years for misdemeanor larceny and felonious larceny, there was error in the trial of the misdemeanor larceny charge, and it is impossible to tell what portion of the judgment was attributable to that charge, the case must be remanded for a resentencing hearing and entry of an appropriate judgment on the felony conviction as well as for a new trial on the misdemeanor charge.

APPEAL by defendant from *Llewellyn, Judge*. Judgment entered 20 January 1984 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 2 April 1985.

In 83CRS17818, defendant was charged with misdemeanor larceny of property having a value of $161.00 from J C Penney, Inc., on 13 August 1983. Defendant was convicted in District Court and appealed to Superior Court. During the pendency of that appeal, in 83CRS17819 defendant was charged in a proper bill of indictment with felonious larceny and felonious possession of property having a value of $596.00 from J C Penney, Inc., on 26 August 1983. These cases were consolidated for trial in Superior Court.

The sole witness at trial was Mildred Scearce, a security officer at J C Penney, Inc., who testified that on 13 August 1983, she observed defendant and a black male carry merchandise to Lillian Fair, who inserted it into her handbag. Scearce confronted the three, Fair took the merchandise out of the bag, threw it underneath the counter, and they left. Scearce calculated the value of the retrieved items as follows: one ski jacket at $42.00; two pair of pants at $15.88 each; and five denim pants at $9.95 each, "for a total of $161.00."

Concerning the 26 August 1983 incident, Scearce testified she saw defendant and a black male in the store with two black plastic bags, filling them with merchandise. In response to the question as to what she had seen, Scearce stated:

> A. Now this is approximate. Approximately eighteen polo shirts valued at $6.99 each; approximately ten pairs of Levis at $15.88 each.

THE COURT: How many?

A. Ten, at $15.88. I saw four dresses valued at $20.00 each, and six dresses valued at $23.00 each. Approximately five sweaters at $12.00 each, and approximately three more sweaters at $11.00 each.

She testified the total value of the unrecovered merchandise was $596.00.

The court charged the jury on the offenses of concealment of merchandise of a store as to the 13 August incident, and felonious larceny and non-felonious larceny as to the 26 August incident. For both cases, the court instructed the jury on acting in concert. In 83CRS17818 the jury was given a choice on the verdict sheet between "[g]uilty as charged" or "[n]ot guilty," and for case 83CRS17819 the jury was given a choice on the verdict sheet between "[g]uilty of felonious larceny," "[g]uilty of non-felonious larceny," or "[n]ot guilty."

Upon verdicts of "[g]uilty as charged" in 83CRS17818 and "[g]uilty of felonious larceny" in 83CRS17819, the court heard from the State on sentencing. The prosecutor offered statements from an uncertified FBI sheet tending to show prior convictions punishable by confinement for more than sixty days. The court found one aggravating circumstance of prior convictions, no mitigating circumstances, consolidated the two cases for judgment, and sentenced defendant to six years' imprisonment. Defendant appealed.

Attorney General Edmisten by Charles H. Hobgood, Assistant Attorney General, for the State.

Appellate Defender Adam Stein by Geoffrey C. Mangum, Assistant Appellate Defender, for defendant-appellant.

PARKER, Judge.

I.

(Case No. 83CRS17818)

[1] Although defendant was charged in a magistrate's order with misdemeanor larceny, the court instructed the jury in this case on concealment of merchandise. The jury found defendant "[g]uilty as

charged," and the court entered judgment of conviction for misdemeanor larceny. This was clearly error as the court instructed the jury on the wrong offense. "Since a correct charge is a fundamental right of every accused . . . ," *State v. Orr*, 260 N.C. 177, 181, 132 S.E. 2d 334, 337 (1963), the error was so prejudicial that defendant is entitled to a new trial on the charge of misdemeanor larceny.

II.

(Case No. 83CRS17819)

[2] Defendant contends the court erred by proceeding to trial in her absence. The jury was selected in the defendant's presence, and the trial judge told defendant that her trial would proceed at 9:30 a.m. the next morning. At 9:37 a.m. the judge ordered the trial to proceed in her absence. Defendant did enter the courtroom later that morning, but offered no explanation for her absence. After a trial has commenced, the burden is on the defendant to explain his absence, *State v. Stockton*, 13 N.C. App. 287, 185 S.E. 2d 459 (1971), and an unexplained absence is considered a voluntary waiver of the right to be present at trial. *State v. Mulwee*, 27 N.C. App. 366, 219 S.E. 2d 304 (1975); *State v. Stockton, supra.* This assignment of error is overruled.

[3] Next, defendant contends she was denied her right to effective assistance of counsel when her court-appointed attorney moved to withdraw in her absence, and because he was otherwise ineffective. Under the standards enunciated by the United States Supreme Court in *Strickland v. Washington*, --- U.S. ---, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), a defendant must show that counsel's performance was deficient, and that there is a reasonable probability that, but for counsel's inadequate representation, the result would have been different. Defendant herein has completely failed to carry her burden that a different outcome might have resulted, and, therefore, we need not address whether counsel's performance was deficient. 80 L.Ed. 2d at 699. The assignment of error is overruled.

[4] In her next assignment of error, defendant contends that the requirements of G.S. 14-72(a) were not met in two regards. First, that the State failed to establish that the value of the stolen property was "more than four hundred dollars," and second, that the

jury should have been required to fix the value of the property stolen in their verdict form. We disagree.

Ms. Scearce offered a detailed account of the "approximate" number of different items she observed being stolen and the retail value of each item, and she testified that the approximate total value of the goods taken was $596.00. In *State v. Williams*, 65 N.C. App. 373, 375, 309 S.E. 2d 266, 267 (1983), *pet. dis. rev. denied*, 310 N.C. 480, 312 S.E. 2d 890 (1984), this Court concluded: "We hold . . . that where a merchant has determined a retail price of merchandise which he is willing to accept as the worth of the item offered for sale, such a price constitutes evidence of fair market value sufficient to survive a motion to dismiss." Therefore, Scearce's testimony, based on her observations as an employee of the store, was competent to establish the value of the goods stolen.

Defendant argues that because Scearce's testimony concerning the value of the items in 83CRS17818 appears to be mathematically incorrect (the correct total was $123.51, and not $161.00 as she testified), that her testimony is unreliable. This argument is without merit. This inconsistency goes to the witness' credibility but does not make her testimony unreliable. It was for the jury to resolve any lingering questions about the value of the stolen goods.

[5] A jury should fix the value of the stolen property only in cases of doubt concerning value. *State v. Jeffries*, 41 N.C. App. 95, 254 S.E. 2d 550, *cert. denied*, 297 N.C. 614, 257 S.E. 2d 438 (1979). In the instant case, the jury was given a choice of not guilty, guilty of felonious larceny, or guilty of non-felonious larceny. If they were not satisfied beyond a reasonable doubt that the value of the stolen property exceeded $400.00, they could have found defendant guilty of non-felonious larceny. Finding defendant guilty of felonious larceny indicates their belief that the value of the property exceeded $400.00. This assignment of error is overruled.

Next, defendant contends the court erred in finding as a factor in aggravation that defendant had prior convictions punishable by more than sixty days confinement. This assignment of error was not set out in the record on appeal; it may not be considered on appeal. App. R. 10(c).

[6] In her final assignment of error, defendant asserts the court erred in imposing sentence of six years on the consolidated convictions of misdemeanor larceny and felony larceny in one judgment. We agree. Because there was error in the trial of the misdemeanor larceny charge and it is impossible to tell what portion of the judgment imposed is attributable to that charge, this case must be remanded for a resentencing hearing and entry of appropriate judgment on the felony conviction as well as for a new trial on the misdemeanor charge.

New trial in 83CRS17818; remanded for resentencing in 83CRS17819.

Judges WEBB and BECTON concur.

EDWARD R. SHATLEY, ADMINISTRATOR OF THE ESTATE OF DESS B. PENDERGRASS, DECEASED v. SOUTHWESTERN TECHNICAL COLLEGE AND MACON SAVINGS AND LOAN ASSOCIATION

No. 8430SC1288

(Filed 18 June 1985)

Trusts § 1.1— trust not created under statute—issue of trust under common law

No trust was created pursuant to G.S. 54B-130 where decedent signed the front of a discretionary revocable trust form indicating that she was the trustee for Southwestern Technical College as specified in the trust agreement on the reverse side of the form, but the discretionary revocable trust agreement on the reverse side was never executed. However, a genuine issue of material fact was presented as to whether a trust was created under the common law.

APPEAL by defendant, Southwestern Technical College, from *Downs, Judge*. Judgment entered 21 September 1984 in Superior Court, MACON County. Heard in the Court of Appeals 6 June 1985.

This is a civil action wherein the plaintiff sought a declaratory judgment to determine the rights of the respective parties to the funds contained in Macon Savings and Loan Association account number 8103-182-2. The form which was prepared for this account was a SC 1 TR-Discretionary Revocable Trust Account.

The front of the form indicated that Ms. Pendergrass was the trustee for Southwestern Technical College as specified in the trust agreement on the reverse side of the form; however, the discretionary revocable trust agreement on the reverse side was never executed.

On 25 September 1983, Ms. Pendergrass died intestate. The administrator of her estate filed this action seeking a declaration of the rights of the estate, Southwestern Technical College and the Savings and Loan in the abovementioned funds. The Savings and Loan answered claiming no ownership in the funds and praying that a judgment be entered declaring the rights of the other parties. The College answered alleging that a trust had been created by the deposit of the funds into the account and contending that they were entitled to the money.

On 3 July 1984, the plaintiff moved for summary judgment. The College responded with several affidavits. On 21 September 1984, the trial court entered summary judgment for the plaintiff. From this judgment, the defendant, Southwestern Technical College appealed.

Robert F. Siler for plaintiff appellee.

Holt, Haire & Bridgers, by W. Paul Holt, Jr., Ben Oshel Bridgers and Margaret C. Robinson, for defendant appellant.

ARNOLD, Judge.

The issues presented for review are whether the court erred in allowing the plaintiff's motion for summary judgment and ordering that the funds in the account be made a part of Ms. Pendergrass's estate. G.S. 54B-130 in pertinent part provides:

> (a) If any one or more persons holding or opening a withdrawable account shall execute a written agreement with the association, providing for the account to be held in the name of such person or persons as trustee or trustees for one or more persons designated as beneficiaries, the account and any balance thereof shall be held as a trust account, and unless otherwise agreed upon between the trustees and the association:
>
> . . . .

(3) Upon the death of the surviving trustee, the person or persons designated as beneficiaries who are living at the death of the surviving trustee shall be the holder or holders of the account, as joint owners with right of survivorship if more than one, and payment by the association to the holder or any of them shall be a total discharge of the association's obligation as to the amount paid.

(b) If a person opening or holding a withdrawable account shall execute a written agreement with an association providing that, upon the death of the person named as holder, that the account shall be paid to or held by another designated person or persons, then the account and any balance thereof, shall be held as a payment on death account and unless otherwise agreed between the person executing such agreement and the association:

(1) Upon the death of the holder of such a withdrawable account, the person designated by him and who has survived him shall be the owner of the account, and payment made by the association to any such person shall be a total discharge of the association's obligation as to the amount paid;

. . . .

Ms. Pendergrass signed the following document at Macon Savings and Loan Association:

Account No. 8103182-2

(1) PENDERGRASS, DESS B. Trustee

(2) Southwestern Tech. College Beneficiary
(Last Name) (First Name) (Middle Name)

I hereby apply for a savings account in

MACON SAVINGS & LOAN ASSOCIATION

and for the issuance of evidence thereof. A specimen of my signature is shown below and you are hereby authorized to act without further inquiry in accordance with writings bearing such signature. It is agreed that any funds placed in or added to this account by the undersigned, whether in his

trustee or individual capacity, is and shall be conclusively intended to be a gift and delivery at that time of such funds to the trust estate. You are authorized to supply any endorsement for me on any check or other instrument tendered for this account and you are hereby relieved of any liability in connection with collection of such items which are handled by you without negligence, and you shall not be liable for the acts of your agents, subagents or others for any casualty. Withdrawals may not be made on account of such items until collected, and any amount not collected may be charged back to this account, including expense incurred, and any other outside expense incurred relative to this account may be charged to it.

Signature s / DESS B. PENDERGRASS as Trustee

Address 144 Harrison Ave. Franklin, NC 28734

As Trustee for STC , Beneficiary

as specified in trust agreement on reverse side hereof.

Dated 2-15-83

However, she never executed the agreement on the reverse side which was designed to create the trust. Thus, no trust was created pursuant to the terms of G.S. 54B-130.

Having determined that no trust was created pursuant to the statute there is still the question of whether a trust was created under the common law. "The essentials of a valid express trust are: (1) sufficient words to create it; (2) a definite subject matter; (3) an ascertainable object; and (4) designated beneficiaries." *Williams v. Mullen*, 31 N.C. App. 41, 45, 228 S.E. 2d 512, 514 (1976). Elements numbers two, three, and four are established by the front of the signature card which was signed by Ms. Pendergrass.

In deciding if sufficient words were used we are mindful of the words of our Supreme Court when it stated: "The declaration of a trust in personalty is not required to be in writing, and if in writing, it may be contained in letters or other writings. . . . No technical terms need be used. It is sufficient if the language used shows the intention to create a trust, clearly points out the prop-

erty, the disposition to be made of it, and the beneficiary." *Witherington v. Herring*, 140 N.C. 495, 497, 53 S.E. 303, 304 (1906).

"Generally, summary judgment is inappropriate when intent or other substantive feelings are material." *Feibus & Co. v. Construction Co.*, 301 N.C. 294, 306, 271 S.E. 2d 385, 393 (1980), *reh'g denied*, 301 N.C. 727, 274 S.E. 2d 228 (1981). Where competent evidence is presented which would raise an issue of whether a trust was created by the alleged actions it is the duty of the trial court to submit it to the jury to determine whether the trust is established by clear, strong, convincing and cogent evidence. *Taylor v. Wahab*, 154 N.C. 219, 70 S.E. 173 (1911); *Williams v. Mullen*, 31 N.C. App. 41, 228 S.E. 2d 512 (1976). Where, as here, a jury trial has not been requested it is an issue which must be determined by findings of fact and conclusions of law. The evidence before the court raised such an issue of fact; therefore, summary judgment was improper.

Reversed and remanded.

Judges MARTIN and PARKER concur.

FRANK W. BAKER v. LOG SYSTEMS, INC., D/B/A LINCOLN LOG HOMES, INC.

No. 8419SC929

(Filed 18 June 1985)

1. **Contracts § 27.2— breach of dealership purchase agreement—summary judgment for purchaser proper**

The trial court did not err by granting summary judgment for plaintiff on the issue of liability where the undisputed facts showed that the parties entered into an agreement in which defendant agreed to appoint plaintiff one of its dealers in exchange for the purchase of a log kit by plaintiff and that defendant, not having the authority to issue franchises in California, breached the agreement by being unable to award the franchise upon payment of the deposit by plaintiff.

2. **Contracts § 26— breach of dealership purchase agreement—findings by Commission of Corporations of California**

In an action in which plaintiff sought damages arising from plaintiff's purchase of a dealership in log homes for California, the trial court did not err by finding that the decision of the Commission of Corporations of California af-

fected the validity of the agreement between plaintiff and defendant, determined that defendant's action in entering into the agreement was unlawful conduct, and determined that the agreement between plaintiff and defendant constituted franchising activities as defined under the California Code where the California Commission found that defendant had sold franchises in California, that these franchises included the contractual agreement between the parties, and that plaintiff did not have authority to issue franchises under California law.

3. Appeal and Error § 45.1; Contracts § 27.1— failure to bring forward exceptions —dealership price subsumed in price of log home

In an action arising from plaintiff's purchase of a dealership in log homes, defendant abandoned exceptions to the trial court's findings that plaintiff paid at least $13,000 for his appointment as a designated retailer of defendant's products where those exceptions were not brought forward in defendant's brief; moreover, the sales order which defendant admitted was part of the contract indicated that the territorial grant was subsumed within the purchase price of the home.

APPEAL by defendant from *Davis, Judge*. Judgment entered 11 May 1984 *nunc pro tunc* 7 May 1984 in Superior Court, CABARRUS County. Heard in the Court of Appeals 17 April 1985.

Plaintiff, a California resident, instituted this action on 14 April 1983 by filing a complaint in which he alleged, *inter alia*, that he had been induced to travel to defendant's office in Kannapolis, North Carolina by defendant's advertisement in the *San Francisco Chronicle* soliciting persons to become "dealers" of defendant's log homes; that based upon representations of defendant that it had the authority to sell franchise dealerships for its log home kits in the State of California, plaintiff entered into an agreement in which defendant named plaintiff as its dealer in consideration of plaintiff's purchase of a log home from defendant; that plaintiff paid $13,000 as a deposit for the purchase of a kit; that plaintiff subsequently discovered that defendant did not have the authority to issue a franchise in the State of California; and that he relied upon defendant's representation to his damage. He sought to recover $13,000 in actual damages, $25,000 in punitive damages and damages under G.S. 75-16.

Defendant filed an answer in which it admitted that the parties had entered into the agreement, that plaintiff had agreed to purchase a log home kit, and that plaintiff had paid it $13,000 as part of the purchase price for a kit. It denied all other allegations.

Plaintiff then filed a motion for summary judgment. In support of the motion he filed an affidavit in which he stated that he was required to purchase a log home as an express condition of his appointment as a dealer under the agreement; that at the time the agreement was entered into, defendant did not have the authority to issue franchises in California; and that defendant had refused his demands for a refund. Plaintiff attached to his affidavit a decision of the California Department of Corporations issued 23 June 1983 in which defendant was ordered to desist and refrain from the sale or issuance of franchises because it was not registered to sell or issue franchises under California law.

In response to plaintiff's motion for summary judgment, defendant's president filed an affidavit in which he averred that defendant had made no misrepresentations, that plaintiff was obligated to purchase a log home package under the terms of the parties' agreement, and that defendant was ready, willing, and able to deliver a log home kit to plaintiff.

Based upon these materials, the trial court, concluding there was no genuine issue of material fact as to defendant's breach of the underlying contract, granted partial summary judgment for plaintiff. It reserved the issues of punitive damages and damages under G.S. 75-16 for trial. It also stated certain facts were undisputed requiring no further proof at trial. Upon a certification that there was no just reason for delay, defendant appealed.

Hartsell, Hartsell & Mills, by Fletcher L. Hartsell, Jr., for plaintiff appellee.

Hamel, Hamel & Pearce, by Hugo A. Pearce, III and Reginald S. Hamel, for defendant appellant.

JOHNSON, Judge.

[1] Defendant first contends the court erred in granting summary judgment for plaintiff on the issue of liability. It argues summary judgment was improper because there was a genuine issue of material fact as to the issue of fraud since plaintiff's complaint sounded in fraud. The court, however, granted summary judgment for plaintiff on the ground that the undisputed facts

showed defendant breached its contract with plaintiff. If the facts alleged in a complaint are sufficient to permit recovery under a legal theory not stated in the complaint, recovery will be allowed under that theory. *See Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). Here, the complaint alleged facts sufficient to state a claim for breach of contract. The undisputed facts show that the parties entered into an agreement in which defendant agreed to appoint plaintiff as one of its dealers in exchange for the purchase of a log kit by plaintiff and that defendant, not having the authority to issue franchises in the State of California, breached that contract by being unable to award the franchise upon the payment of the deposit by plaintiff. Defendant's arguments regarding the propriety of summary judgment on the issue of fraud are extraneous and irrelevant.

[2] Defendant next contends that the court erred in finding that the decision of the Commission of Corporations of California: (a) affected the validity of the agreement between plaintiff and defendant; (b) determined that the defendant's action in entering into the agreement was unlawful conduct; and (c) determined that the agreement between the plaintiff and defendant constituted franchising activities as defined under the California Code. This contention is without merit. The California Commission found in its decision that defendant had sold franchises in California, that these franchises included the contractual agreement between the parties, and that plaintiff did not have authority to issue franchises under California law. These findings clearly support the court's finding and conclusion.

[3] Defendant's remaining contention that there was no basis for the court's finding that plaintiff paid at least $13,000 to defendant for his appointment as a designated retailer of defendant's products is also without merit. Among the court's findings of undisputed facts were findings: (1) that among the express terms and conditions of the parties contract was a requirement that plaintiff purchase a log home to reserve the right to sell defendant's products in a designated area of California; and (2) that "[p]laintiff was required to purchase a log home from defendant as an express, concomitant condition of his 'appointment' as a designated retailer of defendant's log home kits in the Designated Area." Defendant did not bring forward exceptions to these findings in its brief; it is therefore deemed to have abandoned them.

Rule 28(b)(5), Rules of Appellate Procedure. Moreover, the sales order, which defendant admitted was part of the contract, indicates that the territorial grant was subsumed within the purchase price of the home.

For the foregoing reasons, the court's judgment is

Affirmed.

Judges WHICHARD and EAGLES concur.

RUFUS W. OVERSTREET AND GRACIE L. OVERSTREET v. THE CITY OF RALEIGH

No. 8410SC1036

(Filed 18 June 1985)

1. **Taxation § 45— tax foreclosure judgment—adverse possession claim extinguished**

The trial court properly granted summary judgment for defendant in an action seeking title to property by adverse possession following a tax sale. Plaintiff's action contesting the validity of the tax foreclosure title was not timely filed pursuant to G.S. 105-377; moreover, the effect of a judgment foreclosing a tax lien on real property is to extinguish all rights, title and interest in the real property subject to foreclosure, including a claim based on adverse possession. G.S. 105-374(k), G.S. 105-375(i), G.S. 1A-1, Rule 56(c).

2. **Taxation § 41.2— notice of tax foreclosure sale—personal notice to adverse possessor not required**

Defendant City complied with all notice requirements of G.S. 105-374(c) where defendant gave personal notice to all record owners of the property in question and notice by publication to all others having an interest in the disputed property who could not with due diligence be located. Defendant was not required to give personal notice to a purported adverse possessor of land whose purported interest was not recorded. G.S. 1A-1, Rule 4.

APPEAL by plaintiffs from *Preston, Judge*. Summary judgment entered 27 July 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 8 May 1985.

This is a civil action in which plaintiffs, Rufus W. and Gracie F. Overstreet, seek to quiet title in real property located in Wake County which was conveyed to defendant, the City of Raleigh, by

commissioner's deed pursuant to a tax foreclosure sale on 7 May 1980.

The essential facts are:

Plaintiffs purchased certain real property and improvements located at 1409 Old Garner Road in Wake County on 16 October 1946. At the same time, plaintiffs attempted unsuccessfully to purchase an adjacent strip of land approximately 50 feet wide and 200 feet deep from their grantor, Henry Rogers. Plaintiffs allege in their complaint that, from the time they moved into their home in 1946 until the present, they have exercised continuous, open, exclusive, hostile and notorious dominion over the 50 × 200 feet strip of property such that title to the property has ripened in them under the doctrine of adverse possession.

A foreclosure action (79CVD4409) was initiated against the record owners of the disputed section of property in 1979 by defendant for failure to pay delinquent ad valorem taxes. The complaint in the tax foreclosure action was served by registered mail to the record owners of the property pursuant to G.S. 1A-1, Rule 4(j)(9)b and to all others by publication pursuant to G.S. 1A-1, Rule 4(j)(9)c and 4(k)(2) as the Rules of Civil Procedure then required. In the foreclosure action, judgment was subsequently entered in favor of defendant, City of Raleigh. A public auction of the property, including the disputed strip, was conducted with defendant being the highest bidder. The commissioner's deed conveying the property to defendant was recorded in the Wake County Registry 7 May 1980.

Plaintiffs commenced this action 14 June 1983, seeking title to the property under the doctrine of adverse possession. Defendant moved for summary judgment based on the one year statute of limitation contained in G.S. 105-377. Summary judgment was entered in favor of defendant and plaintiffs appeal.

Moore, Van Allen, Allen and Thigpen, by C. Steven Mason and William D. Dannelly, for plaintiff-appellants.

Thomas A. McCormick, Jr., for defendant-appellee.

EAGLES, Judge.

The issue on appeal is whether the trial court properly granted summary judgment, barring plaintiffs' action to quiet title as a matter of law. We find no error.

[1] 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). 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.* 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 procedure to foreclose a tax lien on real property is contained in G.S. 105-374, *et seq.* Our examination of the record reveals that the procedures thereunder were fully complied with by defendant and that plaintiffs' action contesting the validity of the tax foreclosure title was not timely filed pursuant to G.S. 105-377.

Although a matter of first impression in this jurisdiction, we hold that the effect of a judgment foreclosing a tax lien on real property is to extinguish all rights, title and interests in the real property subject to foreclosure, including a claim based on adverse possession. The interest in the disputed property acquired by purchasers at a tax foreclosure sale is fee simple and the purchaser's title defeats claims of ownership based on adverse possession. G.S. 105-374(k), 105-375(i); *See, Leciejewski v. Sedlack*, 116 Wis. 2d 629, 342 N.W. 2d 734 (1984).

[2] Concerning the propriety of the notice of the foreclosure sale, we hold that defendant complied with all notice requirements of G.S. 105-374(c). Where defendant gave personal notice to all record owners of the property in question and notice by publication as provided in G.S. 1A-1, Rule 4 to all others having an interest in the disputed property who could not with due diligence be located, defendant was not required to give personal notice to

a purported adverse possessor of land whose purported interest was not recorded. *Leciejewski v. Sedlack, supra.* To hold otherwise would require that every taxing authority in this State seeking to sell land pursuant to a tax foreclosure, conduct an on-site inspection of the land subject to foreclosure in order to determine whether a claim of adverse possession might lie. Such a requirement is not required by the statutes, is unworkable, and would unnecessarily complicate, delay and cloud tax foreclosure sales.

Where the record shows title in defendant pursuant to G.S. 105-374 and where plaintiffs brought their action to quiet title beyond the one year statute of limitation contained in G.S. 105-377, nothing else appearing there are no genuine issues of material fact. Accordingly defendant was entitled to summary judgment as a matter of law.

Affirmed.

Judges WELLS and BECTON concur.

BRENDA PRUETT COX v. JAMES A. COX

No. 8417DC942

(Filed 18 June 1984)

Divorce and Alimony § 30— equitable distribution—summary judgment based on prior separation agreement improper—issues of coercion and ratification

The trial court should not have granted summary judgment for defendant husband in an action for equitable distribution where defendant asserted a prior divorce judgment and separation agreement in bar of plaintiff's action and plaintiff alleged in an affidavit that she had been coerced and forced into signing the separation agreement, that defendant had threatened her physically prior to their separation, that defendant had a violent temper, that defendant had threatened to physically harm her if she did not sign the separation agreement, and that plaintiff signed the separation agreement knowing her husband's temper and fearing for her life. Plaintiff's affidavit raised triable issues of fact as to whether the separation agreement was signed by plaintiff under duress and, if so, whether it was ratified by plaintiff.

APPEAL by plaintiff from *Clark, Judge.* Judgment entered 12 July 1984 in District Court, SURRY County. Heard in the Court of Appeals 17 April 1985.

Plaintiff filed this action on 22 March 1984 seeking an absolute divorce and an equitable distribution of marital property. Defendant filed an answer in which he pled in bar of equitable distribution a separation agreement entered into by the parties on 15 February 1983. Defendant obtained an absolute divorce in another county on 24 April 1984. He then filed a motion for summary judgment in the present action on 15 May 1984 asserting the divorce judgment and separation agreement in bar of plaintiff's action. Plaintiff filed an affidavit in response to defendant's motion in which she alleged she signed the separation agreement under duress. Based upon the pleadings and affidavits, the court granted defendant's motion for summary judgment. Plaintiff appeals.

Everett & Everett, by James A. Everett, for plaintiff appellant.

Morrow and Reavis, by John F. Morrow and Clifton R. Long, Jr., for defendant appellee.

JOHNSON, Judge.

The sole issue is whether the court erred in granting summary judgment for defendant. For the following reasons we hold the trial court did err in granting summary judgment.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." G.S. 1A-1, Rule 56(c). An issue of material fact is one which may constitute a legal defense or is of such a nature as to affect the result of the action or is so essential that the party against whom it is resolved may not prevail; an issue is genuine if it can be supported by substantial evidence. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). A party moving for summary judgment has the burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). If the moving party meets its burden, the burden then shifts to the opposing party to set forth specific facts, through affidavits or otherwise, showing that there is a genuine issue for trial. G.S. 1A-1, Rule 56(e). The opposing party need not convince

the trial court that he would prevail on the issue but only that a genuine issue exists. *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982). In ruling upon the motion, the court must closely scrutinize the movant's papers while indulgently treating the non-movant's papers. *Zimmerman v. Hogg & Allen, supra.*

In the present case, defendant, as the party moving for summary judgment, carried his burden of proof through his affidavit accompanied by the divorce judgment and the separation agreement signed by plaintiff. The burden then shifted to plaintiff to show a genuine issue of material fact for trial. She produced an affidavit in which she averred that she had been coerced and forced into signing the separation agreement by defendant; that defendant had threatened her physically on several occasions prior to their separation, causing her to leave the marital home, once late at night, to avoid physical injury to herself; that defendant had a violent temper and had exhibited this violent temper on several occasions; that defendant had threatened to physically harm her if she did not sign the separation agreement; that these threats were made on the date the separation agreement was executed and prior thereto; and that fearing for her life, knowing her husband's temper, she signed the separation agreement. If plaintiff executed the separation agreement under duress or fear induced by wrongful acts or threats, the separation agreement is invalid and not a bar to equitable distribution unless the separation agreement was ratified by plaintiff. *See Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971). Plaintiff's affidavit, therefore, raises triable issues of fact as to whether the separation agreement was signed by plaintiff under duress, and if so, whether it was ratified by plaintiff. Since plaintiff's affidavit raises a genuine issue of material fact as to the validity of the separation agreement asserted in bar of the action for equitable distribution, the court improvidently granted defendant's motion for summary judgment. The court's judgment must be vacated and the cause remanded for a resolution of the factual issue.

Vacated and remanded.

Judges WHICHARD and EAGLES concur.

STATE OF NORTH CAROLINA v. DAVID HOLLIS MAGEE

No. 8426SC972

(Filed 18 June 1985)

1. **Automobiles and Other Vehicles § 126.2— failure of breathalyzer operator to administer second test—no error**

In a prosecution for driving under the influence, the results of a breathalyzer test were not required to be excluded because the breathalyzer operator refused to retest defendant. At the time the breathalyzer test was administered in this case defendant had a right to a second test but the officer who administered the first was not required to administer the second.

2. **Automobiles and Other Vehicles § 130; Criminal Law § 138— erroneous DWI sentencing—aggravating and mitigating factors not properly found—improper active portion of suspended sentence**

The trial court erred in sentencing a DWI defendant by stating that there were no aggravating factors when there was evidence that defendant had been convicted of illegal passing and reckless driving, both of which are assigned four points; by stating in open court that there were no aggravating factors but one mitigating factor, checking a mitigating factor on the AOC form, checking the place on the form showing no mitigating factors, and imposing a level four punishment required when there are no aggravating or mitigating factors; and by imposing an active term of thirty days as one of the conditions of a suspended sentence when G.S. 20-179(j) limits the active term a defendant may receive as part of a suspended sentence to forty-eight hours. G.S. 20-179; G.S. 20-16.

APPEAL by defendant from *Downs, Judge*. Judgment entered 23 May 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 2 April 1985.

The defendant was tried for driving while impaired. The evidence in Superior Court showed the defendant was arrested on 21 December 1983 and taken to the Mecklenburg County jail. The arresting officer testified that in his opinion the defendant was under the influence of an intoxicating beverage. A breathalyzer test indicated the alcohol content in the defendant's blood was .10 percent. The defendant requested a second breathalyzer test and was told by the breathalyzer operator that he was entitled to another test at defendant's "leisure" but he would not retest the defendant. The defendant testified on cross examination that he had been convicted of illegal passing in 1979 and reckless driving, in January 1979. He was convicted as charged.

The court conducted a sentencing hearing. At the conclusion of the hearing the court announced that it was compelled to find that there were no aggravating factors and there was a mitigating factor that the alcohol concentration did not exceed .11 percent at any relevant time after the driving. The court said it would impose a level four punishment. On the form furnished by the Administrative Office of the Courts the court did not check any aggravating factors. It checked the mitigating factor that there was a slight impairment of the defendant's faculties and that the defendant's alcohol concentration did not exceed .11 at any relevant time. The court also checked the line which says, "There are no aggravating or mitigating factors. Therefore, Level Four punishment shall be imposed." The court sentenced the defendant to 120 days in prison, which sentence was suspended on condition that the defendant serve an active sentence of 30 days and pay a fine of $250.00. The defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Ellis M. Bragg for defendant appellant.

WEBB, Judge.

[1] In his first assignment of error the defendant argues that the results of the breathalyzer test should have been excluded because the breathalyzer operator refused to retest him. At the time the breathalyzer test was administered in this case there was not a requirement that a second test be administered. The defendant had the right to a second test but we do not believe the officer who administered the first test could be required to administer the second one. This assignment of error is overruled.

[2] In his second assignment of error the defendant contends there was error in the sentencing. We believe this assignment of error has merit. G.S. 20-179 provides for the imposition of sentences for persons convicted of impaired driving. After a person has been convicted of impaired driving the court must hold a sentencing hearing. There are five different levels of punishment and the level at which a person is sentenced depends on the aggravating and/or mitigating factors found by the court.

In this case the court stated at the end of the sentencing hearing that there were no aggravating factors. G.S. 20-179(d)(5)

provides that two or more convictions within five years of an offense for which at least three points are assigned under G.S. 20-16 constitutes an aggravating factor. In this case there is evidence that the defendant was convicted of illegal passing and reckless driving in 1979. Four points are assigned by G.S. 20-16 for both these offenses. This would constitute an aggravating factor. G.S. 20-179(e)(1) provides that slight impairment and an alcohol concentration of less than .11 percent at any relevant time after driving constitutes a mitigating factor. In this case there was evidence of an aggravating factor and a mitigating factor.

The court held the defendant was subject to a level four punishment. It is not clear how the court reached this conclusion. The judge stated in open court that there were no aggravating factors but there was a mitigating factor. He checked a mitigating factor on the AOC form but then checked the place on the form showing there were no mitigating factors. If there were no aggravating or mitigating factors the court was required to impose a level four punishment. If there were not an aggravating factor and there was a mitigating factor the court could have concluded the mitigating factors substantially outweigh the aggravating factors in which case G.S. 20-179(f)(3) would require that a level five punishment be imposed.

If the court had correctly found that a level four punishment should have been imposed it erred in the imposition of the sentence. G.S. 20-179(j) limits the active term a defendant may receive as a part of a suspended sentence to 48 hours. In this case the court required the defendant to serve 30 days as a part of the conditions of the suspended sentence. This was error.

We find no error in the trial. We vacate the sentence for errors in concluding what level of punishment should be imposed and for the error in imposing a level four punishment. We order a new sentencing hearing.

No error as to the trial.

Vacated and remanded as to the sentence.

Judges BECTON and PARKER concur.

STATE OF NORTH CAROLINA v. GEORGE T. BARNES

No. 8426SC1054

(Filed 18 June 1985)

1. **Narcotics § 4.2; Criminal Law § 66.1— sufficiency of evidence—opportunity of undercover agent to observe defendant**

There was no error in the denial of defendant's motion to dismiss charges of possession of heroin with intent to sell and sale of heroin for insufficient evidence where an undercover agent who identified defendant as the man who sold her heroin had an adequate opportunity to observe the man who sold her the heroin when the negotiation and sale took place.

2. **Narcotics § 3.1; Criminal Law § 34.6— sale of heroin—sale of drugs two years earlier—admission erroneous**

In a prosecution for possession of heroin with intent to sell and sale of heroin, the trial court erred by admitting testimony that defendant had sold drugs almost two years before the offenses for which he was being tried. The evidence was not admissible to prove intent or guilty knowledge because defendant contended that he was not the person who possessed or sold the heroin, not that whoever possessed and sold it did not have the specific intent to do so or did not have guilty knowledge.

APPEAL by defendant from *Downs, Judge*. Judgment entered 19 April 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 4 April 1985.

The defendant was tried for the possession with intent to sell and the sale of heroin. The State's evidence showed that on 7 July 1983 an undercover agent for the State Bureau of Investigation made contact with Curtis McKenney for the purpose of purchasing heroin. Mr. McKenney introduced her to a man who was called Mike. The undercover agent negotiated a purchase of 15 small bags of heroin from Mike who retrieved it from the hollow of a nearby tree and exchanged it for $160.00. The undercover agent described "Mike" to other law enforcement officers who produced a picture of the defendant. The undercover agent identified the picture as being a photograph of the man who had sold her heroin. She identified the defendant in court as being the man who had sold the heroin to her.

Before the defendant introduced any evidence the State called as a witness a detective with the City of Charlotte Police Department who testified he purchased heroin from the defendant on 6 May 1981.

The defendant offered evidence of an alibi. He was convicted on both charges and was sentenced to ten years on each charge with the sentences to run concurrently. The defendant appealed.

Attorney General Edmisten, by Associate Attorney General Debbie K. Wright, for the State.

Stephen W. Ward, Assistant Public Defender, for the defendant appellant.

WEBB, Judge.

[1] The defendant first assigns error to the denial of his motion to dismiss on the ground that there was not sufficient evidence for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. He bases this argument on what he contends is the unreliability of the undercover agent's identification of him during the trial. The undercover agent had an adequate opportunity to observe the man who sold her the heroin when the negotiations and sale of the heroin took place. The credibility of her testimony was for the jury. This assignment of error is overruled.

[2] The defendant next assigns error to the admission of testimony that he had sold drugs almost two years before the offenses for which he was being tried. We believe this assignment of error was merit. The general rule is that in a prosecution for a particular crime, the State cannot prove that the accused has committed another crime. *See State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). In *McClain* our Supreme Court ordered a new trial in a case in which testimony was admitted that the defendant had committed larceny while she was being tried for engaging in prostitution. The Court in that case listed eight exceptions to the general rule, among which are evidence to show a "specific mental intent or state which is an essential element of the crime charged," and evidence "to establish the requisite guilty knowledge." In his treatise on evidence Professor Brandis comments that the rule is commonly supposed to be difficult to apply. He simplifies the rule, and states it as follows:

> Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant

fact it will not be excluded merely because it also shows him to have been guilty of an independent crime.

1 H. Brandis, *Brandis on N.C. Evidence* § 91 (2d rev. ed., 1982).

The State argues that the testimony was admissible under the two above cited exceptions listed in *McClain*. It also argues that this testimony is admissible under the rule as stated by Professor Brandis as proving intent and guilty knowledge which are relevant facts to the crime of possession with intent to sell and the sale of heroin. The defendant does not contend that whoever possessed and sold the heroin did not have the specific mental intent to do so or that he did not have guilty knowledge. He contends he was not the person who possessed or sold it. There was little need for this evidence to prove the State's case as to intent and guilty knowledge. If we were to hold that testimony of a similar crime committed almost two years previously is admissible to prove intent or guilty knowledge we believe there would be little left of the rule. We believe the evidence of the previous crime proved only the defendant's character or disposition to commit the offense with which he was charged and should have been excluded. We hold this was error which requires a new trial.

New trial.

Judges BECTON and PARKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 JUNE 1985

ALLEGHANY COUNTY v. CAUDILL No. 8423DC1229	Alleghany (84CVD65)	Dismissed
ASHLEY v. DELP No. 8423SC1201	Alleghany (No Co. No.)	Affirmed
CHATTERTON v. CHATTERTON No. 8423DC809	Wilkes (83CVD994) (83CVD838)	Affirmed
CLA-MAR MGT. v. AVERY No. 8410DC1336	Wake (84CVD5722)	Dismissed
GREEN v. NEW BERN OFFICE SUPPLY No. 843SC1223	Craven (81CVS339)	Dismissed
HARGETT v. GOUCH No. 8426SC1070	Mecklenburg (83CVS11594)	Affirmed
LADD v. LADD No. 8422DC1211	Iredell (84CVD301)	Affirmed in part, reversed in part, and remanded.
McCARROLL v. McCARROLL No. 8421DC1231	Forsyth (83CVD540)	Dismissed
MARSHALL v. TOWN OF HILLSBOROUGH No. 8415SC847	Orange (82CVS235)	No Error
MONKEY GRIP RUBBER v. QUALITY TIRE No. 8429SC840	McDowell (82CVS338)	Affirmed
PLANT v. PLANT No. 8422DC1308	Alexander (81CVD137)	Dismissed
RENSHAW v. LONG No. 8413SC1076	Brunswick (84CVS395)	Dismissed
RICH v. CAVINESS No. 8414SC1176	Durham (82CVS1608)	No Error
SALVATION ARMY v. BRANCH No. 8430SC1157	Jackson (82CVS321)	Affirmed
SHAW v. WOODARD No. 846SC1224	Northampton (84CVS167)	Affirmed
STATE v. JOHNSON No. 842SC628	Washington (83CRS1280)	New Trial

STATE v. McKAY No. 8421SC689	Forsyth (83CRS53348) (83CRS53349) (83CRS53350)	83CRS53349—No Error; 83CRS53348, 83CRS53350—New Trial.
STATE v. McMILLAN No. 8410SC1331	Wake (84CRS28250)	No Error
STATE v. PENLAND No. 8415SC925	Orange (84CRS1542)	New Trial
STATE v. ROSS No. 8427SC811	Cleveland (83CRS9461)	No Error
STATE v. STEPHENSON No. 846SC866	Northampton (81CRS1742)	Affirmed
WALLACE v. MANDELL No. 8426DC1014	Mecklenburg (84CVD1642)	Affirmed

CLARENCE N. PARIS AND WIFE, ETHEL PARIS v. MICHAEL KREITZ, JR., P.A., DR. LELAND S. AVERETT, JR., AND HIGH POINT MEMORIAL HOSPITAL, INCORPORATED

No. 8419SC814

(Filed 2 July 1985)

1. **Rules of Civil Procedure § 15.2; Physicians, Surgeons and Allied Professions § 12.1— motion to amend complaint to conform to evidence—new cause of action—denied**

The trial court in a medical malpractice action did not err by denying plaintiffs' motion to amend their complaint to conform to evidence that one of the defendants had altered medical records because plaintiffs sought to add an additional cause of action against which defendants were not prepared to defend and to which they had not consented. G.S. 1A-1, Rule 15(b).

2. **Physicians, Surgeons and Allied Professions § 21— medical malpractice—directed verdict on punitive damages—proper**

The trial court in a medical malpractice action did not err by granting defendants' motion for directed verdict on punitive damages where the evidence permitted the inference that one defendant altered emergency room records but plaintiffs neither alleged nor attempted to prove that the document alteration aggravated the injury caused by the alleged malpractice. Moreover, any error in refusing to submit punitive damages to the jury was harmless because plaintiffs failed to establish their claim of malpractice.

3. **Trial § 6— medical malpractice—admission of only part of stipulation—no error**

The trial court in a medical malpractice action did not err by refusing to allow the entire stipulation concerning a defendant's alteration of emergency room records to be read to the jury. The omitted paragraphs were not relevant to the factual issues before the jury and there was no purpose relevant to the trial of the case to be served by informing the jury of arguments counsel agreed not to make.

4. **Physicians, Surgeons and Allied Professions § 15.2— medical malpractice—defendant allowed to testify as expert—no error**

The trial court in a medical malpractice action did not err by allowing one of the defendants, a doctor, to testify as an expert witness even though he had not been listed as an expert. The doctor was a party and was listed as a potential witness and the fact that he testified as an expert could not have unfairly surprised plaintiffs. Moreover, plaintiffs objected on the grounds that the doctor was not qualified as an expert rather than on surprise, plaintiffs did not move for a continuance, and the substance of the testimony was put before the jury by another doctor.

5. Physicians, Surgeons and Allied Professions § 15.2; Hospitals § 5— doctors qualified as experts on standard of nursing care—duty of nurse to disobey doctor's order

In a medical malpractice action arising from an emergency room diagnosis, there was no error in allowing three doctors to testify that the treatment afforded plaintiff in the emergency room was in conformity with professional nursing standards and that it would not have been in conformity with nursing standards for a nurse to disobey a physician's treatment instructions. Physicians are clearly acceptable experts with regard to the standard of care for nurses, and, while a nurse may disobey the instructions of a physician where those instructions are obviously wrong and will result in harm to the patient, the duty to disobey does not extend to situations where there is a difference of medical opinion.

6. Physicians, Surgeons and Allied Professions § 15— medical malpractice—expert cross-examined about testimony in other cases

There was no error in a medical malpractice case in permitting the cross-examination of plaintiffs' expert witness about his role as an expert in two earlier unrelated murder cases. The expert's testimony was limited to damages, the jury found no negligence and never reached the issue of damages, plaintiffs' objection came after several questions had been asked and answered, the question objected to was never answered, and there was no showing of prejudice.

7. Physicians, Surgeons and Allied Professions § 15— medical malpractice—statement by a doctor at time of treatment—excluded

There was no error in a medical malpractice action in excluding a statement made by a doctor during his treatment of plaintiff where the statement was admitted during re-redirect examination.

8. Physicians, Surgeons and Allied Professions § 15— medical malpractice—cross-examination of doctor based on speculative condition—irrelevant

The trial court did not err in a medical malpractice action by sustaining defendants' objection to what defendant would have done if he had seen plaintiff in the emergency room and plaintiff was in the same condition that he was in the next morning in defendant's office. The uncontradicted evidence was that plaintiff's condition had worsened when defendant saw him in the office.

9. Physicians, Surgeons and Allied Professions § 15.2— standard of care for physician's assistant—doctor not qualified as expert

The trial court in a medical malpractice action did not err by sustaining defendants' objection to plaintiffs' expert testimony as to the standard of care for physician's assistants. A physician's assistant is not subject to the same standard of practice as a doctor, and while plaintiffs' witness was duly qualified as an expert vascular surgeon, no attempt was made to show that he was qualified to testify as to the standard of care for physician's assistants.

10. Physicians, Surgeons and Allied Professions § 15— opinion on whether a defendant exercised reasonable care—objection sustained—no prejudicial error

There was no prejudicial error in a medical malpractice action in sustaining objections to the testimony of plaintiffs' expert on whether defendant exer-

cised reasonable care and diligence. Although defendants' objections were sustained, the answers were never stricken from the record and plaintiffs' doctor expressed his opinion several times in response to other questions.

11. Hospitals § 3— medical malpractice by private doctor in emergency room—directed verdict for hospital proper

In a medical malpractice action arising from the treatment of plaintiff at an emergency room, the trial court did not err by granting a directed verdict for defendant hospital where there was no showing of how the handling of plaintiff's case by the physician and his assistant was so obviously negligent that the nurse was obliged to intervene and order a different treatment, there was no evidence of a standard by which the hospital's handling of the case could be judged by the jury, no indication from persons qualified to testify as to what should have been done under the circumstances, and no testimony that plaintiff's observable manifestations of pain were so severe as to cause a reasonable hospital employee to act differently.

12. Rules of Civil Procedure § 59— medical malpractice—denial of new trial—no error

There was no error in the denial of plaintiffs' motion for a new trial in a medical malpractice action where there was evidence from which the jury could have found that defendants were negligent or that they were not negligent.

APPEAL by plaintiffs from *DeRamus, Judge*. Judgment entered 28 February 1984 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 3 April 1985.

This is a civil action in which plaintiffs seek compensatory and punitive damages from defendants for injuries and losses allegedly resulting from defendants' negligence in the medical treatment of plaintiff Clarence N. Paris.

At all times pertinent to this case, plaintiff Clarence Paris was a retired 70-year-old man. Ethel Paris was his wife. Defendant Dr. Leland Averett was a physician engaged in general practice in High Point. Defendant Michael Kreitz worked for Dr. Averett as a physician's assistant.

On 27 November 1980, after returning from Thanksgiving dinner with his family around 7:30 p.m., Mr. Paris went to bed around 11:00 p.m. and shortly thereafter began to experience pain in his lower left leg and foot. Mrs. Pat Simmons, plaintiffs' daughter, her husband, Donald Simmons, and Russell Hill, plaintiffs' grandson and his wife, Regina, were all summoned to the Paris household. Mrs. Simmons called Mr. Paris' personal physi-

cian, Dr. Wallace. She was informed that Dr. Averett was taking Dr. Wallace's calls while Dr. Wallace was out of town. Mrs. Simmons told the answering service to have Dr. Averett meet Mr. Paris at High Point Memorial Hospital, the corporate defendant in this case (hereafter Hospital).

Testimony for plaintiffs indicated that Mr. Paris arrived at the hospital at approximately 11:40 p.m. Mr. Paris and witnesses for the Hospital testified that he was immediately registered and taken into a treatment room by a nurse's aide. Hospital records show that he was registered at 1:07 a.m. Nurse Judy Garrett, a hospital employee on duty in the emergency room, tried to call Dr. Averett, but contacted instead his assistant, Michael Kreitz; Dr. Averett was out of town.

Mr. Paris was examined initially by Nurse Garrett and nurse's aide Brenda Grant, both employees of defendant Hospital. Although a physician was on duty in the emergency room, he did not examine Mr. Paris since Hospital personnel believed that either Dr. Averett or Michael Kreitz was coming. Nurse Garrett and Brenda Grant noted that Mr. Paris had been in pain for over thirty minutes, that his left leg was pale and cold to the touch, and that his toenails were blue. Defendant Kreitz arrived at approximately 1:30 a.m. and based on his examination of Mr. Paris, made the same general observations as Nurse Garrett in addition to noting symptoms of decreased blood supply to the lower left leg and foot.

Defendants Kreitz and Averett, as well as Nurse Garrett and Brenda Grant, testified that Kreitz called Dr. Averett and discussed the case over the telephone. Plaintiffs offered evidence that no call was made. Kreitz noted his diagnosis of "peripheral vascular insufficiency" on Mr. Paris' record, prescribed a mild painkiller and sent him to bed with instructions to call at Dr. Averett's office in the morning. On the prescription sheet, Kreitz noted "probable surgical appointment in morning."

Mr. Paris, accompanied by Pat and Don Simmons, arrived at Dr. Averett's office at approximately 9:00 the next morning. Dr. Averett returned from his hospital rounds at about 10:30 a.m. and examined Mr. Paris. He noted the same symptoms that Kreitz had noted the night before. Plaintiffs' testimony indicated that the pain had spread up Mr. Paris' leg during the night. Based on

these observations, Dr. Averett diagnosed an occlusion of the lower left leg. He referred Mr. Paris to Dr. Kenneth Shull, a vascular surgeon, who confirmed the diagnosis.

Plaintiff was admitted to defendant Hospital on an emergency basis that afternoon. Surgery was scheduled immediately and began at 2:00 p.m. Dr. Shull removed some thrombus material or blockage from Mr. Paris' upper leg. This operation appeared successful but three days later, the occlusion reoccurred and a second operation was performed. Rather than attempting to remove the blockage, Dr. Shull performed a bypass using a vein graft. Although circulation was restored, Mr. Paris' lower leg continued to be numb in places, indicating some permanent nerve damage. Mr. Paris returned home.

On 22 January 1981, Mr. Paris again experienced acute pain in his left leg. On Dr. Shull's advice, plaintiff was taken to the Hospital. Dr. Shull determined that the graft was completely occluded and, in a third operation, replaced it with a synthetic graft. This operation was unsuccessful and Mr. Paris developed gangrene in his lower left leg. As a result, his left leg was amputated above the knee on 27 January 1981.

Plaintiffs instituted this suit by filing a complaint on 3 August 1982. Plaintiffs alleged that Michael Kreitz was negligent in that (1) he failed to exercise reasonable care and due diligence, (2) he attempted to diagnose Mr. Paris' problem without proper medical training, (3) his diagnosis was obviously incorrect, (4) he failed to consult a physician or other qualified medical professional in making his diagnosis, and (5) he prescribed improper treatment. Plaintiffs alleged that Dr. Averett was negligent in that (1) he failed to exercise reasonable care and due diligence, (2) he failed to attend personally to Mr. Paris, (3) he permitted defendant Kreitz to diagnose and prescribe treatment for Mr. Paris, and (4) he failed to treat Mr. Paris properly or promptly. Plaintiffs also alleged as a basis for punitive damages against Dr. Averett, that his negligence amounted to a reckless disregard of Mr. Paris' rights and safety. Plaintiffs alleged that the Hospital was negligent in that (1) it failed to adopt or enforce accepted rules and procedures regulating the practice of physician's assistants in emergency cases, (2) it failed to assure that plaintiff was seen and treated by a licensed and trained physician, and (3) the Hospital's

agent, Nurse Garrett, failed to see that Mr. Paris received required medical treatment by a trained physician though she knew that he required treatment by a trained physician. Plaintiffs claimed that the negligence of defendant was the proximate cause of Mr. Paris' leg amputation and of the physical, mental and emotional suffering that accompanied it.

In a second count, Ethel Paris alleged that the amputation had adversely affected her relationship with Mr. Paris, that she had been deprived of love, affection and conjugal relations, and that defendants' negligence was the proximate cause of her loss. Plaintiffs claimed compensatory damages in excess of $10,000 and punitive damages.

Defendants Kreitz and Averett filed a response and defendant Hospital filed a separate response. Both responses denied the material allegations of the complaint.

The matter was tried before a jury. Both sides presented expert testimony, discussed *infra*. Prior to trial, one of plaintiffs' attorneys noticed a discrepancy between the copy of the emergency room record of Mr. Paris' 27-28 November 1980 visit previously furnished him and the original record. Plaintiffs' attorney's copy had a handwritten notation on it that read, "Seen & agree—L.S. Averett, M.D." The original had the notation, "Case discussed by phone. Seen & agree—L.S. Averett, M.D." The copy had been prepared by Hospital personnel and bore a stamp that read, "Copy from confidential patient records." A records clerk for defendant Hospital testified that the original was kept in a locked room to which only treating physicians and authorized Hospital personnel had access.

Plaintiffs wished to get the fact of the discrepancy to the jury. In order to present the necessary testimony before the jury without the necessity for withdrawal from the case by plaintiffs' counsel, the parties, through counsel, entered into the following stipulation:

> 1. That a copy of the document entitled "Emergency Records" and designated as Plaintiffs' Exhibit 12A was received by Plaintiffs' counsel Mr. L. P. McLendon, Jr. as an enclosure in a letter of transmittal from High Point Memorial Hospital, Inc. designated as Plaintiffs' Exhibit 12;

2. Exhibit 13 is a copy of the same original document from which Exhibit 12A was prepared;

3. That counsel for the defendants will make no contention in their argument to the jury or otherwise that there has been any change, alteration in, or modification to said Exhibit 12A and 13 since they were received by Mr. McLendon;

4. That counsel for the defendants will make no contention in their argument to the jury or otherwise that there was writing or printing on the original document of which Exhibit 12A and 13 are copies at the time the copies were made which is not visible or legible on Exhibit 12A or 13 by virtue of poor quality of the copy;

5. That in the event of any change in addition to modification of original document of which Exhibit 12A and 13 are copied [sic] has been made since Exhibits 12A and 13 were transmitted to Mr. McLendon by High Point Memorial Hospital, Inc., such modification was not made by any agent or employee of High Point Memorial Hospital, Inc.; was made without the knowledge or consent of any employee or agent of High Point Memorial Hospital, Inc. and Exhibits 12A and 13 are not being introduced into evidence against High Point Memorial Hospital, Inc.

At trial, plaintiffs' counsel was permitted to read only paragraphs 1, 2, and 5 to the jury.

At the close of plaintiffs' evidence, defendants moved separately for directed verdicts with respect to all of the claims. The court reserved ruling on the motions until the close of all the evidence, when it allowed the motions with respect to the punitive damages claim against Dr. Averett and the claim for compensatory damages against the Hospital.

The following issues were submitted to the jury which answered them as indicated:

1. Were the following health care providers negligent in providing health care to the plaintiff, Clarence N. Paris, in the early morning hours of November 28, 1980? (Answer "yes" or "no" in the spaces next to the contentions of plain-

tiffs to indicate whether or not such contention has been proved by the greater weight of the evidence.)

Michael Krietz Jr., P.A.

a. No Michael Krietz, Jr., P.A., did not provide care in accordance with the applicable standard of care by failing to call Dr. Averett from the emergency room, resulting in delay of appropriate diagnosis and treatment of Clarence N. Paris' left leg.

b. No Michael Krietz, Jr., P.A., did not exercise reasonable care and diligence in using his medical skills to determine the symptoms or status of Clarence N. Paris' condition at the emergency room, resulting in delay of appropriate diagnosis and treatment.

. . .

c. No Michael Krietz, Jr., P.A. did not exercise reasonable care and diligence in using his medical skills to fully and accurately relate to Dr. Averett the symptoms or status of Clarence N. Paris' condition at the emergency room, resulting in delay of appropriate diagnosis and treatment.

Dr. Leland S. Averett, Jr.

d. No Dr. Leland S. Averett, Jr., did not provide care in accordance with the applicable standard of care by failing to diagnose the condition of Clarence N. Paris as related to him by Mr. Krietz, and failing to treat it as a medical emergency requiring immediate personal medical attention from a licensed physician or specialist.

Having found no negligence, the jury did not reach the issues of proximate cause or damages. Plaintiffs' motions for judgment n.o.v. and for a new trial were denied and plaintiffs appealed.

Brooks, Pierce, McLendon, Humphrey and Leonard, by L. P. McLendon, Jr., George W. House, and S. Leigh Rodenbough, IV, for plaintiff-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell and Jernigan, by James O. Blount, Jr., and Timothy P. Lehan, for defendant-appellees Michael Kreitz and Dr. Leland Averett.

Tuggle, Duggins, Meschan and Elrod, by Joseph E. Elrod, III, J. Reed Johnston, Jr., and Sally A. Lawing for defendant-appellee High Point Memorial Hospital.

EAGLES, Judge.

I

Plaintiffs' first three assignments of error concern the discrepancy between the original of the emergency room record prepared in connection with Mr. Paris' 27-28 November 1980 visit and the copy provided by defendants to plaintiffs' counsel. In their first argument, plaintiffs contend that it was error for the trial court to deny their motion to amend the complaint to add falsification of medical records as an additional act of negligence entitling them to damages and thereby to conform the complaint to the evidence. In their second argument, plaintiffs contend that the trial court erred in granting Dr. Averett's motion for directed verdict on the issue of punitive damages because the evidence of his falsification of medical records amply supported that claim. In their third argument, plaintiffs contend that the trial court erred in refusing to permit plaintiffs' counsel to read to the jury the entire stipulation reached by the parties with respect to the altered emergency room records.

The essence of plaintiffs' three arguments and related assignments of error is that Dr. Averett's alleged alteration of Mr. Paris' emergency room record constitutes gross negligence or wanton or wilful conduct which, if proven, would entitle them to punitive damages. Since they presented evidence tending to show that Dr. Averett altered the records, they contend that they are permitted under G.S. 1A-1, Rule 15(b) to amend their pleadings to encompass this evidence and allow for the recovery of punitive damages and to submit the issue to the jury. We are not persuaded by plaintiffs' arguments and find their assignments of error on this question to be without merit.

The established law in North Carolina regarding the recovery of punitive damages in tort actions is that "the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed." *Newton v. Insurance Co.*, 291 N.C. 105, 112, 229 S.E. 2d 297, 301 (1976). When the underlying action is grounded in negligence, punitive damages

may be recovered where the negligence is gross or wanton. "Conduct is wanton when in conscious and intentional disregard of or indifference to the rights and safety of others." *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E. 2d 393, 397 (1956). When the tort necessarily involves intentional wrongdoing, as in fraud, punitive damages are appropriate when the actionable conduct is accompanied by "some element of aggravation." *Newton, supra* at 112, 229 S.E. 2d at 301. Aggravated conduct has been variously defined but in the context of an intentional tort usually consists of insult, indignity, malice, oppression, or bad motive in addition to the tort. *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976); *Swinton v. Realty Co.*, 236 N.C. 723, 73 S.E. 2d 785 (1953); *Baker v. Winslow*, 184 N.C. 1, 113 S.E. 570 (1922). *See generally*, 5 N.C. Index 3d *Damages* Sec. 7 (1977 and Supp. 1984).

Whether the tort is negligent or intentional, a party's entitlement to punitive damages can only arise in connection with the tortious act; it may not constitute a separate cause of action. "If the complainant fails to plead or prove his cause of action, then he is not allowed an award of punitive damages because he must establish his cause of action as a prerequisite for a punitive damages award." *Oestreicher v. Stores, supra* at 134, 225 S.E. 2d at 808. *See also Clemmons v. Insurance Co.*, 274 N.C. 416, 163 S.E. 2d 761 (1968); *Gaskins v. Sidbury*, 227 N.C. 468, 42 S.E. 2d 513 (1947). In order to recover punitive damages, plaintiffs would have to allege and prove gross or wanton negligence or intentional misconduct in connection with Dr. Averett's alleged malpractice and some resulting injury.

[1] With these principles in mind, we return to plaintiffs' first argument: that the issue raised by the evidence of the altered document and tried by consent of the parties was "an additional act of negligence entitling plaintiffs to damages" and that the trial court should have allowed their motion under G.S. 1A-1, Rule 15(b), to amend their complaint accordingly. Under the facts of this case, this contention is without merit.

Plaintiff's complaint contains the following allegation:

> XIX. The conduct of the Defendant Averett under all circumstances in not personally attending and overseeing the diagnosis and treatment of Mr. Paris in the early morning hours of November 28, 1980, when he knew or should have

> known that Mr. Paris' condition was serious and grave and emergency treatment was immediately called for, amounted to a reckless and wanton disregard of and indifference to the rights and safety of Mr. Paris.

While this allegation mentions no particular instance of aggravated conduct, we believe that it is sufficient, under the rule of *Shugar v. Guill*, 304 N.C. 332, 283 S.E. 2d 507 (1981), and G.S. 1A-1, Rule 8(a)(1) to put Dr. Averett on notice of the punitive damages claim, to provide an understanding of the nature and basis of the claim, and to allow him to prepare his defense.

Plaintiff argues, however, that the issue purportedly raised by the pleadings and tried by the consent of the parties was "an act of malpractice" or "an additional act of negligence." As stated at trial and on appeal, this constitutes a separate cause of action, not just an additional issue. G.S. 1A-1, Rule 15(b) provides in part as follows:

> If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

While defendants were not prejudiced by the admission of evidence relating to plaintiffs' punitive damages claim, having been put on notice by the complaint, and could take remedial measures at trial, such as entering into a stipulation, to minimize the damage of any surprise, they were not prepared to defend against a separate cause of action based on the alleged alteration and clearly did not impliedly consent to the trial of that action. Allowing the amendment proffered by plaintiffs would have allowed plaintiffs to plead a new cause of action and would have severely prejudiced defendants. "Despite the broad remedial purposes of this provision, however, Rule 15(b) does not permit judgment by ambush." *Eudy v. Eudy*, 288 N.C. 71, 76, 215 S.E. 2d 782, 786 (1975) (partially overruled on other grounds in *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982)); *Fowler v. Johnson*, 18 N.C. App. 707, 198 S.E. 2d 4 (1973).

Since the issue purportedly raised by the evidence was not tried by the consent of the parties, it was not error for the court to refuse to amend the pleadings. Whether defendants waived their objection to the evidence is therefore immaterial. Moreover, as we understand plaintiffs' argument on appeal, the purpose of the proposed amendment was to allow plaintiffs to use the evidence of the altered record in support of their claim for punitive damages. From the record and transcript it appears that the documents were admitted subject to the stipulation and were used in exactly this fashion. We do not perceive how plaintiffs were harmed in their malpractice action by the court's refusal to allow the amendment.

[2] In their second argument, plaintiffs claim that the court erred in granting Dr. Averett's motion for directed verdict on the punitive damages issue. Plaintiffs argue that their evidence clearly permits the inference that Dr. Averett falsified the emergency room record and was clearly sufficient to allow the issue of punitive damages to be submitted to the jury. In support of this argument, plaintiffs cite the cases of *Henry v. Deen*, 310 N.C. 75, 310 S.E. 2d 326 (1983); *Hinson v. Dawson, supra*; and *Mazza v. Huffaker*, 61 N.C. App. 170, 300 S.E. 2d 833, *disc. rev. denied*, 309 N.C. 192, 305 S.E. 2d 734 (1983), *pet. for reconsideration denied*, --- N.C. ---, 313 S.E. 2d 160 (1984). According to plaintiffs' argument these cases stand for the proposition that alteration of medical records is an act of aggravated, intentional, wanton or grossly negligent conduct for which punitive damages are recoverable in a medical malpractice action. Plaintiffs contend that because the evidence of Dr. Averett's gross negligence was clearly sufficient to take the issue of punitive damages to the jury, the directed verdict should not have been allowed. We disagree.

Plaintiffs correctly point out that the evidence permits the inference that Dr. Averett altered the emergency room record of Mr. Paris' 27-28 November 1980 visit. It appears that this evidence constitutes the entire basis for plaintiffs' punitive damages claim; no other evidence has been called to our attention to support the claim. Plaintiffs also correctly note that our Supreme Court in *Henry v. Deen, supra*, held that a party could state a claim for damages in a medical malpractice action when the defendant physician had falsified patient records in an attempt to frustrate recovery by the party injured by his negligence. In

Henry v. Deen, which involved an appeal from a dismissal under G.S. 1A-1, Rule 12(b)(6), the plaintiffs' allegations were held to be sufficient to state a claim for relief thus allowing him the opportunity to prove them at trial and possibly be compensated for the resulting injury.

Here, however, we have already held that plaintiffs could not amend their complaint to include a claim based on the alleged document alteration. Their attempt in this argument to use the same evidence as the basis for their punitive damages claim must also fail because they neither allege nor attempt to prove that the document alteration aggravated the injury caused by the alleged malpractice. On the basis of similar reasoning, another panel of this Court held in *Azzolino v. Dingfelder*, 71 N.C. App. 289, 322 S.E. 2d 567 (1984), *disc. rev. allowed*, 313 N.C. 327, 327 S.E. 2d 887 (1985), also a medical malpractice action, that defendant physicians' attempt to hide their malpractice by "fabricating a trail of evidence" after the fact could not be the basis of a punitive damages claim where there was no evidence that their deception aggravated their tortious conduct.

Neither our holding here nor Judge Hill's opinion in *Azzolino* should be construed as any indication that defendants' alleged behavior was acceptable, that we condone the alleged acts or that conduct of the type alleged may never be the basis for a punitive damages award. Defendant's conduct, if plaintiffs' allegations are true, is reprehensible and evinces a moral deficiency and disregard for the rights of others that we regard as odious and repugnant. Even so, we are bound by the law and the Rules of Civil Procedure which require that in order to be the basis of a recovery, a claim must be properly pleaded and proved. Here, plaintiffs fell short of the mark.

Even if it was error for the trial court to refuse to submit the issue of punitive damages to the jury, this error could not possibly have harmed plaintiffs. As we noted above, punitive damages can only be awarded where the underlying cause of action has been proved and a basis for compensatory damages has been established. *Oestreicher v. Stores, Clemmons v. Insurance Co.* both *supra*. Since plaintiffs failed to establish their claim of malpractice, as discussed more fully *infra*, there was no tortious conduct to which their claim for punitive damages could attach.

[3] As to plaintiffs' third contention that it was error for the court to refuse to allow the entire stipulation to be read to the jury, defendant's argument is directly on point. Stipulations are looked upon favorably by the courts and their use is encouraged. *Rural Plumbing and Heating v. H. C. Jones*, 268 N.C. 23, 149 S.E. 2d 625 (1966). Stipulations remove the necessity for proving certain facts. *State v. Watson*, 303 N.C. 533, 279 S.E. 2d 580 (1981). Paragraphs 1, 2 and 5 of the stipulation are stipulations of fact that resolve evidentiary disputes relating to certain issues involved in the trial. As such they were properly read to the jury. Paragraphs 3 and 4, on the other hand, were agreements between the parties as to what counsel for the defense would or would not argue to the jury; they resolve no evidentiary conflicts and remove nothing from the realm of controversy. We can see no purpose relevant to the trial of this case that would be served by informing the jury of arguments that counsel agreed *not* to make. Those paragraphs were not relevant to the factual issues before the jury. It was not error to refuse to allow them to be read. This contention is without merit.

II

Plaintiffs' fourth contention is that the trial court erred in denying their motion for a new trial on the grounds that the verdict was contrary to the greater weight of the evidence. Their fifth contention is that the trial court erred in allowing a directed verdict for defendant Hospital. Together, these contentions raise questions regarding the sufficiency of the evidence. Plaintiffs' remaining contentions raise questions regarding specific evidentiary rulings by the trial court. Before addressing the general questions, we consider plaintiffs' specific contentions.

a.

[4] Plaintiffs contend in their sixth argument that the trial court erred in allowing Dr. Averett to testify as an expert when defendants had not identified him as an expert witness in their response to plaintiffs' interrogatories. Citing the recent cases of *Green v. Maness*, 69 N.C. App. 292, 316 S.E. 2d 917, *rev. denied*, 312 N.C. 622, 323 S.E. 2d 922 (1984) and *Willoughby v. Wilkins*, 65 N.C. App. 626, 310 S.E. 2d 90 (1983), *disc. rev. denied*, 310 N.C. 631, 315 S.E. 2d 697 (1984), plaintiffs contend that defendant's tactic was an attempt to subvert the rules of discovery and to take

unfair advantage of plaintiffs. In *Willoughby*, a medical malpractice action, counsel for defendants filed supplemental responses to discovery identifying their expert witnesses so close to the date of trial that plaintiffs were unable to depose them fully or to cross examine them effectively. There the discovery requests had been pending for more than a year and plaintiffs had filed several motions to compel discovery. The motions to compel were not acted on until after the trial court had peremptorily set the case for trial. We held that plaintiffs had been deprived of their right to effective cross examination and awarded them a new trial.

In *Green*, defendant produced a new expert witness with a new defense theory "virtually on the eve of trial." The court denied plaintiffs' motion for a continuance. Relying on *Willoughby*, the *Green* court held that plaintiffs were entitled to a new trial because the court's refusal to allow the continuance had unfairly deprived plaintiffs of the opportunity to conduct effective cross examination.

Plaintiffs in this case claim that the prejudice resulting from the "surprise" use of Dr. Averett as an expert is that defendants were allowed to place before the jury the testimony of an expert who, because he was a party to the action, would be listened to more carefully and given more weight by them. We disagree.

Though Dr. Averett was not listed as an *expert* witness, he was a party and was listed as a potential witness. We hold that it was not error for the trial court to let him testify as an expert witness. This case differs from *Willoughby* and *Green* in several respects. We note first that plaintiffs here did not object to Dr. Averett's testimony on the grounds of surprise but on the grounds that he was not qualified as an expert. Having objected on this specific ground, they are precluded from arguing a different ground on appeal. *State v. Sellars*, 52 N.C. App. 380, 278 S.E. 2d 907, *disc. rev. denied and app. dismissed*, 304 N.C. 200, 285 S.E. 2d 108 (1981). *See generally*, Brandis, N.C. Evidence, Sec. 27 (1982 and Supp. 1983). Secondly, we note that plaintiffs here, as contrasted to *Green*, did not move for a continuance in order to prepare for Dr. Averett's expert testimony. Third, Dr. Averett was listed by both parties as a witness and was a named party defendant. Plaintiffs knew that he was a physician in general practice and therefore more qualified than the jury to testify as

to issues of medical causation. Plaintiffs certainly anticipated that Dr. Averett would testify and should have anticipated that he could be qualified to testify as an expert. Fourth, the substance of Dr. Averett's testimony—that the delay in diagnosis did not cause the loss of Mr. Paris' leg—was later put before the jury by the testimony of Dr. Shull. Further, as contrasted with *Green*, by using Dr. Averett as an expert witness, defendants were not attempting to introduce a new theory into the trial.

While Dr. Averett should have been listed as an expert, the fact that he testified as an expert for defendants could not have unfairly surprised these plaintiffs. Moreover, the prejudice allegedly resulting from this "surprise" does not rise to the level encountered in *Willoughby* and *Green*. Plaintiffs' contention is without merit.

b.

[5] In their seventh argument, plaintiffs contend that the trial court erred in allowing Doctors Averett, Shull and Johnson to testify as to the standard of care for nurses in hospitals. The substance of their testimony was that it would not have been in conformity with standards of nursing practice for a nurse to disobey a physician's treatment instructions and that the treatment afforded Mr. Paris in the emergency room was in conformity with professional nursing standards. In their assignments of error, plaintiffs contend that the doctors were not qualified to testify as experts on the standard of care for nurses. In their brief, they argue that the testimony should have been excluded because it directly contradicts the judicially established standard that permits a nurse to disobey instructions that are obviously negligent. We disagree.

Physicians are clearly acceptable experts with regard to the standard of care for nurses. *Haney v. Alexander*, 71 N.C. App. 731, 323 S.E. 2d 430 (1984), *cert. denied*, 313 N.C. 329, 327 S.E. 2d 889 (1985). While a nurse may disobey the instructions of a physician where those instructions are obviously wrong and will result in harm to the patient, *Byrd v. Marion General Hospital*, 202 N.C. 337, 162 S.E. 738 (1932); *Bost v. Riley*, 44 N.C. App. 638, 262 S.E. 2d 391 (1979), *disc. rev. denied*, 300 N.C. 194, 269 S.E. 2d 621 (1980), the duty to disobey does not extend to situations where there is a difference of medical opinion. Plaintiffs' argument on

this point assumes that there was obvious negligence on the part of Kreitz and Dr. Averett in diagnosing Mr. Paris' problem, that the treatment prescribed by them resulted in his injury and that its potential for harm was obvious. In our opinion, none of plaintiffs' assumptions on these key issues is supported by the evidence. While the negligence of Kreitz and Averett may be a question of fact, it is clear that the negligence was not so obvious as to require Nurse Garrett to disobey an instruction or refuse to administer a treatment. Nurse Garrett's observations of Mr. Paris agreed with those of Kreitz. Any disagreement or contrary recommendation she may have had as to the treatment prescribed would have necessarily been premised on a separate diagnosis, which she was not qualified to render. *Byrd v. Marion General Hospital, supra.* This assignment of error is overruled.

c.

[6] In their eighth argument, plaintiffs contend that it was error to allow defendants to cross examine their expert witness, Dr. Selwyn Rose, regarding his role as an expert witness in two earlier unrelated cases. Dr. Rose had testified as an expert in two well-publicized murder cases and, over objection, was cross examined about his role in these cases. On appeal, plaintiffs contend that defendants were allowed to place before the jury material of questionable relevancy that had the effect of inflaming passion and prejudice against Dr. Rose and his testimony. As plaintiffs concede, counsel must be given a wide latitude on cross examination to test the qualifications of an opposing party's expert. Plaintiffs contend defendants' questioning of Dr. Rose exceeded permissible bounds. We disagree.

We note first that Dr. Rose's testimony was limited to the issue of damages. Since the jury found no negligence, they never reached the issue of damages. Plaintiffs' counsel's objection came after several questions in this line had been asked and answered and though the objection was overruled, the question objected to was never answered. Accordingly, there was no evidence admitted to which plaintiffs made a timely objection. Further, our reading of the transcript fails to disclose how plaintiffs were prejudiced by defendants' questions or by Dr. Rose's answer. Without a showing of prejudice, a finding of error is not warranted. *Collins v. Lamb*, 215 N.C. 719, 2 S.E. 2d 863 (1939). *See generally*, Brandis, *supra*, Section 9. Plaintiffs' contention is without merit.

d.

[7] In their ninth argument, plaintiffs contend that the trial court erred when it excluded testimony regarding statements allegedly made by Dr. Shull during his treatment of Mr. Paris. Plaintiffs' witnesses were asked what Dr. Shull had said regarding the delay in treating Mr. Paris. Defendants' objections were sustained. There was no error and no prejudice by these objections being sustained.

Later in the trial, on re-re-redirect examination, Pat Simmons testified over objection by defendants that Dr. Shull had said to her, "I'm not sure that I can save your father's leg due to the lapse of time of the onset and the time I get him into surgery." The statement that plaintiffs argue had been erroneously excluded came before the jury in Pat Simmons' testimony. This assignment of error is overruled. *Collins v. Lamb, supra*; Brandis, *supra*, Section 9.

e.

[8] During cross examination of Dr. Averett, he was asked what he would have done if he had seen Mr. Paris in the emergency room and Mr. Paris had been in the same condition as he was in Dr. Averett's office the next morning. The trial court sustained defendants' objection to this question and plaintiffs contend it was error to do so. They argue that cross examination is properly limited by considerations of relevance and competence and that this question was not objectionable under this liberal standard. Plaintiffs' argument here is not persuasive.

Counsel is permitted a liberal cross examination but his questions must nevertheless be based on evidence that is before the court and not on mere conjecture. *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980); Brandis, *supra*, Section 35. Here, all the evidence tends to show that Mr. Paris' condition was worse when Doctor Averett saw him in the office than it had been in the emergency room. There is no evidence to the contrary. Having no basis in the evidence of record, Dr. Averett's answer to the question would have been irrelevant. Plaintiffs' assignment of error is without merit.

f.

[9] Plaintiffs next contend that it was error to exclude the testimony of their expert, Dr. Neville, as to the standard of care for physician's assistants. Dr. Neville was asked whether the treatment afforded Mr. Paris in the emergency room on 27 and 28 November 1980 by defendants Kreitz and Dr. Averett was in accordance with the standards of practice among doctors with similar training and experience to Dr. Averett in communities like High Point. Defendants objected and the court sustained the objections to the portion of the question pertaining to physicians' assistants. Plaintiffs' contention that this was error is without merit.

Where there is an offer of expert testimony as to an applicable standard of professional care for physicians' assistants, the witness must first be shown to have a familiarity with the standard of practice (1) among physicians' assistants with similar training and experience to the person in question, (2) who are situated in the same or similar communities, (3) at the time the alleged malpractice occurred. *See Haney v. Alexander, supra.*

While Dr. Neville had been duly qualified as an expert vascular surgeon of national repute and had testified in that capacity, no attempt was made to show that he was qualified to testify as to the standard of care for physicians' assistants. Plaintiffs' argument that physicians' assistants are subject to the same standards of care as the physicians for whom they work is without merit. G.S. 90-21.12 provides that a "health care provider" is subject to the "standards of practice among members of the *same health care profession with similar training and experience* situated in the same or similar communities. . . ." [Emphasis added.] Clearly Kreitz, a physician's assistant, was not subject to the same standard of practice as Dr. Averett, a medical doctor. *See Wall v. Stout*, 310 N.C. 184, 311 S.E. 2d 571 (1984) (regarding elevated standards of practice for medical specialists).

g.

[10] In their final assignment of error, plaintiffs contend that the trial court erred prejudicially in sustaining defendants' objection to plaintiffs' direct examination of Dr. Neville on whether in his opinion, based on the applicable standards of practice, Dr. Aver-

ett exercised reasonable care and diligence in his diagnosis and treatment of Mr. Paris on 27 and 28 November 1980. We disagree.

Defendants objected to each question in a series of similar questions. Defendants' objection to the first question was sustained after Dr. Neville had answered, "He did not." Defendants' objection to a second similar question was initially overruled and Neville answered, "He did not." After a bench conference, defendants' second objection was sustained but Dr. Neville's answers were never stricken from the record. Notwithstanding that defendants' objections were sustained twice, Dr. Neville's answer remained before the jury. Moreover, several times in response to other questions, Dr. Neville expressed his opinion (1) that Dr. Averett did not meet the applicable standard of care; (2) that Dr. Averett's initial diagnosis of peripheral vascular insufficiency was wrong in that the symptoms indicated an occlusion; (3) that Dr. Averett should have admitted Mr. Paris to the hospital and consulted a vascular surgeon immediately; and (4) that "the initial problem with the delay in diagnosis was the proximate cause of [Mr. Paris'] amputation."

Based on the testimony of Dr. Neville that was before the jury, we perceive no prejudice to plaintiffs. This assignment of error is without merit.

III

a.

[11] In their fifth argument, plaintiffs contend it was error for the trial court to grant a directed verdict for defendant Hospital. The test for whether a directed verdict is proper is well established. The purpose of a motion for a directed verdict is to test the legal sufficiency of the evidence to support a verdict for the plaintiff and to submit the contested issue to a jury. *E.g., Manganello v. Permastone*, 291 N.C. 666, 231 S.E. 2d 678 (1977); *Wallace v. Evans*, 60 N.C. App. 145, 298 S.E. 2d 193 (1982). Where a motion for directed verdict is made at the close of the evidence, the court must consider the evidence in the light most favorable to the party opposing the motion and give that party the benefit of every reasonable inference. *E.g., Cook v. Export Leaf Tobacco Co.*, 50 N.C. App. 89, 272 S.E. 2d 883 (1980), *disc. rev. denied*, 302 N.C. 296, 279 S.E. 2d 350 (1981). Any contradictions, conflicts or

inconsistencies in the evidence must be resolved in favor of the opposing party. *Hart v. Warren*, 46 N.C. App. 672, 266 S.E. 2d 53, *disc. rev. denied*, 301 N.C. 89, --- S.E. 2d --- (1980). The court should deny the motion if there is more than a scintilla of evidence to support the plaintiffs' *prima facie* case. *Wallace v. Evans, supra. See generally*, 11 N.C. Index 3d, *Rules of Civil Procedure*, Section 50 (1978 and Supp. 1984).

In this case, plaintiffs argue that the evidence was sufficient to establish defendant Hospital's negligence on two theories and that the motion for directed verdict should have been denied. Under the theory of *respondeat superior*, plaintiffs argue that the Hospital is liable for the negligence of its employees. *Byrd v. Marion General Hospital, supra.* Under the theory of corporate negligence, plaintiffs argue that the Hospital violated its direct duty to them to use reasonable care in the treatment of Mr. Paris. *Bost v. Riley, supra.*

With respect to the theory of *respondeat superior*, plaintiffs argue that the treatment of Mr. Paris in the emergency room on 27 and 28 November 1980—the diagnosis and prescription of Defendants Kreitz and Averett—was obviously negligent and that Nurse Garrett was under an obligation either to overrule the diagnosis or to order an alternative treatment. We disagree.

Though plaintiffs in their brief repeatedly characterize the treatment of Mr. Paris by Kreitz and Dr. Averett as "obviously negligent," the record reveals no evidentiary support for this assertion. As noted earlier, plaintiffs' argument assumes that Nurse Garrett was in a position to diagnose Mr. Paris. Plaintiffs correctly concede that nurses are not responsible for the diagnosis or treatment of patients. *Byrd v. Marion General Hospital, supra.* Plaintiffs' assertions that Mr. Paris was not afforded proper treatment by Hospital employees are supported only by evidence that he did not get the treatment that he and his daughter and son-in-law thought he should have. There is no showing of how the handling of Mr. Paris' case by the physician and his assistant was so obviously negligent that Nurse Garrett was obliged to intervene and order a different treatment. Whether Kreitz or Averett were negligent at all was, at the time of the motion, not an established fact. What evidence of negligence there was, in our opinion, was not sufficient to warrant submit-

ting the question of the Hospital's negligence to the jury on the theory of *respondeat superior.*

Similarly, we do not think that the evidence would have supported a jury finding of negligence on the theory of corporate liability. Applying *Bost v. Riley, supra,* to the present case, plaintiffs claim that the Hospital employees "may not close their eyes to the commission of obvious negligence by a physician or a physician's assistant who has been granted the privilege of using the emergency room." This argument is no different from plaintiffs' argument under the *respondeat superior* theory and fails for the same reasons.

Plaintiffs contend in addition that the Hospital's negligence existed also in its apparent lack of regard for Mr. Paris' obvious pain and his daughter's request that he be examined by the emergency room staff physician. While there is evidence that Mr. Paris was experiencing some pain and that Mrs. Simmons requested that he be seen by the staff physician, we can find no evidence that the Hospital or its employees violated any standard of care owed to Mr. Paris. There is no evidence of a standard by which the Hospital's handling of the case could be judged by a jury; no indication from persons qualified to testify as to what should have been done under the circumstances; and no testimony that Mr. Paris' observable manifestations of pain were so severe as to cause a reasonable hospital employee to act any differently. The evidence clearly shows that Mr. Paris was not ignored. He was observed and examined upon arrival by Nurse Garrett and her assistant who determined that his condition was not urgent enough to warrant being seen by the on-duty physician. Further, the Hospital employees were aware that either Dr. Averett or Michael Kreitz was on the way. There is no evidence that the Hospital employees did anything other than what they should have done under the circumstances. Since the evidence fails to establish that the Hospital was negligent, its motion for directed verdict was properly allowed. We need not consider whether the Hospital's alleged negligence was the proximate cause of plaintiffs' injury. Plaintiffs' contention is without merit.

b.

[12] Finally, plaintiffs contend that the trial court erred in denying their motion for a new trial. We disagree.

Under North Carolina law, a motion for a new trial is addressed to the sound discretion of the trial judge who may order a new trial whenever, in his opinion, the verdict rendered is contrary to the weight of the evidence. *Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977); *Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 176 S.E. 2d 851 (1970). "[A]n appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial 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).

While there is evidence from which the jury could have concluded that Kreitz or Dr. Averett or both were negligent in their treatment of Mr. Paris, there is also evidence tending to show that they were not negligent. Which evidence to believe was properly the province of the jury. We find no abuse of discretion in the trial court's denial of plaintiffs' motion for a new trial.

For all of the foregoing reasons, we hold that plaintiffs were afforded a fair trial, free from prejudicial error.

No error.

Judges WHICHARD and JOHNSON concur.

BRADFORD P. DAILEY v. INTEGON GENERAL INSURANCE CORPORATION, A NORTH CAROLINA CORPORATION

No. 843SC283

(Filed 2 July 1985)

1. **Damages § 11.1— refusal to settle insurance claim—punitive damages**

Under some circumstances N.C. law permits the recovery of punitive damages on claims for a tortious, bad faith refusal to settle under an insurance policy even though the refusal to settle is also a breach of contract.

2. **Damages § 11.1— refusal to settle fire insurance claim—aggravated conduct—punitive damages—sufficient evidence**

Plaintiff's evidence was sufficient to show a tortious refusal by defendant insurer in bad faith to settle plaintiff's fire insurance claim with accompanying aggravation so as to support an award of punitive damages where it tended to

show: defendant insurer waited two and one-half months after the fire that substantially destroyed plaintiff's home and more than three weeks after plaintiff's first proof of loss form was received to take steps to investigate plaintiff; although the investigator advised defendant shortly thereafter that there was no defense to the claim, defendant waited another two months before having an unlicensed builder to examine plaintiff's house; it was another month before defendant offered to settle the claim based on an estimate prepared by the unlicensed builder which was grossly inadequate when compared to five estimates furnished by plaintiff from a professional construction engineer and four licensed contractors; and defendant's investigating agent, with no basis whatever, told plaintiff's friends and neighbors that defendant had determined that plaintiff had his house burned for insurance purposes and offered money to two persons if they would help establish that plaintiff had his house burned.

3. Trial § 40.1— form of issues—failure to object

Defendant cannot complain on appeal about the form of the punitive damages issues where defendant made no objection at trial to the form of the issues but stated to the court that it had no objection to their form.

4. Appeal and Error § 31.1— failure to object to instructions

Where defendant failed to object to the court's instructions on punitive damages, it is conclusively presumed that the instructions conformed to the issues submitted and were without legal error. App. Rule 10(b)(2).

5. Principal and Agent § 4.2— proof of agency—out-of-court statements by alleged agent

An alleged agent's out-of-court statements to the effect that he was working for defendant insurer while investigating plaintiff could properly be considered on the question of agency when (1) the fact of agency appeared from other evidence, and (2) the statements were within the agent's actual or apparent authority.

6. Insurance § 136; Torts § 1; Trespass § 2— intentional infliction of emotional distress—insufficient evidence—expenses of insurance claim—failure to state claim

Plaintiff's evidence was insufficient to support his claim for intentional infliction of emotional distress by defendant insurer in refusing to settle plaintiff's fire insurance claim. Furthermore, plaintiff's allegations concerning expenses he incurred in presenting his fire insurance claim to defendant and pursuing this lawsuit did not state a claim for relief against defendant.

7. Insurance § 132; Interest § 2; Judgments § 55— fire insurance recovery—prejudgment interest

Plaintiff was properly permitted to recover prejudgment interest on the amount recovered under a fire insurance contract even though the exact amount due was not established until trial. G.S. 24-5.

8. Interest § 2; Judgments § 55— interest in contract case—issue before jury not required

G.S. 24-5 does not require that an issue be submitted to the jury before interest may be allowed in contract cases. The requirement of G.S. 24-5 that

the jury "distinguish the principal from the sum allowed as interest" pertains only to those rare situations where evidence as to both principal and interest is submitted to the jury for its consideration.

APPEAL by plaintiff and defendant from *Winberry, Judge.* Order entered 19 October 1983 in Superior Court, CRAVEN County. Heard in the Court of Appeals 16 November 1984.

In this civil action plaintiff seeks damages for defendant's alleged wrongs in failing to settle or pay plaintiff's claim under an insurance policy insuring plaintiff's house and personal property against loss by fire. The complaint sets forth three claims for relief, as follows: The *first claim*, for breach of contract in failing to pay the losses covered by the policy, seeks $157,500 for the fire damage done to the house and contents and $500 a month in living expenses for as long as the house remained uninhabitable. The *second claim*, based on defendant's alleged bad faith failure to settle its policy obligations, is for compensatory damages in the amount of $30,000 because of expenses allegedly incurred and time lost by plaintiff in pursuing the claim and this lawsuit; and for the embarrassment, humiliation, and mental distress that defendant's wrongs allegedly caused. The *third claim*, also based on defendant's bad faith refusal to settle the insurance claim, is for punitive damages in the amount of $200,000 and contains allegations that defendant refused to acknowledge plaintiff's damage estimates, to assign qualified agents to estimate the damage, and through its agent offered money to witnesses that would discredit plaintiff, and did other things to delay and inconvenience him. It was also alleged that Integon's bad faith failure to settle was wilful, wanton, malicious and intentional; for the wrongful purpose of pressuring plaintiff into accepting an unfair settlement; was a breach of its implied covenant of good faith and fair dealing and an abuse of its superior power under the policy, amounting to outrageous conduct. The defendant moved to dismiss all three claims pursuant to the provisions of Rule 12(b)(6) of the N.C. Rules of Civil Procedure; and upon the motion being heard Judge Rouse dismissed plaintiff's *second* and *third claims*, but permitted plaintiff's *first claim* to stand. On plaintiff's appeal to this Court it was ruled that plaintiff's *second* and *third claims* stated justiciable claims for relief and the order of dismissal was reversed. *Dailey v. Integon General Insurance Corp.*, 57 N.C. App. 346, 291 S.E. 2d 331 (1982).

When the case was finally tried, at the close of plaintiff's evidence the court directed a verdict against plaintiff on his *second claim*, but permitted the other claims to go to the jury, which rendered verdict for the plaintiff as follows: On the *first claim*, the plaintiff was awarded $105,000, the policy limits, for fire damage done to the house, $37,000 for fire damage done to the contents, and $15,000 for living expenses during the preceding thirty months that the premises had been uninhabitable. On the *third claim* for punitive damages, after finding that adjuster William T. Charnock was defendant's agent while investigating plaintiff's character, activities, and background in the New Bern area, the jury awarded plaintiff $20,000 for his wrongful conduct in maliciously and untruthfully notifying various neighbors and acquaintances of plaintiff that Integon had determined that plaintiff burned his house or caused it to be burned for insurance purposes; and awarded plaintiff $100,000 for defendant's wrongful failure to settle the claim in good faith. After judgment on the verdict was entered for plaintiff in the amount of $277,000, together with costs and prejudgment interest on the property damage award, defendant timely moved under Rule 50(b) of the N.C. Rules of Civil Procedure for judgment notwithstanding the verdict, and in the alternative for a new trial and for amendment of the judgment in various respects. The motion, heard 5 October 1983, was taken under advisement and on 19 October 1983 the court entered judgment notwithstanding the verdict for the defendant on both issues for punitive damages. In doing so the court ruled that though the allegations in the complaint were supported by evidence, the law of North Carolina does not allow punitive damages in a case based on breach of contract and it was error to submit the issues in the first place. Defendant's other motions were denied. Plaintiff appealed from the latter judgment, and defendant appealed from the denial of its other post-trial motions, but the only assignment of error that defendant has brought forward relates to the award of prejudgment interest on the property damage award of $142,000. Thus the validity of the $157,000 recovery under the policy is not before us. Defendant did bring forward several cross-assignments of error, however, by which it is maintained that various alternative grounds exist for upholding the judgment setting aside the verdict for punitive damages. The evidence relating to the many questions raised by the appeals and cross-assignments, viewed in its most favorable light for the plaintiff, tends to show the following:

In July of 1979 plaintiff and his wife moved into plaintiff's newly constructed, three level house situated in the River Bend community near New Bern. The property was insured against fire loss by an Integon homeowner's policy with limits of $100,000 on the house, $50,000 on the contents, and $21,000 for the Daileys' living expenses, at the rate of $500 a month upon the house being rendered uninhabitable. In June of 1980, when the policy came up for renewal, an Integon agent suggested that plaintiff increase his coverage by 5% because of inflation—to $105,000 for the house and $52,500 for the contents—and this was done. On 25 July 1980 while plaintiff and his wife were vacationing in Florida the house was rendered uninhabitable and its contents severely damaged by fire. An investigation by the Craven County Fire Marshal indicated that the fire was deliberately set by some unknown person, but the investigation eliminated plaintiff as a suspect. In early August Integon sent plaintiff a letter stating that a proof of loss form was enclosed, but the enclosure was a waiver of rights form, which plaintiff sent back, and it was about 27 August before Integon mailed the proof of loss form. With the aid of Integon's local agent plaintiff worked up the form and mailed it to Integon on 18 September 1980, but a few days later it was returned to plaintiff with the notation "rejected" across the top. A second proof of loss, prepared with the aid of defendant's agent, was mailed to defendant 13 October 1980, but it, too, was returned with a "rejected" notation on it. Some weeks later plaintiff mailed a third proof of loss to defendant, which was neither returned nor acted on for some weeks.

At the suggestion of one of Integon's adjusters, Phil Ellis, plaintiff obtained and submitted five estimates as to the cost of repairing the fire damage to his house, and plaintiff's wife prepared a list of the personal items and furnishings that were destroyed or damaged by the fire, along with the cost and age of each. Of the five estimates obtained by Dr. Dailey, one was by a professional construction engineer and the other four were by licensed contractors, each of whom had much experience building houses in Craven County. All of the estimators were of the opinion that the interior of the house had been rendered useless and that the second and third floors of the house, at least, should be demolished and rebuilt, and some of them were of the opinion that the entire structure to its foundation should be razed and re-

built. Each estimator was also of the opinion that the cost of accomplishing the needed repairs would exceed the policy limits of $105,000 and testified for plaintiff at trial. The one estimate Integon obtained was by a carpenter from Goldsboro, not licensed as a general contractor, who together with his son conducted a house building and repair business out of his home. He testified that he could have repaired the house "board by board" for $48,286.63 without tearing any portion of it down; and would have signed an agreement to repair the house for that price and would have acted as foreman while Integon served as the contractor, which he could not do since he had no contractor's license. In eventually submitting a settlement offer to plaintiff based on this estimate Integon did not know, so its claims examiner testified, that the estimator was not a licensed general contractor. Mrs. Dailey, with the help of local merchants who sold them some of the furnishings, clothing, and other items damaged or destroyed by the fire, estimated that it would cost $49,234.32 to replace the lost or damaged items and that their actual cash value when the fire occurred was $39,724.37. Integon's adjuster, Ellis, determined from an industry depreciation chart that the contents of the house had a value of only $23,487.36. While Ellis did not question the accuracy of Mrs. Dailey's list he depreciated the items substantially more than she did contending, among other things, that shoes over a year old had no value at all. On 26 January 1981, based largely on the unlicensed builder's estimate as to the house damage and Ellis' estimate of the value of the destroyed contents, Integon offered to settle Dr. Dailey's entire claim for $69,607.85.

Some weeks after the fire and before contacting the Craven County Fire Marshal Integon, through its chief claims examiner, engaged William T. Charnock of INS Investigations to determine whether Dr. Dailey was involved in the fire; and he instructed Charnock not to conduct a fire scene investigation but to conduct a background personal investigation of Dr. Dailey in Craven County. Charnock spent October 13, 14 and 15, 1980 in the New Bern area, during which time he interrogated Dr. Dailey, sixteen of the Daileys' neighbors or acquaintances, and the Craven County Fire Marshal. Charnock later sent a written report of his investigation to Integon and his bill for services rendered and expenses was paid in due course. Charnock asked one of the persons interrogated, Stephen Dentico, a number of questions, including: Whether

he knew that they had decided that the fire was an arson? If he thought that somebody had been hired to burn the house? If he had anything to do with the house being burned? If he had any knowledge of Dr. Dailey hiring anybody to burn the house? Dentico answered all these questions "no" and according to his testimony Charnock then said he had "determined this was a contract burning of the house and that it was done for insurance purposes"; and that he "knew that the house had been burned . . . for insurance purposes," and then offered Dentico a $10,000 fee and immunity from prosecution if he would sign a statement and testify that he was hired by Dr. Dailey to set fire to the house. Within a few days after Charnock's investigation started, Integon's chief claims examiner advised him that Dentico and another New Bern resident named Hinkle had accused him of offering each of them a $10,000 bribe if they would help establish that plaintiff had his house burned. Another neighbor of Dr. Dailey, Judy Burnette, testified that Charnock asked her if she knew of any reasons why he would want his house burned. The Craven County Fire Marshal, Henry P. Sermons, testified that Charnock told him "he had stirred up a lot of hate and discontent out there" and that he had offered Dentico $10,000 for information about Dr. Dailey's house fire. When Charnock took the stand he denied offering Dentico or Hinkle anything and said he only told Dentico that there was a $10,000 reward for catching arsonists and that if he had any involvement with the fire he should report to the fire marshal, who would speak to the prosecutor in his behalf.

Sumrell, Sugg & Carmichael, by Fred M. Carmichael and Rudolph A. Ashton, III, for plaintiff appellant/appellee.

Dunn & Dunn, by Raymond E. Dunn, for defendant appellee/appellant.

PHILLIPS, Judge.

Many questions, most of which are duplicating, overlapping, or related, are raised by the two appeals and defendant's numerous cross-assignments of error. The determination of these questions will be facilitated and this opinion greatly shortened by discussing the questions to the extent necessary, and some require no discussion, in connection with the subject that they relate to.

I

The Award of Punitive Damages for Defendant's Bad Faith Refusal to Settle Plaintiff's Contract Claim and for the Malicious Acts of its Agent Charnock in Furtherance Thereof

The defendant's liability to plaintiff under the policy in the amount of $157,000 has been set at rest. The primary question raised by plaintiff's appeal is whether the verdict for punitive damages was erroneously set aside. Stated a different way, are punitive damages recoverable in this state where the basic, underlying claim is for breach of contract?

a.

[1] The general rule in North Carolina is that punitive or exemplary damages are not recoverable for a mere breach of contract, unless the contract is to marry. *King v. Insurance Company of North America*, 273 N.C. 396, 159 S.E. 2d 891 (1968). But nearly ten years ago our Supreme Court, in a plurality opinion by Justice Copeland, recognized that punitive damages might be appropriate in breach of contract actions that "smack of tort because of the fraud and deceit involved" or those actions "with substantial tort overtones emanating from the fraud and deceit." *Oestreicher v. American National Stores*, 290 N.C. 118, 136, 225 S.E. 2d 797, 809 (1976). In a later opinion by Justice Exum, citing *Oestreicher*, the exception to the rule was stated as follows: "Nevertheless, when there is an identifiable tort even though the tort also constitutes, or accompanies, a breach of contract, the tort may itself give rise to a claim for punitive damages." *Newton v. Standard Fire Insurance Co.*, 291 N.C. 105, 111, 229 S.E. 2d 297, 301 (1976). But the Court added the following qualification: "Even when sufficient facts are alleged to make out an identifiable tort, however, the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed." *Id.* at 112, 229 S.E. 2d at 301. In the sense used here, aggravated conduct has long been defined to include "fraud, malice, gross negligence, insult, . . . wilfully, or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights." *Baker v. Winslow*, 184 N.C. 1, 5, 113 S.E. 570, 572 (1922). During the nine years since *Newton*, our courts have relied on this exception at least three times in holding that a party to an action for breach of contract

had also stated a claim for punitive damages. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979); *Payne v. N.C. Farm Bureau Mutual Insurance Co.*, 67 N.C. App. 692, 313 S.E. 2d 912 (1984); and *Dailey v. Integon*, 57 N.C. App. 346, 291 S.E. 2d 331 (1982), the earlier appeal in this case. In each of these cases, it was held that the trial court erroneously dismissed the plaintiff's claim for punitive damages under Rule 12(b)(6) of the N.C. Rules of Civil Procedure. In *Payne v. N.C. Farm Bureau Mutual Insurance Co.*, the plea for punitive damages was also based on an insurance company's bad faith refusal to settle a policy claim and in reversing the trial court's dismissal on the pleadings, the decision in *Dailey* was relied upon. These decisions clearly support the proposition that under some circumstances our law permits the recovery of punitive damages on claims for a tortious, bad faith refusal to settle under an insurance policy, even though, as in this instance, the refusal to settle is also a breach of contract. Thus, the judgment to the contrary by the trial court was error.

b.

[2] Because this is an appeal from a judgment *non obstante veredicto*, instead of a dismissal under Rule 12(b)(6), the main question presented is somewhat different from the one adjudicated in the other cases above referred to. The question raised by a judgment *non obstante veredicto* is essentially the same as that raised by a directed verdict. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). In resolving the question—whether the evidence is sufficient to support the verdict—the evidence, of course, must be viewed in the light most favorable to the party who won the verdict. *Potts v. Burnette*, 301 N.C. 663, 273 S.E. 2d 285 (1981). In contending that the verdict was erroneously upset, plaintiff strongly relies upon this Court's earlier holding that his complaint sufficiently alleged a tortious act with accompanying aggravation to support an award of punitive damages. In our opinion this position is well taken. The evidence produced at trial is clearly sufficient, we think, to support the jury's finding that with accompanying aggravation of a very high degree, indeed, defendant tortiously refused in bad faith to settle plaintiff's claim. Defendant's argument that plaintiff failed to prove the existence of a "separate identifiable tort" is based on a misreading of the law. None of the cases discussed above require proof of a *separate* identifiable tort unrelated to the contract, as defendant

seemingly maintains. On the contrary our Supreme Court has stated that the tort need only be "identifiable" and that punitive damages may be recoverable "even though the tort also *constitutes . . . a breach of contract.*" (Emphasis added.) *Newton v. Standard Fire Insurance Co., supra* at 111, 229 S.E. 2d at 301. In this case, according to the evidence, the identifiable tort alleged—defendant's bad faith refusal to settle—not only accompanied the breach of contract, it also was a breach of contract that was accomplished or accompanied by some element of aggravation. *Id.* at 112, 229 S.E. 2d at 301; *Dailey v. Integon, supra* at 350, 291 S.E. 2d at 333. That Integon breached the contract has been set at rest and was established by evidence mainly to the effect that its failure to pay plaintiff's loss was not excused by any provision in the policy. That this breach was accomplished in bad faith is indicated by the great volume of evidence which tends to show that defendant's refusal to pay or settle plaintiff's claim on any reasonable basis was not based on honest disagreement or innocent mistake. *Newton v. Standard Fire Insurance Co., Payne v. N.C. Farm Bureau Mutual Insurance Co.*, and *Dailey v. Integon*, all *supra.* And the record is replete with evidence of defendant's malice, oppression, wilfulness and reckless indifference to consequences. *Newton v. Standard Fire Insurance Co., supra* at 112, 229 S.E. 2d at 301.

The evidence indicates that though the fire occurred on 25 July 1980, and it was immediately obvious that defendant's potential liability under the policy was substantial, it was not until 10 October 1980, two and a half months after the fire and more than three weeks after plaintiff's first proof of loss was received—the proof of loss itself having been delayed for some weeks by defendant's failure to send the form in its first mailing—that defendant took steps to have plaintiff investigated, and that though Charnock advised defendant shortly after 15 October that the investigation was fruitless and there was no defense to the claim, it was not until 17 December 1980, two months later and nearly five months after the fire, that defendant had an unlicensed builder, whose lack of qualifications to do the work were not checked, to examine the house, and it was a month after that before defendant offered to settle the claim based on that builder's estimate, which was grossly inadequate. This evidence and the other evidence above stated fairly shows, we think, that after arbitrarily

rejecting plaintiff's well documented claim defendant took no steps at all to check plaintiff's estimated construction costs for several months and then selected an unqualified builder to do the checking, and then waited another month before making a settlement offer for the real property loss that had no reasonable basis and an offer to settle the contents loss that disregarded the actual utility and value of the destroyed items.

The evidence supports the conclusion, we think, that defendant's effort to settle plaintiff's claim consisted of requiring him to go to the inconvenience and expense of obtaining qualified, expert estimates defendant had no intention of considering; inordinately delaying both the settlement and plaintiff's return to his usual comforts and amenities of life; and then offering about half the amount owed in anticipation that plaintiff would have neither the will nor the resources to refuse it. More aggravated, oppressive conduct, not involving physical force or personal insult, by one having a duty to relieve financial distress and inconvenience is hard to imagine. But that was not all. Defendant, through its agent Charnock, also told some of plaintiff's friends and neighbors, with no basis whatever, that it had determined that plaintiff had his house burned "for insurance purposes," and "stirred up a lot of hate and discontent" against plaintiff among his neighbors.

When taking defendant's motion to set aside the verdict under advisement the trial judge, who heard and saw the testifying witnesses, appraised defendant's conduct as follows:

> I would say to you in all candor that when this jury went out that I went and called my insurance agent to check that my fire insurance wasn't with your client. There is no question in my mind based on the evidence I heard that your client did not act in good faith in settling this claim. I wouldn't any more let those two people in Goldsboro work on my house, much less go inside my house than anything. I can understand why the jury would feel the same way. The plaintiff on the one hand offered uncontested evidence from five licensed contractors who build the majority of the homes apparently in the New Bern area as to the cost of repair and the only evidence really that you had was two people from Goldsboro, a father and son team who were going to work at six percent

> profit and use their profit—just give up their profit—to buy all the extra materials they would need; and you know, I love American businessmen but I just never have met two quite as kind as those people. It was just a little far fetched, you know, that legitimate licensed contractors could be so far afield from these two people. I think that your client in representing that those two gentlemen from Goldsboro were competent in good faith to repair this home breached a duty that they had to their policyholder; and, then they would come along with an appraiser who testifies as to the personal property that every pair of shoes I have which is over a year old has no cash value whatsoever and when that is coupled with an investigator who comes down and tours the neighborhood and goes and talks to others and conducts himself as the jury found he did then I think the evidence clearly supports the punitive damage verdict if that verdict, if that issue, were properly to be submitted to the jury.

The jury's finding that defendant's conduct was tortious and warranted punishment has the sanction of law, in our opinion, and it was error to disturb it. Thus, the judgment of the trial court setting aside the punitive damages awarded is vacated and upon remand the jury verdict with respect thereto will be reinstated. By five cross-assignments of error the defendant maintains that the evidence does not support the punitive damage awards and that even if the judge erred in ruling that our law does not authorize punitive damages in cases of this kind the judgment appealed from should nevertheless be upheld. These contentions were considered and rejected in determining that the evidence of defendant's tortious and aggravating conduct is sufficient to support the awards made, and discussing defendant's contentions *ad seriatim* would serve no useful purpose.

[3, 4] By two further cross-assignments of error defendant also maintains that the punitive damages issues were erroneously formed and that this is still another alternative ground for upholding the setting aside of the verdict. But the record plainly shows not only that defendant made no objection to the form of these issues, but expressly stated to the court before they were submitted that it had no objection to their particular form. Since the defendant tried the case to a conclusion without ever raising these questions and giving the trial court an opportunity to rule

on them, we will not consider them now. *Kim v. Professional Business Brokers, Ltd.*, 74 N.C. App. 48, 328 S.E. 2d 296 (1985). Nor did the defendant object to the court's instructions to the jury on these issues or any others, for that matter, and under the provisions of Rule 10(b)(2) of the N.C. Rules of Appellate Procedure, it is conclusively presumed that the instructions conformed to the issues submitted and were without legal error. *Hanna v. Brady*, 73 N.C. App. 521, 327 S.E. 2d 22 (1985).

II

Evidence that Charnock was Defendant's Agent

[5] By several other cross-assignments of error defendant contends that the jury verdict that Charnock was defendant's agent during his three-day investigation of plaintiff in Craven County is not sufficiently supported by admissible evidence. It is particularly contended that plaintiff and some of his witnesses were erroneously permitted to testify as to certain out-of-court statements by Charnock to the effect that he was working for Integon while investigating the plaintiff in Craven County. As defendant correctly maintains, the general rule is that neither the fact nor the extent of an agency relationship can be proved by the out-of-court statements of an alleged agent. *Branch v. Dempsey*, 265 N.C. 733, 145 S.E. 2d 395 (1965). But it is also the rule that such statements may be considered as evidence on the question of agency when (1) the fact of agency appears from other evidence and (2) the statements were within the agent's actual or apparent authority. *Branch v. Dempsey, supra*; *Commercial Solvents v. Johnson*, 235 N.C. 237, 69 S.E. 2d 716 (1952); *New Hanover County v. Twisdale*, 42 N.C. App. 472, 256 S.E. 2d 840 (1979). The "other evidence" required by the latter rule was presented. Before trial plaintiff submitted an interrogatory requiring defendant to list the name, address, and dates of investigation of "all individuals employed or hired by the defendant corporation and all of defendant's *agents* and *employees* that investigated the fire that caused the damage to the plaintiff's dwelling . . ." (Emphasis supplied.) In response thereto defendant listed Bill Charnock, among others, gave his Richmond address, and stated that his investigation was made between "October 2, 1980 through 11-2-80. Exact dates of investigation unknown." The interrogatories and answers, received into evidence, were sufficient to establish Charnock's agency dur-

ing the investigation that he conducted for the defendant. Thus, the statements Charnock made to plaintiff's witnesses were also admissible, both as to his agency and as part of the *res gestae* of the tortious breach. *Commercial Solvents v. Johnson, supra; Robinson v. Whitley Moving and Storage, Inc.*, 37 N.C. App. 638, 246 S.E. 2d 839 (1978). But both Charnock's agency and that he acted within the scope and course of it was shown by other evidence as well. Defendant's chief claims examiner, William L. Armour, testified that he hired Charnock after telephoning him on 10 October 1980 and instructed him to do a background investigation on plaintiff personally in the New Bern area and give them an opinion as to whether plaintiff had anything to do with the fire. And Charnock himself testified that he did the investigation on 13, 14 and 15 October, 1980, during the course of which he told the several persons interviewed that he was investigating plaintiff for Integon and made remarks to the witness, Dentico, that were similar in several respects to the bribery offer that Dentico testified to. Thus, even if it was error to receive the testimony initially, and we do not believe it was, the error was cured. We also note that the rule of evidence invoked here by defendant has since been superseded by the adoption of the N.C. Rules of Evidence, Chapter 8C of the General Statutes (effective 1 July 1984), under which the challenged statements would be clearly admissible. *See generally*, 2 Brandis *N.C. Evidence* § 169 (1982 and Supp. 1983). All of defendant's cross-assignments of error relating to the testimony concerning Charnock are therefore overruled.

III

The Directed Verdict Against Compensatory Damages on Plaintiff's Second Claim

[6] Returning to plaintiff's appeal, was it error for the trial court to direct a verdict against plaintiff's *second claim* for compensatory damages because of expenses that he incurred and emotional distress that he suffered as a result of defendant's bad faith refusal to settle his claim? Plaintiff argues that the dismissal of this claim violated the mandate of this Court following the first appeal. We disagree. There is a difference between sufficiently alleging a claim and sufficiently proving it. The tort of intentional infliction of emotional distress was recognized in the case of *Stan-*

back v. Stanback, supra. See also, Morrow v. King's Department Stores, 57 N.C. App. 13, 290 S.E. 2d 732, *disc. rev. denied*, 306 N.C. 385, 294 S.E. 2d 210 (1982). Plaintiff in *Stanback*, on appeal from a dismissal under Rule 12(b)(6), alleged that defendant's conduct in breaching a separation agreement was "wilful, malicious, calculated, deliberate and purposeful . . . ;" that defendant acted recklessly, irresponsibly and "with full knowledge of the consequences that would result . . . ;" and that plaintiff "suffered great mental anguish and anxiety as a result" of defendant's actions. *Stanback v. Stanback, supra* at 198, 254 S.E. 2d at 622-23. Those allegations stated a claim, so our Supreme Court held, and under that holding plaintiff in this case clearly alleged a sufficient claim for emotional distress, as this Court held on the first appeal. *Dailey v. Integon, supra.* But in our search of the record we found no testimony whatever to indicate that plaintiff suffered emotional distress, compensable or otherwise, because of defendant's bad faith refusal to settle his claim. Such injury cannot be assumed, but must be proved by evidence.

The other part of this claim seeks recovery for fees plaintiff paid out for construction and repair estimates, photographs, expert witnesses, and other things in processing the claim and this lawsuit. But, under our law, such losses are not recoverable as damages unless authorized by statute, *City of Charlotte v. McNeely*, 281 N.C. 684, 190 S.E. 2d 179 (1972), and we do not believe that the Court intended in the earlier appeal to contradict this long-standing rule. It only intended to rule, we feel sure, that plaintiff's *second claim*, which is based on both emotional distress suffered and expenses incurred, states a claim for which legal relief can be granted. Which it does, as above noted, through the allegations concerning the intentional infliction of emotional distress. But the allegations made concerning the expenses plaintiff incurred in presenting his claim to the defendant and in preparing and pursuing this lawsuit do not state a claim that will support legal relief, and *Dailey v. Integon, supra* should not be construed as holding otherwise.

IV

Evidence of Other Alleged Derelictions by Defendant

During the course of the trial plaintiff unsuccessfully sought to introduce testimony by two former insureds of the defendant

that they were treated almost identically the way the evidence indicates plaintiff was treated. And plaintiff was not permitted to offer evidence as to the fact that more than a year after the lawsuit was filed, defendant purchased the note and deed of trust on his property from the original mortgagee and that a few days before the trial defense counsel wrote a letter to plaintiff and his counsel, stating that defendant held the note and deed of trust, and since plaintiff was behind in his payments defendant was exercising its option to accelerate the remaining payments due, and to demand that the full balance due, including interest and late charges, be paid at once. Plaintiff's contention that the excluded evidence should have been received into evidence because it tends to show defendant's bad faith, overreaching, and wilfulness will not be ruled on, since a new trial is not being granted.

V

Prejudgment Interest on Amount Recovered Under the Policy

[7] Under the terms of its policy defendant was required to pay plaintiff the amount due thereunder for damage done to the house and personal property within sixty days after proof of loss was filed. Since plaintiff's first proof of loss was sent to defendant on 18 September 1980, the trial court in entering judgment ordered that interest attach to the $142,000 recovered for the house and contents damage from 18 November 1980 until paid. Defendant contends that this order was erroneous because those damages were unliquidated and undetermined until the verdict was rendered. This contention is without merit and we overrule it. A policy of insurance is a contract. The amount defendant owed plaintiff was due under its policy and the statutory basis for the award of prejudgment interest in this case could not be plainer. G.S. 24-5, in pertinent part, provides as follows:

> All sums of money due by contract of any kind, excepting money due on penal bonds, shall bear interest, and when a jury shall render verdict therefor they shall distinguish the principal from the sum allowed as interest; . . .

Nothing in this provision supports the proposition that a party obligated by contract to pay money to another can use the other party's money at no cost merely because the exact amount due has not already been established. Indications to the contrary in

some earlier cases have long since been abandoned. In *Perry v. Norton*, 182 N.C. 585, 109 S.E. 641 (1921), a suit based on the equitable principles of *quantum meruit*, interest was allowed on the sum due plaintiff for services rendered and improvements made to defendant's property four years earlier. As to the trial judge's allowance of interest from the time payment was due, the Court said:

> In this the trial judge simply followed the law as established by the decisions of this Court. . . . The statute says that all sums of money due by contract of this kind, excepting money due on penal bonds, shall bear interest. . . . From this it would seem to follow in this State that whenever a recovery is had for a breach of contract and "the amount is ascertained from the terms of the contract itself or for (sic) evidence relevant to the inquiry," that interest should be added.

182 N.C. at 589, 109 S.E. at 643. In *Thomas v. Piedmont Realty and Development Company*, 195 N.C. 591, 143 S.E. 144 (1928), prejudgment interest was allowed on plaintiff's *quantum meruit* recovery for services performed as a broker. In *Harris and Harris Construction Company, Inc. v. Crain and Denbo, Inc.*, 256 N.C. 110, 127, 123 S.E. 2d 590, 602 (1962), the Court said there was a definite trend in this State toward the "allowance of interest in almost all types of cases involving breach of contract," and approved prejudgment interest on the unliquidated balance due a subcontractor. In *General Metals, Inc. v. Truitt Manufacturing Company*, 259 N.C. 709, 131 S.E. 2d 360 (1963), interest on a disputed, unliquidated contractor's claim was allowed from the time the job was completed.

[8] Nor does G.S. 24-5 require that an issue be submitted to the jury before interest can be allowed in contract cases. The requirement is merely that the jury "distinguish the principal from the sum allowed as interest," which obviously pertains only to those rare situations where *evidence as to both principal and interest* is submitted to the jury for their consideration. This distinction was recognized in the early case of *DeLoach v. Work*, 10 N.C. (3 Hawks) 36 (1824), and has been restated in several decisions since then including *Perry v. Norton* and *Thomas v. Piedmont Realty and Development Company*, both *supra*. In this case, computing the interest due was a mere clerical matter, and it would have

been an absurd, pointless waste of time to ask the jury to "distinguish" between principal and interest.

As to plaintiff's appeal (a) the judgment setting aside the verdict on Issues 5 and 6 is vacated and on remand the judgment for punitive damages originally entered thereon will be reinstated; (b) the verdict directed against plaintiff's *second claim* is affirmed.

As to defendant's appeal and cross-assignments, the judgment appealed from is affirmed and all the cross-assignments of error are denied.

Affirmed in part; vacated and remanded in part.

Judges WHICHARD and JOHNSON concur.

LEXINGTON HOMES, INC., D/B/A CONTRACTORS WHOLESALE BUILDING SUPPLY, PLAINTIFF v. W. E. TYSON BUILDERS, INC., ORIGINAL DEFENDANT AND THIRD PARTY PLAINTIFF v. OSCAR L. NORRIS, THIRD PARTY DEFENDANT AND LEXINGTON HOMES, INC., D/B/A CONTRACTORS WHOLESALE BUILDING SUPPLY, PLAINTIFF v. W. E. TYSON, DEFENDANT

No. 8412SC230

(Filed 2 July 1985)

Contracts § 34— supplier's interference with building loan contract—evidence sufficient

The evidence was sufficient to support a claim of tortious interference with contract and the trial court erred in directing a verdict against the defendant and third-party plaintiff, W. E. Tyson Builders, Inc., where the evidence viewed favorably to the defendant showed that defendant had entered into a valid construction loan agreement with First Atlantic Corporation and The Northwestern Bank, incident to which defendant had received a draft for $114,210 and deposited it in its account; plaintiff Lexington Homes and its president, third-party defendant Oscar Norris, knew that defendant had the construction loan; knew that the draft had been obtained under the contract and deposited in defendant's account; knew that checks had been written and mailed thereon to other suppliers and that defendant's business would be disrupted if payment on the draft were stopped; nevertheless got First Atlantic to stop payment on the draft by falsely representing that defendant was not going to pay plaintiff and other suppliers from the loan funds; acted without justification for the malicious purpose of coercing or intimidating defendant into immediately paying in full Lexington Home's bill, which was several hundred dollars too high; and caused defendant to stop pay-

ment on several checks it had written against the deposit, which delayed the completion and sale of the houses for several months and increased defendant's expenses in completing the houses by approximately sixty to eighty thousand dollars.

Judge WHICHARD concurring.

Judge JOHNSON concurs in the result.

APPEAL by defendant and third party plaintiff W. E. Tyson Builders, Inc. from *Brewer, Judge.* Judgment entered 29 September 1983 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 14 November 1984.

This appeal involves two separate civil actions that were consolidated for trial. The first case, 80CVS490, involves (1) a claim by Contractors Wholesale Building Supply, a division of the plaintiff, Lexington Homes, Inc., against W. E. Tyson Builders, Inc. for the price of various supplies and materials sold to W. E. Tyson Builders, Inc. on an open account; (2) a counterclaim by defendant W. E. Tyson Builders, Inc. for plaintiff's tortious interference with its contract with First Atlantic Corporation and The Northwestern Bank; and (3) a third party action by defendant W. E. Tyson Builders, Inc. against Oscar L. Norris, plaintiff's president, for interfering with the same contract. The second case, 82CVS3207, involves plaintiff's claim for fraud against defendant W. E. Tyson and his counterclaim against plaintiff for interfering with the aforesaid contracts of W. E. Tyson Builders, Inc. and for loss of value of his capital stock in that company. At the close of plaintiff's evidence the court granted the motion of W. E. Tyson for directed verdict in the fraud case, but denied the motion of W. E. Tyson Builders, Inc. for directed verdict in the open account case. At the end of all the evidence the court directed verdict against both defendants on their counterclaims and also against the third party claim of W. E. Tyson Builders, Inc. This left for adjudication only plaintiff's open account claim against Tyson Builders and before it was submitted to the jury plaintiff took a voluntary dismissal without prejudice. The only appeal is by the defendant and third party plaintiff, W. E. Tyson Builders, Inc., for the dismissal of its contract interference claims against plaintiff and Oscar L. Norris. The evidence presented during the trial pertinent to this appeal tended to show the following:

W. E. Tyson owned all the stock in W. E. Tyson Builders, Inc., which was engaged in the business of building dwelling houses and selling them directly to customers. In June, 1979 the corporation decided to build a house on each of ten building lots that it owned in a Cumberland County subdivision known as Golf Acres, and obtained a written commitment from First Atlantic Corporation, a wholly owned subsidiary of The Northwestern Bank, to loan it $307,000 to defray the cost of constructing the ten houses. The loan was secured by a deed of trust on the ten lots in favor of The Northwestern Bank. Construction proceeded in a normal manner and in August, 1979 Tyson Builders received a first draw of $165,246 on the construction loan; it deposited the draft or check in the company's bank account, and immediately issued checks to suppliers and subcontractors for the amounts then due them. Construction continued to progress and shortly before Monday, 26 November 1979, Tyson Builders applied for a second disbursement on the construction loan and on that date it received a sight draft drawn by First Atlantic on The Northwestern Bank in the amount of $114,210. The draft was deposited that day in Tyson Builders' checking account with Southern National Bank, and Tyson Builders got ready to issue checks to suppliers and contractors that had furnished materials for or done work on the houses involved. The next morning, Tuesday, 27 November, Tyson Builders wrote and mailed checks to six such suppliers or subcontractors in the total amount of about $42,000; but a check was not issued to plaintiff at that time, because in checking some of the invoices for supplies and materials sold to defendant some overcharges were noted and it was decided to delay plaintiff's check until the rest of the invoices could be checked against the prices quoted when the materials were ordered, which would take another day or two.

During the afternoon of 27 November 1979, Tommy D. Spiller, an employee of plaintiff, telephoned W. E. Tyson and asked that plaintiff's outstanding invoices for materials furnished on the ten houses be paid immediately. Tyson told him of the billing errors that had been discovered; that the rest of plaintiff's invoices were being checked and payment would be made just as soon as the correct amount due could be verified, which would be no later than Friday, 30 November; that the next day, Wednesday, 28 November, he had to be in Charlotte but would be back in

Fayetteville either that night or Thursday, and in all events would check the invoices and pay plaintiff the amount due no later than the upcoming Friday. Almost immediately after that telephone conversation was completed Spiller telephoned Tyson again and substantially the same conversation was had. And a few minutes after that second telephone conversation ended Tyson received a call from plaintiff's president, Oscar L. Norris, who also asked that the account be paid at once and was told somewhat the same thing that Spiller was told. Norris then stated to Tyson that unless Tyson Builders paid plaintiff $39,975.32, the amount of plaintiff's invoices, by two o'clock the next afternoon he would file a lien on the ten houses and have payment stopped on the $114,210 sight draft. Tyson told Norris that he hoped he would not file liens and have payment on the draft stopped because about $40,000 worth of checks had already been mailed out and that would disrupt their business; and he again stated that plaintiff would be paid everything due it no later than the following Friday, after he had had a chance to verify the amount owed. Norris then telephoned Bobby Thompson, an employee of First Atlantic, and told him that "Tyson was not going to use the loan money to pay the construction bills on the houses" and requested that First Atlantic stop payment on the draft given Tyson. Thompson relayed that information to his superior in the company, Will McClain, who talked with the company's title insurer that night and stopped payment on the draft the next morning, Wednesday, 28 November. McClain, by telephone, then advised Tyson's bank of the step taken, and tried to telephone Tyson but was told that he was away for the day. McClain then telephoned Tyson's lawyer, who advised him not to stop payment on the draft. Plaintiff and six other suppliers and subcontractors filed liens against the ten houses that day. One subcontractor who later filed a lien telephoned Tommy Spiller for information since plaintiff was the defendant's biggest supplier, and Spiller told him that plaintiff was filing a lien and its lawyer was also filing liens for three or four subcontractors who did not have lawyers.

Tyson returned to his office on Thursday, 29 November, and after learning what had happened he had payment stopped on the several checks that had been mailed to suppliers two days earlier, as funds in the company's account were no longer sufficient to

cover them. He also checked the rest of plaintiff's invoices and verified that plaintiff had overcharged the defendant in the amount of $886. On Thursday, 29 November, First Atlantic issued a second draft for $114,210, which was made payable jointly to Tyson Builders and its attorney and was mailed to the attorney. Appended to the draft was a letter instructing the attorney to use the funds to pay off all liens filed against the mortgaged premises and to pay the balance to Tyson Builders. Tyson returned the draft to First Atlantic. Sometime thereafter—but how and when the record does not show—the liens were either paid, bonded or dismissed and none of them were of record when the case was tried. Tyson testified that: Stopping payment on the $114,210 draft increased the expense of W. E. Tyson Builders on the ten house project between $60,000 and $80,000. Before payment was stopped the sale of four of the ten houses had been arranged and good looking applications for the purchase of five other houses had received preliminary approval, but the whole operation came to a halt after payment was stopped and liens were filed. To finish the houses and continue paying the people who worked for the company he had to find other financial sources and it was late the following spring before any sales were closed out.

Hutchens & Waple, by H. Terry Hutchens and John K. Burns, Jr., for plaintiff appellee.

J. Duane Gilliam and Barrington, Jones, Armstrong & Flora, by Carl A. Barrington, Jr., for defendant and third party plaintiff appellant W. E. Tyson Builders, Inc.

PHILLIPS, Judge.

The only question raised by this appeal is whether the evidence presented at trial was sufficient to support the claim of W. E. Tyson Builders, Inc. that Lexington Homes, Inc. and Oscar L. Norris tortiously interfered with its contract with First Atlantic Corporation and The Northwestern Bank. We are of the opinion that the evidence was sufficient to support the claim made and that the trial court erred in directing a verdict against the defendant and third party plaintiff, W. E. Tyson Builders, Inc.

It has long been the law in this State that one who tortiously interferes with the contract rights of another is liable for the

damage caused thereby. *Jones v. Stanly,* 76 N.C. 355 (1877). When viewed favorably to the defendant, as the law requires, the evidence presented tends to show the following: In furtherance of its plan to build houses on the Golf Acres lots and sell them, defendant had entered into a valid construction loan agreement with First Atlantic Corporation and The Northwestern Bank, incident to which defendant had received a draft for $114,210 and deposited it in its account. Lexington Homes and its President, Oscar L. Norris, knew that defendant had the construction loan; that the $114,210 draft obtained under the contract had been deposited in defendant's bank account; that checks had been written and mailed thereon to other suppliers in the approximate amount of $42,000; and that defendant's business would be disrupted if payment on the draft was stopped. Lexington Homes and Norris nevertheless got First Atlantic to stop payment on the draft by falsely representing to it that defendant was not going to pay plaintiff and the other suppliers from the loan funds; and they did this without justification for the malicious purpose of coercing or intimidating defendant into immediately paying in full plaintiff's bill, which was several hundred dollars larger than it should have been. The unjustified interference by the appellees caused defendant to stop payment on the several checks it had written against the $114,210 deposit, and caused some checkholders to file liens against the property; delayed the completion and sale of the houses for several months; and increased defendant's expenses in completing the houses in the approximate amount of $60,000 to $80,000.

While the rule laid down in 86 C.J.S. *Torts* § 44 that an action will lie against one who wrongfully interferes with the contract rights of another had been recognized by our Supreme Court in numerous cases, including *Bryant v. Barber,* 237 N.C. 480, 75 S.E. 2d 410 (1953), *Coleman v. Whisnant,* 225 N.C. 494, 35 S.E. 2d 647 (1945), and *Jones v. Stanly, supra,* so far as our research discloses, the proof required for such an action had not been itemized until *Childress v. Abeles,* 240 N.C. 667, 84 S.E. 2d 176 (1954). In *Childress* the Court stated that in these cases it is necessary to show: (1) That a valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person; (2) that the outsider had knowledge of the plaintiff's contract with the third person; (3)

that the outsider intentionally induced the third person not to perform his contract with the plaintiff; (4) that in so doing the outsider acted without justification; (5) that the outsider's act caused the plaintiff actual damages. *Id.* at 674, 84 S.E. 2d at 181, 182. It is obvious, we think, that the requisites stated, except that the tortfeasor be an "outsider," are met by the evidence recorded in this case, but what an "outsider" is was not explained by the *Childress* Court, though it cited with approval *Jones v. Stanly, supra*, a case which certainly involved a "non-outsider," if there be such a thing. In that case a judgment against the President and Superintendent of the Atlantic & North Carolina Railroad for wrongfully causing the railroad that he managed not to perform its contract to transport a large number of crossties for plaintiff was reinstated, without the Court even intimating that the defendant's status as an insider excused or justified the tort committed. In a later case involving another defendant that had a legitimate interest in and was closely connected with the contract allegedly interfered with the Court clarified this ambiguity in the *Childress* decision by declaring that a "defendant's status as an outsider or a non-outsider is pertinent only to the question of justification for his action," *Smith v. Ford Motor Co.*, 289 N.C. 71, 88, 221 S.E. 2d 282, 292 (1976), and held that Ford Motor Company had no right to interfere with its dealer's management contract with plaintiff for any purpose other than promoting the efficient operation of the dealership. Since the evidence in this case tends to show that plaintiff and Norris acted unjustifiably for the improper purpose of obtaining payment of a sum defendant did not owe, plaintiff's status as a creditor entitled to collect the actual amount that defendant owed it is immaterial to the case, as explained later.

The appellees contend here, as they did in obtaining the dismissal in the court below, that the evidence presented was insufficient to establish the following three things defendant was obliged to prove; that First Atlantic *breached* its contract with defendant; that appellees were not justified in having payment on the $114,210 draft stopped; and that defendant was actually damaged as a consequence of the interference. The grounds relied upon for these contentions and the arguments made in support of them are largely irrelevant to the thrust and tenor of defendant's case against them and the recorded evidence in support of it.

First of all defendant does not have to prove that appellees caused First Atlantic to *breach* its contract with defendant, because its claim is only that appellees wrongfully *interfered* with defendant's rights under the contract; and clear, direct evidence that appellees did wrongfully interfere with its contract rights was presented. According to the evidence, the appellees caused First Atlantic to stop payment on the draft that defendant lawfully had in its bank account and had written checks against. That defendant had a right to possess the draft and use it free from the wrongful interference of others is clearly inferable from the facts that it had a loan agreement with First Atlantic, a lending rather than an eleemosynary institution, and that First Atlantic issued and delivered the draft to defendant. That defendant did not show, as appellees contend, that the underlying loan agreement required First Atlantic to issue the draft at that time and in that amount, or that the draft might have been issued later or in a different way without recourse on defendant's part, is beside the point. As Justice Barnhill so cogently pointed out in the concurring opinion to *Bruton v. Smith*, 225 N.C. 584, 36 S.E. 2d 9 (1945), a party to a contract has the right to reap the benefits of it, such as they are, free from the wrongful interference of others; and since First Atlantic as a contracting party issued the draft to defendant at that time and in that manner defendant had a right to use and enjoy that benefit of its contract free from the wrongful interference of the appellees or anyone else.

The appellees' argument as to justification, equally wide of the mark, starts and stops with their legitimate interest in obtaining early payment of the sum owed from the funds received by defendant. The evidence which tends to show that the appellees falsely claimed that defendant was not going to pay it or the other suppliers and contractors with the draft funds, and that their purpose was to obtain several hundred dollars in funds plaintiff was not entitled to was not even addressed.

And as to damages, the appellees simply and incorrectly argue that W. E. Tyson's testimony that defendant incurred "some seventy or eighty thousand dollars in additional expenses" in the construction of the ten houses did not "rise above the level of speculation" and that no other evidence of damages was presented. In the first place, Tyson's testimony as to the extra expense incurred because payment of the draft was stopped was

purportedly based on the witness's personal knowledge, and was thus factual, rather than speculative, in nature. In the second place, the witness's purported knowledge of what he testified to was neither gainsaid by other evidence, nor questioned by the appellees, who waived cross-examination. Nor is it fatal to defendant's case that Tyson neither itemized the additional expenses he claimed were incurred nor explained in any detail why defendant did not accept the $114,210 draft that First Atlantic issued to defendant and its lawyer two days after payment on the first draft was stopped. These weaknesses in the witness's testimony go to its weight, they do not affect its legal sufficiency. Furthermore, the testimony as to the extra expense incurred because payment on the draft was stopped was not the only evidence presented as to defendant's damages. Tyson also testified that defendant had to stop payment on checks of its own amounting to about $42,000 and that those six or seven checkholders filed liens against the property when their checks were cancelled. This evidence by itself tends to show that defendant was actually damaged in some pecuniary amount by the tort complained of. That Tyson did not further testify as to the amount of the charges that defendant had to pay for stopping payment on the several checks and for the several lien filings, does not mean that defendant was not damaged thereby; it only means that the evidence could not support an award of damages in any *substantial* amount. But the evidence is sufficient to support an award of nominal damages, as our law provides that where a legal wrong is shown, the one wronged is entitled to nominal damages, though no substantial loss or damage has been proved. *Hairston v. Atlantic Greyhound Corp.*, 220 N.C. 642, 18 S.E. 2d 166 (1942); *Bowen v. The Fidelity Bank*, 209 N.C. 140, 183 S.E. 266 (1936). In order to make out a case for the jury the victim of contract interference does not have to show that *substantial* damages resulted; it is enough if the evidence shows that the victim suffered some damage, and the evidence presented in the trial below tended to show that.

Reversed and remanded.

Judge WHICHARD concurs.

Judge JOHNSON concurs in the result.

Judge WHICHARD concurring.

The scope of a claim for tortious interference with contract includes not only procurement of breach but also all invasions of contractual relations that retard, make more difficult, or prevent performance, or make performance of less value to the promisee. Annot., 84 A.L.R. 43, 52 (1933); *see generally* Carpenter, "Interference with Contract Relations," 41 Har. L. Rev. 728 (1928). If defendant here cannot prove breach—since its contract with First Atlantic did not specify a date it was due the funds and since First Atlantic reissued the check within one day after it stopped payment on the draft—defendant has at least presented evidence that due to the filing of liens against its property subsequent performance of the contract was of less value to it.

As to the element of justification, 75 N.C. App. 404, 411, 331 S.E. 2d 318, 322 (1985), to be actionable interference with contract must be otherwise than in the legitimate exercise of one's own equal or superior right. *Carpenter* at 763. Whether plaintiff and third party defendant were unjustifiably demanding early payment or were acting within a privilege to protect a right to money due is ordinarily a question for the jury. *See* Annot., 26 A.L.R. 2d 1227, 1264 (1952). I do not believe that on the evidence here we can say as a matter of law that plaintiff and third party defendant acted with or without sufficient legal reason. *Childress v. Abeles*, 240 N.C. 667, 674-75, 84 S.E. 2d 176, 182 (1954) ("Justification imports 'a sufficient lawful reason why a party did or did not do the thing charged, a sufficient lawful reason for acting, or failing to act. It connotes just, lawful excuse, and excludes' legal 'malice.' ").

For these reasons and for those stated in the opinion, *supra*, I agree that the evidence on defendant Tyson Builders' counterclaim, viewed in the light most favorable to it, is sufficient to support a claim for tortious interference with contract and to withstand plaintiff and third party defendant's motion for directed verdict.

SUSAN M. POORE v. FRANK JEFFERSON POORE

No. 8422DC579

(Filed 2 July 1985)

1. **Divorce and Alimony § 30— equitable distribution—valuation of professional practice**

In valuing a professional practice for equitable distribution purposes, a court should consider the following components of the practice: (a) its fixed assets including cash, furniture, equipment, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities.

2. **Divorce and Alimony § 30— equitable distribution—valuation of professional practice**

Among the approaches courts may find helpful in valuing a professional practice are: (1) an earnings or market approach, which bases the value of the practice on its market value, or the price which an outside buyer would pay for it taking into account its future earning capacity; and (2) a comparable sales approach which bases the value of the practice on sales of similar businesses or practices. Courts might also consider evidence of offers to buy or sell the particular practice or an interest therein, and if the practice is conducted as a partnership, and the value of the practice or an interest therein is set in a partnership or redemption agreement, the value set in the agreement should be considered but not treated as conclusive.

3. **Divorce and Alimony § 30— equitable distribution—valuation of professional practice—consideration of goodwill**

Goodwill is an asset that must be valued and considered in determining the value of a professional practice for purposes of equitable distribution.

4. **Divorce and Alimony § 30— equitable distribution—valuation of goodwill**

There is no set rule for determining the value of the goodwill of a professional practice; rather, each case must be determined in light of its own particular facts. The determination of the existence and value of goodwill is a question of fact, not of law, and should be made with the aid of expert testimony.

5. **Divorce and Alimony § 30— equitable distribution—valuation of goodwill of professional practice**

Among the factors which are relevant in valuing the goodwill of a professional practice are the age, health and professional reputation of the practitioner, the nature of the practice, the length of time the practice has been in existence, its past profits, its comparative professional success, and the value of its other assets.

6. Divorce and Alimony § 30— equitable distribution—valuation of goodwill of professional practice

Any legitimate method of valuation that measures the present value of goodwill by taking into account past results and not the post-marital efforts of the professional spouse is a proper method of valuing goodwill.

7. Divorce and Alimony § 30— equitable distribution—valuation of goodwill—required findings

In ordering a distribution of marital property, a court should make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations are based, including the valuation method or methods on which it relied. If it appears on appeal that the trial court reasonably approximated the net value of the practice and its goodwill, if any, based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed.

8. Divorce and Alimony § 30— equitable distribution—unsupported valuation of dental practice

The trial court's valuation of a solely owned dental practice for equitable distribution purposes was not based on a sound method of evaluation and was not supported by the evidence.

9. Divorce and Alimony § 30— equitable distribution—dental license as separate property

The trial court erred in failing to find that defendant's license to practice dentistry was separate property owned by defendant. G.S. 50-20(b)(2).

10. Divorce and Alimony § 30— equitable distribution—pension and profit sharing interests of professional association—husband's separate property—consideration of wife's contributions as homemaker

Defendant husband's rights in pension and profit sharing plans of his solely owned professional association were "retirement rights" within the meaning of former G.S. 50-20(b)(2) and thus constituted separate property of defendant. However, the trial court was required to consider plaintiff wife's contributions as a homemaker to the acquisition of defendant's vested interests in the pension and profit sharing plans in determining an equitable distribution of the marital property. G.S. 50-20(c)(12).

APPEALS by plaintiff and defendant from *Cathey, Judge.* Order entered 12 January 1984 in District Court, IREDELL County. Heard in the Court of Appeals 4 February 1985.

Curtis, Millsaps and Chesson by Joe T. Millsaps for plaintiff appellant-appellee.

Brinkley, Walser, McGirt, Miller and Smith by Walter F. Brinkley for defendant appellant-appellee.

COZORT, Judge.

The primary questions presented by this appeal are: (1) how a solely-owned professional association should be valued for purposes of equitable distribution; and (2) whether the defendant-husband's rights in his profit sharing plan from his dentistry practice are separate or marital property included within the term "retirement rights" under G.S. 50-20(b)(2) (Cum. Supp. 1981). Both parties have appealed from the court's order, contending that the court erred in its valuation of the professional association and in its determination that an equal division of the marital property was equitable. We remand for a new hearing.

On 16 September 1982, plaintiff filed a complaint seeking an absolute divorce based on one year's separation, alimony, child custody, child support, and an equitable distribution of the marital property. Judgment of divorce was entered and the issues of alimony, child custody, and child support were resolved. Hearings were held on the matter of the distribution of the marital property at which evidence was presented which tends to show the following, in pertinent part:

The parties were married on 5 August 1967. At that time plaintiff was a certified teacher, and defendant was in dental school. After graduating from dental school in 1968, defendant worked with the Army for three years and then went into a private dental practice in Mooresville. In 1978, defendant incorporated his solo practice and thereafter operated as a professional association. During the marriage, plaintiff primarily worked as a homemaker and cared for the parties' three children; however, she also worked outside the home for short periods of time as a teacher and as a department store clerk before the parties' first child was born in 1971. The parties separated on 25 August 1981. During their marriage and prior to their separation, the parties acquired both real and personal property of substantial value.

On 12 January 1984, the court entered an order in which it concluded that an equal division of the marital property would be equitable and divided the property accordingly. From the order entered, both parties appeal.

The first question presented is whether the trial court correctly valued the defendant's professional association. The divi-

sion of marital property upon divorce is to be accomplished by using the net value of the property, *i.e.*, its market value, if any, less the amount of any encumbrance serving to offset or reduce the market value. *See* G.S. 50-20(c); *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E. 2d 772 (1984). When a divorce is granted on the ground of one year's separation, as was done here, the marital property must be valued as of the date of the parties' separation. *See* G.S. 50-21(b). In accordance with G.S. 50-20(c) and 50-21(b), the court here determined the net value of the professional association on the date of the parties' separation and used that figure in determining an equitable distribution of the property. The parties argue, however, that the court erred in finding that the net value of the professional association on that date was $73,561. Defendant-husband argues the court overvalued it, and plaintiff-wife argues the court undervalued it.

In its order of distribution the court found that the professional association had a net value on the date of the parties' separation of $73,561 and explained its valuation as follows:

> Establishing the value of this Professional Association is extremely difficult. While the Court considered the valuations placed on the business by both parties incorrect, rather than obtaining a third party evaluation on the business as it should have, the Court valued the business at $73,561.00 considering available evidence including the tangible assets and net income of the business.

The court further found that "[t]he plaintiff failed to show any goodwill value to be placed on the business."

The evidence regarding the value of the professional association may be summarized as follows:

Defendant's testimony showed that as of 31 July 1981 the professional association had assets, including the lot on which it was located, the equipment owned by it, its checking and savings accounts, and its accounts receivable, of a total value of $50,394, and had liabilities of $61,405. Thus, the professional association had a negative value of $11,011 as of 31 July 1981. The gross income of the professional association for its fiscal year ending 31 October 1981 was approximately $232,000 and its gross income for the previous year was approximately $204,743. It had net income

of approximately $6,000 in 1979, $700 in 1980, between $5,000 and $6,000 in 1981, and suffered a net loss of approximately $1,200 in 1982.

Edward Grissom, a certified professional business consultant employed by a firm which had been providing management services to defendant for several years, testified for defendant. Grissom had been involved previously in the purchase and sale of dental practices and had experience in appraising their value. His testimony showed that as of 31 August 1981 defendant's professional association had assets worth $73,601 and liabilities of $66,012. According to his calculations, the practice had a net worth as of 31 August 1981 of $7,549. In his opinion, the professional association had no goodwill of significant value. He defined goodwill as any corporate earnings in excess of reasonable compensation. His opinion was based on the fact that defendant's practice had retained very little or no earnings during the period of time it had been incorporated. This factor indicated to him that defendant had received reasonable compensation from the practice and nothing else. He further testified that he was familiar with the average income of dentists practicing in situations comparable to that of defendant, and that defendant's compensation was average when compared with the income of these dentists.

Boyd P. Falls, a certified public accountant practicing in Charlotte, testified for plaintiff. Falls had previously evaluated businesses for sale purposes and had experience in the purchase of accounting firms, which he explained were professional businesses like dental practices. In his opinion, the value of defendant's professional association was $232,000 which was its gross income for the fiscal year in which the parties separated. Falls based his opinion on his knowledge of the dental industry for the past 15-20 years which he acquired through observation and exchange of information, and what dentists had told him their practices were worth. He testified that he had been informed by a dentist in Charlotte that "on today's market a good dental business is selling for a hundred percent of current gross volume," and that he had relied on that information in substantial part in forming his opinion as to the value of the professional association. In valuing the practice, Falls relied entirely on its gross sales or receipts and did not consider its net income, its assets, or its liabilities. He stated that the valuation method used by him was

the method most commonly used to value a professional practice and noted that what he was valuing could be called the goodwill of the practice.

The question of how to value a solely-owned professional association for purposes of equitable distribution has not been addressed previously by our courts. However, this Court has considered the valuation of a spouse's interest in a professional partnership for equitable distribution purposes. *See Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E. 2d 915 (1985). In *Weaver*, we stated that there is no single best approach to valuing an interest in a professional partnership, and that various appraisal methods can and have been used to value such interests. *Id.* at 412, 324 S.E. 2d at 917. The task of a reviewing court on appeal is to determine whether the approach used by the trial court reasonably approximated the net value of the partnership interest. *Id.* at 412, 324 S.E. 2d at 917-18. If it does, the valuation will not be disturbed. *Id.*

Similarly, there is no single best approach to valuing a professional association or practice, and various approaches or valuation methods can and have been used. *See* L. Golden, *Equitable Distribution of Property* Sec. 7.10, at 221 (1983). B. Goldberg, *Valuation of Divorce Assets* Sec. 8.3, at 203 (1984). It is generally agreed that in valuing a professional practice, or an interest therein, for equitable distribution, it should not make any significant difference whether the practice is conducted as a corporation or professional association, a partnership, or a sole proprietorship. *See* Goldberg, *supra*, at 201; 2 J. McCahey, *Valuation and Distribution of Marital Property* Sec. 22.08, at 22-99 (1984).

[1, 2] The valuation of each individual practice will depend on its particular facts and circumstances. *See* Golden, *supra*, Sec. 7.09, at 216. In valuing a professional practice, a court should consider the following components of the practice: (a) its fixed assets including cash, furniture, equipment, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities. *See In Re Marriage of Lopez*, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974); *Stern v. Stern*, 66 N.J. 340, 331 A. 2d 257 (1975). Among the valuation approaches courts may find helpful are: (1) an earnings or market approach, which bases the value of the practice on its

market value, or the price which an outside buyer would pay for it taking into account its future earning capacity; and (2) a comparable sales approach which bases the value of the practice on sales of similar businesses or practices. *See* McCahey, *supra*, Sec. 22.08. Courts might also consider evidence of offers to buy or sell the particular practice or an interest therein. *See* Goldberg, *supra*, at 205. If the practice is conducted as a partnership, and the value of the practice or an interest therein is set in a partnership or redemption agreement, then the value set in the agreement should certainly be considered but should not be treated as conclusive. *See Weaver, supra.* Other guidelines and valuation approaches have also been suggested and they too may be of assistance to courts. *See, e.g.*, McCahey, *supra*; L. Schwechter and R. Quintero, *Valuing the Professional Service Corporation* Vol. 3, No. 12 Equitable Distribution Reporter, at 142-44 (June 1983); J. Hempstead, *Valuation of a Closely-Held Business* Vol. 2, No. 4 Equitable Distribution Reporter, at 51-2 (October 1981).

The component of a professional practice which is the most controversial and difficult to value, and yet often the most valuable, is its goodwill. Golden, *supra*, Sec. 7.10, at 222. Goodwill is commonly defined as the expectation of continued public patronage. *Matter of Marriage of Fleege*, 91 Wash. 2d 324, 325, 588 P. 2d 1136, 1138 (1979). It is an intangible asset which defies precise definition and valuation. *See, e.g.*, Black's Law Dictionary 625 (rev. 5th ed. 1979); *Dugan v. Dugan*, 92 N.J. 423, 457 A. 2d 1 (1983). It is clear, however, that goodwill exists, that it has value, and that it has limited marketability. *See Jewel Box Stores v. Morrow*, 272 N.C. 659, 158 S.E. 2d 840 (1968) (the execution of a covenant not to compete, in connection with the sale of a business, is essentially a sale of the goodwill of the business).

[3] Although some courts have refused to consider goodwill in valuing a professional practice, *see, e.g., Nail v. Nail*, 486 S.W. 2d 761 (Tex. 1972), the vast majority of courts which have ruled on the question have held that the goodwill of a professional practice is property of value which should be included among the assets distributed upon the dissolution of marriage. *See Dugan, supra*, at 433, 457 A. 2d at 6; *Fleege, supra*, at 326, 588 P. 2d at 1138; *see generally*, Annot., 52 A.L.R. 3d 1344 (1973). We agree that goodwill is an asset that must be valued and considered in determining the value of a professional practice for purposes of equitable

distribution. *See Weaver, supra.* We must now determine whether the court below erred in valuing the professional association, including its goodwill.

[4, 5] There is no set rule for determining the value of the goodwill of a professional practice; rather, each case must be determined in light of its own particular facts. *See, e.g., Wisner v. Wisner*, 129 Ariz. 333, 631 P. 2d 115 (1981); *Hurley v. Hurley*, 94 N.M. 641, 615 P. 2d 256 (1980); *Marriage of Goger*, 27 Or. App. 729, 557 P. 2d 46 (1976). The determination of the existence and value of goodwill is a question of fact and not of law (*see* Goldberg, *supra*, Sec. 8.4, at 207) and should be made with the aid of expert testimony. *See* Golden, *supra*, Sec. 7.11, at 226. Courts are cautioned to value goodwill "with great care, for the individual practitioner will be forced to pay the ex-spouse 'tangible' dollars for an intangible asset at a value concededly arrived at on the basis of some uncertain elements." *Dugan, supra*, at 435, 457 A. 2d at 7. Among the factors which may affect the value of goodwill and which therefore are relevant in valuing it are the age, health, and professional reputation of the practitioner, the nature of the practice, the length of time the practice has been in existence, its past profits, its comparative professional success, and the value of its other assets. *See, e.g., Hurley* and *Goger, supra; see also* Golden, *supra*, at 223-24.

[6] Various appraisal methods can be and have been used to value goodwill. *See, e.g., Dugan, supra.* Any legitimate method of valuation that measures the present value of goodwill by taking into account past results, and not the postmarital efforts of the professional spouse, is a proper method of valuing goodwill. *See In Re Marriage of King*, 150 Cal. App. 3d 304, 197 Cal. Rptr. 716 (1984). One method that has been widely accepted in other jurisdictions is to determine the market value of the goodwill, *i.e.*, the price that a willing buyer would pay to a willing seller for it. *See, generally*, McCahey, *supra*, Sec. 23.04(2)(a), at 23-57; Golden, *supra*, at 224. Another method that has been received favorably is a capitalization of excess earnings approach as described in *Dugan, supra*, at 439-40, 457 A. 2d at 9-10, and McCahey, *supra*, Sec. 23.04(2)(b), at 23-58 through 23-59. Under this approach, the value of goodwill is based in part on the amount by which the earnings of the professional spouse exceed that which would have been earned by a person with similar education, experience, and skill

as an employee in the same general locale. *Dugan, supra.* It has also been suggested that the value of goodwill be based on one year's average gross income of the practice, or a percentage thereof, *see Mueller v. Mueller*, 144 Cal. App. 2d 245, 301 P. 2d 90 (1956), and that evidence of sales of comparable practices is relevant to the determination of its value. *See In Re Marriage of Nichols*, 43 Colo. App. 383, 606 P. 2d 1314 (1979).

[7] In ordering a distribution of marital property, a court should make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied. On appeal, if it appears that the trial court reasonably approximated the net value of the practice and its goodwill, if any, based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed.

In the present case, defendant's evidence tends to show that the professional association, or practice, had little or no net value because its liabilities were approximately equal to the value of its assets, and that the practice had no goodwill of significant value. Defendant's expert determined that the practice had no goodwill by using an excess earnings approach. Plaintiff's evidence tends to show that the professional association had goodwill and that the total value of the professional association, including its goodwill, was $232,000. Plaintiff's expert valued the professional association and its goodwill primarily by using a comparable sales and gross income approach.

[8] The trial court rejected both parties' valuations and instead valued the practice based on "available evidence including the tangible assets and net income" of the practice. It appears the court found the practice had no goodwill. However, the court's valuation of the practice does not appear to be based on a sound method of valuation nor is it supported by the evidence. For this reason, we vacate the equitable distribution order and remand for a new hearing on the value of the professional association. In valuing the professional association, the court should clearly state whether it finds the practice to have any goodwill, and if so, its value, and how it arrived at that value. The court may appoint an additional expert witness under Rule 706 of the North Carolina Rules of Evidence if needed.

We now turn to the trial court's finding of no separate property and its conclusion that an equal division of the marital property was equitable. Plaintiff contends the court erred in failing to find that defendant owned substantial separate property in the form of his license to practice dentistry and his vested and nonvested interests in the pension and profit sharing plans of his professional association, and that therefore an equal division of the marital property would be an unequitable division in defendant's favor. The court found that neither party owned any separate property. This finding is not supported by the evidence.

[9, 10] The evidence clearly shows the defendant had a license to practice dentistry which G.S. 50-20(b)(2) classifies as separate property. Thus, it was error for the trial court to fail to find that this was separate property owned by defendant. The evidence also shows the defendant had both vested and the expectation of nonvested interests in pension and profit sharing plans of his professional association and that this property had substantial value. At the time this action was instituted, 16 September 1982, G.S. 50-20(b)(2) (Cum. Supp. 1981) provided that all vested and the expectation of nonvested pension or retirement rights were to be considered separate property. *Johnson v. Johnson*, 74 N.C. App. 593, 328 S.E. 2d 876 (1985). Although the term "retirement rights" is not defined in the statute, we believe that defendant's rights in his profit sharing plan are included within that term. Any deferred compensation plan, whether structured as a pension, a profit sharing, or a retirement plan, may properly be denominated a retirement plan. *See* Goldberg, *supra*, Sec. 9.2, at 231. Accordingly, any benefits from such plans should be termed retirement benefits. Courts in other jurisdictions have consistently treated interests in pension and profit sharing plans in the same way, and we see no reason to act differently. *See, e.g., Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W. 2d 844 (1981); *In Re Marriage of Hunt*, 78 Ill. App. 3d 653, 397 N.E. 2d 511 (1979). Thus, the court erred in failing to find that defendant's interests in the pension and profit sharing plans are separate property. The court further erred by awarding plaintiff a contingent interest in defendant's pension and profit sharing benefits because those interests are separate property not subject to distribution.

In determining an equitable division of marital property, a court is to take into consideration the separate property owned

by each party at the time the division of property is to become effective. *See* G.S. 50-20(c)(1); *Loeb v. Loeb*, 72 N.C. App. 205, 216, 324 S.E. 2d 33, 41, *cert. denied*, 313 N.C. 508, 329 S.E. 2d 393 (1985). Because of the errors committed by the court with respect to the separate property owned by defendant, this cause must be remanded for a redetermination of an equitable division of the marital property, with the trial court giving appropriate consideration to the separate property owned by defendant.

Plaintiff further contends the court erred in failing to consider her contributions to the value of defendant's separate property interests in the pension and profit sharing plans. She argues that she, as housewife, mother, and family bookkeeper, by conservative household expenditures, permitted defendant to reduce his salary and to stash away each year beginning in 1979 sizable amounts of money for his retirement through the pension and profit sharing plans of his professional association, and that the court should have considered her contributions to the acquisition of that separate property in determining an equitable division of the marital property. In light of our legislature's subsequent recognition that vested pension and retirement rights should be considered marital property, *see* G.S. 50-20(b)(1) (Cum. Supp. 1983), we agree that fairness requires that plaintiff's contributions as a homemaker to the acquisition of at least defendant's vested interests in the pension and profit sharing plans be considered by the court under G.S. 50-20(c)(12) in determining an equitable division of the marital property. On remand, the court should so consider plaintiff's contributions and assign them the weight which it, in its discretion, believes is appropriate.

Lastly, plaintiff argues that several of the findings of fact are not supported by the evidence. The findings to which plaintiff objects are those relating to the value of the parties' real estate, the value of one of the parties' automobiles, the parties' checking and savings accounts, and the application of the rent paid by the professional association towards the mortgage on the property on which it was located. We find plaintiff's arguments without merit. We have carefully examined the record and have determined that the findings in question are supported by competent evidence; thus, they are conclusive. *See Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975); *see also* 1 Strong's N.C. Index 3d *Appeal and Error* Sec. 57.2 (1976).

For the reasons stated herein the 12 January 1984 order of equitable distribution is vacated. The case is remanded for a hearing on the issue of the value of the professional association, a new determination of equitable distribution, including whether equal is equitable, and entry of an appropriate order consistent with this opinion.

Vacated and remanded.

Chief Judge HEDRICK and Judge WHICHARD concur.

MARGARET JOHNSON BROWER (HOUGH) v. WILLIAM ROSS ODELL BROWER

No. 8415DC754

(Filed 2 July 1985)

1. **Divorce and Alimony § 24.4— child support—dismissal of show cause order—underlying obligation not affected**

An underlying past due child support obligation was not affected by the dismissal of the wife's show cause order where the grounds for the husband's motion to dismiss did not appear in the record and there was no order in the record specifically relieving the husband of his obligation. G.S. 50-13.4(f)(9) (1984). G.S. 5A-21 (1981).

2. **Divorce and Alimony § 27— child support—attorney's fees—findings inadequate**

An order requiring a husband to pay past due child support and $500 in the wife's attorney's fees was vacated and remanded where the order included no finding on the wife's good faith, the husband's refusal to provide adequate support, or the wife's inability to defray attorney's fees. Moreover, the court's sole finding as to the amount of attorney's fees was not specific enough to allow a determination of the reasonableness of the attorney's fees awarded, there was nothing in the record concerning the husband's gross income for any year, neither party testified to the net value of their real estate holdings, neither party testified about their debts other than the husband's mortgage, and there was no evidence of the value of the husband's business. G.S. 50-13.6 (1984).

3. **Divorce and Alimony § 24.5— child support—reduction of arrearage—findings inadequate**

The trial court erred by reducing the arrearage under a 1970 child support order for the period from 1980 through 1984 where the older child reached eighteen in 1979 and the younger child reached eighteen in 1984,

because there were no specific findings or evidence of the younger child's needs and expenses between 1979 and 1984 or the relative abilities of the parties to provide support. G.S. 50-13.7 (1984). G.S. 50-13.7 (1984).

4. **Divorce and Alimony § 24.1— child support—no credit for child's earnings, husband's purchase of automobile, or husband's inability to claim dependent deduction**

In an action for past due child support, the husband waived his right to credit for one son's earnings where there was no evidence that the husband ever objected to the child's receipt of earnings. The husband was also not entitled to credit for his inability to claim the sons as dependents for income tax purposes and there was no error in denying him credit for the purchase of two automobiles for his sons, considering the history of delinquent payments and the lack of the wife's consent to the voluntary expenditures.

5. **Rules of Civil Procedure § 58— child support—order drafted and signed by one judge and entered by another—no notice to parties—no prejudicial error**

In an action for past due child support, there was no prejudicial error in the entry of judgment in open court without notice to the parties by a judge other than the judge who drafted and signed the order because notice of appeal was timely filed. G.S. 1A-1, Rules 58 and 63.

APPEAL by defendant from *Peele, Judge*. Order and Judgment signed by *Peele, Judge*, 7 March 1984 and entered the same day by *Hunt, Judge*, in District Court, CHATHAM County. Heard in the Court of Appeals 12 March 1985.

Edwards & Atwater, by Phil S. Edwards, for plaintiff appellee.

Ottway Burton for defendant appellant.

BECTON, Judge.

This case deals with a contempt hearing pursuant to N.C. Gen. Stat. Sec. 50-13.9 (1984) to collect back child support.

The parties, Margaret Johnson Brower (Hough) and William Ross Odell Brower, were married on 2 July 1960 and separated on 17 March 1969. Since the separation their two children, William Allen Brower (born 28 September 1961) and Craig Odell Brower (born 8 January 1966) have lived with the wife.

In May 1969, the wife asked the trial court for alimony *pendente lite*, child support and attorney's fees. In a 20 February 1970 order, the trial court ordered the husband to pay seventy dollars in child support every two weeks to the office of the

Chatham County Clerk of Superior Court to be disbursed to the wife "until further order of the court." In 1975 and again in 1976 the wife instituted civil contempt proceedings against the husband for nonpayment of child support. In the first instance, Judge C. Cates ordered the husband jailed for thirty days, but this Court, in an unpublished opinion filed 16 June 1976, reversed based on the lack of evidence to support Judge Cates' finding of a willful refusal to pay. In the second instance, Judge Donald Lee Paschal granted the husband's motion to dismiss the wife's show cause order without explanation on the date set for hearing, 31 August 1976.

On 7 November 1983, the Chatham County Clerk of Superior Court instituted civil contempt proceedings against the husband pursuant to G.S. Sec. 50-13.9 (1984), alleging that the husband was $5,550 in arrears. After a hearing, Judge Stanley Peele drafted and signed an order on 7 March 1984 that was read and entered in open court the same day by Judge Patricia S. Hunt. Judge Peele ordered the husband to pay $3,670 in back child support and $500 in attorney's fees by 1 August 1985 or face "the imposition of the contempt powers of the court." The husband appeals.

The husband challenges (1) the award of child support which accrued before 1976, (2) the award of attorney's fees, (3) the calculation and payment of the arrearage, and (4) the authority of "a chief judge to order another district court judge in the same district to read his [the chief's] order in open court [when] neither the defendant nor his attorney were present or had any notice the order was entered or read in open court." Because the evidence and findings of fact do not support an award of attorney's fees to the wife or a reduction in the child support arrearage, we vacate and remand for further proceedings consistent with this decision.

I

[1] According to the Chatham County District Court calendar for 31 August 1976, included in the record, Judge Paschal granted the husband's motion to dismiss the wife's 1976 show cause order. The grounds for the husband's motion do not appear in the record. Nor is there an order in the record specifically relieving the husband of his past due child support obligation. On appeal, the husband contends the dismissal of the contempt action cancelled

the accrued child support debt to that date. We disagree. At most, the dismissal signifies that the husband was not in contempt as of August 1976.

Although an order for child support is enforceable by civil contempt proceedings, N.C. Gen. Stat. Sec. 50-13.4(f)(9) (1984); N.C. Gen. Stat. Sec. 5A-21 (1981), a supporting party cannot be held in contempt unless the party willfully failed to comply with the support order. *Henderson v. Henderson*, 307 N.C. 401, 298 S.E. 2d 345 (1983); *Jones v. Jones*, 52 N.C. App. 104, 278 S.E. 2d 260 (1981). A finding of willful failure to comply with the order requires evidence of the present ability to pay or to take reasonable measures to comply. *Teachey v. Teachey*, 46 N.C. App. 332, 264 S.E. 2d 786 (1980). However, a failure to find the supporting party in contempt does not affect the underlying debt; it merely forces the custodial parent or an authorized party to pursue one of the alternate remedies listed in G.S. Sec. 50-13.4(f) to enforce the debt.

II

[2] In his 7 March 1984 order, Judge Peele made forty-three findings of fact concerning the various contempt proceedings, the amount of child support paid over the years, the incomes of the parties, the "equitable arrearage," and attorney's fees. The two findings directly addressing attorney's fees read as follows:

> 42. That the [wife] has been found by the court to be unable to defray attorney fees in this case.
>
> 43. That the [wife's] attorney is entitled to recover attorney fees in the amount of $500.00. (Court estimates 7 hours time consumed by the court proceeding, estimated 3 hours out of court, at $50.00 per hr.).

The trial court then ordered the husband to pay the five hundred dollars in attorney's fees to the wife before 1 August 1984. We conclude that the findings of fact in the 7 March order are insufficient to award attorney's fees. We vacate and remand to the trial court to hear additional evidence and to make additional findings of fact, for the following reasons.

This action to enforce the 20 February 1970 order for child support was instituted by the Chatham County Clerk of Superior Court pursuant to G.S. Sec. 50-13.9 (1984). G.S. Sec. 50-13.9

became effective on 1 October 1983. It enables the clerk of superior court to institute contempt proceedings whenever a supporting party fails to pay past due child support on demand. G.S. Sec. 50-13.9(d). Significantly, G.S. Sec. 50-13.9(f) gives the trial court the discretion to "order payment of reasonable attorney's fees as provided in G.S. Sec. 50-13.6" for representation of the "party to whom support payments are owed."

Turning to the provisions of N.C. Gen. Stat. Sec. 50-13.6 (1984), we cite the pertinent language:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding. . . .

Thus, to award attorney's fees in a child support action, the trial court must find as fact that (1) the interested party (a) acted in good faith and (b) has insufficient means to defray the expenses of the action and further, that (2) the supporting party refused to provide adequate support "under the circumstances existing at the time of the institution of the action or proceeding." *Id.; 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). Moreover, the required findings of fact must in turn be supported by competent evidence. *Hudson v. Hudson.*

Measured against the statutory requirements of G.S. Sec. 50-13.6, the 7 March 1984 order does not permit the award of attorney's fees. The order includes no finding on the wife's good faith or on the husband's refusal to provide adequate support. Equally important, the finding on the wife's inability to defray attorney's fees is not supported by competent evidence.

Our courts have consistently construed the attorney's fees provision in the alimony statutes, *see* N.C. Gen. Stat. Secs. 50-16.3

and -16.4 (1984), as enabling "the dependent spouse, *as litigant*, to meet the supporting spouse, *as litigant*, on substantially even terms by making it possible for the dependent spouse to employ adequate counsel." *Williams v. Williams*, 299 N.C. 174, 190, 261 S.E. 2d 849, 860 (1980). The *Hudson* Court extended the holding on attorneys' fees in alimony cases to encompass the award of attorney's fees to the interested party in custody, support, or custody and support suits under G.S. Sec. 50-13.6.

In *Hudson*, the Supreme Court held that the trial court's finding that the plaintiff wife had insufficient means to defray the expenses of the support suit was not supported by the evidence. The Court compared the evidence of the following: the parties' annual incomes, their estates, including stock holdings and real estate investments, and their debts, the same figures considered in *Rickert v. Rickert*, 282 N.C. 373, 193 S.E. 2d 79 (1972) and *Williams v. Williams*, before concluding that the plaintiff wife both had sufficient means to defray legal expenses and was financially able to employ adequate counsel to meet her husband in litigation on substantially even terms. In *Hudson*, the plaintiff wife had an estate of $930,484, debts totalling $264,831, and an income of $9,192. The defendant husband's estate was valued at $747,553 and his indebtedness was $254,612.

Reviewing the record in the case before us, we find competent evidence of the wife's gross income for the years 1981 through 1983—1981: $11,095; 1982: $9,678; 1983: $10,076—but no competent evidence of the husband's gross income. The trial court found:

> 19. [Husband] testified to income in 1981, '82 and '83 of approximately $8,000 per year.

However, we find nothing in the record concerning the husband's gross income for any year. The husband testified instead to the salary earned by his son-employee from 1979 through 1981, by referring to the federal tax Schedule C (Form 1040)—*Profit or Loss from Business or Profession (Sole Proprietorship)* which the husband had filed for those years. Apparently, the husband's federal income tax returns for 1979 through 1981, or at least the Schedule C forms for those years, were admitted in evidence, but none of the exhibits were included in the record on appeal. Further, the trial court found:

20. Defendant's gross sales for income tax purposes in 1980 was $34,700; and his total business income was $16,979.00.

21. Defendant's gross sales for income tax purposes in 1981 was $41,423 and his total business income was $17,723.

22. It is not to be implied from the figures in items 20 and 21 that the defendant is earning anything close to approximately $17,000 per year.

The husband never testified to any of the facts cited in Findings Number 20 through 22. Since the tax forms are not before us, we have no competent evidence to support Findings Number 19 through 22. And, considering the years involved, this evidence alone would be insufficient to reflect the husband's present gross income.

Because the matter is likely to arise again on remand, we emphasize that the trial court is to consider the parties' annual gross income. As a sole proprietor, the husband is permitted to deduct his business expenses from his gross sales or receipts on Schedule C (Form 1040). The net profit or loss figure on Schedule C (line 32) is then transferred to Form 1040 (line 12) as business income and calculated into the total gross income listed on Form 1040 (line 23). Therefore, if the "total business income" mentioned in Findings number 20 through 22 refers to the net profit figure on Schedule C (line 32), that figure accurately represents at least a portion of the husband's gross income and should not be discounted, as in Finding number 22.

Neither party testified to the net value of their real estate holdings. The wife owns a house with a tax value of $30,000 and a 9.9 acre tract of land purchased jointly with one of her sons. The husband owns a two bedroom brick house and a cinder block building on five and one-half acres of land.

The husband operates his body shop business out of the cinder block building on his property. We emphasize that the business is part of his estate. There is no evidence of its value. The body shop has been in existence since 1979; it is large enough to employ several workers. In valuing the business, the trial court should consider evidence of the husband's equity in the business (cash accounts, receivables, and equipment, including the build-

ing), and good will. *Cf. Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E. 2d 915 (1985) (valuation of a partnership interest in an equitable distribution proceeding).

Moreover, neither party testified about their debts, other than the husband's $33,000 mortgage. The wife mentioned that she was paying mortgages on her home and the 9.9 acre tract, but did not state the balance due.

Even assuming that the parties had presented sufficient evidence of their incomes, estates, and debts to enable the trial court to find as fact the wife's good faith, her insufficient means to defray legal costs, and the husband's refusal to provide adequate support, the award of attorney's fees could not stand. The sole relevant finding of fact, Finding of Fact No. 43, cited *supra*, is not specific enough to allow a determination of the reasonableness of the attorney's fees awarded. *See Falls v. Falls*, 52 N.C. App. 203, 278 S.E. 2d 546, *disc. rev. denied*, 304 N.C. 390, 285 S.E. 2d 831 (1981); *Austin v. Austin*, 12 N.C. App. 286, 183 S.E. 2d 420 (1971); G.S. Sec. 50-13.6 (1984). Court estimates of the time required and the attorney's hourly rate are not sufficient. *Falls v. Falls; Austin v. Austin.*

III

[3] The 20 February 1970 order required the husband to pay seventy dollars every two weeks to support his two minor children. Neither party has ever filed a motion under N.C. Gen. Stat. Sec. 50-13.7 (1984) to modify the original support order. On 28 September 1979 the oldest son, William, reached the age of eighteen. The husband unilaterally decreased his child support payments to $100 per month. On 8 January 1984 the youngest son, Craig, reached the age of eighteen.

No demand for payment of arrears was made from 1976 until this 1983 action. The trial court concluded that the child support arrearage totalled $3,670. Approximately two-thirds of the arrearage accrued prior to 1979. In calculating the "equitable arrearage," the trial court charged the husband the full $140 per month, as required by the February 1970 order, through 1979, reduced the payments to $120 per month in 1980, to $115 per month in 1981, and finally to $100 per month from 1982 through 8 January 1984.

The husband contends that the trial court miscalculated the arrearage because: (1) the parties agreed to the $100 per month payment beginning in October 1979; (2) the husband is entitled to credit for his oldest child's earnings from 1977 through 1979; (3) the husband is entitled to credit because he was no longer able to claim his children as dependents for income tax purposes; and (4) the husband is entitled to credit for purchasing automobiles for both sons. We agree that the order must be vacated and the case remanded, but for different reasons. There are no specific findings or evidence in the record on the younger child's needs and expenses between 1979 and 1984, or on the relative abilities of the parties to provide support. These findings are essential to a modification in court-ordered child support. N.C. Gen. Stat. Sec. 50-13.7 (1984); *Daniels v. Hatcher*, 46 N.C. App. 481, 265 S.E. 2d 429 (1980). Consequently, without the requisite findings supported by competent evidence, the trial court erred in reducing the child support arrearage for the period from 1980 until 1984. We vacate and remand to the trial court to hear additional evidence and to make additional findings of fact, as discussed below.

The 20 February 1980 order directed the husband to pay child support for "his two minor children . . . until further orders of the Court. . . ." N.C. Gen. Stat. Sec. 48A-2 (1984) provides that "[a] minor is any person who has not reached the age of 18 years." This statutory abrogation of the common law definition became effective 5 July 1971. *Shoaf v. Shoaf*, 282 N.C. 287, 192 S.E. 2d 299 (1972). Thus, the trial court properly recognized its lack of authority to enforce, under the provisions of the February 1970 order, any payments accruing after 8 January 1984.

The husband had no authority to unilaterally attempt his own modification between 1979 and 1984. *Gates v. Gates*, 69 N.C. App. 421, 317 S.E. 2d 402 (1984), *aff'd per curiam*, 312 N.C. 620, 323 S.E. 2d 920 (1985); *Tilley v. Tilley*, 30 N.C. App. 581, 227 S.E. 2d 640 (1976). There is no evidence of an agreement between the parties to modify child support in the record. The proper procedure for the husband to follow would have been to apply to the trial court for relief pursuant to G.S. Sec. 50-13.7 (1984). *Id.*

In *Gates v. Gates*, a husband unilaterally reduced support payments due under a consent judgment in 1974, eight years before the subject contempt action. Since a substantial portion of

the obligations had terminated in 1974, and no demand for payment had been made during the eight subsequent years, this Court sought to avoid an injustice by remanding the case to the trial court for the consideration of a reduction. This Court remanded in large part because the record was insufficient as to the child's needs. In similar child support cases involving voluntary expenditures, this Court has remanded for further proceedings to prevent an injustice. *Beverly v. Beverly*, 43 N.C. App. 60, 257 S.E. 2d 682 (1979); *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E. 2d 178 (1977). Significantly, the trial court in this instance labelled its finding on arrearages "the equitable arrearage." We believe it was commendably trying to remedy a perceived injustice with its graduated reductions in child support payments. Unfortunately, the trial court had insufficient evidence before it to do equity.

[4] The husband's right to credit for his older son's earnings from 1977 through 1979 has been effectively waived. It is true that a parent is entitled to the earnings of its unemancipated child, *Goodyear v. Goodyear*, 257 N.C. 374, 126 S.E. 2d 113 (1962), *unless* the parent has relinquished its right by either expressly or impliedly consenting to the child's receipt of earnings,

> as where the parent authorizes the child to make contracts of hire and receive the wages, makes no objection to a contract of hire made by the child, or confirms and approves an agreement of employment making wages payable to the child.

67A C.J.S. *Parent & Child* Sec. 106, at 460 (1978); *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E. 2d 753 (1965) (waiver of parent's rights to earnings of minor child). Here there is no evidence that the husband ever objected to the child's receipt of earnings. The doctrine of waiver is applicable.

The husband's remaining contentions are treated summarily. The husband is not entitled to credit for his inability to claim his sons as dependents for income tax purposes from 1974 through 1984. Nor did the trial court err in denying the husband credit for the purchase of two automobiles for his sons, considering the history of delinquent payments and the lack of the wife's consent to the voluntary expenditures. *See Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E. 2d 178 (1977) (credit given if denial would create an injustice).

IV

[5] The husband's final assignment of error attacks the entry of judgment in open court by another district court judge without notice to the parties. Although another district court judge may enter judgment in open court under N.C. Gen. Stat. Sec. 1A-1, Rule 63 (1983), the entry of judgment in open court presupposes that the parties have been notified. *See* N.C. Gen. Stat. Sec. 1A-1, Rule 58 comment (1983). We do not condone the alleged failure to notify the parties in this case; however, we find no prejudicial error. The notice of appeal was timely filed.

V

In conclusion, the findings of fact and the evidence are insufficient to support an award of attorney's fees or a reduction in the child support arrearage. The case is remanded to the trial court for further proceedings consistent with this decision.

Vacated and remanded.

Judges WEBB and PARKER concur.

BERNARD R. SMITH AND WIFE, MARY ELLEN SMITH, MIKE HODGINS AND WIFE, HILARY HODGINS, LEWIS ANTON AND WIFE, MARY E. ANTON, ALTON L. SIBLEY AND WIFE, JUANITA H. SIBLEY, JOSEPH H. JONES AND WIFE, MARY A. JONES, ARCHIE WOOD AND WIFE, BETTY WOOD, CECIL BENNETT, JR. AND WIFE, JO ANN JONES BENNETT, EDNA W. GATHERCOLE, WILLIAM B. MERCER AND WIFE, PATRICIA M. MERCER, BRENDA J. NORMAN AND HUSBAND, HENRY D. NORMAN v. ASSOCIATION FOR RETARDED CITIZENS FOR HOUSING DEVELOPMENT SERVICES, INC., RUFUS L. EDMISTEN, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, AND WESTMINSTER COMPANY

No. 843SC1075

(Filed 2 July 1985)

Deeds § 20.3— subdivision restrictive covenants—group care facility—single family residential dwelling

A group care facility conformed with the requirements of single family use and design and construction and thus constituted a single family residential dwelling within the meaning of subdivision restrictive covenants.

APPEAL by plaintiffs from *Winberry, Charles B., Judge.* Judgment entered 25 July 1984 in CRAVEN County Superior Court. Heard in the Court of Appeals 9 May 1985.

Plaintiffs, homeowners in the North Hills Subdivision in Craven County, North Carolina, instituted this civil action to temporarily and permanently enjoin the Association for Retarded Citizens for Housing Development Services, Inc. (hereinafter ARCHDS) from erecting a dwelling in the North Hills Subdivision. ARCHDS is a non-profit corporation which secures federal funding for the construction of family care homes. Plaintiffs alleged that the ARCHDS structure violated the restrictive covenants applicable to the subdivision. The Attorney General of North Carolina petitioned, and was granted the right, to intervene as a party defendant. The following facts are pertinent to this appeal.

The North Hills Subdivision is subject to restrictive covenants which provide, in pertinent part, that:

> (1) LAND USE AND BUILDING TYPE: No structure shall be erected, altered, placed or permitted to remain on any lot other than for use as a single family residential dwelling . . .
>
> (2) DWELLING SIZE: Any dwelling erected upon any lot shall contain, if a one story dwelling, not less than 1,200 square feet of ground floor heated area . . . and if more than a one story dwelling no less than 900 square feet of ground floor heated area . . .
>
> (3) DWELLING QUALITY: All dwelling and outbuildings erected upon any lot shall be constructed of material of good grade, quality, and appearance, and all construction shall be performed in good workmanlike manner. . . .

The restrictive covenants also contain provisions regulating setbacks and sidelines for dwellings constructed on each lot.

ARCHDS purchased a lot in North Hills and employed Westminster Company (hereinafter Westminster) to construct a dwelling on the lot designated as 2402 Dogwood Avenue. The single story dwelling constructed by Westminster contains approximately 3,694 square feet under a single roof, with 3,207 square feet heated floor space. The structure is more than twice the size of any other residence in the subdivision. The structure

has five exterior doors having commercial type locks. Entrances to the dwelling provide barrier free access. The dwelling is served by a single electrical circuit and two air conditioning units and two furnaces connected to a common duct system. The dwelling has two mechanical rooms.

The interior of the dwelling has six bedrooms, three bathrooms, one lavatory, two living rooms, one den, and one large kitchen. Passageways provide barrier free access, and the interior design utilizes nonslip flooring, lowered electrical outlets and switches, and lowered shelves to reduce the risk of injury to the disabled residents. The supervisory personnel occupy a living area of approximately 361 square feet. This area has the necessary electrical and plumbing connections for a separate efficiency kitchen even though they are not currently connected (stubbed-in). The supervisor's living area is connected to the living area used by the developmentally disabled adults by a single exterior-type door. A commercial type lock system was employed which permits one master key and at least two submaster keys; one of which is for the supervisory living area. Each bedroom for disabled adults is opened by a separate key. Many of the exterior and interior features of the ARCHDS facility were required by the Housing and Urban Development (hereinafter HUD) regulations in order for ARCHDS to qualify for low interest loans, by the requirements of the North Carolina Department of Human Resources (hereinafter NCDHR), the licensing authority for group care homes in this state, and by applicable building codes.

The group care home provides environmental and emotional support to five handicapped residents. The residents are not biologically related. The group care home operates as a single economic unit, the supervisory personnel acting as surrogate parents. Residents are assigned usual household chores; *i.e.*, cooking, shopping, cleaning and maintenance. No professional counseling or medical services are provided on the premises. The residents participate in activities away from the dwelling during the day, the activities include sheltered workshops, professional rehabilitation or habilitation training, and, on occasion, employment in the private sector. Expenses for the group care facility are paid from a common operating fund. The common fund receives monies from direct federal, state, and local government grants and monies from social security benefits and other support

programs paid to or on behalf of the disabled residents. Supervisory personnel are salaried and paid directly by the Neuse River Center for Mental Health, Mental Retardation, and Substance Abuse.

Plaintiffs twice petitioned the court for temporary injunctions; first, during construction, and, second, after construction but prior to occupancy. Temporary injunctions were denied on both occasions. Defendants then moved for summary judgment, and the trial court granted summary judgment to all defendants on 25 July 1984.

Dunn & Dunn, by Raymond E. Dunn and Raymond E. Dunn, Jr., for plaintiffs.

Moore, Van Allen, Allen & Thigpen, by Joseph W. Eason, and Attorney General Rufus L. Edmisten, by Assistant Attorney General Robert R. Reilly, for the Association for Retarded Citizens for Housing Development Services, Inc.

Stith and Stith, P.A., by Lawrence A. Stith, for Westminster Company.

WELLS, Judge.

Plaintiffs bring forth one assignment of error in which they contend that the trial court erred in granting summary judgment. Plaintiffs contend that the nature of the structure erected by ARCHDS presents a material question of fact: whether the structure is a single family residential dwelling within the meaning of the North Hills Subdivision restrictive covenants. They also argue that if there is no genuine issue as to any material fact, the trial court erred by granting defendants' motion for summary judgment. We find that the trial court properly entered summary judgment for all defendants.

Under N.C. Gen. Stat. § 1A-1, Rule 56 of the Rules of Civil Procedure (1983), a defendant moving for summary judgment:

> [I]s entitled to summary judgment only if he can produce a forecast of evidence, which, when viewed most favorably to plaintiff, would, 'if offered by plaintiff at the trial, without more, . . . compel a directed verdict' in defendant's favor. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 473, 251 S.E. 2d

> 419, 423 (1979). In other words, if the forecast of evidence available for trial, as adduced on the motion for summary judgment, demonstrates that plaintiff will not at trial be able to make out at least a *prima facie* case, defendant is entitled to summary judgment. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981). In such cases there is no genuine issue of material fact. *Moore v. Fieldcrest Mills, Inc., supra.*

Mims v. Mims, 305 N.C. 41, 286 S.E. 2d 779 (1982) (emphasis in original); *see generally* W. Shuford, *N.C. Civ. Prac. and Proc.* § 56-7 (2nd ed. 1981). Applying these principles to the forecast of evidence before the trial court, we must first determine the structural requirements imposed by the North Hills Subdivision restrictive covenants, and then determine whether the forecast of evidence in this case indicates that any issue of material fact remains as to whether the ARCHDS group care facility violates the restrictive covenants.

In *Hobby & Son v. Family Homes*, 302 N.C. 64, 274 S.E. 2d 174 (1981), our supreme court stated the general rules applicable to the enforcement of restrictive covenants:

> While the intentions of the parties to restrictive covenants ordinarily control the construction of the covenants, . . . such covenants are not favored by the law, . . . and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land. . . . The rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent. . . . Even so, we pause to recognize that clearly and narrowly drawn restrictive covenants may be employed in such a way that the legitimate objective of a development scheme may be achieved. Provided that a restrictive covenant does not offend articulated considerations of public policy or concepts of substantive law, such provisions are legitimate tools which may be utilized by developers and other interested parties to guide the subsequent usage of property.
>
> . . . each part of the covenant must be given effect according to the natural meaning of the words, provided that

> the meanings of the relevant terms have not been modified by the parties to the undertaking. . . . [Citations omitted.]

In a previous case, this court interpreted the North Hills Subdivision restrictive covenants. In *Higgins v. Builders and Finance, Inc.*, 20 N.C. App. 1, 200 S.E. 2d 397 (1973), *cert. denied*, 284 N.C. 616, 201 S.E. 2d 689 (1974), this court held that the language of the covenant providing that "[n]o structure shall be erected, altered, placed or permitted to remain on any lot other than for use as a single family residential dwelling" imposed both a "use" restriction and a "structural" restriction. In reaching its decision, the *Higgins* court held:

> In clear language the restriction prohibits the erection, altering, placing or permitting to remain on any lot of any structure other than for use as a single family residential dwelling. Erecting on any lot or permitting to remain thereon any duplex house, even though it remain vacant and unoccupied and not "used" at all, even by one family, would be a violation of the covenant.

Higgins v. Builders and Finance, Inc., supra. The *Higgins* court's interpretation of the North Hills Subdivision's covenants is applicable to the facts of the case before us under the doctrine of *stare decisis. McGill v. Lumberton*, 218 N.C. 586, 11 S.E. 2d 873 (1940).

Plaintiffs concede that the ARCHDS group health care facility is a "residential" use of the dwelling. The law in this state clearly comports with plaintiffs' position. N.C. Gen. Stat. §§ 168-22 and -23 (1982); *see also Hobby & Son v. Family Homes, supra* (holding that group health care facility was a "residential" use as opposed to an institutional use of the property. In *dicta*, the *Hobby* court stated, "[w]hile we deem it unnecessary to reach the question of whether the individuals living at the [group care] home constitute a family, we are compelled to observe that the surrogate parents and the adults subject to their supervision function as an integrated unit rather than independent persons who share only the place where they sleep and take their meals as would boarders in a boarding house").

Plaintiffs contend that their forecast of evidence substantiates their contention that the ARCHDS dwelling is institutional

in design, and, therefore, non-conforming. First, they argue that the ARCHDS structure is composed of two separate units; one for the adult supervisory personnel and one for the disabled adults. Second, they note that the ARCHDS dwelling has twice the square footage as any other dwelling in the subdivision. Third, they contend that the dwelling incorporates institutional design features such as a commercial lock system, five exterior doors and entrances to the dwelling, barrier free access, and two separate mechanical rooms. These facts are undisputed by defendants.

The ARCHDS group care home contains some 3,694 square feet under a single roof and is twice the size of other homes in the North Hills Subdivision. Furthermore, in order to obtain federal flood insurance protection, as required by HUD, the lot on which the structure was built was elevated five feet prior to construction. The restrictive covenants in issue only prohibit construction of dwellings with less than 1,200 square feet of floor space. No maximum size is established beyond the limitations imposed by setback and sideline covenant restrictions and applicable building codes. No covenant provision prohibits elevation of the construction site. The record establishes that the ARCHDS structure meets all covenant standards relating to setback and sidelines and complies with all applicable building code requirements.

The commercial lock system, five exterior doors and entrances to the facility, exterior barrier free access, and two separate mechanical rooms do not violate any covenant requirement *per se*. It is undisputed that these features comply with the terms of the restrictive covenants requiring use of materials of good quality and workmanship. Furthermore, these deviations from the typical suburban family residence are necessary to accommodate the developmentally disabled adults residing in the structure and comply with HUD, NCDHR, and building code requirements for group care homes.

The group care supervisory personnel live in a 361 square foot living area that is separated from the disabled adults. This area contains a separate living room, bedroom, and bathroom. The plumbing, exterior venting, electrical receptacles, and wiring necessary for a separate kitchen were stubbed-in the walls and

floors. The supervisory personnel's living area is separated from the rest of the living area by walls and an interior doorway using an exterior-type door rather than an interior-type door. All the locks in the supervisory personnel's living area use different keys than those used in the living area of the disabled adults. These design features do not violate any specific restrictive covenants.

Plaintiffs contend that the ARCHDS dwelling is similar to the structure determined to be in violation of the restrictive covenants in *Higgins*. The builder, in *Higgins*, had constructed duplex apartments. The trial court issued a restraining order prohibiting further construction. A consent order was entered in which the builder was to modify the structure to conform with the North Hills Subdivision restrictive covenants. The builder subsequently placed one doorway in the common wall in each duplex and left one stubbed-in kitchen in each duplex. Plaintiffs, in that case, contended that the structural changes did not alter the character of the duplexes. The trial court issued a mandatory injunction for the removal of the duplexes. The trial court relied on numerous factors in finding that the buildings erected did not conform with the North Hills Subdivision restrictive covenants: (1) intent of the builder to construct duplexes, (2) general outside appearance as a duplex, (3) separate electrical meters and systems, (4) separate utility rooms, (5) separate kitchens and laundry areas, (6) separate postal enumerations, and (7) separate heating and cooling systems. The trial court concluded as a matter of law that installing one doorway in the common duplex interior wall and stubbing-in one kitchen did not convert the building into a single family residence so as to conform with the restrictive covenants. The builder was ordered to submit another plan to convert the structures into single family structures. The builder offered a plan suggesting minor structural changes, which the trial court again rejected. The *Higgins* court classified the defendant's alteration of the duplexes by inserting a doorway in the common walls and finishing only one kitchen as "minor" alterations, and found that all of the trial court's remaining findings of fact tended to show that the structure was not a single family structure.

The *Higgins* duplex is clearly distinguishable from the ARCHDS dwelling. The ARCHDS group care home is designed to house an extended family. The general outside appearance of the

structure is that of a single family residence, albeit with barrier free access for the disabled adults living therein. The dwelling is serviced by common electrical, heating, cooling, and plumbing systems. Furthermore, the dwelling has but one postal designation.

We hold that based on the principles of construction enunciated in *Hobby* the plaintiffs' forecast of evidence shows that the ARCHDS structure conforms to the requirement of single family design and construction. The ARCHDS dwelling has the outward appearance of a single family residence except for those modifications necessary to use the dwelling for handicapped individuals; *i.e.*, barrier free access and extra doors. Furthermore, the unique interior modifications are those minimally necessary to accommodate the disabilities of the residents. Most of the exterior and interior structural changes were required by either federal, state, or local regulations. The restrictive covenants do not specifically prohibit the structural features of which plaintiffs complain, and nothing in the covenants would prohibit an existing resident of the community from altering a home to accommodate a handicapped family member. We conclude that the trial court, therefore, properly entered summary judgment for defendants. *Mims v. Mims, supra.*

Our decision makes it unnecessary for us to address either plaintiffs' assignments of error relating to the applicability of G.S. §§ 168-23 and -24 to "structural" limitations imposed by restrictive covenants or the constitutionality of the statute as applied to "structural" restrictions contained in restrictive covenants.

Our decision ought not to be interpreted to mean that restrictive covenants cannot be drafted so as to regulate the character of the structures erected in a neighborhood or their utilization. *Hobby & Son v. Family Homes, supra.* The North Hills Subdivision restrictive covenants simply do not prohibit the type of structure constructed by the ARCHDS.

The trial court's entry of summary judgment for all defendants must be and is hereby

Affirmed.

Judges JOHNSON and EAGLES concur.

GARLAND E. HARRIS, ADMINISTRATOR OF THE ESTATE OF FLORIENE T. HARRIS, PLAINTIFF v. SCOTLAND NECK RESCUE SQUAD, INC. AND WILLIAM KENNETH BAKER, DEFENDANTS AND THIRD PARTY PLAINTIFFS v. BEN BELL HARRIS, INCOMPETENT, BY AND THROUGH HIS GUARDIAN AD LITEM, JESSE B. BULLOCK, THIRD PARTY DEFENDANT

SCOTLAND NECK RESCUE SQUAD, INC., PLAINTIFF v. BEN BELL HARRIS, DEFENDANT

WILLIAM KENNETH BAKER, PLAINTIFF v. BEN BELL HARRIS, DEFENDANT

No. 843SC1105

(Filed 2 July 1985)

1. **Evidence § 18— automobile accident—audiology expert—voir dire proper**

In an action arising from a collision with an ambulance at an intersection, the court did not err by allowing plaintiff to examine appellants' expert in audiology on *voir dire*. The expert intended to testify as to the results of an experiment and the court needed to determine whether the experiment was made under conditions substantially similar to those prevailing at the time of the occurrence involved in this action and whether the result of the experiment had a legitimate tendency to prove or disprove an issue arising out of the occurrence.

2. **Automobiles and Other Vehicles §§ 45, 45.6— cross-examination of driver—use of diagram—no error**

In an action arising out of a collision with an ambulance, there was no error in permitting the driver of the ambulance to be cross-examined about how far south of the intersection he stopped and to illustrate his testimony with a scale diagram. Appellants incorrectly assigned error to the testimony of the wrong witness, the evidence was within the scope of the direct examination, and the diagram was properly used to illustrate the testimony.

3. **Automobiles and Other Vehicles § 45.2; Negligence § 27.2— collision with ambulance at intersection—testimony concerning ambulance at prior intersection**

In an action arising from a collision with an ambulance at an intersection, the court did not err by admitting the testimony of a witness who saw the ambulance run a red light at high speed without its yelper at the intersection immediately prior to the scene of the collision. The testimony did not involve an act of negligence on a prior unrelated occasion and the testimony was properly offered in rebuttal to impeach the ambulance driver by evidence of conduct inconsistent with his testimony at trial.

4. **Automobiles and Other Vehicles § 45— collision with ambulance—testimony concerning other ambulances—properly admitted**

The trial court did not err in an action arising from a collision with an ambulance by admitting testimony that an eyewitness had observed other am-

bulances pass through the intersection where the collision occurred or by stating in response to the objection "It's certainly a permissible subject." Appellants opened the door to that line of questioning, the evidence was relevant to show the standard of care to which the ambulance driver should have conformed, and there was no prejudice in the court saying that the evidence was admissible.

5. Automobiles and Other Vehicles § 45.4— collision at intersection—testimony concerning traffic light—properly admitted

In an action arising from a collision with an ambulance at an intersection, the trial court did not err by admitting testimony from the investigating officer that he could not determine any malfunction in the traffic lights on the afternoon of the accident or testimony from a witness who installed and maintained traffic signals that he had received no complaints about the light at that intersection. The installer was competent to so testify, and the officer's testimony was admissible as a fact within the officer's knowledge, as a shorthand statement of fact, and as a statement which was not an opinion on the ultimate issue to be decided by the jury.

6. Evidence § 25— automobile accident—photographs properly admitted

The trial court in an action arising from a collision with an ambulance did not err by admitting photographs as substantive rather than illustrative evidence. A proper foundation was laid for introducing the photographs as either illustrative or substantive evidence, appellants did not show prejudice, did not cite authority for their position, did not argue that the photographs were inflammatory and did not include the photographs as exhibits. G.S. 8-97.

7. Automobiles and Other Vehicles § 90.10— collision with ambulance—instruction that testimony concerning ambulance siren not relevant to passenger in car—proper

In an action arising from a collision with an ambulance in which appellants sought to prove that the negligence of the driver of the passenger car was the sole proximate cause of the collision, the court did not err by instructing the jury that testimony as to the condition and value of the ambulance, the location of the siren, and the distance over which it would be audible was not relevant to plaintiff's decedent, who was a passenger in the car. No claim of contributory negligence was asserted against plaintiff's decedent.

8. Appeal and Error § 31.1; Death § 11— no objection to instruction at trial—plain error rule not applicable to civil actions

In an action arising from a collision with an ambulance at an intersection, the appellants could not object on appeal to the court's instruction on the negligent beneficiary rule because they did not object at trial. The plain error rule is not applicable in a civil case.

9. Trial § 9.2— conversation between parties and witnesses before jurors—no mistrial—no error

The trial court did not err by failing to conduct further inquiry into a conversation between plaintiff and a juror where the record showed that the conversation was about collateral matters between parties and witnesses in the

presence of the jurors, appellants did not move for a mistrial, and appellants expressed satisfaction with the court's handling of the matter. The court was not under a duty to conduct further inquiry or declare a mistrial *ex mero motu* in this situation or when informed by plaintiff's counsel that he had early on cautioned his clients not to speak to jurors.

10. Rules of Civil Procedure § 59— new trial for excessive damages denied—no abuse of discretion

There was no manifest abuse of discretion in an action arising from a collision with an ambulance where the court denied appellants' motions to set aside the verdict, for judgment notwithstanding the verdict and for a new trial on the basis of excessive damages, even though the decedent was seventy-five years old at the time of death and the award was $323,333.

11. Judgments § 55— prejudgment interest—no evidence of liability insurance—burden on defendant to show absence

The trial court did not err by allowing prejudgment interest in an action arising from a collision with an ambulance where plaintiff presented no evidence that the rescue squad carried liability insurance covering the claim. Defendant had the burden of showing the absence of such insurance, the record reveals no presentation of evidence or statement to the trial court indicating that the rescue squad did not have liability insurance covering the claim, appellants did not assert the absence of liability insurance in their brief, and counsel for appellants declined during oral argument to state that the rescue squad was not covered. G.S. 20-309 *et seq.*

12. Judgments § 55— prejudgment interest—accrues from filing of complaint rather than service

The trial court did not err by allowing prejudgment interest for the period prior to the time appellants were served with a valid complaint. G.S. 24-5 allows prejudgment interest to accrue from the time the action was instituted, and G.S. 1A-1, Rule 3 provides that an action is commenced by filing a complaint.

13. Judgments § 55; Constitutional Law §§ 19, 23.1— prejudgment interest—constitutional

G.S. 24-5, which allows prejudgment interest, does not violate Art. I, §§ 19 and 32 of the North Carolina Constitution or the equal protection and due process clauses of the Fourteenth Amendment to the U. S. Constitution.

APPEAL by Scotland Neck Rescue Squad, defendant and third party plaintiff, and William Kenneth Baker, defendant, third party plaintiff, and plaintiff, from *Lewis, John B., Jr., Judge.* Judgment entered 15 December 1983 in Superior Court, PITT County. Heard in the Court of Appeals 13 May 1985.

Blount and White, by Marvin Blount, Jr., and Charles Ellis, for plaintiff appellee.

Morris, Rochelle, Duke & Braswell, P.A., by Thomas H. Morris and Edwin M. Braswell, Jr., for appellants.

WHICHARD, Judge.

This action arises out of a collision at an intersection between an ambulance owned by Scotland Neck Rescue Squad (Rescue Squad), which was being driven by William Kenneth Baker (Baker), and a passenger vehicle driven by Ben Bell Harris (Harris), the husband of plaintiff's decedent. Plaintiff's decedent, who died from injuries sustained in the collision, was riding in the passenger vehicle.

The jury found both drivers negligent and awarded plaintiff $500,000 which the court reduced to $323,333 under the negligent beneficiary rule, by which plaintiff's decedent's husband, as a beneficiary found negligent by the jury, is precluded from recovery. Rescue Squad and Baker appeal. We find no prejudicial error.

Evidentiary Issues

[1] Appellants contend they were prejudiced when the court allowed plaintiff to examine their expert in audiology on *voir dire*. They argue that the *voir dire* enabled plaintiff to depose the witness and thereby avoid eliciting potentially harmful answers on cross-examination. There is no merit to this contention. The audiology expert intended to testify as to the results of an experiment. Before he could do so the court needed to determine in its discretion whether the experiment satisfied the requirements of *Mintz v. R.R.*, 236 N.C. 109, 114-15, 72 S.E. 2d 38, 43 (1952) (the experiment must be made under conditions substantially similar to those prevailing at the time of the occurrence involved in the action and the result of the experiment must have a legitimate tendency to prove or disprove an issue arising out of such occurrence). *See also Lea Co. v. Board of Transportation*, 57 N.C. App. 392, 400-01, 291 S.E. 2d 844, 850 (1982), *affirmed*, 308 N.C. 603, 304 S.E. 2d 164 (1983). Thus, the court properly allowed *voir dire*.

[2] Appellants contend the court erred in permitting Baker to be cross examined as to how far south of the intersection he stopped the ambulance, illustrating his testimony with a diagram where

one inch equalled twenty feet. Appellants argue that no evidence was introduced concerning the accuracy of the scale of the diagram. This contention is without merit. First, appellants incorrectly assign this error to testimony of Baker when the record shows that the testimony is actually that of Susan Edwards. Second, the evidence elicited on cross-examination was within the scope of the witness' testimony on direct examination. Third, the diagram was properly used to illustrate her testimony. We find no abuse of the court's discretion in admitting this testimony. 1 Brandis, *North Carolina Evidence* Sec. 42 at 162-63 (2d Revised Edition 1982); *see also State v. Bumper*, 275 N.C. 670, 674, 170 S.E. 2d 457, 460 (1969).

Appellants contend the court erred by not limiting plaintiff's cross-examination of Baker. We find that the court acted within its discretion. *See McCorkle v. Beatty*, 226 N.C. 338, 341-42, 38 S.E. 2d 102, 105 (1946); *see also Bumper*, 275 N.C. at 674, 170 S.E. 2d at 460.

[3] Appellants contend the court erred in admitting the testimony of Gary Davis, a witness who stated that he saw the ambulance run a red light at a high rate of speed without its yelper on at the intersection immediately prior to the scene of the collision. Appellants argue that this testimony falls within the rule that evidence of acts of negligence on prior unrelated occasions is not competent to prove a driver's negligence on the present occasion. *Mason v. Gillikin*, 256 N.C. 527, 532, 124 S.E. 2d 537, 540 (1962). We disagree that the evidence falls within this rule. Davis' testimony was as to Baker's negligence on this occasion, not a prior occasion. In addition, Baker testified that he was driving forty-five miles per hour, slowed to thirty miles per hour as he reached the intersection before the one at which the collision occurred, and put on his yelper at that point. The testimony of Davis was thus properly offered in rebuttal to impeach Baker by evidence of conduct inconsistent with his testimony at trial. 1 Brandis, *supra*, Sec. 46 at 176.

[4] Appellants contend the court erred in allowing William Eakes, an eyewitness, to testify that he had observed other ambulances pass through the intersection where the collision occurred and that the court erred in stating in response to appellants' objection to this testimony, "It's certainly a permissible subject."

Appellants' first assignment of error as to Eakes' testimony is overruled for two reasons: appellants opened the door to this line of questioning by eliciting testimony from Eakes concerning other ambulances and whether their sirens were on; and the evidence was relevant to show the standard of care to which Baker should have conformed when travelling through the intersection. Brandis, *supra*, Sec. 89 at 335. *See, e.g., Fox v. Texas Co.*, 180 N.C. 543, 545-46, 105 S.E. 437, 438 (1920) (evidence that a similar accident was avoided by ordinary care admissible to show want of care); *Murdock v. R.R.*, 159 N.C. 131, 74 S.E. 887 (1912) (plaintiff in negligence action allowed to testify as to care exercised by other railroads). Appellants' second assignment of error as to the court's comment is also without merit. The testimony was admissible and there was no prejudice to appellants in the court saying so.

[5] Appellants contend the court erred in admitting testimony of an investigating officer that he examined the traffic signal the afternoon of the accident and "could not determine any malfunction in the lights." Appellants' objection may not have been timely since it was not made until after the officer had answered the question asking him the result of his checking. *Medford v. Davis*, 62 N.C. App. 308, 310, 302 S.E. 2d 838, 840, *disc. rev. denied*, 309 N.C. 461, 307 S.E. 2d 365 (1983). Assuming, *arguendo*, that the objection was timely, we find the testimony admissible: as a fact within the officer's knowledge; as a permissible shorthand statement of a fact impractical to describe in detail, *id*; and as a statement which was "not an opinion on the ultimate issue to be decided by the jury." *Id.* This assignment of error is thus overruled.

Without citing authority, appellants contend the court erred in allowing a witness who maintained and installed traffic signals to testify that he had received no complaints about the light at the intersection where the collision occurred. We find that the witness was competent to so testify and that the evidence was admissible. *See* 1 Brandis, *supra*, Sec. 82.

[6] Appellants assign as error the court's admission of several photographs as substantive rather than illustrative evidence. They cite no authority for their position. They do not argue that the photographs are inflammatory and do not include the photographs as exhibits. It appears from the record that a proper foun-

dation was laid for introducing the photographs as either illustrative or substantive evidence. G.S. 8-97 (effective 1 October 1981). Moreover, appellants have failed to show prejudice. This assignment of error is therefore overruled.

Appellants contend the court erred in permitting plaintiff to ask certain leading questions. Appellants have not shown prejudice therefrom and we find no abuse of discretion by the court. This assignment of error is without merit.

Jury Instructions

[7] At trial appellants sought to prove that the negligence of Harris was the sole proximate cause of the collision. To that end they offered testimony as to the condition and value of the ambulance, the location of the siren, and the distance over which it would be audible. Without citing authority, appellants assign as error the court's instruction that this evidence related to Harris but did not relate to plaintiff's decedent. We find the instruction proper. Since no claim of contributory negligence was asserted against plaintiff's decedent, evidence as to the value of the ambulance, the location of the siren, or the distance over which the siren could be heard could not be relevant as to her. We do not believe the instruction precluded the jury from finding that Harris' negligence was the sole proximate cause of the accident.

[8] Appellants assign error to the court's instruction on the negligent beneficiary rule and its application in this case. Since appellants did not object at trial, however, they may not now object on appeal. N.C. Rules of Appellate Procedure, Rule 10(b)(2). Contrary to appellants' contention, the plain error rule, *State v. Odom*, 307 N.C. 655, 659, 300 S.E. 2d 375, 378 (1983), is not applicable in a civil case. *Durham v. Quincy Mutual Fire Ins. Co.*, 311 N.C. 361, 367, 317 S.E. 2d 372, 377 (1984). This assignment of error is thus without merit.

Appellants' contention that they were prejudiced by the court's failure to conduct a charge conference pursuant to Rule 21 of the *General Rules of Practice for the Superior and District Courts* is also without merit. The record clearly reveals that the court complied with the rule.

[9] Appellants assign error to the court's failure to conduct further inquiry into "a conversation between plaintiff and [a] juror." As plaintiff notes and the record shows, however, the alleged conversation was not between a party and a juror but was a conversation concerning collateral matters between parties and witnesses in the presence of jurors. Further, appellants did not move for a mistrial and on the record expressed satisfaction with the court's handling of the matter. We find no authority, and appellants cite none, that imposes a duty on the court in this situation to conduct further inquiry or declare a mistrial *ex mero motu*. For the same reasons we find no merit in appellants' contention that the court erred in failing to declare a mistrial *ex mero motu* when informed by plaintiff's counsel that he had early on cautioned his clients not to speak to jurors. Appellants misread this cautionary remark by plaintiff's counsel as an admission that actual conversations between clients and witnesses took place. That they did not is clear from the record.

[10] Appellants contend the court erred in denying their motions to set aside the verdict, for judgment notwithstanding the verdict, and for a new trial. Each motion was made on the grounds that the damages awarded were excessive. Appellants argue that because plaintiff's decedent was seventy-five years old at the time of death, the award of $323,333 to her two adult sons was in excess of the value of the loss of her services, protection, society, comfort, and guidance. Citing *Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982), appellants contend the court's denial of their motions to set aside the verdict and for a new trial amounts to a "substantial miscarriage of justice."

In reviewing a trial court's discretionary ruling either granting or denying a motion to set aside the verdict and order a new trial, we are virtually prohibited from intervening, *Pearce v. Fletcher*, 74 N.C. App. 543 (1985); appellate review "is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Id.* citing *Worthington*, 305 N.C. at 482, 290 S.E. 2d at 602. After a careful review of the record we find no such manifest abuse of discretion. We also find that the evidence viewed in the light most favorable to plaintiff was sufficient to sustain the verdict,

Investment Properties v. Allen, 281 N.C. 174, 184-85, 188 S.E. 2d 441, 447-48 (1972), and that, therefore, the court properly denied appellants' motion for judgment notwithstanding the verdict.

Prejudgment Interest

[11] Appellants contend the court erred by allowing prejudgment interest since G.S. 24-5 permits such only on claims covered by liability insurance and plaintiff presented no evidence that Rescue Squad carried liability insurance covering this claim. We do not believe G.S. 24-5 requires plaintiff to present such evidence. Indeed, the law prohibits plaintiff from introducing such evidence at trial. *Fincher v. Rhyne*, 266 N.C. 64, 145 S.E. 2d 316 (1965) (evidence of liability insurance is prejudicial and entitles movant to a new trial); *Lytton v. Manufacturing Co.*, 157 N.C. 331, 72 S.E. 1055 (1911). In light of the statutory requirement of financial responsibility, G.S. 20-309 *et seq.*, which is generally met through liability insurance, we hold that defendant had the burden of showing the absence of such insurance. The record reveals no presentation of evidence or statement to the trial court indicating that Rescue Squad does not have liability insurance covering this claim. Appellants have not asserted the absence of liability insurance in their brief in this Court; at oral argument counsel for appellants, upon specific questioning, declined to state that Rescue Squad is not so covered. This assignment of error is therefore overruled.

[12] Appellants contend the court erred in allowing prejudgment interest for the period prior to the time they were served with a valid complaint. G.S. 24-5 allows prejudgment interest to accrue "from the time the action is instituted." G.S. 1A-1, Rule 3 provides, that "[a] civil action is commenced by filing a complaint with the court." Here plaintiff filed his complaint on 4 June 1982. Thus the action was instituted on 4 June 1982 and the court properly allowed prejudgment interest to accrue from that time.

[13] Appellants contend that G.S. 24-5 violates Art. I, Sections 19 and 32 of the North Carolina Constitution and the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. Our Supreme Court has resolved these arguments adversely to appellants in *Lowe v. Tarble*, 312 N.C. 467, 323 S.E. 2d 19 (1984) and *Powe v. Odell*, 312 N.C. 410, 322 S.E. 2d 762 (1984).

We conclude that this trial was free from prejudicial error and that judgment was properly entered for plaintiff.

No error.

Chief Judge HEDRICK and Judge WEBB concur.

CRAVEN COUNTY HOSPITAL CORPORATION v. LENOIR COUNTY, THE CITY OF KINSTON, AND LEO HARPER, SHERIFF OF LENOIR COUNTY

No. 843SC854

(Filed 2 July 1985)

1. **Sheriffs and Constables § 1— injury to prisoner—no personal liability for medical expenses**

Even if an injured person was in the custody of the sheriff at the time of his injury, the sheriff would have no personal liability to pay for medical treatment of the injury absent an express agreement to do so.

2. **Jails and Jailers § 1; Municipal Corporations § 9.1— injury to person in custody of police officers—medical expenses—no liability by city**

Plaintiff hospital's complaint was insufficient to support a claim against defendant city for medical treatment rendered to a person injured while in the custody of city police officers based on express contract. Furthermore, no duty was imposed on the city by G.S. 153A-224(b) to pay for medical services rendered to persons in the custody of its police officers but not yet confined in a local confinement facility, and there was thus no relationship implied by law which would obligate the city to pay the costs of such treatment. G.S. 160A-16.

3. **Jails and Jailers § 1; Counties § 2.1— injury to person in custody of city officers—medical expenses—no liability by county**

There was no implied obligation by a county to pay for medical services rendered to a person injured while in the custody of city police officers where such person was not placed in the county jail or in the custody of any officer or employee of the county. G.S. 153A-224(b).

4. **Counties § 2.1— hospital care for indigents—no duty by county**

No constitutional or statutory provision imposes an obligation on a county to pay for hospital care rendered to its indigent citizens, and in the absence of such a duty, no cause of action accrues in favor of a health care provider against a county to recover for the cost of hospital services rendered to an indigent resident of the county. G.S. 130A-34; Art. XI, § 4 of the N.C. Constitution.

APPEAL by plaintiff from *Beaty, Judge* and *Phillips, Judge.* Orders entered 2 November 1983 and 28 June 1984 in Superior Court, CRAVEN County. Heard in the Court of Appeals 15 April 1985.

Plaintiff brought this action to recover from the defendants, jointly and severally, the costs of medical care rendered to one Fred Baker. Defendants moved to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6). Judge Beaty allowed the motions as to defendants City of Kinston and Sheriff Harper on 2 November 1983, and denied the motion as to defendant Lenoir County. After discovery was completed, both plaintiff and defendant Lenoir County moved for summary judgment. On 28 June 1984, Judge Phillips denied plaintiff's motion for summary judgment and allowed summary judgment for defendant Lenoir County.

Sumrell, Sugg and Carmichael, by Fred M. Carmichael and Rudolph A. Ashton, III, for plaintiff appellant.

Thomas B. Griffin, and Womble, Carlyle, Sandridge and Rice, by Allan R. Gitter, for defendant appellees.

MARTIN, Judge.

In this appeal we are called upon to determine whether, under the factual circumstances which follow, any of the defendants are obligated to pay the cost of hospital care rendered to an indigent who was injured while in police custody. Finding no express or implied contractual obligation to pay for such expenses, nor any constitutional or statutory provision imposing such a duty, we affirm the decision of the trial court.

There are no facts in dispute. Fred Baker was an habitual inebriate who was frequently confined at the Lenoir County jail for offenses relating to public drunkenness or for non-criminal detainment pursuant to G.S. 122-65.13. He was last released from the jail on 30 December 1982 after having posted bond on a charge of being intoxicated and disruptive in public in violation of G.S. 14-444. On the evening of 31 December 1982, Officers Lewis and Arndt of the Kinston Police Department found Baker in an intoxicated condition in front of a local tavern, but apparently not violating the law. The officers placed Baker in their patrol car and took him to the Lenoir County courthouse for the purpose of

placing him in the county jail, pursuant to G.S. 122-65.13, until he became sober. As the officers were assisting him from their car to the building, Baker fell and sustained an injury to his head, rendering him unconscious. An ambulance was summoned by the police officers and Baker was transported to Lenoir Memorial Hospital. He was not accompanied by any police officer, nor was the hospital contacted by the Kinston Police Department. At the time of his injury, Baker had not been delivered to the jail nor placed in the custody of any employee of the Lenoir County Sheriff's Department.

Due to the nature of Baker's head injury, personnel at Lenoir Memorial Hospital arranged his transfer to Craven County Hospital for treatment by a neurosurgeon. Baker remained at plaintiff hospital until 10 January 1983 when he died. Plaintiff made demand on defendants for payment of Baker's hospital bill, which was refused.

[1] Plaintiff's claim against defendant Harper, Sheriff of Lenoir County, was properly dismissed. Even if Baker had been in the lawful custody of the sheriff at the time of his injury, as alleged in the complaint, the sheriff would have no personal liability to pay for Baker's medical treatment in the absence of an express agreement to do so. *Spicer v. Williamson*, 191 N.C. 487, 132 S.E. 291 (1926). No express agreement was alleged to have existed between defendant Harper and plaintiff; therefore, the complaint was insufficient to state a legally recognized claim against him.

[2] Plaintiff's claim against defendant, City of Kinston, was also properly dismissed. Plaintiff alleged that Baker was arrested by officers of the Kinston Police Department and that after he fell, while in their custody, he was transported by the officers to the Lenoir Memorial Hospital. Though these allegations were later shown by discovery to be factually inaccurate, for the purposes of the Rule 12(b)(6) motion the trial court was required to accept the allegations as true. *Rawls v. Lampert*, 58 N.C. App. 399, 293 S.E. 2d 620 (1982). Plaintiff also alleged that due to the inability of Lenoir Memorial Hospital to treat Baker, he was transported to plaintiff hospital and that defendant, City of Kinston, being vested with authority to contract for the provision of medical attention to those in custody of its officers, thereby contracted with plaintiff to provide treatment to Baker and is liable for the costs thereof.

An action may be dismissed pursuant to Rule 12(b)(6) if the complaint discloses an absence of law to support the claim, or an absence of facts sufficient to make a good claim. *Morrow v. Kings Department Stores*, 57 N.C. App. 13, 290 S.E. 2d 732, *disc. rev. denied*, 306 N.C. 385, 294 S.E. 2d 210 (1982). The allegations of the First Claim for Relief are insufficient to support a claim against the City of Kinston in contract. G.S. 160A-16 provides that:

> All contracts made by or on behalf of a city shall be in writing. A contract made in violation of this section shall be void and unenforceable unless it is expressly ratified by the council.

No express agreement is alleged to have been entered into between plaintiff and any person acting on behalf of defendant City.

Nor can a contract to pay for medical services be implied from the allegation that City's officers took Baker to Lenoir Memorial Hospital for treatment. In *Spicer v. Williamson*, *supra*, our Supreme Court quoted the general rule:

> The rule that where a person requests the performance of a service, and the request is complied with, and the service performed, there is an implied promise to pay for the services, does not apply where a person requests a physician to perform services for a patient *unless the relation of that person to the patient is such as raises a legal obligation on his part to call in a physician and pay for the services*, or the circumstances are such as to show an intention on his part to pay for the services, it being so understood by him and the physician. [Citation omitted.]

Spicer, *supra* at 489, 132 S.E. at 293 (emphasis supplied). Relating this general rule to the relationship of a governmental unit to a prisoner the Court said:

> It has been stated as a general rule of law, that, *in the absence of some express provisions of the law*, the public is not liable to a physician or surgeon for services rendered prisoners, even though they are insolvent, and unable to pay for such services themselves.

Id. at 491, 132 S.E. at 294 (emphasis supplied). The Court went on to hold that the Duplin County Board of Commissioners had a

duty, created by the provisions of statutes then in existence, to provide necessary medical attention to a prisoner in the custody of the sheriff and that the sheriff, in seeking medical treatment for the prisoner, had authority to bind the commissioners for payment of the reasonable charges for such services. The holding of *Spicer* has recently been followed by this Court in Annie Penn Memorial Hosp., Inc. v. Caswell County, 72 N.C. App. 197, 323 S.E. 2d 487 (1984), where a prisoner was shot by a deputy sheriff during the course of an arrest, taken by the deputy to a hospital for treatment, and the hospital was told by the deputy that the county would be responsible for payment. In both *Spicer* and *Annie Penn Memorial Hosp., Inc.*, the health care providers were expressly told by the officer that payment would be made.

In the case *sub judice* there is no allegation that either Lenoir Memorial Hospital or plaintiff was told that defendant City would pay for Baker's treatment. Applying the general rules of *Spicer* to this case, we find that no promise to pay plaintiff for medical services rendered Baker can be implied on the part of defendant City unless it is charged with a statutory duty to do so. G.S. 160A-287 provides authority for, but no duty for, a city to establish a lockup. The City of Kinston does not maintain a lockup; persons arrested by Kinston police officers, if confined, are confined in the Lenoir County jail, which is the local confinement facility for Lenoir County. G.S. 153A-216 *et seq.* provide standards for local confinement facilities. G.S. 153A-224(b) authorizes custodial personnel to secure emergency medical services for persons *confined* in a local confinement facility and provides that *the unit of local government operating the facility* shall pay for the cost of such services. No duty is imposed by statute upon the City of Kinston to pay for medical services rendered to persons in the custody of its police officers; therefore there is no relationship implied by law which would obligate the City to pay the costs of such treatment.

Although not necessary to our holding, we note that discovery which was conducted after dismissal of the claim against defendant City showed that Baker was not *arrested* by the officers for drunk and disruptive conduct. He was *assisted* by the officers, pursuant to G.S. 122-65.13, which authorizes officers to transport a person found intoxicated in a public place to a county jail, to be detained until he becomes sober. If such person

is in apparent need of immediate medical care, the officers are authorized to transport him to a hospital. G.S. 122-65.11(a)(4). The record does not suggest that Baker was injured due to any conduct on the part of Officers Lewis and Arndt. Rather, the record indicates that his injury was due to his intoxicated condition. The officers properly caused him to be transported to the hospital. G.S. 122-65.11 does not suggest that the governmental unit employing an officer who acts pursuant to the statute assumes responsibility for payment for the medical care rendered to the intoxicated person.

Plaintiff alleged, in its Second Claim for Relief, that defendant City has a constitutional obligation to provide necessary medical attention to those in the custody of its officers, including the obligation to pay for such treatment. In *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 77 L.Ed. 2d 605, 103 S.Ct. 2979 (1983), the Supreme Court of the United States held that the due process clause of the federal constitution requires that a governmental entity provide medical attention to its detainees, but that the obligation to provide such care is satisfied when the injured person is taken promptly to a hospital which provides the necessary treatment. As long as the necessary medical care is provided, the constitutional duty is satisfied; allocation of costs is a matter of state law. *Id.* As previously discussed, under North Carolina law, the relationship of a municipality to persons in the custody of its officers, nothing else appearing, does not impose upon the municipality the obligation to reimburse a health care provider for the cost of medical treatment rendered to such persons.

[3] We also conclude that summary judgment was properly entered in favor of defendant Lenoir County. Plaintiff has presented no evidence that anyone acting on behalf of Lenoir County made any statement or promise to plaintiff hospital regarding payment for Baker's care and treatment; therefore, no express contract existed. We must therefore determine if plaintiff has shown facts from which such an obligation may be implied.

G.S. 153A-224(b) imposes a duty upon Lenoir County, as the governmental unit operating a local confinement facility, to pay the costs of emergency medical services rendered to persons confined in its jail. In *Spicer*, our Supreme Court construed similar

statutes to extend the duty of the county to pay for medical treatment rendered to "a person in the *lawful custody of the sheriff*, who is unable, because of the condition of the prisoner, to take him at once to the jail." *Spicer v. Williamson, supra* at 492, 132 S.E. at 294 (emphasis supplied). The undisputed facts show that Baker was not placed in the Lenoir County jail nor was he, at any time on 31 December 1982 or thereafter, placed in the custody of any officer or employee of the Lenoir County Sheriff's Department. There was no communication between any officer or employee of the county and either hospital regarding Baker's care and treatment until after his death, when plaintiff hospital demanded, and defendant County refused, payment. Thus, we hold that there is no genuine issue of material fact as to the existence of an implied promise by Lenoir County to pay plaintiff for Baker's care and treatment.

[4] Plaintiff argues, however, that even in the absence of a contractual obligation to pay for Baker's treatment, Lenoir County has an obligation, imposed by Sections 3 and 4 of Article XI of the North Carolina Constitution, to pay for hospital care to its indigent residents. We find no such constitutional obligation. The North Carolina Supreme Court, interpreting Article XI, Section 7 of the Constitution of 1868, which was similar to Article XI, Section 4 of the present Constitution, stated:

> [I]t has been uniformly held in this State that the care of the indigent sick and afflicted poor is a proper function of the Government of this State, and that the General Assembly may by statute require the counties of the State to perform this function at least within their territorial limits.

Martin v. Board of Comm'rs of Wake County, 208 N.C. 354, 365, 180 S.E. 777, 783 (1935). In the absence of a delegation by the State to the counties of the obligation to pay the cost of medical care of the indigent sick, such obligation is that of the State. *Board of Managers v. Wilmington,* 237 N.C. 179, 74 S.E. 2d 749 (1953).

The General Assembly has delegated to the counties the duty to provide local public health services by the mandate contained in G.S. 130-13(a) (repealed, Session Laws 1983), effective 1 January 1984, now G.S. 130A-34) that "[each] county shall make public health services available to its residents." *Casey v. Wake County,* 45 N.C. App. 522, 263 S.E. 2d 360, *disc. rev. denied,* 300 N.C. 371,

267 S.E. 2d 673 (1980). With respect to hospital care, however, the General Assembly has only authorized, not required, counties and municipalities to establish public hospitals. General Statutes, Chapter 131 (repealed, Session Laws 1983, effective 1 January 1984). In authorizing counties to establish public hospitals, the General Assembly did not impose upon the counties the obligation to pay for hospital care rendered to its indigent citizens. We find no constitutional or statutory provision which would impose such an obligation on a county. In the absence of such a duty, clearly mandated and expressed by the General Assembly, we hold that no cause of action accrues in favor of a health care provider against a county to recover for the cost of hospital services rendered to an indigent resident of the county.

In summary, we hold that neither Sheriff Harper, the City of Kinston nor Lenoir County are liable to plaintiff hospital for the costs of its treatment of Fred Baker. In so holding, we recognize that an apparent gap exists between the provisions of G.S. 153A-224(b), the holdings of *Spicer v. Williamson*, *supra*, and *Annie Penn Memorial Hosp., Inc. v. Caswell County*, *supra*, and the status of a detainee in need of medical treatment who happens to be in the custody of city police officers rather than a sheriff or his deputy. We conclude, however, that the gap must be filled, if at all, by the General Assembly. It is for that body, not the courts, to devise means by which health care providers may be compensated for services rendered in treating indigent persons injured while in the custody of such officers.

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

STATE OF NORTH CAROLINA v. BARBARA KELLY

No. 8429SC1021

(Filed 2 July 1985)

1. **Constitutional Law § 34— indictment for larceny dismissed—subsequent indictment for obtaining property by false pretenses—no double jeopardy**

Defendant was not subjected to double jeopardy where an indictment for larceny of an automobile was dismissed and defendant was subsequently indicted and convicted of obtaining property by false pretenses. The factor of an intentionally false and deceptive representation of a fact or event is an element of obtaining property by false pretenses but not of larceny; similarly, a key element of larceny is that the property be wrongfully taken without the owner's consent. G.S. 14-100, North Carolina Constitution, Art. I, § 17, U. S. Constitution, Amendments V and XIV.

2. **False Pretense § 2.1— indictment sufficient—passage of title not a requisite element**

The passage of title is not a requisite element of obtaining property by false pretenses and the trial judge did not err by refusing to dismiss an indictment which did not allege that title passed. G.S. 14-100.

3. **False Pretense § 3.2— instruction on larceny not given—no error**

The trial court did not err in a prosecution for obtaining property by false pretenses by refusing to charge the jury on the crime of larceny. G.S. 14-100(a) requires the instruction only when there is evidence from which the jury could find that the crime was committed.

4. **False Pretense § 3— obtaining automobile by false pretenses—telephone conversation with dealer properly admitted**

The trial court in a prosecution for obtaining an automobile by false pretenses did not err by admitting a telephone conversation between the witness and "Clyde Horton" where the witness, an employee of an automobile dealership, relied on the conversation in allowing defendant to take a car. The testimony was admitted to explain the witness's actions and the jury was instructed on the limited purpose of the evidence.

5. **False Pretense § 3; Criminal Law § 86.1— defendant cross-examined about prior acts of misconduct—no error**

There was no abuse of discretion in an action for obtaining property by false pretenses where the trial judge allowed the State to cross-examine defendant about prior acts of misconduct. The questions concerned only prior instances of misconduct by defendant and the prosecution indicated its good faith basis for its inquiries by producing a police report discussing the bad acts in question.

6. **Criminal Law § 138— aggravating factor—record insufficient for review**

Defendant did not meet her burden of showing that the trial judge improperly found as an aggravating factor that defendant committed the offense

of obtaining property by false pretenses while on pretrial release on another felony charge where defendant did not place in the record sufficient portions of the trial transcript to enable the court to review the assignment of error.

APPEAL by defendant from *Davis, Judge.* Judgment entered 25 May 1984, in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 4 April 1985.

Attorney General Lacy H. Thornburg by Associate Attorney Augusta B. Turner for the State.

Robert G. Summey for defendant appellant.

COZORT, Judge.

Defendant Barbara Kelly was indicted for larceny of an automobile from dealer McCurry-Deck, Inc. At the close of the State's evidence, the trial judge dismissed the charge because the crime was not alleged to have occurred without the owner's consent. Defendant was subsequently indicted for obtaining property by false pretenses, tried by a jury, and convicted. After finding that the aggravating factors outweighed the mitigating factors, the trial court sentenced the defendant to seven years' imprisonment. Defendant's major assignments of error on appeal concern the subsequent indictment for obtaining property by false pretenses, the admission into evidence the substance of a telephone conversation by the prosecuting witness, and the trial judge's charge to the jury. We hold that defendant's trial was free of prejudicial error.

On 12 July 1983, Raymond Rose, an employee of McCurry-Deck, Inc., an automobile dealership, received a phone call from a man who identified himself as Clyde Horton and made inquiries into purchasing a Pontiac TransAm. After Rose described the car and suggested his selling price, Horton told Rose he would send his wife to the dealer to test drive the car, and that if she liked it, he would then purchase the car later that day.

Subsequently, a woman, who Rose identified as the defendant, Barbara Kelly, arrived at the dealership, identified herself as Mrs. Horton, and said that her husband had called earlier about a TransAm. Rose gave her the key, and the woman drove the car away. Since that date, neither Rose nor any employee of McCurry-Deck has seen the car.

[1] Defendant's primary contention is that under the present facts, the crimes of larceny and of obtaining property by false pretenses are indistinguishable, and therefore the issuance of the second indictment and her trial, after the dismissal of the larceny charges, constitutes double jeopardy in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and Art. I, Sec. 17 of the N.C. Constitution. In *State v. Bullin*, 34 N.C. App. 589, 591-92, 239 S.E. 2d 278, 280 (1977), this Court stated:

> It is a well settled rule in North Carolina that "the two prosecutions must be for the same offense—*the same both in law and in fact*—to sustain the plea of former conviction." [Citation omitted.] "[I]f proof of an additional fact is required in the one prosecution, which is not required in the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same, and the plea of former jeopardy cannot be sustained." [Citation omitted.]

A comparison of the elements of the crimes of larceny and obtaining property by false pretenses reveals that these crimes are separate and distinguishable offenses. Therefore, the defendant's argument is without merit.

The crime of larceny is a common law offense. To support a conviction for larceny, the State must prove:

(1) a wrongful taking and carrying away of the personal property of another

(2) without his consent

(3) done with the felonious intent to deprive the owner of his property, and

(4) to appropriate it to the taker's use fraudulently.

State v. Watts, 25 N.C. App. 194, 212 S.E. 2d 557 (1975). *See also, State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982).

Unlike larceny, the crime of obtaining property by false pretenses is statutory. G.S. 14-100. The Supreme Court of North Carolina has interpreted G.S. 14-100 to require proof of four elements:

(1) a false representation of a subsisting fact or a future fulfillment or event

(2) which is calculated and intended to deceive

(3) which does in fact deceive and

(4) by which one person obtains or attempts to obtain value from another.

State v. Cronin, 299 N.C. 229, 262 S.E. 2d 277 (1980).

A key element of obtaining property by false pretenses is that an intentionally false and deceptive representation of a fact or event has been made. If this factor is not present, then there can be no conviction for violation of G.S. 14-100. A false and deceptive representation is not an element of larceny. Thus, the defendant's plea of double jeopardy cannot be sustained.

Similarly, a key element of larceny is that the property be wrongfully taken without the owner's consent. If the property was initially obtained with the consent of the owner, then there can be no larceny. The lack of this element was precisely the basis on which the trial judge dismissed the larceny charge against the defendant in the first trial.

[2] Defendant does not assert that larceny by trick is separable from or a lesser included offense of larceny. The defendant also contends that the second indictment was improperly issued because the crucial distinction between larceny and obtaining property by false pretenses is whether title has passed from the owner to the perpetrator. Because no passage of title was alleged in this case, the defendant reasons that the two crimes under the present facts are inseparable. We find this argument to be wholly without merit.

G.S. 14-100 is a carefully drawn statute charging a particular violation with specificity; in 1975, the range of offenses was broadened to cover not only false representations of subsisting facts but also of *future* events or fulfillments, and was extended to include *attempts* to obtain property by false pretenses. Nowhere does the statute or our case law prescribe or imply passage of title as a requisite element of the offense.

In a similar sense, but as an alternative argument, the defendant, in relying on the distinction of passage of title, claims that because the indictment for obtaining property by false pretenses does not allege that title passed, it is therefore faulty and

the trial judge erred when he refused to dismiss the indictment. However, the plain language of the statute requires no such allegation:

> [I]t shall be sufficient in any indictment for obtaining . . . property . . . by false pretenses to allege that the party accused did the act with intent to defraud . . . without alleging any ownership of the . . . property. . . .

G.S. 14-100(a). *See also State v. Cronin, supra,* at 242, 262 S.E. 2d at 286. For this reason and for those discussed above, we hold the trial court properly refused to dismiss the indictment.

[3] Next, the defendant assigns as error the trial judge's refusal upon her request to charge the jury on the crime of larceny. G.S. 14-100(a) states: "[I]f, on the trial of anyone indicted for [a crime under this statute], it shall be *proved* that he obtained the property in such manner as to amount to larceny or embezzlement, the jury shall have submitted to them such other felony *proved* . . . ." (Emphasis added.) The necessity for instructing the jury arises when and only when there is evidence from which the jury could find that the crime was committed. The presence of such evidence is the determinative factor. *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954). In the case *sub judice*, there was no evidence on which the jury could find that the defendant obtained the car without the owner's consent, an essential element of larceny. We hold, therefore, that the trial court properly refused to give the requested larceny charge to the jury.

[4] Defendant's next assignment of error is the admission into evidence of the telephone conversation between the witness Raymond Rose and "Clyde Horton." Defendant argues that the contents of that conversation is inadmissible hearsay. The evidence was necessary in order to establish that the car was obtained by false pretenses. Hearsay is defined as (1) an out-of-court statement (2) offered for proof of the matter asserted. *Financial Corp. v. Transfer, Inc.*, 42 N.C. App. 116, 256 S.E. 2d 491 (1979). However, evidence that may otherwise be inadmissible as hearsay may nonetheless be introduced for a non-hearsay purpose. The particular purpose in the instant case was to explain Rose's subsequent conduct in allowing the defendant to take the car after receiving the phone call from Horton. There is ample authority to support admissibility for this purpose. *See State v. Tate*, 307 N.C.

242, 297 S.E. 2d 581 (1982); *State v. White*, 298 N.C. 430, 259 S.E. 2d 281 (1979). In addition, the trial judge exercised sound precaution by instructing the jury as to the limited purpose of the evidence. We hold the trial court properly admitted this evidence.

[5] Defendant next contests the scope allowed the State during its cross-examination of the defendant. In particular, the defendant objects to the State's questions concerning the defendant's prior commission of specific acts of misconduct. In *State v. Williams*, 279 N.C. 663, 675, 185 S.E. 2d 174, 181 (1971), the Supreme Court emphasized that

> [i]t is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. [Citations omitted.] Such questions relate to matters *within the knowledge of the witness*, not to accusations of any kind made by others. We do not undertake here to mark the limits of such cross-examination except to say generally (1) the scope thereof is subject to the discretion of the trial judge, and (2) the questions must be asked in good faith.

Our examination of the record reveals no abuse of discretion by the trial judge in allowing the inquiry since the State's questions concerned only prior instances of misconduct by the defendant. Further, the prosecution indicated to the trial court its good-faith basis for its inquiries by producing a police report discussing the bad acts in question. This assignment of error is without merit and therefore overruled.

[6] Finally, the defendant contends that the trial judge improperly found as an aggravating factor that the defendant committed the offense of obtaining property by false pretenses while on pretrial release on another felony charge. However, the defendant has failed to place in the record adequate portions from the trial transcript to enable us to review this assignment of error. Previously, in the guilt phase of the defendant's trial, the State attempted to impeach the defendant by bringing out the fact that she had stolen a car in Florida. The Florida felony charge formed the basis for the finding of this aggravating factor. A PIN report dealing with the Florida felony charge was presented to the court. At the point in the record where the relevant

information on this aggravating factor would have logically been located, only the following appears:

> [Prosecutor]: No convictions, but I would like to state for the Court what came out here in the trial of the. . . .

Nothing else appearing to support her contention, we hold the defendant has failed to meet her burden of showing that the trial court improperly found this aggravating factor. An appellate court cannot assume or speculate that error occurred when none appears in the record before them. *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983). This assignment of error is overruled.

Upon review of the record and for reasons stated herein, we find defendant's further assignments of error are without merit and hereby hold that the indictment, trial, conviction, and sentencing of defendant Barbara Kelly for obtaining property by false pretenses in violation of G.S. 14-100 were free of prejudicial error.

No error.

Judges ARNOLD and PHILLIPS concur.

IN THE MATTER OF: ALLEGHANY COUNTY DEPARTMENT OF SOCIAL SERVICES v. TAMI W. REBER AND CRAWFORD D. REBER

No. 8423DC1170

(Filed 2 July 1985)

Parent and Child § 1.6— termination of parental rights—abuse of child—insufficient evidence

In a proceeding to terminate respondent mother's parental rights following an adjudication that respondent had abused the child in that she created or allowed to be created a substantial risk of physical injury to the child by leaving the child with its father, who caused an injury to the child, findings concerning abuse, the probability of its repetition, and the child's best interests were not based on clear, cogent and convincing evidence and were insufficient to support termination of respondent's parental rights on the ground of abuse. G.S. 7A-289.30(e).

Judge WEBB dissenting.

In re Alleghany County v. Reber

APPEAL by respondent Tami W. Reber from *Osborne, Judge.* Judgment entered 3 May 1984 in District Court, ALLEGHANY County. Heard in the Court of Appeals 15 May 1985.

Attorney General Thornburg, by Assistant Attorney General Jane Rankin Thompson, for petitioner appellee.

Legal Services of the Blue Ridge, by Andrea B. Young and Bruce Kaplan, for respondent appellant.

WHICHARD, Judge.

Respondent Tami W. Reber (respondent) appeals the termination of her parental rights to her daughter Tiffany Reber (Tiffany). Tiffany was twenty-six months old at the time of the hearing, is severely microcephalic and is developmentally slow. Crawford D. Reber (Reber), whose parental rights also were terminated, does not appeal.[1] Based upon our application of *In re Ballard*, 311 N.C. 708, 319 S.E. 2d 227 (1984), to termination proceedings on the grounds of abuse, we have determined that certain findings of fact concerning Tiffany's best interests, respondent's fitness to care for her, and the probability of the repetition of abuse were not based upon "clear, cogent, and convincing evidence" as required by G.S. 7A-289.30(e). We therefore reverse.

I.

The background of the case is as follows:

On 14 June 1982 respondent lost custody of Tiffany due to the following incident: On 30 May 1982 respondent left the child, age three months, alone with Reber for approximately ten minutes while she went next door to make a phone call. When she returned Reber told her Tiffany had been vomiting and choking. Respondent found Tiffany barely breathing and rushed her to the hospital. Tiffany was diagnosed as suffering from a brain hemorrhage due to trauma. Due to lack of history of trauma, the ex-

1. Reber was convicted of felonious child abuse for the conduct, described herein, which gave rise to this termination proceeding. That conviction subsequently has been reversed by this Court in *State v. Reber*, 71 N.C. App. 256, 321 S.E. 2d 484 (1984), for lack of sufficient evidence that Reber caused the injury the child sustained or that he caused it intentionally. Petitioner initiated this proceeding when Reber was in prison.

amining physician believed the injury was due to child abuse such as violent shaking. She referred the case to petitioner.

For purposes of removing custody from respondent Tiffany was adjudicated an abused child within the meaning of G.S. 7A-517: a juvenile whose parent "[c]reates or allows to be created a substantial risk of physical injury to the juvenile by other than accidental means which would be likely to cause death, disfigurement, impairment of physical health, or loss or impairment of the function of any bodily organ." G.S. 7A-517(1)(b).

That adjudication appears to be based upon the following evidence, reintroduced at the termination proceeding: Reber had handled Tiffany roughly in respondent's presence, tossing her two inches or so above his hands and failing to support her head. Respondent, as well as other family members, had reprimanded him for this. Reber had a violent temper and had "popped" respondent on several occasions prior to the birth of Tiffany. As a result of Reber's abuse, respondent at one time spent three months at a battered women's shelter, where she gave birth to a previous baby. That child died at age two and one-half months after unexplained vomiting and choking. Respondent was originally reluctant to leave Tiffany alone with Reber.

II.

Pursuant to *Ballard*, 311 N.C. at 715, 319 S.E. 2d at 232, we assume *arguendo* that the 14 June 1982 adjudication of abuse was binding upon the court in the termination proceeding. *See also In re Wilkerson*, 57 N.C. App. 63, 69-70, 291 S.E. 2d 182, 186 (1982). The *Ballard* court found that a binding prior adjudication of neglect does not prejudice the parents in a termination proceeding because the court there must determine "the then existing best interests of the child and fitness of the parent(s) to care for it in light of all evidence of neglect and the probability of a repetition of neglect." *Ballard*, 311 N.C. at 715, 319 S.E. 2d at 232. Thus, in a proceeding to terminate parental rights on grounds of neglect, *Ballard* requires clear, cogent, and convincing evidence that neglect authorizing termination under G.S. 7A-289.32(2) exists at that time. *Id.* at 716, 319 S.E. 2d at 232. To that end the court must "consider all evidence of relevant circumstances or events which existed or occurred *either before or after* the prior adjudication of neglect." *Id.* at 716, 319 S.E. 2d at 232-33.

We believe the law and reasoning of *Ballard* apply equally when parental rights are terminated pursuant to a finding of abuse. Thus, while we may not reexamine whether respondent created or allowed to be created a substantial risk of physical injury to Tiffany by leaving her with Reber on 30 May 1982, we are bound to review the findings relating to conduct both before and after that date. Petitioner must show by clear, cogent, and convincing evidence, G.S. 7A-289.30(e), that grounds for termination—here abuse or the probability of its repetition—exist at the time of the termination proceeding. Once grounds for termination are found the court must determine whether termination is in the child's best interest. G.S. 7A-289.31.

III.

Here the evidence shows that prior to the ten minute interval when respondent left Tiffany with Reber she had not abused or neglected the child. The child was fed regularly and had no bruises or other outward signs of mistreatment. As soon as respondent noticed that the child was ill she rushed her to the hospital and stayed with her in the hospital room for two weeks. Respondent and Reber are the parents of a daughter five years older than Tiffany who is a normal, active child. Not until Tiffany's injury was there any suggestion that Reber may have contributed to the unexplained death of their previous child. In fact, the attending pediatrician specifically informed respondent and Reber that "[t]he baby's loss [was] not due to anything that [they] did or did not do."

Respondent earned her GED (General Education Diploma) two years prior to the time of the hearing and has completed two quarters of college. Her employment history has been erratic and she and Reber have repeatedly separated and reconciled. At the hearing she testified that she was babysitting for a ten-month old niece, but had been offered a good job, and intended to go to school.

Respondent stated that she loves Tiffany, misses her, and wants her home. She has repeatedly told petitioner she would do what was necessary to get Tiffany back. Respondent has visited Tiffany at her foster home although she has had some difficulty completing arranged visitations due to lack of transportation and money. A social worker for petitioner testified that he had visited

respondent in her home and had not found it to be unsatisfactory, unclean, or dangerous. He observed that the older child received adequate parenting.

Respondent has been counseled concerning her parenting skills. At the time of the hearing she had moved to Dare County and bought a trailer. She contacted the local Developmental Evaluation Center and arranged for home visits to teach her how to deal with a handicapped child. She investigated a day care center that cares for the handicapped. She became a member of the North Carolina Handicapped Children's program and wrote to their headquarters for information about organizations that could help her. She asked Dare County social services to make home visits to evaluate the improvements she had made on the trailer in preparation for regaining custody of Tiffany. A social worker made several unannounced visits and testified that except for the bathtub which was disconnected there was no reason the trailer could not support a family.

At the time of the hearing Reber was living in the trailer with respondent and their older child. He stated that this was temporary and she stated that they had no intent to reconcile.

IV.

We do not find from the above clear, cogent, and convincing evidence that respondent is unfit to care for Tiffany, that there is a probability of repetition of abuse, or that terminating respondent's parental rights is at this time in Tiffany's best interests. *See Ballard*, 311 N.C. at 715, 319 S.E. 2d at 232. We believe even pre-*Ballard* case law requires stronger evidence to terminate parental rights. In *In re Adcock*, 69 N.C. App. 222, 227, 316 S.E. 2d 347, 350 (1984), the Court found that the "totality of the evidence . . . was plenary, clear, cogent, and convincing . . . ." In *In re Moore*, 306 N.C. 394, 405, 293 S.E. 2d 127, 133 (1982), three grounds for termination were supported by clear, cogent, and convincing evidence, and as to one of these grounds "there was no evidence to the contrary." In *In re Biggers*, 50 N.C. App. 332, 343, 274 S.E. 2d 236, 243 (1981), the Court found "overwhelming and uncontradicted evidence" to support the trial court's findings.

Here the evidence is neither plenary, nor overwhelming, nor uncontradicted. While we would not hesitate to uphold the "harsh

judicial remedy," *Adcock*, 69 N.C. App. at 227, 316 S.E. 2d at 350, of terminating parental rights in the best interest of the child if the basis for termination were supported by clear, cogent, and convincing evidence, as the statute requires, we conclude that this evidence does not provide such support.

The order terminating respondent's parental rights to Tiffany Reber is therefore

Reversed.

Chief Judge HEDRICK concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. The parental rights of Tami W. Reber were terminated on the ground that her child was abused. This is one of the grounds for termination under G.S. 7A-289.32(2). G.S. 7A-517 (1) defines an abused child as follows:

> (1) Abused Juveniles—Any juvenile less than 18 years of age whose parent or other person responsible for his care:
>
> a. Inflicts or allows to be inflicted upon the juvenile a physical injury by other than accidental means which causes or creates a substantial risk of death, disfigurement, impairment of physical health, or loss or impairment of function of any bodily organ. . . .

I believe the evidence is such that the court may find, as it did, by clear, cogent and convincing evidence that Tami W. Reber has "created, or allowed to be created, a substantial risk of physical injury to Tiffany Reber." This finding that Tami W. Reber has abused Tiffany Reber supports the conclusion to terminate the parental rights.

I do not believe *In re Ballard*, 311 N.C. 708, 319 S.E. 2d 227 (1984), controls this case. That case was based on neglect as a ground for termination. Neglect can be corrected. A change in circumstance can occur and at the time of the hearing there may be no neglect. Once a child has been abused, as was Tiffany Reber, it cannot be corrected. This is a ground for termination under the

statute and I believe it was proved in this case. I believe also that the evidence was such that the court did not abuse its discretion by terminating the parental rights of Tami W. Reber.

I vote to affirm.

SAM MAFFEI, AND ALL PERSONS SIMILARLY SITUATED v. ALERT CABLE TV OF NORTH CAROLINA, INC.

No. 8415SC1316

(Filed 2 July 1985)

Rules of Civil Procedure § 23— cable television subscribers—certification as class improperly denied

In an action arising from the "Season Ticket" cable television program, which required an additional fee for coverage of 23 ACC basketball games, the trial court erred by finding that the actual amount of damages would be at most $0.29 and refusing certification as a class action. North Carolina trial courts have no authority to hear the merits of a case in determining whether to certify a class. G.S. 1A-1, Rule 23.

APPEAL by plaintiff from *Battle, Gordon F., Judge.* Order entered 28 September 1984 in ORANGE County Superior Court. Heard in the Court of Appeals 6 June 1985.

Plaintiff Maffei contracted with defendant Alert Cable TV, which had an exclusive franchise to provide cable television services in Carrboro, for basic cable service. For an additional $3.00 per month, plaintiff also contracted for six 24-hour expanded service channels, including The Entertainment and Sports Programming Network (ESPN), a channel devoted exclusively to sports programming. In late 1983, defendant announced to its subscribers its "Season Ticket" program. For $75.00, defendant would provide live coverage of 23 Atlantic Coast Conference basketball games over its regular ESPN channel. Those who did not pay the additional fee would receive a "scrambled" signal instead of ESPN.

Plaintiff did not pay the additional fee. After six games had been shown on "Season Ticket" plaintiff filed the present action. He sought orders certifying it as a class action and enjoining defendant from disrupting his ESPN programming, and requiring

defendant to show the "Season Ticket" games as part of its regular ESPN programming. Before anymore "Season Ticket" games were shown, defendant terminated the program and refunded in full all additional fees collected.

In September 1984 defendant, with plaintiff's consent, filed a "Motion for Adjudication of Measure of Damages," supported by pleadings, discovery of record, affidavits and deposition testimony. The court, upon consideration of the above materials, concluded that plaintiff's damages would be the value of twelve hours of undifferentiated ESPN programming, not the value of any specific programming including "Season Ticket." The court found, without deciding the actual amount of damages, that they would be at most $0.29. Since damages would be minimal, the court ruled it would be "inadvisable, inefficient and inappropriate" for the action to go forward as a class action. The court exercised its discretion not to certify the action as a class action. Plaintiff appealed.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill & Hargrave, by Martin J. Bernholz and G. Nicholas Herman, for plaintiff.

Smith, Moore, Smith, Schell & Hunter, by Richard W. Ellis, James L. Gale and Robert H. Slater, for defendant.

WELLS, Judge.

The parties do not address the issue, but we first must decide whether this appeal is properly before this court. *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). An order purporting to fix what the rule of damages will be at trial is indeterminate and not immediately appealable. *Realty, Inc. v. City of High Point*, 36 N.C. App. 154, 242 S.E. 2d 895 (1978). An order denying certification of a class affects the rights of the potential class members, however, and therefore affects a substantial right and is immediately appealable. *Perry v. Cullipher*, 69 N.C. App. 761, 318 S.E. 2d 354 (1984).

Class actions are governed by Rule 23 of the Rules of Civil Procedure (1983). This rule is patterned after former provisions of Federal Rule of Civil Procedure 23. The federal courts have devel-

oped an extensive body of case law regarding class actions, we therefore rely in part on federal precedent in deciding this case. *See English v. Realty Corp.*, 41 N.C. App. 1, 254 S.E. 2d 223, *disc. rev. denied*, 297 N.C. 609, 257 S.E. 2d 217 (1979).

Whether a proper class exists, such that a court should certify that an action may be so maintained, is a question of fact dependent for its resolution on the circumstances of the individual case. *Id.* The trial court enjoys a certain amount of discretion in making this determination. *Id.* The factors to be considered are carefully enumerated in *English*; briefly, they are the makeup and number of the class, the impracticability of bringing its members before the court, commonality of issues of fact or law, and adequacy of representation of the class by the individuals before the court. The court is not strictly limited to these factors, however. *Id.*

Whether the court may decide the measure of damages, determine that they will probably be minimal, and deny class certification on grounds of efficiency appears to be a question of first impression. We note that the efficient dispatch of business is the policy underlying Rule 23. *Cocke v. Duke University*, 260 N.C. 1, 131 S.E. 2d 909 (1963). However, we have found no authority expressly approving the rationale applied here.

In *Perry v. Cullipher, supra*, we held that the court did not abuse its discretion in denying class certification, since each class member's damages (for emotional distress arising from alleged desecration of graves) could vary widely, necessitating separate proof. *Accord Carter v. Butz*, 479 F. 2d 1084 (3d Cir.) (varying discount rates applied to alleged class; denial of certification affirmed), *cert. denied*, 414 U.S. 1094 (1973). Federal courts have also denied certification in suits under the Truth in Lending Act where plaintiffs did not allege any actual damages, but only technical violations of loan drafting requirements. *Shroder v. Suburban Coastal Corp.*, 729 F. 2d 1371 (11th Cir. 1984); *Watkins v. Simmons and Clark, Inc.*, 618 F. 2d 398 (6th Cir. 1980). *See also Shumate & Co., Inc. v. Nat'l Ass'n of Sec. Deal., Inc.*, 509 F. 2d 147 (5th Cir.) (individual plaintiff's damages entirely speculative; affirming verdict for defendants and denial of class certification), *cert. denied*, 423 U.S. 868 (1975).

In none of these cases was general computation of damages necessary to determine the propriety of class certification. Either plaintiff failed to show any cognizable damage at all, or it was evident from the pleadings that damages must be calculated separately, *i.e.*, the class lacked sufficient commonality. Nowhere did the trial courts evaluate the merits to determine the likely result as a prerequisite to class certification.

Upon proof of breach of contract, a plaintiff is entitled to at least nominal damages. *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968); *Cook v. Lawson*, 3 N.C. App. 104, 164 S.E. 2d 29 (1968). And where actual damages are alleged, their measure and amount will depend upon the evidence. *See Troitino v. Goodman*, 225 N.C. 406, 35 S.E. 2d 277 (1945); *Iron Works Co. v. Cotton Oil Co.*, 192 N.C. 442, 135 S.E. 343 (1926). Plaintiff proceeded upon a breach of contract theory, and claimed substantial damages. In denying class certification, the trial court ruled on the measure and likely amount of damages and thus necessarily considered the merits of plaintiff's action. This it lacked authority to do.

Pre-trial orders purporting to establish a rule of damages and their amount are not favored. *See Realty Corp. v. City of High Point, supra; see also Green v. Insurance Co.*, 250 N.C. 730, 110 S.E. 2d 321 (1959) (per curiam). Nothing in the Rules of Civil Procedure specifically authorizes such practice. Rule 16 of the Rules of Civil Procedure (1983). Under former law, apparently still applicable, trial courts lacked authority to find facts or enter judgment at pre-trial hearings. *Whitaker v. Beasley*, 261 N.C. 733, 136 S.E. 2d 127 (1964) (per curiam); *see also Fidelity & Deposit Co. of Md. v. Southern Utilities, Inc.*, 726 F. 2d 692 (11th Cir. 1984) (no authority to enter judgment under Federal Rule of Civil Procedure 16; court could entertain motion for summary judgment on remand). As the measure and amount of damages depend on the evidence adduced, orders such as the one entered here in effect constitute a pre-trial judgment improperly limiting the actual trial.

It is now firmly established in the federal courts that Rule 23 does not in any way authorize a trial court to hold a preliminary hearing on the merits before deciding whether to certify a class. Initially, some courts did hold that they could order a preliminary

evidentiary hearing, at which plaintiffs would be required to demonstrate "a substantial possibility that they will prevail on the merits" to justify the expense and public exposure of a class action. *Dolgow v. Alexander*, 43 F.R.D. 472 (E.D.N.Y. 1968) (exhaustive opinion of Weinstein, J.), *remanded on other grounds*, 438 F. 2d 825 (2d Cir. 1971). Most federal courts have rejected this approach. *Mersay v. First Republic Corp. of America*, 43 F.R.D. 465 (S.D.N.Y. 1968) (such hearing may determine ultimate facts and affect trial rights); *see generally* 7A C. Wright and A. Miller, *Federal Practice and Procedure: Civil* § 1785 (1972 and Supp. 1985).

The Supreme Court resolved this conflict in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). This was a complicated private anti-trust action in which plaintiff, whose own damages were only $70.00, claimed to represent a class of 2 million members. Because of the size of the class and the threat that the litigation could become unmanageable, the Second Circuit had ordered an evidentiary hearing to determine class certification. The Supreme Court reversed the resulting order:

> We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained.

Id. The court also noted that tentative findings, entered in proceedings had without the protection of traditional civil procedure, could color subsequent proceedings to the prejudice of litigants. *Id.; see also Dolgow v. Alexander*, 438 F. 2d 825 (2d Cir. 1971) (procedural quagmire at such hearing).

Following *Eisen*, construing our Rule 23, we hold that North Carolina trial courts have no authority to hear the merits of a case in determining whether to certify a class. The class must be determined solely according to procedural criteria relevant to Rule 23. *See English v. Realty Corp., supra.* We therefore hold

that the order entered herein exceeded the court's authority and must be vacated. Further consideration of the class certification issue should be on the criteria of Rule 23, not the merits.

In closing, we note that the trial court's order in essence constituted an advisory opinion to the parties on damages. By focusing on the issue of damages before this court, the parties have asked us to render a second advisory opinion. Such is not the function of the courts. *See generally State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 323 S.E. 2d 294 (1984); *Greensboro v. Wall*, 247 N.C. 516, 101 S.E. 2d 413 (1958). Only upon judgment on the facts, whether on motion for summary judgment or by proceeding to trial, will the damages issue be ripe for appellate review.

The order appealed from is vacated, and the cause is remanded for further proceedings not inconsistent with this opinion.

Vacated and remanded.

Judges JOHNSON and COZORT concur.

JENNETTE FRUIT & PRODUCE CO., INC. v. SEAFARE CORPORATION, MICH[AE]L D. HAYMAN, PHOEBE G. HAYMAN, WILLIAM A. STAFFORD AND WIFE, VANESSA C. STAFFORD, TRENOR CORPORATION, THOMAS E. FLOUNDERS, III, AND EDWARD T. CAYTON, III, TRUSTEES, AND NORMAN W. SHEARIN, JR., TRUSTEE

No. 841SC1250

(Filed 2 July 1985)

Rules of Civil Procedure § 13— plaintiff's voluntary dismissal of all claims—dismissal of crossclaim not required

Unless a crossclaim is dependent upon plaintiff's original claim or is purely defensive, a plaintiff's dismissal of its claims against all defendants does not require dismissal of crossclaims properly filed in the same action.

APPEAL by defendant Seafare Corporation from *Watts, Judge*. Order entered 28 August 1984 and amended 13 September 1984 *nunc pro tunc* 28 August 1984 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 17 May 1985.

Defendant Seafare Corporation appeals from an order dismissing without prejudice its crossclaim against codefendants William A. Stafford, Vanessa C. Stafford and Trenor Corporation.

Trimpi, Thompson & Nash, by John G. Trimpi and C. Everett Thompson, for defendant appellant Seafare Corporation.

Leroy, Wells, Shaw, Hornthal & Riley, by Dewey W. Wells, for codefendant appellees William A. Stafford and Vanessa C. Stafford.

No brief filed for codefendant appellee Trenor Corporation.

WHICHARD, Judge.

The issue is whether plaintiff's voluntary dismissal of its claims against all defendants requires dismissal of a crossclaim pled by one defendant against three codefendants. We hold that it does not, and we accordingly reverse.

Plaintiff sought to recover money due it from defendant Seafare Corporation (defendant). It also sought to set aside a conveyance of real property from defendant to codefendants William A. Stafford and Vanessa C. Stafford on the ground that the conveyance was without consideration and made with intent to defraud plaintiff and other creditors. Codefendants Stafford conveyed to codefendant Trenor Corporation a portion of the property which defendant conveyed to them.

Defendant admitted that it owed plaintiff a sum of money and that it had made the conveyance to the Staffords. It alleged, however, that it made the conveyance upon certain assurances and representations by the Staffords which "were false and made with fraudulent intent . . . and for the purpose of defrauding and deceiving [it]." Defendant cross-claimed against the Staffords and Trenor Corporation (codefendants) seeking to have the conveyances declared void.

By notice filed 6 August 1984 plaintiff voluntarily dismissed its action as to all defendants. The court subsequently dismissed defendant's crossclaims without prejudice to its "rights . . . to bring a separate action against all remaining defendants." The order recited, as the basis for the ruling, that "the Court [was] of the opinion that the dismissal of plaintiff's claims against the

crossclaiming defendants requires the dismissal of said crossclaims." Defendant appeals.

Crossclaims are governed by G.S. 1A-1, Rule 13(g), which provides:

> A pleading may state as a crossclaim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.

As this litigation was initially constituted, defendant was a party and codefendants were coparties. Defendant's crossclaim related to the real property conveyed by defendant to codefendants Stafford, which property was part of the subject matter of plaintiff's original action. The crossclaim thus met the requirements of Rule 13(g).

The rule does not resolve the issue of whether plaintiff's dismissal of its action against all defendants requires dismissal of defendant's crossclaim against codefendants. The question appears to be one of first impression in this jurisdiction. A treatise on North Carolina civil practice and procedure states: "A defendant may continue to maintain a crossclaim against a codefendant even though the plaintiff's claim against that codefendant is subsequently dismissed; however, a defendant against whom the plaintiff's claim has been dismissed may not thereafter maintain a crossclaim against a codefendant." W. Shuford, *North Carolina Civil Practice and Procedure* Sec. 13-10 at 120 (2nd Ed. 1981). The treatise cites no North Carolina or other state court authority for the proposition stated, however, and our research has disclosed none. The single case cited, *United States v. Thomas Steel Corporation*, 107 F. Supp. 418 (1952), is distinguishable from this case in that (1) the issue there was actually whether to dismiss a party rather than, as here, the viability of that party's crossclaim upon the party's dismissal, and (2) the decision involved concerns over federal jurisdiction that are not applicable in a state court action. We thus find *Thomas Steel* neither authoritative nor persuasive here.

Crossclaims generally are held to be within the ancillary jurisdiction of federal courts and thus need not present independ-

ent grounds of federal jurisdiction. 6 Wright and Miller, *Federal Practice and Procedure* Sec. 1433 at 177 (1971). Dismissal of an original claim for lack of subject matter jurisdiction, however, requires dismissal of a crossclaim unless that claim is supported by an independent basis for federal jurisdiction. *Id.* at 180; 2 H. Kooman, *Federal Civil Practice* Sec. 13.16 at 199 (1969). *See also Picou v. Rimrock Tidelands, Inc.*, 29 F.R.D. 188 (1962) (original claim dismissed for lack of diversity but crossclaim retained on grounds of independent basis for diversity jurisdiction; court cited reasons of judicial economy and facilitation of litigation). Dismissal of an original claim in federal court on non-jurisdictional grounds generally requires dismissal of a crossclaim where the federal court, by resolving the crossclaim, would invade state autonomy by unnecessarily deciding "a claim purely of state law." *American Nat. Bank & Tr. Co. of Chicago v. Bailey*, 750 F. 2d 577, 581 (7th Cir. 1984), citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed. 2d 218, 228 (1966) ("[n]eedless decisions of state law should be avoided . . .").

Concerns relating to diversity jurisdiction which govern dismissal of crossclaims upon dismissal of original claims in federal courts are not present in an action in state court, however. No jurisdictional issue is presented. If defendant's crossclaim had been filed as an original action to set aside the conveyance as fraudulent, our courts would have had both personal and subject matter jurisdiction. Further, no problem of usurpation of state prerogatives by a federal court is presented. The unique role of the federal courts in our system that has shaped their interpretation of Rule 13(g) as it relates to dismissal of crossclaims upon dismissal of original claims is inapposite in an action in state court. We thus find the federal cases requiring dismissal of crossclaims upon dismissal of original claims unauthoritative and unpersuasive here. We note also that "several [federal] courts have held that if the main action is terminated on nonjurisdictional grounds, then the court may continue to hear the cross-claim even though it does not satisfy the requirements for federal subject matter jurisdiction," 6 Wright and Miller, *supra*, Sec. 1433 at 181, and that one commentator has stated that "[a] cross-claim may . . . be maintained after the dismissal of the main action for lack of Federal jurisdiction where independent grounds of Federal jurisdiction do exist as to the cross-claim," 2 H. Kooman, *supra*, Sec. 13.16 at 199.

Our research has disclosed no state court case resolving the precise issue presented. It has been held, however, that a crossclaim against a coparty survives dismissal of the plaintiff's claim against that party. *Land v. Highway Const. Co., Ltd.*, 645 P. 2d 295, 299 (Hawaii 1982). *See also Iliff v. Richards*, 272 S.E. 2d 645, 648 (Va. 1980). It has also been held that a counterclaim survives the dismissal of the plaintiff's original claim. *Young v. Jones*, 230 S.E. 2d 32, 33 (Ga. App. 1976).

Early equity decisions dealt with crossbills, which generally covered both crossclaims and counterclaims. *Bell v. McLaughlin*, 62 So. 798, 799 (Ala. 1913). The general rule was that if the relief sought in a crossbill was merely defensive and would be satisfied by dismissal of the original bill, dismissal of the original bill operated to dismiss the crossbill. *Equitable Life Assur. Society v. Wilson*, 66 S.E. 836, 837 (Va. 1910). However, " 'where the cross-bill show[ed] grounds for equitable relief for matters growing out of the subject-matter of the original bill *which may uphold the jurisdiction of the court independent of the original bill*,' the dismissal of the original bill [did] not carry with it [the] cross-bill." *Bell*, 62 So. at 799.

Finally, we note that at least one state has resolved the issue statutorily by providing, as follows, that the crossclaim survives: "No dismissal, voluntary or involuntary, of a plaintiff's action in which a counterclaim or cross-claim has been filed shall operate to dismiss or discontinue such counterclaim or cross-claim." 31 Mo. Ann. Stat. Sec. 510.170 (Vernon, 1952).

Finding no controlling authority, we adopt, as the preferable policy, the approach of the Missouri statute. We perceive no valid or compelling reason to dismiss a crossclaim over which the courts of this state have jurisdiction merely because the plaintiff's original claim against the crossclaiming defendant has been dismissed. To hold otherwise would needlessly force a defendant who has filed a proper crossclaim concerning a matter governed by state law to refile its claim as a new action. This would require additional time and expense, including court costs and counsel fees. Further, absent adoption of "relation-back" principles which could unnecessarily complicate the litigation, it could result in the time-barring of claims once timely filed. Such a holding would elevate form over substance. *See Equitable Life*

Assur. Society, 66 S.E. at 837 ("would manifestly sacrifice substance to form"). It would also be inconsistent with the purpose of Rule 13(g) to enlarge the scope of permissible crossclaims, which pre-Rules law permitted only for indemnification in a tort action. *See* Shuford, *supra*, Sec. 13-2 at 114-15.

"The aim of procedural rules is facilitation [,] not frustration [,] of decisions on the merits." *Frommeyer v. L. & R. Construction Co.*, 139 F. Supp. 579, 585 (D.N.J. 1956). "The canon of interpretation of the . . . Rules is one of liberality, and . . . the general policy of the Rules is to disregard technicalities and form and determine the rights of litigants on the merits." *Johnson v. Johnson*, 14 N.C. App. 40, 42, 187 S.E. 2d 420, 421 (1972). To allow litigation of properly filed crossclaims to proceed regardless of whether a plaintiff's original claim remains extant will facilitate resolution of the crossclaims on their merits, while to disallow such is to regard technicalities and form without serving a substantive purpose. We thus hold that, unless a crossclaim is dependent upon plaintiff's original claim (as would be, e.g., a crossclaim for indemnity or contribution) or is purely defensive, a plaintiff's dismissal of its claims against all defendants does not require dismissal of crossclaims properly filed in the same action. The order is accordingly

Reversed.

Chief Judge HEDRICK and Judge WEBB concur.

KENNETH ALEXANDER SMITH v. R. W. WILKINS, JR., COMMISSIONER OF MOTOR VEHICLES

No. 8413SC756

(Filed 2 July 1985)

Automobiles and Other Vehicles § 2.5— driver's license—revocation in another state—refusal to consider for N. C. license—constitutionality of statute

Where petitioner's driver's license was revoked until 1992 in South Carolina where he resided because of numerous driving under the influence convictions, and petitioner thereafter moved to North Carolina, the Department of Motor Vehicles properly refused to consider petitioner for a North Carolina license pursuant to G.S. 20-9(f) until he was eligible for a license in

South Carolina. G.S. 20-9(f) is not unconstitutional on its face and was not applied in a manner which deprived petitioner of equal protection of the laws and his constitutional right to travel. G.S. 20-19(e); Fourteenth Amendment to the U.S. Constitution.

APPEAL by defendant from *Farmer, Judge.* Judgment entered 4 June 1984 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 12 March 1985.

While a resident of South Carolina, petitioner was convicted nine times of driving under the influence between 1964 and 1978. Under South Carolina law, his driving privilege was suspended on 31 May 1978, until 3 January 1992. In April 1983, petitioner moved to North Carolina and has resided in this State since that time.

Petitioner thereafter requested a hearing with the Department of Motor Vehicles (hereinafter DMV) to obtain driving privileges in this State. The DMV, by letter dated 30 March 1984, denied his request pursuant to G.S. 20-9(f), stating that he could not be considered for a North Carolina license until he was eligible for a license in South Carolina.

Pursuant to G.S. 20-25, petitioner requested the Superior Court to review the action of the DMV in denying him a hearing and to declare G.S. 20-9(f) unconstitutional on its face and unconstitutional as applied to him.

The trial court ruled that his request for a hearing was properly denied by the DMV, and G.S. 20-9(f) is constitutional on its face and as applied to petitioner. Petitioner appealed.

Attorney General Edmisten by Assistant Attorney General Jane P. Gray for State.

Michael W. Willis for petitioner-appellant.

PARKER, Judge.

Petitioner presents two questions for review: (i) is G.S. 20-9(f) unconstitutional on its face, and (ii) is G.S. 20-9(f) unconstitutional as applied to him? Petitioner contends that G.S. 20-9(f) denies him equal protection of the laws and violates his fundamental right to travel. We disagree.

General Statute 20-9(f) provides:

> The Division shall not issue a driver's license to any person whose license or driving privilege is in a state of cancellation, suspension or revocation in any jurisdiction, if the acts or things upon which the cancellation, suspension or revocation in such other jurisdiction was based would constitute lawful grounds for cancellation, suspension or revocation in this State had those acts or things been done or committed in this State; provided, however, any such cancellation shall not prohibit issuance for a period in excess of 18 months.

The premise for petitioner's argument concerning violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution is that under G.S. 20-19(e) had he been licensed in North Carolina and convicted in North Carolina of the identical offenses for which he was convicted in South Carolina, the period of revocation of his license would have been permanent. However, at the end of a three year revocation period, petitioner would have been eligible for a hearing to determine whether his license should be conditionally restored. Petitioner argues that under G.S. 20-9(f) a person whose license is revoked out-of-state who moves into this State and establishes residency is treated differently from a person whose North Carolina license has been revoked. This difference in treatment, according to petitioner, constitutes invidious discrimination without a rational basis between the two groups.

We note first of all that a party challenging the constitutionality of a statute has the burden of establishing its unconstitutionality. *In re House of Raeford Farms v. Brooks*, 63 N.C. App. 106, 304 S.E. 2d 619 (1983). Legislative acts are presumed to be constitutional, *Andrews v. Chateau X*, 296 N.C. 251, 250 S.E. 2d 603 (1979), unless the contrary clearly appears. *State v. Lambert*, 40 N.C. App. 418, 252 S.E. 2d 855 (1979). With these principles in mind, we examine the petitioner's constitutional attack upon G.S. 20-9(f).

The principle is well settled that like treatment of all persons similarly situated is all that is required by the Equal Protection Clause of the Fourteenth Amendment. *State Bd. of Tax Commissioners v. Jackson*, 283 U.S. 527, 51 S.Ct. 540, 75 L.Ed. 1248 (1931). All people, who, as the result of traffic convictions, have their

licenses revoked in other jurisdictions and then move to North Carolina are treated similarly. A person with a revoked license from another jurisdiction is not similarly situated with a person residing in North Carolina with a revoked North Carolina license. It is the state of revocation of the license, not residency as petitioner appears to contend, that governs the application of G.S. 20-9(f) and G.S. 20-19(e).

Moreover, General Statute 20-9(f) is clearly designed to promote public safety on the highways and to protect motorists on North Carolina's highways from the hazards created by a person who has demonstrated disregard for the rules of safety while operating a motor vehicle. The enactment of laws to assure public safety on the State's highways is a valid exercise of the police power by the legislature. As stated by our Supreme Court in *Fox v. Scheidt*, 241 N.C. 31, 84 S.E. 2d 259 (1954):

> The General Assembly has full authority to prescribe the conditions upon which licenses to operate automobiles are issued, and to designate the agency through which, and the conditions upon which licenses, when issued shall be suspended or revoked. *S. v. McDaniels*, 219 N.C. 763, 14 S.E. 2d 793. G.S. N.C. 20-Art. 2 vests exclusively in the State Department of Motor Vehicles the issuance, suspension and revocation of licenses to operate motor vehicles. *S. v. Warren*, 230 N.C. 299, 52 S.E. 2d 879.
>
> 'The right of a citizen to travel upon the public highways is a common right, but the exercise of that right may be regulated or controlled in the interest of public safety under the police power of the State. The operation of a motor vehicle on such highways is not a natural right. It is a conditional privilege, which may be suspended or revoked under the police power. The license or permit to so operate is not a contract or property right in a constitutional sense.' *Commonwealth v. Ellett*, 174 Va. 403, 4 S.E. 2d 762.

The Fourteenth Amendment does not limit or preclude the proper exercise of the state's police power so long as the police power is not invoked to protect one class of citizens against another without any compelling need for protection of society in general. *State v. Ballance*, 229 N.C. 764, 51 S.E. 2d 731 (1949). Subject to this limitation, the state may enact such laws for the safe-

ty and protection of its citizens as the circumstances and necessities of a particular class may require without violating any constitutional guaranty. Certain classifications may be necessary to satisfy the public objective, and in this situation perfect uniformity of treatment of all persons is not practicable. In the application of a statute to a particular case, the court's function is to carry out the intent of the legislature, not to nullify it, except where the statute so applied would conflict with the superior voice of the constitution. *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). The legislative intent with respect to the challenged statute is clear and a valid exercise of police power.

Further, petitioner contends that G.S. 20-9(f) violates his right to travel under the Constitution. The right to travel, however, has been construed to be nothing more than an extension of the Equal Protection Clause. *Zobel v. Williams*, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed. 2d 672 (1982). In support of his argument, petitioner cites *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969) and *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed. 2d 306 (1974). These cases are inapposite as both deal expressly with durational residency requirements to obtain vital governmental benefits. General Statute 20-9(f) imposes no such durational residency requirement to obtain a North Carolina driver's license. General Statute 20-9(f) requires only that the individual's license not be in a revoked status in another jurisdiction. Again, it is the revocation, not residency, that puts petitioner in a different classification. Each new resident does not have to meet a time limit arbitrarily set by North Carolina; rather, a person with a revoked license has only to meet the requirements to lift the revocation in the state where the license is revoked, whatever they may be, in order to qualify for a North Carolina license. Petitioner's argument based on right to travel is without merit.

Petitioner also contends that the Full Faith and Credit Clause is inapplicable on the grounds that G.S. 20-9(f) is a penal statute. Having determined on other grounds that G.S. 20-9(f) is constitutional, we do not reach the question of the applicability of the Full Faith and Credit Clause. We do note, however, that administration of statutes governing the issuance, revocation, suspension and cancellation of driving privileges is civil, rather

than penal, in nature. In *Harvell v. Scheidt*, 249 N.C. 699, 107 S.E. 2d 549 (1959), our Supreme Court stated:

> It is well to keep in mind that the suspension or revocation of a driver's license is no part of the punishment for the violation or violations of traffic laws. It will be deemed that the court or courts in which the licensee was convicted, meted out the appropriate punishment under the facts and circumstances of each case. The purpose of the suspension or revocation of a driver's license is to protect the public and not to punish the licensee.

Petitioner further contends that the statute is unconstitutional as applied to him. However, petitioner has failed to make any showing that he is being treated differently from any other person with a revoked license who became a resident of North Carolina.

This Court is duty bound to carry out the intent of the legislature. While amendment of the statute might be feasible to grant a hearing in situations such as this where plaintiff has ceased to reside in the state of revocation, such action is for the legislature, not this Court. Finally, we note that the record in this proceeding is void of any indication that petitioner has endeavored to have the revocation lifted in South Carolina.

Having carefully reviewed petitioner's appeal, we find

No error.

Judges WEBB and BECTON concur.

STATE OF NORTH CAROLINA v. PAMELA MERISSA HEIDMOUS

No. 844SC907

(Filed 2 July 1985)

Criminal Law § 138— voluntary manslaughter—aggravating factor of malice and deadly weapon—improper

The trial court erred when sentencing defendant for voluntary manslaughter by finding as an aggravating factor that "defendant, with malice,

intentionally shot and killed her husband with a deadly weapon to wit: a shotgun." There was evidence before the trial court that the shooting was done with malice, although the court had to determine that there was a "factual basis" that the killing was committed without malice in order to accept defendant's guilty plea; however, the judge also added that defendant "killed her husband with a deadly weapon." The State must prove an unlawful killing to convict a defendant of manslaughter and evidence of the use of a deadly weapon to shoot the victim was necessary to prove the unlawful killing. G.S. 15A-1022(c), G.S. 15A-1340.4(a)(1).

Judge PHILLIPS dissenting.

APPEAL by defendant from *Stevens, Judge.* Judgment entered 17 April 1984 in Superior Court, ONSLOW County. Heard in the Court of Appeals 14 March 1985.

Attorney General Rufus L. Edmisten by Assistant Attorney General Sarah C. Young for the State.

Ellis, Hooper, Warlick, Waters & Morgan by Charles H. Henry, Jr., for defendant appellant.

COZORT, Judge.

Pamela Merissa Heidmous shot and killed her husband and pled guilty to voluntary manslaughter. She was sentenced to the statutory maximum of twenty years' imprisonment. The only issue presented for our review concerns whether the trial court erred in finding the factor in aggravation that the defendant, with malice, intentionally shot and killed her husband with a deadly weapon. We hold the trial court erred in finding this aggravating factor. The facts necessary for an understanding of this case follow.

At approximately 10:52 p.m. on 12 May 1983, the defendant telephoned the Onslow County Sheriff's Department and stated that she had shot her husband. The defendant told Officer Harry Pugliese that she and her husband had been fighting and that her husband had hit her. She further stated that she did not know the gun was loaded and that it had fired accidentally. The defendant, however, later recanted this statement and admitted to a friend that she had in fact loaded the shotgun.

The victim was found in his bed lying on his back with his right hand resting behind his head, a position he was known to

have slept in during his life. According to Officer Pugliese, the victim was wearing underwear and had the bedcovers pulled up to his waist. The Onslow County Medical Examiner observed that the victim had a gaping wound beginning in his chest and extending all the way up through the lower part of his chin. An exit wound was found in the back of his head with an entrance wound in the right hand.

R. Z. Zynkavich, an S.B.I. agent, examined the .12 gauge shotgun involved in the manslaughter and determined that the weapon would not misfire or fire accidentally, even if cocked and dropped or thrown against other objects. According to Zynkavich, although the safety on the shotgun was defective, the gun would not fire unless it was loaded, cocked, and the trigger pulled, applying 5½ to 6½ pounds of pressure.

The evidence further showed that at the time of the shooting the defendant and the victim were experiencing marital difficulties. The State offered evidence that the defendant "was running around with . . . a person that she worked with." Evidence was also presented that the defendant suffered from "battered wife syndrome," meaning that even though David Heidmous physically abused her periodically she remained in the marriage because she depended on him as her sole source of approval, support, and security.

The defendant's evidence at the sentencing hearing indicated that on 12 May 1983 her husband returned home around 10:30 p.m. They began to argue. She followed her husband into the bedroom and sat down on the side of the bed to talk to him. At that point David slapped the defendant across the face, cutting the inside of her mouth and bruising her face. He then grabbed her and began to punch her repeatedly. David finally knocked her off the bed where the defendant struck her head against the bureau. David exclaimed that he was going to kill her. This assault resulted in various abrasions and bruises to the defendant's head, neck, back, knee, and shins. Chief Detective Douglas Freeman observed these injuries when he arrived at the scene later that evening.

In a semi-conscious state, which resulted from the blow to her head, the defendant got up and reached for the shotgun which David kept on a nearby shelf. The defendant quickly opened the

bolt and immediately loaded the shotgun with a shell also on the shelf. With the shotgun in hand, the defendant started moving away from David who was taunting her. As she stepped away, she lost her balance due to some clutter on the floor, and as she fell backwards, the gun discharged, striking and killing David. The defendant immediately went to the telephone and called for help.

The defendant's sole assignment of error concerns whether the trial court erred in finding the following aggravating factor: "Defendant, with malice, intentionally shot and killed her husband with a deadly weapon to wit: a shotgun." In the present case, the State agreed not to try the defendant for murder in exchange for the defendant's plea of guilty to voluntary manslaughter. Voluntary manslaughter has been defined as "the unlawful killing of a human being without malice, express or implied, and without premeditation and deliberation." *State v. Brown*, 64 N.C. App. 578, 579, 307 S.E. 2d 831, 832 (1983).

The defendant questions in particular whether there was sufficient evidence presented to support a finding that the killing was committed with malice. Although the trial court had to determine that there was a "factual basis" that the killing was committed without malice in order to accept the defendant's guilty plea, there was other evidence before the court that the shooting was done with malice. *See* G.S. 15A-1022(c). For example: the defendant had been physically abused repeatedly by the victim; she was seeing a man other than her husband; she admitted loading the shotgun; the victim was found in bed in a known sleeping position; the gun would not fire accidentally; the gun required trigger pressure of 5½ to 6½ pounds to be fired; and the defendant fired one shot which hit the victim in the chest.

Furthermore, malice can be inferred from the fact that the defendant used a deadly weapon to accomplish the killing. *State v. Taylor*, 309 N.C. 570, 308 S.E. 2d 302 (1983). Since "malice" is not an element of voluntary manslaughter, this portion of the aggravating factor does not violate the G.S. 15A-1340.4(a)(1) principle that evidence necessary to prove an element of the offense cannot be used to support a factor in aggravation. By way of analogy, we find support for this contention in *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983), where the Supreme Court

held that the defendant's sentence for second-degree murder could be aggravated by a finding that the defendant premeditated and deliberated the killing.

Standing alone, an aggravating factor proved by a preponderance of the evidence that the defendant committed the shooting with malice would have been proper. However, the judge in the present case also added that the defendant "killed her husband with a deadly weapon." In effect, it appears that Judge Stevens found two aggravating circumstances in one factor.

In *State v. Green*, 62 N.C. App. 1, 301 S.E. 2d 920, *modified on other grounds and affirmed*, 309 N.C. 623, 308 S.E. 2d 326 (1983), the defendant was tried for second-degree murder and convicted of manslaughter. The Court of Appeals considered whether the "use of a deadly weapon to shoot a victim, and thereby accomplish an unlawful killing, may properly be considered as a factor in aggravation in manslaughter cases." *Id.* at 3-4, 301 S.E. 2d at 921. To convict a defendant of manslaughter, the State must prove an unlawful killing. Our Court therefore reasoned that since evidence of the use of a deadly weapon to shoot the victim was necessary to prove the unlawful killing, this factor could not be used to aggravate the defendant's sentence.

Although in *Green*, the judge had found the statutory aggravating factor, G.S. 15A-1340.4(a)(1)(i), that "[t]he defendant was armed with or used a deadly weapon at the time of the crime," we find the *Green* court's rationale equally persuasive in the present case where the court added the factor in question as an additional non-statutory aggravating factor. Even in light of the fact that the General Assembly specifically prescribed this factor for consideration, the *Green* court stated: "We do not believe, however, that it intended this factor to be used to enhance sentences in cases where the offense itself is an unlawful killing accomplished by shooting the victim with a deadly weapon." *Id.* at 4, 301 S.E. 2d at 922. *See also State v. Rivers*, 64 N.C. App. 554, 307 S.E. 2d 588 (1983); *see generally State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983). We agree and apply this principle to this non-statutory aggravating factor of the same import.

Most probably, Judge Stevens did not intend to find a "deadly weapon" aggravating factor, but only intended to aggravate the defendant's sentence on a finding of "malice." However, we

are not in a position to second guess the meaning of an obviously ambiguous aggravating factor. Because it appears that the court erred in finding the aggravating factor that the defendant killed her husband with a deadly weapon, we hold the case must be remanded for resentencing. It is clear that in every case in which it is found that the trial judge erred in findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

Remanded for resentencing.

Judge ARNOLD concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

I dissent. I believe that the aggravating factor that the judge found and that he intended to find was not that the defendant used a deadly weapon, but that she acted maliciously and intentionally in killing the victim, and would affirm.

MAE B. GOODMAN, WIDOW OF AND ADMINISTRATRIX OF THE ESTATE OF BROWN B. GOODMAN, DECEASED, EMPLOYEE, PLAINTIFF v. CONE MILLS CORPORATION, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8410IC1051

(Filed 2 July 1985)

Master and Servant § 68— workers' compensation—chronic obstructive pulmonary disease—exposure to cotton dust not cause

The evidence, though conflicting, was sufficient to support the Industrial Commission's determination that deceased's chronic obstructive pulmonary disease was not caused or contributed to by his exposure to cotton dust in his employment in the finishing department of defendant's textile plant but was a result of his cigarette smoking.

APPEAL by plaintiff from opinion and award of the North Carolina Industrial Commission filed 4 April 1984. Heard in the Court of Appeals 9 May 1985.

Brown B. Goodman originally filed this Workers' Compensation claim in June 1978 alleging disability due to an occupational disease caused by exposure to cotton dust. Before the claim was heard, Goodman died on 19 January 1979. Thereafter, plaintiff, Brown Goodman's widow and administratrix of his estate, filed claim for his death. Plaintiff's claim was denied by opinion and award filed 1 December 1982 by Commissioner Vance and plaintiff appealed to the Full Commission. The denial of plaintiff's claim was affirmed by opinion and award by the Full Commission entered 4 April 1984. Plaintiff appeals the denial of her claim.

Charles R. Hassell, Jr., for plaintiff appellant.

Hatcher Kincheloe and John F. Morris, for defendant appellees.

MARTIN, Judge.

Plaintiff argues on appeal that the Industrial Commission erred in finding that Brown Goodman's disability and death were not caused, or contributed to, by his exposure to cotton dust in his employment with Cone Mills. We conclude that the evidence, though conflicting, was sufficient to support the Commission's findings and its denial of plaintiff's claim. Accordingly, we must affirm its decision.

The evidence before the Commission tended to show that Brown Goodman was employed by Cone Mills for 47 years and that he retired on 31 March 1971 at the age of 66. During the entire period of his employment, he worked in the finishing department of Cone Mills' Salisbury plant, which produced, at various times, 100% cotton cloth and cotton/polyester blend cloth. When the cloth reached the finishing department, the cotton fiber had already been spun and woven into cloth, washed, dyed, starched, sized and dried. The further processing of the cloth in the finishing department generated dust in the air from the cloth. Approximately six or seven years before his retirement, Mr. Goodman developed a wheezing cough which would produce sputum of various colors. According to plaintiff's testimony the color of the

sputum would correspond to the color of dye being used at the mill. Mr. Goodman's cough became worse over the next few years.

After his retirement, Mr. Goodman gardened and helped his sons in farming to some extent until 1975. His symptoms persisted after he left the mill. He had smoked approximately a pack of cigarettes per day until 1973, when he stopped smoking. In February 1976, he sought treatment from Dr. Joseph A. Oliver for breathing problems. Dr. Oliver diagnosed Mr. Goodman's condition as emphysema and bronchitis. In February 1977, he was admitted to the hospital suffering from far advanced emphysema, and remained hospitalized for about six weeks. His condition continued to deteriorate, with subsequent hospitalizations for difficulty in breathing, until his death on 19 January 1979. Dr. Oliver determined the cause of death to be "far advanced emphysema with pulmonary failure and arteriosclerotic heart disease."

Dr. Leo J. Heaphy, a specialist in pulmonary medicine, testified for plaintiff. He had not examined Mr. Goodman, but based his testimony on work history, medical records and a history obtained from Mrs. Goodman. Dr. Heaphy testified that in his opinion Mr. Goodman suffered from chronic obstructive lung disease which had been caused, aggravated, accelerated and contributed to by long term exposure to inhaled cotton dust, as well as dust from dyes, sizing and starches, in the mill. In his opinion, Mr. Goodman was severely impaired when he retired in 1971 and totally and permanently disabled in 1975.

Dr. Charles D. Williams, also a specialist in pulmonary medicine, testified for defendants. He, like Dr. Heaphy, had never examined Mr. Goodman, and based his testimony on the medical records, x-ray reports, and the testimony of other witnesses as to work conditions in the finishing department relating to dust. Dr. Williams testified that in his opinion there is no relationship between the development of chronic obstructive lung disease and the inhalation of dust from cotton cloth which has been processed (as opposed to dust from raw cotton), or of dust from the starches and dyes used in the processing of the cloth. In his opinion neither Mr. Goodman's chronic obstructive lung disease nor his death were caused, aggravated or accelerated, in whole or in part, by exposure to cotton, starch or dye dust or any other substances peculiar to Mr. Goodman's employment in the finishing depart-

ment of the mill. Dr. Williams testified that in his opinion the most probable etiological factor to Mr. Goodman's chronic obstructive lung disease was cigarette smoking.

Commissioner Vance found, *inter alia*:

> Plaintiff has failed in her burden of proof to show that her decedent husband contacted [sic] chronic obstructive pulmonary disease as a result of the cotton dust in his employment which resulted in his death. *Any chronic obstructive pulmonary disease decedent had was a result of cigarette smoking.* [Emphasis supplied.]

Commissioner Vance concluded:

> Plaintiff has failed in her burden of proof to show that her decedent husband's chronic obstructive lung disease was caused by his exposure to cotton dust in his employment with defendant employer, which resulted in his death. G.S. 97-53(13); G.S. 97-38.

In affirming the denial of plaintiff's claim, the Full Commission adopted Commissioner Vance's opinion and award after making the additional finding that:

> After reviewing all the competent evidence in this case together with the Opinion and Award of Commissioner Vance, it is the opinion of the Full Commission that the disease suffered by the deceased employee was not caused by or *contributed to in any degree* by his cotton dust exposure. This in effect defeats the claim for disability while deceased employee was living and the claim for death benefits. [Emphasis supplied.]

It is well established that appellate review of decisions of the Industrial Commission is limited to a determination of whether there was competent evidence before the Commission to support its findings and whether such findings support its legal conclusions. *McLean v. Roadway Express*, 307 N.C. 99, 296 S.E. 2d 456 (1982). Findings of fact made by the Commission are conclusive on appeal when sufficient competent evidence exists to support the findings, even though there may be evidence to support contrary findings. *Id.; see also Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981).

Disability caused by, or death resulting from, a disease is compensable only when "the disease is an occupational disease, or is aggravated or accelerated by" causes and conditions characteristic of and peculiar to claimant's employment. *Walston v. Burlington Industries*, 304 N.C. 670, 680, 285 S.E. 2d 822, 828, *amended on rehearing*, 305 N.C. 296 (1982). Chronic obstructive lung disease may be an occupational disease provided that the worker's exposure to substances peculiar to the occupation in question significantly contributed to, or was a significant causal factor in the development of the disease. *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983). In determining whether exposure to an occupational substance significantly contributed to, or was a significant causal factor in, chronic obstructive lung disease, the Commission may consider medical testimony as well as other factual circumstances in the case, including the extent of the worker's exposure to the substance, the extent of non-occupational but contributing factors, and the manner of development of the disease as it relates to the claimant's work history. *Id.* The burden of proving the existence of a compensable claim is upon the claimant. *Davis v. Raleigh Rental Center*, 58 N.C. App. 113, 292 S.E. 2d 763 (1982).

In the case before us, it is clear that Brown Goodman suffered from chronic obstructive lung disease and that the disease was a cause of his death. However, the evidence with respect to causation was conflicting. Had the Commission accepted Dr. Heaphy's testimony, it could have found that workers in the finishing department were at increased risk, as opposed to the general public, of contracting chronic obstructive lung disease through exposure to dust from cotton, dyes and starch and that Brown Goodman's exposure to those substances was a significant causative factor in the development of his disease along with cigarette smoking. The Commission, in its role as fact finder, chose not to do so. Instead, after considering the likewise competent, but conflicting, evidence offered by Dr. Williams that exposure to dust from processed cotton, dyes and starch, such as is present in the finishing department at defendant's mill, is not related to the development of chronic obstructive lung disease or emphysema so as to place workers such as Brown Goodman at a risk to which the general public is not exposed, the Commission found that plaintiff had failed in her burden of proving that Brown

Goodman's chronic obstructive lung disease was occupational. Dr. Williams testified, and the Commission found that Brown Goodman's chronic obstructive lung disease was not caused, in whole or in part, by exposure to an occupational substance, but was due, instead, to cigarette smoking. Upon such a finding, the Commission was required to conclude that Brown Goodman's disease was not an occupational disease. *See Rutledge v. Tultex Corp., supra* at 107, 301 S.E. 2d at 373.

Plaintiff argues that the Commission erred in its finding because it ruled, in another case, that another worker in the finishing department at Cone Mills, Robie Swink, was entitled to compensation for chronic obstructive lung disease caused by his employment. She argues that the Commission and this court are bound by the decision in *Swink v. Cone Mills, Inc.*, 65 N.C. App. 397, 309 S.E. 2d 271 (1983), and the Commission's findings and conclusions on remand of that case. Plaintiff's argument has no merit, as each case must be considered and decided on the strength of the evidence presented. In *Swink, supra*, this Court noted that the evidence in that case was uncontroverted that Robie Swink's exposure to cotton dust contributed to his disease. Such was not the case as to Brown Goodman; the evidence as to causation was conflicting. The Commission has resolved the conflict against the plaintiff.

Affirmed.

Judges ARNOLD and PARKER concur.

LINDA ANTHONY CAMP v. RALPH LAMAR CAMP

No. 8427DC1177

(Filed 2 July 1985)

1. Husband and Wife § 12— separation agreement—resumption of marital relations

The rule that a separation agreement between a husband and wife is terminated insofar as it remains executory on their resumption of the marital relation has not been superseded by G.S. 50-20(d).

2. Husband and Wife § 12— one year's separation—marital relationship not resumed

The trial court's conclusion that plaintiff and defendant had not resumed their marital relationship was supported by findings that defendant had moved into the former marital home for ten days while he was looking for a job; that plaintiff had agreed to allow defendant to stay in the home based on representations that his girlfriend was returning to California and that he was being evicted from a trailer court; plaintiff was in Atlanta for three of the ten days and was involved in a training program from 6:30 a.m. to 12:30 a.m.; defendant did not have sexual relations with plaintiff, sleep in the same bedroom, or move any personal effects other than a change of clothes into the house; defendant was constantly looking for work; defendant never visited friends, attended social events, or ate meals with plaintiff during the ten days; defendant did not represent himself to have resumed the marital relationship with plaintiff; and defendant did not return to the residence after moving out. The findings were supported by the evidence and the issue of intent is an essential element in determining whether the parties have reconciled where the evidence is conflicting. G.S. 50-6, G.S. 50-20, G.S. 50-21.

APPEAL by defendant from *Hamrick, Judge.* Judgment entered 9 July 1984 in District Court, CLEVELAND County. Heard in the Court of Appeals 15 May 1985.

Defendant appeals from a judgment granting plaintiff a divorce after one year's separation and concluding that the parties' separation agreement is valid and enforceable.

Law Offices of O. Max Gardner, III, by O. Max Gardner, III, for plaintiff appellee.

N. Dixon Lackey, Jr., P.A., by N. Dixon Lackey, Jr., for defendant appellant.

WHICHARD, Judge.

[1, 2] The issue is whether as a matter of law defendant's return to the marital home for a ten-day period constituted a resumption of marital cohabitation which invalidated the parties' separation agreement and barred divorce on the grounds of living separate and apart for one year, G.S. 50-6. We hold that it did not, and we thus affirm.

Plaintiff and defendant were married on 14 April 1960. They separated on 17 January 1983 and signed a separation agreement dated 28 February 1983. The separation agreement purported to resolve all issues regarding marital property, spousal support,

and joint debts and obligations. In it the parties specifically waived their rights to a judicial division of property under the Equitable Distribution Act, G.S. 50-20 and 50-21.

On 1 April 1983 defendant returned to the marital home and remained there until 10 April 1983. Plaintiff testified: that defendant requested a place to stay until he found work; that he kept one change of clothing at the house; that he looked for work constantly; that she was out of town for three of the ten days defendant was there and on the other days was involved in a training program in a nearby town; and that they did not eat together, socialize, sleep in the same bed, or have sexual intercourse. Defendant testified: that he returned home at plaintiff's request; that they slept in the same bed; and that they had sexual intercourse three times.

On 7 February 1984 plaintiff filed for absolute divorce on the grounds of living separate and apart for one year. The court made the following pertinent findings:

> 6. On or about February 28, 1983, the plaintiff and defendant signed a written Separation Agreement in accordance with North Carolina law.
>
> 7. In the Separation Agreement, the plaintiff and the defendant resolved all issues regarding marital property; spousal support; joint debts and obligations; and specifically waived any and all of their respective rights under the North Carolina Equitable Distribution Act.
>
> 8. The Separation Agreement constitutes a fair and equitable division of the property of the parties.
>
> 9. Subsequent to the separation of the parties, the plaintiff resided at the former marital residence . . . in Shelby, . . . North Carolina. The defendant resided at a trailer park with his girlfriend . . . .
>
> 10. At the time of their separation, the defendant was operating a [Peterbilt] truck and trailer in connection with his business as a long-haul truck driver. On or about April 1, 1983, Commercial Credit Corporation repossessed the truck from the defendant thereby leaving him without any means of income.

11. On or about April 1, 1983, the defendant happened to see the plaintiff returning from work at approximately 5:30 o'clock a.m. The defendant was in his 1977 Ford truck and the plaintiff was driving her 1982 Toyota Corona. The defendant motioned for the plaintiff to pull over to the side of the road and the plaintiff complied with this request. The parties then met in the plaintiff's vehicle for several hours and discussed the defendant's financial troubles. The defendant then advised the plaintiff that he needed a place to stay for several days; that his girlfriend planned to return to California; that he was being evicted from the trailer court; and that he had nowhere else to go.

12. The plaintiff, based upon the representations made by the defendant, agreed to allow the defendant to stay in the former marital home . . . until he could find a job. The defendant actually moved into a bedroom in the residence on or about April 1, 1983. On the following day, the plaintiff left the marital home and spent approximately three (3) days in Atlanta, Georgia. When she returned . . . [she] was involved in a training and work program in Gaffney, South Carolina, from approximately 6:30 o'clock a.m. in the morning until 12:30 o'clock [a.m.] at night.

13. The defendant subsequently found employment . . . and left the residence . . . on or about April 10, [1983].

14. During the time that the defendant stayed at the residence . . ., he never had any sexual relations with the plaintiff; he never slept in the same bedroom with the plaintiff; he never moved any of his personal effects other than a change of clothing into the residence; he was constantly looking for work; he never went to any social events with the plaintiff; he never visited any friends with the plaintiff; he never slept with the plaintiff; he did not go anywhere in public with the plaintiff; and he did not otherwise represent himself to have resumed the marital relationship with the plaintiff. During that same period of time, the plaintiff and defendant did not eat any meals together in the residence . . . nor did they eat any meals together in any restaurant or other [similar] establishment outside of the marital home.

15. The defendant has never returned to [the] residence . . . at any time since April 10, [1983].

16. The plaintiff and defendant have not lived together as husband and wife since January 17, 1983.

17. The plaintiff and defendant have not associated among themselves in such a character during the period of their separation as to hold themselves out to the general public as husband and wife.

18. The plaintiff and defendant have waived any right or claim that they might have against the other for any form of spousal support based on the provisions contained in the written Separation Agreement.

19. Both the plaintiff and defendant have expressly waived any claim or demand that they might otherwise have in this action or otherwise for an equitable distribution of the real and personal property [acquired] during the course of their marriage by virtue of the provisions contained in the written Separation Agreement.

Based upon these findings the court concluded, *inter alia*, that

[t]he casual and isolated relationship between the plaintiff and defendant that [occurred] between April 1, 1983, and April 10, 1983, is not sufficient to constitute a resumption of the marital relationship or to constitute a holding out of the plaintiff and defendant to the public as husband and wife.

The court granted plaintiff a divorce under G.S. 50-6 and declared the separation agreement valid and enforceable.

Defendant contends the court erred in failing to find as a matter of law that by spending ten days in the marital home he resumed marital cohabitation with plaintiff. He contends that the court should not have looked behind the parties' actions to determine whether they intended to reconcile.

It is settled law that a separation agreement between a husband and wife is terminated 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); *Carlton v. Carlton*, 74 N.C. App. 690, 692, 329 S.E. 2d 682, 684 (1985); *Case v.*

Case, 73 N.C. App. 76, 79, 325 S.E. 2d 661, 663 (1985). Contrary to plaintiff's contentions, this rule has not been superseded by G.S. 50-20(d) which provides that parties may execute a written agreement governing the distribution of marital property before, during, or after marriage. The Court in *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E. 2d 97 (1984), cited by plaintiff, did not address whether a *resumption* of cohabitation after parties have separated terminates a separation agreement. It held, rather, that under G.S. 50-20(d) a party may not avoid a separation agreement on the grounds that he or she *continued* to live with the other spouse after the agreement was signed. *Id.* at 488, 317 S.E. 2d at 100. *See also Carlton*, 74 N.C. App. at 694, 329 S.E. 2d at 685 (parties to separation agreements must still be able to cancel their agreements, and the indicia of intent to cancel as developed in common law must still be intact).

It is also settled law that for the purpose of obtaining a divorce under G.S. 50-6 separation may not be predicated upon evidence which shows that during the statutorily prescribed period of separation the parties have cohabited as husband and wife. *Adamee*, 291 N.C. at 391-92, 230 S.E. 2d at 545-46.

Where evidence is conflicting, as here, however, the issue of the parties' mutual intent is an essential element in determining whether the parties were reconciled and resumed cohabitation. *Hand v. Hand*, 46 N.C. App. 82, 87, 264 S.E. 2d 597, 599, *disc. rev. denied*, 300 N.C. 556, 270 S.E. 2d 107 (1980), quoting *Newton v. Williams*, 25 N.C. App. 527, 532, 214 S.E. 2d 285, 288 (1975). Where the court sits as judge and juror, its findings of fact have the effect of a jury verdict and are conclusive on appeal if there is evidence to support them. *Hand*, 46 N.C. App. at 87, 264 S.E. 2d at 599-600. Contradictions and discrepancies are to be resolved by the trier of facts. *Id.*, 246 S.E. 2d at 600.

Here the court resolved discrepancies in favor of plaintiff and found that the parties did not resume the marital relationship. This finding accords with numerous cases where the court has required activity more substantial than that here to find a holding-out as husband and wife. *Ledford v. Ledford*, 49 N.C. App. 226, 232, 271 S.E. 2d 393, 397-98 (1980), citing: *Adamee*, 291 N.C. 386, 230 S.E. 2d 541 (wife moved back into marital domicile and lived with husband for eight months); *Dudley v. Dudley*, 225 N.C. 83, 33

S.E. 2d 489 (1945) (spouses slept in same room together for two and one-half to three years and in adjoining rooms in same house for remainder of alleged five years' separation); *Young v. Young*, 225 N.C. 340, 34 S.E. 2d 154 (1945) (husband in the Navy but parties stayed together whenever he was on leave or stationed near the marital home); *Tuttle v. Tuttle*, 36 N.C. App. 635, 636-37, 244 S.E. 2d 447, 448 (1978) ("interruption of the statutory period should not be found . . . from the mere fact of . . . contact between the parties").

We hold that the court's findings are supported by competent evidence and they, in turn, support the conclusions of law. The order entered thereupon is therefore

Affirmed.

Chief Judge HEDRICK and Judge WEBB concur.

STATE OF NORTH CAROLINA v. JAMES DAVID SINGLETARY

No. 841SC1067

(Filed 2 July 1985)

1. **Criminal Law §§ 62, 75— statements to polygraph operator during post-test interview**

The decision holding that the results of a polygraph test are no longer admissible in evidence, *State v. Grier*, 307 N.C. 628 (1983), did not preclude the admission of statements made by defendant to the polygraph operator during the post-test interview.

2. **Criminal Law §§ 75, 75.7— post-test statements to polygraph operator—no custodial interrogation—voluntariness**

Incriminating statements made by defendant to a polygraph operator during a post-test interview were not the result of custodial interrogation where defendant had requested the time, place and operator of the polygraph test, defendant realized he was free to leave at any time, and defendant was not arrested until two weeks after the interview. Furthermore, defendant's statements were made voluntarily and understandingly notwithstanding defendant, an attorney, contended that at the time he made the statements he believed that the decision of *State v. Grier*, 307 N.C. 628 (1983), prohibited the admission of all statements having any connection with a polygraph test.

3. Criminal Law § 169.3— evidence admitted over objection—similar evidence admitted without objection

When evidence is admitted over objection but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost.

4. Criminal Law § 33— business involvement with codefendants—relevancy

In a prosecution for various crimes related to the burning of an uninhabited dwelling, testimony that defendant set up a corporation to manufacture firearms was relevant to show defendant's business involvements with some of his codefendants.

5. Criminal Law § 39— scope of rebuttal testimony

Defendant failed to show prejudice by testimony of rebuttal witnesses which went beyond the scope of rebuttal.

6. Constitutional Law § 30— motion to obtain evidence—failure to make findings—harmless error

Even if the trial court was required to make detailed findings of fact in denying defendant's motion to obtain statements of the defendant and certain other information, defendant failed to show that the trial court's failure to do so was prejudicial.

APPEAL by defendant from *Peel, Jr., Judge.* Judgment entered 26 March 1984 in Superior Court, CHOWAN County. Heard in the Court of Appeals 4 April 1985.

Defendant, a licensed practicing attorney, was convicted of (i) burning an uninhabited house, (ii) conspiracy to burn an uninhabited house, (iii) fraudulently burning a building designed or intended as a dwelling house, and (iv) conspiracy to fraudulently burn a building designed or intended as a dwelling house. Defendant received an active sentence and was disbarred from the practice of law. Defendant appealed.

Attorney General Edmisten by Assistant Attorney General Joan H. Byers and Assistant Attorney General Charles H. Hobgood for the State.

Pritchett, Cooke & Burch by Stephen R. Burch for defendant-appellant.

PARKER, Judge.

[1] In his first assignment of error, defendant challenges the trial court's refusal to suppress certain incriminating statements made immediately following a polygraph test administered to him

by SBI Agent William Godley, after the machine had been turned off. Defendant makes a twofold argument in this regard. First, defendant contends that pursuant to the decision of our Supreme Court in *State v. Grier*, 307 N.C. 628, 300 S.E. 2d 351 (1983), all evidence obtained during a polygraph test can no longer be introduced into evidence, including evidence obtained during the "post-test interview." Secondly, defendant contends that even if these statements are admissible under the *Grier* decision, they should have been suppressed because they were not in fact voluntarily and understandingly made. We disagree with both of these contentions for the reasons stated herein.

In *Grier, supra*, our Supreme Court held that polygraph evidence is no longer admissible in any civil or criminal trial, even though the parties stipulate to its admissibility. *Id.* at 645, 300 S.E. 2d at 361. It is clear that the decision was grounded on the sensitive interrelationship between the reliability of the examiner in interpreting the results and the reliability of the machine itself. *Id.* at 636, 300 S.E. 2d at 355-56. The Court stated:

> We hasten to note that in these cases permitting polygraph evidence upon stipulation of the parties, we have not implicitly recognized the reliability of the polygraph technique. Admissibility of this evidence has not been based on the validity and accuracy of the lie detector, but rather that by consenting to the evidence pursuant to stipulation, the parties have waived any objections to the inherent unreliability of the test. *Id.* at 640, 300 S.E. 2d at 358.

The Court also was "disturbed by the possibility that the jury may be unduly persuaded by the polygraph evidence." *Id.* at 643, 300 S.E. 2d at 360.

The *Grier* court outlined the three step process involved in a polygraph examination as follows: "The examiner conducts a pre-test interview, prepares the test questions and asks them during the examination, supervises the examinee's behavior during the examination, conducts a post-test interview and, finally, interprets the test results." *Id.* at 636, 300 S.E. 2d at 356. Defendant contends that any information elicited during any of the three phases is automatically inadmissible under the *Grier* decision.

In our view when our Supreme Court held that "polygraph evidence" is no longer admissible, they meant that all evidence

concerning whether or not, in the operator's opinion, the defendant was being deceptive, is to be excluded. Our conclusion is supported by the Supreme Court's stated and above-quoted concern about the reliability of the machine itself and the reliability of the examiner in interpreting these results. Therefore, because the statements introduced in the case before us were not based on the examiner's interpretation of the polygraph tests results, we hold the court did not err in refusing to suppress these statements under the *Grier* rule.

Having concluded that the statements were not inadmissible solely because of the *Grier* decision, we must now determine whether the statements were admissible as a confession. Our Supreme Court, in *State v. Stephens*, 300 N.C. 321, 266 S.E. 2d 588 (1980), restated the well established rules regarding confessions as follows:

> The test of admissibility is whether the statements made by defendant were in fact voluntarily and understandingly made. Admissibility depends upon whether the statement was freely and voluntarily made and whether the officers who elicited the statement employed appropriate procedural safeguards. A confession or incriminating statement is voluntary in law when, and only when, it is in fact voluntarily made. The question of voluntariness must be determined by the total circumstances of each particular case. Although *Miranda* warnings are required only when defendant is being subjected to *custodial* interrogation, and are not required during the investigatory stage when defendant is not in custody at the time he makes the statement, all *involuntary* confessions or incriminating statements, made in custody or out, are ordinarily inadmissible for any purpose. (Citations omitted.)

The challenged statements must be examined in light of these legal principles to determine their admissibility.

[2] First, we reject defendant's contention that he was subjected to custodial interrogation at the time the statements were made. Not only did the defendant request the time and place of the test (the Sheriff's private office), the examination was given by the Agent defendant requested to do the examination. Also, the trial court found as a fact, which we think was supported by compe-

tent evidence, that defendant realized he was free to leave at any time. Defendant was not in fact arrested until two weeks after the interview. When these factual circumstances are coupled with the fact, as found by the trial court, that defendant, who was familiar with polygraph release forms, signed the release form, which contains *Miranda* warnings, both before and after the interview, we are satisfied that the statements were voluntarily made under the totality of these circumstances.

Defendant contends that these statements were not understandingly made. His argument is that he had read the *Grier* decision prior to taking the polygraph examination, and that he interpreted that decision to mean that all statements having any connection with a polygraph examination would be automatically inadmissible. At the motion to suppress hearing, the court made the following finding of fact:

> 15. That the District Attorney Williams did not tell the defendant he would be indicted if he did not take the polygraph test, but Mr. Williams discussed with the defendant that the polygraph results would not be admissible; that neither Mr. Godley nor Mr. Williams told the defendant that any evidence that might arise during the polygraph would not be admissible; that Mr. Godley specifically told the defendant that the test results would not be admissible, but that the *Grier* case would not effect any statements made during the testing; that if the defendant was of the opinion that any voluntary statements made during the test would not be admissible solely because of the fact that the polygraph was involved, that it was of his own doing and not because of anything told to him by the officer or the district attorney;

This finding, which was supported by competent evidence, is binding upon us on this appeal. *State v. Jackson*, 306 N.C. 642, 295 S.E. 2d 383 (1982). Therefore, under the totality of these circumstances, the trial court did not err in refusing to suppress the incriminating statements solely because a polygraph machine was involved. The assignment of error is overruled.

[3] In his second assignment of error, defendant contends the court erred in allowing testimony as to unrelated crimes of which the defendant had been accused, but not convicted. Defendant's

argument is without merit. A co-defendant, Luckie Cartwright, and Agent Godley both testified that defendant loaned money to Cartwright to finance drug deals before defendant began objecting to this evidence. When evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost. *King v. Demo*, 40 N.C. App. 661, 253 S.E. 2d 616 (1979). Therefore, the assignment of error is overruled.

[4] In his third assignment of error, defendant contends the court erred in admitting highly prejudicial evidence unrelated to the offense with which he was charged. The court admitted testimony that defendant set up a corporation to manufacture firearms. There being nothing illegal about such a corporation, this evidence was relevant on the issue of defendant's business involvements with some of his co-defendants.

On cross-examination, defendant denied that he thought the family of one of his co-defendants was involved in drug trafficking. Police Chief Merritt was called by the State to rebut this testimony and his testimony was, therefore, clearly relevant. This testimony was also relevant as to defendant's knowledge of the criminal activities of some of his co-defendants. The assignment of error is overruled.

[5] In his fourth assignment of error, defendant contends the court erred by allowing rebuttal witnesses to go beyond the scope of rebuttal testimony, thereby giving the State a chance to present its case twice with defendant's case sandwiched in between.

The burden is on the defendant to prove that there is a reasonable possibility that a different result would have occurred had the court not committed error. *State v. Armistead*, 54 N.C. App. 358, 283 S.E. 2d 162 (1981). Defendant has failed to carry his burden in this regard, and the assignment of error is overruled.

[6] In his last assignment of error, defendant contends the court erred in failing to order an in-camera inspection after defendant filed a motion to obtain statements of the defendant and for certain other specific information. The court found "after looking at the file that there was nothing . . ." and denied the motion. Even assuming the court was required to make detailed findings of fact, defendant has failed to carry his burden of proving that this con-

stituted prejudicial error. *State v. Armistead, supra.* The assignment of error is overruled.

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

No error.

Judges WEBB and BECTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 JULY 1985

AETNA CASUALTY CO. v. PENN NAT. MUTUAL CAS. CO. No. 8418SC696	Guilford (83CVS4119)	Affirmed
BRAME v. GILLEY No. 8523SC138	Wilkes (83CVS985)	Dismissed
CARPENTER v. HERTZ CORP. No. 8414SC633	Durham (83CVS3223)	Affirmed
CASTEEN v. DE NEMOURS & CO. No. 8410IC1071	Industrial Commission (H-9012)	Reversed
DUNN v. DUNN No. 8417DC1356	Rockingham (84CVD596)	Affirmed
ELKS v. HARDEE No. 853SC134	Pitt (83SP467)	Affirmed
FAIRCLOTH v. KELLY SPRINGFIELD TIRE No. 8410IC977	Industrial Commission (G-9955)	Affirmed
GALLEY STACK, INC. v. J. F. ENTERPRISES, INC. No. 8410SC543	Wake (82CVS2934)	Affirmed
IN RE CAMERON No. 8512DC36	Cumberland (84J72)	Reversed
IN RE UNDERWOOD No. 8410DC1207	Wake (83J231)	Affirmed
LANE v. JACKSON WHOLESALE CO. No. 8410IC762	Industrial Commission (I-5523)	Vacated
LOPEZ v. WILLIAMSON No. 8410SC1065	Wake (83CVS7619) (83CVS7620)	Dismissed
MARSHALL v. DUNNING IND. No. 8410IC839	Industrial Commission (I-4806)	Affirmed
MYRVIK v. RICHARDSON No. 8421SC913	Forsyth (83CVS448)	Affirmed
PATE v. TOWN OF ST. PAULS No. 8416SC911	Robeson (83CVS1098)	No Error

PLANT v. PLANT No. 8422DC1139	Alexander (83CVD204)	Affirmed
POWELL v. WILLIAMS OIL CO. No. 8412SC846	Cumberland (83CVS355)	Affirmed
PREVATTE v. HOLLAR No. 8423DC828	Wilkes (80CVD915)	Vacated & Remanded
REID v. DURHAM HERALD CO. No. 8414SC945	Durham (83CVS03024)	Affirmed
SMITH v. JONES No. 8426SC1264	Mecklenburg (81CVS12895)	Affirmed
STATE v. BOYD No. 8526DC97	Mecklenburg (83CRS78786)	No Error
STATE v. BROOKS No. 8513SC77	Columbus (84CRS4180)	No Error
STATE v. CLUBB No. 8528SC99	Buncombe (83CRS27179)	No Error
STATE v. EKLEBERRY No. 8412SC1270	Cumberland (84CRS14979)	Affirmed
STATE v. MOORE No. 854SC28	Jones (83CRS448) (83CRS449) (83CRS450) (83CRS451) (83CRS452)	Affirmed
TROXLER v. ROACH No. 8417SC1241	Rockingham (83CVS909)	Reversed
WACHOVIA BANK v. LANGLEY No. 8415DC1169	Alamance (83CVD686)	Affirmed
WAITS v. JOHNSTON No. 8424SC807	Watauga (80CVS372)	Affirmed
WESTMORELAND v. WESTMORELAND No. 8526DC82	Mecklenburg (72CVD5086)	Affirmed

STATE OF NORTH CAROLINA v. CLARENCE A. OWENS, MASIE McCLAIN AND LORETTA LYNN TYLER

No. 8412SC985

(Filed 2 July 1985)

1. **Criminal Law § 74.2— statements by non-testifying codefendant—admission as prejudicial error**

A non-testifying codefendant's out-of-court statement that he had picked up defendant and his companion because they had pointed guns at him was incriminating to defendant, and its admission thus violated defendant's right of confrontation as set forth in *Bruton v. United States*, 391 U.S. 123 (1968), where the statement placed defendant and his companion on foot near the scene of a robbery in possession of guns later identified as similar to those used in the robbery and so eager to flee the area that they forced their way into the codefendant's truck at gunpoint. Furthermore, the violation of the *Bruton* rule constituted prejudicial error where there was no eyewitness identification of defendant, and the jury might not have convicted defendant without evidence putting the robbery weapons in the hands of defendant and his companion.

2. **Robbery § 5— armed robbery—instructions on possession of recently stolen goods—sufficient evidence**

The evidence in a robbery prosecution was sufficient to show that defendant was in possession of stolen goods so as to support the trial court's instruction on the doctrine of possession of recently stolen goods where it tended to show that defendant was a passenger in a truck carrying property taken during an armed robbery, that defendant and two others in the truck were acting in concert, and that a codefendant never saw any weapons or a duffel bag containing stolen goods until defendant entered the truck.

3. **Robbery § 4.6— armed robbery—acting in concert—sufficient evidence**

The State's evidence was sufficient to support defendant's conviction of armed robbery on the theory of acting in concert where it tended to show that a convenience store was robbed at 2:00 a.m. by two armed men; moments thereafter two men were picked up in a truck by defendant and his companion on a dead-end road immediately behind the store; and when the foursome was apprehended a short time later, defendant was driving the truck and stolen items and weapons similar to the ones used in the robbery were discovered in the cab of the truck.

4. **Larceny § 8.4; Robbery § 5— recent possession doctrine—identification of stolen goods**

Items stolen during an armed robbery were sufficiently identified to permit an instruction on the doctrine of possession of recently stolen property where a store clerk's description of what was taken matched the items identified by a crime scene technician as having been found in a truck occupied by defendants.

5. Criminal Law § 90.1— State not bound by exculpatory statement

The State was not bound by defendant's exculpatory statement which it introduced where such statement was contradicted by a codefendant's testimony.

6. Criminal Law § 138.7— sentencing—improper remark not considered

The record showed that the sentencing judge did not consider the prosecutor's improper reference to a robbery that had occurred the night before the robbery in question where the judge asked whether defendant had ever been tried for the other robbery, and the prosecutor responded that there "really was no evidence" connecting defendant with the other crime.

APPEAL by defendants Owens and McClain from *Bailey, Judge.* Judgment entered 31 May 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 2 April 1985.

Attorney General Rufus Edmisten, by Special Deputy Attorney General Ann Reed, for the State.

Appellate Defender Adam Stein, by First Assistant Appellate Defender Malcolm Ray Hunter, Jr., for defendant appellant Owens.

Assistant Public Defender Staples Hughes, for defendant appellant McClain.

BECTON, Judge.

I

Defendants, Owens, McClain, and Tyler, were charged with armed robbery and conspiracy to commit armed robbery. McClain and Tyler were also charged with accessory after the fact of armed robbery. At the close of all the evidence, the trial court dismissed the conspiracy charges. The jury returned verdicts of guilty of armed robbery against Owens and McClain, and a verdict of guilty of accessory after the fact against Tyler.

A fourth defendant, Anthony Lee Kelly, was tried separately on a two-count indictment charging robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon, which charges arose out of the same facts as the convictions on appeal. Kelly was acquitted of robbery and convicted of conspiracy. Kelly's conviction was set aside on the ground that the conspiracy charges against the three persons with whom Kelly was charged to have conspired had all been dismissed.

Defendants Owens and McClain appeal. Owens contends that it was reversible error to allow the State to present evidence of an out-of-court statement by a non-testifying codefendant, and also that it was plain error for the court to instruct the jury on the theory of recent possession. McClain contends that his motion to dismiss was erroneously denied, and also contends that certain statements by the prosecutor impermissibly tainted his sentencing hearing. For the reasons stated below, as to defendant McClain we find no error, and as to defendant Owens, because the State's introduction of the out-of-court statement violated Owens' right to confront witnesses against him, we find error, and award a new trial.

II

Factual Background

Owens, McClain, Tyler and Kelly were charged with the robbery of a Kroger Sav-On store. Linda Fritsch, the cashier, testified that in the early morning hours of 28 November 1983, two armed, masked men entered the store. While one man held her fellow employees at gunpoint, the other had her empty the contents of her cash register into a green duffel bag. Fritsch testified as to the contents of the register. She also testified that both men wore camouflage fatigues and gloves, that one had a brown stocking over his face, and the other a full ski mask.

Two sheriff's deputies on patrol were called to the Krogers. After interviewing the employees, the deputies drove toward a section of woods behind the store to look for the two men. The deputies stopped a red pick-up truck that held Owens, Kelly, Tyler, and the driver, McClain. When one of the deputies spotted a weapon on the floorboard of the cab, all four were arrested.

One of the deputies briefly searched the truck. Two rifles were found partially under the front seat. A ski mask was found near the guns on the floorboard. A green duffel bag and brown coat were found in the back of the truck. Tyler had two rolls of quarters in her purse. A later search by a crime scene technician revealed cash, checks, food stamps and food coupons in the green bag, a pair of brown gloves near the passenger door, a single glove on the floorboard and a pair of pantyhose on the floorboard.

The Kroger cashier testified that the ski mask and the pair of gloves looked similar to those worn by the robbers.

III

Defendant Owens' Appeal

A.

[1] Neither Owens nor McClain testified at trial. Tyler, however, took the stand in her own behalf and testified that she and McClain were driving down the road when they encountered Owens and Kelly. She testified that in return for a promise of payment for gasoline, McClain offered the pair a ride. Tyler stated that she never saw Owens or Kelly with any of the incriminating items and was not aware that the guns, ski mask and green bag were in the truck until the police discovered them after the arrest. The prosecution, in an apparent attempt to discredit Tyler's testimony, called a sheriff's detective as a rebuttal witness. The detective testified that he had interviewed McClain shortly after the crime, and McClain told him that he had picked up the two men because they had "pointed guns at him and the girl." Owens' contention is that the admission of the out-of-court statement of McClain, a non-testifying codefendant, which statement incriminated him, constituted reversible error because it denied Owens his right to confront witnesses against him.

The controlling rule of law appears in the landmark case of *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), in which the United States Supreme Court "held that in a joint trial the admission of a non-testifying codefendant's extrajudicial confession, which implicates [a codefendant], is a violation of the [latter's] 'right of cross-examination secured by the Confrontation Clause of the Sixth Amendment'." *State v. Gonzalez*, 311 N.C. 80, 92, 316 S.E. 2d 229, 236 (1984) (quoting *Bruton*, 391 U.S. at 126, 20 L.Ed. 2d at 479, 88 S.Ct. at 1622). *See State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968) (*Bruton* binding on N.C. Courts). The State contends that the *Bruton* rule is inapplicable here because the extrajudicial statement was not a confession, and that it did not incriminate Owens. Neither contention has merit.

Bruton and its North Carolina progeny have not limited the application of the rule to confessions only. The more general term

"statement" is used interchangeably with "confessions," *see Bruton; Gonzalez*, and the rule has been expressly applied to statements that are not confessions. *Gonzalez; State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977) (*Bruton* rule applies "equally to admissions" by a codefendant).

The State also suggests that McClain's out-of-court statement did not incriminate Owens and is thus beyond the pale of *Bruton*. We disagree. "The *sine qua non* for application of *Bruton* is that the party claiming incrimination without confrontation at least be implicated," *State v. Jones*, 280 N.C. 322, 340, 185 S.E. 2d 858, 869 (1972), and the challenged statement here easily meets that test.

The statement was incriminating to Owens because it placed Owens and Kelly on foot near the scene of the robbery, in possession of the guns which were later identified as similar to those used in the robbery, and so anxious to flee the area that they forced their way into the truck at gunpoint. It is not significant that proper names were not used because Owens and Kelly were the only other "two men" in the truck when the police arrived. *See Gonzalez* (codefendant's statement that "some guys" committed the robbery incriminated defendant when context made it clear that defendant was one of the "guys").

Finally, we conclude that the violation of the *Bruton* rule was not harmless error. There was no eyewitness identification of Owens. Without the evidence putting the robbery weapons in the hands of Owens and Kelly, the jury might not have been able to find beyond a reasonable doubt that Owens was one of the robbers. *Compare Jones* (*Bruton* error harmless when extrajudicial statement merely provided cumulative evidence and evidence of accused's guilt was overwhelming). Although we award Owens a new trial on the basis of the *Bruton* violation, we discuss his other assignment of error as it pertains to an issue that will undoubtedly recur on retrial.

B.

[2] Owens' second contention is that the trial court committed plain error in instructing the jury on the doctrine of possession of recently stolen goods. The doctrine has been applied to the charge of armed robbery in the appropriate case. *State v. Hickson*, 25 N.C. App. 619, 214 S.E. 2d 259, *cert. denied*, 288 N.C. 246,

217 S.E. 2d 670 (1975). In order to invoke the doctrine, and raise a presumption of guilt, the State must show beyond a reasonable doubt, that:

> (1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to [defendant's] control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods; . . . and (3) the possession was recently after the larceny. . . .

State v. Maines, 301 N.C. 669, 674, 273 S.E. 2d 289, 293 (1981) (citations omitted). Owens argues that the evidence does not support the second element: possession. Specifically, he contends that evidence that he was a passenger in a truck that carried stolen property is not sufficient to permit the jury to consider whether the doctrine applied in this case. We disagree.

In *State v. Eppley*, 282 N.C. 249, 192 S.E. 2d 441 (1972), the Supreme Court stated:

> The possession sufficient to give rise to such inference does not require that the defendant have the article in his hand, on his person or under his touch. It is sufficient that he be in such physical proximity to it that he has the power to control it to the exclusion of others and that he has the intent to control it.

Id. at 254, 192 S.E. 2d at 445. "The 'exclusive' possession required to support an inference or presumption of guilt need not be a sole possession but may be joint." *State v. Maines*, 301 N.C. at 675, 273 S.E. 2d at 294.

> For the inference to arise when more than one person has access to the property in question, the evidence must show the person accused of the theft had complete dominion, which might be shared with others, over the property or other evidence which sufficiently connects the accused person to the crime or a joint possession of co-conspirators or persons acting in concert in which case the possession of one criminal accomplice would be the possession of all. Stated differently, for the inference to arise, the possession in defendant must be to the exclusion of all persons not party to the crime.

State v. Maines, 301 N.C. at 675, 273 S.E. 2d at 294. *See State v. Hopson*, 266 N.C. 643, 146 S.E. 2d 642 (1966) (when defendant was neither driver nor owner of the vehicle in which stolen articles were found, nothing else appearing, evidence does not show defendant in possession of the articles).

In this case, we conclude that sufficient evidence was adduced to show that Owens was in possession of the stolen goods, and thus that it was proper to instruct the jury on the doctrine of recently stolen property. The evidence showed that Owens, Tyler and McClain were acting in concert; further, Tyler testified that she never saw any weapons, the duffel bag, or its contents until the group was arrested—until after Owens and Kelly had gotten into the truck. Since we find the instructions free from error on this point, it is unnecessary to address the issue of plain error.

IV

Defendant McClain's Appeal

A.

McClain argues that the trial court erred in denying his motion to dismiss the charge of armed robbery at the close of all the evidence. He makes three specific contentions with regard to this argument, and after briefly reviewing the applicable law, we address these contentions serially.

> An armed robbery is defined as the taking of personal property of another in his presence or from his person without his consent by endangering or threatening his life with a firearm, with the taker knowing that he is not entitled to the property and the taker intending to permanently deprive the owner of the property.

State v. Davis, 301 N.C. 394, 397, 271 S.E. 2d 263, 264 (1980). The familiar rules governing a motion to dismiss made in a criminal case need no lengthy recitation here. "The question for the court is whether, when the evidence is so considered, there is reasonable basis upon which the jury might find that an offense charged in the indictment has been committed and the defendant was a principal in the commission of the crime." *State v. Dowd*, 28 N.C. App. 32, 37, 220 S.E. 2d 393, 396 (1975).

[3] McClain first contends that his motion to dismiss should have been granted because the evidence did not warrant submitting the issue of aiding and abetting to the jury. We disagree. A person who is actually or constructively present when a crime is committed and who aids or abets another in its commission is a principal in the second degree, and is equally guilty as a principal in the first degree, the person who actually commits the crime. *State v. Davis.* The trial court appears to have instructed the jury on a theory of acting in concert, rather than aiding and abetting. As a practical matter, however, the difference between acting in concert and aiding and abetting is of little significance, both being "equally guilty" and "equally punishable." *State v. Williams*, 299 N.C. 652, 656, 263 S.E. 2d 774, 777 (1980). *See State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979) (acting in concert means acting in conjunction with another pursuant to a common plan or purpose).

Applying these principles to the instant case, we find that the evidence shows that a Kroger store was robbed at 2:00 a.m. by two armed men who fled the store. Moments thereafter, Owens and Kelly were picked up by McClain and Tyler on a dead-end road immediately behind the store. When the foursome was apprehended, the stolen items and weapons similar to the ones used in the robbery were discovered in the cab of the truck. In our opinion, this evidence would support theories on either aiding and abetting or acting in concert as to McClain, and there was no error in charging the jury on the latter theory.

McClain next argues that the motion to dismiss should have been allowed because there was insufficient evidence for the court to instruct the jury on the doctrine of possession of recently stolen property. McClain bases this argument on two separate contentions, the first being insufficient evidence that McClain possessed the stolen goods. Our discussion of Owens' possession earlier in this opinion appertains here, and we conclude that the evidence shows McClain was in possession of the goods.

[4] Second, McClain argues that the goods were not adequately identified. In the case at hand, Linda Fritsch testified that cash, loose change, rolled change, two checks countersigned by her, some food stamps, and two merchandise coupons, one for hot dogs and one for diapers, were taken from her cash register. She

estimated the total value of the currency, including the checks, at $85 to $95. The crime scene technician testified as to the contents of the green cloth bag removed from the truck, namely, $146 in currency, $17.50 in rolled change, $8.22 in loose change, $29.00 in food stamps, personal checks totalling $11.90, dated 28 November 1983, and countersigned "L. Fritsch," and two store coupons, one a hotdog coupon and one a diaper coupon.

It is true that "[t]he identity of the fruits of the crime must be established before the presumption of guilt from possession of recently stolen goods can apply." *State v. Jones*, 227 N.C. 47, 49, 40 S.E. 2d 458, 460 (1946). When, as here, items "devoid of identifying features," such as money, "are the proceeds of a larceny, their identity . . . must necessarily be drawn from other facts satisfactorily proved." *State v. Crawford*, 27 N.C. App. 414, 415, 219 S.E. 2d 248, 249, *disc. rev. denied*, 288 N.C. 732, 220 S.E. 2d 621 (1975). In our opinion, the evidence at bar was sufficient to identify the stolen property. Fritsch's description of what was taken matched the items identified by the crime scene technician. *See State v. Hales*, 32 N.C. App. 729, 233 S.E. 2d 601, *disc. rev. denied*, 292 N.C. 732, 235 S.E. 2d 782 (1977) (identification sufficient; "a great many variables coincided perfectly"); *State v. Jackson*, 274 N.C. 594, 164 S.E. 2d 369 (1968) (same result; amount of money, number and denomination of bills tallied).

[5] Finally, McClain argues that his motion to dismiss should have been granted because the State was bound by the uncontradicted, exculpatory statement of defendant McClain, which the State introduced, that two men pointed guns at him and at co-defendant Tyler. An exculpatory statement introduced by the State justifies dismissal only when it is both exculpatory and uncontradicted. *State v. Carter*, 254 N.C. 475, 119 S.E. 2d 461 (1961). Assuming, *arguendo*, that the statement was exculpatory, McClain's statement was clearly contradicted by Tyler's testimony that Owens and Tyler were hitchhiking when they were picked up by McClain in exchange for gas money. Thus, the State was not bound by the statement.

B.

[6] McClain makes a final argument based on a perceived impropriety at his sentencing hearing. The record shows that the prosecutor made a reference to a robbery that had occurred the

night before the robbery of Krogers, arguably implying that McClain had been involved in that other incident. McClain contends that the record contains no assurance that the sentencing judge did not consider this information in sentencing, but we conclude otherwise. The judge himself asked whether McClain had ever been tried for the other robbery, to which the prosecutor responded that there was "really no evidence" connecting McClain with the other crime. The record therefore discloses not that the sentencing judge considered the improper material, but that he specifically declined to consider it.

As to defendant Owens, there must be a

New trial.

As to defendant McClain, we find

No error.

Judges WEBB and PARKER concur.

ELLEN SPEAR MARKS v. EDGAR SEYMOUR MARKS

No. 8418DC934

(Filed 2 July 1985)

Divorce and Alimony § 21.6— separation agreement—integrated property settlement—not modifiable

The provisions of a 1974 separation agreement incorporated into a consent judgment were part of an integrated property settlement, and therefore not modifiable by a motion in the cause, where clearly neither party intended any provision of the deed of separation to be modifiable except as provided by its own terms or enforceable except by a separate action; the court that entered the consent judgment clearly intended that the consent judgment only be an approval of the deed of separation and not an adoption of it; the agreement included a clause indicating an intent that the alimony provision not be modified except under the terms of the agreement and then only after a fixed time; and it was clear from the record that the payment by defendant of alimony to plaintiff was an integral part of the overall property settlement between the parties. G.S. 50-16.9.

Marks v. Marks

APPEAL by plaintiff from *John, Judge.* Judgment entered 30 March 1984, in District Court, GUILFORD County. Heard in the Court of Appeals 17 April 1985.

In this civil action, plaintiff seeks enforcement of defendant's obligation to pay her "permanent alimony" under the terms of a 1974 separation agreement between the parties. Defendant seeks modification of his alimony obligation under a 1974 consent judgment that incorporated the separation agreement.

Plaintiff wife and defendant husband were married in 1950. They separated in 1972. On 30 April 1974, plaintiff and defendant executed a Deed of Separation disposing of questions relating to, *inter alia*, child support, child custody, division of marital property, statutory and common law spousal rights, inheritance, taxes, and alimony. According to the deed, defendant was to pay alimony to plaintiff in an amount equal to 27½% of his yearly income but in no event less than $15,000 per year until plaintiff remarried or died. Defendant's estate was to be responsible for this obligation after defendant's death. As a lump sum transfer in lieu of alimony for the first seven years, defendant agreed to transfer to plaintiff his interest in the parties' marital home, which was valued at $210,000.

The deed of separation contained the following paragraphs:

> 10. DEED OF SEPARATION TO BE INCORPORATED INTO COURT DECREE AND TO SURVIVE DIVORCE. Nothing herein contained shall be deemed to prevent either of the parties from maintaining a suit for absolute divorce against the other in any jurisdiction based upon one or more years' separation.
>
> The parties agree that this Deed of Separation may be incorporated in any court decree awarding alimony with or without divorce; but notwithstanding such incorporation, this agreement shall not be merged in such decree or any divorce decree, but shall be [sic] in all respects survive such decrees and be forever binding and conclusive upon each of the parties and his heirs, devisees, executors, administrators and assigns.

On 21 May 1974, the parties entered into the consent judgment that is the subject of this action. The consent judgment incorporated the deed of separation by reference as follows:

A. That the Deed of Separation duly executed by plaintiff and defendant on April 30, 1974, is hereby incorporated by reference in its entirety in this Order, and, by consent of the parties, is a part of the judgment of this Court; and that its terms shall control and determine alimony, child support, attorneys' fees paid by defendant for the benefit of plaintiff and all other matters set out therein; but that said Deed of Separation is not merged in this Order to the end that a final termination of this cause, if such should occur, will leave the parties free to enforce said Deed of Separation by independent action.

Regarding the alimony obligation, the consent judgment provides:

13. Said Deed of Separation provides for alimony for plaintiff on terms and in amounts which the Court deems appropriate, the Court having given due regard to the circumstances, estates, earnings, earning capacity, condition, and accustomed standard of living of the parties.

In December of 1981, plaintiff filed a complaint in District Court alleging that defendant's resumption of alimony payments was to have occurred on 15 August 1981. She alleged that she had demanded payment but that no payments had been made. Plaintiff sought enforcement of the alimony provision of the Deed of Separation.

Defendant responded denying the material allegations of the complaint and alleging further that plaintiff had not complied with the terms of the Deed of Separation. In a motion filed simultaneously with his response, defendant alleged that he had suffered severe financial reverses since entering into the consent judgment; that the financial position of the parties relative to one another had changed; that plaintiff was no longer a dependent spouse; and that the payment of permanent alimony was no longer warranted. Based on these changes of condition, defendant sought modification of the consent judgment to the end that his alimony obligation be terminated completely.

The parties stipulated that the preliminary question to be determined by the court was whether the 1974 Deed of Separation and consent judgment were modifiable. If so, the parties

would proceed on defendant's motion to modify and if not, on plaintiff's action to enforce the Deed of Separation.

After a hearing on 25 July 1983, the court held that the consent judgment was modifiable. A written order to this effect was filed *nunc pro tunc* on 9 November 1983.

Accordingly, on 12 December 1983, a hearing was held on the motion to modify and both sides presented evidence. On 30 March 1984, the trial court entered an order making extensive findings of fact regarding the incomes and estates of the parties and how their situations had changed since entering into the consent judgment. Based on these findings, the court concluded that plaintiff was no longer a dependent spouse and terminated defendant's obligation to pay alimony to her as of 8 January 1982, the date of defendant's motion. Plaintiff appealed.

Hunter, Wharton and Howell, by John V. Hunter, III, for plaintiff-appellant.

Nichols, Caffrey, Hill, Evans and Murrelle, by William D. Caffrey and Richard L. Pinto for defendant-appellee.

EAGLES, Judge.

As the trial court did, we first address the issue of whether the 21 May 1974 consent judgment was modifiable by motion in the cause. For reasons set out below, we hold that it was not and reverse the judgment of the trial court.

As has been noted in many similar cases, there are essentially two types of consent judgments. One is a contract that is approved by the court. It is enforceable or modifiable as an ordinary contract—by an independent action brought by one of the parties. *See, e.g., Moore v. Moore*, 297 N.C. 14, 252 S.E. 2d 735 (1979). The other is an actual adjudication of the court where the court adopts the agreement of the parties as its judgment and specifically orders compliance with the provisions of the agreement. It is enforceable or modifiable by a motion in the cause. *See, e.g., Stancil v. Stancil*, 255 N.C. 507, 121 S.E. 2d 882 (1961). *See generally, Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964); *Levitch v. Levitch*, 294 N.C. 437, 241 S.E. 2d 506 (1978).

G.S. 50-16.9, which applies to all orders entered on or after 1 October 1967, provides that any order for the payment of

alimony, whether entered by consent or not, is modifiable by a motion in the cause. In *Rowe v. Rowe*, 305 N.C. 177, 287 S.E. 2d 840 (1982) and *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1978), the Supreme Court noted that this statute declared a clear public policy that consent orders to pay alimony are modifiable and that even a purported waiver of the statute would be without force and effect. Nevertheless, those cases held that consent orders containing provisions for the payment of alimony were not enforceable or modifiable by a motion in the cause where it appeared that the periodic support payments to the spouse, even though characterized or denominated by the parties as alimony, were actually reciprocal provisions of a property settlement and were integrated into the agreement in such a way that any modification of the support provision would destroy the agreement. *See Bunn v. Bunn, supra.*

Recently, in *Walters v. Walters*, 307 N.C. 381, 298 S.E. 2d 338, *reh'g denied*, 307 N.C. 703, --- S.E. 2d --- (1983), the Supreme Court held that any distinction between the types of consent judgments would no longer be recognized for purposes of enforcing the alimony provisions contained therein.

> [W]e now establish a rule that whenever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. All separation agreements approved by the court as judgments of the court will be treated similarly, to-wit, as court ordered judgments. These court ordered separation agreements, as consent judgments, are modifiable and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case.

Id. at 386, 298 S.E. 2d at 342. The Court specifically held that its previous opinions in *Bunn* and *Levitch* were no longer controlling to the extent that they conflicted with the new rule. By its own terms, the rule of *Walters* was prospective only. *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).

With these principles in mind, we turn to the Deed of Separation executed by the parties and incorporated by reference into the consent judgment of 21 May 1974. We find that the alimony provisions are clearly within the exception set out in *White* and

Rowe and relied on in *Doub* in that they are clearly part of an integrated property settlement.

It is clear that neither party intended any provision of the Deed of Separation to be modifiable except as provided by its own terms or enforceable except by a separate action. The deed specifies that its incorporation by reference into the consent judgment does not constitute a merger of the two. The deed also recites the agreement of the parties to be bound by it irrespective of any divorce decree. Further, the deed of separation in this case contains a provision entitled "COVENANTS NOT TO INTERFERE," which provides in part as follows: "It is the intention of the parties that each will not bother, molest, or interfere with the other in any way whatsoever from this day forward." In *Cecil v. Cecil*, 74 N.C. App. 455, 328 S.E. 2d 899 (1985), we held that a similar provision in the separation agreement involved in that case was evidence of the parties' intention that the agreement be a permanent property settlement. *See also Barr v. Barr*, 55 N.C. App. 217, 284 S.E. 2d 762 (1981).

Notwithstanding the intent of the parties to the deed of separation, the court that entered the consent judgment clearly intended that the consent judgment only be an approval of the deed of separation and not an adoption of it. In *Levitch v. Levitch, supra*, the consent judgment contained language respecting incorporation by reference of the deed of separation and survival of the deed beyond the court's order that is almost identical to the language in the consent judgment before us. There, the Supreme Court held that the "unequivocal language" of the consent judgment indicated the trial court's intent to adopt the deed of separation and to order compliance with its terms. Here, however, the court specifically provided that the incorporation by reference of the Deed of Separation into the consent judgment was not intended to be a merger of the two, only that the Deed of Separation was part of the judgment of the court. The court made findings of fact in the consent judgment that the terms of the Deed of Separation were in the best interest of both parties and specifically that the terms relating to alimony were appropriate. From the following finding it is clear that the court intended the consent judgment to be the final disposition of any matters in controversy.

> 17. The parties thereto and their attorneys accept this Order as a final determination of all matters and things raised or alleged or which might have been raised or alleged by the plaintiff's complaint, and of all matters and things in controversy between the parties, and all matters and things which might have been at issue, in law or in fact, at the trial of this action; and it is agreed and consented to by the parties hereto and their attorneys that this Order shall be as full, complete and final a determination as if any issues of fact had been answered by a jury and questions of law determined by the Court.

Similar language in a settlement agreement was recently held by this court to indicate an intent that the agreement be a permanent property settlement and not modifiable. *Cecil v. Cecil, supra.*

As a further indication that the alimony provision was intended to be part of a property settlement and not intended to be modifiable by a motion in the cause, we note that the Deed of Separation makes the provision for "permanent alimony" modifiable as follows:

> Upon Husband's reaching the age of sixty-five either party may make motion in any court having jurisdiction for review and revision of the terms herein stated for the payment of permanent alimony. Said review and revision by the court shall include consideration of the estates, earnings, earning capacity, condition, accustomed standard of living of the parties and other relevant facts as provided by law. Such consideration shall not include the then income or estate of Husband's spouse, if any, nor the inheritance of Husband, if any.

While this capability for independent modification might, under *Acosta v. Clark*, 70 N.C. App. 111, 318 S.E. 2d 551 (1984), be construed to mean that the alimony provision is separable from the rest of the agreement and therefore modifiable under G.S. 50-16.9, we do not think that is the intention of the parties or the court in this case. Rather, it indicates an intent that the alimony provision not be modified except under the terms of the agreement and then only after a fixed length of time. Recognizing this, the court did not specifically order the payment of alimony, but merely

directed that the "terms [of the Deed of Separation] shall control and determine alimony."

Finally, it is clear from the record that the payment by defendant of alimony to plaintiff was an integral part of the overall property settlement between the parties. Both plaintiff and defendant were financially secure when they entered into the deed of separation and the consent judgment in 1974. According to plaintiff, they lived "in the lap of luxury." They each held, jointly or individually, several substantial income producing investments. The Deed of Separation disposing of their assets consumes 15 pages of the record on appeal and is a comprehensive and detailed division of the property and obligations of the parties. The "permanent alimony" provision is only one of 42 separate provisions, each dealing with a specific asset or obligation. The fact that defendant's obligation to pay alimony was suspended for a fixed seven year term contingent upon his transfer of his interest in the marital home indicates that the "alimony"—a substantial sum—was not necessary for plaintiff's support but was a reciprocal obligation supported by consideration and was part of an integrated property settlement.

We think it is clear that the alimony provisions contained in the consent judgment here were not alimony at all, despite their denomination as "permanent alimony"; that they are actually a part of an overall property settlement by the parties; that they are not separable from the other provisions of the Deed of Separation; and that modification of the alimony provisions now would destroy the agreement. Accordingly, we hold that G.S. 50-16.9 does not apply and that it was error for the trial court to determine that the consent judgment of 21 May was modifiable by a motion in the cause.

Because the consent judgment was not modifiable, it was error for the trial court to terminate defendant's obligation for "permanent alimony" under the consent judgment. Further discussion of that assignment of error is unnecessary. The judgment of the court is reversed, and the cause is remanded for proceedings to enforce the Deed of Separation.

Reversed and remanded.

Judges WHICHARD and JOHNSON concur.

WILLIAM D. GOODRICH AND WIFE, BRENDA GOODRICH AND SHIRLEY R. MORTER v. WARREN RICE AND RICE EXCAVATING, INC.

No. 8415DC1059

(Filed 2 July 1985)

1. **Rules of Civil Procedure § 15.1— motion to amend complaint allowed—no error**

In an action in which plaintiffs sought damages for defendant's failure to construct a pond upon the land of Shirley Morter pursuant to an oral contract, the trial court did not err in granting plaintiffs' motion to amend their complaint to add Shirley Morter as an additional plaintiff and to allege that defendant was conducting business individually under the name Rice Excavating, Inc. Neither amendment brought out new material, changed the theory of the case, or in any way could have surprised defendant. G.S. 1A-1, Rules 15(a) and (b).

2. **Contracts § 21.2— breach of contract to build pond—evidence sufficient to support findings**

In an action for breach of contract, there was evidence to support the trial court's findings and its award of damages for breach of a contract to construct a two acre pond. Plaintiff William Goodrich testified that he met defendant at the site and discussed a two acre pond, plaintiff Brenda Goodrich testified that defendant spoke with her after his examination of the site and told her the pond would be two acres in size, and defendant testified that he recalled a telephone conversation with Brenda Goodrich during which he told her he would construct a two acre pond. While there was evidence of a later agreement for a 1.2 acre pond, the evidence was void of any consideration to support a modification of the original agreement.

3. **Rules of Civil Procedure § 41— breach of contract to build pond—denial of motion for involuntary dismissal proper**

The trial court properly denied defendant's motion for a directed verdict, reviewed as a motion for involuntary dismissal because it was a non-jury trial, where the evidence sufficiently supported the determination by the trial court that the contractual agreement required the construction of a two acre pond and that the agreement had been breached. G.S. 1A-1, Rules 41(b) and 50(a).

4. **Unfair Competition § 1— advance payment for pond construction—no further work—not an unfair trade practice**

The trial court erred by finding that defendant's conduct constituted an unfair and deceptive trade practice and by awarding plaintiff attorneys' fees where the parties had agreed that defendant would receive no funds until the pond which defendant was to construct was complete, unless defendant experienced cash flow problems, in which case he would ask for an advance for work already performed; after excavating the pond site, defendant advised plaintiffs that he needed $2,000 to complete repairs on equipment and that as soon as the repairs were complete he would resume construction on the pond; plaintiffs advanced defendant $2,000 which defendant testified was for work already done; no additional work was done; and the trial court found that

defendant believed he was entitled to the $2,000 in return for services that he had already performed. G.S. 75-1.1.

5. **Quasi Contracts § 2— breach of express contract—no conformity of pleadings and proof—no recovery for work done**

Defendant could not recover in *quantum meruit* in an action for breach of express contract to construct a pond where defendant failed to file an answer. There must be conformity between the pleadings and proof in contract actions.

6. **Rules of Civil Procedure § 17— breach of contract to build pond—landowner real party in interest**

In a contract action alleging breach of contract to build a pond, the trial court erred by awarding all of the damages to plaintiffs where the record clearly established that plaintiffs were acting as agents for the landowner and that the money advanced to defendant was the landowner's; the real party in interest was the landowner. G.S. 1A-1, Rule 17(a).

APPEAL by defendant from *Hunt, Judge*. Judgment entered 31 May 1984 in District Court, ORANGE County. Heard in the Court of Appeals 9 May 1985.

In this civil action, as originally filed, plaintiffs William Goodrich and his wife sought damages for defendants' failure to construct a pond upon the land of one Shirley Morter pursuant to the terms of an oral contract. Plaintiffs also sought the return of $2,000.00 which plaintiffs contend had been advanced to defendants. No responsive pleadings were filed on defendants' behalf, and an entry of default was entered against them. Defendants' motion to set aside the entry of default and motion to dismiss were denied. Upon hearing on the default judgment, plaintiffs' motion to amend their complaint to add Shirley Morter as an additional party plaintiff and to allege that defendant Warren Rice was conducting business in an individual capacity using the name of Rice Excavating, Inc., was granted.

The evidence presented during the hearing was for the most part uncontradicted and tended to show the following: Plaintiff Shirley Morter owns certain real property in Chatham County. On her behalf, plaintiffs William and Brenda Goodrich contracted with defendant Rice for the construction of a pond on Shirley Morter's land. The parties initially agreed on the construction of a two acre pond for the price of $11,950.00 if the proceeds resulting from the sale of timber on the property which would be cut for construction purposes were retained by plaintiffs. If the proceeds from the sale of timber were retained by defendant, the

price would be $11,500.00. The parties then agreed that defendant would deliver to the plaintiffs five cords of hardwood, defendant would retain the proceeds from the timber sale, and the pond would be constructed for $11,500.00.

Defendant performed excavation services at the pond site and disposed of some of the debris and stumps. He then advised the plaintiffs that the pond would contain only .7 acres but that the price would remain the same. When plaintiffs expressed their dissatisfaction, defendant told them he would increase the size of the pond to 1.2 acres; plaintiffs agreed to a pond size of not less than 1.2 acres. Defendant was to receive no funds until the job was completed, unless he experienced cash flow problems, in which case he could ask for an advance of funds. Several weeks later defendant advised plaintiffs that certain equipment required repair and he needed a $2,000.00 payment in order to resume construction, although defendant testified that the advance of funds was needed to cover expenses which he had already incurred in construction. Plaintiffs paid defendant the sum of $2,000.00. Thereafter, defendant failed to perform any services at the job site despite repeated requests from plaintiffs to do so. Plaintiffs obtained an estimate from another company which agreed to construct a two acre pond according to the same terms and specifications as were discussed with defendant for $15,750.00.

From the foregoing evidence, the trial judge made findings of fact, upon which she concluded as a matter of law that defendant was in breach of contract and acted in violation of G.S. 75-1.1 in obtaining the $2,000.00 payment from the plaintiffs. Based upon these conclusions the trial court ordered:

> 1. That the Plaintiffs have and recover of the Defendant Rice the sum of $10,925.00 as damages in this action, consisting of:
>
> a. $4,250.00 for the additional costs to the Plaintiffs to secure the services originally contracted by the Defendant;
>
> b. $6,000.00 for the restitution of the $2,000.00 paid by the Plaintiff to the Defendant, the aforesaid damages being trebled according to law;
>
> c. $450.00 for the value of the timber cut from the property;

d. $225.00 for the value of the hardwood which the Defendant failed to deliver to the Plaintiffs;

2. That the costs of this action, including reasonable attorneys' fees pursuant to the provisions of N. C. Gen. Stat. § 75-1.1, *et seq.*, be taxed to the Defendant with the attorneys' fees in this action to be taxed based upon an Affidavit to be submitted by counsel for the Plaintiffs herein and at such hearings as the Court deems appropriate based upon the Affidavit.

From this order defendant appealed.

Winston, Blue & Rooks, by J. William Blue, Jr., for plaintiff appellees.

Levine, Stewart & Tolton, by Michael D. Levine, for defendant appellant.

MARTIN, Judge.

Defendant's assignments of error relate to the granting of plaintiffs' motion to amend the complaint, sufficiency of the evidence to support the findings, the denial of his motion for directed verdict, and the award of damages, including treble damages and attorneys' fees. We reverse the award of treble damages and attorneys' fees as being unsupported by the evidence and remand the cause for entry of judgment entitling the real party in interest to receive the fruits of the litigation.

[1] Defendant, in his first two assignments of error, contends the trial court erred in granting plaintiffs' motion to amend the complaint. Defendant asserts that the amended complaint contained new substantive allegations from those originally contained in the complaint, and, therefore, the granting of plaintiffs' motion prejudiced him by forcing him to defend against allegations for which he was not prepared.

We find no merit in these assignments. It is a fundamental concept of Rules 15(a) and (b) of the North Carolina Rules of Civil Procedure that amendments to pleadings should be liberally allowed. Discretion in allowing amendment of pleadings is vested in the trial judge and his ruling will not be disturbed on appeal absent a showing of prejudice to the opposing party. *See Auman v.*

Easter, 36 N.C. App. 551, 244 S.E. 2d 728, *disc. rev. denied*, 295 N.C. 548, 248 S.E. 2d 725 (1978). Defendant has failed to demonstrate prejudice from the amended pleading. The amendments added an additional plaintiff, Shirley Morter, and inserted additional language that defendant was conducting business individually under the name of "Rice Excavating, Inc." Neither of the amendments brought out any new material, changed the theory of the case, or in any way could have surprised defendant. Defendant in his own testimony acknowledged that plaintiffs had disclosed to him that the property belonged to Shirley Morter and the pond was being constructed for her; that no corporation existed in Orange County under the name of "Rice Excavating, Inc."; and that "Rice Excavating was the name that was given to . . . [defendant] . . . to do business under." Defendant was named as an individual defendant. Defendant showed no prejudice as a result of the amendments allowed.

[2] Defendant, in his next two assignments of error, contends the trial court erred in finding and basing its award of damages on a breach of contract for a two acre pond. Defendant asserts that the ultimate agreement between the parties was for the construction of a 1.2 acre pond. We find the evidence sufficient to support the trial court's findings. Plaintiff William Goodrich testified that he met defendant at the pond site, that they discussed the construction of a two acre pond, and that defendant assured him a two acre pond would be built. Plaintiff Brenda Goodrich testified that defendant spoke with her after his examination of the pond site and told her the pond would be two acres in size with a depth of fifteen feet, and that the price would include the dam, shorelines, banks and overflow pipe. Defendant testified that he recalled a telephone conversation with plaintiff Brenda Goodrich during which he told her he would construct a two acre pond and advised her of various technical aspects concerning the construction of the pond. While there was evidence of a later agreement for a 1.2 acre pond in lieu of a two acre pond, the evidence was void of any consideration to support a modification of the original agreement. 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, even though evidence might have supported findings to the con-

trary. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979).

[3] Defendant next assigns error to the denial of his motion for a directed verdict under Rule 50(a) of the North Carolina Rules of Civil Procedure. A Rule 50(a) motion for directed verdict is appropriate only to a case tried before a jury. In non-jury trials, a motion for involuntary dismissal under Rule 41(b) provides a procedure whereby, at the close of plaintiff's evidence, the judge can give judgment against the plaintiff, not only because his proof has failed to make out a case, but also on the basis of facts as the judge may determine them. *O'Grady v. Bank*, 296 N.C. 212, 250 S.E. 2d 587 (1978). Treating defendant's motion as one made under Rule 41(b), we find that it was properly denied. The evidence sufficiently supported the determination by the trial court that the contractual agreement between the parties required the construction of a two acre pond and that such agreement had been breached. This assignment of error is overruled.

[4] Defendant next contends the trial court erred in its finding that his conduct constituted a violation of G.S. 75-1.1 and in awarding attorneys' fees under G.S. 75-16.1. The trial court determined "[t]hat the acts of the Defendant Rice in obtaining the $2,000 payment from the Plaintiffs in July of 1983 were a violation of N.C. Gen. Stat. § 75-1.1, *et seq.*," and, therefore, as part of the award of damages, the trial court trebled $2,000.00 and ordered "[t]hat as a part of the cost to be taxed to the Judgment in this action, the Defendant shall be taxed with reasonable attorneys' fees payable to counsel of the Plaintiffs. . . ."

The existence of unfair acts and practices under G.S. 75-1.1 must be determined from the circumstances of each case. *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). Under the circumstances of this case, the parties agreed that defendant would receive no funds until the job was complete, unless defendant experienced cash flow problems, in which case he would ask for an advance for work already performed. Plaintiffs produced evidence that after excavating the pond site defendant advised them that he needed $2,000.00 to complete repairs on equipment and that as soon as the repairs were complete he would resume construction on the pond. Based upon these representations, plaintiffs advanced to defendant the sum of $2,000.00. Defendant testified that

the payment was for work already performed on the project. No additional work was performed at the job site after the payment was received.

We hold that G.S. 75-1.1 is inapplicable to the facts of the case before us. We cannot say that the evidence of defendant's receipt of the payment violates the parties' agreement, or that its receipt offends "established public policy," or constitutes a practice which is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Johnson v. Insurance Co.*, 300 N.C. 247, 263, 266 S.E. 2d 610, 621 (1980). The trial court found that defendant "believed that he was entitled to the $2,000.00 in return for services that he had already performed." The record is devoid of evidence to the contrary, and the trial court erred in awarding treble damages and attorneys' fees to plaintiffs.

[5] Defendant next assigns error to the trial court's exclusion of evidence concerning expenses incurred on the project and the monetary value of the services he had performed. Defendant contends he is entitled to recover for the reasonable value of his performance under *quantum meruit*. This assignment of error is without merit. In contract actions there must be a conformity between the pleadings and proof. In the case under review, an action brought on an express contract, defendant failed to file an answer and therefore cannot recover on a theory of *quantum meruit*. *See generally* 17A C.J.S. *Contracts* §§ 568-69.

[6] Defendant finally contends the trial court erred in awarding the entire amount of damages to plaintiffs William and Brenda Goodrich. Defendant argues that since the record indicates that these plaintiffs were acting as agents for plaintiff Morter, the judgment in their favor is defective. We agree.

Every claim must be prosecuted in the name of the real party in interest. G.S. 1A-1, Rule 17(a). "A real party in interest is a party who is benefited or injured by the judgment in the case." *Parnell v. Insurance Co.*, 263 N.C. 445, 448, 139 S.E. 2d 723, 726 (1964), *quoting Rental Co. v. Justice*, 211 N.C. 54, 55, 188 S.E. 609, 610 (1936). The mere appointment of an agent does not make him the real party in interest. *Morton v. Thornton*, 259 N.C. 697, 131 S.E. 2d 378 (1963). "[I]t has been consistently held that an agent for another could not maintain an action in his name for the bene-

fit of his principal." *Howard v. Boyce*, 266 N.C. 572, 577, 146 S.E. 2d 828, 831 (1966).

The evidence clearly establishes an agency relationship as it discloses the plaintiffs William and Brenda Goodrich were negotiating the pond's construction on behalf of plaintiff Shirley Morter. Plaintiff William Goodrich testified, "As for the $2,000 we loaned Mr. Rice, that was my sister-in-law's [plaintiff Morter's] money. I had no money involved in this matter. . . ." The court correctly found "[t]hat the Plaintiff Shirley Morter is the owner of certain real property . . . and that the Plaintiffs Goodrich, on behalf of the Plaintiff Morter, contracted with the Defendant Rice for the construction of a pond on the land owned by the Plaintiff Morter." The real party in interest in the case *sub judice* is plaintiff Shirley Morter. Therefore, she is the one who is entitled to receive the fruits of the litigation. *See Hood v. Mitchell*, 206 N.C. 156, 173 S.E. 61 (1934); *see also Raintree Corp. v. Rowe*, 38 N.C. App. 664, 248 S.E. 2d 904 (1978).

In conclusion, we hold that the trial court erred in trebling damages under G.S. 75-1.1, in awarding attorneys' fees to plaintiffs, and in awarding damages to parties other than the real party in interest. Those portions of the judgment are therefore vacated. Otherwise, the judgment in favor of Shirley Morter is affirmed and the cause is remanded for entry of judgment in favor of Shirley Morter in the amount of $6,925.00.

Affirmed in part; vacated in part.

Judges ARNOLD and PARKER concur.

Umstead v. Employment Security Commission

ERICK UMSTEAD, PLAINTIFF v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA AND NORTH CAROLINA DEPARTMENT OF AGRICULTURE, DEFENDANTS

No. 8410SC1242

(Filed 2 July 1985)

Master and Servant § 108.1— unemployment compensation—employee not guilty of misconduct

The refusal of an employee to go to his supervisor's office immediately to discuss a field trip did not constitute misconduct within the meaning of G.S. 96-14(2) sufficient to disqualify the employee from receiving unemployment compensation benefits when he was dismissed for insubordination where the employee told his supervisor that he would come to his office in an hour, and where the supervisor admitted that he had very little information about the field trip to convey to the employee, that there was no urgent need for an immediate meeting, and that he could have conveyed the information by telephone.

APPEAL by defendants from *Barnette, Judge.* Judgment entered 18 July 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 17 May 1985.

Attorney General Thornburg, by Assistant Attorney General Thomas G. Meacham, Jr., for defendant appellant North Carolina Department of Agriculture.

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

Smith, Patterson, Follin, Curtis, James & Harkavy, by Donnell Van Noppen, III for plaintiff appellee.

BECTON, Judge.

On 25 January 1984 defendant-appellant, North Carolina Employment Security Commission (Commission), disqualified the claimant-appellee, Erick Umstead, from receiving unemployment insurance benefits after it concluded that he was discharged by defendant-appellant, the North Carolina Department of Agriculture, for misconduct connected with his work. On appeal, the Wake County Superior Court reversed the decision of the Commission and directed the Commission to proceed with payments to Erick Umstead of unemployment insurance benefits. The de-

fendants appeal to this Court and present the following questions for review.

> I. Did the Superior Court err in concluding that plaintiff-appellee's conduct did not rise to the level of culpability required for a disqualification of unemployment benefits based upon 'misconduct' within the meaning of North Carolina General Statute 96-14(2)?
>
> II. Did the Superior Court violate the statutory standard of review contained in North Carolina General Statute 96-15(i) and thus err in reversing the decision of the Employment Security Commission under Docket No. 83(G)4649 and in directing the Commission to proceed with payment of plaintiff-appellee's unemployment insurance benefits?

Believing that Umstead's actions did not evince such wrongful intent, wilfulness, wantonness, or deliberate misconduct as to disqualify him completely from unemployment insurance benefits as a matter of law, we affirm and find it unnecessary to discuss the standard of review issue.

I

On 13 July 1983, Erick Umstead was dismissed from his employment allegedly for insubordination and misconduct. Prior to his dismissal, the quality of Mr. Umstead's work was never in question, and he had at no time during his employment with the Department of Agriculture received any oral or written warnings concerning his performance. However, in the weeks preceding his discharge, Mr. Umstead had filed an intra-departmental grievance concerning John Hunter, his immediate supervisor, but had received no response to that grievance.

On the afternoon prior to his discharge, Erick Umstead, upon request, went to John Hunter's office to discuss the scheduling of a field trip which Mr. Umstead was to take two or three days later. Shortly thereafter, John Hunter summoned Mr. Umstead again to his office. Because John Hunter had in recent weeks repeatedly summoned Mr. Umstead to his office, for what Mr. Umstead considered to be trivial matters which could easily have been conveyed by telephone, Mr. Umstead stated that he was tired of walking back and forth to the office, and that he was a human being, by which he was implying that he "was not [Mr.

Hunter's] puppy dog that he could whistle for every two or three minutes." Mr. Hunter then apologized.

What occurred on the date of the discharge is set forth in finding of fact number 2 by the Commission. We include relevant portions of that finding below:

> 2. On the morning of July 13, 1983 [Hunter], instructed [Umstead] to come to his . . . office immediately . . . to discuss the final details of an upcoming field trip. . . . [Hunter] instructed [Umstead] to come immediately to his office . . . after [Hunter] had first called [Umstead] by phone at approximately 8:23 a.m. on July 13, 1983. . . . [Umstead] advised [Hunter] in that phone conversation that he would be able to come . . . in about an hour's time whereupon [Hunter] informed [Umstead] that he had 30 minutes to come. . . . [Umstead] replied that he would need at least an hour to go over some papers on his desk before reporting. . . . [Hunter] repeated his request. . . . [Umstead] responded by indicating that he thought he would need an hour whereupon [Hunter] proceeded to [Umstead's] office and in person instructed [Umstead] to come to his . . . office *immediately*. The distance between [Umstead's] and [Hunter's] office was 35 feet. [Umstead] did not comply because he had been on vacation the week of July 4 through July 8, 1983 and wanted to go over some papers on his desk. [Umstead] had returned from his vacation on July 11, 1983.

Significantly, Mr. Hunter admitted that he had very little in the way of information regarding the field trip to convey; that there was no urgent need for an immediate meeting; and that he could have conveyed the information by telephone. Nevertheless, Erick Umstead was dismissed.

N.C. Gen. Stat. Sec. 96-14(2) (Supp. 1983) states that an individual shall be disqualified from receiving unemployment benefits if "such individual is . . . unemployed because he was discharged for misconduct connected with his work," and then defines "misconduct" as follows:

> conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has

> the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer.

G.S. Sec. 96-14(2) (Supp. 1983). Of course, the burden is on the employer to show circumstances which disqualify the claimant.

Citing *In re Cantrell*, 44 N.C. App. 718, 263 S.E. 2d 1 (1980), for the proposition that a refusal of a work assignment constitutes misconduct sufficient to disqualify a claimant from receiving unemployment benefits, the defendant employer in this case sought to carry its burden by characterizing Mr. Umstead's actions as a "refusal of a work assignment." We find *Cantrell* distinguishable. In *Cantrell*, a truck driver deliberately and unjustifiably refused to report to work when he knew that his refusal would cause logistical problems for the employer. The *Cantrell* Court held:

> A claimant's deliberate and unjustifiable refusal to report to work, when the employer has a right to insist on the employee's presence and when the claimant knows that his refusal would cause logistical problems for the employer, constitutes misconduct sufficient to disqualify claimant from receiving benefits.

44 N.C. App. at 723, 263 S.E. 2d at 4. In this case, there were no logistical problems sufficient to constitute misconduct under the statute, caused by Umstead. Equally important, we find no refusal to report to work or to perform an assigned task. Considering Hunter's apology the day before Umstead's discharge and Umstead's statement that he would come to Hunter's office, this case devolves to a dispute between a supervisor and an employee about how fast the employee should move. We have already noted Hunter's admission that there was very little by way of information that he had to convey to Umstead, that there was no urgent need for an immediate meeting, and that he could have conveyed the information by telephone.

Defendant also relies on *In re Hagan*, 57 N.C. App. 363, 291 S.E. 2d 308 (1982) and *Yelverton v. Kemp Furniture Industries, Inc.*, 51 N.C. App. 215, 275 S.E. 2d 553 (1981). Those cases are

also factually distinguishable. *Hagan* involved a discharge based on gross insolence when an employee called his supervisor a "God-damned liar." Yelverton was discharged after he threatened a fellow employee with serious bodily harm, left his assigned work area to harass a fellow employee, and picked up a wooden post in the course of the argument with the fellow employee.

Considering the facts in this case, we find *In re Miller*, 62 N.C. App. 729, 303 S.E. 2d 411, *disc. rev. denied*, 309 N.C. 321, 307 S.E. 2d 165 (1983), controlling. Miller "refuse[d] to assume an additional, permanent work assignment because she did not agree with her supervisor's decision that she had time to perform the additional task." 62 N.C. App. at 731, 303 S.E. 2d at 412. This Court held that Miller's refusal was not misconduct as defined in G.S. Sec. 96-14(2) (Supp. 1983), noting a distinction between an employer's right to discharge an employee and the Commission's right to deny unemployment benefits based on the conduct that led to the discharge. Specifically, the *Miller* Court said:

> The issue here is not whether the employer had the right to assign this duty to claimant, or whether claimant had the right to refuse to do the task, but is whether claimant's behavior rises to the level of misconduct within the statute. It does not follow from the right to discharge an employee for his or her refusal to assume additional job responsibilities that the employee by refusing was wilfully or wantonly disregarding the employer's interest. To extend the definition of misconduct in such an expansive fashion, as appellants would have it, would be to abandon questions of wrongful intent, wilfulness, wantonness, or deliberate misbehavior.

Id. at 731-32, 303 S.E. 2d at 413. Considering this statement in *Miller* and the *Miller* Court's suggestion that an unaggravated refusal of a work assignment is not misconduct within the meaning of the Employment Security Act, we are compelled to find that the employer failed to carry its burden of showing that Umstead's conduct rose to the level of culpability required for a finding of "misconduct" within the meaning of the statute.

For the above reasons, the decision of the Wake County Superior Court directing the Commission to pay Erick Umstead unemployment insurance benefits is

Affirmed.

Judges PHILLIPS and EAGLES concur.

STATE OF NORTH CAROLINA v. WINDLEY MOORE

No. 842SC956

(Filed 2 July 1985)

1. **Homicide § 23— instructions on first and second degree murder and voluntary manslaughter—evidence sufficient**

There was evidence to support the trial court's instruction on first and second degree murder and on voluntary manslaughter where two witnesses heard loud voices preceding the shot which killed decedent, neither saw decedent assault or make threatening moves toward defendant, no weapon was found on or near decedent, and defendant told the investigating officer that decedent was trying to steal his property and that defendant intended to kill him. G.S. 15A-1232.

2. **Homicide § 30.3— refusal to instruct on involuntary manslaughter—proper**

The trial court properly denied defendant's request for instructions on involuntary manslaughter where all the evidence presented by the defendant suggests that he intentionally assaulted the decedent with a deadly weapon knowing the assault was likely to kill or inflict serious injury. An attempt by defendant to protect himself from decedent would support a charge of voluntary rather than involuntary manslaughter.

3. **Criminal Law § 162— no objection to questions—assignment of error dismissed**

In a prosecution for murder, an assignment of error concerning the circumstances surrounding defendant's statement to police was dismissed because defendant failed to make a timely objection to the questions. G.S. 15A-1446.

4. **Criminal Law § 165— improper argument by prosecutor—defendant's refusal to cooperate in reconstructing record—no error**

The Court of Appeals could not review the denial of defendant's motion for appropriate relief from a voluntary manslaughter conviction, based on improper comments in the State's closing argument and on the court's failure to record the State's closing argument despite defendant's request, where defendant declined the court's offer to reconstruct the argument using the court's notes and the remembrances of the opposing attorneys. G.S. 15A-1230, Rule 9(a), North Carolina Rules of App. Procedure.

State v. Moore

APPEAL by defendant from *Phillips (Herbert O.), Judge.* Judgment entered 11 April 1984, in Superior Court, BEAUFORT County. Heard in the Court of Appeals 2 April 1985.

Attorney General Rufus L. Edmisten by Associate Attorney Sueanna P. Peeler for the State.

Wilkinson & Vosburgh by James R. Vosburgh for defendant appellant.

COZORT, Judge.

Defendant was charged with murder in the shooting death of Charles Richards. The jury found defendant guilty of voluntary manslaughter, and on a finding of mitigating factors he was sentenced to four years' imprisonment, a term less than the presumptive term. Defendant appeals from the judgment and the denial of his motion for appropriate relief, alleging error in the charge to the jury and the trial court's failure to record the State's argument to the jury. We find no error.

The State's evidence showed the following:

Eric Sheldon and Christopher Jones were fixing a broken rim on Sheldon's car at the corner of Respass and Fourth Streets in Washington at 1:30 on the morning of 3 December 1983. Sheldon was changing the tire while Jones was looking for the hub which had come off the axle. Sheldon heard two men arguing across the street. He heard a gunshot, looked up and saw one of the men fall. The defendant was standing ten feet away from the man who fell. He put the gun away and started walking over toward Sheldon and Jones, who had returned to the car. The defendant told Sheldon and Jones that he had just shot a man who had been stealing from him, and he was tired of it. Jones testified that when he was looking for the hub, he heard two men arguing. He looked over and saw the defendant pull a pistol up and shoot the other man somewhere in the chest. He stated that he saw no weapons in the hands of the deceased; furthermore, he did not see the deceased advance upon or raise his arms toward the defendant.

Washington City Police Patrolman George Stokes testified that he was dispatched to the scene of the shooting. Patrolman Stokes asked Jones and Sheldon who shot the man. The defend-

ant approached Patrolman Stokes and said he had shot him. When Patrolman Stokes searched the area of the body, he found no weapons either in the deceased's hands or in the vicinity. Washington City Police Captain Leon Schaffer testified that he booked the defendant at the Police Department following his arrest. He advised the defendant of his right to remain silent, and the defendant elected not to make a statement. However, during the booking process, defendant stated in a loud voice, not directed to any specific person, that he shot the deceased, that he was sorry he did it, but that he intended to do it, that they were not going to steal from him any more, that he had a right to protect his property, and that he did not have to worry about this kind of thing any more.

The deceased died before he reached the hospital.

Defendant testified at trial about the events which climaxed in the shooting death of Charles Richards. At about 7:00 p.m. on the evening of 2 December 1983, defendant left his woodyard where he had been working all day. He drove his pickup truck to a rooming house he owned some blocks away where he intended to collect the rent due from his tenants. Defendant spent several hours at the rooming house waiting for tenants to return from work. During the evening Mr. Charles Richards, the deceased, poked his head in the doorway to the room where defendant was waiting. Although Richards was not a tenant in the house, defendant knew him as a longtime resident of the neighborhood. Sometime later defendant left to go home. As he walked toward his truck he heard a voice behind him say, "Bitch, I'm going to rob you." Defendant looked around and saw Richards. Richards grabbed at defendant who ducked and ran away with Richards following. After some detours defendant arrived at his woodyard where he had another truck. Before defendant could reach his truck Richards again confronted him saying, "Bitch, I'm going to still get you." Richards threw something, possibly a brick, at defendant. Defendant ducked, pulled his gun from its holster, pointed the gun at Richards, and shot him.

[1] On appeal defendant cites as error that the court instructed the jury on first- and second-degree murder and voluntary manslaughter. Defendant argues that he was being feloniously assaulted at the time of the shooting and the evidence does not support the court's instructions.

In a criminal trial the judge has the duty to instruct the jury on the law arising from all the evidence presented. G.S. 15A-1232. To determine if an instruction should be given, the court must consider whether there is any evidence in the record which might convince a rational trier of fact to convict defendant of the offense. *State v. Wright*, 304 N.C. 349, 283 S.E. 2d 502 (1981). In the present case Sheldon and Jones, who viewed the shooting, testified that preceding the shot they heard loud voices. Neither of the young men saw the decedent assault or make threatening moves toward the defendant. No weapon was found on or near the decedent.

Officer Stokes, who arrived on the scene minutes after the shooting testified as follows:

> Mr. Windley Moore said, "I intended to kill his A S S." I asked, "why did you shoot," and he said that he was trying to steal my property. I asked him, "what kind of property," and he stated, "he was trying to steal my property." I asked Mr. Moore did the deceased try to assault him in any kind of way and he said "no . . . a man's got a right to protect his property."

Officer Stokes further testified that when he asked defendant how many shots were fired, the defendant responded, "It only took one shot . . . I didn't intend to miss."

The evidence produced by the State was sufficient to convince a rational trier of fact that defendant formed an intent to kill with deliberation and premeditation as required for a conviction of first-degree murder, *see State v. Misenheimer*, 304 N.C. 108, 282 S.E. 2d 791 (1981) or, alternatively, that defendant had the requisite malice for a conviction of second-degree murder. *See State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). Testimony by the defendant was sufficient to convince a rational trier of fact that defendant shot Richards in the heat of passion or in the exercise of an imperfect right of self-defense where excessive force was used, as required for a conviction of voluntary manslaughter. *Id.* Because the record discloses sufficient evidence to support a verdict of first- or second-degree murder or voluntary manslaughter, we find the trial court correctly instructed the jury on these crimes.

[2] Next defendant argues that it was error for the court not to instruct the jury on involuntary manslaughter. He contends that this case revolves around one question—whether defendant used excessive force to protect himself or his property. Defendant has misapprehended the law. An imperfect act of self-defense or defense of property, such as defendant argues may have occurred, is an intentional act without malice within the purview of voluntary manslaughter. *See State v. Rinck*, 303 N.C. 551, 280 S.E. 2d 912 (1981). Involuntary manslaughter has been defined as the unlawful killing of a human being without malice, without premeditation and deliberation and without intent to kill or inflict serious bodily injury. *State v. Norris*, 303 N.C. 526, 279 S.E. 2d 570 (1981). All the evidence presented by the defendant suggests that he intentionally assaulted Richards with a deadly weapon knowing the assault was likely to kill or inflict serious injury. That the assault was an attempt by defendant to protect himself from Richards would support a charge of voluntary, not involuntary manslaughter. *State v. Ray*, 299 N.C. 151, 261 S.E. 2d 789 (1980). Because no evidence supported a charge of involuntary manslaughter, the trial court properly denied defendant's request for those instructions.

[3] Defendant next contends that it was prejudicial error for the trial court to permit the State to impeach defendant's testimony with questions about the circumstances surrounding defendant's statement to the police. Defendant points out that he was not represented by counsel at the time he refused to make a statement and such questions infringed upon his right to remain silent.

In order to preserve error at trial for appellate review defendant must have brought that error to the attention of the trial court by appropriate and timely objection. G.S. 15A-1446. Because the defendant failed to make a timely objection, this assignment of error is dismissed.

[4] Finally, defendant argues that the court committed reversible error when it denied his motion for appropriate relief. After sentencing, defendant filed a motion for appropriate relief in which he complained that the State's closing argument was violative of G.S. 15A-1230 in that the State made improper comments and referred to matters outside the trial record. In addition defendant claimed that the trial court failed to record the State's

argument after defendant requested that this be done, thus denying defendant the opportunity for appellate review.

At the hearing on the motion the court apologized to defense counsel for misunderstanding his request to have the State's closing argument recorded. The Court offered to reconstruct the argument for the record using the court's notes and the remembrances of the opposing attorneys. Apparently defendant declined the offer of the court because a reconstructed argument does not appear in the record on appeal. This Court's review on appeal is limited to what is in the record or in the designated verbatim transcript of proceedings. Rule 9(a), N.C. Rules App. Proc. An appellate court cannot assume or speculate that there was prejudicial error when none appears on the record before it. *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983). Because defendant failed to cooperate with the trial court to provide this Court with a record of the State's closing argument, we are precluded from reviewing that argument on appeal.

No error.

Judges ARNOLD and PHILLIPS concur.

TYSON FOODS, INC. v. KATIE AMMONS AND HUSBAND, BENNIE AMMONS; JOHN G. HARRINGTON AND WIFE, JESSIE RUTH HARRINGTON; AND A. M. COOKE AND WIFE, JESSICA M. COOKE

No. 8420SC1118

(Filed 2 July 1985)

1. Frauds, Statute of § 5.1— indirect benefit to stockholder—main purpose doctrine inapplicable

Defendant's alleged oral guaranty of a poultry company's debt for poultry purchased from plaintiff did not come within the "main purpose doctrine" exception to the statute of frauds where plaintiff's evidence merely established an indirect benefit to defendant by virtue of her position as an officer and stockholder of the poultry company. G.S. 22-1.

2. Fraud § 12— sufficient evidence of fraud

Plaintiff's evidence was sufficient to go to the jury on the issue of fraud by defendant corporate officer where it tended to show that plaintiff informed defendant that personal guaranty agreements would be required before addi-

tional poultry items would be delivered to the corporation; plaintiff sent six guaranty agreements to the corporation to be signed by the six corporate stockholders; defendant told plaintiff's credit manager that the guaranty agreements had been executed by five of the six stockholders and that they were being forwarded to plaintiff; based upon this representation, plaintiff shipped nearly $40,000 worth of poultry items to the corporation; in fact, the guaranty agreements had not been executed and were never forwarded to plaintiff; and the total amount due for the poultry items remains unpaid. The issue of whether plaintiff reasonably relied upon defendant's representations was for the jury to determine.

APPEAL by plaintiff from *Wood, William Z., Judge.* Judgment entered 11 June 1984 in Superior Court, MOORE County. Heard in the Court of Appeals 14 May 1985.

Plaintiff seeks to recover $39,330.77 plus interest, the balance due plaintiff for the delivery of chickens to Cooke's Wholesale Poultry Company. Cooke's Wholesale Poultry Company is a North Carolina Corporation that filed for bankruptcy in August, 1979.

Plaintiff's complaint alleges that the defendants, officers and shareholders of Cooke's Wholesale Poultry Company, are jointly and severally liable for an amount of $39,330.77, since plaintiff delivered poultry items to Cooke's Wholesale Poultry Company in reliance on defendants' guaranty of payment of its account. The complaint also alleges, alternatively, that defendants fraudulently induced plaintiff to ship to Cooke's Wholesale Poultry Company the poultry items. The defendants' answer denies the guaranty alleged to have been made to plaintiff and alleges that plaintiff's complaint fails to state a claim against defendants upon which relief may be granted. The answer also specifically pleads G.S. 22-1, North Carolina's statute of frauds, as a defense.

The evidence presented tends to establish the following: Prior to 1 January 1979, plaintiff had provided poultry items to Cooke's Wholesale Poultry Company pursuant to a bank guaranty, which by its terms terminated "on or before December 22, 1978." Plaintiff informed Katie Ammons, operating officer of Cooke's Wholesale Poultry Company, that after 22 December 1978, additional bank credit or a personal guaranty would be required before any additional deliveries would be made. Financial statements, indicating Cooke's Wholesale Poultry Company's net worth to be approximately $500,000.00, were forwarded to plaintiff, who thereafter drafted and sent to Cooke's Wholesale

Poultry Company six guaranty agreements to be signed by the defendants and returned.

Plaintiff's credit manager testified that in early January 1979, Katie Ammons told him that "everything was in order," the guaranty agreements would be sent "as soon as possible," and all six signatures had been obtained "with the exception of her husband." Plaintiff made deliveries of poultry items on 10 January 1979 through 9 February 1979. Plaintiff did not receive the guaranty agreements from Cooke's Wholesale Poultry Company and there remains an outstanding balance of $39,330.77.

After plaintiff rested, defendants made a motion for directed verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure. The presiding judge allowed defendant's motion and entered judgment for defendants. Plaintiff appealed.

Seawell, Robbins, May, Rich & Scarborough, by P. Wayne Robbins, for plaintiff appellant.

Cameron, Hager & Kinnaman, P.A., by Richard B. Hager, for defendant appellees.

MARTIN, Judge.

Plaintiff concedes that the trial court acted properly in granting defendants' motion for directed verdict as to all defendants except Katie Ammons. Plaintiff contends that the evidence was sufficient to submit his case against defendant Ammons to the jury on two grounds: (1) the establishment of an oral guaranty agreement protected from the statute of frauds by the main purpose doctrine; and (2) the establishment of the essential elements of fraud. Considering the evidence in the light most favorable to plaintiff, resolving all conflicts and giving plaintiff the benefit of every inference reasonably drawn in his favor, we find the evidence insufficient as a matter of law on the first ground to justify a verdict for plaintiff but sufficient to go to the jury on the second ground.

Plaintiff first alleges that defendant Ammons personally guaranteed Cooke's Wholesale Poultry Company's account and that poultry was sent on credit to the corporation in reliance on Ammons' personal guaranty. A guaranty of payment is defined as

> an absolute promise by the guarantor to pay a debt at maturity if it is not paid by the principal debtor. This obligation is separate and independent of the obligation of the principal debtor, and the creditor's cause of action against the guarantor ripens immediately upon the failure of the principal debtor to pay the debt at maturity.

Investment Properties v. Norburn, 281 N.C. 191, 195, 188 S.E. 2d 342, 345 (1972).

[1] Plaintiff contends that Ammons' oral guaranty is not within North Carolina's statute of frauds, G.S. 22-1, because Ammons had a direct, immediate, and pecuniary interest in Cooke's Wholesale Poultry Company's transactions with plaintiff. G.S. 22-1 provides in pertinent part as follows:

> No action shall be brought . . . to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.

North Carolina has recognized the "main purpose doctrine" as an exception to the statute of frauds, and our Supreme Court has often defined the exception with the following language from *Emerson v. Slater*, 63 U.S. (22 How.) 28, 43, 16 L.Ed. 360, 365 (1859):

> . . . [W]henever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.

See, e.g., Warren v. White, 251 N.C. 729, 112 S.E. 2d 522 (1960); *Garren v. Youngblood*, 207 N.C. 86, 176 S.E. 252 (1934).

We hold that plaintiff's evidence was insufficient as a matter of law to justify a verdict for plaintiff on the ground that the

main purpose doctrine protects Ammons' oral statements from the statute of frauds. The majority rule, as adopted by our Supreme Court, states that the benefit to be derived from one's ownership of stock or holding the position of an officer or director of a corporation "is too indirect or remote to invoke the application of the main purpose rule. Something more—some other expected benefit or advantage to be gained by making the promise—is required to make the main purpose rule applicable." *Burlington Industries v. Foil*, 284 N.C. 740, 750, 202 S.E. 2d 591, 600 (1974). Plaintiff's evidence merely establishes the indirect benefit which would accrue to Ammons by virtue of her position as a stockholder and officer; it fails to establish the required direct interest on the part of Ammons in Cooke's Wholesale Poultry Company's transactions with plaintiff. The evidence, taken as true, is too indirect and remote to invoke application of the main purpose doctrine.

[2] Plaintiff also alleges that Katie Ammons made a promissory misrepresentation with the intent to induce the plaintiff to ship to Cooke's Wholesale Poultry Company the poultry items. In order to make out a case of actionable fraud, plaintiff must show:

> (a) that defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that defendant knew the representation was false when it was made or made it recklessly without any knowledge of its truth and as a positive assertion; (d) that defendant made the false representation with the intention that it should be relied upon by plaintiffs; (e) that plaintiffs reasonably relied upon the representation and acted upon it; and (f) that plaintiffs suffered injury.

Johnson v. Insurance Co., 300 N.C. 247, 253, 266 S.E. 2d 610, 615 (1980).

Defendant Ammons' representation to plaintiff was specific, definite, and materially false. She told plaintiff's credit manager that the guaranty agreements had been executed by five of the six individuals whose signatures were needed and that the guaranty agreements were being forwarded to plaintiff. Based upon this representation, plaintiff shipped nearly $40,000.00 worth of poultry items to Cooke's Wholesale Poultry Company on credit. In fact, the guaranty agreements had not been executed, they

were never forwarded to plaintiff, and there remains an outstanding balance of $39,330.77. We believe that Ammons' statements constitute a positive and definite misrepresentation of a character to induce action by a reasonable person. *See Keith v. Wilder*, 241 N.C. 672, 86 S.E. 2d 444 (1955).

Defendants maintain that plaintiff's reliance on Ammons' statements that five of the six individuals had signed the guaranty agreements was unreasonable. They base this contention on plaintiff's established procedure for extending credit, i.e., plaintiff was willing to extend credit only if all six guaranty agreements were signed and returned. The law does impose upon the individual the duty to exercise ordinary prudence in relying upon persons with whom they conduct their business affairs. *See Gray v. Edmonds*, 232 N.C. 681, 62 S.E. 2d 77 (1950). However, where reasonable men could differ with respect to whether a party acted with reasonable care, it remains in the province of the jury to apply the reasonable man standard. *Gladstein v. South Square Assoc.*, 39 N.C. App. 171, 249 S.E. 2d 827, *disc. rev. denied*, 296 N.C. 736, 254 S.E. 2d 178 (1979). We conclude that based on this record there is sufficient evidence upon which reasonable men could form divergent opinions concerning whether plaintiff reasonably relied upon the representations of Ammons. Plaintiff is therefore entitled to have the reasonableness of its reliance considered by a jury.

In conclusion, we affirm the judgment of the trial court as to all defendants except Katie Ammons. The order dismissing plaintiff's claim against defendant Ammons on the theory of an oral guaranty protected from the statute of frauds by the main purpose doctrine is also affirmed. The order dismissing plaintiff's claim against defendant Ammons on the theory of fraud is reversed, and the cause is remanded for trial on that issue.

Affirmed in part; reversed in part and remanded.

Judges ARNOLD and PARKER concur.

RHONDA E. PUETT v. PATSY CAROL PUETT

No. 8427DC1111

(Filed 2 July 1985)

1. **Divorce and Alimony § 8.1— divorce from bed and board—not supported by findings and conclusions**

The trial judge's order granting plaintiff a divorce from bed and board was not supported by his findings and conclusions where he found that plaintiff devoted an average of six to eight hours per week of his free time to a community rescue squad, found that plaintiff persisted in his rescue squad activities even though it disturbed his wife and caused her to suspect that he was unfaithful, found that plaintiff embarrassed his wife in public by calling her names, and expressly concluded that plaintiff was not blameless. G.S. 50-7(4).

2. **Divorce and Alimony § 17— divorce from bed and board—refusal to award alimony—no error**

The trial judge's findings supported his conclusions that defendant was not entitled to alimony where the court found that plaintiff left the marital residence for just cause and that plaintiff's conduct was not such as to cause defendant's condition to become intolerable and her life burdensome. G.S. 50-16.2.

3. **Divorce and Alimony § 27— court's refusal to award attorney fees—no error**

The trial judge did not err by denying defendant attorney fees where defendant was not entitled to alimony, there is no statute giving the district court judge authority to award attorney fees as to defendant's defense to plaintiff's action for divorce from bed and board, and there was no abuse of discretion in not allowing attorney fees on defendant's child custody and support counterclaim. G.S. 50-13.6, G.S. 50-16.3 and .4.

APPEAL by defendant from *Phillips, Judge*. Judgment entered 25 May 1984 in District Court, GASTON County. Heard in the Court of Appeals 4 June 1985.

The plaintiff, Rhonda E. Puett, and the defendant, Patsy Carol Puett, were married on 13 May 1967, and lived together as husband and wife until 4 July 1983. Two children were born of the marriage, Windy C. Puett, born 5 August 1968, and Kimberly D. Puett, born 21 September 1972.

After ten years of marriage, the defendant developed myasthenia gravis, a neuromuscular disease. Defendant underwent an operation and takes medication. Her physical condition is good, although occasionally she suffers weakness and is unable to per-

form her normal tasks. Defendant has not worked for four years. She receives full-time Social Security disability benefits in the amount of $314.00 for herself and $121.00 for her children per month.

On 16 January 1984, the plaintiff filed a complaint requesting a divorce from bed and board and an inquiry by the court into custody of the minor children. On 3 February 1984, the defendant filed an answer and a counterclaim requesting alimony pendente lite and permanent alimony, an award of the marital home and payments on it as partial alimony, child support, payment of all the children's medical and dental bills and insurance, payment of defendant's medical and hospitalization insurance, and defendant's reasonable attorneys' fees.

Plaintiff testified that in the last several years defendant's attitude towards him and the marriage changed substantially. Plaintiff testified that defendant argued with him constantly and refused to participate in any activities with defendant and his friends. Plaintiff was a member of Cherryville Rescue Squad and spent on average six to eight hours per week in its activities. Plaintiff testified that defendant was jealous of his activities with the rescue squad and accused him of having affairs with female members of the rescue squad. On one occasion after the parties had separated, plaintiff testified, defendant threw a cup of ice at a female member of the rescue squad, while her daughter accused the rescue squad member of having a relationship with plaintiff. Plaintiff testified that he had had no extramarital relationships. Plaintiff also testified that defendant told him on several occasions to get out, and to discontinue his activities with the rescue squad.

Defendant testified that plaintiff had on occasion embarrassed her in public by calling her names such as "lardass." She admitted that she and plaintiff had frequent arguments which she felt were principally caused by plaintiff's involvement with the rescue squad.

Plaintiff testified that his income is $375 per week after taxes and that his monthly living expenses are $540. Defendant testified that her monthly income is $435 and that her monthly living expenses are $649.

The trial judge granted plaintiff divorce from bed and board, and denied defendant's request for alimony and attorneys' fees.

Simpson, Aycock, Beyer & Simpson, by Richard W. Beyer and Michael Doran, for defendant appellant.

The plaintiff appellee filed no brief.

ARNOLD, Judge.

[1] We first address defendant's contention that the district judge's order granting plaintiff a divorce from bed and board is not supported by his findings of fact and conclusions of law.

Plaintiff based his action for divorce from bed and board on G.S. 50-7(4). That statute provides that the district court may grant a divorce from bed and board on application of the party injured if his or her spouse "[o]ffers such indignities to the person of the other as to render his or her condition intolerable and life burdensome."

In his judgment, the district judge made the following findings. First, defendant suffers from myasthenia gravis, a neuromuscular disease which causes her on occasion to become weak and unable to carry out her daily tasks, but which otherwise does not prevent her from leading a normal life. Plaintiff has been involved with a community rescue squad, spending on average six to eight hours a week participating in its activities. Plaintiff and defendant have had frequent and repeated arguments.

The testimony of the parties, as summarized by the district judge in his findings, indicates that these arguments have arisen out of plaintiff's devotion of time to the rescue squad and defendant's suspicion that plaintiff has had affairs with female members of the rescue squad. Plaintiff denied that he had had any extramarital affairs. Further, he offered evidence through a neighbor that on one occasion subsequent to the parties' separation defendant threw ice on a woman member of the rescue squad while the parties' daughter accused the woman of having an extramarital relationship with plaintiff. The judge found further that defendant testified that plaintiff had embarrassed her on occasion in public by calling her names such as "lardass."

In his conclusions of law, the district judge stated:

> That the unfounded accusations of the Defendant and her other actions were such as to constitute such indignities to the person of the Plaintiff as to render his condition intolerable and life burdensome, *even though the Plaintiff was not blameless.* (Emphasis added.)

The defendant argues that the trial judge's findings and conclusions do not support the judgment because they indicate that plaintiff was not blameless and that he contributed to the abuses of which he complains. We agree that in North Carolina a party relying on G.S. 50-7(4) must not have provoked the "indignities" of which he complains. *Jackson v. Jackson*, 105 N.C. 433, 438-39, 11 S.E. 173, 175 (1890); *Pearce v. Pearce*, 225 N.C. 571, 572, 35 S.E. 2d 636, 637 (1945); *see also* 1 Lee, North Carolina Family Law § 82 (1979). In this case, the district judge expressly concluded that plaintiff was not blameless. His findings indicate that plaintiff devoted on average six to eight hours per week of his free time to a community rescue squad, and that this was a bone of contention in the parties' marriage. The evidence and findings indicate that the plaintiff persisted in rescue squad activities even though this disturbed his wife, and caused her to suspect that he was unfaithful. Also, the plaintiff embarrassed his wife in public by calling her names such as "lardass." While it is difficult to weigh relative fault in a case such as this, the district judge's findings compel the conclusion that plaintiff's conduct so contributed to his wife's criticism and accusations and to the parties' repeated arguments that he cannot be said to have shown a lack of adequate provocation on his part. The district judge's grant of divorce from bed and board is reversed.

[2] We next address defendant's contention that the district court erred in denying her counterclaim for alimony. Under G.S. 50-16.2, a dependent spouse is entitled to alimony when one or more of ten statutory grounds is established. In the present case the district judge concluded that the defendant was a dependent spouse but that she was not entitled to alimony as alleged in her counterclaim. In her counterclaim, defendant alleged that plaintiff "intentionally and willfully engaged in a course of conduct so as to cause her condition to become intolerable and her life burdensome" and that plaintiff constructively abandoned her. The

district court concluded that plaintiff did not abandon defendant, but that his leaving the marital residence was for just cause. This is supported by competent evidence in the record. Further, the district court's findings indicate that while plaintiff often neglected his wife while participating in rescue squad activities, and on occasion called her names in public, thus contributing to his wife's suspicions and irritation, his conduct was not such as to cause her condition to become intolerable and her life burdensome. This also is supported by competent evidence in the record. The trial judge's findings support his conclusion that the defendant is not entitled as a matter of law to alimony.

[3] Finally, defendant contends that the trial judge erred in not granting her attorneys' fees. Defendant requested attorneys' fees to prosecute her counterclaim and, as we understand, to defend against plaintiff's action for divorce from bed and board. Defendant argues that the trial judge erred by exercising his discretion to deny attorneys' fees, when defendant was the dependent spouse and in need of assistance to meet her husband on equal terms.

The district judge may award attorneys' fees only when statute allows. Under G.S. 50-16.4, "[a]t any time that a dependent spouse would be entitled to alimony pendente lite pursuant to G.S. 50-16.3, the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse . . . ." Under G.S. 50-16.3, a dependent spouse is entitled to an award of alimony pendente lite if it appears from the evidence that the spouse is entitled to relief in the action in which application for alimony pendente lite is made. The district court would not be justified in making an allowance where the dependent spouse, in law, has no case. *Brady v. Brady*, 273 N.C. 299, 304, 160 S.E. 2d 13, 17 (1968). As noted above, the defendant was not entitled to alimony, and therefore is not entitled to attorneys' fees for the prosecution of her claim for alimony.

Since defendant's counterclaim involved issues of child custody and support, G.S. 50-13.6 comes into play. Under that statute, in child custody or support proceedings, "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." The court's discretion in disallow-

ing attorneys' fees is limited only by the abuse of discretion rule. *Brandon v. Brandon*, 10 N.C. App. 457, 463, 179 S.E. 2d 177, 181 (1971). We find no abuse of discretion in the present case.

As to defendant's defense to plaintiff's action for divorce from bed and board, we find no statute giving the district judge authority to award attorneys' fees.

On the issue of attorneys' fees, we find no reversible error.

The district court's order granting divorce from bed and board is reversed; the order denying alimony and attorneys' fees is affirmed.

Reversed in part, affirmed in part.

Judges MARTIN and PARKER concur.

W. CONWAY OWINGS AND ASSOCIATES, INC., D/B/A PIEDMONT EXPORTS, INC. AND D/B/A OWINGS JEANS AND FASHIONS GMBH CO., KG v. KARMAN, INC., D/B/A KARMAN WESTERN APPAREL, D/B/A KENNY ROGERS WESTERN COLLECTION BY KARMAN AND D/B/A MOUNTAIN TRAILS OUTERWEAR COLLECTION BY KARMAN

No. 8418SC1050

(Filed 2 July 1985)

1. Process § 9— jurisdiction over foreign corporation—statutory authority

North Carolina courts had jurisdiction over a Colorado corporation which shipped goods to a buyer in North Carolina under provisions of G.S. 1-75.4(1)(d) authorizing the exercise of jurisdiction over a party engaged in substantial activity in this state.

2. Process § 9— jurisdiction over foreign corporation—statutory authority

North Carolina courts had jurisdiction over a Colorado corporation which shipped goods to a buyer in North Carolina under provisions of G.S. 1-75.4(5)(e) authorizing the exercise of jurisdiction in an action relating to goods "actually received by the plaintiff in this state from the defendant through a carrier without regard to where delivery to the carrier occurred" although the goods were shipped F.O.B. Denver and title thus passed in Colorado. Furthermore, the goods were received by plaintiff in North Carolina within the meaning of the statute even though they were then shipped from North Carolina to Germany without being opened.

3. Constitutional Law § 24.7; Process § 9— jurisdiction over foreign corporation—sufficient minimum contacts

A Colorado corporation had sufficient contacts with this state so that the exercise of personal jurisdiction over it in a North Carolina buyer's action for breach of warranty did not violate due process where the goods which defendant foreign corporation allegedly warranted were delivered to North Carolina, payments for the goods were made from North Carolina, and the corporation which claims a breach of warranty is domiciled in this state.

APPEAL by defendant from *Washington, Judge*. Order entered 13 July 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 8 May 1985.

The defendant appeals from a denial of its motion to dismiss for lack of in personam jurisdiction. The plaintiff brought this action for breach of warranty for clothing it had bought from the defendant. The defendant made a motion to dismiss on the ground of lack of personal jurisdiction over the defendant.

The materials filed in support of the motion to dismiss showed the defendant is a Colorado corporation with its principal place of business in Denver, Colorado. It manufactures and sells western style clothing. It maintains showrooms in Denver, Colorado, and Dallas, Texas, but has no sales or business office, telephone listing, bank account, mailing address, or employees in North Carolina. The defendant has no interest in any property in North Carolina and does not receive or use textiles from North Carolina.

Between 23 April 1981 and 14 December 1981 plaintiff purchased certain goods from the defendant in a series of transactions in Denver, Colorado. The goods were chosen at a western wear show at the defendant's Denver showroom. They were shipped to North Carolina and without being opened shipped to Germany for resale. All order forms and invoices which constitute the contracts between the parties say, "All orders are subject to acceptance and approval in the home office in Denver, Colorado" and "This contract is made pursuant to Colorado law." The goods were shipped by common carrier F.O.B. Denver, Colorado. The plaintiff had purchased goods from the defendant under the same circumstances in 1979.

The plaintiff alleged it discovered the goods were defective after they reached Germany.

The court denied the defendant's motion to dismiss and this appeal followed.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Joseph W. Moss and Margaret E. Shea, for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter, by Peter J. Covington, for defendant appellant.

WEBB, Judge.

[1] This case brings to the Court two questions: (1) whether the General Statutes permit the courts of this state to exercise in personam jurisdiction over the defendant, and (2) whether the exercise of jurisdiction by our courts violates due process of law. *See Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977). We believe our statutes authorize personal jurisdiction in this case. G.S. 1-75.4 provides in part:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served . . . under any of the following circumstances:
>
> (1) Local Presence or Status.—In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
>
> . . . .
>
> d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.
>
> . . . .
>
> (5) Local Services, Goods or Contracts.—In any action which:
>
> . . . .
>
> e. Relates to goods, documents of title, or other things of value actually received by the plaintiff in this State from the defendant through a carrier without regard to where the delivery to the carrier occurred.

In *Dillon v. Funding Corp., supra*, our Supreme Court said it is apparent that G.S. 1-75.4(1)(d) intended to make available to our courts the full jurisdictional powers permissible under federal due

process and held that our courts had in personam jurisdiction in that case. If this be the test we have only to determine that the due process clause of the Fourteenth Amendment to the United States Constitution does not bar in personam jurisdiction to make G.S. 1-75.4(1)(d) applicable.

[2] We believe G.S. 1-75.4(5)(e) also grants our courts in personam jurisdiction. The defendant argues that it does not apply because the goods were shipped F.O.B. Denver at which point the title to the goods passed. We do not so read G.S. 1-75.4(5)(e). We believe that the words "actually received by the plaintiff in this State from the defendant through a carrier without regard to where delivery to the carrier occurred" means that wherever title passed jurisdiction is conferred if the plaintiff does not take actual possession of the goods until they arrive in North Carolina.

The defendant argues that the goods were not received in North Carolina. The plaintiff in its complaint alleged that there was an "understanding and agreement that the goods would be shipped directly from Karman to their final destination." There was in evidence a letter from the plaintiff's president which states "Karman knew the goods were going directly to Germany and knew from prior shipments and from the routing of these shipments that they would go direct from your plant to Germany." The defendant argues that this shows the goods were not received in North Carolina but were received in Germany. For this reason it says G.S. 1-75.4(5)(e) does not apply. The invoices show the goods were received by a subsidiary of the plaintiff in Charlotte, Fayetteville and Wilmington. We believe this evidence shows they were received by the plaintiff in North Carolina. We hold that the Superior Court of Guilford County has in personam jurisdiction under G.S. 1-75.4(5)(e). The question then becomes does the entertainment of jurisdiction by our courts in this case deprive the defendant of due process of law.

[3] *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945) is the seminal case dealing with in personam jurisdiction over residents or corporations of other states. In that case the United States Supreme Court held the courts of the State of Washington had in personam jurisdiction over a Delaware corporation to render a judgment for unemployment compensation tax. The corporation had salesmen residing in

Washington who took orders for shoes. The orders were transmitted to St. Louis, Missouri, where they were accepted. The shoes were shipped F.O.B. at the point of origin. The Supreme Court said:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. at 316, 90 L.Ed. at 102, 66 S.Ct. at 158. The Court said that in determining whether the contacts which confer jurisdiction "offend traditional notions of fair play" an "estimate of the inconveniences" to the defendant in trying the case should be considered. *Id.* at 317, 90 L.Ed. at 102, 66 S.Ct. at 158. It also said a factor to be considered is whether the obligation arises out of and is connected with the activity within the State. *Id.* at 319, 90 L.Ed. at 104, 66 S.Ct. at 160.

International Shoe has been cited in many cases. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, --- U.S. ---, 80 L.Ed. 2d 404, 104 S.Ct. 1868 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L.Ed. 2d 490, 100 S.Ct. 559 (1980); *McGee v. International Life Insurance Co.*, 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199 (1957); *Miller v. Kite*, 313 N.C. 474, --- S.E. 2d --- (1985); *Patrum v. Anderson*, 75 N.C. App. 165, --- S.E. 2d --- (1985); and *Phoenix America Corp. v. Brissey*, 46 N.C. App. 527, 265 S.E. 2d 476 (1980).

In determining whether the contacts of the defendant with this State are such that "traditional notions of fair play and substantial justice" are violated if the courts of this State exercise in personam jurisdiction we believe we are bound by *McGee v. International Life Insurance Co., supra.* In that case a beneficiary of a life insurance policy brought an action on the policy in California against a Texas corporation. The decedent had purchased the policy from an Arizona corporation and the Texas life insurance company had assumed the obligations of the Arizona corporation. The Texas corporation mailed a reinsurance certificate to the decedent offering to insure him in accordance with the terms of the policy he had with the Arizona company. The decedent accepted the offer and from that time until his death he

paid his premiums by mail to the Texas company. Neither of the two insurance companies ever had an office or an agent in California. The Texas insurance company never solicited or did any business in California apart from the insurance policy involved in that case. The court held the due process clause of the Fourteenth Amendment did not preclude a California court from exercising in personam jurisdiction over the Texas corporation. The Supreme Court said, "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. . . . The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died." *Id.* at 233, 2 L.Ed. 2d at 226, 78 S.Ct. at 201.

If it was not a violation of due process for the California courts to exercise in personam jurisdiction in *McGee* we do not believe it is a violation of due process for our courts to exercise it in this case. The goods which the defendant allegedly warranted were delivered to North Carolina, the payments for the goods were made from North Carolina and the corporation which claims a breach of warranty is domiciled in this State. We hold these contacts are sufficient under *McGee* to give our courts in personam jurisdiction.

Affirmed.

Chief Judge HEDRICK and Judge WHICHARD concur.

LORETTA PINSON SIMON v. CECELIA HOWARD MOCK, INDIVIDUALLY AND CECELIA HOWARD MOCK, ADMINISTRATRIX OF THE ESTATE OF WILLIAM ROGERS ODELL MOCK, DECEASED

No. 8422SC1274

(Filed 2 July 1985)

1. Frauds, Statute of § 8— parol rental agreement for indefinite term—barred by statute of frauds

The trial judge correctly dismissed plaintiff's cause of action seeking to enforce an oral agreement for rent where the agreement was for an indefinite or uncertain term. Such an agreement is barred by the statute of frauds.

2. Limitation of Actions §§ 4, 9— action for rents due—three year statute of limitations—tolled by death of party

The trial court erred by concluding that plaintiff's action for the fair rental value of her property was barred by the statute of limitations. A cause of action for rent under G.S. 42-4 accrues continually and is subject to the three year statute of limitation of G.S. 1-52(2); however, because defendant was sued individually and as administratrix of her husband's estate, plaintiff may sue under G.S. 28A-19-3(c) for rents not paid for the three year period prior to her husband's death on 10 April 1983 rather than from the filing of her action on 16 September 1983. G.S. 1-31 does not apply because the agreement between the parties was not a mutual account.

3. Landlord and Tenant § 19— action for rents due—court's refusal to find value—abuse of discretion

The trial judge's refusal to find a reasonable compensation for the occupation of plaintiff's land in an action for rents due was an abuse of discretion. Even if the house on the property had fallen down or been demolished, the land would still have a rental value.

APPEAL by plaintiff from *Freeman, Judge*. Judgment entered 28 September 1984 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 6 June 1985.

In January 1974 the plaintiff Loretta Simon acquired 4½ acres in Davidson County by gift deed from her grandfather. The land had a house on it, which was occupied by William Mock and his wife, the defendant Cecelia Mock. Plaintiff claims that in March 1974 she discussed the occupancy of the property with William Mock. Through her mother, who was present at the time of the discussion, plaintiff offered evidence that Mr. Mock agreed to pay rent of $100 per month and to make repairs on the house at his own expense. Plaintiff's mother also testified that plaintiff had suggested that the Mocks could either pay $150 per month and not make repairs, or pay $100 per month and make repairs, and that Mr. Mock accepted the latter suggestion.

Plaintiff testified that the Mocks never paid any rent or made any improvements to the property. Mr. Mock died on 10 April 1983 and his wife vacated the premises in early May 1983. Plaintiff testified that the property needs repairs which will cost in excess of $7,000.

Plaintiff commenced an action against defendant Cecelia Mock, individually and as administratrix of her husband's estate, on 16 September 1983. Her complaint requests $10,800 for rental

due, and $3,000 for damages done to the house. In the alternative, plaintiff asks for $16,200 as the fair rental value of the property.

The cause was heard before the trial judge sitting without a jury. He ordered that the complaint be dismissed and that plaintiff have and recover nothing of defendant.

Plaintiff appeals.

Stoner, Bowers and Gray, by Bob W. Bowers, for plaintiff appellant.

Leonard, Tanis and Cleland, by Robert K. Leonard, for defendant appellee.

ARNOLD, Judge.

On 16 September 1983, plaintiff filed a complaint seeking rent from defendant for occupation of her property from 1 March 1974 until 10 April 1983. Plaintiff set out two alternative theories of recovery: (1) that defendant's husband entered into an agreement on 1 March 1974 to pay $100 per month rent and to maintain the house, and (2) whether or not there was an agreement, that plaintiff is entitled to recover from defendant the fair rental value of the property for the time she and her husband occupied it. Plaintiff requested recovery of $13,800 under the rental agreement and, in the alternative, $16,200 as the fair rental value of the property. The trial judge, sitting without a jury, dismissed plaintiff's complaint and denied recovery under any theory.

[1] We first note that the trial judge was correct in concluding that the statute of frauds prevented plaintiff from seeking to enforce the alleged oral agreement for rent. The record indicates that the alleged agreement was for an indefinite or uncertain term. Such an agreement is barred by the statute of frauds. *See Davis v. Lovick*, 226 N.C. 252, 255, 37 S.E. 2d 680, 681 (1946), *overruled on other grounds, Kent v. Humphries*, 303 N.C. 675, 281 S.E. 2d 43 (1981). The trial judge therefore correctly dismissed plaintiff's first cause of action.

[2] The next question we face is whether, and to what extent, plaintiff's second cause of action is barred by the statute of limitations. The trial judge concluded that plaintiff's action was barred so far as it sought rentals for occupation of the land prior to 16 September 1980.

Plaintiff's second cause of action seeks to recover the "fair rental value" of her property from 1 March 1974 through 10 April 1983, the period dating from the purported agreement with Mr. Mock to pay rent through Mr. Mock's death. Although not denominated as such in the complaint, this cause of action appears to be based on, and we will treat it as based on, G.S. 42-4, which enables a property owner to recover "reasonable compensation" for occupation of her property. Since the action is brought upon a statutory liability, it is subject to the three-year period provided for in G.S. 1-52(2). Although we have found no authority on this point, we believe that a cause of action for rent under this section must accrue continually, for each day the property is occupied. Under G.S. 1-52(2), then, plaintiff can sue for "reasonable compensation" under G.S. 42-4 for the Mocks' use of her property during the period three years prior to the filing of her cause of action.

G.S. 1-52(2), however, is not the only statute affecting the period of limitations in this case. Plaintiff correctly notes that G.S. 28A-19-3(c) affects the period, because defendant was sued not only in her individual capacity, but also as administratrix of her husband's estate.

Under G.S. 28A-19-3(c):

> No claim shall be barred by the statute of limitations which was not barred thereby at the time of the decedent's death, if the claim is presented within the period provided by subsection (a) hereof.

Defendant's husband died 10 April 1983. Plaintiff filed suit on 16 September 1983. The plaintiff alleged in her complaint that she complied with Chapter 28A in presenting her claim to defendant. Defendant responded in her answer that "plaintiff has made demand upon defendant administratrix for payment of money and that defendants [sic] have refused to pay." Defendant failed to deny plaintiff's argument as to G.S. 28A-19-3(c) on appeal. We are satisfied that plaintiff presented her claim to defendant administratrix within the statutory period and that she may therefore invoke G.S. 28A-19-3(c).

Plaintiff's claim for reasonable compensation against the defendant as administratrix, which was not barred by G.S. 1-52(2) as of the decedent's death, 10 April 1983, therefore survives.

Plaintiff may sue the defendant administratrix for rents not paid in the period of three years prior to 10 April 1983, *i.e.*, back to 10 April 1980. The trial judge's conclusion that the statute of limitations bars plaintiff's action for all rents due before 16 September 1980 is incorrect as to the defendant administratrix.

Plaintiff's argument as to G.S. 1-31 applies to the accrual of her first cause of action which, as noted above, was barred by the statute of frauds. Even if plaintiff's first cause of action was not barred by the statute of frauds, G.S. 1-31 would not apply to it, because the alleged rental agreement between the parties was not a mutual account. *See Brock v. Franck*, 194 N.C. 346, 139 S.E. 696 (1927); *Electric Service, Inc. v. Sherrod*, 293 N.C. 498, 503, 238 S.E. 2d 607, 611 (1977).

[3] The plaintiff's action for fair rental value or "reasonable compensation" appears, then, to have merit so far as it is not barred by the statute of limitations. The trial judge, however, denied any recovery under this theory, finding that "[p]laintiff has failed to prove by the greater weight of the evidence what a reasonable compensation or fair rental value of said property is or would be." The record indicates that the plaintiff testified that in her opinion "the fair rental value of the house and land occupied by Mr. and Mrs. Mock since 1974 has been $150.00 per month and the house had been rented earlier for that amount." The record also indicates that the defendant offered evidence that the house was in poor condition. Defendant argues that, because the house was in poor condition, the trial judge essentially found that the property had no rental value, and that his finding should be upheld because he sat without a jury and acted as finder of fact.

We agree that because the parties waived jury trial, it was the trial judge's "right and duty to consider and weigh all the competent evidence before him, giving to it such probative value as in his sound discretion and opinion it was entitled to be given." *Repair Co. v. Morris & Associates*, 2 N.C. App. 72, 75, 162 S.E. 2d 611, 613 (1968). Further, "[w]hen a trial by jury is waived, and where different *reasonable* inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial judge." *Id.* (emphasis added).

While the trial judge had the authority to believe all, any or none of plaintiff's testimony, and so to decline to accept her

estimate of reasonable compensation, he did not have the authority to refuse to assign any rental value to the land at all. Even if the house on the property were fallen down or demolished, the land would still have a rental value. We do not believe that the judge reasonably could have inferred from defendant's evidence that the house was in such poor condition that the property had no value whatsoever. We therefore conclude that the trial judge's refusal to find a reasonable compensation for the occupation of plaintiff's land was an abuse of discretion. We remand for a calculation of such compensation for the period 10 April 1980 through 16 September 1983. We note that the result of our analysis above is that the defendant in her individual capacity or as administratrix of the estate is liable for amounts due from 16 September 1980 to 16 September 1983, while only the defendant in her capacity as administratrix is liable for amounts due from 10 April 1980 through 16 September 1980.

Reversed and remanded.

Judges MARTIN and PARKER concur.

LAMBE-YOUNG, INC. v. HOWARD M. AUSTIN AND OPAL L. AUSTIN

No. 8421DC778

(Filed 2 July 1985)

1. **Brokers and Factors § 1.1— exclusive sales contract—construction with offer to purchase**

An "exclusive sales contract" and an "offer to purchase" executed on the same date had to be construed together in order to determine the terms of the whole agreement made between a real estate agency and property owners.

2. **Brokers and Factors §§ 2, 6.6— exclusive sales agreement—sale of property by owners—condition precedent—rescission of agreement—genuine issues of fact**

In an action by a real estate agency against property owners to recover its commission under an exclusive sales contract after the owners sold the property themselves, the evidence on motion for summary judgment presented genuine issues of material fact as to whether the exclusive sales contract was subject to a condition precedent concerning the type of deal or trade the owners could get in their purchase of other property and whether the sales contract had been rescinded by the parties before the owners sold their property.

Lambe-Young, Inc. v. Austin

APPEAL by defendant from *Alexander, Judge.* Order entered 9 May 1984 in District Court, FORSYTH County. Heard in the Court of Appeals 14 March 1985.

Bell, Davis & Pitt by William Kearns Davis and Joseph T. Carruthers for plaintiff appellee.

Finger, Parker & Avram by M. Neil Finger and Raymond A. Parker, II, for defendant appellants.

COZORT, Judge.

The plaintiff real estate agency and the defendants executed an "Exclusive Sales Contract," giving the plaintiff an exclusive right to sell the defendants' house for six months. The defendants, however, sold their home themselves within the six-month period. The plaintiff brought this action to recover its 6% commission, or $5,580.00. The trial court granted the plaintiff's motion for summary judgment and ordered the defendants to pay the commission. The defendants have appealed from this order.

On 22 December 1982, Howard Austin, a defendant, met with Doris Burr, a real estate agent for the plaintiff, to discuss the purchase of a tract of land in Yadkin County and the simultaneous sale of his Forsyth County property. On that day, Austin and Burr signed two documents: (1) an "Exclusive Sales Contract" for 180 days at a price of $107,900.00 and (2) an "Offer to Purchase" the Yadkin County property at a price of $95,000.00. This "Offer to Purchase" was expressly "contingent upon the sale and closing of buyers [the defendants'] property" in Forsyth County. The defendants also deposited with the plaintiff $1,000.00 in earnest money for the purchase of the Yadkin County property.

On 9 February 1983, the plaintiff obtained an "Offer to Purchase" the defendants' Forsyth County property from a third party for the sum of $95,000.00. This offer was "conditioned upon the release of Mr. Austin" from the terms of the offer to purchase he had previously made on the Yadkin County property. The defendants were notified that the sale of their Forsyth County property and the purchase of the Yadkin County property would be closed on 28 February 1983. However, the defendants were later advised by an agent of the plaintiff that the third-party purchaser had reneged on its offer and the deal had fallen through.

According to defendant Howard Austin's affidavit, the plaintiff made two attempts to his knowledge to negotiate a trade to enable him to sell his Forsyth County property and to buy the Yadkin County property. Both attempts were unsuccessful. Austin further averred that an agent of the plaintiff, Kelly Burr, advised him that the deal could not be made because his asking price for the Forsyth County property was too steep and requested that he lower it. When Mr. Austin refused to do so, "the plaintiff's agent . . . advised [the Austins] that the deal was off and that [the plaintiff] could not sell [their] property . . . . Mr. Burr also told [the Austins] that he would advise [the owners of the Yadkin County property] that the 'deal was off.' " A few days later on 25 February 1983, the plaintiff returned the $1,000.00 deposit the defendants had given on the Yadkin County property.

Thereafter, the defendants sold their Forsyth County property for $93,000.00 on 12 April 1983, within the six-month period under the exclusive sales contract signed by the parties.

The defendants contend on appeal that the trial court improperly granted the plaintiff's motion for summary judgment and improperly entered judgment in its favor. We agree.

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). The party moving for summary judgment has the burden of showing the lack of any genuine issue of material fact. If the movant is also the party bringing the action, he must establish his claim beyond any genuine dispute with respect to any material fact. *Gebb v. Gebb*, 67 N.C. App. 104, 312 S.E. 2d 691 (1984).

In a general sense, an exclusive right to sell listing contract, like the contract involved in this case, gives the employed agent the exclusive right to sell the property during the term of the contract, precluding the seller from listing his property with other agencies and also precluding the seller himself from competing with the agent in obtaining a buyer. If the owner does sell the property by his own efforts during the term of the contract, the agent is still entitled to his commission. Webster and Hetrick,

North Carolina Real Estate For Brokers and Salesmen, 247 (2d ed. 1983).

On appeal, the plaintiff contends the facts of this case are as simple and as certain. We believe, however, that the record reveals several genuine issues of material fact that have not been resolved. To make this determination we initially must decide whether the exclusive sales contract represents the entire agreement between the parties. The exclusive sales contract contains no provision purporting to embody their entire agreement.

The plaintiff argues in its brief that because the exclusive sales contract does not contain on its face any condition precedent, the trial court properly disregarded the defendants' parol evidence that a condition precedent in fact existed. According to the plaintiff, since this parol evidence contradicted the written exclusive sales contract, it could not be considered by the trial court.

[1, 2] In the first place, we disagree that the only evidence before the court concerning the condition precedent was parol. The "Offer to Purchase" which contains the condition that the defendants' offer to buy the Yadkin County property was contingent upon the sale of their home in Forsyth County is a written document. The plaintiff admits that the "Exclusive Sales Contract" and the "Offer to Purchase" were executed on the same date by the defendant through the plaintiff. "The general rule of contract is that '[a]ll contemporaneously executed written instruments between the parties, relating to the subject matter of the contract are to be construed together in determining what was undertaken.' " *In re Foreclosure of Sutton Investments*, 46 N.C. App. 654, 659, 266 S.E. 2d 686, 689, *disc. rev. denied*, 301 N.C. 90 (1980), *citing Yates v. Brown*, 275 N.C. 634, 640, 170 S.E. 2d 477, 482 (1969). These documents must therefore be construed together in order to determine the terms of the whole agreement made by the parties. In this regard, there was at least a genuine issue of fact as to how the condition affected the "Exclusive Sales Contract." According to the defendant Howard Austin in his affidavit, the "Exclusive Sales Contract" was subject to the condition precedent that the defendants be able to acquire the Yadkin County property without a cash outlay. Whether the sale of the defendants' property did in fact depend on the type of deal or

trade they could get in their purchase of the Yadkin County property has not yet been determined. We merely hold that because there was proper evidence before the trial court which raises this issue of fact, summary judgment in favor of the plaintiff was improperly granted.

Furthermore, there also appears to be a genuine issue of fact as to whether plaintiff's agent, Kelly Burr, by stating that the defendants' desired deal of simultaneously selling their property and buying a second parcel could not be obtained and by returning the defendants' earnest money on the Yadkin County property, in effect offered to rescind the "Exclusive Sales Contract" which was accepted by the defendants. It is well settled that "the parties to a contract may, by a later agreement, rescind a contract . . . if the original contract remains executory and if the parties in their later agreement, act upon a sufficient consideration." *Corbin v. Langdon*, 23 N.C. App. 21, 26, 208 S.E. 2d 251, 254 (1974). Since the plaintiff had not found a buyer or procured the sale of the defendants' property under the terms of the "Exclusive Sales Contract," that contract remained executory. Furthermore, the consideration for such an agreement is the discharge of each parties' obligations under the contract. Therefore, again we hold that there was a genuine issue of material fact as to whether the parties had rescinded the "Exclusive Sales Contract" by the time the defendants sold their property in April. The trial court thus improperly granted the plaintiff's motion for summary judgment.

Reversed and remanded.

Judges ARNOLD and PHILLIPS concur.

SOUTHERN GLOVE MANUFACTURING COMPANY, INC.; JOYCE FIDLER AND HUSBAND, LEONARD C. FIDLER; JANICE HARVEY AND HUSBAND, WILLIAM J. HARVEY v. CITY OF NEWTON

No. 8425SC966

(Filed 2 July 1985)

1. **Municipal Corporations § 2.2— annexation—tract with house and areas used to grow feed—one lot**

A 1.83 acre tract with a house did not have to be treated as more than one lot under G.S. 160-53 for annexation purposes because two separate parts of the lot were used to grow grass which was mowed and fed to cattle.

2. **Municipal Corporations § 2.3— annexation—necessary land connection**

Two lots of less than five acres which the City proposed to annex as a sub-area under G.S. 160A-48(d)(2) were a "necessary land connection." The unnumbered paragraph at the end of G.S. 160A-48(b) should be read as describing the sub-areas allowed by the statute rather than as requiring that the sub-areas constitute necessary land connections between the municipality and areas developed for urban purposes. Moreover, there is nothing in the statute to support the argument that a sub-area cannot consist entirely of tracts of five acres or less.

APPEAL by petitioners from *Lupton, Judge*. Judgment entered 3 May 1984 in Superior Court, CATAWBA County. Heard in the Court of Appeals 18 April 1985.

This appeal involves the judicial review of the validity of an annexation ordinance adopted by the City of Newton which extended the city limits to include land owned by the petitioners. An appeal involving this land has previously been in this Court. *See Southern Glove Mfg. Co. v. City of Newton*, 63 N.C. App. 754, 306 S.E. 2d 466 (1983). The evidence showed that the land the City proposed to annex is on the westerly side of the City, is approximately seventeen acres in size and consists of seven distinct parcels of land. The City treated four of the parcels of land as developed for urban purposes. Three of these lots have buildings upon them and the other is a vacant lot. The other three parcels were treated by the City as a sub-area. These three parcels are all less than five acres. One of them is comprised of a part of West 25th Street including the right of way for the street. The other two are vacant lots, one of which is on the southwest side of West 25th Street and the other is on the northeast side of the street. More than 60 percent of the external boundaries of these

three lots are contiguous to the city limits or to a part of the other land which the City proposes to annex.

The evidence showed that one of the parcels in what the City contends is the area developed for urban purposes consists of a tract of 1.83 acres with .45 acres of this tract within the city limits at the time of the proposed annexation. This lot is owned by Southern Glove and a rented house is located on it. On two separate parts of the lot fescue and sudex grass is grown and a person living in the neighborhood has been allowed to mow this grass, bale it and feed it to his cows.

On 3 August 1982 the annexation ordinance was adopted by the City of Newton. The petitioners asked for review by the Superior Court and on 27 February 1984 the Superior Court remanded the matter to the Board of Aldermen for further review. The City reconsidered the ordinance and did not change it. The petitioners again asked for a review by the Superior Court. The Superior Court affirmed the annexation ordinance. The petitioners appealed.

Mullen, Holland & Cooper, P.A., by James Mullen, and Williams & Pannell, by Martin C. Pannell, for petitioner appellants.

Sigmon, Sigmon and Isenhower, by Jesse C. Sigmon, Jr., for respondent appellee.

WEBB, Judge.

The petitioners contend the area which the City of Newton proposes to annex does not meet the requirements of G.S. 160A-48 which provides in part:

> (a) A municipal governing board may extend the municipal corporate limits to include any area
>
> . . . .
>
> (2) Every part of which meets the requirements of either subsection (c) or subsection (d).
>
> . . . .
>
> (c) Part or all of the area to be annexed must be developed for urban purposes. An area developed for urban

purposes is defined as any area which meets any one of the following standards:

. . . .

(3) Is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size.

(d) In addition to areas developed for urban purposes, a governing board may include in the area to be annexed any area which does not meet the requirements of subsection (c) if such area either:

(1) Lies between the municipal boundary and an area developed for urban purposes so that the area developed for urban purposes is either not adjacent to the municipal boundary or cannot be served by the municipality without extending services and/or water and/or sewer lines through such sparsely developed area; or

(2) Is adjacent, on at least sixty percent (60%) of its external boundary, to any combination of the municipal boundary and the boundary of an area or areas developed for urban purposes as defined in subsection (c).

The purpose of this subsection is to permit municipal governing boards to extend corporate limits to include all nearby areas developed for urban purposes and where necessary to include areas which at the time of annexation are not yet developed for urban purposes but which constitute necessary land connections between the municipality and areas developed for urban purposes or between two or more areas developed for urban purposes.

The appellee contends the area which it proposes to annex complies with G.S. 160A-48 because a part of the area is so developed that at least 60% of the lots to be annexed are used

for residential or industrial purposes and 60% of the total acreage consists of lots which are five acres in size or less. This constitutes an area developed for urban purposes which complies with G.S. 160A-48(c)(3). The appellee contends the other part of the land to be annexed complies with G.S. 160A-48(d)(2) in that more than 60% of its external boundary is adjacent to a combination of the City boundary line and a line of the area to be annexed.

The appellant contends the annexation ordinance is deficient in two respects. They say that 1.83 acre tract should not be counted as one lot and if this is done 60% of the lots are not used for business or residential purposes. They also argue that the two lots adjoining West 25th Street do not qualify as sub-areas under G.S. 160A-48(d)(2).

[1] The appellants say the 1.83 acre tract with a house on it should not be treated as one lot used for residential purposes because the evidence showed and the court found that two separate parts of the tract were being used to grow grass which was mowed and fed to cattle. They contend that for this reason there are three separate lots, one used for a residential purpose and the other two for agricultural purposes. G.S. 160-53 provides in part:

> The following terms where used in this Part shall have the following meanings, except where the context clearly indicates a different meaning:
>
> . . . .
>
> (2) "Used for residential purposes" shall mean any lot or tract five acres or less in size on which is constructed a habitable dwelling unit.

In light of this statute we believe the City could classify this tract as one lot. So long as it is less than five acres and contains a house we do not believe the tract has to be classified as more than one lot because someone mows the grass and feeds it to his cattle. We believe that the planting and mowing of grass on the lot to be fed to cattle is not so significant as to require the City to classify those portions of the tract on which the grass is grown as separate lots.

We do not believe *R.R. v. Hook*, 261 N.C. 517, 135 S.E. 2d 562 (1964), relied on by the appellants, is applicable. In that case our

Supreme Court held it was error to classify a tract of 13.747 acres of which 1.4 acres were used for parking as a tract used for industrial purposes. In this case we have a smaller lot and a statute which helps in the definition.

[2] The appellants also contend that the two lots adjoining West 25th Street do not qualify as a sub-area under G.S. 160A-48(d)(2). They argue that "Liberally construed, G.S. 160A-48(d), the sub-area subsection would make it possible to completely gut the other provisions of G.S. 160A-48 which establish clear standards for annexation." They contend that the unnumbered paragraph at the end of G.S. 160A-48(d) requires that the sub-area "constitute necessary land connections between the municipality and areas developed for urban purposes" which the sub-area in this case does not. We do not believe G.S. 160A-48(d) should be so read. We believe the unnumbered paragraph should be read to describe the sub-areas allowed by G.S. 160A-48(d). We believe the sub-area allowed by G.S. 160A-48(d)(2) is one of those described by the unnumbered paragraph as a "necessary land connection." If we were to hold otherwise we believe we would not be following the words of the statute. It may, as the appellants contend, "gut the other provisions of G.S. 160A-48," but that is a matter for the General Assembly.

The appellants also argue that a sub-area cannot consist entirely of tracts of five acres or less. There is nothing in the statute to support this argument.

The appellants also argue that the annexation in this case does not comply with the requirements of *In re Annexation Ordinance*, 300 N.C. 337, 266 S.E. 2d 661 (1980). They advance no reasons why this is so. We do not believe that case prohibits the annexation in this case.

Affirmed.

Judges BECTON and PARKER concur.

GLEN NARRON v. HARDEE'S FOOD SYSTEMS, INC.

No. 847DC1127

(Filed 2 July 1985)

1. **Appeal and Error § 6.2— partial summary judgment—appealable**

A summary judgment for defendant in which the court expressly retained jurisdiction of defendant's counterclaim and did not certify that there was no just reason for delay nevertheless affected a substantial right of plaintiff and was appealable. G.S. 1A-1, Rule 54(b), G.S. 1-277, G.S. 7A-27.

2. **Master and Servant § 9— Wage and Hour Act—forfeiture of benefits**

The Wage and Hour Act requires an employer to notify the employee in advance of the wages and benefits which he will earn and the conditions which must be met to earn them, and to pay those wages and benefits when the employee has actually performed the work required to earn them. Once the employee has earned the wages and benefits under this statutory scheme, the employer is prevented from rescinding them, with the exception that for certain benefits such as commissions, bonuses and vacation pay an employer can cause a loss or forfeiture of such pay if he has notified the employee of the conditions for loss of forfeiture in advance of the time when the pay is earned. G.S. 95-25.2(16), G.S. 95-25.12, G.S. 95-25.13.

3. **Master and Servant § 9— Wage and Hour Act—compensation for unused vacation—summary judgment for defendant improper**

The trial court erred by granting summary judgment for defendant in an action in which plaintiff sought payment for accumulated vacation leave upon termination of his employment. A genuine issue of material fact existed as to whether plaintiff earned and accumulated vacation leave under a policy which did not provide for forfeiture of unused vacation leave.

APPEAL by plaintiff from *Sumner, Judge.* Judgment entered 20 September 1984 in District Court, NASH County. Heard in the Court of Appeals 14 May 1985.

Plaintiff, discharged from his employment with defendant, seeks to recover from defendant accumulated vacation leave under the Wage and Hour Act, G.S. 95-25.1 *et seq.*, plus exemplary damages and attorneys' fees. Defendant Hardee's Food Systems, Inc., answered plaintiff's complaint, asserting that all their personnel practices associated with plaintiff's discharge and his claim for vacation pay, complied with the Wage and Hour Act. Defendant asserted as a counterclaim plaintiff's wrongful conversion of company funds, or alternatively, the negligent loss of such funds. Defendant prayed for an award equal to the amount of funds al-

legedly converted or lost, plus punitive damages and attorneys' fees.

The trial court concluded that the Act "requires only that an employer comply with whatever policy or practice regarding vacation pay it may have in effect at the time of [an employee's] termination." Applying this conclusion to the facts if found to be uncontroverted, the court held that defendant had correctly denied vacation pay to plaintiff under the terms of the vacation policy in effect at the time of his termination.

The trial court entered summary judgment for defendant on plaintiff's claim and ordered that defendant's counterclaim was "not affected in any manner by the granting of this Motion or by this Order." Plaintiff appealed.

Edelstein, Payne and Jordan, by Steven R. Edelstein, for plaintiff appellant.

Blakeney, Alexander & Machen, by W. T. Cranfill, Jr. and John C. Miller, for defendant appellee.

MARTIN, Judge.

This appeal involves the interpretation of the Wage and Hour Act, G.S. 95-25.1 *et seq.* The specific issue raised is whether plaintiff had accumulated unused vacation for which he was entitled to be paid upon his termination from employment, where the employer's personnel policy under which plaintiff earned the vacation did not provide for forfeiture thereof, but the policy in effect at the time of his termination provided for such forfeiture. Because the record reveals a genuine issue of fact as to whether plaintiff had earned and accumulated vacation under the former policy, we hold that the trial court erred in entering summary judgment for defendant.

[1] We initially note that the judgment from which plaintiff appeals adjudicates "the rights and liabilities of fewer than all the parties" and expressly retains jurisdiction for the purpose of adjudication of defendant's counterclaim without a determination by the trial judge that "there is no just reason for delay" within the language of Rule 54(b) of the North Carolina Rules of Civil Procedure. Therefore, at first glance, this appeal may appear to be subject to dismissal as being from an interlocutory order and sub-

ject to dismissal as fragmentary and premature. G.S. 1A-1, Rule 54(b); *Leasing, Inc. v. Dan-Cleve Corp.*, 25 N.C. App. 18, 212 S.E. 2d 41 (1975); *Arnold v. Howard*, 24 N.C. App. 255, 210 S.E. 2d 492 (1974). However, we believe that a "substantial right" of the plaintiff is affected by the granting of summary judgment, so that the order granting defendant's motion for summary judgment is appealable under G.S. 1-277 and G.S. 7A-27. *See Nasco Equipment Co. v. Mason*, 291 N.C. 145, 229 S.E. 2d 278 (1976).

The question presented is whether the trial court erred in granting summary judgment for defendant. Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a 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); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). "However, summary judgments should be looked upon with favor where no genuine issue of material fact is presented." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971).

Applying this standard to the facts of this case, we find that summary judgment was inappropriately entered. The uncontradicted facts reveal that plaintiff commenced employment with defendant in November 1972. He managed one of defendant's restaurants in Greenville, North Carolina, from 15 August 1978 until February or March 1983, at which time he was transferred to Rocky Mount, North Carolina. At the end of April 1983, defendant discovered that deposits totalling $3,500.00 for the period of 23 February through 28 February 1983 were missing from the Greenville restaurant, formerly managed by plaintiff. After conducting an investigation, defendant suspended plaintiff without pay on 6 May 1983, and in November 1983, defendant converted plaintiff's suspension into a discharge due to "gross negligence with respect to company property."

Based upon corporate policies which became effective on or about 13 April 1983, defendant did not provide plaintiff with any vacation pay upon his discharge. Plaintiff received notice of these

policies through the following memorandum, dated 13 April 1983, which was sent to all restaurant managers:

> SUBJECT: Termination for Cause--Vacation Pay
>
> I have been notified of a change in our current termination policy. The change is effective immediately and applies to *any employee* who is discharged for cause. The new procedure is that Hardee's will no longer pay unused vacation to *any* employee who has been justifiably "terminated for cause" . . . . A new policy is currently being drafted to cover this and will be distributed sometime during the next few months.

Plaintiff denied taking or misappropriating the missing funds. Defendant refused to pay plaintiff his accumulated vacation pay, asserting that plaintiff was dismissed for cause.

[2] The words of statutes should be given their ordinary meaning, unless it appears from the context, or otherwise in the statute, that a different sense was intended. *Abernethy v. Commissioners*, 169 N.C. 631, 86 S.E. 577 (1915). G.S. 95-25.12 of the Wage and Hour Act provides as follows:

> No employer is required to provide vacation for employees. However, if an employer provides vacation for employees, the employer shall give all vacation time off or payment in lieu of time off in accordance with the company policy or practice. Employees shall be notified in accordance with G.S. 95-25.13 of any policy or practice which requires or results in loss or forfeiture of vacation time or pay. Employees not so notified are not subject to such loss or forfeiture.

The Act also defines the term "wage" to include such wage-related benefits as "sick pay, *vacation pay*, severance pay, commissions, bonuses, and other amounts promised when the employer has a policy or a practice of making such payments." G.S. 95-25.2(16) (emphasis added). With the exception of statutory requirements to pay at least the current minimum wage and proper overtime, where applicable, the employer is free to offer the employee any wage he desires. G.S. 95-25.3; G.S. 95-25.4. Moreover, with respect to wage-related benefits, such as vacation pay, the employer can choose either to have no policy at all or to have any policy of his own choosing. G.S. 95-25.2(16); G.S. 95-25.12. Once

having chosen the wages and benefits for the employee, the employer is required to notify the employee at the time of hiring of the rate of pay and the policies on vacations and other wage-related benefits. G.S. 95-25.13(1). An employer may provide for loss or forfeiture of wages and benefits, or change the wages and benefits offered at any time, but prior to such change, the employer must notify the employee of the change in writing or through a posted notice, and the change can only have prospective application, except in the case of increases in wages and benefits. G.S. 95-25.13(3). Therefore, giving the statutory language its natural and ordinary meaning, the Wage and Hour Act requires an employer to notify the employee in advance of the wages and benefits which he will earn and the conditions which must be met to earn them, and to pay those wages and benefits due when the employee has actually performed the work required to earn them. Once the employee has earned the wages and benefits under this statutory scheme, the employer is prevented from rescinding them, with the exception that for certain benefits such as commissions, bonuses and vacation pay, an employer can cause a loss or forfeiture of such pay if he has notified the employee of the conditions for loss or forfeiture in advance of the time when the pay is earned.

[3] Under this statutory construction, the vacation pay due plaintiff at the termination of his employment was not, as the trial court held, controlled solely by defendant's vacation policy in effect at the time of termination. A genuine issue of material fact exists as to whether plaintiff may have been due vacation pay which he had earned under the earlier policy. This issue is created by plaintiff's assertion in his affidavit that he had met the requirements for vacation pay under defendant's prior personnel policies which contained no provision for forfeiture, and defendant's admission that it had changed its personnel policy pertaining to vacation pay shortly before plaintiff's discharge. If plaintiff earned and accumulated vacation under a vacation policy which did not provide for forfeiture of unused vacation, the Wage and Hour Act would dictate that plaintiff receive all vacation pay earned prior to defendant's change of personnel policy with regard thereto. Accordingly, the summary judgment appealed from is reversed.

Reversed.

Judges ARNOLD and PARKER concur.

DAVID J. LUDWIG v. LARRY L. WALTER AND WIFE, SUZANNE R. WALTER

No. 8425SC1135

(Filed 2 July 1985)

1. **Partnership § 3— promise to convey realty to partner—statute of frauds**

G.S. 59-40(c), which recognizes that partnership property may be held by one but not all partners, and G.S. 59-56, which makes a partner's interest in partnership property, even real property, a personal property interest, did not render the statute of frauds of G.S. 22-2 inapplicable to defendant partner's alleged promise to convey to plaintiff partner an interest in realty in exchange for cash contributions to capital.

2. **Partnership § 3; Frauds, Statute of § 6— land as partnership asset—written agreement—statute of frauds**

Land owned individually by one who enters into a partnership cannot become a partnership asset absent some written agreement sufficient to satisfy the statute of frauds.

3. **Partnership § 9.2— partnership note—liability for interest—repayment from partnership funds**

The evidence supported the trial court's finding that defendant partner did not promise to pay the interest on a note executed in furtherance of the partnership. However, the court should have determined the nature of the note and ordered it repaid out of partnership funds if possible.

4. **Partnership § 3— mortgage payments—failure to credit partner's account**

The trial court did not err in failing to credit plaintiff partner's account for half the mortgage payments made on realty during the life of the partnership, although such payments were made by checks from the partnership account, where the property belonged solely to defendant partner, rent payments were made solely to defendant and were deposited in the partnership account, and there was no evidence that defendant, by writing checks from the partnership account to pay the mortgage, intended the payments to be on behalf of the partnership.

5. **Partnership § 9— dissolution**

An order for dissolution of a partnership, having been prayed for and not resisted, was appropriate. G.S. 59-62.

Ludwig v. Walter

APPEAL by plaintiff from *Lamm, Charles A., Judge.* Judgment entered 14 June 1984 in CATAWBA County Superior Court. Heard in the Court of Appeals 14 May 1985.

Plaintiff sued defendants seeking recognition of an oral partnership agreement, an accounting, an interest in certain real property, and dissolution of the partnership. The evidence showed an informal partnership arrangement beginning in 1978 to purchase and operate several pieces of real property. Capital and maintenance funds were contributed and spent on an *ad hoc* informal basis, with little formal account keeping. Disputes arose over whether contributions to capital balanced and over other matters, resulting in the present lawsuit. Because of the disputes, partnership obligations went into default and two properties in Hickory were sold at foreclosure. The partnership apparently retained substantial assets from the sales. Pending trial, defendant Suzanne Walter obtained a divorce from Larry Walter; she had only a nominal role in partnership affairs.

The case was heard before the court without a jury. The evidence as to various oral agreements conflicted sharply. The court determined that a partnership had existed, and that plaintiff was entitled to $4,080.20 from defendant Larry Walter to equalize capital, as well as an equitable lien of $500.00 against defendants' property in Mount Pleasant, Cabarrus County. The court dismissed Suzanne Walter from the case. Plaintiff appealed.

Bryce O. Thomas, Jr., for plaintiff.

Rudisill & Brackett, P.A., by J. Steven Brackett, for defendant.

WELLS, Judge.

Defendant Suzanne Walter had only a nominal interest in these proceedings and we allowed her motion to dismiss the appeal as to her on 6 May 1985. That portion of the court's order dismissing the case as to her is therefore affirmed. All references hereinafter to "defendant" are to Larry Walter.

Plaintiff first assigns error to the court's refusal to award him a one-half interest in the Mount Pleasant property. Plaintiff claimed that upon formation of the partnership, defendant promised to convey to him the interest in exchange for cash contribu-

tions to capital. Defendant denied any such agreement and timely pleaded the Statute of Frauds. N.C. Gen. Stat. § 22-2 (1965). That statute requires some written memorandum of the contract, containing all the essential features of an agreement to sell. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). None of the documents cited by plaintiff fit these requirements. Partnership tax returns listing the Mount Pleasant property as a partnership asset may reflect nothing more than defendant's intent to give the partnership the tax benefits of its depreciation. A lease signed by defendant and plaintiff merely designates them as "partners in common" without defining that term or indicating their ownership of the property or any arrangement for the partnership to operate it. The lease never took effect in any event. The other documents cited by plaintiff also fail to satisfy the Statute of Frauds. We note in this context that the evidence clearly showed that defendant purchased the property in his own right and consistently received the rent payments under oral agreement between himself and the tenants. We conclude that the court could and did properly find that plaintiff had failed to satisfy the statute's requirement of some written memorandum evidencing a contract or agreement to sell an interest in the Mount Pleasant property.

[1, 2] Relying principally on the provisions of N.C. Gen. Stat. § 59-40(c) (1982), which recognizes that partnership property may be held by one but not all partners, read in conjunction with N.C. Gen. Stat. § 59-56 (1982), which makes a partner's interest in partnership property, even real property, a personal property interest, plaintiff contends in essence that the Statute of Frauds does not apply. This argument presupposes that the Mount Pleasant property was originally brought into the partnership, which the court, on conflicting evidence, found did not occur. Moreover, the general rule is that land owned individually by one who enters into a partnership cannot become a partnership asset absent some written agreement sufficient to satisfy the Statute of Frauds. 60 Am. Jur. 2d *Partnership* § 98 (1960). While we have found no North Carolina case so holding, such a rule conforms to public policy of this state. The Statute of Frauds is a firmly established feature of our real property law, and we do not believe the General Assembly intended to abrogate it *implicitly* by enacting the partnership statutes. The court's order denying plaintiff an interest in the Mount Pleasant property was accordingly proper.

Plaintiff's next two assignments of error concern a $12,000.00 note signed by himself and defendant. Plaintiff contends (1)(a) the court should have declared the note a partnership obligation and (b) ordered it paid out of the partnership assets and (2) the court erred in not ordering defendant to pay the interest accrued thereon. Regardless of whether the note was signed by plaintiff and defendant as individuals or as partners, its legal effect is the same. N.C. Gen. Stat. § 59-45 (1982); N.C. Gen. Stat. § 25-3-413 (1965); *Grimes v. Grimes*, 47 N.C. App. 353, 267 S.E. 2d 372 (1980). Nothing in the record suggests that the lender has exercised its right to payment "on demand."

[3] Nevertheless, it does appear that the note was executed in furtherance of the partnership, and that there may be partnership funds available to satisfy it. In the interest of resolving this matter, the court should have determined the nature of the note and ordered it repaid out of the partnership funds if possible. It will have an opportunity to do so, since we remand for other error. As to defendant's alleged promise to pay the interest on the note, the court had diametrically conflicting oral evidence before it. The note itself reflects no such promise. Its conclusion that there was no such promise, being supported by the evidence, is binding on this court.

Plaintiff assigns error to the court's finding of fact No. 15 as unnecessary. Since the finding did not contribute in any way to the judgment, we simply disregard it, without affecting our consideration of the other assignments.

[4] Plaintiff assigns as error the court's failure to credit his account for half the mortgage payments on the Mount Pleasant property during the life of the partnership, since these payments were made by checks from the partnership accounts. As noted above, the property belonged solely to defendant and rent payments were made solely to him. He deposited the payments in the partnership account. The fact that defendant then wrote checks from that account to pay the mortgage does not conclusively establish that he intended the payments to be on behalf of the partnership, particularly in light of the informal treatment of the property. We note that the court did not credit these deposits, nor the profit thereon (excess of rent over mortgage), to defendant's capital account. In light of the sketchy accounting and con-

flicting testimony as to oral agreement, we conclude that the court reached the correct result, supported by the evidence.

[5] Finally, plaintiff assigns error to the court's failure to dissolve the partnership in accordance with his prayer for relief. It appears that the court's order resolved all differences between the parties regarding liability to each other, and that the partnership would conduct no further business. The court has authority to order dissolution. N.C. Gen. Stat. § 59-62 (1982). Dissolution will not affect the liability of the partners, N.C. Gen. Stat. § 59-64 (1982), but will relieve the parties of further liability for each other's acts. N.C. Gen. Stat. § 59-65 (1982). Dissolution will enable the court to distribute the remaining partnership assets. N.C. Gen. Stat. § 59-68 (1982). An order of dissolution, having been prayed for and not resisted, undoubtedly was appropriate. The cause is remanded for further consideration of this issue on the existing record.

Affirmed in part; reversed and remanded in part.

Judges JOHNSON and COZORT concur.

STATE OF NORTH CAROLINA v. WILLIE LEE EDWARDS

No. 8419SC734

(Filed 2 July 1985)

1. **Burglary and Unlawful Breakings § 5— first degree burglary—constructive breaking—evidence sufficient**

The trial court did not err by refusing to dismiss a first degree burglary charge where an occupant of a motel room was awakened at 4:00 a.m. by a loud pounding on his door, looked outside and saw no one, stepped outside and saw defendant about twenty-five feet away, was approached by defendant and forced into his room with a pistol in his face, was bound and gagged by two other men, and was robbed of money, jewelry, and other personal property. A constructive breaking may be accomplished by tricking an occupant into opening the door or by threatening the occupant with a deadly weapon. G.S. 14A-51.

2. **Criminal Law § 138— first degree burglary—use of deadly weapon as aggravating factor—error**

The trial court erred when sentencing defendant for first degree burglary by considering as a factor in aggravation that defendant used a deadly weapon

where the breaking and entering was proved by evidence that defendant pointed a gun at the victim's head and drove him into the motel room and the only felony defendant intended to commit therein was armed robbery. G.S. 15A-1340.4(a)(1).

Judge MARTIN concurring in part and dissenting in part.

APPEAL by defendant from *Helms, Judge.* Judgment entered 27 July 1983 in Superior Court, CABARRUS County. Heard in the Court of Appeals 5 March 1985.

Defendant was convicted of first degree burglary and robbery with a firearm. The State's evidence tended to show that: On 14 April 1983, Michael Gissing, staying in a room at the Holiday Inn in Concord, was awakened at approximately 4 o'clock in the morning by a loud pounding noise on his door. Looking through both the door peephole and the window and seeing no one, he then opened the door, stepped outside, and saw defendant about twenty-five feet away. Defendant approached Gissing, put a pistol in his face, forced him back into his room, and told him to lie face-down on the bed. Two other men then entered the room and bound and gagged Gissing. After the three men removed Gissing's money, jewelry and other personal property from the room and left, Gissing removed the bindings and reported the incident to the police. Carl Mann, a motel security guard, noticed a man near Gissing's room at or near the time of the robbery and described him and a two-tone green car that other evidence showed belonged to the defendant's grandfather and was often used by defendant.

Defendant's evidence tended to show that he was in Charlotte the night involved and did not participate in either crime.

Attorney General Edmisten, by Special Deputy Attorney General T. Buie Costen, for the State.

Corriher, Whitley & Busby, by James A. Corriher, for defendant appellant.

PHILLIPS, Judge.

[1] Defendant first argues that the first degree burglary charge should have been dismissed because the State's evidence failed to show a breaking and entering of the dwelling involved. G.S. 14A-51. We disagree. A burglarious breaking and entering can be

constructive, as well as actual. *State v. Jolly*, 297 N.C. 121, 254 S.E. 2d 1 (1979). A constructive breaking may be accomplished in a number of different ways. *State v. Henry*, 31 N.C. 463 (1849). One way is by tricking the occupant into opening the door, *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976), another is by threatening the occupant with a deadly weapon, *State v. Rodgers*, 216 N.C. 572, 5 S.E. 2d 831 (1939), and the evidence tends to show that in this instance the defendant did both.

[2] But defendant's contention that the trial court erred in sentencing him on the first degree burglary conviction by considering as a factor in aggravation that defendant used a deadly weapon is well taken. G.S. 15A-1340.4(a)(1) provides that "[e]vidence necessary to prove an element of the offense may not be used to prove any factors in aggravation"; and if the evidence that defendant used a deadly weapon was removed from the record the State would have failed to prove not one but *three* elements of the burglary. That defendant broke into and entered the motel room was proved only by evidence that he pointed a gun at Gissing's head and drove him into the room; and the only felony that defendant intended to commit therein, according to the evidence, was armed robbery. Thus, the judgment imposed on the first degree burglary conviction must be vacated and the matter remanded for re-sentencing on that offense.

Defendant's several other contentions—that the evidence was insufficient to warrant his conviction of robbery with a dangerous weapon; that the trial court erred in admitting into evidence the in-court identification of defendant by Carl Mann; and that he was denied effective assistance of counsel—are all manifestly without merit and require no discussion.

No error in the convictions; remanded for re-sentencing.

Judge WEBB concurs.

Judge MARTIN concurs in part and dissents in part.

Judge MARTIN concurring in part; dissenting in part.

I concur with that portion of the majority opinion which finds no error in defendant's convictions. However, I respectfully dis-

sent from the majority's holding that the trial court's finding that "[t]he defendant was armed with or used a deadly weapon at the time of the offense" was evidence necessary to prove an element of the offense of first degree burglary, and was improperly considered by the trial court as a factor in aggravation of the sentence for that offense. I vote to affirm the sentence.

The indictment charging defendant with first degree burglary charged that defendant broke into and entered the victim's motel room in the nighttime, while it was occupied, with the felonious intent to commit larceny. The trial court instructed the jurors that they must find that defendant intended to commit larceny at the time of the breaking or entering. The use of a deadly weapon is not an element of larceny; evidence of defendant's possession or use of the deadly weapon was not necessary to prove the element, essential for conviction of first degree burglary, of defendant's felonious intent.

The majority further states that defendant's possession or use of the weapon was essential to prove the necessary elements of a breaking and an entry. I disagree. As pointed out in the majority opinion, a breaking may be actual or constructive; a constructive breaking may occur when some trick, such as knocking at the door, is used to induce the occupant to open the door in order for the accused to gain entry. *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976). A constructive breaking may also occur when violence, or threat thereof, is employed in order for the accused to gain entry. *State v. Jolly*, 297 N.C. 121, 254 S.E. 2d 1 (1979). The evidence in the case *sub judice* tended to show that the victim was induced to open the door by defendant's pounding on it. After the door was opened, the defendant continued his artifice by holding up a key and telling the victim that he had left his key in the door. While doing so, defendant approached the victim, pushed him, pointed a pistol at him and backed him into the room. The evidence of defendant's possession and use of the firearm, while certainly relevant to show the degree of violence threatened by defendant, was not essential to prove the breaking as there was other evidence of trick (knocking on the door and representing that the victim had left his key in the door) and violence (pushing the victim) sufficient to prove a constructive breaking. Since the element of entry is satisfied by proof of "the least entry with the whole or any part of the body . . . for the

purpose of committing a felony . . .", Black's Law Dictionary 478 (rev. 5th ed. 1979), evidence of defendant's possession or use of a firearm was clearly unnecessary to prove the existence of that evidence.

In my view, the evidence of defendant's possession and use of the firearm at the time of the commission of the first degree burglary was not necessary to prove any element of that offense and was properly considered as an aggravating factor. *See State v. Toomer*, 311 N.C. 183, 316 S.E. 2d 66 (1984) (defendant convicted of first degree burglary, first degree sexual offense and robbery with a firearm; although use of firearm was necessary to prove essential element of joinable offense, possession of the weapon was not essential element of first degree burglary and was properly considered as a factor in aggravation of punishment for that offense); *State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983) (defendant convicted of first degree rape, first degree sexual offense and first degree burglary; court properly found possession of weapon as factor in aggravation of the sentence for first degree burglary).

> As long as they are not elements essential to the establishment of the offense . . . all circumstances which are transactionally related to the . . . offense and which are reasonably related to the purposes of sentencing must be considered during sentencing. [Citations omitted.]

State v. Melton, 307 N.C. 370, 378, 298 S.E. 2d 673, 679 (1983).

ERNEST LINWOOD LAWRENCE v. RAMONA S. LAWRENCE

No. 841DC1023

(Filed 2 July 1985)

Divorce and Alimony § 30— equitable distribution—repairs, alterations and additions to separate property

While real property purchased by the wife with her own funds prior to the marriage constituted her separate property, repairs, alterations and additions made to the property during the marriage constituted marital property. G.S. 50-20(b)(1) and (2).

Lawrence v. Lawrence

APPEAL by plaintiff from *Parker, Judge.* Judgment entered 27 June 1984 in District Court, PASQUOTANK County. Heard in the Court of Appeals 7 May 1985.

Plaintiff instituted this action seeking an absolute divorce and an equitable distribution of the marital property based on one year's separation. In her answer, defendant joined in the prayer for divorce, but denied plaintiff's right to an equitable distribution. On 23 May 1983, plaintiff filed a motion to sever the issues of absolute divorce and equitable distribution, which the trial court granted. On the same date, the trial court also granted the parties an absolute divorce. Thereafter, on 13 July 1983, defendant moved for summary judgment on the issue of equitable distribution. The trial judge granted summary judgment as to an automobile and a mobile home, but denied the motion as to real property located in Perquimans County, North Carolina. On 27 June 1984, plaintiff's remaining claim for equitable distribution came on for trial with the trial judge sitting without a jury. At the conclusion of plaintiff's evidence, the trial judge granted defendant's motion to dismiss. From this order, plaintiff appealed.

D. Keith Teague, P.A., for plaintiff appellant.

White, Hall, Mullen, Brumsey & Small, by John H. Hall, Jr., for defendant appellee.

JOHNSON, Judge.

Plaintiff contends that the trial court erred in finding and concluding that no equity developed in the real property located in Perquimans County, irrespective of the repairs, alterations and additions contributed by plaintiff. The trial court granted defendant's motion to dismiss at the close of plaintiff's evidence, thus the only evidence before the trial judge was supplied by plaintiff. This evidence indicated that the parties were married on 19 May 1978. Defendant, prior to the marriage, purchased Lot 4, Section two, of Durant's Colony in Perquimans County and title was in her name alone. After the marriage until the date of separation, there were various repairs, alterations and additions made to the house and waterfront area. Plaintiff's contributions resulted mostly from his labor expended on the improvements. Plaintiff attempted to show the value of his labor through his own opinion testimony, but such testimony was excluded by the trial judge.

The trial judge also excluded testimony as to the value of the house.

The trial judge found, *inter alia*, that defendant purchased the house prior to her marriage to the plaintiff. Defendant paid for all materials and hired labor incident to repairs, alterations and additions to the house and waterfront area and the only contribution by plaintiff was labor. The court further found that plaintiff was making the improvements for the mutual benefits of the parties and did not intend to charge the wife for the improvements. The court found no credible, competent evidence with respect to the value of the work done by plaintiff. The court also failed to find any credible, competent evidence with respect to the net value of the marital property claimed by plaintiff. From these findings, the trial judge concluded (1) that no equity in said real property, solely owned by defendant and purchased by defendant prior to her marriage to plaintiff, developed during the marriage because of repairs, alterations and additions made by plaintiff; (2) that the repairs, alterations and additions made by plaintiff to the real property, solely owned by defendant and purchased by defendant prior to her marriage to plaintiff, do not constitute marital property and the same, therefore, are not subject to equitable distribution; and (3) there is no credible, competent evidence with respect to the value of the work performed by plaintiff or the value of the repairs, alterations and additions made to the real property, solely owned by defendant and purchased by defendant prior to her marriage to plaintiff. We disagree.

Under G.S. 50-20(c), equitable distribution applies only to the net value of marital property. This requires the trial court to first ascertain *what is marital property*, then to find the net value of that property, and finally to make a distribution based upon the equitable goals of the statute and the various factors specified therein. *Turner v. Turner*, 64 N.C. App. 342, 307 S.E. 2d 407 (1983). The Equitable Distribution Act says that "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property [,]" is "marital property," subject to distribution under the Act. G.S. 50-20(b)(1). "Separate property" includes property acquired before marriage, as well as property

acquired in exchange for separate property. G.S. 50-20(b)(2). Moreover, "[t]he increase in value of separate property and the income derived from separate property shall be considered separate." *Id. Phillips v. Phillips*, 73 N.C. App. 68, 72, 326 S.E. 2d 57, 60 (1985).

The trial court properly found that the real property located in Perquimans County was separate property, as the property was purchased by the defendant prior to her marriage to the plaintiff from her own funds. G.S. 50-20(b)(2). The controversy centers upon the characterization of the repairs, additions and alterations made to the separate property owned by defendant. We find that the trial court erred in concluding that these contributions were not marital property.

G.S. 50-20(b)(2) provides that the increase in value of separate property and the income derived from separate property shall be considered separate. This provision concerning the classification of the increase in value of separate property has been interpreted as referring only to passive appreciation of separate property, such as that due to inflation, and not to active appreciation resulting from the contributions, monetary or otherwise, by one or both spouses. *Wade v. Wade*, 72 N.C. App. 372, 325 S.E. 2d 260 (1985). The Court held that increase in value of separate property due to active appreciation, which otherwise would have augmented the marital estate, is marital property. *Id.*

We conclude that the real property concerned herein must be characterized as part separate and part marital. It is clear the marital estate invested substantial labor and funds in improving the real property, therefore the marital estate is entitled to a proportionate return of its investment. *Id.; Accord, Turner v. Turner*, 64 N.C. App. 342, 307 S.E. 2d 407 (1983) (where an equity developed in a house purchased by the husband before marriage because of improvements or payments contributed to by the wife during marriage, that equity could be marital property). That part of the real property consisting of the unimproved property owned by defendant prior to marriage should be characterized as separate and that part of the property consisting of the additions, alterations and repairs provided *during marriage* should be considered marital in nature. As the marital estate is entitled to a return of its investment, defendant because of her contribution of

separate property is entitled to a return of, or reimbursement or credit for, that contribution.

To the extent the property is marital in character, it must be divided pursuant to the Equitable Distribution Act. Following the dictates of the Act, we do not believe the plaintiff's two remaining assignments of error will arise at the next proceeding, therefore we decline to address them. The trial court's judgment must be vacated and the cause remanded for a determination and division of the marital assets.

Vacated and remanded.

Judges WELLS and COZORT concur.

LYNN WEHLAU (WITEK), A/K/A LYNN WEHLAU v. NORMAN LEE WITEK

No. 8429DC954

(Filed 2 July 1985)

1. **Divorce and Alimony § 25.7— child custody order—modification—changed circumstances required**

The trial court properly concluded that a change of circumstances was required to modify a child custody agreement where all the facts pertinent to custody were before the court which issued the initial custody decree and neither party attempted prior to the original decree to conceal the kind of environment in which the children would live. When all substantial facts relevant to the issue of custody are revealed to the court at the time of the original decree, a change of circumstances must be shown before that decree can be modified.

2. **Divorce and Alimony § 25.10— child custody—changed circumstances not shown**

The trial court correctly concluded that its findings did not amount to a substantial change in circumstances sufficient to authorize a modification of a custody order which had granted each parent joint and equal custody with the children residing with each parent in alternating years. Both parents were found to be fit and suitable to have custody of the children; defendant's evidence that he is a suitable parent does not negate plaintiff's standing and does not represent a change of circumstances. G.S. 50-13.7(a).

APPEAL by defendant from *Gash, Judge*. Order entered 16 May 1984 in District Court, TRANSYLVANIA County. Heard in the Court of Appeals 18 April 1985.

Hafer, Hall & Schiller by Marvin Schiller for plaintiff appellee.

Ramsey, Smart, Ramsey & Pratt by Michael K. Pratt for defendant appellant.

COZORT, Judge.

Defendant made a motion in the cause requesting a modification of a prior custody order under G.S. 50-13.7. At the time of the parties' divorce, an order was entered, granting each parent joint and equal custody of the two minor children born of the marriage. The parties had agreed that the children would reside with each parent in alternating years. Prior to the time when the defendant would be required to relinquish custody of the children to plaintiff, he filed a motion claiming that the joint custody arrangement was not in the best interests of the children. After a hearing the court denied defendant's motion for failing to show that there had been a substantial change of circumstances. We affirm.

Two children were born of the union between the parties: Steven in 1973 and Berry in 1976. At the time the parties separated in 1981 they negotiated an agreement which provided, among other things, for the custody of the two minor children. Their joint custody arrangement allowed for alternating one year periods of custody. The court incorporated the separation agreement with its custody arrangement into the 1982 divorce decree.

Plaintiff had custody of the two children for the 1982-1983 school year, then she relinquished their care to defendant under the agreement. On 13 April 1984, several months before defendant would be required to relinquish custody to plaintiff, he filed a motion in the cause in which he claimed that the joint custody arrangement was inappropriate and detrimental to the well-being of the children. Defendant claimed that he offered the children a healthy stable environment and that it would be in the best interests of the children that he be allowed permanent custody.

At the hearing on the motion, defendant testified that plaintiff had moved her residence several times while she had custody of the children and that she had left them without adequate supervision at times when she was working. He further testified that he and his new wife offered a stable, loving home for the

children where their educational, emotional, and spiritual development would be maximized. Defendant presented his parish priest and a school psychologist as witnesses to support his claim.

Plaintiff testified that during the period of time when she had custody of the children she had been involved with a work training program which had necessitated several moves. She further stated that her period of training was over and she did not anticipate any further transfers. Plaintiff testified that she thought the best interests of the children would be served if they had an opportunity to be exposed to the different lifestyle of each parent.

The court entered its order finding as facts that the children's living situation had been stable while they had been with defendant and that defendant's new wife had a good and motherly relationship with the children. The court also found as a fact that the "experts" who had testified for defendant had characterized the alternating custody arrangement as not in the children's best interests. The court concluded as a matter of law that the findings did not amount to a substantial change of circumstances as required by the statute and ordered that the motion for modification of the custody arrangement be denied.

[1] On appeal defendant argues that a change of circumstances was not required for a modification of the custody arrangement because the issue had not previously been litigated by the parties. Citing *Newsome v. Newsome*, 42 N.C. App. 416, 256 S.E. 2d 849 (1979), defendant argues that the reason for requiring a change of circumstances before modification is to prevent the parties from relitigating the same issues. Here, defendant asserts the court incorporated the parties' agreement into the divorce decree. Consequently, custody was never litigated.

To modify a custody order a court must find a change of circumstances. *Rock v. Rock*, 260 N.C. 223, 132 S.E. 2d 342 (1963). However, when facts pertinent to the custody issue existed at the time of the custody decree but were not disclosed to the court, the prior decree is *res judicata* only to the facts that *were* before the court, and other pertinent facts may be considered in subsequent custody determinations. *Newsome v. Newsome, supra.*

In the present case, all the facts pertinent to the issue of custody were before the court which issued the initial custody de-

cree. Prior to the original decree neither party attempted to conceal the kind of environment in which the children would live. At the hearing on the motion neither party brought forth evidence of lifestyle or circumstances which had not been within the contemplation of the court prior to their original decree. When all substantial facts relevant to the issue of custody are revealed to the court at the time of the original custody decree, a change of circumstances must be shown before that decree can be modified. Therefore, we hold the court properly concluded that a substantial change of circumstances was required before the court was authorized to modify the previous judgment.

[2] Next defendant argues that the trial court erred in concluding that its findings did not amount to a change of circumstances. The change of circumstances contemplated by G.S. 50-13.7(a) is a change affecting the welfare of the minor child. *Hensley v. Hensley*, 21 N.C. App. 306, 204 S.E. 2d 228 (1974). Where there is no evidence that the fitness or unfitness of either party has changed, the trial court may not modify a prior order unless sufficient change of circumstances adversely affecting the welfare of the child is shown. *Pritchard v. Pritchard*, 45 N.C. App. 189, 262 S.E. 2d 836 (1980). What represents the welfare of the child is frequently a difficult determination and the trial court is in the best position to observe the parties and evaluate the evidence. *Paschall v. Paschall*, 21 N.C. App. 120, 203 S.E. 2d 337 (1974). Therefore, the judgment of the trial court will not be disturbed on appeal if the evidence supports the findings of fact and those findings form a valid basis for the conclusions of law and order. *Id.*

After the hearing on the motion the court entered an order making findings of fact consistent with the evidence presented. The conclusions of law and order denying the motion logically flowed from the findings. A court cannot modify a custody order based on speculation or conjecture that a detrimental change may take place sometime in the future. Both parents were found to be fit and suitable to have custody of the children. Defendant's evidence that he is a suitable parent for custody does not negate plaintiff's standing as a suitable parent for custody and does not represent a change of circumstances. We hold that the court correctly concluded that its findings did not amount to a substantial

change in circumstances sufficient to authorize a modification of the custody order.

For the reasons cited the order of the court denying defendant's Motion for Modification is affirmed.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

B M & W OF FAYETTEVILLE, INC. v. CONNIE LEE BARNES, RONALD DUSTIN BARNES, JEANNETTE McLAMB LEE, GUARDIAN FOR CONNIE LEE BARNES, MINOR, JEANETTE McLAMB LEE, GUARDIAN FOR RONALD DUSTIN BARNES, MINOR, AND FESTUS BARNES, ADMINISTRATOR OF THE ESTATE OF WILLIAM HOMER BARNES, DECEASED

No. 8412SC1078

(Filed 2 July 1985)

1. **Trusts § 13— creation of purchase money resulting trust**

When the purchase price of property is paid by one person but title is taken in the name of another, a resulting trust arises in favor of the one who furnishes the consideration absent evidence indicating a contrary intent.

2. **Trusts § 13— resulting trust—obligation before or at time of conveyance not required**

The incurring of an obligation before or at the time of a conveyance is not a prerequisite for the imposition of a resulting trust.

3. **Trusts § 13.3— resulting trust in favor of corporation**

A corporation was entitled to have a resulting trust imposed on property titled in the names of three corporate officers and directors where all payments on the property were made with corporate funds, the corporation has paid all taxes and insurance on the property, and the purchase money note was carried as a liability and the property was carried as an asset on the corporation's books.

4. **Trusts § 15— action to impose resulting trust—statute of limitations**

A corporation's action to impose a resulting trust on property titled in the names of three corporate directors and officers was governed by the ten-year statute of limitations of G.S. 1-56 rather than by the three-year statute of limitations of G.S. 1-52(9) for actions to reform a deed for mistake.

5. **Trusts § 18— resulting trust—parol evidence**

Parol evidence is admissible for the purpose of engrafting a parol trust on legal title provided the declaration of trust is not in favor of the grantor.

6. Evidence § 11.7— dead man's statute—independent knowledge

The dead man's statute, G.S. 8-51, does not bar one from testifying as to his own acts or matters as to which he has independent knowledge not acquired in a communication or transaction with a deceased person.

APPEAL by defendants from *Johnson, Judge.* Order entered 17 July 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 9 May 1985.

Plaintiff instituted this action by filing a complaint on 24 February 1984 in which plaintiff alleged that William Homer Barnes, Harvey Mitchell Smith and Marvin William Smith, as officers and directors of plaintiff corporation, purchased a tract of real property in Cumberland County in 1978 with corporate funds, but title to this property was placed in the names of the three individuals. William Homer Barnes died intestate on 10 March 1983. The defendants are Festus Barnes, administrator of William Homer Barnes' estate, and the minor children of William Homer Barnes and their guardian. They filed separate answers in which they counterclaimed for their share of the rents from plaintiff's use of the property. Plaintiff moved for summary judgment. From the granting of plaintiff's motion and the entry of judgment for plaintiff, defendants appeal.

Butler, High, Baer & Jarvis, by Ervin I. Baer and Bruce F. Baer, for plaintiff appellee.

Morgan, Bryan, Jones & Johnson, by Robert H. Jones, for defendant appellants.

JOHNSON, Judge.

Two primary issues are presented by this appeal: (1) whether the court properly granted summary judgment in favor of plaintiff; and (2) whether the court properly considered the affidavit of Harvey Mitchell Smith, which was submitted in support of plaintiff's motion for summary judgment. For the following reasons we find no error and affirm the entry of summary judgment for plaintiff.

Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions of 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). The burden is upon the party moving for summary judgment to show that there is no genuine issue of law. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). If the movant meets this burden, the burden then shifts to the non-movant to set forth specific facts showing that there is a genuine issue of material fact for trial. *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982).

In the present case, plaintiff attached to its motion the affidavit of Harvey Mitchell Smith in which he averred that he, acting on behalf of plaintiff corporation, negotiated the purchase of the real estate in question; that he mistakenly told the seller of the property to list Harvey Mitchell Smith, Marvin William Smith and William Homer Barnes as purchasers of the property on the offer to purchase and contract; that the offer to purchase and contract was signed only by him on behalf of plaintiff corporation; that upon the signing of the contract and before the delivery of the deed, checks totalling $10,000, written on plaintiff's bank account or from funds obtained by plaintiff, were delivered to the sellers as a down payment of the purchase of the property; that the deed to the property was made to the three men rather than to the corporation; that the three men executed a purchase money note and deed of trust; that all further payments, including payments of interest and principal on the note, taxes and insurance on the property, and for improvements to the property, were paid by the plaintiff; and that the property appeared on the plaintiff's books as an asset and the note as a liability. Attached to the affidavit were the offer to purchase and contract, the deed, checks written on plaintiff's account and plaintiff's financial statements. In opposition to plaintiff's motion, defendants produced the affidavit of John Shaw, an attorney, who averred that he prepared the offer to purchase and contract, purchase money note and deed of trust and deed conveying the property to the three men pursuant to instructions he received from the sellers of the property.

[1, 2] It is well settled that in the absence of evidence indicating a contrary intent, when the purchase price of property is paid by one person but title is taken in the name of another, a resulting trust arises in favor of the one who furnishes the consideration. *Vinson v. Smith*, 259 N.C. 95, 130 S.E. 2d 45 (1963); *Cline v. Cline*,

297 N.C. 336, 255 S.E. 2d 399 (1979). Citing language in *Waddell v. Carson*, 245 N.C. 669, 97 S.E. 2d 222 (1957), defendants argue that in order for a purchase money resulting trust to arise in favor of plaintiff, plaintiff must have incurred an obligation to pay the remainder of the purchase price of the property at or before the time of the conveyance. We disagree. The language defendants cite is dictum. Defendants have not cited, nor can we find, any cases in this State which hold that the incurring of an obligation before or at the time of a conveyance is a prerequisite for the imposition of a resulting trust. Indeed, in *Furniture Co. v. Cole*, 207 N.C. 840, 178 S.E. 2d 579 (1935), a shareholder of the plaintiff corporation made the down payment on the purchase of real property with funds of the plaintiff, and signed a deed of trust securing the balance of the purchase price. The note secured by the deed of trust was carried as a liability and the property was carried as an asset in plaintiff's books. The plaintiff also paid taxes on the property. The Court upheld the jury's verdict that the plaintiff corporation had furnished the consideration for the conveyance, and thus was entitled to have a resulting trust imposed in its favor. The Court did not say that the plaintiff's signing of the note or deed of trust was a prerequisite to the imposition of a resulting trust.

[3] The facts in the present case are on all fours with those of *Furniture Co., supra.* The forecast of evidence is undisputed that all payments on the property, down payment or otherwise, have been made with corporate funds; that the plaintiff has paid all taxes and insurance of the property; and that the note and property appears on the plaintiff's books as a liability and fixed asset, respectively. Based upon these uncontroverted facts, plaintiff was entitled to the imposition of a resulting trust in its favor. There being no genuine issue of material fact and plaintiff being entitled to judgment as a matter of law, summary judgment in favor of plaintiff was therefore properly granted.

[4] Defendants argue summary judgment was improper because there is a genuine issue of material fact as to the statute of limitations if this action is one to reform a deed based on mistake, which is governed by a three year statute of limitations under G.S. 1-52(9). This action, however, is one to impose a resulting trust, which is governed by a ten year statute of limitations. G.S. 1-56 (1983); *Bowden v. Darden*, 241 N.C. 11, 84 S.E. 2d 289 (1954).

Even if there is an issue of fact as to whether the Smiths should have discovered that their names were on the deed in 1978, this action was commenced in 1984, well within the ten year period of limitations.

[5, 6] Defendants also contend that Harvey Mitchell Smith's affidavit should not have been considered by the court on the ground that it was not competent under the parol evidence rule or G.S. 8-51 (1983), commonly known as the "dead man's statute." These contentions have no merit. Parol evidence is admissible for the purpose of engrafting a parol trust on legal title provided the declaration of trust is not in favor of the grantor. *Tomlinson v. Brewer*, 18 N.C. App. 696, 197 S.E. 2d 901, *cert. denied*, 284 N.C. 124, 199 S.E. 2d 663 (1973). The dead man's statute does not bar one from testifying as to his own acts or matters as to which he has independent knowledge not acquired in a communication or transaction with a deceased person. *Waddell v. Carson, supra; Carswell v. Greene*, 253 N.C. 266, 116 S.E. 2d 801 (1960). Here, Smith's affidavit primarily concerns his own acts, and does not relate to transactions or communications with the deceased, William Homer Barnes.

For the foregoing reasons, the judgment of the superior court is

Affirmed.

Judges WELLS and COZORT concur.

PEGGY SOLES SHAW, ADMINISTRATRIX OF THE ESTATE OF JOSEPH E. SOLES, SR. v. EDDIE MALCOLM WILLIAMSON

No. 844SC203

(Filed 2 July 1985)

1. Appeal and Error § 6.2— compelling answers to interrogatories—self-incrimination—right of appeal

Defendant had the right to appeal an interlocutory order compelling him to answer interrogatories which might violate his right against self-incrimination.

2. Constitutional Law § 74; Rules of Civil Procedure § 33— compelling answers to interrogatories—no violation of right against self-incrimination

Defendant could not refuse to answer interrogatories in a wrongful death action arising out of an automobile accident on the ground of self-incrimination where (1) defendant's answers could not incriminate him since he had pled guilty to death by vehicle and driving while intoxicated based on the same incident and had complied with the judgments entered in those cases, and (2) no allegation of plaintiff's complaint would support either of the required findings under G.S. 1-311 for execution against defendant's person. Furthermore, interrogatories as to whether defendant had a cold on the night in question, where he was going, who employed him and other similar matters had no incriminating propensity.

APPEAL by defendant from *Bruce, Judge.* Order entered 28 November 1983 in Superior Court, ONSLOW County. Heard in the Court of Appeals 14 November 1984.

In this wrongful death action, based on a collision between automobiles operated by defendant and plaintiff's intestate, plaintiff seeks both compensatory and punitive damages based on allegations that defendant operated his vehicle in wanton disregard of the rights, life, and safety of plaintiff's intestate by driving while intoxicated and without adequate sleep. After defendant answered and counterclaimed, plaintiff served various interrogatories on defendant concerning his activities, condition and status during the period immediately before the collision. Defendant declined to answer some of the interrogatories on the grounds of self-incrimination and contended that his answers would subject him to "fines, penalties, imprisonment, forfeitures or punitive damages." Upon plaintiff moving to compel defendant to answer the interrogatories, the court sustained certain of defendant's objections but overruled others and ordered defendant to answer the latter interrogatories. Defendant's appeal is from that order.

The disputed interrogatories were as follows:

[4] (d) Did the operator have a cold, muscular soreness, headache, or other minor discomfort?

. . . .

(e) If so, describe.

. . . .

10. (a) At the time of the collision, where was the driver of the vehicle in question (4) coming from and going to?

. . . .

(b) When had operator started on this trip?

. . . .

(c) What was the purpose of the trip?

. . . .

(d) By whom was the driver employed?

. . . .

(e) Was the driver acting as the agent of the employer described in answer (c) above in the course and scope of his employment at the time the collision occurred?

. . . .

(g) Who had been passengers in the vehicle at any time from the beginning of the trip?

. . . .

(h) State the locations and addresses of any stops made by the operator of the defendant's vehicle within two hours prior to the alleged collision and the purposes of said stops.

Ellis, Hooper, Warlick, Waters & Morgan, by John Drew Warlick, for plaintiff appellee.

Moore, Ragsdale, Liggett, Ray & Foley, by George R. Ragsdale and Nancy Dail Fountain, for defendant appellant.

PHILLIPS, Judge.

[1] Though this appeal is from an interlocutory order, it is nevertheless authorized under the provisions of G.S. 1-277 and G.S. 7A-27(d). Because the right against self-incrimination is a very substantial right, indeed, protected by both the United States and North Carolina Constitutions, and if some of the interrogatories are incriminating, as defendant contends, and he is nevertheless compelled to answer them now his constitutional right could be lost beyond recall and his appeal at the end of the

trial would be of no value. *Stone v. Martin*, 56 N.C. App. 473, 289 S.E. 2d 898, *cert. denied*, 306 N.C. 392, 294 S.E. 2d 220 (1982).

[2] Defendant cannot incriminate himself criminally by answering the interrogatories, however, because the record shows that, based on the same incident referred to in the complaint, he was charged with death by vehicle and driving while intoxicated, pled guilty, and has complied with the judgments entered on the convictions. But the constitutional protection against self-incrimination also extends to civil actions that subject one to arrest, imprisonment, or execution against the person. The case so holding that defendant most strongly relies on is *Allred v. Graves*, 261 N.C. 31, 134 S.E. 2d 186 (1964). In that case plaintiff sought punitive damages of the defendant for a malicious assault and the Court held that defendant did not have to answer certain interrogatories deemed to be incriminating. The basis for the Court's holding, though, was that if a judgment for punitive damages was entered against defendant and was not satisfied by regular execution he would be subject to execution against the person pursuant to the provisions of G.S. 1-311. But the defendant in this case faces no such peril and in our opinion the order requiring defendant to answer the interrogatories was properly entered. In 1977, after *Allred* was decided, G.S. 1-311 was amended to limit execution against the persons of judgment debtors to instances where either the jury's verdict or the judge's findings of fact include a finding "that the defendant either (1) is about to flee the jurisdiction to avoid paying his creditors, (2) has concealed or diverted assets in fraud of his creditors, or (3) will do so unless immediately detained." But since there is no allegation in plaintiff's complaint that would support either of the required statutory findings for execution against the person, we see no basis for defendant's self-incrimination plea and he must answer the interrogatories, as the trial court ordered. Furthermore, the objected to interrogatories, in our opinion, have no incriminating propensity in any event. So far as we can tell from the record and the law relating to it, stating whether he had a cold on the night involved, where he was going, who employed him, and other such things called for by the interrogatories could not conceivably incriminate defendant. The Constitution protects against real dangers, not mere speculative possibilities. *Zicarelli v. Investigation Commission*, 406 U.S. 472, 32 L.Ed. 2d 234, 92 S.Ct. 1670 (1972).

Affirmed.

Judges WHICHARD and JOHNSON concur.

TONY R. GORDON, EMPLOYEE, PLAINTIFF v. WEST CONSTRUCTION CO., EMPLOYER, AND CONSOLIDATED AMERICAN INS. CO., CARRIER, DEFENDANTS

No. 8410IC1236

(Filed 2 July 1985)

Master and Servant § 50.1— workers' compensation—carpentry work—employee rather than independent contractor

The Industrial Commission correctly found that plaintiff was an employee of defendant rather than an independent contractor at the time of his accident where defendant, a contractor, had subcontracted a painting job to plaintiff's father; defendant had asked plaintiff's father in plaintiff's presence to hang molding along the roof of the house on which they were working; plaintiff's father did not do carpentry work; plaintiff agreed to do the work; plaintiff was to be paid by the hour; and defendant supplied the materials and brought them to the job site, which was under defendant's control.

APPEAL by the defendant-employer, West Construction Company, and the defendant-insurance carrier, Consolidated American Insurance Company. Opinion and award filed by the North Carolina Industrial Commission on 4 September 1984. Heard in the Court of Appeals 17 May 1985.

Taylor, Warren, Kerr & Walker, by John Turner Walston, for defendant appellants.

Farris and Farris, P.A., by Robert A. Farris, Jr. and Thomas J. Farris, for plaintiff appellee.

BECTON, Judge.

In this workers' compensation case, the sole question presented for review is whether the evidence is sufficient to sustain the North Carolina Industrial Commission's finding and conclusion that the claimant, Tony R. Gordon, at the time of his accident, was an employee of the defendant, West Construction Company (West), rather than an independent contractor. Guided by the controlling principle in these types of cases that the ap-

pellate court is bound by the findings of the Industrial Commission, when supported by competent evidence, even though there may be evidence in the record to support contrary findings, we affirm.

I

The essential facts follow. West, a contractor, subcontracted a painting job to Ed Gordon, the father of the claimant, Tony Gordon. While Ed Gordon and his two sons were painting the outside of the house in question, West asked Ed Gordon to hang molding along the roofline in order to avoid having West's carpentry crew climb up there. West and Ed Gordon discussed the molding job in the presence of Tony Gordon, and because Ed Gordon did not do carpentry work, Tony Gordon agreed to hang the molding. He and his father testified that he was to be paid by the hour for that job. While Tony Gordon was hanging the molding, a swarm of bees attacked him, causing him to fall from the ladder and suffer serious injuries, the basis for this claim.

The Deputy Commissioner hearing the claim found that: (1) Tony Gordon was an employee of Ed Gordon; (2) Ed Gordon was a subcontractor of West; (3) West was the principal contractor; and thus, (4) West and Consolidated American Insurance Company were liable for Tony Gordon's workers' compensation benefits. The North Carolina Industrial Commission sustained the Deputy Commissioner's finding with the following modification: Tony Gordon was found to be a direct employee of West at the time of the accident.

II

To establish that he was covered by the provisions of the Workers' Compensation Act, Tony Gordon had the burden of proving that he was either an employee of West or an employee of his father, Ed Gordon. Believing that the evidence fully supports the Industrial Commission's finding that Tony Gordon was an employee of West, we reject West's contention that the Industrial Commission erroneously found that Tony Gordon was an employee of Ed Gordon. Although it would have been the better practice for the Industrial Commission to have deleted the finding of the Deputy Commissioner that Tony Gordon was an employee of Ed Gordon, we are convinced from our reading of the In-

dustrial Commission's opinion and award that the Deputy Commissioner's finding was modified by the specific findings of the Industrial Commission which follow:

> Both parties appeared before the Full Commission and ably argued their respective positions in this case. The Full Commission makes the following addition to Findings of Fact number 3: At the end of the paragraph, add:
>
> > Plaintiff, Tony R. Gordon, was actually working for West Construction Company by the hour hanging molding at the time of his injury by accident.
>
> The Full Commission has considered the record in its entirety and can find no reversible error.

We now focus on the nature of the relationship between Tony Gordon and West. We conclude from our reading of the record that there is evidence to support the Industrial Commission's finding that Tony Gordon was actually working for West by the hour. Ed Gordon, the claimant's father, was unquestionably an independent contractor with regard to the painting job that had been subcontracted to him. And, there is authority that the relationship of owner and independent contractor does not change, when the independent contractor agrees to do additional work *of the same nature* not covered by the original contract, if the additional work is under the independent contractor's control, including the supply of labor and materials. *See Odum v. Nat'l Oil Co.*, 213 N.C. 478, 196 S.E. 823 (1938). The facts of this case are different from *Odum*, however. The additional work that West and Ed Gordon talked about in Tony Gordon's presence was not of the "same nature" as the work covered by the original contract. West is a contractor who has regular carpentry crews. Hanging molding is carpentry. Ed Gordon is a painting subcontractor, who testified that he asked Tony Gordon "if he could do it . . . [because] I'm not very good at carpentry work, so I knew I couldn't do it." We also find it significant that Tony Gordon was to be paid by the hour for the molding work. Moreover, West supplied the materials and brought them to the Kirby house—the job site, which was under the control of West.

Finally, we find the cases cited by West to be inapposite as they involve additional work of the same nature or services to be

performed for a lump sum rather than an hourly wage. The opinion and award of the Industrial Commission is therefore

Affirmed.

Judges EAGLES and PHILLIPS concur.

STATE OF NORTH CAROLINA v. SYLVESTER THOMAS LATTA

No. 8426SC491

(Filed 2 July 1985)

1. **Criminal Law § 66.4— victim's presence at arraignment—no denial of neutral lineup**

A robbery victim's unannounced, unexpected presence at defendant's arraignment did not deny defendant his right to a neutral lineup procedure under G.S. 15A-281 where defendant made no request for such a procedure and did not ask the court to find that such a procedure could not be fairly conducted.

2. **Criminal Law § 66.12— failure to rule on arraignment confrontation—harmless oversight**

The trial court's failure to rule on whether an arraignment confrontation was impermissibly suggestive was a harmless oversight where the victim's in-court identification of defendant was based on a reliable pretrial photographic identification and the victim's observations of defendant in a well lighted room at close range for several minutes.

3. **Criminal Law § 113.1— identification of defendant—failure to recapitulate evidence**

In a robbery prosecution in which identification of defendant was the only real issue, the trial court erred in charging the jury where the summary of evidence relating to identification did not mention the victim's unannounced presence at defendant's arraignment or that a police report made after the first interview with the victim contained the word "no" in answer to a question as to whether the suspect could be identified.

APPEAL by defendant from *Burroughs, Judge*. Judgment entered 15 December 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 February 1985.

Defendant was charged with and convicted of armed robbery pursuant to G.S. 14-87. The State's evidence tended to show that on the night of 3 June 1983 Carl Alexander, the owner of Famous

Pinball on North Tryon Street in Charlotte, saw defendant and another man drive by under the streetlights. A couple of minutes later defendant entered the place, asked Alexander what time he closed, and after being told played a pinball machine and then a video game. Then the other man that Alexander had seen with defendant walked in, asked for a game Alexander did not have, and began playing a pinball machine. Defendant then stated that his video game was not working properly, walked over to the other man and said something; and then walked to the counter and asked what Doritos cost. Upon being told defendant handed Alexander a dollar bill, and when Alexander looked up after making change defendant and the other man had guns pointed in his face. Thereafter the men rifled the cash register; made Alexander get a money box from the office and give it to them; searched Alexander's pockets and took his wallet and keys; and told him to lie on the closet floor. After Alexander heard them leave he called upstairs to his brother, who called the police, and after they arrived Alexander described the robbers and the robbery to them.

On 19 June 1983, sixteen days after the robbery, a police officer gave Alexander a stack of six pictures to look through and told him to overlook the sizes and shapes of the pictures, not to turn them over, and to see if he recognized either man that had robbed him. After going through the pictures twice Alexander identified defendant as being one of the robbers and defendant was arrested. Thereafter, Alexander and his wife called the Assistant District Attorney handling the case several times and were told that defendant's arraignment had been scheduled but Alexander did not have to attend. Nevertheless, on the day defendant was arraigned the Alexanders went to the courtroom where another District Attorney was in charge. Alexander identified himself, asked if the Latta hearing had been held, and after being told that it had not, unbeknownst to defense counsel he remained in the courtroom and saw defendant brought into the courtroom and heard his counsel argue for a bond. Based thereon defense counsel moved to dismiss the case and to suppress the identifying evidence. The motions were denied both then and when they were renewed later at trial.

Attorney General Edmisten, by Associate Attorney General Barbara Peters Riley, for the State.

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

PHILLIPS, Judge.

[1] Defendant first contends that the unannounced, unexpected presence of the robbery victim, Carl Alexander, at defendant's arraignment denied him his right to a neutral lineup procedure under the provisions of G.S. 15A-281. We disagree. The defendant made no request for such a procedure, either before or after the identifying witness's unexpected presence at the arraignment hearing; nor did defendant ask the court to find that he intended to request such a procedure and that the procedure could not be fairly conducted. Since these questions were neither raised nor ruled on in the trial court, they will not be decided by us now. *State v. Parks*, 290 N.C. 748, 228 S.E. 2d 248 (1976).

[2] Defendant also contends that the photo display and the pretrial confrontation were impermissibly suggestive. Unnecessarily suggestive identification procedures are disapproved because they substantially increase the likelihood of misidentification, but "the admission of evidence of a showup without more does not violate due process." *Neil v. Biggers*, 409 U.S. 188, 198, 34 L.Ed. 2d 401, 411, 93 S.Ct. 375, 382 (1972). In all events the trial court ruled on adequate findings supported by competent evidence that the pretrial photo identification "was not so unnecessarily suggestive and conducive to irreparably mistaken identification so as to violate the defendant's right to due process of law," and we are bound thereby. *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972). And while the trial court made no specific finding with respect to the arraignment confrontation, it did find upon a wealth of competent evidence that:

> [B]ased on clear and convincing evidence, any in-court identification of the defendant is of an independent origin based solely upon what the witness saw at the time of the armed robbery and is not tainted by any pretrial identification procedure so unnecessarily suggestive as to constitute irreparably mistaken identification.

Thus, even if the arraignment confrontation was impermissibly suggestive, the court's failure to rule in regard to it was a harmless oversight, in our opinion, since the later in-court identification was based on the reliable out-of-court photo display identification and the witness's observation of the defendant in a well lighted room at close range for several minutes. "[R]eliability is the linchpin in determining the admissibility of identification testimony," *Manson v. Brathwaite*, 432 U.S. 98, 114, 53 L.Ed. 2d 140, 154, 97 S.Ct. 2243, 2253 (1977); *State v. Headen*, 295 N.C. 437, 245 S.E. 2d 706 (1978), and the evidence recorded in this case is sufficient to support the judge's conclusion that the testimony was reliable.

[3] But the defendant's contention that the court committed prejudicial error in charging the jury is well taken. Before the judge charged the jury defendant objected on the ground that the proposed summary of evidence relating to his identification did not mention Alexander's presence at the arraignment or that the incident report made by the police after interviewing Alexander the first time contained the word "no" in answer to the question, "Can the suspect be identified?" Defendant objected on the same grounds after the charge was given. Identification was the only real issue in the case and the evidence referred to was the foundation stone upon which defendant's hope for an acquittal rested, with some justification. Since the evidence referred to could support the inference that Alexander's identification of defendant was unreliable because it was based on developments that occurred after defendant had left the scene of the crime, his objection was well taken. In depriving defendant of the fair benefit of this evidence, vital to his case, the trial court impermissibly and erroneously tilted the scales in favor of the State and a new trial is required. *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978).

New trial.

Judges WEBB and MARTIN concur.

STATE OF NORTH CAROLINA v. EMANUEL WILLIE JONES

No. 8416SC903

(Filed 2 July 1985)

1. **Homicide § 26— second degree murder—self-defense—evidence of murder sufficient**

The court did not err by denying defendant's motion to dismiss the charge of second degree murder where defendant's statement that he shot decedent in self-defense when decedent was advancing on him with a knife was contradicted by evidence that decedent had nothing in his hands but cigarettes, decedent's knife was closed and in his pocket, and neither man moved towards the other after a warning shot was fired.

2. **Criminal Law § 102.5— cross-examination—improper question—no prejudice**

There was no prejudice in a prosecution for second degree murder where the prosecutor on cross-examination asked the widow of decedent, a defense witness, whether she could say anything she wanted since the decedent was not there to contradict her.

APPEAL by defendant from *Mills, Judge.* Judgment entered 17 February 1984 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 14 March 1985.

Defendant was tried and convicted of second degree murder. The State's evidence was as follows: James Wiley Smith and his wife had been separated for about three years. Defendant and Smith had been hostile towards each other since defendant started associating with his wife about six months earlier, and they had quarreled several times about it. On the day in question: Shortly after defendant arrived at a convenience store the decedent James Wiley Smith entered and the two men began arguing. The proprietor stepped between them and asked them to leave his premises separately. Smith, leaving the store first, walked toward the gas pumps; defendant, leaving in the opposite direction, walked toward his car. Shortly thereafter two gunshots were heard and witnesses saw Smith stagger and fall. When the shots were fired the two men were standing about six to eight feet from defendant's car, according to one witness, who did not see what, if anything, either man held in his hands. Immediately after the first shot was fired another witness saw Smith holding several cigarette packages in his right hand and did not see him with a knife. A closed knife was in Smith's pants pocket after the shoot-

ing and the only objects found on the ground near him were two packs of cigarettes. Immediately after the shooting defendant drove his car to the sheriff's office and told a deputy that he had shot James Wiley Smith. When questioned further defendant stated that Smith followed him to his car and threatened him with a knife; that he then got his gun from the car, fired one shot in warning, and when Smith continued to advance on him with the knife he shot a second time in self-defense.

Defendant's testimony concerning the shooting was largely consistent with the State's account of his statement. In addition he testified that Smith had threatened him on many occasions and he had threatened Smith several times. Other defense witnesses testified to previous arguments and threats by the two men. Smith's estranged wife, a passenger in defendant's car at the time of the shooting, testified that: Smith had threatened to kill them if he ever saw her and defendant together again; she left him three years earlier because of his violent and dangerous character; though she heard defendant warn Smith to leave him alone she did not see the shooting, because she dived down on the seat of the car when defendant got his gun.

Attorney General Edmisten, by Assistant Attorney General Tiare B. Smiley, 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 trial court erred in denying his motion to dismiss the charge of second degree murder because the evidence was insufficient for a rational trier of fact to find beyond a reasonable doubt that he was guilty. Specifically, he contends that his statement to the deputy sheriff, introduced into evidence by the State, exculpated him under *State v. Tolbert*, 240 N.C. 445, 82 S.E. 2d 20 (1954). We disagree. The introduction of a defendant's exculpatory statement does not preclude the State from showing that the facts were otherwise; and when the State's evidence, according to the view taken of it, tends to both inculpate and exculpate the defendant, it is a jury issue. *State v. Robinson*, 229 N.C. 647, 50 S.E. 2d 740 (1948). Defendant's statement that he shot Smith in self-defense when Smith was advanc-

ing on him with a knife is contradicted by evidence that Smith had nothing in his hands but some cigarettes, his knife was closed and in his pocket, and neither man moved towards the other after the warning shot was fired. Thus, the jury was at liberty to choose between these conflicting versions of the incident and their finding that defendant shot Smith with felonious intent, rather than in self-defense, is not invalid, as defendant contends.

[2] The defendant also cites as error the prosecutor's cross-examination of Geneva Smith, the widow of the decedent and a witness for the defendant, as follows:

> Q Truth is, Mrs. Smith, you can say about anything you want to since your husband isn't here—
>
> MR. GORDON: Object.
>
> Q —to contradict you, can't you?
>
> THE COURT: Overruled.
>
> Q Can't you?
>
> A What?
>
> Q Tell about anything you please about threats or anything else, can't you?
>
> A Well, I'm telling the truth.
>
> Q You took an oath to tell the truth, didn't you?
>
> A That's right.

While this was certainly improper cross-examination and for the obvious purpose of prejudicing defendant's case with the jury, we seriously doubt that it had that effect. Jurors are not without perception; those sitting on this case already knew that there would be no rebuttal by the decedent, and since few people enjoy being told the obvious, it is unlikely that the prosecutor's announcement of that fact impressed them. Even so the court should have stopped and corrected this attempt at prejudice, rather than condone it.

No error.

Judges ARNOLD and COZORT concur.

STATE OF NORTH CAROLINA v. DON WESLEY KING

No. 8421SC837

(Filed 2 July 1985)

Bills of Discovery § 6— ballistics report—required disclosure by defendant—prejudicial error

The trial court had no authority under G.S. 15A-905(b) to require that a copy of the report of a ballistics expert hired by defendant be furnished to the district attorney where the record did not show that defendant ever intended to introduce the report or put the expert on the stand; furthermore, defendant was prejudiced by the court's order since it permitted the State to know more about this critical aspect of defendant's case than it was entitled to know and enabled the prosecutor improperly to imply to the jury that defendant's ballistics expert agreed with the State's expert.

Judge ARNOLD dissents.

APPEAL by defendant from *Beaty, Judge*. Judgment entered 22 February 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 12 March 1985.

Defendant appeals from his convictions for discharging a firearm into an occupied building pursuant to G.S. 14-34.1, assault with a deadly weapon with intent to kill inflicting serious bodily injury pursuant to G.S. 14-32, and possession of a firearm by a felon pursuant to G.S. 14-415.1.

The State's evidence tended to show that: At 7 o'clock in the morning on 1 September 1983, while in the den of her house in Winston-Salem, Mrs. Gail Voss Butler was shot by a pistol bullet that entered the house through the den window. A few minutes earlier a neighbor of Mrs. Butler's and the neighborhood paper boy saw a man in work clothes get out of a dark colored station wagon that had wood grain sides and a large white stain, and walk toward the Butler house. Neither witness saw anyone else in the vehicle. Some weeks earlier defendant had worked on Mrs. Butler's house and he visited her several times thereafter. A few days before the shooting, Mrs. Butler's house was robbed of several items, and during one of his visits defendant showed her how the thief entered via the sliding glass door and told her how to secure the door thereafter. Defendant owned a dark colored, wood grained Ford station wagon and worked at a carpentry shop situated several miles from Mrs. Butler's house. Jimmy Lee White, Sr. worked with defendant and was at the shop around

7:15 o'clock the morning of the shooting when defendant arrived in his station wagon, driven by his girlfriend. During that morning defendant told White his ears were ringing from firing a gun earlier, and he pulled a pistol out of a paper bag and let White examine it. The pistol had three shells in it, one of which had been fired, and had a tiger on the grip. White told defendant not to leave the gun with the work tools and he left it in White's truck when they went to lunch. That afternoon when the police asked White whether he had seen defendant with a gun that day he denied that he had, because he did not want to get defendant, a paroled felon, in trouble. White gave the pistol to the police the next morning and told them the defendant had it the day before. The pistol was examined by the State's ballistics expert, who testified that was the weapon that shot Mrs. Butler.

Defendant testified in substance that: He did not shoot Mrs. Butler, was being driven to work by his girlfriend at 7 o'clock when the shooting occurred and was there when White arrived a few minutes later. The tiger handled pistol was not his but White's, and White tried to sell it to him the morning Mrs. Butler was shot, after trying to get his girlfriend to buy it the day before. His girlfriend testified that defendant was not out of her sight on the morning of the shooting from the time he got up at 6:30 until she dropped him off at work a few minutes after 7 o'clock, and that White tried to sell the pistol to her the day before.

Before trial defendant moved that a ballistics expert of his choosing be permitted to examine the pistol. In granting the motion the court ordered that a copy of the examining expert's report be sent to the District Attorney, and the District Attorney received the report before the trial, though the defendant never decided to introduce the report into evidence or have the maker of it testify as a witness. In presenting the State's case the prosecutor questioned a police witness about being ordered by the court to take the pistol and bullet to a ballistics expert engaged by defense counsel.

Attorney General Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.

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

PHILLIPS, Judge.

Since no witness saw defendant shoot Mrs. Butler or identified him as being at the scene near the time she was shot, the ballistics opinion evidence, which was not as unequivocal and direct as we have seen, was crucial both to the State and the defendant. The State's case on this pivotal point was erroneously strengthened to defendant's irreparable prejudice, we think, when the prosecutor deliberately implied to the jury that defendant's ballistics expert, who did not testify, agreed with the State's expert. Though the prosecutor's acts were his responsibility and inexcusable, they could not have happened if the court had followed the law in permitting defendant's expert to examine the gun. G.S. 15A-905(b) provides in pertinent part that where objects in the State's possession are examined or tested pursuant to a defendant's motion that "the court must, *upon motion of the State*, order the defendant to permit the State to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case . . . *which the defendant intends to introduce* in evidence at the trial or which were prepared by a witness whom the defendant *intends* to call at the trial." (Emphasis supplied.) Since the record does not show that defendant ever intended to introduce the report or put the preparer of it on the stand, the judge had no authority to require that a copy of the report be sent to the District Attorney. *State v. Miller*, 61 N.C. App. 1, 300 S.E. 2d 431 (1983). The purpose of G.S. 15A-905(b) is not to inform the State why scientific evidence will not be offered by the defendant, but to acquaint it with scientific evidence that will be offered during the trial. Thus, the State had the undue advantage of knowing before presenting its own ballistics evidence that it probably would not be attacked or refuted by defendant's ballistics evidence. Whether this knowledge resulted in the State's evidence on this crucial point being less equivocal than it would have been otherwise, we do not know; but that the State as a consequence of an order entered in violation of a statute knew more about this critical aspect of defendant's case than it would have known if the law had been obeyed entitles defendant to a new trial on all the charges, as the gun and its use or possession was an essential element of each.

New trial.

Judge COZORT concurs.

Judge ARNOLD dissents.

MARY CATHERINE WEBSTER v. CARL ROBERT WEBSTER

No. 8418DC1227

(Filed 2 July 1985)

1. **Constitutional Law § 26.6— Texas property settlement—default judgment—entitled to full faith and credit**

A North Carolina district court erred by not giving full faith and credit to a Texas default judgment for payment of arrears under a property settlement approved by a Texas court. Defendant entered a special appearance in Texas to contest jurisdiction, his objection was overruled, default judgment was entered, and prospective attorney fees, allowed in Texas on proper proof, were awarded. Defendant did not appeal the Texas order or object to the lack of detailed findings of fact; if the Texas proceedings were irregular, that matter should properly have been raised by appeal or post-trial motion in Texas. U. S. Constitution, Art. IV, § 1.

2. **Constitutional Law § 26.6; Divorce and Alimony § 21.8— Texas divorce decree—entitled to full faith and credit**

A North Carolina district court erred by concluding that a Texas divorce decree was void because it specified that the Agreement Incident to Divorce would be void if the divorce was not granted within forty-five days and the decree of divorce was signed fifty-two days later. The full faith and credit clause precludes examination of such matters on the merits; moreover, the divorce decree was signed by counsel for both parties and defendant admitted compliance with it for at least two years.

3. **Constitutional Law § 26.6; Divorce and Alimony § 21.8— Texas property settlement—North Carolina motion to increase—properly denied**

In an action in North Carolina to enforce a Texas default judgment for arrears in a property settlement, the court did not err by denying plaintiff's motion to increase her share of defendant's military retirement benefits from 46 percent to 50 percent where there was nothing in the pleadings asking for such relief and plaintiff did not demonstrate how the court should have assumed jurisdiction to modify a Texas property settlement decree.

APPEAL by plaintiff from *Cecil, Robert, Judge.* Judgment entered 10 July 1984 in GUILFORD County District Court. Heard in the Court of Appeals 16 May 1985.

Webster v. Webster

Plaintiff wife and defendant husband were divorced in 1977 in Texas, with child support and property division settled by agreement approved by the court. Under the property settlement, plaintiff was to receive 46 percent of regular payments of defendant's military retirement benefits. Defendant thereafter moved to North Carolina. Plaintiff filed a motion in the cause in Texas in 1982, seeking payment of arrears. The Texas court overruled defendant's special appearance to contest jurisdiction and entered default judgment for plaintiff in the amount of $12,541.14 in January 1983. In August 1983, plaintiff filed this action in North Carolina seeking enforcement of the Texas money judgment. Defendant denied liability, contending that the Texas judgment was unenforceable on jurisdictional and other grounds. Both parties moved for summary judgment. The court denied plaintiff's motion and allowed defendant's motion, denying the Texas judgment full faith and credit and dismissing the action. Plaintiff appealed.

Pearman & Pearman, by Richard M. Pearman, Jr., for plaintiff.

Elton Edwards for defendant.

WELLS, Judge.

Full faith and credit shall be given in each state to the judicial proceedings of every other state. U.S. Const. Art. IV, § 1. A judgment of another state may be attacked in this state only on grounds of fraud, public policy, or lack of jurisdiction. *White v. Graham*, 72 N.C. App. 436, 325 S.E. 2d 497 (1985). A second court's review of the jurisdiction of a court rendering a judgment is limited to determining if the jurisdictional issues were fully and fairly litigated. *Boyles v. Boyles*, 308 N.C. 488, 302 S.E. 2d 790 (1983). Once the jurisdictional issues have been litigated, constitutional federal principles preclude their relitigation elsewhere. *Durfee v. Duke*, 375 U.S. 106 (1963); *Sherrer v. Sherrer*, 334 U.S. 343 (1948). Appearing specially to contest jurisdictional issues constitutes litigation of those issues for full faith and credit purposes. *Cook v. Cook*, 342 U.S. 126 (1951). This leaves non-resident parties the unenviable choice of not appearing at all in the foreign state or appearing to contest jurisdiction and, if unsuccessful, submitting to jurisdiction over the merits. *See Sherrer v. Sherrer, supra* (Frankfurter, J., dissenting). That is the law, however.

[1] Here the record clearly shows that through counsel defendant entered a special appearance in Texas to contest jurisdiction, and that at that appearance his objection was overruled. These proceedings are entitled to a presumption of regularity, and jurisdiction is presumed until the contrary is shown. *Thrasher v. Thrasher*, 4 N.C. App. 534, 167 S.E. 2d 549, *cert. denied*, 275 N.C. 501 (1969); *Cook v. Cook, supra.* Defendant did not appeal the Texas order, nor did he object to the lack of detailed findings of fact. On this record, the Texas decree is entitled to full faith and credit. Texas Rule of Civil Procedure 120a, which provides that by entering a special appearance which is overruled the non-resident does not waive his or her objection to jurisdiction, does not change this result. The objection is preserved for review by Texas courts, not other states. *See Middleton v. Kawasaki Steel Corp.*, 687 S.W. 2d 42 (Tex. Ct. App. 1985) (Texas asserts jurisdiction to the limits of due process); *Harris v. Poole*, 688 S.W. 2d 78 (Tenn. App. 1984) (special appearance in Texas overruled; res judicata on jurisdictional issues). This conforms with Texas' own practice regarding judgments of other states. *See Moody v. First Nat. Bank of Dona Ana County*, 530 S.W. 2d 879 (Tex. Civ. App. 1975).

The trial court, in concluding that the Texas decree was not entitled to full faith and credit, apparently agreed with defendant that he had been denied due process in Texas by entry of default against him. The record is silent as to why default was entered: it does show that defendant's counsel entered a special appearance and thereafter approved the form of the default judgment. As discussed above, once his special appearance was overruled, defendant had to be prepared to appeal or proceed generally. We can only speculate as to why he did not. We must presume the default judgment was regular. If the Texas proceedings were irregular, that matter properly should have been raised by appeal or post-trial motion in Texas, not here in North Carolina.

The trial court expressed concern in its order that an award of prospective attorney fees might chill defendant's right to appeal. Such fees are allowed in Texas, however, upon proper proof. *Pleasant Hills Children's Home of the Assemblies of God, Inc. v. Nida*, 596 S.W. 2d 947 (Tex. Civ. App. 1980). The hearing record not being before us, we must again presume that the Texas court reached its award upon sufficient evidence. Defendant's right to

appeal in Texas, governed by Texas and not North Carolina law, was not thereby infringed.

[2] The court also concluded that the original Texas divorce decree, signed in 1977, on which these enforcement proceedings depend, was void. As noted above, the full faith and credit clause precludes examination of such matters of defense on the merits. In any event, it appears that the court reached its conclusion from a recitation in the Agreement Incident to Divorce to the effect that if the divorce was not granted within forty-five days of execution, the agreement would be void. The decree of divorce, signed some fifty-two days later, specifically incorporated the agreement. The decree was signed by counsel for both parties. Defendant admits compliance with it for at least two years. Under the circumstances, we conclude that the parties mutually waived the right to insist on enforcement of the provision voiding the agreement.

We therefore conclude that the trial court erred in denying full faith and credit to the Texas judgment.

[3] In an unrelated assignment of error, plaintiff contends that the court erroneously denied her motion to increase her share of defendant's retirement benefits from 46 percent to 50 percent. Like the trial court, we find nothing in the pleadings asking for such relief. Moreover, plaintiff has not demonstrated how the court should have assumed jurisdiction to modify a Texas property settlement decree. On this record, we conclude that this portion of the judgment was correct.

That portion of the judgment denying full faith and credit to the Texas judgment is reversed; that portion of the judgment denying plaintiff's request for modification is affirmed. The cause is remanded for further proceedings not inconsistent with this opinion.

Affirmed in part; reversed and remanded in part.

Judges JOHNSON and COZORT concur.

BLACKWELDER FURNITURE COMPANY OF STATESVILLE, INC. v. JACK R. HARRIS

No. 8522DC61

(Filed 2 July 1985)

1. **Rules of Civil Procedure § 41— dismissal for failure to prosecute—motion by defendant unnecessary**

A trial judge has authority to dismiss a plaintiff's claim pursuant to G.S. 1A-1, Rule 41(b) for failure to prosecute without a motion by defendant to do so. This decision limits the holding in *Simmons v. Tuttle*, 70 N.C. App. 101, 318 S.E. 2d 847 (1984).

2. **Parties § 8— trustee in bankruptcy—proper party to plaintiff's claim—necessary party to counterclaim—necessity for findings of fact**

Plaintiff's trustee in bankruptcy was a proper but not necessary party with respect to plaintiff's claim against defendant to recover on a past due account, and it was thus not necessary for the trial judge to make findings of fact in ruling on a motion to make the trustee a party to plaintiff's claim. However, the trustee was a necessary party with respect to defendant's counterclaim for legal services rendered to plaintiff, and the trial court should have made findings of fact in ruling on a motion to join the trustee as a party to the counterclaim.

3. **Rules of Civil Procedure § 41— improper dismissal for failure to prosecute**

Plaintiff's claim to recover for a past-due account was improperly dismissed for failure to prosecute where plaintiff had moved to make its trustee in bankruptcy a party to the action and the trustee was present when the case was called. G.S. 1A-1, Rule 41(b).

APPEAL by plaintiff from *Fuller, Judge*. Order of Involuntary Dismissal entered 20 August 1984 in District Court, IREDELL County. Heard in the Court of Appeals 24 June 1985.

This is a civil action, filed 2 January 1981, in which plaintiff seeks to recover $3,645.18 plus interest and costs on a past due account. In his answer, defendant denied knowledge of any indebtedness and counterclaimed for unpaid legal services rendered by defendant to plaintiff.

On 1 August 1984, plaintiff, by and through its attorneys Marc R. Gordon and Nelson M. Casstevens, Jr., filed a motion stating:

> 1. That on or about January 27, 1982 and subsequent to the filing of this action, plaintiff became a debtor under Chapter 7 of Title 11 of the United States Code.

2. That on or about said date, J. Samuel Gorham, III was duly appointed as Trustee in Bankruptcy of plaintiff.

3. That the said Trustee is required by federal law to properly administer the assets of plaintiff and that this litigation should not continue in the absence of joinder of said Trustee.

4. That the said Trustee has consented to his joinder as a party plaintiff hereto.

Plaintiff then moved the Court to enter an Order joining J. Samuel Gorham, III, as a party plaintiff.

Thereafter the case appeared on the calendar for the regularly scheduled session of the Civil Division of District Court in Iredell County for 20 August 1984, the Honorable George T. Fuller presiding. The record discloses that Samuel Gorham appeared and identified himself to the judge and "suggested" that the case be continued until a later session of court because he, the trustee, was scheduled to appear as a witness in Federal District Court in Wilkesboro, North Carolina the following day. Judge Fuller then announced in open court that the motion to join the trustee as a party to the proceeding would be denied, and that the case would be dismissed for failure to prosecute. The judge entered the following Order:

This matter coming on to be heard and being heard before the Honorable George T. Fuller, Judge presiding over the regularly scheduled August 20, 1984, Civil District Jury term and it appearing to the Court that prior to the call of this calendar, the above matter has been pending in the Iredell County Courts since January 2, 1981, and that the matter has repeatedly appeared on trial calendars and clean-up calendars without appearance by the attorney for Plaintiff and that by letter from attorney for the Plaintiff of March 24, 1982, he has indicated that Plaintiff filed bankruptcy but that there is no formal notice or record of any bankruptcy proceedings in the file; that by letter of September, 1983, the partner of attorney for Plaintiff wrote the Court a letter indicating that it would file a motion to join the bankruptcy trustee as a party; that motions were filed to join said trustee as a party August 1, 1984, and are on now for hearing; and,

That it further appears to the Court after inquiring into the matter that this matter has been unnecessarily delayed and that said motions should be denied and the matter should be dismissed for failure of Plaintiff to prosecute its claim.

Now, therefore, it is ORDERED, ADJUDGED and DECREED that this matter is hereby involuntarily dismissed with regard to Plaintiff's Complaint and Defendant's counterclaim.

This the 20th day of August, 1984.

s/ GEORGE T. FULLER
Judge Presiding

Plaintiff appealed.

Thomas, Gaither, Gorham & Crone, by J. Samuel Gorham, III, for plaintiff, appellant.

Harris & Pressly, by Edwin A. Pressly, for defendant, appellee.

HEDRICK, Chief Judge.

[1] There is nothing in the record before us to indicate that defendant made a motion to have plaintiff's claim dismissed for failure to prosecute. On appeal, citing *Simmons v. Tuttle*, 70 N.C. App. 101, 318 S.E. 2d 847 (1984), plaintiff strenuously contends that the trial judge was without authority to dismiss plaintiff's claim for failure to prosecute in the absence of a motion by defendant to do so. We note that two of the judges participating in *Simmons* also participated in the review of the present case, and concur in the Court's decision to limit the holding in that case. We disagree with the contention that the trial judge does not have authority to dismiss a claim pursuant to Rule 41(b) in the absence of a motion by defendant to do so. Whether a judge may dismiss a claim pursuant to G.S. Sec. 1A-1, Rule 41(b) depends on the facts and circumstances surrounding the particular case.

[2] In the present case a motion to make the trustee in bankruptcy a party to the action was pending when the case appeared on the calendar. Plaintiff contends the trial judge erred in denying the motion to make the trustee a party.

The trustee, in accordance with the provisions of 11 U.S.C. Sec. 323(a) and 323(b) became, at the time of his appointment, the

legal representative of plaintiff's estate, with the capacity to sue and be sued. Additionally, he "may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor . . ." Bankruptcy Rule 6009. Thus, as plaintiff argues, the trustee had to be made a party, either by intervention or joinder, so that defendant's counterclaim against plaintiff could proceed.

We note that the trial judge made no findings of fact in ruling on the motion to make the trustee a party. It appears that the trustee was a proper party but not a necessary party with respect to plaintiff's claim against defendant, and thus it was not necessary for the judge to make findings of fact in ruling on the motion to make the trustee a party to plaintiff's claim. *Kimsey v. Reaves*, 242 N.C. 721, 89 S.E. 2d 386 (1955). But since the trustee appears to be a necessary party with respect to defendant's counterclaim against plaintiff, the bankrupt, the trial court should have made findings of fact in ruling on the motion. Thus, the Order denying the motion to join the trustee as a substitute party for plaintiff must be vacated, and the cause remanded to the district court for a new hearing and ruling on that motion.

[3] Since the record affirmatively discloses that the trustee was present when the case was called, we hold the trial court erred in dismissing plaintiff's claim with prejudice pursuant to G.S. Sec. 1A-1, Rule 41(b). We note that defendant gave notice of appeal from the Order dismissing the proceeding, but that he did not perfect that appeal. The result is: that part of the Order denying plaintiff's motion to make the trustee in bankruptcy a party to the proceeding is vacated, and the cause is remanded to the district court for further proceedings regarding the motion; that part of the Order dismissing plaintiff's claim for failure to prosecute is vacated, and the cause is remanded for further proceedings.

Vacated and remanded.

Judges ARNOLD and JOHNSON concur.

JACKSON COUNTY BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT AGENCY, EX REL. ANNETTE JACKSON v. JOHN WESLEY SWAYNEY

No. 8430DC976

(Filed 2 July 1985)

Indians § 1— action to establish paternity and recover public assistance payments

The District Court of Jackson County did not have subject matter jurisdiction over an action to have defendant adjudicated the father of Kevin Jackson and to collect for past public assistance paid for Kevin's benefit where Kevin, defendant, and Kevin's mother were all members of the Eastern Band of Cherokee Indians living within their reservation. Under 25 C.F.R. § 11.22 (1984) the status of the defendant controls the proper forum for litigation, making it irrelevant to determine whether plaintiff or Kevin's mother is the real party in interest; moreover, 25 C.F.R. § 11.30 (1984) states that the Court of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child. G.S. 1A-1, Rule 12(h)(1) and (2).

Judge WEBB dissenting.

APPEAL by plaintiff from *Snow, Judge*. Judgment entered 16 July 1984 in District Court, JACKSON County. Heard in the Court of Appeals 18 April 1985.

In April 1982 plaintiff, the Jackson County Child Support Enforcement Agency, filed a civil action to have defendant adjudicated the father of Kevin Jackson and to collect a debt owed to the State of North Carolina for past public assistance paid for Kevin's benefit, a recipient of Aid for Dependent Children. Annette Jackson, Kevin's mother, swore under oath that defendant was the biological father of Kevin Jackson.

Defendant filed a general answer denying the material allegations contained in the complaint, without raising any defenses pursuant to G.S. 1A-1, Rule 12(b)(1) and (2). On 16 July 1984 defendant filed a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(1) and (2). From an Order granting defendant's motion to dismiss on both grounds, plaintiff appealed.

Attorney General Edmisten, by Assistant Attorney General Robert E. Cansler for plaintiff-appellant.

Coward, Dillard, Cabler, Sossomon & Hicks, P.A. by Creighton W. Sossoman for defendant-appellee.

PARKER, Judge.

The sole issue presented on this appeal is whether the trial court lacked subject matter jurisdiction to decide this case on its merits. Defendant waived his right to contest lack of personal jurisdiction when he filed his answer without raising this defense. G.S. 1A-1, Rule 12(h)(2). Lack of subject matter jurisdiction may always be raised by a party, or the court may raise such defect on its own initiative, even after an answer has been filed. G.S. 1A-1, Rule 12(h)(1); *Dale v. Lattimore*, 12 N.C. App. 348, 183 S.E. 2d 417, *cert. denied*, 279 N.C. 619, 184 S.E. 2d 113 (1971).

Defendant contends the court lacked the necessary subject matter jurisdiction because he, Annette Jackson and the minor child are members of the Eastern Band of Cherokee Indians, and all three reside within the exterior boundaries of their reservation. Defendant contends that this domestic issue may be litigated only in the Court of Indian Offenses of the Eastern Band of Cherokee Indians. Plaintiff, however, contends that pursuant to G.S. 110-130, it, not Annette Jackson, is the real party in interest and has an independent right to institute civil proceedings in our state courts against the responsible parent of any child to whom it has furnished public assistance.

Only one North Carolina case involving litigation against a member of the Eastern Band of Cherokee Indians who lives on the reservation has been decided by our appellate court. In *Wildcatt v. Smith*, 69 N.C. App. 1, 316 S.E. 2d 870 (1984), *pet. disc. rev. allowed*, 312 N.C. 90, 321 S.E. 2d 909 (1984), appeal withdrawn 4 Dec. 1984, this Court discussed the two pronged infringement-preemption test to determine state court jurisdiction in a paternity suit between two members of the Eastern Band of Cherokee Indians and concluded the District Court was without jurisdiction, after the creation of the Court of Indian Offenses on 28 July 1980, to hold defendant in contempt of a child support order obtained in state court. The Court stated:

> It is clear that any exercise of state power after the creation of the Indian court system would unduly infringe upon the tribe's asserted right of self-government. 69 N.C. App. at 11; 316 S.E. 2d at 877.

The principle of federal preemption is well established, and federal power to regulate Indian affairs is plenary and supreme.

United States v. Mazurie, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed. 2d 706 (1975). The States generally have only such power over Indian affairs on a reservation as is granted by Congress, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 843 (1832), while the tribes retain powers inherent to a sovereign state, except as qualified and limited by Congress. *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed. 2d 303 (1978). An examination of appropriate federal laws and regulations reveals that our state court's subject matter jurisdiction to entertain these domestic actions has been preempted by federal enactments.

The enabling legislation for these tribal courts is contained in 25 C.F.R. § 11.22 (1984), which states:

> The Court of Indian Offenses shall have jurisdiction of all suits wherein the *defendant* is a member of the tribe or tribes within their jurisdiction. . . . (Emphasis added.)

It is clear from this section that it is the membership status of the defendant that controls the proper forum for litigation. The plaintiff's status is not relevant, making it unnecessary to determine whether the plaintiff or Annette Jackson is the real party in interest in this action.

In addition, in a section entitled Domestic Relations, the following appears under 25 C.F.R. § 11.30 (1984):

> The Court of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child.

The present civil action sought to have defendant adjudicated the father of Kevin Jackson and to obtain a judgment for the past public assistance paid to support this child.

Therefore, after considering the well established rules of federal preemption, in conjunction with the two specific federal regulations quoted above which address precisely the issues sought to be litigated below, we hold that plaintiff must litigate this matter in the Court of Indian Offenses, and that our Courts of General Justice lack the necessary subject matter jurisdiction where the defendant is a member of the Eastern Band of Cherokee Indians who resides on the reservation.

The judgment appealed from is

Affirmed.

Judge BECTON concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. Our Supreme Court in *Settle v. Beasley*, 309 N.C. 616, 308 S.E. 2d 288 (1983), held that an action brought by a Department of Social Services under Article 3 of Chapter 49 of the General Statutes is a separate and distinct action from an action brought by the child or mother of the child. The plaintiff in this case is not an Indian and does not live on an Indian reservation. I do not believe the plaintiff is preempted in this case by any federal statute from suing an Indian in a state court.

I vote to reverse.

STATE OF NORTH CAROLINA v. JESSE THOMAS HORTON AKA JESSE PAUL HORTON

No. 848SC629

(Filed 2 July 1985)

1. Narcotics § 4— trafficking in heroin—weight of mixture

Evidence tending to show that defendant sold six tinfoil packets containing a white powdery substance to an undercover agent, that when the contents of all six packets were dumped together they weighed 6.65 grams, and that a sample from the mixture contained one measure of heroin to twenty measures of manitol was sufficient to support defendant's conviction of trafficking in heroin by possessing and selling more than four but less than fourteen grams of heroin notwithstanding defendant contended that all of the heroin could have been in one packet, the contents of which weighed no more than one gram and a fraction.

2. Narcotics § 1— convictions of possessing and selling heroin and cocaine—same transaction

Defendant could properly be convicted under G.S. 90-95(b)(1) of offenses of possessing and selling heroin and offenses of possessing and selling cocaine even though the evidence showed that defendant possessed both substances at the same time and place and sold both substances to an undercover agent in the same transaction.

State v. Horton

APPEAL by defendant from *Phillips, Herbert O., III, Judge.* Judgments entered 10 June 1983 in Superior Court, WAYNE County. Heard in the Court of Appeals 12 February 1985.

Defendant was convicted of eight offenses involving the possession, sale or delivery of cocaine or heroin. Four of the offenses occurred on 9 December 1982, two on 16 December 1982, and two on 5 January 1983. The State's evidence tended to show that on those dates defendant sold various quantities of cocaine or heroin or both to undercover agent T. J. Arthurs in a Goldsboro motel room.

Attorney General Edmisten, by Assistant Attorney General James Peeler Smith, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Ann B. Petersen, for defendant appellant.

PHILLIPS, Judge.

[1] The crimes that defendant committed on 5 January 1983, according to the verdict, were trafficking in heroin—first, by possessing with intent to sell or deliver more than four grams but less than fourteen grams of heroin; and second, by selling the same to the undercover agent. G.S. 90-95(h)(4)a. The defendant's contention that the evidence presented was insufficient to support either conviction is without merit. In gist, the evidence on this point was as follows: On two occasions before 5 January 1983, defendant had sold quantities of cocaine or heroin or both to Arthurs, the undercover agent, and on that day after discussing the price of heroin defendant removed six tinfoil packets from a plastic bag, showed Arthurs that one of the packets contained a white powdery substance, and sold all six packets to Arthurs for $1,050 in cash. The other five packets also contained a white powdery substance, and when the contents of all six packets were dumped together they weighed 6.65 grams. A sample from the pile when analyzed was found to contain one measure of heroin to about twenty measures of manitol, a form of sugar. Defendant concedes that the State did not have to show that the heroin itself weighed more than four grams and that the weight of the mixture rather than the weight of the illicit drug controls. *State v. Tyndall*, 55 N.C. App. 57, 284 S.E. 2d 575 (1981). The flaw in the evidence, so defendant contends, is that for aught that it shows

all the heroin could have been in just one packet the contents of which weighed no more than one gram and a fraction. This same contention was rejected in *State v. Dorsey*, 71 N.C. App. 435, 322 S.E. 2d 405 (1984), where defendant's conviction of trafficking in heroin was upheld even though the analysis was not made until after the contents of the 105 bags that he sold had been dumped together.

[2] The four crimes that defendant committed on 9 December 1982, according to the verdict, were (1) selling and delivering cocaine; (2) selling and delivering heroin; (3) possessing cocaine with the intent to sell and deliver; and (4) possessing heroin with the intent to sell and deliver. Since the evidence shows that defendant possessed both substances at the same time and place, and sold both substances to Arthurs in the same transaction, defendant contends that he can be lawfully convicted of only one possessing offense and one selling offense because under G.S. 90-95 (b)(1) the possession of *either* heroin or cocaine is a felony, as is the sale of *either* cocaine or heroin. This argument is not only illogical, it runs counter to the purposes of our Controlled Substances Act, one of which is certainly to deter dealers in illicit drugs. Since each of the acts that defendant has been convicted of perpetrating is prohibited by statute and is clearly contrary to the public good, it would be absurd to hold that the General Assembly intended for each act to be but half of a crime. Furthermore, our Supreme Court has already held that one may be properly convicted of both possession with intent to sell and deliver a controlled substance and of selling or delivering it even though both offenses are based on the same transaction. *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973). Nothing in that decision or the Controlled Substances Act supports the contention that the law is otherwise when more forbidden substances than one are handled or sold.

Affirmed.

Judges WEBB and MARTIN concur.

FIVE OAKS HOMEOWNERS ASSOCIATION, INC. v. EFIRDS PEST CONTROL COMPANY

No. 8414SC963

(Filed 2 July 1985)

Estoppel § 4.6— termite inspection contract—failure to pay reinspection fee—equitable estoppel not available

The trial court properly entered summary judgment for defendant in an action in which plaintiff sought specific performance or damages for an alleged breach of a termite inspection contract. Plaintiff knew from the contract that an inspection fee was due annually, that the contract was subject to automatic termination for failure to make the payments, and admitted that it failed to pay for the years 1981 and 1982. Although defendant had invoiced plaintiff for a reinspection fee the first year, plaintiff could not rely on that practice in subsequent years and could not assert equitable estoppel because the language of the contract was plain and unambiguous.

APPEAL by plaintiff from *Brannon, Judge*. Judgment entered 9 April 1984 in Superior Court, DURHAM County. Heard in the Court of Appeals 18 April 1985.

Plaintiff brought this action seeking specific performance or damages resulting from an alleged breach by defendant of a termite inspection contract. The initial contract was dated 11 September 1979. At an unspecified time a renewal notice for the $200 annual reinspection fee covering the period October 1980 through September 1981 was sent to plaintiff. Plaintiff paid this amount by check on 11 September 1980. Plaintiff did not receive a renewal notice and did not pay the reinspection fee for 1981 and 1982 when due. Plaintiff alleges that on 15 November 1982, when a new officer discovered that defendant had not sent invoices for 1981 and 1982, plaintiff tendered a check for $400 which was declined. The contract provided that a reinspection fee was due within sixty days of the anniversary of the effective date of the contract, and the contract would terminate automatically without notice upon failure to make any payment due.

After considering the pleadings, interrogatories, admissions, and oral arguments of both parties, the trial judge granted defendant's motion for summary judgment.

Everett and Hancock by S. Allen Patterson II for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner and Hartzog by D. James Jones, Jr. and Theodore B. Smyth for defendant-appellee.

PARKER, Judge.

The fact is undisputed that the termite inspection contract required annual reinspection payments and allowed automatic termination without notice upon failure to make the payments. Plaintiffs admits that it failed to pay the annual reinspection fee for 1981 and 1982. Plaintiff contends that summary judgment was inappropriate. Plaintiff argues that having received an invoice for reinspection fees at the end of the first year, it was entitled to rely on this practice by defendant for subsequent years, and there was a genuine issue of material fact as to whether (i) defendant's regular business practice was to invoice customers for fees and (ii) whether this practice was deliberately not followed with respect to plaintiff in 1981 and 1982. The contract did not specify that defendant would invoice plaintiff each year, but plaintiff argues that defendant is equitably estopped from terminating the contract because plaintiff relied on being invoiced by defendant.

The essential elements of equitable estoppel as related to the party estopped are (i) a false representation or concealment of material facts, or conduct reasonably calculated to convey the impression that the facts are otherwise than those which the party afterwards attempts to assert; (ii) intention or expectation that such conduct be acted upon by the other party; and (iii) knowledge, actual or constructive, of the real facts. *Hawkins v. M & J Finance Corp.*, 238 N.C. 174, 77 S.E. 2d 669 (1953). As related to the party claiming the estoppel, the essential elements are (i) lack of knowledge and the means of knowledge of the truth of the facts in question; (ii) reliance upon the conduct of the party to be estopped; and (iii) action based on this conduct which changes his position prejudicially. *Id.*

In the instant case, plaintiff has failed to show that it lacked knowledge, or the means of knowledge, of the truth of the facts. The contract provided:

> The Buyer may extend this Guarantee for an unlimited number of one year periods by having the Company reinspect

the premises annually and paying a reinspection fee in the amount shown on the reverse side thereof within sixty (60) days after the anniversary of this Contract's effective date. This Guarantee, and all liability of the Company, shall terminate automatically and without notice upon the Buyer's failure to make any payment in accordance with the provisions of this Contract.

When the language of a written contract is plain and unambiguous, the contract must be interpreted as written and the parties are bound by its terms, *Corbin v. Langdon*, 23 N.C. App. 21, 208 S.E. 2d 251 (1974); neither party can deny knowledge of its contents. Since plaintiff knew from the contract that the reinspection fee was due annually, it cannot claim that defendant was estopped from cancelling the contract because it had not sent plaintiff an invoice for the reinspection fee. Absent fraud, estoppel is not available to protect a party from the consequences of its own negligence. *Thomas v. Ray*, 69 N.C. App. 412, 317 S.E. 2d 53 (1984).

Plaintiff knew that the reinspection fee was due annually, and that the contract was subject to automatic termination for failure to make the payments. Plaintiff admits it failed to pay for years 1981 and 1982. There is, therefore, no issue of material fact, and defendant is entitled to judgment as a matter of law. The trial court's entry of summary judgment is

Affirmed.

Judges WEBB and BECTON concur.

STATE OF NORTH CAROLINA v. RODERICK SYLVANIS JORDAN

No. 8419SC800

(Filed 2 July 1985)

1. Automobiles and Other Vehicles § 130.1— driving under the influence—insufficient evidence of second offense

A colloquy between the court and the prosecutor to the effect that defendant had previously been convicted of driving under the influence was insufficient to establish a stipulation by defendant to a previous conviction, and

where the State failed to offer evidence of the previous conviction, the trial court erred in entering judgment for a second offense of driving under the influence.

2. **Automobiles and Other Vehicles § 131— failing to stop at accident scene—sufficiency of allegations**

A magistrate's order was sufficient to charge defendant with failing to stop at the scene of an accident although it failed to allege that defendant knew his car had collided with another and damaged it since such knowledge could be inferred from allegations that while defendant operated a car it collided with and damaged another vehicle.

3. **Automobiles and Other Vehicles § 131.1— failing to stop at accident scene—knowledge of collision—sufficiency of evidence**

The evidence was sufficient to permit an inference that defendant knew his car had collided with another and damaged it so as to support his conviction of failing to stop at the scene of an accident where it tended to show that defendant was driving a vehicle when it hit another car from the rear, spun it sideways, and proceeded down the highway a distance of between 900 and 1,800 feet before pulling off on a side road and stopping; defendant then changed positions with a passenger; and the passenger attempted to drive the vehicle away but was prevented from doing so by witnesses to the collision.

4. **Weapons and Firearms § 2— carrying concealed weapon—sufficiency of evidence**

The evidence was sufficient to support defendant's conviction of carrying a concealed weapon about his person in violation of G.S. 14-269 where it tended to show that a patrolman found a gun under the driver's seat of a car defendant was driving after witnesses to a collision advised him that they had seen defendant reach under the driver's seat as though placing something there.

APPEAL by defendant from *Mills, Judge.* Judgment entered 31 January 1984 in Superior Court, ROWAN County. Heard in the Court of Appeals 7 March 1985.

Defendant was convicted of driving under the influence, failing to stop at the scene of an accident resulting in property damage, and carrying a concealed weapon. The evidence relating to these convictions, to the extent necessary, is stated in the opinion.

Attorney General Edmisten, by Special Deputy Attorney General Ann Reed, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Geoffrey C. Mangum, for defendant appellant.

PHILLIPS, Judge.

[1] Though the jury verdict was "[g]uilty of operating a vehicle on the highways of this State while under the influence of alcoholic beverages," the judgment imposed was for a second offense of that crime. Defendant contends that this was error in that the State did not establish by either evidence or stipulation that defendant had been previously convicted of driving under the influence. We agree. The State's contention that defendant stipulated to the previous conviction is not borne out by the record, which reflects only a colloquy between the court and the prosecutor to the effect that defendant had been previously convicted and evidence of that fact would not be offered. But the defendant remained silent and was not asked to be otherwise, according to the record. Such circumstances are insufficient to establish a stipulation, *State v. Powell*, 254 N.C. 231, 118 S.E. 2d 617 (1961), and judgment should have been entered on the verdict as rendered.

[2, 3] Defendant contends that his conviction of failing to stop at the scene of the accident is invalid for two reasons, neither of which has merit. First, it is argued that the magistrate's order upon which he was tried was defective in that it did not allege that defendant *knew* his car had collided with another and damaged it. Contrary to defendant's contention, a criminal pleading does not have to state every element of the offense charged; it is only necessary to assert facts "*supporting* every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." G.S. 15A-924(a)(5). (Emphasis added.) Defendant's knowledge that a collision involving his car had occurred and that property damage had resulted is clearly inferable from the facts, duly alleged, that while defendant operated the car it collided with and damaged another vehicle. *State v. Lucas*, 58 N.C. App. 141, 292 S.E. 2d 747, *cert. denied*, 306 N.C. 390, 293 S.E. 2d 593 (1982). The insufficiency of the evidence is the other reason advanced for setting aside the conviction, but it is clearly sufficient to establish defendant's guilt. Among other things, the evidence tends to show that: While defendant was driving along U.S. Highway 29, his vehicle hit another from the rear, spun it sideways, and proceeded down the highway a distance of between 900 and 1,800 feet before pulling off on a side road and stopping; and that defendant then changed

positions with his passenger and the passenger attempted to drive the car away, but some witnesses to the collision prevented him from doing so. This evidence supports the inference that defendant knew about the collision and damage and was trying to escape the consequences when the witnesses of the collision intervened. *State v. Fearing*, 304 N.C. 471, 284 S.E. 2d 487 (1981).

[4] Nor was there any prejudicial error with respect to defendant's conviction of carrying a concealed weapon about his person. G.S. 14-269. Contrary to defendant's contentions, the magistrate's order properly charged the offense; the evidence presented was sufficient to warrant the conviction; and the judge's instructions to the jury were legally correct. The evidence of defendant's guilty knowledge and intent was really quite plain. He was the driver of the car; the witnesses to the accident who prevented defendant's escape, as they advised the patrolman, saw him reach under the driver's seat as though placing something there, and that is where the patrolman found the gun. *State v. Reams*, 121 N.C. 556, 27 S.E. 1004 (1897).

The judgment for driving under the influence, second offense, is vacated and the matter remanded for the entry of judgment on the verdict.

The judgments entered for failing to stop at the scene of the accident and carrying a concealed weapon are affirmed.

Vacated and remanded in part; affirmed in part.

Judges WEBB and MARTIN concur.

SYBLE ALEXANDER, AS ADMINISTRATRIX OF THE ESTATE OF ARCHIE COLEMAN ALEXANDER v. PILOT LIFE INSURANCE COMPANY

No. 842SC1175

(Filed 2 July 1985)

Insurance § 41— health insurance—treatment for pneumonia within exclusion period—later diagnosis of lung cancer

In an action to recover benefits on a health insurance policy, there was no error in the denial of defendant's motions for summary judgment and for a

peremptory instruction as to its defense of an exclusion under the policy clause for preexisting conditions where the policy defined preexisting condition as an injury or sickness for which medical care was received during the three-month period before becoming insured; plaintiff's decedent had been admitted to the hospital on 7 September 1981 complaining of pain in his left chest and bloody sputum; he was treated for pleurisy and pneumonia and discharged on 13 September; the policy was issued on 21 September; he died of lung cancer on 5 July 1982; and there was medical testimony that the first findings, while consistent with cancer, should not have been limited to cancer. A jury could have inferred that the medical care received prior to 21 September was not for cancer.

APPEAL by defendant from *Lewis, John B., Jr., Judge.* Judgment entered 5 July 1984 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 15 May 1985.

This is an action to recover benefits on a health insurance policy issued to Archie Coleman Alexander. The policy was issued on 21 September 1981 and Archie Coleman Alexander died of lung cancer on 5 July 1982. The defendant refused payment on the ground that coverage is excluded by a paragraph in the policy which provides that no payment will be made for a condition that was treated within 90 days before the effective date of the policy. The defendant moved for summary judgment which motion was denied. At the end of the evidence the defendant moved for a peremptory instruction which was also denied. The jury found for the plaintiff. The defendant appealed from a judgment entered on the verdict.

Michael A. Paul and Carter, Archie and Hassell, by Sid Hassell, Jr., for plaintiff appellee.

Rodman, Holscher and Francisco, by Edward N. Rodman, for defendant appellant.

WEBB, Judge.

The defendant assigns error to the denial of its motions for summary judgment and for a peremptory instruction as to its defense of an exclusion from the coverage under the policy. These two assignments of error present the same question. That question is whether the jury could only conclude from the evidence that the plaintiff's claim is barred by a provision in the policy which excludes coverage for a pre-existing condition and defines a pre-existing condition as follows:

5. "Pre-existing condition" means an injury or sickness for which you or a dependent received any medical care during the three month period just before becoming insured for Major Medical Expense Benefits under the Group Policy.

Dr. Charles O. Boyette testified that prior to the date the policy was issued he admitted the deceased to the hospital on 7 September 1981. Mr. Alexander was "complaining of pain in his left chest and bloody sputum, symptoms of pleurisy and pneumonia." An x-ray of his chest was made on the day of his admission and another was made on 11 September 1981. Each x-ray showed an upper left lung infiltrate which "means there may be infection or fluid accumulation in that particular area." Mr. Alexander was treated for pleurisy and pneumonia and was discharged on 13 September 1981 after the symptoms for pneumonia and pleurisy were improved.

Mr. Alexander returned to Dr. Boyette on 28 September 1981. An x-ray showed his upper left lung still had an infiltrate. A lung scan was done on 29 September 1981 which showed diminished activity in the area of the lung corresponding to the x-rays. Dr. Boyette testified this indicated either an inflammatory or thromboembolic disease and explained that a thromboembolic disease is the passage of a clot by the blood from one part of the body to another. He said, "[I]t could be fat or it could be tumor or perhaps other material that can be blood born or blood spread."

On 11 November 1981 Mr. Alexander returned to Dr. Boyette's office with "the history of having coughed up bright red blood for three mornings in a row." He was examined by Dr. Boyette who then referred him to Pitt Memorial Hospital on 16 November 1981. Mr. Alexander's condition was then diagnosed as lung cancer. In response to a question as to whether the findings at the time of the original treatment of Mr. Alexander had any significance with regard to the cancer, Dr. Boyette responded, "Those findings are indicative of many types of diseased process and not necessarily limited to malignancy." Dr. Boyette then testified as follows:

Q. But after and in retrospect with the findings of the biopsy and analysis, this infiltrate and blunting of the costro-

phrenic angle would be significant with regard to the possibility of a lung . . . cancer of the lung?

A. Significant as to the possibility, and I emphasize possibility and not necessarily probability.

You may . . . again, it's a very indefinite type of consideration in the comparison we're making.

Q. But certainly it's consistent with a cancer?

A. Not totally. You have these abnormal findings and they clear up in time and never have a malignancy.

In order for the plaintiff to be barred by the exclusion in the policy it is necessary for Mr. Alexander within three months before 21 September 1981 to have received medical care for cancer. It certainly may be inferred from the evidence that although Mr. Alexander's condition was not diagnosed at the time of the treatments he received in September 1981 he was receiving medical care for cancer. We do not believe, however, that this is the only inference that may be made. As we read Dr. Boyette's testimony it is that although a later diagnosis showed Mr. Alexander had cancer and the first findings are consistent with a diagnosis of cancer nevertheless the diagnosis should not be limited to cancer. We believe a jury could infer from this testimony that the medical care received by Mr. Alexander prior to 21 September 1981 was not for cancer.

We do not believe *Hincher v. Hospital Care Asso.*, 248 N.C. 397, 103 S.E. 2d 457 (1958), relied on by the defendant, is controlling. In that case the exclusion was for "any condition, disease, or injury which existed on or before the effective date" of the policy. In this case the exclusion requires that there must be treatment for such a pre-existing condition. The jury has found in this case that there was no such treatment. We have held there is sufficient evidence to support this finding.

No error.

Chief Judge HEDRICK and Judge WHICHARD concur.

JOHN DOUGLAS, JR. v. PENNAMCO, INC.; OLD REPUBLIC LIFE INSURANCE COMPANY; FRANKLIN SAVINGS BANK OF NEW YORK; J. WILLIAM ANDERSON; AND CHARLOTTE F. TWYMAN

No. 8414SC672

(Filed 2 July 1985)

1. **Insurance § 43— mortgage payment disability insurance—insurer not liable for delays in payments**

A mortgage payment disability insurer was not liable for damages caused by foreclosure of the mortgage because of delays in making disability payments to plaintiff where the delays in payment were due to plaintiff's failure properly to document his continued disability, and where plaintiff failed to apply any of the disability payments he received to the mortgage.

2. **Insurance § 42; Unfair Competition § 1— mortgage payment disability insurance—proof of disability each month—no unfair trade practice**

A mortgage payment disability insurer's requirement that the insured submit proof of his disability each month benefits were applied for did not constitute an unfair and deceptive trade practice in violation of G.S. 58-54.4(11)(d) where the insured's injury was of uncertain duration and subject to improvement.

3. **Mortgages and Deeds of Trust § 39— improper collateral attack on foreclosure**

Plaintiff's claim against a trustee who processed a mortgage foreclosure based on incorrect or inadequate notice and affidavit of default constituted an impermissible collateral attack on the foreclosure proceeding and judgment.

APPEAL by plaintiff from *McLelland, Judge*. Orders entered 23 January 1984 and 2 February 1984 in Superior Court, DURHAM County. Heard in the Court of Appeals 5 March 1985.

Gary K. Berman for plaintiff appellant.

Manning, Fulton & Skinner, by Charles B. Morris, Jr. and Robert S. Shields, Jr., for defendant appellees Pennamco, Inc., American Savings Bank (Successor to Franklin Savings Bank of New York), and Old Republic Life Insurance Company.

Spears, Barnes, Baker, Hoof, Wainio & Holeman, by Marshall T. Spears, Jr., for defendant appellee J. William Anderson.

PHILLIPS, Judge.

Plaintiff's case against defendants Pennamco, Inc., Old Republic Life Insurance Company, and Franklin Savings Bank of

New York was dismissed by order of summary judgment. His case against defendant J. William Anderson was dismissed on the pleadings. In our opinion neither judgment was erroneously entered and we affirm them.

The substance of plaintiff's claim is that his home was foreclosed on and his equity therein lost because (a) the defendant insurance company failed to timely pay sums due him under a mortgage payment disability policy and unfairly required him to submit proof of his disability each month; (b) defendant Pennamco, Inc., the mortgage loan administrator, refused to accept late or partial payments; and (c) defendant Franklin Savings Bank of New York, which held the note and deed of trust, defendant Anderson, who was the trustee, and defendant Pennamco, Inc. wrongfully foreclosed on the property.

[1] As to the defendant insurance company the evidence before the trial court showed that: The payments due plaintiff were made in compliance with the policy terms; plaintiff's disability was due to neck and back injuries of unknown duration and such delays in payment as occurred were due to plaintiff's failure to properly document his continued disability, as the policy required. Benefits due under the policy were payable directly to the insured, rather than to the mortgage holder, and though during the many months involved plaintiff received payments from the company amounting to $3,211.80, he applied none of the funds to his mortgage, and was $3,150.36 behind in the payments when foreclosure on the property was begun. From this evidence it is obvious that even if the insurance company had been dilatory in paying the benefits that plaintiff was entitled to, he can justly blame no one but himself for his property being foreclosed on. The law, like the Lord, seldom helps those who refuse to help themselves.

[2] Nor is there any merit in plaintiff's contention that requiring proof of his disability each month benefits were applied for, as the policy permitted, constituted an unfair and deceptive trade practice by the insurance company in violation of G.S. 58-54.4(11)(d). We see nothing unfair in requiring an insured whose injury is of uncertain duration and subject to improvement to show that he is still disabled before paying him further disability benefits. Which is not to say that arbitrarily requiring costly, difficult to

obtain medical reports that are clearly unnecessary and serve no legitimate purpose, as when the insurer already has proof from a doctor, or the circumstances clearly indicate that the insured's disability is not episodic but will extend beyond the current period benefits are applied for, is not an unfair trade practice; we think it clearly is. But such is not this case. Though the application form that Republic provided plaintiff each month had a space on it in which plaintiff's doctor could have stated that the disability would extend beyond the date of the report, no such statement was made and nothing in the record leads us to conclude that the continuing reports were not necessary.

As to plaintiff's claims against defendants Pennamco, Inc. and Franklin Savings Bank, the evidence before the trial judge shows without contradiction that plaintiff was more than $3,000 behind on the note and mortgage payments and these defendants were within their rights in foreclosing on his property.

[3] And plaintiff's claim against defendant J. William Anderson, the trustee who processed the foreclosure, is obviously without merit on its face. The complaint alleges that the foreclosure proceeding, which is over and done with, was irregular because the notice was incorrect or inadequate in certain respects and the affidavit of default was based on hearsay. This is a collateral attack on a foreclosure proceeding and judgment, which the law does not permit. *Robinson v. United States Casualty Co.*, 260 N.C. 284, 132 S.E. 2d 629 (1963). If the foreclosure proceeding was not authorized for any reason or if it was irregularly conducted, it was incumbent on plaintiff to raise that issue in that proceeding either by objection or motion in the cause. *See* Chapter 45, General Statutes of North Carolina; 8 Strong's N.C. Index 3d, *Judgments* § 30 (1977).

Affirmed.

Judges WEBB and MARTIN concur.

STATE OF NORTH CAROLINA v. PETER JONES FIELD

No. 8410SC1028

(Filed 2 July 1985)

Automobiles and Other Vehicles § 130— grossly aggravating factors for DWI—constitutional

G.S. 20-179(c)(3), which requires an active jail term of not less than seven days upon the finding of one of three grossly aggravating factors for driving while impaired, including causing serious injury to another person, is not unconstitutional in that it requires an active jail term without a jury trial because serious injury is not an element of the crime of driving while impaired. G.S. 20-138.1.

APPEAL by defendant from *Lee, Judge*. Judgment entered 21 August 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 4 April 1985.

Defendant pled guilty to driving while impaired in violation of G.S. 20-138.1 and to failing to stop at a duly erected stop sign in violation of G.S. 20-158. Prior to entering his pleas and before the sentencing hearing defendant filed a motion to declare G.S. 20-179(c)(3), the part of the sentencing statute that defendant's sentence is based on, unconstitutional. The motion was denied. At the sentencing hearing evidence was presented which tended to show that as a result of defendant's impaired driving and the collision that followed one occupant of the car he collided with suffered multiple injuries, including a severe cut on the head that required twenty-nine stitches and fractures of the knee that also required surgery; and another occupant suffered a blow to the head and a broken nose, which required surgery and skin grafting to cover a hole in the membrane. The evidence also showed that defendant had a blood alcohol concentration of 0.16 when the collision occurred. As authorized by G.S. 20-179(c)(3) the trial court found as a grossly aggravating factor that defendant's impaired driving caused serious injury to another person and the punishment included an active jail term of not less than seven days.

Attorney General Edmisten, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Presnell & Allen, by Gary Lester Presnell, for defendant appellant.

PHILLIPS, Judge.

The only question presented for our determination is the constitutionality of G.S. 20-179(c), under which defendant was sentenced for driving while impaired. That statute creates three "grossly aggravating factors," one of which is that the impaired driver caused serious injury to another person; and it requires the sentencing judge upon finding one such factor to impose an active jail term of not less than seven days under subsection (h) of G.S. 20-179. It is fundamental, of course, that one charged with crime in this state is entitled as a matter of right, under both the federal and state Constitutions, to a jury trial as to every essential element of the crime charged. *State v. Lewis*, 274 N.C. 438, 164 S.E. 2d 177 (1968). The thrust of defendant's argument is that since the purported fact that his impaired driving caused serious injury to another requires him to serve an active jail term under G.S. 20-179(c) and (h) the existence of that fact is an element of the crime he is being punished for and must be found by the jury, rather than the judge. We disagree. Whether defendant seriously injured another person is not an element of the crime of driving while impaired; it is a sentencing factor that the General Assembly has deemed to be important in punishing those convicted of driving while impaired. The punishment imposed for violating the law is generally not an element of the violation. *State v. Stafford*, 274 N.C. 519, 164 S.E. 2d 371 (1968).

The bifurcated procedure that the legislature has established for impaired driving cases, with the jury determining whether G.S. 20-138.1 has been violated and the judge determining the length of punishment required under G.S. 20-179, is similar to procedures that have passed constitutional muster both here and in the federal courts. Our Supreme Court deemed it permissible for one convicted of kidnapping under G.S. 14-39(a) to be sentenced more severely under former G.S. 14-39(b) if the judge found that the victim suffered a serious injury. *State v. Boone*, 302 N.C. 561, 276 S.E. 2d 354 (1981). And in the federal courts those found by judges to be "Dangerous Special Offenders" under 18 U.S.C. § 3575 are routinely punished more severely than other offenders. *United States v. Williamson*, 567 F. 2d 610 (4th Cir. 1977). As these and other decisions indicate, legislatures have great latitude in establishing crimes and fixing punishment for

them. We do not believe that latitude has been exceeded in this instance.

Affirmed.

Judges ARNOLD and COZORT concur.

IN THE MATTER OF: THE WILL OF EMMA ELLIS FIELDS, DECEASED

No. 8415SC1309

(Filed 2 July 1985)

Wills § 21.4— undue influence—evidence sufficient

Caveator produced sufficient evidence to establish a prima facie case of undue influence where the jury could find that Haskell Fields dominated testatrix's affairs backed by the threat of irrational rages and physical violence to the extent that testatrix even encouraged caveator, her own daughter, to placate his sexual demands; that Haskell Fields threatened to disown caveator when she refused him; and that he then did exactly that, using his control of his wife to enforce his will against her wishes. Although the jury could have reached a different result, the verdict was not so against the greater weight of the evidence as to mandate its being set aside.

APPEAL by propounder from *Battle, F. Gordon, Judge.* Judgment entered 26 July 1984 in ORANGE County Superior Court. Heard in the Court of Appeals 6 June 1985.

Testatrix Emma Fields and her husband, Haskell Fields, simultaneously executed reciprocal wills in 1965. Each spouse willed all property to the other, or, if the other spouse did not survive, to propounder, Ruby Wiley. Propounder and caveator, Nellie Wicker, were testatrix's two daughters. Haskell Fields died in March 1979. Testatrix died in August 1979. Propounder obtained letters testamentary in due course, and caveator then timely commenced these proceedings, alleging undue influence.

Caveator's evidence tended to show the following: Testatrix was 63 years old at the time the wills were executed. She was illiterate. Haskell Fields had a violent temper and people in the neighborhood feared him. He would frequently get drunk on weekends. On one occasion he beat testatrix, and also injured ca-

veator's child. Haskell Fields was seen with other women, and testatrix stopped having sexual relations with him after discovering him in bed with another woman.

Haskell Fields repeatedly tried to have sexual relations with caveator, beginning when she was 13. She refused, as a result of which Haskell Fields would beat her without mercy, including use of sticks. Testatrix did not interfere, and even encouraged caveator to submit to Haskell Fields' demands. He threatened to disown her if she did not submit. When she continued to refuse, Haskell Fields drove her out of the house. Nevertheless, caveator's relationship with testatrix remained good throughout the years.

Haskell Fields always tended to testatrix's business affairs. He made all the plans for the family, and she went wherever he went. Haskell Fields arranged to have the wills drawn up; testatrix apparently believed that the two daughters, propounder and caveator, would share equally. The wills were otherwise, however. When testatrix and Haskell Fields arrived to sign them, testatrix said, "I wish Nellie [caveator] had something." Haskell Fields replied, "The wills are just like they ought to be." Testatrix signed.

Propounder's evidence tended to show that testatrix knew the terms of the will and that she had a mind of her own. The jury found that testatrix had in fact executed the will, but that the execution was procured by undue influence. The jury answered the *devisavit vel non* issue "No." From judgment entered accordingly, propounder appealed.

Cheshire & Parker, by Lucius M. Cheshire, for propounder appellant.

Long & Long, by Lunsford Long, for caveator appellee.

WELLS, Judge.

The decisive question brought forward on appeal is whether the court erred in denying propounder's motions for directed verdict and for judgment notwithstanding the verdict. We apply the same evidentiary test to both motions. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). We consider the evidence in the light most favorable to the caveator, deeming her evidence to be

true, resolving all conflicts in her favor, and giving her the benefit of every reasonable favorable inference. *In re Andrews*, 299 N.C. 52, 261 S.E. 2d 198 (1980). Even where there are contradictions and conflicts in the evidence, the case should go to the jury on sufficient evidence. *Id.*

To prove undue influence, once propounder has shown due execution, caveator must show more than mere influence or persuasion. She must show some sufficient controlling force to destroy the free agency of the testatrix, such as to make the will properly the expression of the wishes of another, not testatrix. *Id.; In re Will of Kemp*, 234 N.C. 495, 67 S.E. 2d 672 (1951). Caveator ordinarily must rely on circumstantial evidence and inferences therefrom, *In re Andrews, supra*, particularly when as here testatrix was apparently a homemaker with little independent daily contact with the community.

Our supreme court has enumerated certain factors which are probative on the issue of undue influence. *Id.* Propounders rely heavily on this list. However, that court also recognized that the impossibility of setting forth all the various combinations of factors which make out a case of undue influence. The very nature of undue influence prevents the court from establishing precise tests by which to determine its existence. *Id.* It is the collective effect of the circumstances, and whether these would satisfy a rational mind of the existence of undue influence, that is determinative. *Id.*

We are persuaded that caveator produced sufficient evidence to establish a *prima facie* case of undue influence. The jury could find that Haskell Fields dominated testatrix's affairs, backed by the threat of irrational rages and physical violence, to the extent that testatrix even encouraged her own daughter to placate his sexual demands. The jury could find that Haskell Fields threatened to disown caveator when she refused him, and that he then did exactly that, using his control of his wife to enforce his will against her wishes. As in *Andrews*, the jury could have reached a different result, but the verdict reached was not so against the greater weight of the evidence to mandate its being set aside. *See In re Will of Hodgin*, 10 N.C. App. 492, 179 S.E. 2d 126 (1971).

In a separate argument, propounder contends that the trial court erred in denying her motion for a new trial on the issue of

devisavit vel non. Our decision has settled this issue, in caveator's favor. This assignment is overruled.

No error.

Judges JOHNSON and COZORT concur.

DAVID McCOY CRISP v. WILLIAM HENRY COBB

No. 842DC836

(Filed 2 July 1985)

1. **Automobiles and Other Vehicles § 50.1— striking vehicle sitting in road— absence of negligence**

Defendant was not negligent in bringing about a collision, and the doctrine of last clear chance thus did not apply, where plaintiff's car was situated diagonally across the center line of the highway at night partially blocking both lanes, defendant was rounding a curve and did not see that plaintiff's car was blocking his lane of travel until he was 100 feet away, and defendant was unable to turn to either side because a large ditch was on one side and plaintiff and other people were on the other.

2. **Costs § 3.1— property damage action—attorney fee as part of costs**

The trial court was authorized by G.S. 6-21.1 to award a fee to defendant's attorney as part of the costs of defendant's counterclaim in a property damage suit in which the damages recovered were less than $5,000. Since the suit was not on an insurance policy, a finding that plaintiff's refusal to pay was unwarranted was not required.

APPEAL by plaintiff from *Hardison, Judge.* Judgment entered 7 May 1984 in District Court, BEAUFORT County. Heard in the Court of Appeals 4 April 1985.

Plaintiff sued defendant for the damage done to his car in a motor vehicular collision. Defendant counterclaimed and the parties waived a jury trial. The trial judge after hearing the evidence rendered judgment for the defendant on his counterclaim and awarded a fee to defendant's attorney as part of the costs.

James R. Vosburgh for plaintiff appellant.

Rodman, Holscher & Francisco, by Edward N. Rodman, for defendant appellee.

PHILLIPS, Judge.

[1] Of the two issues raised by this appeal the first is whether the court erred in concluding that defendant was not negligent in bringing about the collision sued for and that the doctrine of last clear chance does not apply. We are of the opinion that he did not and affirm the judgment.

Like a jury, the judge was at liberty to pick and choose from the evidence as he saw fit, and the findings and conclusions made are supported by recorded evidence which the court converted into findings of fact somewhat to the following effect: Plaintiff's car was situated diagonally across the center line of the highway at night, partially blocking both lanes; defendant, rounding a gradual curve at approximately fifty miles per hour, did not see that plaintiff's car was blocking his lane of travel until he was about one hundred feet away, and was unable to turn to either side because a large ditch was on one side and plaintiff and other people were on the other; defendant's car skidded into plaintiff's car while traveling approximately twenty miles an hour. These findings support the conclusion that defendant was not negligent. Having concluded defendant was not negligent, the ruling that the doctrine of last clear chance had no application necessarily followed as a matter of course. *Clodfelter v. Carroll*, 261 N.C. 630, 135 S.E. 2d 636 (1964). No finding was made that defendant saw or should have seen plaintiff's car when far enough away to have stopped his car before the collision, and since fact finders have great leeway in determining what facts have been proven, we cannot say from the record that such a finding was required.

[2] The other issue presented is whether the court erred in allowing defendant reasonable attorney fees. Since this is a property damage suit in which the damages recovered are less than $5,000, the award of attorney fees was authorized by G.S. 6-21.1. And since the suit is not on an insurance policy a finding that plaintiff's refusal to pay was unwarranted was not required. *Rogers v. Rogers*, 2 N.C. App. 668, 163 S.E. 2d 645 (1968).

Affirmed.

Judges ARNOLD and COZORT concur.

THOMAS J. FRASER AND WIFE, JENNIFER F. FRASER v. ANTHONY S. DI SANTI, C. BANKS FINGER, DONALD M. WATSON, JR., ANTHONY S. DI SANTI AND LINDA M. McGEE, PARTNERS D/B/A FINGER, WATSON, DI SANTI AND McGEE

No. 8424SC1235

(Filed 2 July 1985)

Appeal and Error § 6.2— denial of motions to dismiss and for summary judgment —no just reason for delay—dismissal as interlocutory

Defendants' appeal was dismissed as interlocutory even though the trial judge had stated that there was no just reason for delay where the order denying defendants' motions to dismiss and for summary judgment was not a final determination of defendants' rights and the appeal did not affect defendants' substantial rights. G.S. 7A-27.

APPEAL by defendants from *Saunders, Judge*. Order entered 3 July 1984 in Superior Court, WATAUGA County. Heard in the Court of Appeals 17 May 1985.

This is a civil action in which plaintiffs, Thomas J. Fraser and wife, Jennifer W. Fraser, seek damages from defendants, Anthony S. Di Santi, C. Banks Finger, Donald M. Watson, Jr. and Anthony S. Di Santi and Linda M. McGee, Partners d/b/a Finger, Watson, Di Santi and McGee, for alleged professional malpractice.

Defendants filed separate motions to dismiss for failure to join a necessary party (G.S. 1A-1, Rule 12(b)(7)) and failure to bring the action in the name of the real party in interest (G.S. 1A-1, Rule 17(a)). Defendants also filed a motion for summary judgment. G.S. 1A-1, Rule 56.

A hearing was held upon the motions filed on 11 June 1984 in Superior Court, Watauga County. Defendants' motions were denied on 3 July 1984 and defendants gave notice of appeal. The trial judge, in the appeal entries, found that there was "no just reason to delay the appeal."

Boyle, Alexander, Hord and Smith, by Robert C. Hord, Jr., for plaintiff-appellees.

Moore and Willardson, by John S. Willardson, for defendant-appellants.

EAGLES, Judge.

Defendants purport to bring forth two assignments of error on appeal: (1) the trial court erred in denying defendants' motions to dismiss for failure to bring the action in the name of the real party in interest and failure to join a necessary party and (2) the trial court erred in denying defendants' motion for summary judgment.

An appeal does not lie from an interlocutory order unless the order affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment. *Veazey v. Durham*, 231 N.C. 357, 57 S.E. 2d 377 (1950). The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). The order entered by the trial court in this case denying defendants' motions to dismiss and for summary judgment was not a final determination of defendants' rights. *Auction Company v. Myers*, 40 N.C. App. 570, 253 S.E. 2d 362 (1979) (denial of motions to dismiss); *Hill v. Smith*, 38 N.C. App. 625, 248 S.E. 2d 455 (1978) (denial of motion for summary judgment). This is true even though the trial court, in its appeal entries, states that "there is no just reason to delay the appeal." *Cook v. Tobacco Co.*, 47 N.C. App. 187, 266 S.E. 2d 754 (1980). This finding by the trial court must be construed in light of G.S. 7A-27 and our well-settled case law concerning interlocutory appeals. Further, this appeal does not affect defendants' substantial rights. The appeal cannot lie as of right to this court.

Appeal dismissed.

Judges BECTON and PHILLIPS concur.

IN RE: FORECLOSURE OF DEED OF TRUST FROM CHARLES WAYNE ROLLINS AND WIFE, DELORISE LEE ROLLINS, TO TIM, INC., TRUSTEE, DATED APRIL 25, 1979 AND RECORDED IN BOOK 570 AT PAGE 970 IN THE DAVIDSON COUNTY PUBLIC REGISTRY AND IN BOOK 1109 AT PAGE 100 IN THE RANDOLPH COUNTY PUBLIC REGISTRY

No. 8422SC797

(Filed 2 July 1985)

Mortgages and Deeds of Trust § 17.1— foreclosure in one county—note paid in full—no foreclosure in second county

When a debt secured by a deed of trust on land lying in two different counties was paid in full from the proceeds of a foreclosure sale in one county, no valid debt existed which would support foreclosure of the deed of trust in the second county.

APPEAL by respondents from *McConnell, Judge.* Order entered 15 December 1983 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 2 April 1985.

In 1979, to secure the payment of a note in the amount of $45,900, Charles Wayne Rollins and wife, appellants here, executed a deed of trust on a 6.88 acre tract of land, part of which lies in Davidson County and part in Randolph County. The deed of trust directs that any foreclosure sale be conducted "at the usual and customary place for such sales at the Courthouse in Davidson and Randolph County." Sometime after the documents were executed they were assigned to the appellee, Bankers Mortgage Corporation, which substituted J. William Anderson as trustee. In September 1981, the note was in default and the substitute trustee began foreclosure proceedings in Randolph County only. After a hearing the Randolph County Clerk of Superior Court authorized the foreclosure sale, which was conducted in due course at the Randolph County Courthouse, where Bankers Mortgage Corporation was the last and highest bidder in the amount of $51,920. Thereafter, the bid was assigned to the Veterans Administration, the bid proceeds were applied to and paid off the mortgage debt in full, the trustee deeded the property to the Veterans Administration, and the proceeding was concluded in due course with the court auditing and approving the substitute trustee's final report and account on 15 December 1981. In July 1983, after various transactions and proceedings irrelevant to this appeal, the substitute trustee, at Bankers Mort-

gage Corporation's behest, began this proceeding in Davidson County to foreclose on the same land under the authority of the same deed of trust. After a hearing the Clerk of Superior Court of Davidson County found that the debt secured by the deed of trust had been satisfied by a prior foreclosure, concluded that "there is no valid debt of which the party seeking to foreclose is the holder," and ordered that the attempted foreclosure cease. On appeal to the Superior Court Judge it was found that a "valid debt exists as evidenced by the Deed of Trust Note dated 25 April 1979," and the substitute trustee was authorized to proceed with foreclosure. From this order the respondents Rollins appealed.

Clarence Mattocks for respondent appellants.

Whitley & Spach, by John B. Whitley, for appellee Bankers Mortgage Corporation.

PHILLIPS, Judge.

The existence of a mortgage debt is an indispensable requisite for foreclosure under our law. G.S. 45-21.16(d); *Matter of Sutton Investments, Inc.*, 46 N.C. App. 654, 266 S.E. 2d 686 (1980), *disc. rev. denied*, 301 N.C. 90, --- S.E. 2d --- (1980). The record before us contains no competent evidence to support the judge's finding that a valid debt exists under the note and deed of trust in question. The record shows without contradiction that the mortgage indebtedness that the substitute trustee seeks to collect in this foreclosure proceeding was paid off in full during the first foreclosure in Randolph County. Thus, this foreclosure is without foundation and the order of the trial judge must be set aside. *In re Foreclosure of Connolly v. Potts*, 63 N.C. App. 547, 306 S.E. 2d 123 (1983). As to the many questions that may later arise between the parties concerning the property involved, we say nothing. The only question now before us is whether this foreclosure proceeding is well founded, and our holding is that it is not.

Reversed.

Judges ARNOLD and COZORT concur.

IN THE MATTER OF: THE APPEAL OF WILLIAM H. McELWEE, JR., WILLIAM H. McELWEE, III, ELIZABETH McELWEE CANNON, DOROTHY PLONK McELWEE AND JOHN PLONK McELWEE; R. B. JOHNSTON AND SONS; AND PAUL OSBORNE AND PRESLEY E. BROWN LUMBER COMPANY, FROM THE VALUATION OF CERTAIN OF THEIR PROPERTIES BY WILKES COUNTY FOR 1977

No. 8410PTC1225

(Filed 2 July 1985)

Taxation § 25.10— remand to Property Tax Commission—new evidence received—error

The Property Tax Commission erred by receiving new evidence in an appraisal proceeding which had been remanded to the Commission from the Supreme Court because the Commission's findings and conclusions were not supported by competent, material, and substantial evidence in view of the entire record. The property owners were entitled to a decision on the record before the Commission and the Court.

APPEAL by taxpayers from an Order of the North Carolina Tax Commission entered 25 June 1984. Heard in the Court of Appeals 4 June 1985.

McElwee, McElwee, Cannon & Warden, by W. H. McElwee and William C. Warden, Jr., for petitioner appellants.

Brewer and Freeman, by Paul W. Freeman, Jr., for respondent appellee Wilkes County.

JOHNSON, Judge.

Petitioners present four assignments of error challenging the findings of fact and conclusions of law of the Property Tax Commission. We decline to address these assignments of error, as we believe the Property Tax Commission exceeded its authority by receiving and reviewing new evidence which formed the basis of its order.

This is the second time this case has been before the appellant courts of this state. *In re McElwee*, 51 N.C. App. 163, 275 S.E. 2d 865, *reversed*, 304 N.C. 68, 283 S.E. 2d 115 (1981). In the previous appeal before this Court, the Court affirmed the Order of the Tax Commission sustaining the county's appraisal of the taxpayers' property. The Supreme Court reversed and remanded the decisions of the Court of Appeals and the Commission holding

that the Commission's findings and conclusions were not supported by competent, material and substantial evidence in view of the entire record. In reversing and remanding the matter to the Commission, the Supreme Court did not vacate the proceedings and order new proceedings in order to give the taxing authorities a second opportunity to bolster its position with new evidence, although such evidence might have been available. The Court concluded that the property owners were entitled to a decision on the record before the Commission and before the Court. *In re McElwee, supra; see also, In re Southern Railway*, 313 N.C. 177, 328 S.E. 2d 235 (1985).

The record presently before us reveals that the Tax Commission received new evidence in the form of testimony from witnesses presented by both appellants and appellees. This procedure was error in light of the decision of the Supreme Court. Accordingly, we remand these proceedings to the Tax Commission to enter an Order based on the record before the Commission at the time of the parties' first appeal and consistent with the opinion of the Supreme Court.

Remanded.

Judges WELLS and COZORT concur.

ROBERT LEE JOHNSON v. DORIS WILKIE JOHNSON

No. 8426DC781

(Filed 2 July 1985)

Divorce and Alimony § 30— equitable distribution—recovery for personal injuries—separate property

A recovery by plaintiff husband after the parties separated for personal injuries sustained during the marriage constituted separate property. G.S. 50-20(b)(1); G.S. 52-4.

Judge ARNOLD concurring in result.

Judge COZORT concurs in the opinion of Judge ARNOLD concurring in result.

Johnson v. Johnson

APPEAL by defendant from *Sherrill, Judge.* Order entered 13 March 1984 in District Court, MECKLENBURG County. Heard in the Court of Appeals 14 March 1985.

Wray, Bryant, Cannon & Parker, by John J. Parker, III, for plaintiff appellee.

Cannon and Basinger, by Thomas R. Cannon, for defendant appellant.

PHILLIPS, Judge.

Plaintiff and defendant were divorced in December, 1982 and this appeal is from an order of equitable distribution in which the court found and concluded that a recovery plaintiff obtained for personal injuries that he sustained during the marriage and property that he bought with some of the proceeds are his separate property as the same is defined in G.S. 50-20(b)(2).

Though this is apparently a question of first impression in this state, it was answered long ago by our General Assembly. By enacting former G.S. 52-4 in 1913, it was established beyond dispute that the personal injury recoveries of all married women in this state are their "sole and separate property"; as, of course, the personal injury recoveries of married men had been since time immemorial. These undoubted facts were reestablished by our lawmaking body in 1965 when the present G.S. 52-4 was made applicable to married men and women alike. In pertinent part the statute now reads "such . . . recovery shall be his or her sole and separate property." Though not referred to in the briefs by either party, this statute clearly controls the case, in our opinion, because nothing in the Equitable Distribution Act suggests that the General Assembly intended to render these long recognized, well established concepts inoperative. Since the legislative mandate is so plain we need not seek guidance from other jurisdictions and the many conflicting cases that the parties cite in their briefs will not be discussed; though we certainly think that far the better view, even in the absence of a statute like G.S. 52-4, is that a personal injury settlement or recovery of a married person, along with any property acquired by the recovery funds, is that person's sole and separate property. *See, Amato v. Amato,* 180 N.J. Super. 210, 434 A. 2d 639 (1981); *Bugh v. Bugh,* 120 Ariz. 190, 608 P. 2d 329 (1980); *Broussard v. Broussard,* 340 So. 2d 1309

(1977); *Graham v. Franco*, 488 S.W. 2d 390 (Texas, 1972); and *Soto v. Vandeventer*, 56 N.M. 483, 245 P. 2d 826 (1952).

The obvious purpose of the Equitable Distribution Act is to require married persons to share their maritally acquired property with each other—it is not to require either party to contribute his or her bodily health and powers to the assets for distribution—and the funds that the appellant claims to have a right to share in were paid to the appellee for injuries suffered by his body, which, of course, he had before the marriage.

Affirmed.

Judges ARNOLD and COZORT concur in the result.

Judge ARNOLD concurring in the result.

I concur in the result reached in Judge Phillips' opinion, however, I do not agree with the reasoning set forth therein. G.S. 50-20(b)(1) in pertinent part provides:

> (b) For purposes of this section:
>
> (1) "Marital property" means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties. . . .

The record reveals that the parties separated in August 1981 and that the personal injury recovery, at issue in this action, was not received by the plaintiff until sometime during 1982. Thus, the recovery was not "marital property" within the meaning of the statute. For that reason I vote to affirm the trial court's judgment.

Although it is not necessary that we decide the question in this case, I do not believe that G.S. 52-4 is controlling on this issue. G.S. 52-4 states: "The earnings of a married person by virtue of any contract for his or her personal services and any damages for personal injury or other tort sustained by either . . . shall be his or her sole and separate property." G.S. 50-20 and 21, The Equitable Distribution Act, classifies as marital property, for the purpose of equitable distribution, all real and personal prop-

erty acquired by the spouse during the marriage unless such property is exempted by G.S. 50-20(b)(2). Personal injury recoveries are not among the enumerated exemptions set forth in G.S. 50-20(b)(2). The statutes, thus, appear to be in conflict. When two acts of the legislature deal with the same subject, the provisions are to be reconciled if this can be done by fair and reasonable interpretation, but if they are necessarily repugnant, the last one enacted shall prevail. *Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E. 2d 22 (1967); *Nytco Leasing v. Southeast Motels*, 40 N.C. App. 120, 252 S.E. 2d 826 (1979). G.S. 52-4 was enacted in 1913 and G.S. 50-20 was enacted in 1981. Thus, the language of G.S. 50-20 should prevail in deciding this question.

Judge COZORT concurs in the opinion of Judge ARNOLD concurring in the result.

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

APPEAL AND ERROR

§ 6.2. Premature Appeals

An appeal from an amendment of a judgment changing the dismissal of plaintiff's claim to a judgment without prejudice was dismissed as premature. *Landreth v. Salem Properties*, 196.

Defendants' appeal was dismissed as interlocutory even though the trial judge had stated that there was no just reason for delay. *Fraser v. Di Santi*, 654.

A summary judgment for defendant in which the court expressly retained jurisdiction of defendant's counterclaim and did not certify that there was no just reason for delay nevertheless affected a substantial right of plaintiff and was appealable. *Narron v. Hardee's Food Systems, Inc.*, 579.

Defendant had the right to appeal an interlocutory order compelling him to answer interrogatories which might violate his right against self-incrimination. *Shaw v. Williamson*, 604.

§ 9. Moot Questions

An appeal by a third-party plaintiff from summary judgment for the third-party defendant was dismissed where the original plaintiff took a voluntary dismissal of its complaint against the third-party plaintiff. *E. L. Morrison Lumber Co., Inc. v. Vance Widenhouse Construction, Inc.*, 190.

§ 19. Appeals in Forma Pauperis

The trial court correctly denied respondent leave to proceed on appeal in forma pauperis where respondent did not file her motion within ten days of the expiration of the session at which judgment was rendered. *In re Caldwell*, 299.

§ 24. Necessity for Objections and Exceptions

An assignment of error relating to the proper standard of judicial review of Employment Security Commission decisions was raised for the first time on appeal and was not considered. *Williams v. Burlington Industries, Inc.*, 273.

§ 28.2. Exceptions and Assignments of Error to Findings of Fact; Necessity for Evidence to Support Findings

The sufficiency of the evidence to support the findings was not before the Court of Appeals in a termination of parental rights action where respondent failed to except to any findings of fact. *In re Caldwell*, 299.

§ 31.1. Necessity and Timeliness of Objections to Charge

Appellants could not object on appeal to the court's instruction on the negligent beneficiary rule because they did object at trial. *Harris v. Scotland Neck Rescue Squad, Inc.*, 444.

§ 42. Conclusiveness and Effect of Record

A medical report not offered at trial but included in an appendix to plaintiff's brief will not be considered by the appellate court. *Watts v. Cumberland County Hosp. System*, 1.

No prejudicial error was shown where the tape device used to record a trial in district court did not work and appellant simply conjectured that there may have been objections to critical testimony. *In re Caldwell*, 299.

§ 45.1. Effect of Failure to Discuss Exceptions and Assignments of Error in Brief

Plaintiff airport in a condemnation case abandoned on appeal its contention that the trial court erred by allowing testimony regarding prices charged for park-

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 76.1. Contributory Negligence; Hitting Momentarily Stopped or Slowly Moving Vehicles

There was no error in the denial of defendants' motions for a directed verdict and judgment n.o.v. based on plaintiff's alleged contributory negligence where plaintiff struck an unlighted trailer in her lane after dark. *Dunn v. Herring*, 308.

§ 83.2. Contributory Negligence of Pedestrians While Standing on Highway

Plaintiff's conduct constituted contributory negligence as a matter of law where he was standing in defendant's lane of Highway 64 and took one or two steps toward the center of the road between the time defendant's car turned onto the highway and the time of the collision. *Meadows v. Lawrence*, 86.

§ 86. Last Clear Chance

Plaintiffs' contention that summary judgment for defendant was inappropriate because a genuine issue of fact existed as to last clear chance was not addressed where plaintiffs did not plead facts sufficient to invoke the doctrine and did not exercise the option of filing a reply. *Meadows v. Lawrence*, 86.

§ 90.9. Failure to Give Instructions on Particular Issues Generally

There was no evidence requiring the judge to instruct the jury on the proper control of an automobile where plaintiff struck an unlighted tractor-trailer which was across her lane of traffic after dark. *Dunn v. Herring*, 308.

§ 90.10. Failure to Give Instructions on Negligence

The trial court did not err in an action arising from a collision with an ambulance by instructing the jury that testimony as to the condition and value of the ambulance, the location of the siren, and the distance over which it would be audible was not relative to plaintiff's decedent who was a passenger in the car. *Harris v. Scotland Neck Rescue Squad, Inc.*, 444.

§ 120. Driving Under the Influence Generally; Elements of Offense

The 0.10% blood alcohol standard for driving while impaired is not unconstitutionally vague and a measurement made some time after drinking is not so dissimilar from a defendant's condition while driving that it bears no reasonable relationship to penalizing impaired drivers. *S. v. Ferrell*, 156.

§ 126.2. Blood and Breathalyzer Tests Generally

The State introduced sufficient evidence to lay a foundation for the admissibility of breathalyzer results where the evidence was overwhelming that defendant was the driver of the car and the State offered substantial evidence that defendant consumed alcohol before or during the time he drove. *S. v. Ferrell*, 156.

The results of a breathalyzer test were not required to be excluded because the breathalyzer operator refused to retest defendant. *S. v. Magee*, 357.

§ 130. Driving Under the Influence; Verdict and Punishment Generally

The trial court erred in sentencing a DWI defendant by improperly finding aggravating and mitigating factors and giving an improper active term as part of a suspended sentence. *S. v. Magee*, 357.

G.S. 20-179(c)(3) is not unconstitutional in that it requires an active jail term without a jury trial. *S. v. Field*, 647.

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 130.1. Driving Under the Influence; Verdict and Punishment; Second Offenses

A colloquy between the court and the prosecutor to the effect that defendant had previously been convicted of driving under the influence was insufficient to establish a stipulation by defendant to a previous conviction. *S. v. Jordan*, 637.

§ 131. Failing to Stop after Accident

A magistrate's order was sufficient to charge defendant with failing to stop at the scene of an accident although it failed to allege that defendant knew his car had collided with another and damaged it. *S. v. Jordan*, 637.

The evidence was sufficient to permit an inference that defendant knew his car had collided with another and damaged it so as to support his conviction of failing to stop at the scene of an accident. *Ibid.*

BANKS AND BANKING

§ 1.1. Grant of Franchise or Charter

The statute prohibiting the acquisition or control of certain nonbank banking institutions by a bank holding company or any other company does not violate the commerce clause or the contract clause of the U.S. Constitution or provisions of the N.C. Constitution and does not constitute a bill of pains and penalties proscribed by Art. I, § 10 of the U.S. Constitution. *Citicorp v. Currie, Comr. of Banks*, 312.

Citicorp did not have a vested right to operate an industrial bank because it had entered into a contract to acquire an industrial bank and filed an application for approval of such acquisition before the enactment of the statute prohibiting the acquisition or control of an industrial bank by any company. *Ibid.*

BILLS OF DISCOVERY

§ 6. Compelling Discovery

The trial court had no authority under G.S. 15A-905(b) to require that a copy of the report of a ballistics expert hired by defendant be furnished to the district attorney where the record did not show that defendant ever intended to introduce the report or put the expert on the stand. *S. v. King*, 618.

BROKERS AND FACTORS

§ 6.6. Right to Commission Where Broker Does not Procure Purchaser

The evidence on motion for summary judgment presented genuine issues of material fact as to whether an exclusive sales contract was subject to a condition precedent concerning other property to be purchased by the owners and whether the contract had been rescinded by the parties before the owners sold their property. *Lambe-Young, Inc. v. Austin*, 569.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence Generally

The trial court did not err by refusing to dismiss a first degree burglary charge. *S. v. Edwards*, 588.

§ 6.2. Sufficiency of Evidence of Felonious Intent

There was insufficient evidence to support defendant's conviction for first-degree burglary where there was no evidence of intent to commit larceny and there was evidence of other intent or explanatory facts. *S. v. Lamson*, 132.

CONTRACTS

§ 6.1. Contracts by Unlicensed Contractors

Summary judgment for defendants in an action by a builder against the homeowners was proper where the court correctly classified plaintiff as an unlicensed general contractor. *Spears v. Walker*, 169.

Summary judgment was properly entered for defendants in an action on a construction contract where plaintiff's president and sole shareholder was individually licensed as a general contractor but plaintiff corporation was not. *Joe Newton, Inc. v. Tull*, 325.

§ 21.2. Sufficiency of Performance; Breach of Construction Contracts

There was evidence to support the trial court's findings and its award of damages for breach of a contract to construct a two acre pond. *Goodrich v. Rice*, 530.

§ 26. Actions on Contracts; Competency and Relevancy of Evidence Generally

In an action in which plaintiff sought damages arising from his purchase of a dealership in log homes for California, the trial court did not err by finding that the decision of the Commission of Corporations of California affected the validity of the agreement between plaintiff and defendant. *Baker v. Log Systems, Inc.*, 347.

§ 27.2. Sufficiency of Evidence of Breach of Contract

The trial court did not err by granting summary judgment for plaintiff on the issue of liability where the undisputed facts showed that the parties entered into a dealership agreement and that defendant breached the agreement by being unable to award the franchise. *Baker v. Log Systems, Inc.*, 347.

§ 34. Interference with Contract; Sufficiency of Evidence

The evidence was sufficient to support a claim of tortious interference with contract and the trial court erred in directing a verdict against the defendant and third-party plaintiff. *Lexington Homes, Inc. v. W. E. Tyson Builders, Inc.*, 404.

CORPORATIONS

§ 12. Transactions between Corporation and its Officers

There was sufficient evidence to support a verdict that defendant, an officer or director of All Star Mills, had usurped or misappropriated corporate opportunities by formation or operation of other corporations controlled by him. *Lowder v. All Star Mills, Inc.*, 233.

In a shareholders' derivative action alleging misappropriation of corporate opportunities by an officer, there was no error in placing a constructive trust in favor of the corporation upon the assets of corporations controlled by defendant rather than upon their stock. *Ibid.*

§ 13. Liability of Officers to Third Persons for Mismanagement, Fraud and the Like

There was no error in ordering the dissolution of corporations controlled by defendant where the court found that defendant had misappropriated corporate opportunities of All Star Mills by directing operations toward companies in which he had larger interests. *Lowder v. All Star Mills, Inc.*, 233.

COSTS

§ 3.1. Taxing of Costs in Discretion of Court; Allowance of Attorney's Fees

The trial court was authorized to award a fee to defendant's attorney as part of the costs of defendant's counterclaim in a property damage suit involving damages of less than $5,000, and a finding that plaintiff's refusal to pay was unwarranted was not required. *Crisp v. Cobb*, 652.

COUNTIES

§ 2.1. Care of Indigent Sick

No constitutional or statutory provision imposes an obligation on a county to pay for hospital care rendered to its indigent citizens. *Craven County Hosp. Corp. v. Lenoir County*, 453.

CRIMINAL LAW

§ 62. Lie Detector Tests

The decision holding that the results of a polygraph test are no longer admissible in evidence does not preclude the admission of statements made by defendant to the polygraph operator during the post-test interview. *S. v. Singletary*, 504.

§ 66.4. Lineup Identification of Defendant

A robbery victim's unexpected presence at defendant's arraignment did not deny defendant his right to a neutral lineup procedure under G.S. 15A-281. *S. v. Latta*, 611.

§ 66.12. Identification of Defendant; Confrontation in Courtroom

The trial court's failure to rule on whether an arraignment confrontation was impermissibly suggestive was a harmless oversight. *S. v. Latta*, 611.

§ 74.2. Confession by Codefendant; Incompetency of Confession

A nontestifying codefendant's out-of-court statement that he had picked up defendant and his companion because they had pointed guns at him was incriminating to defendant, and its admission thus violated defendant's right of confrontation as set forth in Bruton v. United States. *S. v. Owens*, 513.

§ 75.2. Admissibility of Confession; Effect of Promises, Threats or other Statements of Officers

Defendant's cause was remanded for a new hearing where there was conflicting testimony at the voir dire on her motion to suppress her statement to law enforcement officers and the court did not make findings resolving the conflict. *S. v. Walden*, 79.

§ 75.7. Voluntariness of Confession; What Constitutes Custodial Interrogation

Incriminating statements made by defendant to a polygraph operator during a post-test interview were not the result of custodial interrogation and were voluntarily and understandingly made. *S. v. Singletary*, 504.

§ 86.1. Impeachment of Defendant

There was no abuse of discretion in an action for obtaining property by false pretenses where the trial judge allowed the State to cross-examine defendant about prior acts of misconduct. *S. v. Kelly*, 461.

CRIMINAL LAW – Continued

§ 87.3. Past Recollection Recorded

The court did not improperly limit the cross-examination of an undercover S.B.I. agent in a prosecution for the sale and delivery of cocaine and for trafficking in cocaine. *S. v. Duncan*, 38.

§ 90.1. Rule that Party Is Bound by Own Witness; Showing Facts to Be Other than as Testified by Witness

The State was not bound by defendant's exculpatory statement which it introduced where such statement was contradicted by a codefendant's testimony. *S. v. Owens*, 513.

§ 91.7. Continuance on Ground of Absence of Witness

There was no abuse of discretion or denial of defendants' constitutional rights in denying their motion for a continuance to secure a witness in a prosecution for the sale and delivery of cocaine and trafficking in cocaine. *S. v. Duncan*, 38.

§ 102.5. Conduct in Cross-Examining Witnesses

There was no prejudice in a prosecution for second degree murder where the prosecutor on cross-examination asked the widow of decedent whether she could say anything she wanted since the decedent was not there to contradict her. *S. v. Jones*, 615.

§ 113.1. Instructions; Summary of Evidence

The trial court erred in its summary of evidence relating to identification where it failed to mention the victim's unannounced presence at defendant's arraignment or that a police report of the first interview with the victim stated that the suspect could not be identified. *S. v. Latta*, 611.

§ 138. Severity of Sentence

The trial court did not err when sentencing defendant for the second-degree murder of a four-year-old child by finding as aggravating factors that the child was very young and that defendant took advantage of a position of trust or confidence to commit the offense. *S. v. Hitchcock*, 65.

The trial court erred in failing to consider defendant's prison conduct between the original sentencing hearing and the resentencing hearing for purposes of mitigation. *S. v. Corley*, 245.

Where the trial court consolidated kidnapping and larceny charges for sentencing, it should have made separate findings in aggravation and mitigation as to each offense. *Ibid.*

The trial court did not abuse its discretion in finding that a single aggravating factor outweighed the eleven mitigating factors. *Ibid.*

The trial court erred when sentencing defendant for voluntary manslaughter by finding as an aggravating factor that defendant shot her husband with a deadly weapon and with malice. *S. v. Heidmous*, 488.

Defendant did not meet her burden of showing that the trial judge improperly found as an aggravating factor that defendant committed the offense while on pretrial release where defendant did not place in the record sufficient portions of the transcript to enable the court to review the assignment of error. *S. v. Kelly*, 461.

The trial court erred when sentencing defendant for first degree burglary by considering as a factor in aggravation that defendant used a deadly weapon where the breaking and entering was proved by evidence that defendant pointed a gun at the victim's head and drove him into a motel room. *S. v. Edwards*, 588.

CRIMINAL LAW — Continued

§ 138.7. Severity of Sentence; Particular Matters and Evidence Considered

The record showed that the sentencing judge did not consider the prosecutor's improper reference to a robbery that had occurred the night before the robbery in question. *S. v. Owens*, 513.

§ 162. Necessity for Objections to Evidence

An assignment of error concerning the circumstances surrounding defendant's statement to police was dismissed because defendant failed to make a timely objection to the questions. *S. v. Moore*, 543.

§ 165. Exceptions and Assignments of Error to Arguments of Prosecutor

The Court of Appeals could not review the denial of defendant's motion for appropriate relief based on improper comments in the State's closing argument and on the court's failure to record the State's closing argument where defendant declined the court's offer to reconstruct the argument. *S. v. Moore*, 543.

§ 181. Postconviction Hearing

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury on a prosecuting witness, the trial court erred by hearing the State's motion to set aside the judgment for newly-discovered evidence after the victim objected and came forward with additional medical expenses the day after judgment. *S. v. Oakley*, 99.

DAMAGES

§ 2. Compensatory Damages Generally

Although it was proper for the jury to award interest in a quantum meruit action, the jury was required by G.S. 24-5 to distinguish the principal from the amount allowed as interest. *Environmental Landscape Design v. Shields*, 304.

§ 10. Credit on Damages

In an action by one co-employee against another for injuries resulting from a deliberate prank, evidence of plaintiff's sick leave pay was properly excluded but testimony of her company's personnel director and evidence of her back problems were properly admitted. *Andrews v. Peters*, 252.

§ 11.1. Circumstances Where Punitive Damages Appropriate

Plaintiff's evidence was sufficient to show a tortious refusal by defendant insurer in bad faith to settle plaintiff's fire insurance claim with accompanying aggravation so as to support an award of punitive damages. *Dailey v. Integon Ins. Corp.*, 387.

§ 12.1. Pleading Punitive Damages

Plaintiff's claim for punitive damages based on bad faith and fraud by defendant insurer in failing to pay plaintiff's claim under a hospital insurance policy was properly dismissed. *Beasley v. National Savings Life Ins. Co.*, 104.

§ 17.7. Instructions on Punitive Damages

There was no error in the dismissal of plaintiff's claim for punitive damages in an action arising from the use of corporal punishment in a high school where the jury found that there was no malice on the part of the assistant principal who had administered the punishment. *Gaspersohn v. Harnett Co. Bd. of Education*, 23.

DECLARATORY JUDGMENT ACT

§ 2. Jurisdiction

The district court had subject matter jurisdiction to determine the parties' rights to a private road in a declaratory judgment action involving an easement over a private road adjacent to White Lake and a pier and boat ramp extending into the lake. *Woodlief v. Johnson*, 49.

In a declaratory judgment action to determine the rights of the parties in an easement over a private road, pier, and boat ramp running from a state road to White Lake, the trial court erred by finding and concluding that the pier was an extension of the street easement. *Ibid.*

DEEDS

§ 20.3. Restrictions against Multiple Family Dwellings

A group care facility constituted a single family residential dwelling within the meaning of subdivision restrictive covenants. *Smith v. Assoc. for Retarded Citizens*, 435.

DIVORCE AND ALIMONY

§ 8.1. Provocation for Abandonment

The trial judge's order granting plaintiff a divorce from bed and board was not supported by his findings and conclusions. *Puett v. Puett*, 554.

§ 17. Alimony upon Divorce from Bed and Board Generally

The trial judge's findings supported his conclusions that defendant was not entitled to alimony. *Puett v. Puett*, 554.

§ 21.6. Enforcement of Alimony Award; Effect of Separation Agreement

The provisions of a 1974 separation agreement incorporated into a consent judgment were part of an integrated property settlement and therefore not modifiable by a motion in the cause. *Marks v. Marks*, 522.

§ 21.8. Enforcement of Foreign Alimony Awards

A North Carolina district court erred by concluding that a Texas divorce decree was void because it specified that the Agreement Incident to Divorce would be void if the divorce was not granted within forty-five days and the decree of divorce was signed fifty-two days later. *Webster v. Webster*, 621.

The trial court did not err by denying plaintiff's motion to increase her share of defendant's military retirement benefits where there was nothing in the pleadings asking for such relief. *Ibid.*

§ 24.1. Determining Amount of Child Support

In an action for past due child support, the husband waived his right to a credit for one son's earnings where there was no evidence that the husband ever objected to the child's receipt of earnings. *Brower v. Brower*, 425.

§ 24.4. Enforcement of Child Support Orders

An underlying past due child support obligation was not affected by the dismissal of the wife's show cause order. *Brower v. Brower*, 425.

§ 24.5. Modification of Child Support Order

The trial court erred by reducing the arrearage under a child support order for the period from 1980 through 1984 where the older child reached eighteen in 1979

DIVORCE AND ALIMONY — Continued

and the younger child reached eighteen in 1984 but there were no specific findings or evidence of the younger child's needs between 1979 and 1984. *Brower v. Brower*, 425.

§ 24.10. Termination of Child Support Obligation

Plaintiff's complaint seeking support from her father for her college education was properly dismissed for failing to state a claim upon which relief could be granted. *Appelbe v. Appelbe*, 197.

§ 25.7. Modification of Child Custody Order

The trial court properly concluded that a change of circumstances was required to modify a child custody agreement where all the facts pertinent to custody were before the court which issued the initial custody decree. *Wehlau v. Witek*, 596.

§ 25.10. Modification of Child Custody Order; Where Changed Circumstances Are Not Shown

The trial court correctly concluded that its findings did not amount to a substantial change in circumstances sufficient to authorize a modification of a custody order which had granted each parent joint and equal custody with the children residing with each parent in alternating years. *Wehlau v. Witek*, 596.

§ 27. Attorney's Fees Generally

An order requiring a husband to pay past due child support and $500 in the wife's attorney's fees was vacated and remanded where there were deficiencies in the record and where the order included no findings on the wife's good faith, the husband's refusal to provide adequate support, or the wife's inability to defray attorney's fees. *Brower v. Brower*, 425.

The trial judge did not err by denying defendant attorney fees. *Puett v. Puett*, 554.

§ 30. Equitable Distribution

The trial court was without authority to enter an order of equitable distribution with the consent of the parties prior to a decree of absolute divorce. *McKenzie v. McKenzie*, 188.

Whether a promissory note and new stock acquired by the husband after the separation of the parties in exchange for stock acquired by the husband during the marriage in his name alone constituted separate or marital property depended not on whether they were acquired after the date of separation but whether the source of assets used for their purchase constituted marital assets. *Mauser v. Mauser*, 115.

When a divorce is granted on the ground of separation for one year, marital property is to be valued as of the date of separation. *Ibid.*

The trial court should not have granted summary judgment for defendant husband in an action for equitable distribution where plaintiff's affidavit raised triable issues of fact as to whether the separation agreement was signed by plaintiff under duress and whether it was ratified by plaintiff. *Cox v. Cox*, 354.

In ordering a distribution of marital property, a court should make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill. *Poore v. Poore*, 414.

The trial court's valuation of a solely owned dental practice for equitable distribution purposes was not based on a sound method of evaluation and was not supported by the evidence. *Ibid.*

EMINENT DOMAIN — Continued

§ 6.4. Other Evidence of Value

In a condemnation action arising from the expansion of an airport, the trial court did not commit prejudicial error by admitting evidence concerning the airport's rental income from airport service and commercial tenants. *Raleigh-Durham Airport Authority v. King*, 57.

In a condemnation case arising from an airport expansion, prices charged for parking by the Airport Authority reflected demand for parking space in the area and helped to establish a fair market value for defendants' land. *Raleigh-Durham Airport Authority v. King*, 121.

There was no error in a condemnation case from the admission of testimony from the landowners' expert as to his use of the income approach as part of his overall appraisal. *Ibid.*

§ 6.5. Testimony of Witness as to Value

The trial court in a condemnation action did not err by admitting expert opinion of the fair market value of defendants' property based on capitalization of hypothetical income from hypothetical improvements. *Raleigh-Durham Airport Authority v. King*, 57.

§ 6.7. Testimony as to Uses of Land

In an action to determine compensation for the condemnation of defendants' property for airport expansion, the court did not err by allowing defendants' expert to testify to the properties' highest and best use if it had not been under a cloud of condemnation. *Raleigh-Durham Airport Authority v. King*, 57.

In a condemnation action arising from an airport expansion, the trial court did not err by admitting expert testimony that the highest and best use of the property would be an expansion of an existing parking facility with a portion reserved for a service station. *Raleigh-Durham Airport Authority v. King*, 121.

§ 6.8. Testimony as to General and Special Benefits

The trial court did not err in allowing testimony by plaintiff's experts as to the increased value of defendant's remaining land after construction of a state secondary paved road partially on land taken by condemnation from defendant and partially on a right-of-way which already contained a dirt and gravel road. *S. v. Thrift Lease, Inc.*, 152.

ESTOPPEL

§ 4.6. Equitable Estoppel; Conduct of Party Asserting Estoppel; Reliance

The trial court properly entered summary judgment for defendant in an action in which plaintiff sought specific performance or damages for an alleged breach of a termite inspection contract. *Five Oaks Homeowners Assoc., Inc. v. Efirds Pest Control Co.*, 635.

EVIDENCE

§ 11.7. Transactions with Decedent; Particular Evidence Barred by Statute

The dead man's statute does not bar one from testifying as to his own acts or matters as to which he has independent knowledge not acquired in a communication with a decedent. *B M & W of Fayetteville v. Barnes*, 600.

EVIDENCE — Continued

§ 18. Experimental Evidence

The trial court did not err by allowing plaintiff to examine the appellants' expert in audiology on voir dire in an action arising from a collision with an ambulance at an intersection. *Harris v. Scotland Neck Rescue Squad, Inc.*, 444.

§ 25. Photographs

The trial court in an action arising from a collision with an ambulance did not err by admitting photographs as substantive rather than illustrative evidence. *Harris v. Scotland Neck Rescue Squad, Inc.*, 444.

§ 29.3. Business Records

Various hospital records and correspondence between physicians should have been admitted in a medical malpractice action under the business records exception to the hearsay rule, and the hospital records were also admissible to show the basis of opinions formed by plaintiff's expert witnesses. *Donavant v. Hudspeth*, 321.

FALSE PRETENSE

§ 2.1. Indictment and Warrant Sufficient

The passage of title is not a requisite element of obtaining property by false pretenses. *S. v. Kelly*, 461.

§ 3. Evidence

The trial court in a prosecution for obtaining an automobile by false pretenses did not err by admitting a telephone conversation between the witness and a third party where the testimony was admitted to explain the witness's actions and the jury was instructed on the limited purpose of the evidence. *S. v. Kelly*, 461.

§ 3.2. Instructions

The trial court did not err in a prosecution for obtaining property by false pretenses by refusing to charge the jury on the crime of larceny. *S. v. Kelly*, 461.

FRAUD

§ 9. Pleadings

Plaintiff's amended complaint was sufficient to state a claim for relief against defendant family and marital therapist for fraudulent concealment in failing to tell her that her pain was caused by physical injuries she received in an automobile accident rather than by her psychological state. *Watts v. Cumberland County Hosp. System*, 1.

§ 12. Sufficiency of Evidence

Plaintiff's evidence was sufficient for the jury on the issue of fraud by defendant corporate officer in making misrepresentations concerning guaranty agreements. *Tyson Foods v. Ammons*, 548.

FRAUDS, STATUTE OF

§ 5.1. Contracts to Answer for Debt of Another; Main Purpose Rule

An oral guaranty of a poultry company's debt by an officer and stockholder did not come within the main purpose doctrine exception to the statute of frauds. *Tyson Foods v. Ammons*, 548.

FRAUDS, STATUTE OF — Continued

§ 6. Contracts Affecting Realty Generally

Land owned individually by one who enters into a partnership cannot become a partnership asset absent some written agreement sufficient to satisfy the statute of frauds. *Ludwig v. Walter*, 584.

§ 8. Leases

The trial judge correctly dismissed plaintiff's cause of action seeking to enforce an oral agreement for rent where the agreement was for an indefinite or uncertain term. *Simon v. Mock*, 564.

HIGHWAYS AND CARTWAYS

§ 9. Actions against the Highway Commission Generally

The superior court erred by dismissing plaintiff's claim for liquidated damages and additional compensation under a contract with the North Carolina Department of Transportation. *C. W. Matthews Contracting Co., Inc. v. State of North Carolina*, 317.

HOMICIDE

§ 5. Murder in the Second Degree; Definitions

There was no error in the trial court's definition and distinction of malice and criminal negligence in a prosecution for second-degree murder arising from the death of a four-year-old child. *S. v. Hitchcock*, 65.

§ 15.2. Defendant's Mental Condition; Malice

The trial court did not err by admitting testimony that the four-year-old homicide victim had sustained a fractured jawbone while alone with defendant two months before her death. *S. v. Hitchcock*, 65.

§ 23. Instructions in General

There was evidence to support the trial court's instruction on first and second degree murder and on voluntary manslaughter. *S. v. Moore*, 543.

§ 26. Instructions on Second Degree Murder Generally

In a prosecution for the second-degree murder of a four-year-old child, the trial court did not redefine second-degree murder in its instructions by using N.C.P.I.-Crim. 206.35. *S. v. Hitchcock*, 65.

The court did not err by denying defendant's motion to dismiss the charge of second degree murder. *S. v. Jones*, 615.

§ 30.3. Instructions on Involuntary Manslaughter

The trial court properly denied defendant's request for instructions on involuntary manslaughter. *S. v. Moore*, 543.

HOSPITALS

§ 3. Liability of Charitable Hospital for Negligence of Employees

The trial court did not err by granting a directed verdict for defendant hospital in a medical malpractice action arising from the treatment of plaintiff at an emergency room. *Paris v. Kreitz*, 365.

HOSPITALS — *Continued*

§ 5. Regulation of Nurses

In a medical malpractice action arising from an emergency room diagnosis, there was no error in allowing three doctors to testify that the treatment afforded plaintiff in the emergency room was in conformity with professional nursing standards. *Paris v. Kreitz*, 365.

HUSBAND AND WIFE

§ 12. Revocation of Separation Agreement; Resumption of Marital Relationship

The rule that a separation agreement between a husband and wife is terminated insofar as it remains executory on the resumption of marital relations has not been superseded by G.S. 50-20(d). *Camp v. Camp*, 498.

The trial court's conclusion that plaintiff and defendant had not resumed their marital relationship was supported by the findings and the evidence. *Ibid.*

INDIANS

§ 1. Generally

The District Court of Jackson County did not have subject matter jurisdiction over an action to have defendant adjudicated the father of Kevin Jackson and to collect for past public assistance paid for Kevin's benefit where Kevin, defendant, and Kevin's mother were all members of the Eastern Band of Cherokee Indians living within their reservation. *Jackson Co. v. Swayney*, 629.

INFANTS

§ 5. Jurisdiction to Award Custody

Where the trial court obtained jurisdiction over the custody of a juvenile pursuant to G.S. 7A-523 of the Juvenile Code rather than pursuant to G.S. Ch. 50A, the informational affidavit referred to in G.S. 50A-9 was not a prerequisite to its jurisdiction. *In re Botsford*, 72.

§ 6.2. Modification of Custody Order

The trial court was authorized by G.S. 7A-664(a) to modify a consent custody order in a juvenile delinquency proceeding upon a showing of a change in the needs of the juvenile without showing a change in circumstances. *In re Botsford*, 72.

There was no change in the needs of a juvenile requiring that her custody be returned from her grandmother to her parents where the parents wanted custody so that they could consent to the juvenile's marriage and terminate their responsibility for her support. *Ibid.*

INSURANCE

§ 2.2. Liability of Agent for Failure to Procure Insurance

There was no error in submitting contributory negligence to the jury in an action against an insurance agent for not procuring adequate fire insurance where plaintiffs did not read the policy, did not know the true value of their property, and did not inform defendant of its true value. *Kirk v. R. Stanford Webb Agency, Inc.*, 148.

Plaintiffs' evidence was insufficient to support a jury verdict finding defendant agent negligent in failing to procure insurance on plaintiffs' house. *Alford v. Tudor Hall and Assoc.*, 279.

INSURANCE — Continued

§ 41. Health Insurance; Inception of Sickness

In an action to recover benefits on a health insurance policy, there was no error in the denial of defendant's motions for summary judgment and for a peremptory instruction as to its defense of an exclusion under the policy. *Alexander v. Pilot Life Ins.*, 640.

§ 42. Notice and Proof of Disability

A mortgage payment disability insurer's requirement that the insured submit proof of his disability each month benefits were applied for did not constitute an unfair and deceptive trade practice. *Douglas v. Pennamco, Inc.*, 644.

§ 43. Payment and Discharge of Disability Benefits

A mortgage payment disability insurer was not liable for damages caused by foreclosure of the mortgage because of delays in making disability payments to plaintiffs. *Douglas v. Pennamco, Inc.*, 644.

§ 43.1. Hospital Expenses Policy

Plaintiff's claim for punitive damages based on bad faith and fraud by defendant insurer in failing to pay plaintiff's claim under a hospital insurance policy was properly dismissed. *Beasley v. National Savings Life Ins. Co.*, 104.

§ 121. Fire Insurance; Provisions Excluding Liability

The evidence was sufficient to support a jury finding that defendant's sole stockholder caused the burning of defendant's property. *Shelby Mut. Ins. Co. v. Dual State Constr. Co.*, 330.

§ 132. Fire Insurance; Right to Interest

Plaintiff was properly permitted to recover prejudgment interest on the amount recovered under a fire insurance contract. *Dailey v. Integon Ins. Corp.*, 387.

§ 136. Actions on Fire Policies

Testimony elicited about prior fires allegedly resulting from incendiary origins and in the collection of insurance proceeds was relevant on the question of intentional burning in an action to determine an insurer's liabilities under a fire insurance policy issued to defendant. *Shelby Mut. Ins. Co. v. Dual State Constr. Co.*, 330.

Plaintiff's evidence was insufficient to support his claim for intentional infliction of emotional distress by defendant insurer in refusing to settle plaintiff's fire insurance claim. *Dailey v. Integon Ins. Corp.*, 387.

§ 145.1. Property Damage Insurance; Rates

The Commissioner of Insurance erred in conditioning approval of an 11.7 percent rate increase for farmowner insurance coverages subject to the Rate Bureau's jurisdiction on a filing for a rate decrease for farmowner insurance coverages not subject to the Rate Bureau's jurisdiction. *State ex rel. Comr. of Insurance v. N. C. Rate Bureau*, 201.

The Commissioner of Insurance did not err in disapproving the Rate Bureau's calculation of the premium trend component of the modified farm projection factor in its filing for an increase in farmowner insurance rates but did err in adopting the recommendation of a witness that the premium and loss trends be considered equal. *Ibid.*

LANDLORD AND TENANT

LARCENY

LIMITATION OF ACTIONS

LIMITATION OF ACTIONS — Continued

§ 7. Accrual of Actions to Declare Constructive Trusts

The trial court properly instructed the jury that a ten-year statute of limitations applied to an action to impose a constructive trust on corporate assets arising from a breach of a fiduciary duty and the court's instruction properly applied the principle that the statute of limitations began to run from the time the trustee disavowed the trust and knowledge of the disavowal was brought home to the cestui que trust. *Lowder v. All Star Mills, Inc.*, 233.

§ 8.2. Sufficiency of Notice of Facts Constituting Alleged Fraud

Plaintiff's claim against defendant marital and family therapist for fraudulent concealment was not barred by the statute of limitations of G.S. 1-52(9). *Watts v. Cumberland County Hosp. System*, 1.

§ 9. Tolling of Statute of Limitations by Death of Party

Plaintiff may sue for rents not paid for the three year period prior to defendant's husband's death where plaintiff brought action against defendant individually and as administratrix of her husband's estate. *Simon v. Mock*, 564.

MASTER AND SERVANT

§ 9. Actions to Recover Compensation

The Wage and Hour Act requires an employer to notify the employee in advance of the wages and benefits which he will earn and the conditions which must be met to earn them, and to pay those wages and benefits when the employee has actually performed the work required to earn them. *Narron v. Hardee's Food Systems, Inc.*, 579.

The trial court erred by granting summary judgment for defendant in an action in which plaintiff sought payment for accumulated vacation leave upon termination of his employment. *Ibid.*

§ 50.1. Workers' Compensation; Independent Contractors

The Industrial Commission correctly found that plaintiff was an employee of defendant rather than an independent contractor. *Gordon v. West Construction Co.*, 608.

§ 68. Occupational Diseases

The evidence supported a determination that deceased's chronic obstructive pulmonary disease was not caused or contributed to by his exposure to cotton dust in his employment but was a result of his cigarette smoking. *Goodman v. Cone Mills Corp.*, 493.

§ 73.1. Loss of Vision or of Eye

Plaintiff's injury was compensable under G.S. 97-31(24) where a piece of metal hit him in the eye while he was operating a rivet machine because he suffered a permanent injury to the eye but did not lose the eye or suffer any loss of vision. *Little v. Penn Ventilator Co.*, 92.

§ 75. Medical and Hospital Expenses

The Industrial Commission erred by awarding future medical expenses to a plaintiff who had a piece of metal imbed itself in his eye while operating a rivet machine. *Little v. Penn Ventilator Co.*, 92.

MASTER AND SERVANT — Continued

§ 89.1. Remedies against Third Person Tortfeasors Generally; Fellow Employee as Third Person

There was no error in denying defendant's motions for a directed verdict in an action by an employee injured as the result of a prank by defendant co-employee where defendant did not deny that he intended to tap plaintiff behind the knee. *Andrews v. Peters*, 252.

§ 108.1. Right to Unemployment Compensation; Effect of Misconduct

There was not a willful and deliberate disregard of company policy or an unwillingness to work which would disqualify claimant from unemployment benefits where claimant left work early without permission and entered hours into his time record that he did not work but had what amounted to a good faith reason. *Williams v. Burlington Industries, Inc.*, 273.

Refusal of an employee to go to his supervisor's office immediately to discuss a field trip did not constitute misconduct sufficient to disqualify the employee from receiving unemployment benefits. *Umstead v. Employment Security Commission*, 538.

§ 111. Unemployment Compensation; Appeal and Review of Proceedings before Employment Security Commission.

The Employment Security Commission erred by remanding to the appeals referee for a second hearing where the facts found by the appeals referee determined the controversy even though the facts found did not support the conclusions. *Williams v. Burlington Industries, Inc.*, 273.

MORTGAGES AND DEEDS OF TRUST

§ 17.1. Particular Acts Constituting Payment and Satisfaction

When a debt secured by a deed of trust on land lying in two different counties was paid in full from the proceeds of a foreclosure sale in one county, no valid debt existed which would support foreclosure of the deed of trust in the second county. *In re Foreclosure of Rollins*, 656.

§ 25. Foreclosure by Exercise of Power of Sale in the Instrument

Where a loan modification agreement gave petitioner the right to accelerate the entire indebtedness if one monthly payment became delinquent, the monthly payment became delinquent when it was not made on or before its due date rather than after the thirty-day grace period contained in the original note. *In re Foreclosure of Fortescue*, 127.

Equitable defenses may not be raised in a hearing pursuant to G.S. 45-21.16. *Ibid.*

§ 39. Action for Damages for Wrongful Foreclosure

Plaintiff's claim against a trustee who processed a mortgage foreclosure based on inadequate notice and affidavit of default constituted an impermissible collateral attack on the foreclosure proceeding and judgment. *Douglas v. Pennamco, Inc.*, 644.

MUNICIPAL CORPORATIONS

§ 2.2. Annexation; Requirements of Size and Use of Tracts

A 1.83 acre tract with a house did not have to be treated as more than one lot for annexation purposes because two separate parts of the lot were used to grow

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 11. Generally; Duty and Liability of Physician

Certified marital and family therapists are health care providers, and any action for damages arising out of their furnishing or failing to furnish professional services is a medical malpractice action. *Watts v. Cumberland County Hosp. System*, 1.

A health care provider's unauthorized disclosure of a patient's confidences constitutes medical malpractice. *Ibid.*

Plaintiff's amended complaint was sufficient to state a claim for relief against defendant family and marital therapist for fraudulent concealment in failing to tell her that her pain was caused by physical injuries she received in an automobile accident rather than by her psychological state. *Ibid.*

§ 13. Limitation of Actions for Malpractice

A claim against a marital and family therapist for medical malpractice based upon unauthorized disclosure of confidential information was governed by the statute of limitations set forth in G.S. 1-15(c) rather than that set forth in G.S. 1-52. *Watts v. Cumberland County Hosp. System*, 1.

§ 15. Malpractice; Competency and Relevancy of Evidence Generally

There was no error in a medical malpractice case in permitting the cross-examination of plaintiffs' expert witness about his role as an expert in two earlier unrelated murder cases. *Paris v. Kreitz*, 365.

There was no error in a medical malpractice action in excluding a statement made by a doctor during his treatment of plaintiff where the statement was admitted during redirect examination. *Ibid.*

The trial court did not err in a medical malpractice action by sustaining defendants' objection to what defendant would have done if he had seen plaintiff in the emergency room and plaintiff was in the same condition that he was the next morning in the defendant's office. *Ibid.*

There was no prejudicial error in a medical malpractice action in sustaining objections to the testimony of plaintiffs' expert on whether defendant exercised reasonable care and diligence. *Ibid.*

§ 15.2. Malpractice; Who May Testify as Experts

A former Catholic priest was qualified to testify about the standard of care for a marital and family therapist in Fayetteville from 1974 until 1981 and defendant's deviation from that standard. *Watts v. Cumberland County Hosp. System*, 1.

The trial court in a medical malpractice action did not err by allowing one of the defendants, a doctor, to testify as an expert witness even though he had not been listed as an expert. *Paris v. Kreitz*, 365.

The trial court in a medical malpractice action did not err by sustaining defendants' objection to plaintiffs' expert testimony as to the standard of care for physician's assistants. *Ibid.*

§ 17. Sufficiency of Evidence of Malpractice; Departing from Approved Methods or Standard of Care

Defendant marital and family therapist failed to show that there was no genuine issue of material fact with respect to plaintiff's claim for fraudulent concealment in failing to inform plaintiff that her pain was caused by physical injuries she received in an automobile accident rather than by her psychological state. *Watts v. Cumberland County Hosp. System*, 1.

QUASI CONTRACTS AND RESTITUTION

§ 2. Actions to Recover on Implied Contracts Generally

Defendant could not recover in quantum meruit in an action for breach of express contract to construct a pond where defendant failed to file an answer. *Goodrich v. Rice*, 530.

§ 2.1. Actions to Recover on Implied Contracts Generally; Sufficiency of Evidence

Plaintiff's evidence was sufficient to permit it to recover in quantum meruit for landscape design work performed for defendants. *Environmental Landscape Design v. Shields*, 304.

§ 2.2. Actions to Recover on Implied Contracts; Measure and Items of Recovery

Although it was proper for the jury to award interest in a quantum meruit action, the jury was required by G.S. 24-5 to distinguish the principal from the amount allowed as interest. *Environmental Landscape Design v. Shields*, 304.

ROBBERY

§ 4. Sufficiency of Evidence of Conspiracy

There was sufficient evidence that one defendant knowingly entered into a criminal conspiracy with intent to carry out an agreement to commit robbery with a dangerous weapon. *S. v. Walden*, 79.

§ 4.6. Cases Involving Multiple Perpetrators in which Evidence Was Sufficient

The trial court did not err by submitting common law robbery to the jury where the State's evidence showed that defendant Darby counseled and aided the principals even though she was not present when the robbery was committed. *S. v. Walden*, 79.

The State's evidence was sufficient to support defendant's conviction of armed robbery on the theory of acting in concert. *S. v. Owens*, 513.

§ 5. Instructions

Evidence that defendant was a passenger in a truck carrying goods taken during an armed robbery was sufficient to show that defendant was in possession of the goods so as to support the court's instruction on the doctrine of possession of recently stolen goods. *S. v. Owens*, 513.

Items stolen during an armed robbery were sufficiently identified to permit an instruction on the doctrine of possession of recently stolen property. *Ibid.*

RULES OF CIVIL PROCEDURE

§ 13. Counterclaim

There was no error in dismissing plaintiff's claim as a compulsory counterclaim to a pending declaratory judgment action. *Carolina Squire, Inc. v. Champion Map Corp.*, 194.

A plaintiff's dismissal of its claims against all defendants does not require dismissal of crossclaims properly filed in the same action. *Jennette Fruit v. Seafare Corp.*, 478.

§ 15.1. Discretion of Court to Grant Amendment to Pleadings

The trial court did not err in granting plaintiffs' motion to amend their complaint where neither amendment brought out new material, changed the theory of the case, or in any way could have surprised defendant. *Goodrich v. Rice*, 530.

RULES OF CIVIL PROCEDURE — Continued

§ 15.2. Amendment of Pleadings to Conform to Evidence

The trial court did not err by denying plaintiffs' motion to amend their complaint to conform to the evidence where plaintiffs sought to add an additional cause of action against which defendants were not prepared to defend and to which they had not consented. *Paris v. Kreitz*, 365.

§ 17. Parties Plaintiff and Defendant

In a contract action alleging breach of contract to build a pond, the trial court erred by awarding all of the damages to plaintiffs where the real party in interest was the landowner. *Goodrich v. Rice*, 530.

§ 19. Necessary Joinder of Parties

The trial court erred by failing to join as a necessary party in an action to hold adjacent landowners liable for flooding the record owner of property leased to a named defendant. *Bjornsson v. Mize*, 289.

§ 23. Class Actions

The trial court erred by determining actual damages and refusing to certify the "season ticket" action as a class action because North Carolina trial courts have no authority to hear the merits of a case in determining whether to certify a class. *Maffei v. Alert Cable TV of N.C., Inc.*, 473.

§ 24. Intervention

A motion to intervene filed after entry of default was untimely. *State Employees' Credit Union, Inc. v. Gentry*, 260.

§ 33. Interrogatories

Defendant could not properly refuse to answer interrogatories in a wrongful death action arising out of an automobile accident on the ground of self-incrimination. *Shaw v. Williamson*, 604.

§ 41. Dismissal of Actions Generally

A trial judge has authority to dismiss a plaintiff's claim for failure to prosecute without a motion by defendant to do so. *Blackwelder Furniture Co. v. Harris*, 625.

Plaintiff's claim to recover for a past-due account was improperly dismissed for failure to prosecute where plaintiff's trustee in bankruptcy was present when the case was called. *Ibid.*

The trial court properly denied defendant's motion for a directed verdict where the evidence supported the determination by the court that a contractual agreement had been breached. *Goodrich v. Rice*, 530.

§ 52. Findings by Court Generally

An action by an employee against a co-employee for an intentional tort was remanded for additional findings of fact where defendant had filed a motion asking for detailed findings and conclusions and the court's order was no more than a statement of its discretionary authority. *Andrews v. Peters*, 252.

§ 56. Summary Judgment

The trial court did not err by not ruling on plaintiff's motion to strike the answer before considering defendants' motion for summary judgment based on plaintiff's failure to be licensed as a general contractor. *Joe Newton, Inc. v. Tull*, 325.

RULES OF CIVIL PROCEDURE — Continued

§ 56.4. Summary Judgment in Negligence Cases

There was no issue of fact as to whether plaintiff was a general contractor and summary judgment was properly granted for defendants where plaintiff had alleged in its complaint that it was employed as a general contractor, that it performed "general contracting services," and that it had furnished materials and labor for which defendants had agreed to pay $90,154. *Joe Newton, Inc. v. Tull,* 325.

§ 58. Entry of Judgment

There was no prejudicial error in the entry of judgment in open court without notice to the parties by a judge other than the judge who drafted and signed the order because notice of appeal was timely filed. *Brower v. Brower,* 425.

§ 59. New Trials

There was no manifest abuse of discretion in denying appellants' motions to set aside the verdict, for judgment n.o.v., and for a new trial even though the decedent was seventy-five years old and the award was $323,333. *Harris v. Scotland Neck Rescue Squad, Inc.,* 444.

There was no error in the denial of plaintiffs' motion for a new trial in a medical malpractice action where there was evidence from which the jury could have found that defendants were negligent or that they were not negligent. *Paris v. Kreitz,* 365.

SCHOOLS

§ 1. Supervision in General

In an action arising from the use of corporal punishment, the court did not err by not including instructions on whether reasonable force had been used, that the jury could consider the regulations of the Harnett County Board of Education, and that corporal punishment should never be employed as a first line of punishment for misbehavior. *Gaspersohn v. Harnett Co. Bd. of Education,* 23.

The trial court did not express an opinion in an action arising from the use of corporal punishment in a high school while stating the contentions of the parties, in its comments, in its evidentiary rulings, or by declining plaintiff's requested charge to the jury. *Ibid.*

In an action arising from the use of corporal punishment in a high school, the court did not err by limiting questions concerning alternatives to corporal punishment or corporal punishment administered to other students. *Ibid.*

§ 13.2. Dismissal of Teachers

The court properly granted summary judgment for plaintiff on the issue of whether he was entitled to the safeguards of the Teacher Tenure Act before being demoted from his supervisory position. *Faison v. New Hanover Co. Board of Education,* 334.

SHERIFFS AND CONSTABLES

§ 1. Nature of Office

The sheriff has no personal liability to pay for medical treatment of a person injured while in his custody absent an express agreement to do so. *Craven County Hosp. Corp. v. Lenoir County,* 453.

STATE

§ 1. Sovereignty and Authority

Corporal punishment is not proscribed by international law made applicable to North Carolina by the United Nations Charter. *Gaspersohn v. Harnett Co. Bd. of Education*, 23.

TAXATION

§ 25.10. Ad Valorem Taxes; Proceedings; State Board of Assessment

The Property Tax Commission erred by receiving new evidence in an appraisal proceeding which had been remanded to the Commission from the Supreme Court. *In re McElwee*, 658.

§ 41.2. Foreclosure of Tax Lien; Notice

Defendant City complied with all notice requirements for a tax foreclosure sale where defendant gave personal notice to all record owners of the property and notice by publication to all others having an interest in the property who could not with due diligence be located. *Overstreet v. City of Raleigh*, 351.

§ 45. Title and Rights of Purchaser at Tax Sale

The trial court properly granted summary judgment for defendant in an action seeking title to property by adverse possession following a tax sale. *Overstreet v. City of Raleigh*, 351.

TRESPASS

§ 2. Trespass to the Person

Plaintiff's complaint in an action to recover damages for defendant insurer's failure to pay plaintiff's claim under a hospital insurance policy was insufficient to state a claim for intentional infliction of emotional distress. *Beasley v. National Savings Life Ins. Co.*, 104.

Plaintiff's evidence was insufficient to support his claim for intentional infliction of emotional distress by defendant insurer in refusing to settle plaintiff's fire insurance claim. *Dailey v. Integon Ins. Corp.*, 387.

TRIAL

§ 6. Stipulations

The trial court in a medical malpractice action did not err by refusing to allow the entire stipulation concerning a defendant's alteration of emergency room records to be read to the jury. *Paris v. Kreitz*, 365.

§ 9.2. Duties of Court; Ordering Mistrial

The trial court did not err by failing to conduct further inquiry into a conversation between plaintiff and a juror. *Harris v. Scotland Neck Rescue Squad, Inc.*, 444.

§ 32.1. Form and Sufficiency of Instructions in General

There was no prejudicial error in not instructing the jury as requested by plaintiff in an action against an insurance agent for failing to procure sufficient insurance where the jury answered that issue in plaintiff's favor. *Kirk v. R. Stanford Webb Agency, Inc.*, 148.

TRIAL — Continued

§ 40.1. Form of Issues

Defendant cannot complain on appeal about the form of the punitive damages issues where defendant made no objection at trial. *Dailey v. Integon Ins. Corp.*, 387.

TRUSTS

§ 1.1. Creation of Written Trusts; Particular Cases

No trust was created under G.S. 54B-130 where decedent signed the front of a discretionary revocable trust form but failed to execute the trust agreement on the reverse side, but a genuine issue of material fact was presented as to whether a trust was created under the common law. *Shatley v. Southwestern Tech. College*, 343.

§ 13.3. Creation of Resulting Trusts; Implied Contracts

A corporation was entitled to have a resulting trust imposed on property titled in the names of three corporate officers and directors. *B M & W of Fayetteville v. Barnes*, 600.

§ 15. Actions to Establish Resulting Trusts; Limitations

A corporation's action to impose a resulting trust on property titled in the names of three corporate directors and officers was governed by the ten-year statute of limitations of G.S. 1-56 rather than by the three-year statute of limitations for actions to reform a deed for mistake. *B M & W of Fayetteville v. Barnes*, 600.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

Plaintiff's complaint in an action to recover damages for defendant insurer's failure to pay plaintiff's claim under a hospital insurance policy was insufficient to state a claim for unfair and deceptive trade practices. *Beasley v. National Savings Life Ins. Co.*, 104.

A mortgage payment disability insurer's requirement that the insured submit proof of his disability each month benefits were applied for did not constitute an unfair and deceptive trade practice. *Douglas v. Pennamco, Inc.*, 644.

The trial court erred by finding that defendant's conduct constituted an unfair and deceptive trade practice and by awarding plaintiff attorney's fees. *Goodrich v. Rice*, 530.

WEAPONS AND FIREARMS

§ 2. Carrying or Possessing Weapons

Evidence that a patrolman found a gun under the driver's seat of a car defendant was driving was sufficient to support defendant's conviction of carrying a concealed weapon about his person. *S. v. Jordan*, 637.

WILLS

§ 21.4. Sufficiency of Evidence of Undue Influence

Caveator produced sufficient evidence to establish a prima facie case of undue influence. *In re Will of Fields*, 649.

WORD AND PHRASE INDEX

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